

The Application of the WTO Agreement in China

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Index of Abbreviations

AD	Anti-Dumping (Agreement of the World Trade Organization)
CISG	United Nations Convention on Contracts for the International Sale of Goods
DSB	Dispute Settlement Body (of the World Trade Organization)
DSU	Dispute Settlement Understanding (of the World Trade Organization)
e.g.	exempli gratia
etc.	et cetera
EC	European Community
ECJ	European Court of Justice
ECHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Service
MFN	Most Favored Nation
NPC	National People's Congress (of the People's Republic of China)
PRC	People's Republic of China
PSI	Pre-shipment Inspection (Agreement of the World Trade Organization)
RO	Rules of Origin (Agreement of the World Trade Organization)
ROC	Republic of China
SCM	Subsidies and Countervailing Measures (Agreement of the World Trade Organization)

SPSM	Application of Sanitary and Phytosanitary Measures (Agreement of the World Trade Organization)
TBT	Technical Barriers to Trade (Agreement of the World Trade Organization)
TRIPS	Trade-Related Aspects of Intellectual Property Rights (Agreement of the World Trade Organization)
UN	United Nations
US	United States
USA	United States of America
USSR	Union of Soviet Socialist Republics
WTO	World Trade Organization

Chapter 1 Introduction

China is definitely one of the most dynamic and fastest growing developing countries in the world. Its accession to the World Trade Organization on December 11, 2001 accelerates China's long journey to the rule of law and boosts a profound legal reform. In the Working Party Report, China committed to ensure its laws and regulations pertaining to or affecting trade were in conformity with the WTO Agreement and with its commitments so as to fully perform its international obligations.¹ Whether and how this commitment is fulfilled arouses great interest in academic and economic circles worldwide.

This study focuses on the application of international treaty, especially the WTO Agreement in China. Since the WTO Agreement was recognized as "Treaty and Important Agreement" in China according to the conclusion procedure, it is inevitable to first do research on the position of international treaty in China. Due to the complicated background in modern history, the attitude of the Chinese government toward international treaties is discreet. The current Chinese Constitution does not include any provision concerning the position of international treaty in the Chinese legal system. It also does not prescribe the application mechanism for treaties. Thus, it is particularly difficult to answer the question of the application of international treaty. Luckily, since China's active involvement in the global economy and especially after the WTO accession, Chinese academia has been extremely zealous in the discussion on the relationship between international law and domestic law and on the application of international treaty in China. Their discussions greatly enrich the theories of international treaty law in China and assist the accomplishment of this study. However, it is undeniable that the Chinese theories on treaty application are still

¹ Article 67 of the Report of the Working Party on the Accession of China.

immature. Most scholars do not distinguish the introduction of treaty from the applicability of treaty. Among the abundant literature, very few authors have a clear recognition of Western theories and base their arguments on independent investigations. This academic field needs to be further explored.

Since the Chinese legal system is a continental legal system, the author of this study, as well as many other Chinese scholars, first borrows the concepts and theories from Western countries such as Germany and bases the study on the theories put forward by German scholars. In Western theories, the different understandings on the relationship between international law and domestic law are generally divided into Dualism and Monism. Based on these theories, Chinese scholars have further developed their own understandings such as the theory of inter-permeating relationship and the theory of inter-relation. As far as international treaties are concerned, each country has its own mechanism to introduce treaties into domestic law and to apply them. *Bleckmann*, a German scholar, points out three questions that need to be answered when international law enters into domestic legal field. These questions are the validity of international law in the domestic legal system (*die innerstaatliche Geltung*), the substantial question of applicability (*das eigentliche Problem der Anwendbarkeit*), and the hierarchy (*der Rang*) of international law in the domestic legal system.² Based on this theory, the author of this study does a thorough investigation on Chinese legislation, academic review, and China's legal practice to answer the three questions. As mentioned, the Chinese Constitution only provides the conclusion procedure of treaties, but does not include any provision concerning the position of international treaty in the Chinese legal system. More hints should be sought in other legislation. The author surveys the entire Chinese law and finds several formulations concerning the direct application of treaty from provisions in

² Bleckmann, *Begriff und Kriterien der innerstaatlichen Anwendbarkeit völkerrechtlicher Verträge*, pp. 55 and 56.

some parts of Chinese law. These formulations and the provisions containing them are summarized in the form of tables. From the constitutional provisions on the treaty conclusion procedure and the provisions of other laws containing formulations concerning direct application, the author finds out important clues to answer the three questions. Beside pieces of legislation, the author also collects official interpretations and documents, as well as judgments of Chinese courts and academic opinions to intensify the arguments. From the analysis the author comes to a conclusion which attempts to answer the three questions.

After analyzing the position of treaty and the application mechanism of treaty in China's domestic legal system, it is then possible to discuss the application of the WTO Agreement in China. The study on the applicability of the WTO Agreement shall begin with the nature of the WTO Agreement being an applicable treaty. From the provisions of the WTO Agreement it can be seen that, although the Agreement is neither interpreted by the GATT/WTO institutions nor by the important trading partners such as the USA and the EU as producing "direct effect", the Agreement is not entirely silent about individual rights. Turning back to China, Chinese scholars show different attitudes on vesting the WTO Agreement with direct applicability. The author lists the reasons given by Chinese scholars on the arguments denying and favoring direct applicability. The author further discusses the conclusion procedure of the Agreement, the attitude of the Working Party Report and the Chinese legislature, and the attitude of the Supreme People's Court on direct applicability. One judicial interpretation issued by the Supreme People's Court draws special attention, since it provides that, by trying administrative cases relating to international trade, the Chinese courts shall follow Chinese laws.³ Whether this can represent the attitude of Chinese courts on the application of the Agreement, and whether this has enough validity to defy other

³ Article 7 and 8 of the Provisions of the Supreme People's Court on Several Issues on Trying Cases of International Trade Administrative Cases.

provisions in Chinese law that contain direct application, shall be elaborately analyzed. Another point the author focuses is the “direct effect” of the Agreement, namely the possibility for a private citizen to rely on the WTO Agreement to challenge domestic law before a Chinese court. Last, but not least, it is not difficult to find out that the Chinese court system has some impediments which may prevent the Agreement from being directly applied through the above discussions. These impediments are also problems already existent in the Chinese judiciary system and are objects of judicial reform.

This study generally clarifies the theories on the problem of treaty application and supports the further development of the theories. It also opens a window to foreign investors and researchers, who are affected by and interested in economic law practice in China. The investigation and conclusion should be suggestive and contribute to the current legal reform and the adjudicating work of Chinese judges in this field.

The second chapter introduces the arduous course of China’s WTO accession from 1946 to 2001 in four phases. China’s reform from 1978 onward has been closely connected to the accession course, it is interposed in the accession course as the background. During the accession course, China has established a legal system supporting economic reform and China’s economy and the legal sector has achieved a remarkable accomplishment. The third chapter systematically introduces the relationship between international law and domestic law and the theories of the problem of the application of treaty in Western academics. The theories of the application of treaty contain three questions: the introduction of treaty into a domestic legal system, the hierarchy of treaty in a domestic legal system, and the applicability of treaty. For a clear understanding of the theories, the author cites the approaches of the European Community and the USA as two typical examples. The fourth chapter generally researches the Chinese approach

on the application of treaty. Investigation is made into China's legislation, administrative and judicial interpretations, official documents, judicial judgments, and academic discussions. Based on these materials, the author does her own analysis on China's approach. The fifth chapter does comprehensive analysis on the application of the WTO Agreement in China. The author first looks at the requirements of the WTO Agreement and introduces the opinions of Western scholars. Based on Western opinions, Chinese academic works are then reviewed. The author further examines the WTO conclusion procedure, the attitude of the Working Party Report, the attitude of the Chinese legislature and the attitude of the Supreme People's Court for the possibility of direct applicability and direct effect of the WTO Agreement. The impediments of direct application in the court system are discussed as well. Beside the possibility of direct applicability, the author also proposes the possibility of indirect application of the WTO Agreement in China. In Chapter Six, the author gives a conclusion on all the results investigated above.

Chapter 2 The Process of China's Accession To The WTO And China's Reform

2.1 Accession as a Contracting Party

The history of China's accession into the World Trade Organization can be traced back to the time when the General Agreement on Tariffs and Trade was established in 1947.

As one of the Allies in World War II, the Republic of China, at that time represented by the Kuomintang government⁴, was invited, by the UN Secretary General to participate in the Preparatory Committee for the UN Conference on Trade and Employment in 1946. The then Chinese Government held a positive attitude to this matter since all of the 17 present countries accounted for over 70% of the world trade. China also wished to attract more foreign investment and technologies to develop the weak industry and commerce.⁵ Besides, the political confrontation between the USSR and other democratic countries was being widened. Since China would not stand on the side of USSR,⁶ it would be totally isolated if it refused the economic cooperation with other democratic countries as well.⁷ Taking all these reasons into consideration, the representatives of Kuomintang government were sent to attend the negotiations in both sessions of the preparatory committee in London and Geneva, as well as the final conference in Havana.⁸ After a long round of formidable negotiations, the Kuomintang

⁴ The Republic of China (ROC) was established in 1912, followed by more than a decade of civil wars among military cliques. The Kuomintang Party terminated the chaos in 1928 and reigned over the Republic of China until 1949.

⁵ National Second History Archives, The Memorandum on the Draft Charter of the ITO and the General Agreement on Tariffs and Trade compiled by the Ministry of Foreign Affairs of the Republic of China, p. 40.

⁶ The Chinese civil war reflected the later Cold War, as the Nationalists (Kuomintang) were assisted by the United States, and the Communists were supported by the USSR. In this situation, it was impossible that the Kuomintang would stand in the Soviet lines.

⁷ National Second History Archives, The Memorandum on the Draft Charter of the ITO and the General Agreement on Tariffs and Trade compiled by the Ministry of Foreign Affairs of the Republic of China, p. 41.

⁸ Liu, Wunz King and the GATT.

government signed the Protocol of Provisional Application on April 21, 1948 and formally became a contracting party to the GATT on May 21, 1948.⁹

Meanwhile, however, the Kuomintang government itself was at stake because of the long-lasting civil war with the Communist Party. It was only one year after its GATT accession that it lost most of its control in mainland China in the civil war and retreated to Taiwan Island. On October 1, 1949, the Communist Party took the place of Kuomintang and established the People's Republic of China in mainland China. Considering the possible benefits of the GATT for the New China and the uncertain date of its return to the mainland, the Taiwanese government took advantage of its well-recognized status as the ROC and informed the General Secretary of the United Nations of its withdrawal decision from GATT on March 6, 1950.¹⁰ It formally exited the GATT on May 5, 1950. Since the Kuomintang has never regained their control on mainland China and could not legitimately represent China in 1950, the Communist government of the PRC never officially recognized this withdrawal and has always insisted that the withdrawal was an illegal act. The prevailing opinion in China argues that the establishment of the PRC concerns government succession led by social revolution.¹¹ Thus, it is the latter government's decision whether to take over the rights and responsibilities of treaties made by the former government.¹² Article 55 of the Common Program of the Chinese People's Political Consultative Conference of 1949 stated the attitude of the Communist government of the PRC towards international treaties signed by the former government: "the People's Central Government of the PRC should examine them and respectively recognize,

⁹ National Second History Archives, Should China Accept the Protocol of the Havana Charter? p. 1.

¹⁰ The People's Republic of China, in the first 30 years after its establishment, was not recognized by most of the Western countries as an official state. The situation changed in 1971, as the PRC replaced the ROC as the sole representative of China in the United Nations and as one of the five permanent members of the United Nations Security Council according to the UN Resolution No. 2758.

¹¹ Liang, International Law, pp. 86-88; Wang, The Application of International Law in Hong Kong's Return, p. 136; Lu / Sun / Liu, The Taiwan Problem in the Perspective of International Law.

¹² Li / Ou, International Law, p. 55.

repeal, revise or renegotiate them according to their contents.” This denies the Kuomintang's decision over the withdrawal of GATT and indicates the suspended validity of the GATT in the PRC. However, after the establishment of the PRC, and even after China was recognized as the only legitimate representative by the United Nations in 1971, the PRC had never taken communication with the GATT nor accepted GATT for more than thirty years. It left behind a flaw for those who argue that Taiwan's withdrawal was valid and it is the accession procedure, rather than the “resumption” procedure, that should be applied for the PRC.¹³ In fact, although China was an original member of GATT, it can hardly ask the GATT to deny the decision it made, since this may challenge the validity of GATT decisions.

In the next three decades China was blockaded from “Western capitalism” and did not seek many trading opportunities with the outside world except Communist countries. Instead of seeking foreign trade, China chose to pursue economic self-sufficiency and to develop its economy independently. During most of the Maoist period, the Chinese economy was based on an “inward-looking”, centrally-planned economy. The ten-year Culture Revolution (1967-1977) was again a heavy blow to China's economy and human rights. The Gang of Four, the main political faction who took the power of the Communist Party at that time, denied the whole achievement of foreign trade of the previous 17 years and considered foreign trade as an insult to China. Even the Ministry of Foreign Trade was called “Quisling Ministry”, and international economic organizations were regarded as instruments of economic invasion by the imperialist countries.¹⁴ After the Gang of Four was struck down, China made some regional adjustments to the foreign trade regime, however, it did not touch the basic framework and system of

¹³ Gao, China's Participation in the WTO, p.3; Jackson / Davey / Sykes, Legal Problems of International Economic Relations, p. 236.

¹⁴ Yang / Cheng, The Process of China's Accession to the WTO, p.300; Research Team of the Progress, Effect and International Comparison of China's Foreign Trade Regime Reform, The Progress, Effect and International Comparison of China's Foreign Trade Regime Reform, p. 13.

foreign trade, and the function of law was not given prominence in regulating foreign trade. It is not exaggerated to say that China never had a modern legal system representing democracy and fairness at this time. Laws, under the instruction of Marxist-Leninist-Maoist ideology, were only seen as an instrument of the ruling class serving the Communist government. Although at the beginning of the new China some efforts were undertaken to establish a legal system with drafted laws, basic principles, and legal institutions, the consecutive political campaigns in the later years snuffed out its further development. In 1959 the Ministry of Justice and its subordinate bodies of judicial administration were abolished, and a number of legal principles such as the principle of equality before the law, the right to defense in criminal cases, were denounced as reactionary.¹⁵ The whole society was then run by “words” and “red-titled instructions” of the highest echelon of the government. In the later legal reform, this period was pertinently defined as the period of “rule by man”.

2.2 Bid of Resumption as an Original Contracting Party

The situation lasted until *Deng Xiaoping* came to power in 1978. This paramount leader stressed the importance of economic reconstruction and brought forward the “Reform-and-Openness” policy. In the Third Plenum of the Eleventh Central Committee Congress of the Communist Party of China, the Party decided to shift the focus of the Party’s work to economic reconstruction, which was considered as a significant sign for the beginning of China’s economic reform. Besides, *Deng Xiaoping* also tried to blur the ideological boundary between socialism and capitalism. He claimed that “practice is the sole criterion for testing truth” and “black cat or white cat, the one that catches the mouse is the good one”. This provides a better political environment for the reform.

¹⁵ Buhmann, Karin, *Implementing Human Rights Through Administrative Law Reforms*, p. 293.

With this background in mind, China attended the third Multi-Fibre Arrangement negotiation of the Committee on Textiles under the GATT as a non-voting delegate in 1981¹⁶ and became a formal member of the GATT Committee on Textiles in 1984.¹⁷ In 1982 China sent a communication note to the GATT with the request of participating as observer in the thirty-eighth session of the contracting parties and it was permitted. This marks the beginning of the formal contact of the People's Republic of China with the GATT process.

Four years later, China expressed its strong wish to enter the world market again by submitting a formal request to the GATT to resume its membership and a memorandum.¹⁸ There were basically three principles indicated in the application. First, China requested resuming its contracting party status, rather than entering the GATT as a new member.¹⁹ Second, China had the right to join the GATT on the basis of tariff concessions, rather than quantitative import commitments.²⁰ Finally, China insisted on entering the GATT as a developing country and expected "to receive treatment equivalent to that accorded to other developing countries".²¹

In March 1987, the GATT established the Working Party on China's Status as a Contracting Party to examine China's status as a founding member. Since there had been no precedent for resumption, the working party followed the procedure of the working party of accession.²² Thirty-seven contracting parties requested bilateral negotiations with China. Until early 1989, everything seemed to be ready and the WTO was about to accept China's resumption. However, a good gain takes long pain. The "June Fourth Tiananmen Incident" dashed all the

¹⁶ Yang / Cheng, *The Process of China's Accession to the WTO*, p.301.

¹⁷ Yang / Cheng, *The Process of China's Accession to the WTO*, p.301.

¹⁸ GATT document L/6017.

¹⁹ GATT document L/6017.

²⁰ Gong / Song, *Materials of China's WTO Accession in Full Scale*, p.4-5.

²¹ GATT document L/5344.

²² Gao, *China's Participation in the WTO*, p. 6

hopes.²³ The suppression carried out by the government of the drastic demonstrations was considered backwardness with regard to human rights in the eyes of many countries, and the Chinese government was suspected to be uncivilized and repressive.²⁴ This caused a complete setback in the negotiations and in the next two years almost no progress was made.²⁵

Despite the international condemnation and worsened foreign relations, China's economic reform was not much affected by the Incident. Along with the economic reform begun in 1978, a legal system supporting economic reform was gradually rebuilt. Realizing the function of law as the most efficient instrument to bring the society back to its normal orbit, both the government and the population placed law in a more and more important position. A large number of laws and regulations were promulgated in the coming years including basic laws such as the 1982 Constitution, the 1986 General Principles of the Civil Law, and the 1979 Criminal Law. From 1979 to 1989, around 100 major laws were promulgated by the National People's Congress and some 3,000 local regulations were released by Local People's Congress, among which about 70% were economic legislations.

2.3 From Resumption as an Original Contracting Party to Entry as a New Party

In October 1992, China and the USA reached the Memorandum of Understanding of Market Accession after 9 rounds of formidable negotiations, and the Working Party for China's Resumption produced the Draft Report of the Working Party on China and the Draft Protocol on China. However, in July 1993, the new American President *Clinton* took a different, but tough political stand. The new negotiator denied all the achievements of the previous negotiations and claimed that China

²³ The "June Fourth Tiananmen Incident" refers to a series of demonstrations at and around Tiananmen Square in Beijing led by labor activists, students, and intellectuals between 15 April and 4 June 1989. In order to maintain the whole country's political stability, the government chose to suppress the activities.

²⁴ Yang, *China's WTO Accession*, p. 89.

²⁵ Lanteigne, *Red Light, Green Light*, p. 39.

must enter GATT as a developed country rather than developing country.²⁶ This strict requirement was rejected by the Chinese representative. At the same time, the Uruguay Round negotiations run into a bottleneck, as most contracting parties of the GATT placed their attention on the Uruguay Round rather than the China Working Party.²⁷ China was invited as an observer to the Ministerial Conference. Along with the decision of the conversion of the GATT to the WTO, China intensified its negotiation efforts so as to ensure that it could enter the WTO as a founding member by joining GATT first. Yet, the threshold to enter the WTO was much higher than the GATT and the Chinese economy was not ready to pay such a big price. The requirements of the Western countries such as the USA, the European Community and Canada to China were much stricter than to other members. Even if China entered the GATT, it could not enjoy the benefits and would only be a second-class member.²⁸ China's efforts failed again. On the other hand, at the Uruguay Round China was participating for the first time in multilateral trading negotiations, and the Chinese negotiating team was well-trained during this period. Some negotiating results were a foundation of the later WTO accession.²⁹

In this period, China stepped into a fast-developing time. The reform begun in 1978 had affected every aspect of Chinese society and China gradually demonstrated its economic power to the world. Through the reforming years, because of Communist ideology, China had been refusing to admit the market economy. Instead, it used the phrase of "commodity economy", which was not accepted by the other Member States. It was at the Fourteenth National Conference of the Communist Party in October 1992 that China for the first time announced that the aim of the economic reform was to build a "socialist market

²⁶ Ouyang, *Burst into the Door*, p. 33.

²⁷ Gao, *China's Participation in the WTO*, p. 7.

²⁸ Ouyang, *Burst into the Door*, p. 134.

²⁹ Wang, *Century Negotiations*, p. 67.

economy with Chinese characteristics”. The amendment of the Constitution in 1993 further confirmed this aim and added that “the state shall intensify legislation in economic fields and enhance macro-economic control”. Under the instruction of the Constitution, the pace of legislation was obviously accelerated. A series of commercial and economic laws was released for the further liberalization of the domestic market. Besides these, the enactment of the 1990 Administrative Procedure Law greatly regulated the action of the administration. In the mid-1990s, the concept of “rule of law” was brought forward which stressed that no one is above the law, even the legislators and the administrators themselves.

2.4 Way to the Final Conclusion

The eight-year Uruguay Round ended in December 1993 and the WTO was formally established in 1994. The GATT Working Party on China’s Accession was converted into the WTO Working Party on China’s Accession. The United States, the then largest economy and the major voice in the WTO, remained the biggest obstacle to China’s accession.³⁰ The intersecting benefits and worries and the unsteady relationship between the USA and China largely postponed Sino-American negotiations. As the negotiations finally reached a breakthrough in Washington in April 1999 and both sides concluded the Agreement on US-China Agricultural Cooperation and released a Joint Statement on China’s WTO accession. Yet, the U.S. bombing of the Chinese Embassy in Belgrade in May 1999 interrupted the negotiations for another four months. After the short interruption the negotiations went unexpectedly quick and on November 16, 1999, through 6 days of constant negotiations day and night the Sino-US WTO Agreement was finally concluded. The conclusion of the Agreement was an impetus to China’s accession and prompted the accession of the other 16 members

³⁰ Lanteigne, Red Light, Green Light, p.41.

including the EU in only half a year.³¹ China signed the final instruments in the WTO and became an official member on December 11, 2001.

It is not overstated that the reform from 1978 to 1994 was motivated by internal power, and the reform after 1994 was motivated by the establishment of the WTO. From 1978 to 1994 the aim of the reform was to enhance the profits of foreign trading enterprises and to increase export capacity, whereas after 1994 the motive of the reform came from the strong wish to enter the WTO and the aim of it was to strengthen the competing ability of the foreign trade regime and to integrate the domestic regime into the world trading rules.³² The enactment of the 1994 Foreign Trade Law provided legal protection and regulation to foreign trading acts. Other economic laws were soon enacted or revised after it. In 1998, a legal system serving the socialist market economy was believed to be built up.³³ In 1997, the concept rule of law was adopted as a core policy of the Communist Party and was written in the 1999 Amendment of the Constitution. The 1999 Constitution also affirmed the existence of multiple economics under different systems of ownership (Article 5 of the 1999 Constitution) and the importance of individual economy³⁴ and private economy³⁵ (Article 11 of the 1999 Constitution).

The twenty-year process of China's WTO accession saw China's reform progress and is closely connected to it. It is not an exaggeration to say that the accession into the WTO was an impetus for China's reform, and the progress of reform was correspondingly an important assessment for the WTO accession. The reform since 1978 has been comprehensive, profound and thorough. It touches every detail of society and has brought fruitful achievement. Since WTO accession,

³¹ Yang / Cheng, *The Process of China's Accession to the WTO*, p. 316.

³² Pei, *Research on the 30 Years of Opening-Up and Business System Reform in China*, p. 50.

³³ Tian, Working Report of the Standing Committee of the Ninth National People's Congress of the People's Republic of China,

³⁴ In Chinese: 个体经济 (Geti Jingji).

³⁵ In Chinese: 私营经济 (Siying Jingji).

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China has actively engaged itself in international political and economic activities and has gradually played an important role on the international stage. To prove its obedience to the WTO Agreement and responsibility to international obligations, China has released a large amount of policies in compliance with the requirements of the WTO. It has enacted new laws regulating foreign trade and the domestic market in every detail, and revised and abolished laws in contradiction to the WTO Agreement.³⁶ In academia, WTO Law, as a new subject, has aroused the extraordinary interests of scholars. One of the most discussed subjects is the application of the WTO Agreement in China.

³⁶ See 5.2.2.6.2 Supplementary Legislation.

Chapter 3 Introduction to the Problem of Application of International Treaty in Domestic Law

3.1 Terminological Research

Ever since China's active involvement in the global economy, and especially since China's entry into the WTO, Chinese academics have been extremely zealous in the discussion on the relationship between international law and domestic law and on the application of international treaty in China. Most of them base their research on Western theories developed by German, British and American scholars. Therefore, before carrying out thorough research on how China applies and should apply the WTO Agreement within its national legal sphere, it is necessary to study the basic theories on the application of international treaty in domestic legal systems.

Yet, before the discussion begins, there are several basic, but sometimes confusing concepts that need to be defined. Not only because the terminology itself does not have a uniform understanding in the literature, the multilingual background of EC law and the ambiguous Chinese language further complicate the matter. The problem of the application of international law, especially treaties in domestic law, is usually surrounded by terms such as "application" ("Anwendung", "适用"), "applicability" ("Anwendbarkeit", "可适用性"), "direct effect" ("直接效力"), "validity" ("Wirkung" or "Geltung", "生效"), "self-executing" ("自执行"). Many scholars, including Chinese scholars, blur or mix the meaning of these terms when discussing the problem of application. In order to avoid confusion and dig out a clear way for the next study, the author will try to distinguish these terms to the extent that the readers can properly understand this study. It is noteworthy that since this study primarily relates to the category of

international treaty, the terminologies below refer specially to international treaties rather than international law as a whole.

The most confusing concepts are “application” and “applicability”. It can be drawn from the word ending that “applicability” is the capacity of international norms being applied as a resolution in a specific case.³⁷ Authors in English academic books usually use the terminology of “application” when describing the problem of the application of international law in domestic law, whereas German authors use “applicability” (*Anwendbarkeit*). In fact, these two concepts can never be thoroughly separated because they are indeed dealing with the same matter. “Applicability” can be regulated in both international and domestic law and become a character of the legal order, and in this case “application” is the act of a domestic institution to bring this character into practice. To be more exact, “application” can be seen as the legal consequence of “applicability”.³⁸ In this study, “applicability” describes the character of an international treaty, and “application” refers to the implementing act of the domestic institutions.

Many German authors seek to elaborate the discrimination between “domestic validity” (*innerstaatliche Geltung*) and “direct applicability” (*unmittelbare Anwendbarkeit*). “Domestic validity” of an international treaty refers to the request (*Anspruch*) of a treaty of being a compliant (*beachtliches*) law when it enters into the national legal system.³⁹ So the question of “domestic validity” limits itself to the introduction, namely, the “gateway” of a treaty (by means of transformation, adoption or others) into the national legal system and the exertion of its legal force in the national legal system.⁴⁰ A treaty mainly gains its “domestic validity” at the time of ratification, which is executed by the national

³⁷ Klein, *Unmittelbare Geltung, Anwendbarkeit und Wirkung von Europ äischem Gemeinschaftsrecht*, p. 8.

³⁸ See also Bleckmann, *Begriff und Kriterien der innerstaatlichen Anwendbarkeit v ölkerechtlicher Vertr äge*, p. 50.

³⁹ Buchs, *Die unmittelbare Anwendbarkeit v ölkerechtlicher Vertragsbestimmungen*, p.29; Klein, *Unmittelbare Geltung, Anwendbarkeit und Wirkung von Europ äischem Gemeinschaftsrecht*, p. 8; Ehlers, *Der Vorrang des Europ äischen Unionsrechts*, p. 187.

⁴⁰ Bleckmann, *Begriff und Kriterien der innerstaatlichen Anwendbarkeit v ölkerechtlicher Vertr äge*, p. 112; Nollkaemper, *The Direct Effect of Public International Law*, p. 159.

legislative or other authorized institutions. The “domestic validity” of a treaty can be seen from its hierarchy in domestic law.⁴¹ “Direct applicability” refers to the capacity of an international norm being applied as it is as a legal foundation in a specific case by the court or the administrative body, without the need of a further act of legislature.⁴² It is also defined as “self-executing” in the USA.⁴³ In EC law, the traditional concept of “direct applicability” focuses on whether the addressee in the domestic legal range, namely the Member States or private persons, are conferred with rights or imposed with obligations and, in a narrow sense, this term only pertains to private persons.⁴⁴ The understanding in EC law is more of a synonym with the concept of “direct effect” and differs from its original definition.⁴⁵ Scholars have summarized two basic elements for “direct applicability”: the intention of the contracting party to apply the treaty, which possesses applicable (*rechtssetzenden*) character, and the objective criteria of the treaty provisions.⁴⁶ The intention of the contracting party, meaning that the parties aim at the direct application of the treaty without further ado, shall be deduced from the spirit, the general scheme, and the wording of the treaty.⁴⁷ The objective criteria were developed after the establishment of the Human Rights Convention and have played a more and more important role in judging direct applicability. These are: the precision of the text of the treaty, the matters prescribed in the treaty, the addressee, the background of the treaty conclusion, systematic significance and purpose of the treaty, and so on.⁴⁸ The questions are: whether the treaty provisions can find their place in the national legal system,

⁴¹ Klein, *Unmittelbare Geltung, Anwendbarkeit und Wirkung von Europäischem Gemeinschaftsrecht*, p. 8.

⁴² Cronauer, *Der internationale Vertrag im Spannungsfeld zwischen Verfassung und Völkerrecht*, p. 135; Verdross / Simma, *Universelles Völkerrecht*, p. 550.

⁴³ For the difference between the term „direct applicability“ and „self-executing“ with regard to the EC law, see Buchs, *Die unmittelbare Anwendbarkeit völkerrechtlicher Vertragsbestimmungen*, p. 26. Since the difference is irrelevant to this study, it shall be ignored.

⁴⁴ Ehlers, *Der Vorrang des Europäischen Unionsrechts*, p. 187-188.

⁴⁵ See pp. 20 and 21.

⁴⁶ Bleckmann, *Begriff und Kriterien der innerstaatlichen Anwendbarkeit völkerrechtlicher Verträge*, p. 50; Buchs, *Die unmittelbare Anwendbarkeit völkerrechtlicher Vertragsbestimmungen*, pp. 46-51. In the opinion of the Permanent Court of International Justice (PCIJ) on the Jurisdiction of Danzig Court, both of the requirements are mentioned, whereas the American authors emphasize mostly the latter requirement, namely, the requirement of precision of the treaty text. Roš, *Die unmittelbare Anwendbarkeit der Europäischen Menschenrechtskonvention*, p. 12.

⁴⁷ Case 26 / 62, [1963] ECR 1.

⁴⁸ Buchs, *Die unmittelbare Anwendbarkeit völkerrechtlicher Vertragsbestimmungen*, pp. 46-51.

whether national parallel legislation already exists at the beginning when the treaty enters into force, and whether there are any international implementing mechanisms that shall also be taken into consideration.⁴⁹ Since “direct applicability” of international treaty is the character of a treaty itself, the relationship between international and domestic law is irrelevant for this question.

⁵⁰ It should be noted here that the domestic law can still prevent provisions of such a treaty from being directly applied in the national courts. “Domestic validity” on the other side, is closely connected to the question of the relationship between international and domestic law, namely, the dualistic and monistic views. However, the concepts of “domestic validity” and “direct applicability” cannot be arranged into two completely different categories.⁵¹ Both of them are independent and coexisting prerequisites of the domestic application of treaty.⁵² On the one hand, one may argue that only directly applicable treaties can be integrated into national legal systems, namely, “direct applicability” is the necessary precondition of “domestic validity”. This argument corresponds to the American theory of the self-executing treaty, since only an incorporation act, rather than a further executing order is needed for the direct applicability.⁵³ Thus, a treaty has direct applicability directly after acquiring domestic validity. On the other hand, it is argued that only a treaty which has accessed into the national legal system may be confronted with the question of applicability, and thus the latter is the prerequisite of the former.⁵⁴ *Bleckmann* points out that a treaty may be applied in different ways in a national legal system and the certain requirements set on “direct applicability” could possibly match only certain application forms. For example, when “direct applicability” is narrowly defined as an application form which

⁴⁹ Buchs, Die unmittelbare Anwendbarkeit völkerrechtlicher Vertragsbestimmungen, pp. 46-51.

⁵⁰ Buchs, Die unmittelbare Anwendbarkeit völkerrechtlicher Vertragsbestimmungen, p. 29; Bleckmann, Begriff und Kriterien der innerstaatlichen Anwendbarkeit völkerrechtlicher Verträge, p. 60; Winter, Direct Applicability and Direct Effect, p. 428.

⁵¹ Ritgen, Geltung und Anwendbarkeit völkerrechtlicher Verträge, p.119.

⁵² Bleckmann, Begriff und Kriterien der innerstaatlichen Anwendbarkeit völkerrechtlicher Verträge, pp. 58-59.

⁵³ Klein, Unmittelbare Geltung, Anwendbarkeit und Wirkung von Europäischem Gemeinschaftsrecht, p. 11; Verdross / Simma, Universelles Völkerrecht, p. 550.

⁵⁴ Buchs, Die unmittelbare Anwendbarkeit völkerrechtlicher Vertragsbestimmungen, p. 29.

permits a treaty to be applied by the court, rather than an administrative act which might have more discretion, provided that “direct applicability” is the prerequisite of “domestic validity”, the result could be that some treaty provisions can have validity under one application form, but not under another.⁵⁵ Another reason comes from the basic theory of the domestic application of law. It is claimed that since a valid domestic provision can also be rejected of direct applicability in national courts, for instance, a domestic provision may be constrained and may need certain requirements to be directly applied, the same situation can be assumed for international law in the domestic sphere.⁵⁶ Moreover, even if a treaty provision is not directly applicable, it may still have domestic validity by displaying its influence on such an interpretation.⁵⁷

The distinction between “direct effect” and “direct applicability” is also a significant point for the following research. The concept of “direct effect” rose from the study of EC law in the 1970’s and originally refers to the capacity of a treaty provision of creating rights for private persons in a state, and “a private person may base a claim in, and be granted relief from the domestic courts of that state against another private person or the state on the basis of the state’s obligations under an international treaty.”⁵⁸ The difference between “direct effect” and “direct applicability” shall be understood from the angle of the German theory of “subjective rights” (*subjektive Rechte*) and “objective law” (*objectives Recht*).⁵⁹ A directly applicable international treaty may contain both objective legal orders in form of permission for a sovereign act or a restriction of such an act, and subjective rights conferred to the citizens.⁶⁰ The traditional

⁵⁵ For details and more arguments, see Bleckmann, Begriff und Kriterien der innerstaatlichen Anwendbarkeit völkerrechtlicher Verträge, pp. 59-66.

⁵⁶ Art. 114 Abs. 2 and Art. 80 of the German Constitution are cited as examples. For details, see Klein, Unmittelbare Geltung, Anwendbarkeit und Wirkung von Europäischem Gemeinschaftsrecht, p. 8; Buchs, Die unmittelbare Anwendbarkeit völkerrechtlicher Vertragsbestimmungen, p. 30.

⁵⁷ Buchs, Die unmittelbare Anwendbarkeit völkerrechtlicher Vertragsbestimmungen, p. 30.

⁵⁸ Prechal, Directives in EC Law, p. 227; Cottier / Schefer, The Relationship Between World Trade Organization Law, National And Regional Law, p. 91.

⁵⁹ About the theory of “subjektive Rechte” and “objektives Recht” see Ipsen, Staatsrecht II, pp.19-31; Kloepfer, Verfassungsrecht II, pp. 26-35; Meng, Gedanken zur Frage unmittelbarer Anwendung von WTO-Recht in der EG, pp. 1068-1071.

⁶⁰ Meng, Gedanken zur Frage unmittelbarer Anwendung von WTO-Recht in der EG, pp. 1068-1069.

concept of “direct effect” emphasizes conferring subjective rights to individuals and such rights can be invoked directly before a national court, whereas “direct applicability” stresses that treaty provisions be applied by certain national institutions, e.g. courts or administrative bodies, without any further act of legislature.⁶¹ “Direct applicability” is a prerequisite of “direct effect”, whereas “direct effect” does not always appear along with “direct applicability”.⁶² Accordingly, even if individual rights are implicitly or explicitly excluded by the treaty members, it does not mean that “direct applicability” is excluded as well. The question on the two concepts can be posed as “whether the treaty provision has the quality of being directly applied by a national institution” in one way, and in another way as “whether the treaty provision has direct effect on individuals”. In order to make the difference, this study employs the original and narrow definition of direct effect, which is different from the definition of modern European law.⁶³

3.2 Theories and Doctrines

The question on the application of law can arise in several aspects on both international and national levels. The questions discussed below only deal with the application of international law in the domestic legal sphere.

The early scholars of Roman and German law put the relationship of international law and domestic law up for discussion and developed the theories of dualism and monism. When international law enters into domestic law, *Bleckmann* points out three questions that need to be answered. The first question concerns the validity of international law in the domestic legal system (*innerstaatliche Geltung*), which

⁶¹ Prechal, Does Direct Effect Still Matter? pp. 1047-1069; see also Winter, Direct Applicability and Direct Effect, pp. 425-426.

⁶² Meng, Gedanken zur Frage unmittelbarer Anwendung von WTO-Recht in der EG, p. 1069.

⁶³ The concept of direct effect has been developed and broadened today. According to recent cases, “direct effect of community law is not so much concerned with the question of what an individual can do with the provisions, but rather whether the national court can apply it or not”. See Prechal, Does Direct Effect Still Matter?, pp. 1047-1069. According to Prechal, direct effect includes both direct invocability from the side of individual and direct applicability from the side of the applying courts or administrations.

relates to the introduction (*Einführung*) of international law into the domestic legal system. The second one concerns the substantial question of the applicability (*eigentliches Problem der Anwendbarkeit*). The third and final question involves the hierarchy (*Rang*) of international law in the domestic legal system.⁶⁴

3.2.1 The Relationship between International Law and Domestic Law and the Introduction of Treaty into Domestic Law

To explain the relationship between international law and domestic law, early scholars first formulated the theories of Dualism and Monism, which are still influential on today's international law theory. Based on the theories of Dualism and Monism, authors further developed the theories of their corresponding mechanisms, through which treaties are vested with domestic validity and gain their access into the national legal system.

Dualists, represented by *Triepel* and *Anzilotti*, believe that international law and domestic law are separated and are parallel operating norms. This idea is based on the view that international law and domestic law regulate two different subject-matters (the states or other subject matters on the international level such as international organizations, and private persons), have different sources (treaties or customs, and domestic legislation), and regulate different objects (international affairs and domestic affairs).⁶⁵ Neither of the norms can interfere in the creation and alteration of the other.⁶⁶ The consequence of this view is that, in order to get domestic validity, international law needs to be transformed into domestic law through a domestic legal act.⁶⁷ The radical dualists claim that there is no conflict between international and domestic norms because conflicts only exist between the already transformed domestic law and other domestic laws.⁶⁸

⁶⁴ Bleckmann, *Begriff und Kriterien der innerstaatlichen Anwendbarkeit völkerrechtlicher Verträge*, pp. 55-56.

⁶⁵ Fischer / Köck, *Völkerrecht*, p. 42.

⁶⁶ For details see Brownlie, *Principle of Public International Law*, p. 32.

⁶⁷ Vitzthum, *Völkerrecht*, p. 99.

⁶⁸ Stein / Von Buttlar, *Völkerrecht*, p.56; Holloway, *Modern Trends in Treaty Law*, p. 239; Fischer / Köck, *Völkerrecht*, p. 12.

The moderate dualists who represent the prevailing opinion of the dualists acknowledge that there are overlaps upon both. In a collision, the domestic law decides the method of resolution. Even if a state breaches international law and has to burden international responsibility, the state is still at liberty to decide whether to nullify the colliding domestic law or not.⁶⁹

Based on the dualistic view, the method of introducing an international law into the domestic legal system, in which the state releases a law or a law-form act which absorbs the spirit and content of the concerned international treaty, is called transformation.⁷⁰ The new law created through transformation becomes a part of domestic law and possesses domestic legal nature equal to other domestic laws. German scholars define such transformation as special transformation, by which international law is transformed through domestic legislation every single time a state concludes a treaty.⁷¹ The other form of transformation is general transformation. It refers to the approach when international law is converted *en bloc* into domestic law in a state through a general clause in its constitution or other domestic legislation. Through general transformation the state does not have to release a transforming law; instead, it may directly apply the international law as domestic law.⁷² The international law thus loses its character as international law here. Due to this characteristic, general transformation is not considered as a typical transformation. A flaw of this mechanism would be the a-synchronization of the validity of the international law and the transforming law. For instance, when a treaty is declared invalid, the transforming law might still be valid in the domestic sphere.⁷³ Besides, since the grounds of validity of the domestic transforming law derive from the domestic legal system rather than from international law, by interpretation the concerned domestic institution should only follow the interpretative rules of domestic law, which might result, however, in a

⁶⁹ Stein / Von Buttlar, *Völkerrecht*, p. 57; Doehring, *Völkerrecht*, p. 304.

⁷⁰ Verdross / Simma, *Universelles Völkerrecht*, p. 545; Müller / Wildhaber, *Praxis des Völkerrechts*, p. 154.

⁷¹ Stein / Von Buttlar, *Völkerrecht*, p. 57; Doehring, *Völkerrecht*, p. 58.

⁷² Stein / Von Buttlar, *Völkerrecht*, P. 57; Fischer / Köck, *Völkerrecht*, p. 45.

⁷³ Vitzthum, *Völkerrecht*, p. 102.

twisted understanding of the international treaty. The transformed international law should not be taken into account in the domestic interpretation unless a national interpretative rule permits it.⁷⁴ Furthermore, transformation cannot explain the introduction of an executive treaty, which is concluded between the governments of the member states, since it can enter into force in the domestic sphere without the need of the ratification of domestic legislation according to the constitution.⁷⁵

Contrary to the Dualists, Monists emphasize a unified legal sphere which international and domestic law share. International law and domestic law are seen as two elements in a mutual system and concern ultimately with the same subject-matter: human individuals.⁷⁶ Unlike the Dualists, who insist that international law can only depend on when and to what extent domestic law reacts to display its validity, Monists believe that the incorporation or adoption of international law is automatic and direct: international law is not transformed into domestic law and cannot be modified or abrogated by subsequent domestic legislation.⁷⁷ Among Monists, those who assert that the validity of international law depends on the states' adherence to international law, are exponents of the supremacy of domestic law (*Primat des Landesrechts*). In their perception, the validity of international law is placed under the absolute sovereignty of the state and by collision the domestic law shall prevail.⁷⁸ The other group of Monists, representing the supremacy of international law (*Primat des Völkerrechts*), looks for an origin of all the legal norms.⁷⁹ Some of them (the naturalists represented by *Lauterpacht*) believe that the primary function of all laws is concerned with the well-being of individuals and international law is the best available approach to realize this. Another exponent, *Kelsen*, builds his theory on the philosophy of

⁷⁴ Vitzthum, *Völkerrecht*, p. 102.

⁷⁵ Doehring, *Völkerrecht*, p. 308.

⁷⁶ Müller / Wildhaber, *Praxis des Völkerrechts*, p. 161.

⁷⁷ Holloway, *Modern Trends in Treaty Law*, p. 239.

⁷⁸ Vitzthum, *Völkerrecht*, p. 99.

⁷⁹ Müller / Wildhaber, *Praxis des Völkerrechts*, p. 161.

Kant. He assumes a logical system in which international law has a “basic norm” which is the ultimate source of validity of both legal orders.⁸⁰ The Monists of the supremacy of international law are considered to be representatives of the Monistic theory and have developed different solutions to the situation of collision. Radical Monists insist on the unconditional nullification of domestic laws when they collide with international law (“international law breaks domestic law”)⁸¹. The moderate Monists hold the converse opinion and argue that the colliding domestic law can still be applied by the domestic institutions.⁸² But if another state is infringed through this way and condemns this on the diplomatic plane or with international law, the state which applies the colliding law might still have to nullify the colliding law.⁸³ Since the conflict is settled on the plane of international law anyhow, domestic law is under the control of international law in this respect.⁸⁴ This view resembles the subsequent theory of coordination to some extent. The theory of coordination was developed by jurists (*Gerald Fitzmaurice* and *Rousseau*) who wished to avoid the dichotomy of Monism and Dualism. They first deny the premise of the existence of a common field in which international law and domestic law can operate and hold the view that each order is supreme in its own field. When a conflict of obligations rises, e.g., when a state is unable to fulfill its obligation derived from international law, the consequence will be, instead of the nullification of municipal law, the evocation of the responsibility of the state on the international plane.⁸⁵

Like transformation to dualism, there are also some approaches corresponding to monism. In contrast to transformation, adoption (also incorporation) is a more friendly approach. Adoption refers to the mechanism that international law enters into force in a state as it is through a domestic enforcing order without losing its

⁸⁰ Shaw, *International Law*, pp. 148-149; Brownlie, *Principle of Public International Law*, pp. 32-33.

⁸¹ Stein / Von Buttlar, *Völkerrecht*, p. 55.

⁸² Fischer / K öck, *Völkerrecht*, p. 43.

⁸³ Fischer / K öck, *Völkerrecht*, p. 43.

⁸⁴ Fischer / K öck, *Völkerrecht*, p. 43; Doehring, *Völkerrecht*, p. 303; some authors believe that the colliding domestic law is not to be nullified, but to be seen as inapplicable. See Stein / Von Buttlar, *Völkerrecht*, p. 56.

⁸⁵ Brownlie, *Principle of Public International Law*, p. 33.

own character as international law.⁸⁶ Since there is no alternation in the intermediate stage after signature and ratification, the ground of validity stays on the international law plane, and any alteration or abolishment of the international law would display its effect synchronously in the national sphere. Following the mechanism of adoption, it is urged that the administration might execute legislation right away without the legislature and act beyond its authority improperly, especially when the treaty in question can be directly invoked before a court.⁸⁷ Some authors thus claim that the adoption may be undertaken for the introduction of the whole international law, or through certain qualification filters. Yet the latter inclines again to a Dualistic view.⁸⁸ Under the mechanism of adoption, international treaties may have a position in the domestic legal system, and the question of applicability and hierarchy are further raised. However, these questions can never exist under transformation, since treaties do not have any validity and place in domestic law at all.⁸⁹

Based on the Monistic view, German scholars distinguish another form of mechanism from adoption: execution theory (*die Vollzugstheorie*).⁹⁰ It refers to a national executing order which grants permission to the international law for entrance into the state. This approach theoretically differs from the Dualistic theory of general transformation in several respects: after gaining access into the domestic legal system, the international law can still keep its nature as international law; domestic applying institutions must apply the international law as it is since the national executing order only authorizes the force of the international law in question but does not change the contents of it; the executing

⁸⁶ Vitzthum, *Völkerrecht*, p. 102.

⁸⁷ Shaw, *International Law*, p. 148.

⁸⁸ Vitzthum, *Völkerrecht*, p. 102.

⁸⁹ For a different opinion, see Schweisfurth, *Völkerrecht*, p. 201.

⁹⁰ Doehring, *Völkerrecht*, pp.308-309; Stein / Von Buttlar, *Völkerrecht*, p. 56; Boehmer, *Der völkerrechtliche Vertrag im deutschen Recht*, pp. 36ff. It is contentious in Germany whether „Vollzugstheorie“, which comes from the interpretation of Art. 59 of the German Constitution, is a Monistic or Dualistic view. Some authors argue that the executing order only refers to the execution of the very treaty in question, and does not open the door to the general validity of all treaties. Some authors even argue that the treaty is not incorporated in domestic law in this way at all. Thus, it is based on a Dualistic view. See also Vitzthum, *Völkerrecht*, pp. 128-129; Schweisfurth, *Völkerrecht*, p. 201.

order only addresses the national applying institution and thus does not imply conferring direct domestic validity to international law.⁹¹ Since the theory is represented by both followers of Dualism such as *Anzilotti* and moderate Monism such as *Verdross*⁹², some German authors believe that execution theory totally disengages itself from the aforementioned theories of Monism and Dualism and successfully avoids the either-or results of these theories.⁹³ However, despite their differences, these theories resemble each other in result.⁹⁴

States in the modern world are closely associated, and the distinctions of Monism and Dualism do not bring much significance in practice. Based on different starting points, these theories are more or less mixed in their consequences due to the “moderate varieties” among them.⁹⁵ Since in most situations international treaties require their member states to fulfill obligations without prescribing the implementing mechanism, it actually depends on the domestic mechanism to make a treaty valid and applicable in the domestic sphere. Each state is at liberty to decide in its constitution whether the treaty conclusion procedure needs the approval of the national parliament or simply the signature of the government. It can also decide which mechanism shall be applied and what status is a treaty in the domestic legal system. It may further arrange treaties into different categories of the application mechanism and apply them selectively. Although the principle “*Pacta sunt servanda*”⁹⁶ has always been a widely recognized principle and guideline in the field of international law, international law does not care in which way the state fulfills its obligations, it only cares about the result.

⁹¹ Partsch, *Die Anwendung des Völkerrechts im innerstaatlichen Rechts*, p. 20; Schweisfurth, *Völkerrecht*, p. 199.

⁹² Partsch, *Die Anwendung des Völkerrechts im innerstaatlichen Rechts*, p. 19.

⁹³ Vitzthum, *Völkerrecht*, p. 102; Partsch, *Die Anwendung des Völkerrechts im innerstaatlichen Recht*, pp. 19 ff; Schweisfurth, *Völkerrecht*, p. 199.

⁹⁴ Fischer / Köck, *Völkerrecht*, p. 46; Stein / Von Buttlar, *Völkerrecht*, p. 57; Mann, *The Function of Judicial Decision in European Economic Integration*, p. 32.

⁹⁵ Stein / Von Buttlar, *Völkerrecht*, p. 55.

⁹⁶ Art. 26 of the Vienna Convention on the Law of Treaties.

3.2.2 The Direct Applicability of Treaties in Domestic Law

In case of a typical transformation, the question of direct applicability cannot be involved because a treaty can only be applied indirectly through the transforming domestic law. In another words, the treaty itself does not have any intersection with domestic legal system. It is the specific transforming domestic law that is applied by the court or the executive, and under such conditions, the treaty can never be invoked as a legal ground of judgment directly.

After treaty provisions are adopted or “executed” through an executing order in the domestic legal system, in another word, they become part of domestic law. The follow-up question would be whether they can be directly applied before a domestic applying institution. In fact, because of the variety in the nature and content of treaties, and because of each state’s special practice, these questions cannot be answered by pure international legal theory, neither can they be answered by pure national legal theory. Although direct applicability and direct effect is the nature of treaty, this nature depends on a national legislative or judiciary to define it. In this respect, the nature of treaty is not naturally contained in the treaty, but “conferred” by national interpretation. Since the author has introduced the concept previously, this question will be further demonstrated through the examples below.⁹⁷

3.2.3 The Hierarchy of Treaties in Domestic Law

When a treaty has entered into a state and finds its provisions in collision with the provisions of a domestic law, the hierarchy of the treaty in domestic law in this state is to be examined. The hierarchy question is again a question of domestic law. It can be prescribed in the constitution of the state or other laws, or implied in judicial practices.

⁹⁷ See 3.3. Practice on the Application of Treaty in Domestic Law: Two Examples.

In states such as Great Britain and other states of Common Law which undertake the transformation mechanism, the domestic validity of the treaty is denied and the transforming domestic law positions in the domestic legal system as a domestic law. The hierarchy of the transforming domestic law shall follow the general rule of the hierarchy of domestic law in the state. In order to fulfill international obligations and to avoid collision with the later law, the courts are required to interpret domestic law as in conformity with the transformed treaty.⁹⁸

Problems arise in states which adopt treaty into their domestic legal systems. A treaty rarely has status higher than the constitution, such as the status of the ECHR in the Netherlands; it may have the same status as the constitution, such as is written in Art. 91 (3) of the Constitution of the Netherlands; it may have the status under the constitution, but higher than other laws, such as prescribed in Art. 55 of the Constitution of France and Art. 15, Paragraph 4 (2) of the Russian Constitution; it may have the same status as laws, such as in the USA; it may even have the status under laws, such as executive agreements in the USA, and sometimes, special treaties may also be endowed with certain (executing) priority by laws.⁹⁹ Since treaty is now part of domestic law, it is noteworthy that the well-recognized applying rule of domestic law, *lex posterior derogat legi priori*, shall be followed.

Under the “*Vollzugstheorie*”, German authors who argue that the theory is Dualistic believe that treaty is not adopted into the domestic legal system and thus the hierarchy question does not exist.¹⁰⁰ Some authors claim that the execution of treaty and the hierarchy of treaty are separate questions. The hierarchy problem shall be decided by the state rather than the executing order.¹⁰¹

⁹⁸ Verdross / Simma, *Universelles Völkerrecht*, p. 547.

⁹⁹ Schweisfurth, *Völkerrecht*, p. 202.

¹⁰⁰ Schweisfurth, *Völkerrecht*, p. 201.

¹⁰¹ Partsch, *Die Anwendung des Völkerrechts im innerstaatlichen Rechts*, pp. 22 and 23.

3.3 Practice on the Application of Treaty in Domestic Law: Two

Examples

Some states' legal practices and interpretations on the application of treaty have become referential models for many other states. Since many Chinese scholars have proposed resolutions to this question for China in reference to the EU and the USA, it is necessary to briefly introduce their mechanisms.

3.3.1 The Approach of the Application of the EC Law of the European Court of Justice

The ECJ has developed the doctrine of direct effect, which is definitely one of the most discussed topics in the ECJ's jurisprudence. It is noticeable that the concept of direct effect employed by the ECJ has been developed a lot over the past five decades. It embraces today far more contents than its initial definition, which only concerns the invocability of treaty provisions by a private person before a national court. In the ECJ's jurisprudence and doctrines, the problem of direct effect comprises basic questions such as: can a private person rely on a provision of Community Law to sue a state before a national court, or even to sue another person? Can a national court apply the Community Law directly of its own motion without the request of a party? Should the Community Law be relied on to let the Community or the national court take a review of its own legislation? Or should it only be applied as the norm which governs the case? Are the national courts obliged to apply the relative provisions of the Community Law, or the administration as well? What kinds of provisions of the Community Law should be considered as directly effective? Thus, the concept of direct effect shall be understood in a broadened sense here, since it comprises all of the questions about the application of international law in domestic law. In other parts of this

study where the EU Law is not mentioned, direct effect should still be employed in a narrow sense, as mentioned in the previous study.¹⁰²

In the *Van Gend en Loos*¹⁰³, the European Court of Justice was confronted with the question of direct effect for the first time. The Court was then of the opinion that the question of the direct effect of certain provisions of the EEC treaty (in this case Article 12) is a question of interpretation rather than an actual application question in the context of the constitutional laws of the Member States. Thus, it was within the jurisdiction of the Court to answer the question by taking the spirit, general scheme, and the wording of treaty provisions into consideration. The Court stressed that the EEC treaty differs from other international treaties in its objective, which is to establish a common market. For the well functioning of the common market, the Communities are authorized with certain sovereign rights, and the execution of such rights may influence all the Member States and their citizens. After analyzing the treaty provisions, the Court came to the conclusion that certain provisions (Article 12) shall be interpreted as producing direct effect and creating individual rights which the national courts must protect. In *Costa vs. ENEL*¹⁰⁴ the Court further affirmed that “the EEC Treaty has created its own legal system which [...] is an integral part of the legal systems of the Member States and which their courts are bound to apply.” The EEC Treaty was meanwhile endowed with supremacy in the domestic legal systems of the Member States. In *Simmenthal II*¹⁰⁵, the Court replaced the phrase of “direct effect” with “direct applicability”. The explanation of the phrase was that the rules of the Treaty must be fully and uniformly applied in all the Member States, to be more exact, provisions with directly applicable Treaty provisions are a direct source of rights and duties for all the affected Member States or individuals, and the national courts are obliged to protect the rights of the individuals conferred upon

¹⁰² See p. 21.

¹⁰³ Case 26 / 62, [1963] ECR 1.

¹⁰⁴ Case 6 / 64, [1964] ECR 585.

¹⁰⁵ Case 106 / 77, [1978] ECR 629.

by the Community Law. This concept does not diverge much from the direct effect employed by the Court in the previous cases except that it also emphasizes the obligation of the Member States to apply the Treaty. The Court further stated that the directly applicable Treaty and measures of the institutions shall, by their entry into force, render the conflicting domestic provisions inapplicable and preclude the validity of later domestic colliding law. The national courts are obliged to apply the Treaty promptly when there is a collision. In the *Internationale Handelsgesellschaft Case*¹⁰⁶ and many subsequent cases, the Court repeated the supremacy of the Community Law and stressed that the validity and effect of the Community Treaty cannot be affected by the constitutions or the principles of such of the Member States.

Unlike traditional international law, which leaves enough room for the national legislation and jurisdiction, the ECJ takes over the power of the Member States in determining the method of introduction of the Treaty in their domestic law and decides on its own whether a provision of the Community Treaty is directly effective.¹⁰⁷ Otherwise, the effect of the Treaty may “vary from one state to the other in favor of subsequent internal laws”, and the realization of the aims envisaged by the Treaty in Article 5 (2) might be endangered.¹⁰⁸ Over the years, the Court has widened the scope of direct effect to Regulations and partly to Directives and Decisions.¹⁰⁹

According to the EJC’s jurisprudence, there are several criteria to determine the direct effect of a provision under EC Law. *Winter*¹¹⁰ summarizes the requirements for a directly applicable provision which the EJC has set. It is

¹⁰⁶ Case 11 / 70, [1970] ECR 1125.

¹⁰⁷ Winter, Direct Applicability and Direct Effect, p. 431; Yu / Chen, The Discussion about the Problem of the Direct Effect of the WTO Agreement in the European Communities and the Illuminating Points for China (1), 2001.

¹⁰⁸ Case 6 / 64, [1964] ECR 585.

¹⁰⁹ It is debatable to what extent can directives be directly effective. For details, see Craig, Directives, p. 519; Prechal, Directives in EC Law, Chapter 9: Direct Effect of Directives; Winter, Direct Applicability and Direct Effect, p. 437.

¹¹⁰ Winter, Direct Applicability and Direct Effect, pp. 433-434.

noticeable at first that, in the *Van Gend & Loos* case, the spirit, organization, and wording of the Treaty were stressed, especially the spirit of the Treaty. The spirit of the Treaty is, in his view, “not what the drafters of the Treaty had in mind but what they ought to have had in mind.” The second main factor is that the Community Law is able to create rights which individuals can rely on. Such rights are created “not only when they are explicitly granted by the Treaty, but also through obligations which the Treaty lays down in a very definite manner for individuals as well as for the Member States and the Community institutions.” The third requirement is that a Treaty provision should, “by its nature”, completely and legally perfect, lend “itself to producing direct effect in legal relations between the Member States and persons under their jurisdiction” and create “individual rights recognized by the courts.” From the Court’s cases¹¹¹, he further concludes that “complete and legally perfect” means: (1) the provision must be clear and precise; (2) the provision shall be unconditional; (3) the provision must not depend on further legislative intervention either by the Member States or by Community institutions to be implemented or to be valid. The consequence of the supremacy of EC Law would arouse the inapplicability of the domestic colliding law.¹¹²

Since the ECJ imposes a duty on the national courts to apply the EC Law, meaning that the national courts are obliged to apply EC Law as domestic law even before the Treaty norms are incorporated into domestic law, the national courts may thus sanctify the nonobservance of the state and open a door for EC Law through allowing individuals to rely upon it before the courts.¹¹³ In this regard, the national courts are *de facto* conferred with quasi legislation power. This kind of “deprivation” of certain sovereignty of states is considered to be an opening of a new dimension for international treaty law.¹¹⁴ If a directly applicable

¹¹¹ Case 26 / 62, [1963] ECR 1; Case 28 / 67, [1968] ECR 154; Case 13 / 68, [1969] ECR 453.

¹¹² Oppermann, *Europarecht*, p. 235.

¹¹³ Buchs, *Die unmittelbare Anwendbarkeit völkerrechtlicher Vertragsbestimmungen*, pp. 39-40.

¹¹⁴ Buchs, *Die unmittelbare Anwendbarkeit völkerrechtlicher Vertragsbestimmungen*, p. 39.

provision of EC Law not only confers rights to individuals, but also imposes obligations on them, this provision is defined as having horizontal direct effect. If a provision with direct effect can only confer rights to individuals without the capacity of imposing obligations on individuals, it then has vertical direct effect. In practice, vertical direct effect is reflected in cases when the Member State or its public body takes a measure or makes a rule in contradiction to EC Law, and an individual may sue the state or the public body for not complying with its treaty obligation under EC Law. The horizontal direct effect further comprises the situation when a private person is under obligation originating from the Community Law not to take measures or actions which are contradictory to the Community Law. It can be understood in the sense that in very rare situations, if a private person does not fulfill his obligation, another person may challenge that treaty-breaching person with the rights that are enshrined in the Community Law.¹¹⁵ Although some Treaty provisions have been successfully invoked vertically and horizontally in practice,¹¹⁶ academicians have not reached a unified opinion on the theory.

Beside the principles of supremacy and direct effect, the ECJ also has some requirements on the interpretation of EC Law. The Member States are asked to give preference to the interpretation which ensures the effectiveness of the provision where several interpretations exist for a provision of the EC Law.¹¹⁷ In order to avoid inconsistency so that the EC Law can maintain a complete entity, the ECJ also requires the Member States to adopt the principle of “Treaty-consistent-interpretation” for secondary law.¹¹⁸ Where secondary law is open to more than one interpretation, the interpretation which renders the provision consistent with the Treaty, rather than the one which leads to inconsistency, shall apply.¹¹⁹

¹¹⁵ Öberg, *The Doctrine of Horizontal Direct Effect in EC Law and the Case of Angonese*, p. 17.

¹¹⁶ Steiner / Woods / Twigg-Flesner, *Textbook on EC Law*, p. 92.

¹¹⁷ Case 434 / 97, [2000] ECR I-1129; Case 187 / 87, [1988] ECR 5013.

¹¹⁸ Schultze / Zuleeg / Kadelbach (Hrsg), *Europarecht*, p. 576.

¹¹⁹ Case 135 / 93, [1995] ECR I-1651.

3.3.2 The American Approach

The American approach of the application of treaties is founded upon the distinction between “self-executing” and “non-self-executing” treaties. It has shown great influence on academicians and legislatures worldwide, including China, and many Chinese scholars even call for the introduction of this mechanism.

In the United States, treaties are generally accepted as part of federal law and the law of the individual States without any further legislative act by the Congress or by the President,¹²⁰ such as stated in Article VI section 2 of the Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

According to the interpretation of the Supreme Court, this constitutional provision not only refers to the treaties which are to be ratified by the President with the consent of the Senate, but also refers to the executive agreements concluded by the President alone without the participation of the Senate.¹²¹ Since treaties and agreements are regarded as subject to the Constitution, they are replaceable by the *lex posterior*. Where there is a collision, the US statute shall be construed as in conformity to treaties.¹²² If the conflict cannot be settled, the alteration of domestic law shall not relieve the United States from its international obligations or the violation of such.¹²³

¹²⁰ Evans, *International Law*, p. 433.

¹²¹ Aust, *Modern Treaty Law and Practice*, pp. 157-158.

¹²² Evans, *International Law*, p. 433.

¹²³ Evans, *International Law*, p. 433.

Misleadingly, this provision is sometimes understood as all treaties are directly applicable. Actually, it only indicates an introduction of treaties in the United States. In practice, treaties that are introduced into the US legal system are divided into two categories: “self-executing” and “non-self-executing” treaties, such as stated in the Third Restatement of the Foreign Relations Law of the United States:

Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a “non-self-executing” agreement will not be given effect as law in the absence of necessary implementation. (Chapter 2 Status of International Law and Agreements in United States Law, s. 111)

A “self-executing” treaty is one that is directly applicable without separate legislative action, and regarding the aspect of international law it also focuses on the immediate creation of rights and duties of private individuals¹²⁴, whereas a “non-self-executing” treaty is one that explicitly or implicitly requires domestic implementation by an executive or legislative agency before it becomes an applicable rule for the courts or private individuals.¹²⁵ The division of “self-” and “non-self-executing treaty” implies the allocation of power between judicature and the legislature for the enforcement of treaties. Since the *lex posterior* must be enforced by the courts even if it collides with an earlier treaty, the legislature ultimately has the power to exert control over the judiciary in enforcing treaties, even “self-executing” treaties.¹²⁶ Attention should be paid to the point that, although in most cases, the executive agreements are rejected as being “self-executing”, whether a treaty is a treaty referred to by the Constitution or an executive agreement is not a standard to divide between “self-executing” and “non-self-executing” treaties.¹²⁷

¹²⁴ Riesenfeld, The Doctrine of Self-Executing Treaties and U.S. v. Postal, p. 897.

¹²⁵ Evans, Some Aspects of the Problem of Self-Executing Treaties, p.68; Bleckmann, Begriff und Kriterien der innerstaatlichen Anwendbarkeit völkerrechtlicher Verträge, p. 41.

¹²⁶ Vázquez, The Four Doctrines of Self-Executing Treaties, p. 696.

¹²⁷ Aust, Modern Treaty Law and Practice, p. 159.

Since there has not been a clear method to discriminate between “self-executing” and “non-self-executing” treaties, the answer has to be found in each judgment. American scholars have summarized the criteria for the distinction from judgments. One of the foremost scholars on U.S. treaty law, *Carlos Manuel Vázquez*, concludes four grounds on which a treaty needs legislative actions to be enforceable: 1) if the treaty parties intend to accomplish the treaty’s object through domestic legislation; 2) if the norm of the treaty is “addressed” as a constitutional matter to the legislature; 3) if the treaty purports to accomplish the object which, according to the Constitution, can only be realized by statute; 4) if no law confers a right of action on a plaintiff who seeks to enforce the treaty.¹²⁸ In addition, other factors such as language, specific circumstances, or whether there is political content are also to be taken into account.¹²⁹

From US practice it can be concluded that “self-executing” treaties are adopted in the domestic legal system and can be applied directly by national courts, whereas “non-self-executing” treaties must be transformed through legislation to gain their domestic validity. Despite the supreme provision of the Constitution, which seems to imply an adoption, the American approach in practice can neither be ascribed to a Monistic view nor to a Dualistic view. It seems that in the US legal system, the distinction of the theories of domestic validity and applicability does not play a role.

¹²⁸ Vázquez, *The Four Doctrines of Self-Executing Treaties*, p. 697.

¹²⁹ Aust, *Modern Treaty Law and Practice*, p. 197; Shaw, *International Law*, p. 162.

Chapter 4 The Chinese Approach on the Application of Treaty

4.1 Legislation

4.1.1 Legislation on the Treaty Conclusion Procedure

The question of the application of treaty begins already with the participation of the national institutions in the treaty conclusion procedure, since this procedure may influence the later entry into force of the treaty in the domestic law.¹³⁰ The treaty conclusion procedure in China is prescribed in the Constitution¹³¹ and the Law on the Procedure of Treaty Conclusion. Among various terminologies such as “treaty”, “convention”, “agreement”, “protocol”, “declaration” and so on, Chinese law chooses to use “Treaty”, “Agreement”, and “other Treaty- or Agreement-natured instrument”.¹³² In order to avoid confusion in this study, these forms of treaty defined by the Chinese Constitution are written in uppercase of their respective first letters. Treaty whose first letter is written in lowercase generally refers to all the international agreements. Treaties can be concluded in the name of the People’s Republic of China, the Government of the PRC, or the Governmental Department of the PRC.¹³³ The treaty conclusion procedure is completed under the cooperation of the authorized bodies. Table 2 in the Appendix shows that the State Council takes charge of the conclusion of Treaties and Agreements externally. After being signed, treaties are categorized into “Treaty and Important Agreement”, “Agreement and Other Treaty-natured Instrument which requires ratification”, and “Agreement which does not require

¹³⁰ Cottier / Schefer, *The Relationship between World Trade Organization Law, National and Regional Law*, p. 115.

¹³¹ Constitution of the PRC, Art. 67, Clause 14, Art.81 and Art.89, Clause 9.

¹³² Art. 2 of the Law on the Procedure of Treaty Conclusion. It should, however be noted that the Chinese legislators seem to have forgotten to include the ratification procedure of the “agreement-natured instrument” into law. Beside Art. 2, “Agreement-natured instrument” is never mentioned in the subsequent provisions.

¹³³ Art. 4 of the Law on the Procedure of Treaty Conclusion.

ratification” according to a different ratification procedure. The Standing Committee of the National People’s Congress has the decisive power to ratify any “Treaty and Important Agreement”, and the President formally ratifies these treaties according to the decision of the Standing Committee. The “Agreement and Other Treaty-natured Instrument which requires ratification” is to be decided for approval by the State Council. The “Agreement which does not require ratification” only needs a registration at the Ministry of Foreign Affairs or the State Council. The Minister of Foreign Affairs assists in managing detailed issues concerning the conclusion of treaties under the instruction of the State Council.

4.1.2 Legislation on the Application of Treaties

It is widely recognized that the relationship between international law and domestic law largely depends on the attitude of the constitution of each state. But it is particularly difficult to do research on the introduction and application of international treaties in China. Unlike many other countries whose written or unwritten constitutions explicitly prescribe the position of international treaties, the Chinese Constitution does not include any provisions as such. In the ratification of treaties, the National People’s Congress never declares that a certain treaty enters into effect in China. Besides, the legislation for the implement of a certain treaty is also very rare.¹³⁴ Such a silent attitude is attributed to the historical and political background.¹³⁵ From the First Opium War in the Qing Dynasty until the end of the Qing Dynasty, China was compelled to sign a great deal of unequal treaties under the military pressure of the Western countries. The new Government of PRC, after years of struggle to get rid of foreign aggression, had to handle this issue very discreetly. The first constitutional instrument in 1949 which served as the Constitution for the next five years, the Common Program of the Chinese People’s Political Consultative Conference

¹³⁴ Chen / Zhou / Jiang, *The Relation Between International Treaties and Domestic Law and the Practice in China*, p. 92.

¹³⁵ Liu, *New Arguments on the Application of International Treaty in China*, p. 147.

mentioned the attitude in dealing with treaties signed by the former governments, but it was quite unclear. Under the influence of the attitude of the Soviet Union toward treaties, the subsequent Constitutions and Amendments then laid this issue aside.¹³⁶ The current Constitution of 1982 and the Law on the Procedure of Treaty Conclusion of 2000 contain the procedure of treaty conclusion and ratification. It neither tells the position of treaty in the Chinese legal system, nor the mechanism of application in Chinese courts. Notwithstanding the lack of adequate legislation, there are some other clues to help in understanding China's mechanism.

Chinese diplomatic politics is demonstrated in the Preamble of the Constitution, which is interpreted by some scholars in international law as reflecting the position of international law in China.¹³⁷ According to the Preamble, China undertakes an independent foreign policy, and adheres to the Five Principles of Peaceful Coexistence: mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries. Some scholars consider the Principles as an ultimate source of domestic law which is to be complied by all organizations and persons in China.¹³⁸

More hints can be found in the Legislation Law, which also serves as a constitutional instrument. It is to notice that when the first letter of the words "law", "regulation" and "rule" are written in uppercase, they specially refer to the laws and regulations defined by the Constitution and the Legislation Law. Article 2 of the Legislation Law prescribes the scope of legislation by Chinese legislative bodies, namely, the enactment, revision and nullification of Laws, administrative Regulations, local Regulations, autonomous Regulations and separate Regulations.

¹³⁶ Liu, *New Arguments on the Application of International Treaty in China*, p. 147.

¹³⁷ Wang, *International Law in China*, p. 195.

¹³⁸ Shao / Yu, *Theories on Questions in International Law*, p. 433.

The Rules of the departments of the State Council and those of the local governments shall be formulated, revised and nullified in accordance with the Legislation Law. From this Article and all the provisions through the whole Legislation Law, the act of treaty conclusion is apparently not seen as an act of legislation.

Beside constitutional laws, there are a lot of provisions in other laws prescribing the application of treaty. *Renren Gong*, according to the difference of the formulations of the provisions in Chinese laws and regulations, categorizes these provisions in a reasonable way. He summarizes three kinds of formulations appearing in Chinese law.¹³⁹ Since such a categorization facilitates the research, this study will be based on his method, but categorize the formulations in a much more detailed way. After reviewing all the important laws and regulations which contain provisions relating to treaty application, the formulations of these provisions can be arranged into several tables. It is noteworthy that the chosen laws and regulations are limited within a relatively higher hierarchy of law, namely equal to or higher than the Rules of Departments. These tables certainly cannot include all the legislative sources because of the massive legislation and constantly changing situations. But they are representative in terms of the explanation of current legislation. It should be noted that in the following tables, if a Law, Regulation or Rule is constituted from several parts, “G” represents the part of general provisions, “F” represents the part of foreign-related provisions, “S” represents the part of supplementary provisions, and “M” represents the main part.

<p>Formulation 1: If there is a difference in treaty, the treaty applies, unless there is a reservation.</p>

¹³⁹ For details of his categorization, see Gong, *About the Application of Treaties of International Human Rights in China*.

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<p>Example: If any international treaty concluded or acceded to by the People's Republic of China contains provisions different from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations. (Article 142, Paragraph 2 of the General Principles of the Civil Law).</p>				
Laws and Regulations	Year of Enactment or Amendment	Provision (Part)	Legislation	Type
Foreign Economic Contract Law	1985 (abolished in 1999)	Article 6 (G)	Standing Committee of the NPC	Law
General Principles of the Civil Law	1986	Article 142, Paragraph 2 (F)	NPC	Law
Postal Law	1986-2009 ¹⁴⁰	Article 42 (S)	Standing Committee of the NPC	Law
Administrative Procedure Law	1989	Article 72 (F)	NPC	Law
Environmental Protection Law	1989	Article 46 (S)	Standing Committee of NPC	Law
Detailed Rules on the Implementation of the Law on the Prevention and Control of Water Pollution	1989 (abolished in 2000)	Article 37	State Council	Administrative Regulation

¹⁴⁰ This Article was removed in the new Postal Law of 2009.

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Regulation of Consular Privileges and Immunities	1990	Article 27, Paragraph 1	Standing Committee of the NPC	Law
Law on Entry and Exit Animal and Plant Quarantine	1991	Article 47 (S)	Standing Committee of the NPC	Law
Maritime Code	1992	Article 268, Paragraph 1 (F)	Standing Committee of the NPC	Law
Civil Aviation Law	1995	Article 184 (F)	Standing Committee of the NPC	Law
Regulation on the Protection of Wild Plants	1996	Article 31 (S)	State Council	Administrative Regulation
Regulation on Nuclear Export Control	2006 (amended)	Article 22	State Council	Administrative Regulation
Special Maritime Procedure Law	1999	Article 3 (G)	Standing Committee of the NPC	Law
Meteorology Law	2009 (amended)	Article 44 (S)	Standing Committee of the NPC	Law
Regulation on Pesticide	2001 (amended)	Article 48 (S)	State	Administrative

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Administration			Council	Regulation
Regulation on Export Control of Military Items	2002 (amended)	Article 6 (G)	State Council and Central Military Commission	Administrative Regulation
Water Law	2002 (amended)	Article 78 (S)	Standing Committee of the NPC	Law
Law on the Prevention and Control of Environmental Pollution by Solid Wastes	2004 (amended)	Article 90 (S)	Standing Committee of the NPC	Law
Wildlife Protection Law	2004 (amended)	Article 40 (S)	Standing Committee of the NPC	Law
Seed Law	2004 (amended)	Article 77 (S)	Standing Committee of the NPC	Law
Negotiable Instruments Law	2004 (amended)	Article 95 (F)	Standing Committee of the NPC	Law
Frontier Health and Quarantine Law	2007 (amended)	Article 24 (S)	Standing Committee of the NPC	Law

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Regulation on the Administration of the Export of Dual-Use (Military and Civil) Nuclear Facilities and Related Technologies	2007 (amended)	Article 27	State Council	Administrative Regulation
Civil Procedure Law	2007 (amended)	Article 236 (F)	NPC	Law

Provisions within the Chinese law which contain Formulation 1 are mostly found in civil laws, environmental protection laws, laws concerning frontier control or national defense, procedural laws, or in rare cases, diplomatic laws and economic laws. In the laws constituted by several parts, these provisions are written either in the parts of general provisions and supplementary provisions, or in the part of foreign-related provisions, and do not appear in the main part of the laws. These provisions are further applied to the whole law they belong to, in comparison to formulation 4-9. According to the formulations in this category, the direct application of an international treaty sets the collision between treaty and Chinese law as a premise by saying that “If...treaty...contains provisions different from those in the civil laws of the People’s Republic of China, the provisions of the international treaty shall apply.” Beside this, the reservation announced by China is also a premise.

Formulation 2: If there is a difference in treaty, the treaty applies.

Example: If any international treaty or agreement concerning taxation concluded by the People’s Republic of China with other countries contains provisions different from those in this law, the provisions of the international treaty and agreement shall apply. (Article 91 of the Law on the Administration of Tax Collection).

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Laws and Regulations	Year of Enactment or Amendment	Provision	Legislation	Type
Regulation of Consular Privileges and Immunities	1990	Article 27, Paragraph 2	Standing Committee of the NPC	Law
Income Tax Law for Enterprises with Foreign Investment and Foreign Enterprises	1991-2007 (abolished)	Article 28	Standing Committee of the NPC	Law
Regulation on Civil Aviation Security Guard	1996	Article 2, Paragraph 2 (G)	State Council	Administrative Regulation
Provisions on the Implementation of International Copyright Treaties	1992	Article 19	State Council	Administrative Regulation
Law on the Administration of Tax Collection	2001	Article 91 (S)	Standing Committee of the NPC	Law
Enterprise Income Tax Law	2007	Article 58 (S)	NPC	Law

The second formulation is very similar to the first one in its wording, but it omits the prerequisite that China has announced reservations. Since most of the international treaties concerning these fields are bilateral, the premise of reservation seems to be redundant. In the laws constituted by several parts, the

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provisions containing formulation 2 are written in the parts of general provisions or supplementary provisions, and are applied to the whole law they belong to.

<p>Formulation 3: If there are other provisions in treaty, the treaty provisions apply, unless there is reservation.</p> <p>Example: Where there are other provisions in international treaties to which China is a contracting party, the provisions of those treaties shall apply, unless the provisions are ones on which the People’s Republic of China has announced reservations. (Article 27 of the Regulations on Diplomatic Privileges and Immunities).</p>				
Laws and Regulations	Year of Enactment or Amendment	Provision	Legislation	Type
Regulation of Diplomatic Privileges and Immunities	1986	Article 27	Standing Committee of the NPC	Law
Regulation of Consular Privileges and Immunities	1990	Article 27, Paragraph 1	Standing Committee of the NPC	Law
Regulation on the Prevention and Control of Vessel-Induced Pollution to the Marine Environment	2009	Article 75	State Council	Administrative Regulation

This formulation makes a change to the premise of collision. “Other provisions in treaty” may refer to the situation when the Chinese law does not have any regulation on certain matters, whereas the treaty has. It may also refer to the situation where the treaty contains a provision different from the Chinese law.

Provisions regarding specific matters	Formulation 4: Where there is a treaty, special matters shall be handled or administered by treaty provisions.				
	Example: Where treaties or agreements exist between the People's Republic of China and foreign countries, matters of inheritance shall be handled according to treaties and agreements. (Article 36 of the Succession Law).				
	Laws and Regulations	Year of Enactment or Amendment	Provision	Legislation	Type
	Interim Regulation on Notarization	1982	Article 27 (M)	State Council	Administrative Regulation
	Succession Law	1985	Article 36 (S)	NPC	Law
	Law on the Control of the Entry and Exit of Aliens	1985	Article 6, Paragraph 2 (M)	Standing Committee of the NPC	Law
	Law on the Control of the Exit and Entry of Citizens	1985	Article 18, Paragraph 2 (S)	Standing Committee of the NPC	Law
	Regulation on the Administration of Traffic Safety on Inland Waters	1986 (abolished in 2002)	Article 2, Paragraph 2	State Council	Administrative Regulation
Regulation of Diplomatic	1986	Article 24	Standing	Law	

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Provisions regarding specific matters	Privileges and Immunities			Committee of the NPC	
	Regulation on Frontier Inspection of Exit from or Entry into the Country	1995	Article 9 (M)	State Council	Administrative Regulations
	Measure for the Collection of Income Taxes of Foreign Shipping Companies from Transport of Freight	1996	Article 17, Paragraph 1	Ministry of Finance, General Administration of Taxation	Rule of Departments
	Extradition Law	2000	Article 4, Paragraph 2 (G)	Standing Committee of the NPC	Law
	Surveying and Mapping Law	2002 (amended)	Article 16 (M)	Standing Committee of the NPC	Law
	Regulation on the Implementation of the Trademark Law	2002	Article 12 (G)	State Council	Administrative Regulation
	Fisheries Law	2004 (amended)	Article 8 (G)	Standing Committee of the NPC	Law
	Law on Diplomatic Personnel Stationed	2009	Article 10 (M)	Standing Committee of	Law

Abroad			the NPC	
<p>Formulation 5: Specific matters shall be handled or administrated by treaty provisions, and in the absence of treaty, by the relevant domestic provisions or other rules.</p> <p>Example: Transitory exit from and entry into China by Chinese citizens residing in areas bordering on a neighboring country shall be executed according to relevant agreements between two countries or, in the absence of such agreements, according to relevant provisions of the Chinese Government. (Article 18 of the Law on the Control of the Exit and Entry of Citizens).</p>				
Laws and Regulations	Year of Enactment or Amendment	Provision	Legislation	Type
Law on the Control of the Entry and Exit of Aliens	1985	Article 32 (S)	Standing Committee of the NPC	Law
Law on the Control of the Exit and Entry of Citizens	1985	Article 18, Paragraph 1 (S)	Standing Committee of the NPC	Law
Provisions of the General Administration of Customs on the Declaration of Articles Imported and Exported by Diplomatic Missions and Their Members in	1986	Article 10 and Article 11	General Administration of Customs	Administrative Regulation ¹⁴¹

¹⁴¹ Although the Provisions are issued by the General Administration of Customs, it is approved by the State Council, and is the subsequent administrative regulation of that of 1976 made by the State Council.

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China				
Regulation on Frontier Inspection of Exit from or Entry into the Country	1995	Article 13, Paragraph 1 (M)	State Council	Administrative Regulation
Frontier Health and Quarantine Law	2007 (amended)	Article 25 (S)	Standing Committee of the NPC	Law
Civil Procedure Law	2007 (amended)	Article 261, Paragraph 1	Standing Committee of the NPC	Law
<p>Formulation 6: Specific matters shall be handled or administrated by Chinese law, and in absence of Chinese law, by treaty.</p> <p>Example: With regard to the prevention of collection of vessels, matters which are not prescribed in these regulations and other relevant provisions of the People's Republic of China shall be handled in accordance with the "International Rules for the Avoidance of Collision at Sea" implemented by the People's Republic of China. (Article 52 of the Regulations on the Control of Foreign Vessels).</p>				
Laws and Regulations	Year of Enactment or Amendment	Provision	Legislation	Type
Rules Governing Supervision and Control of Foreign Vessels	1979	Article 24 and Article 52	(Ex-) Ministry of Communications	Rule of Departments
Measure on the Usage of	1996	Article 23	State Council	Administrative

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Provisions regarding to specific matters	the Red Cross Sign		(S)		Regulation
	<p>Formulation 7: Special matters shall be handled or administrated by Chinese law and treaty.</p> <p>Example: Any civil lawsuits brought against a foreign national, a foreign organization, or an international organization that enjoys diplomatic privileges or immunities shall be handled according to the relevant laws of the People’s Republic of China and the international treaties concluded or acceded to by the People’s Republic of China. (Article 237 of the Civil Procedure Law).</p>				
	Laws and Regulations	Year of Enactment or Amendment	Provision	Legislation	Type
	Regulation on the Prevention and Control of Vessel-Induced Pollution to the Marine Environment	1983	Article 13 and Article 21 (M)	State Council	Administration Regulation
	Regulation on the Administration of Radio Operation	1993	Article 36 (F)	State Council	Administrative Regulation
Regulation on the Administration of Nuclear Emergency of Nuclear Power Plants	1993	Article 41 ¹⁴² (S)	State Council	Administrative Regulation	

¹⁴² In comparison to other laws and regulations in this category, Art 41 of the Regulations on the Administration of Nuclear Emergency of Nuclear Power Plants adds another prerequisite that treaty provisions are not declared with reservation by the Chinese government.

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Provisions regarding specific matters	Law of Exclusive Economic Zone and the Continental Shelf	1998	Article 5, Paragraph 1	Standing Committee of the NPC	Law
	Civil Procedure Law	2007 (amended)	Article 237 (M)	Standing Committee of the NPC	Law
	Patent Law	2008 (amended)	Article 20, Paragraph 3 (G)	Standing Committee of the NPC	Law
	<p>Formulation 8: Special matters shall be handled or administrated by treaty or Chinese law.</p> <p>Example: Foreign civil aircraft can only fly into or out of China's territorial air space and fly and land inside China's territories by dint of accords or agreements signed between the government of the country of the aircraft registration and the government of the People's Republic of China, or approval or consent from the Civil Aviation Administration of China. (Article 174 of the Civil Aviation Law).</p>				
	Laws and Regulations	Year of Enactment or Amendment	Provision	Legislation	Type
Civil Aviation Law	1995	Article 174, Paragraph 1 and Article 182 (F)	Standing Committee of the NPC	Law	

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	Education Law	1995	Article 70 (M)	NPC	Law
	Regulation on Chinese-Foreign Cooperative Education	2003	Article 34, Paragraph 4 (M)	State Council	Administrative Regulation
	Regulation on Certification and Accreditation	2003	Article 36 (M)	State Council	Administrative Regulation
	Patent Law	2008 (amended)	Article 57 (M)	Standing Committee of the NPC	Law
<p>Formulation 9: Special matters shall be handled or administrated by treaty or the principle of reciprocity or other treaty principles.</p> <p>Example: According to the international treaties concluded or acceded to by the People's Republic of China or the principle of reciprocity, the people's courts of China and foreign courts may request inter-assistance in the service of legal documents, the investigation and the collection of evidence, or other litigation acts. (Article 266 of the Civil Procedure Law).</p>					
	Laws and Regulations	Year of Enactment or Amendment	Provision	Legislation	Type
	Regulations of Consular Privileges and Immunities	1990	Article 14, Paragraph 1	Standing Committee of the NPC	Law

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	Criminal Procedure Law	1996	Article 17 (G)	Standing Committee of the NPC	Law
	Extradition Law	2000	Article 15 (M)	Standing Committee of the NPC	Law
	Trademark Law	2001	Article 17 (G), Article 24, Paragraph 1 (M)	Standing Committee of the NPC	Law
	Regulation on the Administration of the Import and Export of Goods	2001	Article 5 (G)	State Council	Administrative Regulation
	Civil Procedure Law	2007 (amended)	Article 260, Paragraph 1, Article 264, Paragraph 1 and Article 265	Standing Committee of the NPC	Law
	Foreign Trade Law	2004 (amended)	Article 6 (G)	NPC	Law

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	Patent Law	2008 (amended)	Article 18 (G), Article 29 (G), and Article 69, Item 3 (M)	Standing Committee of the NPC	Law
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There are various approaches to apply treaties when the provisions in Chinese law refer to specific matters. These provisions exist in almost all the legal areas and are found in all parts of the laws. Moreover, they are not applied to the whole laws they belong to. Only when it concerns specific matters, they may apply. Formulations 4 and 5 are similar approaches in respect to the fact that the matter in question shall be handled according to the treaty once there is any. Formulation 5 provides a solution that in the absence of treaty the domestic law shall apply. Formulation 6 conversely says international treaty can be applied when domestic law does not provide related provisions. According to formulations 7 and 8, it is very difficult to find out which legal order should apply because both of the expressions are moderate and vague. Provisions of formulation 9 are relatively newly-made which may imply that international principles such as reciprocity are playing a more and more important role in Chinese law.

Formulation 10: The provisions of treaty and agreement are used as a criterion or standard.

Example: The protective role of the sign of the Red Cross shall be used in conformity with the relevant provisions of the Geneva Conventions and their Additional Protocols. (Article 16, Paragraph 2, Subparagraph 2 of the Law of the Red Cross Society)

Laws and Regulations	Year of Enactment or Amendment	Provision	Legislation	Type
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(Temporary) Measure for the Inspection and Control of the Packing of Dangerous Goods for Export by Sea Trial Implementation	1985	Article 2 (G) and Article 10 (M)	(Ex-) National Economy Commission, (Ex-) Ministry of Foreign Trade and Economic cooperation, (Ex-) Ministry of Communication, National Bureau of Entry -Exit Inspection and Quarantine	Rule of Departments
Provisions on the Control of International Ocean-Shipping of Containers	1990-1998	Article 12, Paragraph 1 (M)	State Council	Administrative Regulation
Law on the Red Cross Society	1993	Article 16, Paragraph 2, Subparagraph 2 (M) and Article 18 (M)	Standing Committee of the NPC	Law
Provisions on the Management of Employment of Foreigners in China	1996	Article 10, Paragraph 1 (M)	(Ex-) Ministry of Labor, Ministry of Public Safety, Ministry of Foreign Affairs, Ministry of Foreign Trade and Economic Cooperation	Rule of Departments
Extradition Law	2000	Article 16 (M), Article 18 (M), Article 19 (M),	Standing Committee of the NPC	Law

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		Article 22 (M), Article 24 (M), Article 26 (M) and Article 49 (F)		
Customs Law	2000 (amended)	Article 56, Paragraph 1, Subparagraph 6 (M)	Standing Committee of the NPC	Law
Regulation on Import and Export Duties	2003	Article 10, Paragraph 2 (M)	State Council	Administrative Regulation
Detailed Rules on the Implementation of the Patent Law	2010 (amended)	Article 99 (M), Article 100, Paragraph 1 (M), Article 101 (F), Paragraph 1, Article 106, Paragraph 1 (F) and 3, Article 108 (F) and Article 112, Paragraph 2 (F)	State Council	Administrative Regulation
Foreign Trade Law	2004 (amended)	Article 16, Paragraph 1, Subparagraph 11 (M), Article 24 (M) and Article 26, Paragraph 1, Subparagraph 6 (M)	Standing Committee of the NPC	Law
Law on Individual Income Tax	2007 (amended)	Article 4, Paragraph 1, Subparagraph 9	Standing Committee of the NPC	Law
Civil Procedure Law	2007 (amended)	Article 240 (M), Article 245, Paragraph 1, Item 1 (M), and Article 262 (F)	Standing Committee of the NPC	Law

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Patent Law	2008 (amended)	Article 20, Paragraph 2 (G) and Art 50	Standing Committee of the NPC	Law
Regulation on the Prevention and Control of Vessel-Induced Pollution to the Marine Environment	2009	Article 10, Paragraph 2 (M)	State Council	Administrative Regulation

Certain provisions of treaty, which contain standards or criterion for the judgment of specific matters, can be applied directly in China. These provisions of direct application exist in all the legal areas.

Other Formulations					
Formulation	Laws and Regulations	Year of Enactment or Amendment	Provisio n	Legislation	Typ e
11. Special matters are handled in accordance with the international treaties or with international practice.	Law on the Protection of the Rights and Interests of Returned Overseas Chinese and the Family Members of Overseas Chinese	2000 (amended)	Article 22	Standing Committee of the NPC	Law
12. This law is applicable to crimes specified in international treaties..., and the PRC exercises criminal	Criminal Law	2011 (amended)	Article 9 (G)	NPC	Law

jurisdiction over such crimes within its treaty obligations.					
13. China observes the relevant treaties and agreements.	Law on the Red Cross Society	1993	Article 4 (G)	Standing Committee	Law
	Law on Physical Culture and Sports	2009 (amended)	Article 9 (G)	Standing Committee of the NPC	Law
	Law on National Defense	2009 (amended)	Article 67 (M)	NPC	Law
14. The Provisions of (some specific) treaties shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.	Basic Law of the Hong Kong Special Administrative Region	1990 (promulgated) 1997 (come into force)	Article 39, Paragraph 1 (M)	NPC	Law

The formulations listed above are vague and slogan-like. They only generally commit to treaty compliance but are not detailed and practical enough for the application of treaty.

4.2 Interpretations and official documents

This section will inspect the interpretations of laws, as well as other official documents such as the decisions of the Standing Committee or diplomatic declarations on the application of international treaty in China.

In China, interpretations of laws are generally divided into legislative interpretation, judicial interpretation, and administrative interpretation according

to the different interpreting institutions.¹⁴³ Legislative interpretation is regulated in Chapter 2, Section 4 of the Legislation Law. The Standing Committee of the NPC is accordingly entitled to issue interpretations on Laws for the further clarification of specific provisions or the application of Laws. The interpretations of the Standing Committee shall have the same legal force, namely on the same hierarchy, as Laws made by the Standing Committee and the NPC.

The judicial interpretations are in a very subtle position in the Chinese legal system. Strictly speaking, they cannot be arranged into the Chinese legal hierarchy and shall not be considered as having legally binding force and being applied as law. Judicial interpretations can be issued by the Supreme Court and the Supreme Procuratorate. Theoretically, the judicature may consider judicial interpretations as an internal reference, but shall not directly apply them¹⁴⁴ However, in practice, judicial interpretations often play a very important role in the application of law. In China, judicial interpretations may not only be issued as a reply to a specific case, but also be actively issued as a general rule by the Supreme Court and the Supreme Procuratorate. According to the newly issued Provisions of the Supreme People's Court on the Work of Judicial Interpretation of 2007 and the Provisions of the Supreme People's Procuratorate of the Work Judicial Interpretation of 2006, the judicial interpretation issued by the Supreme Court shall have legal force. Moreover, the Chinese courts and procuratorates may invoke judicial interpretations as the grounds of judgments. It is prescribed in

¹⁴³ Most Chinese scholars divide the interpretation of law in this way. There is, however, a problem differentiating the legislative interpretation and administrative interpretation. It is normally understood that legislative interpretations refer to the clarification of the legislative institution to the meaning of certain provisions for the correct application of law (Cai / Liu, On Legislative Interpretation; Decision of the Standing Committee of the National People's Congress on Enhancing Interpretation of Law.). Thus, the categorization of legislative interpretation shall be based on the nature of the interpretation rather than the interpreting institution. According to the Notice of the General Office of the State Council on the Competence and Procedure of Interpretation of the Administrative Regulation of 1993, the interpretations of administrative regulation can at least be divided into two types: those relating to the explanation of the text of the provisions of the administrative regulations, and those relating to the application of such provisions. The former is *de facto* a kind of legislative interpretation. But it seems that many Chinese scholars do not ascribe these to legislative interpretation in terms of the Legislation Law. For detailed analysis, see Yan / Zhang, A Simple Discussion on the Positioning and Regulation of Administrative Interpretation.

¹⁴⁴ This point is supported by most Chinese textbooks, as well as official documents such as the Reply of the State Administration for Industry and Commerce on the Question Whether Administrative Institutions Can Directly Apply Judicial Interpretation.

Article 27 of the Provisions of the Supreme People's Court that when Laws and judicial interpretations are both invocable, Laws shall be invoked before judicial interpretations. Since the provisions themselves are judicial interpretations whose legal force is susceptible, it is improper to come to the conclusion that the judicial interpretations have binding force based on these Provisions. Nevertheless, in practice, Chinese courts often build their opinions on judicial interpretations and apply them as legal grounds. Moreover, because of the weakness and ambiguity of legislation, judicial interpretations may sometimes take the function of legislative interpretations.

The administrative interpretation basically refers to the interpretations issued by the State Council and other administrative bodies. Pursuant to the Notice of the General Office of the State Council on the Competence and Procedure of Interpretation of the Administrative Regulations of 1993, administrative interpretations are divided into three kinds: interpretations with legislative nature, which are issued by the State Council, or the relative administrative departments authorized by the State Council; interpretations relating to the detailed application work of the administrative Regulations, which are issued by the competent administrative body or the Legislative Affairs Office of the State Council; interpretations on the internal documents of the State Council and the General Office of the State Council, which are issued by the Legislative Affairs Office of the State Council.

Among all the interpretations, the most important one in terms of the application of treaty was the Provisions on Several Questions Dealing with Foreign-Related Cases issued jointly by the Supreme Court, the Supreme Procuratorate, Ministry of Foreign Affairs, Ministry of Public Safety and Ministry of Justice in 1987. According to the Provisions, foreign-related cases shall comply with international treaties accessed to or concluded by China, and under conflict, the treaty provisions shall apply. China shall not draw domestic provisions or internal rules

as an excuse to decline any obligations imposed by international treaties. This spirit is reflected in some interpretations which strictly require the automatic application of a certain treaty, such as the Notice on Several Notable Questions on the Implementation of the United Nations Convention on Contracts for the International Sale of Goods, the Notice of the Distribution of the Memorandum of the Conference of Judicial Work on Economic Cases in China, and the Notice of the Distribution of the Memorandum of the Conference of the Judicial Work on Foreign-Related and Hong Kong- and Macau-Related Economic Cases in Coastland China. In some interpretations, specific treaty or treaty provisions are expressly referred to so as to deal with the issue in question, such as the Reply on the Issue Whether the Staff of Foreign Embassy Can Employ Chinese Lawyers in China as Surrogates for Civil Suits in the Name of Diplomatic Representatives for their Citizens of 1985, the Reply on the Issue Whether A Foreign Party is Permitted to Mandate Other Foreigners in the Territory of China or the Staff of the Embassy of His State in China to be His Surrogate in a Law Suit of 1985, and the Answer to the Legal Question on Damage Compensation of International Freight Communications and the Carriages of Goods by Rail of 1994. Some interpretations only generally mention that certain issues shall be handled according to international treaty or within the treaty commitments, such as the Detailed Provisions on the Jurisdiction of the Maritime Dispute of 1986, the Provisions on the Acceptance of Disputes of the Maritime Court of 1989, and the Interpretation of the Supreme People's Court on Several Questions about the Application of the Criminal Procedure Law of 1998, the Notice on the Application of Agreements on Judicial Assistance of 1988, the Notice on Several Questions on the Delivery of Legal Documents through Diplomatic Means between a Chinese Court and a Foreign Court of 1986. Some interpretations are the detailed instructing rules for the implementation of certain treaties, such as the Notice on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Notice on Several Notable Questions on

the Implementation of the United Nations Convention on Contracts for the International Sale of Goods, Notice on the Implementation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and so on.

Beyond the interpretations, other official documents may also refer to this question. Some of them are made as a general statement for China's attitude toward international treaties, while others are more concerned with certain treaties or specific issues. Among these documents, special attention shall be paid to a diplomatic declaration made by the Chinese representative, which was considered to be important evidence of the Chinese attitude toward treaties. By answering the questions of the Committee against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment of the United Nations when discussing the Report of the Chinese Government on the Implementation of the Convention against Torture in 1990, the Chinese representative replied: "Offences under the Convention were also regarded as offences under Chinese domestic law. When China acceded to any convention, it became binding as soon as it entered into force. [...] it was not necessary to draft special laws to ensure conformity. If an international instrument was inconsistent with domestic law, the latter was brought into line with the former. Where subtle differences remained, international instruments took precedence over domestic law."¹⁴⁵ In 1991, the Chinese representative repeated this stand before the Committee of Economic and Financial of the UN. It was further emphasized that the Convention has entered into force in China, and the behaviors defined by the Convention must also be forbidden in Chinese laws.¹⁴⁶ More examples can be found on different occasions. By discussing the bill of the accession into the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Protocol in 1999, the Ministry of Foreign Affairs explained before the Standing Committee

¹⁴⁵ UN Doc. CAT/C/SR. 51.

¹⁴⁶ People's Daily (Overseas Edition), November 16, 1991, Page 4.

that the Convention and the Protocol can be applied directly in China without the need of further legislation.¹⁴⁷ In the Decision of the Standing Committee of the National People's Congress on the Implementation of Jurisdiction on Criminals Regulated in International Treaties Concluded or Accessed into by the People's Republic of China in 1987, it is stated that China shall exert criminal jurisdiction within the treaty obligations over the crimes regulated by international treaties. In the annual meeting of state parties and experts of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction on August 18, 2003, China declared that China fully complied with the provisions of the Convention, and had issued related Laws and Regulations. Besides, according to China's practice and legal regime, treaties acceded to by China enter into force in China as soon as they are ratified or accepted.¹⁴⁸ In Articles 67 and 68 of the Working Party on the Accession of China into the WTO, the Chinese representative stated that China would ensure that its laws and regulations were in conformity with the WTO Agreement and its commitments so as to fully perform its international obligations. "The WTO Agreement would be implemented by China in an effective and uniform manner through revising its existing domestic laws and enacting new ones fully in compliance with the WTO Agreement." If the Chinese administrative regulations, departmental rules or other measures were not ready within a proper time for China's full implementation of the WTO Agreement, authorities would still honor China's WTO obligations.

4.3 Judicial Judgments

In comparison to judicial interpretations, judicial judgments are less important, since they are only references for the subordinate courts. However, case law seems to play a more and more important role. The Supreme Court has been

¹⁴⁷ Chen / Zhou / Jiang, *The Relation Between International Treaties and Domestic Law and the Practice in China*, p. 93.

¹⁴⁸ Cited from Jia, *Public International Law*, p. 96 and p. 97.

issuing typical judgments through the Gazette of the Supreme People's Court to instruct adjudicating work of the subordinate courts since 1985. The most recent Provisions on Case Instruction Work of 2010 issued by the Supreme Court set down detailed rules for collecting and announcing typical instructive cases. The gradually built case-instruction-regime with Chinese character implies an increased position of case law in China. Thus, it is worthy of making an investigation into the judgments of the Chinese courts about the application of treaties.

In some judgments, treaties are directly applied as legal grounds. In the *АнимурадоВЩамидьГаджи —оглы Hijacking Aircraft*, the Harbin Intermediate Court adjudged the jurisdiction of the Court according to the Tokyo Convention, the Hague Convention, the Montreal Convention, and the Criminal Law of China. This cognizance was based on a notice of the General Office of State Council which provides that certain kinds of foreign-related aircraft hijacking cases are to be handled according to Chinese laws and in conjunction with the above-mentioned Conventions. In the judgment of the *Fox Film Corporation vs. Culture and Art Publishing Firm*, the plaintiff claimed that “copyright of the film work of the plaintiff shall be protected by the Copyright Law of China according to the 1992 Memorandum of Understanding between the government of the USA and China on the Protection of Intellectual Property¹⁴⁹ and the Berne Convention for the Protection of Literary and Artistic Works.” The Court supported this claim in the judgment. In the *Walt Disney vs. Beijing Press*, the Beijing High Court also invoked the Memorandum of Understanding between the USA and China as a legal basis for the protection of copyrights of American citizens. In the *Shanghai Zhenhua Port Machinery Co., Ltd. vs. United Parcel Services Company of United States*, the defendant argued that if the fact of a delayed delivery indeed exists, the compensation for damages shall follow the provisions of the Warsaw Convention

¹⁴⁹ Memorandum of Understanding Between the Government of the United States of America and the Government of the People's Republic of China on the Protection of Intellectual Property, 1992.

and the Hague Protocol to Amend the Warsaw Convention. The Court finally adjudged a compensation of the defendant to the plaintiff directly according to Article 142 of General Principles of the Civil Law and Article 11 of the Hague Protocol to Amend the Warsaw Convention. In the judgment of the *Mitsubishi Corporation (Hong Kong) Ltd. vs. Sanxia Investment Ltd. Co.*, the Supreme Court once invoked the New York Convention¹⁵⁰. The Court stated that since both parties did not make an agreement on the applying law of the validity of the arbitral stipulations in the contract, according to the principle reflected in Article V, 1(a) of the New York Convention, the recognition of the validity of arbitral agreement shall refer to the law of the place of the arbitration agreed on by the parties. Although the Convention concerns the recognition and enforcement of foreign arbitral awards, Article V, 1(a) of the Convention is a well-acknowledged principle when deciding the applying law for such cases. Thus, the Court rejected the application of Chinese law claimed by the Mitsubishi Corporation. In maritime cases, Chinese courts have shown different attitudes towards the application of treaties and made different decisions. In the *China Marine Bunker Supply Co., Ltd. (Tianjin) vs. Hongkong Dashun Shipping Co., Ltd.*, the Tianjin Maritime Court adjudged that the plaintiff has the main responsibility for the ship collision according to Article 5, 6, 7(2), 19(2) and 35(1) of the International Regulations for Preventing Collisions at Sea accessed by China in 1980. Furthermore, according to Article 35(6), the defendant is also adjudged to be partially responsible. In another ship collision case, *the Collision of Donghai 209 and Minrangong2*, the courts in both instances invoked Article I (6) of the International Convention on Civil Liability for Oil Pollution Damage. However, the courts have different understandings on this provision. In the case, the defendant claimed that Article V of the Convention shall be applied for the limitation of liability. The plaintiff objected to this claim with the reason that the issue in concern does not contain any foreign-related factor. The Guangzhou

¹⁵⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Maritime Court stated that the Marine Environmental Protection Law and the Regulation on the Prevention and Control of Vessel-Induced Pollution to the Marine Environment cannot exclude the application of the Convention in terms of ships under 2000t transporting oil along the Chinese coast. Since the Environmental Protection Law prescribes that international treaties concerning environmental protection shall apply when there is a collision with Chinese law, the Convention shall apply. Moreover, in the first instance, the defendant was adjudged not to compensate for the ocean fishery resource, whereas in the second instance, the defendant was adjudged to compensate for mid- and long term damage.¹⁵¹ In the second instance of the *American United Enterprise Co. Ltd. v. China Shandong Foreign Trade Co. (Yantai)*, the appellant claimed that the first instance only applied the United Nations' Convention on Contracts for the International Sale of Goods without taking the American law into consideration, which is an inaccurate application of law. The Supreme Court maintained that both parties did not reach an agreement on the applicable law, and since the United Corporation was registered in the USA, and China and USA are both Members of the Convention, the provisions in the Convention shall apply to this case. The Court did not support the claim of the appellant.

Beside the cases in which Chinese courts directly invoke treaties as legal grounds, there are also a few cases in which the courts refused the application of international treaties. In the case of *Collision of Ship Yanjiuyou 2 to the Coast*, the accused owner of the ship invoked Article V of the International Convention on Civil Liability for Oil Pollution Damage for the limitation of liability. The Qingdao Maritime Court rejected the application of the Convention on the reason that the prerequisite of application did not exist.¹⁵²

¹⁵¹ Cited from Ahl, *Die Anwendbarkeit völkerrechtlicher Verträge in China*, p. 320 and Han, *The Enforcement of International Conventions for the Prevention of Pollution from Ships and Compensation for Pollution Damage in China*.

¹⁵² Cited from Ahl, *Die Anwendbarkeit völkerrechtlicher Verträge in China*, p. 319 and Han, *The Enforcement of International Conventions for the Prevention of Pollution from Ships and Compensation for Pollution Damage in China*.

4.4 Academic Reviews

4.4.1 On the Relationship between International Law and Domestic Law

Based on Western theories, Chinese scholars have gradually developed their own opinions on the relationship between international law and domestic law. *Zhou Gengsheng* firstly expressed his inclination for dualism in his early article “International Law and Municipal Law” in 1932. But, in his last book, “International Law” (1978) he pointed out that, according to the nature of international law and municipal law, they are not opposite, and the question of who takes the primacy does not exist.¹⁵³ If the state strictly fulfills its international obligation, the relationship between both can be naturally adjusted.¹⁵⁴

Wang Tieya, the successor of *Zhou Gengsheng*, brings forward his view which partially resembles the Western “theory of coordination”.¹⁵⁵ He basically acknowledges that international law and domestic law are two special aspects in one legal system. However, since the lawmaker of domestic law is the state, and international law is also made under the participation of states, the two legal systems are closely connected through this way, and the relationship between them is inter-permeating and mutually complementary. In principle, the state should take the requirements of international law into account while making domestic law, and when it participates in making international law, it should *vice versa* take the stand of domestic law into consideration. When a domestic law diverges from international principles or legal orders and causes infringement to other states’ legal rights and interests, it may result in problems of international responsibility rather than conflict between international and domestic law.

¹⁵³ Zhou, *International Law* (I), p.19-20.

¹⁵⁴ Zhou, *International Law* (I), p. 20.

¹⁵⁵ Wang, *Introduction to International Law*, p.55.

Liang Xi, an exponent of the most prevailing school “theory of inter-relation”¹⁵⁶, develops the theory of *Wang Tieya* and claims that the relationship of international and domestic law is a “unity of opposites”¹⁵⁷, which is also known as a “dialectic relationship”¹⁵⁸. He criticizes the idea that Monism totally denied the “opposite” side and Dualism neglected the “unified” side. On the one hand, the natures, the subject-matters, the sources, and the enforcing mechanisms of international and domestic law are different from one another; on the other hand, the two legal orders relate to each other in many ways. The state, as a creator of both legal orders, is the bridge between them, and its internal function and external function affect them. Besides, modern national society and international society are highly interlaced, which further complicates the relationship between international and domestic law. As far as practical application is concerned, it is within the state sovereignty to set down the rules.

Li Long and *Wang Xigen* also base their arguments on *Wang Tieya*’s theory of the inter-permeating relationship between international and domestic law. Yet, they criticize that the Western theory of coordination ignores the foundation of the relationship between the two legal orders, namely “how to implement international law in a domestic scope, or how the state fulfills its international obligation.”¹⁵⁹ If it lacks a legal mechanism to ensure the fulfillment of international obligation which the state bears, how can domestic law, as a reflection of the state’s will, be naturally coordinated with international law?¹⁶⁰ Thus, they introduce the “theory of the coordination of the legal norms” and take the “harmonization and unification of legal norms” as the logical point to connect the two legal orders. Such coordination should not be an abstract coordination and

¹⁵⁶ Most of the Chinese scholars in the same field agree with this theory. Although some of them gave a detailed explanation to the theory, the theory was still barely developed any further. For the adherents and their explanations see: Wang, *International Law*, p. 29; Cheng, *International Law*, p. 25; Zhao / Yang, *International law*, p. 34; Wang, *International Public Law*, p. 32.

¹⁵⁷ Liang, *International Law*, p. 13.

¹⁵⁸ Zhang, *On the Relationship between International Law and Domestic Law*, p. 124.

¹⁵⁹ Zhou, *International Law (I)*, p. 20.

¹⁶⁰ Li / Wang, *Legal Theoretical Thoughts on the Relationship between International Law and Domestic Law*, p. 14.

the two norms cannot be spontaneously or naturally unified.¹⁶¹ To be more exact, the relationship of international and domestic law can be direct and indirect. They are the mutual direct source of the validity of legislation and jurisdiction, and they are the mutual referential materials to create or apply a legal norm.¹⁶² They finally conclude that it should depend on the goodness of the law itself (namely order, freedom, safety, and fairness) to decide which norm overrules. The “good” law can always replace the other one if it violates the “goodness”, and the law that is not good should update with the better law. Should there be a vacancy in one of the legal norms, the “good” law should provide a judgment whether the other norm shall be the source to fill the vacancy.

Shi Hui brings forward the “theory of Monistic coordination”.¹⁶³ She partially agrees with the Monistic view that both international treaty and domestic law have a common nature as “law” and the same source of validity – the intention of the state. She also believes that both of the legal orders can be invoked by individuals and both of them recognize the act of domestic legislation. However, she does not accept that one of the legal orders is superior to the other, because they have different protecting scope. The supremacy of one of the legal orders may possibly result in different judgments on the same issue. Therefore, the state should voluntarily fulfill its treaty obligation and adjust its domestic law to bring it in accordance with the treaty, so that the international and domestic law can be coordinated.

Xiao Youxian accepts the Monism of the supremacy of international law but calls for the correction of this theory.¹⁶⁴ He claims that the ultimate addressee of international law is the relationship between individuals. He refuses to recognize

¹⁶¹ Li / Wang, *Legal Theoretical Thoughts on the Relationship between International Law and Domestic Law*, p. 14.

¹⁶² Li / Wang, *Legal Theoretical Thoughts on the Relationship between International Law and Domestic Law*, p. 14.

¹⁶³ Shi, *New Thoughts on the Question of the Application of International Treaty in China*, p. 64.

¹⁶⁴ Xiao, *The Application of the WTO Agreement in China from the Perspective of Treaty Law Theory*, p. 38.

the common will of the states as the source of validity of international law. Instead, he claims that the highest source of validity should be the existence and development of the human being as a whole, and further calls for a more intensive study of “supranational law” and “regional law” brought by global integration.

The views of Chinese scholars reflect the Chinese philosophy of moderation, which always shuns contradiction and searches for a middle way. Under the influence of this spirit, Chinese scholars neither completely lean to the theory of Monism nor to Dualism. After reviewing their understandings on the relationship between international and domestic law, it seems that all these theories are similar in consequence. In their view, Dualism overemphasizes the difference between international and domestic law, which may cause the separation of the two. Monism of supremacy of domestic law denies the value of international law, whereas the Monism of the supremacy of international law negates the nature of international law as law among nations and it is unreal to replace domestic law by “world law”.¹⁶⁵ Thus, they argue that the traditional discussion on Monism and Dualism has lost its meaning and they propose moderate ways to explain the relationship between international law and domestic law.

4.4.2 On the Introduction and the Applicability of Treaty

The recognitions on the treaty introducing mechanism of China diverge significantly among Chinese jurists. In general, most of them accept that the main mechanism to introduce treaties into the Chinese legal system and to make treaties valid in China is adoption. Among them views diverge again as far as the question of transformation is concerned. Some of them believe that transformation and other approaches also exist parallel in China, and thus China takes a mixed form, whereas others believe that China only takes the approach of adoption. There are

¹⁶⁵ Wang, *Introduction to International Law*, p. 55; Chen, *Concise Textbook on International Law*, p. 36; Yang, *Textbook on International Law*, p. 24; Mu, *Contemporary Theory of International Law*, p. 22.

also some jurists who argue that China neither takes the mechanism of transformation nor adoption.

a. Single Form

Authors who hold the view that China is pursuing a single form in the introduction of treaty into domestic law mostly incline to adoption.¹⁶⁶ They claim that the formulations such as Art. 189 of the 1982 Civil Procedure Law and Art. 9 of the 1982 Trademark Law, which contain the prior application of treaty, are the principle provisions for the domestic implementation of treaties made by the highest legislative institution. According to this principle, as far as treaties come into force, they are naturally adopted into Chinese domestic law and can be applied by the domestic institutions without the need of transformation through legislation.¹⁶⁷ This principle further proves that treaties are viewed as a source of Chinese law and form an indispensable part of the Chinese legal system.¹⁶⁸

The participation of the Standing Committee of the NPC in the treaty conclusion process is also considered to be an important supporting reason, and it is believed that since the legislature participates in the treaty conclusion procedure, it does not have to pass new laws again.¹⁶⁹ Besides, since the domestic ratification procedure under the participation of the Standing Committee resembles the legislation process of the Standing Committee, the domestic ratification procedure can be considered as a legislative procedure. In this way, a further transforming

¹⁶⁶ Wang, *International Law*, Law Press, p. 393; Li, *General Introduction of Treaty Law*, p. 317; Hou, *60 Years of International Law in New China*, pp. 132 and 133; Wang, *Study on the Questions of the Basic Theory of the Application of Treaties in China*, pp. 58-62.

¹⁶⁷ Li, *General Introduction of Treaty Law*, p. 317.

¹⁶⁸ Zhu / Huang, *Comment and Analysis of the Relation between International Treaties and Domestic Law*, p. 327; Tao, *On Several Problems of the Validity of Treaties*, p. 36.

¹⁶⁹ Wang, *The Position of Treaty in Chinese Legal System*, p. 160; Shao / Yu, *Theories on Questions in International Law*, p. 353; Shao, *The Theory and Practice of the Implementation of International Law in China*, p. 434; Wang, *Introduction to International Law*, p. 209; Mu, *Contemporary Theory of International Law*, p. 26.

process is no longer necessary.¹⁷⁰ This argument further influences the discussion on the hierarchy of treaty in Chinese law.

Wang Yong raises more reasons to support the argumentation of adoption.¹⁷¹ Firstly, the introduction of treaties in China has the characteristic of directness. According to the declarations of the Chinese delegations on many official occasions, and according to some academic views,¹⁷² treaties may get domestic binding force directly after conclusion, rather than through special domestic legislation. Secondly, the introduction of treaties in China has the characteristic of invariability. The application of treaties in China doesn't change the nature and content of treaty as a legal resource of international law, not only because the highest legislative institutions have established such principles¹⁷³, the Supreme Court has also issued judicial interpretations to this question. Thirdly, the introduction of treaties in China has the characteristic of integration. All kinds of treaties can acquire domestic validity after conclusion. In his view, adoption ensures the democracy of legislation and saves labors and resources, and further corresponds to the trend in the modern world.

Chen Hanfeng, *Zhou Weiguo* and *Jiang Hao*¹⁷⁴ criticize the practice that the Chinese judges tend to interpret the collision between treaties and domestic laws as a prerequisite of a treaty's domestic validity, namely the prerequisite of direct application. The reason why some provisions read that treaty should apply when there is a conflict between treaty and domestic law is that, in some matters, treaties have more detailed provisions than domestic laws do, and adoption is much easier than transformation. But such provisions may bring out the illusion that, without them, a treaty can never be applied. They also adduced diplomatic

¹⁷⁰ Rao, *About the Application Problems of Treaty in Chinese Domestic Law*, p. 187; Liang, *On the Domestic Application of Treaties and the Practice of China*, p. 175.

¹⁷¹ Wang, *Study on the Questions of the Basic Theory of the Application of Treaties in China*, pp. 58-62.

¹⁷² Wang, *China and International Law*, p. 386; Li, *Discussion on Several Questions on the Effect of International Treaty in Chinese Domestic Law*.

¹⁷³ Li, *General Introduction of Treaty Law*, p. 317.

¹⁷⁴ Chen / Zhou / Jiang, *The Relation Between International Treaties and Domestic Law and the Practice in China*, p. 121.

declarations, notices of the Supreme Court and law provisions as a support to the argument of adoption. They are further of the opinion that the direct application does not exclude domestic pieces of legislation once they are in conformity with treaty. Such legislation can be before and after treaty conclusion. For example, in reference to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, the Regulations of Diplomatic Privileges and Immunities of the PRC, and Regulations of Consular Privileges and Immunities of the PRC were made to adapt to circumstances in China. Yet such legislations do not encumber the direct application of both Conventions. Although they allege that China takes the single form of adoption, their opinion is more or less similar to the mixed form.

The aforementioned adoption can be concluded as “general adoption”¹⁷⁵, and after China’s accession into the WTO, some authors try to interpret the Chinese approach as “partial adoption”, which limits the adoption to certain treaty provisions or certain treaties.¹⁷⁶ Other authors put forward the “selective adoption” and set some filters to adoption. According to them, the direct application of a treaty provision should rely on the domestic corresponding executing provision.¹⁷⁷ When such an executing provision does not exist, the direct applicability of treaties must be analyzed one by one with regard to its content, legal consequence, and China’s situation.¹⁷⁸

Very few authors believe that treaties are introduced into China through transformation. *Jia Bingbing* argues that each law relates only to one special category of treaty, but the formulations in the Chinese legislation do not point out which kind of treaty is to be applied. This kind of approach is also a

¹⁷⁵ Ahl, Björn, *Die Anwendbarkeit völkerrechtlicher Verträge in China*, 2009, pp. 138-142.

¹⁷⁶ Ahl, Björn, *Die Anwendbarkeit völkerrechtlicher Verträge in China*, 2009, p. 142.

¹⁷⁷ Li, *The Role of Domestic Courts in the Adjudication of International Human Rights*, pp. 347ff; Li, *Discussion on Several Questions on the Effect of International Treaty in Chinese Domestic Law*, pp. 269-270.

¹⁷⁸ Mu, *Research on the Questions of International Law under the Background of Globalization*, p. 150; Chen / Yang, *On the Application of the WTO Agreement in China from the Perspective of International Law and Domestic Law*, p. 29.

transformation with Chinese characteristics.¹⁷⁹ The former President of the Supreme Court also expressed his opinion to this question, “China is taking the mechanism of transformation to introduce treaties into domestic law, and it is of special importance to do so during the transitional period.”¹⁸⁰

Although adoption is a well-recognized approach, there are some criticisms that cannot be ignored. It is doubtful whether the domestic provisions which adopt treaties or treaty provisions into domestic legal systems can be considered as a general principle and be applied to all the laws.¹⁸¹ Some scholars argue that these provisions are mostly applied in civil legal relationships with foreign-related matters.¹⁸² Moreover, they adopt treaties into domestic law in a scattered way without any systematic legislative act. If there should be a principle, it should be that all treaties should be adopted into domestic law unconditionally and systematically.¹⁸³ The argument that the treaty ratification procedure resembles the legislation process of the Standing Committee is another controversial one because the ratification procedure of the legislative can only be considered to reflect the function of the executive authorization to conclude treaties.¹⁸⁴ If the ratification procedure can be seen as legislative act, all treaties should be seen as domestic legislations and should be applicable as all the domestic laws are. There are some authors who try to challenge the adoption theory in a political way. That the courts are authorized with a stronger position to override the People’s Congress through direct application does not correspond to the Chinese political system. It is more reasonable that the treaty application of the courts is regulated through the act of a legislative or a quasi-legislative document of the Supreme Court.¹⁸⁵

¹⁷⁹ Jia, Public International Law, p. 99.

¹⁸⁰ Xiao, Speech.

¹⁸¹ Tao, On Several Problems of the Validity of Treaties, p. 39.

¹⁸² Tao, On Several Problems of the Validity of Treaties, p. 37.

¹⁸³ Rao, About the Application Problems of Treaty in Chinese Domestic Law, p. 188; Tao, On Several Problems of the Validity of Treaties, p. 37.

¹⁸⁴ Ahl, Die Anwendbarkeit völkerrechtlicher Verträge in China, p. 186.

¹⁸⁵ Ahl, Die Anwendbarkeit völkerrechtlicher Verträge in China, p. 150.

b. Mixed Form

Some scholars interpret the introduction of treaty in China as a mixed form which combines transformation, adoption or other mechanisms. These authors accept that treaties get their domestic validity mainly through adoption and in specific cases through transformation or other mechanisms.

One of the prevailing views divides the Chinese legislative modus into three types.¹⁸⁶ The first type is that the domestic laws explicitly prescribe the direct application of treaty, such as formulation 1, formulation 4 and formulation 9. The second type is that international law is transformed into domestic law through domestic legislation. For example, the Law on the Protection of Rights and Interests of Women is the transforming law of the Convention on the Elimination of All Forms of Discrimination against Women, or the Copyright Law of 1990 is a transforming law of the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention. The third type is that the domestic laws are amended or complemented according to treaties. For example, after acceding to the Paris Convention for the Protection of Industrial Property in 1985, the Provisional Regulations on Claims of the Right of Priority with Respect to Applications for the Registration of Trademarks of 1985 was passed as a supplement which may help bring the Trademark Law into conformity with the Paris Convention.¹⁸⁷

Zeng Lingliang and *Xiao Yongping* divide the Chinese legislative modus into three types in another way.¹⁸⁸ The first and second ways stay the same as the aforementioned, namely adoption and transformation. Then, the third way is that in some provisions both direct application and transformation are allowed. For example, the Vienna Convention on Diplomatic Relations and the Vienna

¹⁸⁶ Zhao / Yang, *International Law*, pp. 43 and 44; Wang, *International Public Law*, pp. 36 and 37.

¹⁸⁷ Zhao / Yang, *International Law*, p. 44.

¹⁸⁸ Zeng / Xiao, *The Speeches Collection of International Law in Wuhan University*, pp. 73 and 74.

Convention on Consular Relations had been long directly applied without any intermediate legislation until the Regulations of Diplomatic Privileges and Immunities and the Regulations of Consular Privileges and Immunities respectively were passed in 1986 and 1990 in China. These two legislations can be considered as a transformation of the two treaties. However, despite these transformation acts the two treaties can still be directly applied (see formulation 2).¹⁸⁹ They argue that treaties of private international law are adopted in China, and treaties of public international law that are mainly transformed are only partially adopted in China.

Another distinction developed by *Wang Liyu* is: (1) direct application, (2) both adoption and transformation are allowed at the same time and (3) only indirect application.¹⁹⁰ The third approach rarely appears, but according to Art 39 paragraph 1 of the Basic Law of the Hong Kong Special Administrative Region, the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and the International Labor Conventions cannot apply directly in Hong Kong. They shall be implemented through the legislation of Hong Kong.¹⁹¹

Some other authors only divide Chinese legislation into two approaches – adoption and transformation.¹⁹² In *Che Pizhao*'s opinion, China is taking a “seriatim legislation” approach, which means, treaties are transformed into domestic law through domestic legislation unless direct application is explicitly prescribed in Chinese legislation.¹⁹³ He also believes that treaties which are adopted or transformed into domestic law should be the ones that can be implemented as domestic law. Only treaties regulating private rights and

¹⁸⁹ Some authors arrange such an approach simply into the category of transformation. See Wang, *International Law*, p. 33.

¹⁹⁰ Wang, *The Application of International Treaty in Chinese Domestic Law*, pp. 282-284.

¹⁹¹ See also Han, *On the Domestic Application of Treaty in China*, p. 203.

¹⁹² Che, *On the Application of Treaty in China*, pp. 97 and 98; Zhu / Li, *International Treaty Law*, pp. 223 and 224; Mu, *Research on the Questions of International Law under the Background of Globalization*, p. 149.

¹⁹³ Che, *On the Application of Treaty in China*, p. 98.

obligations or treaties regulating the rights and obligations between individuals and the state need to be implemented in national scope, for they need the assistance of domestic procedure. Treaties regulating rights and obligations between states do not need domestic implementation and thus do not relate to the question.

The view of the mixed form is a moderate explanation. From the mixed form it can be concluded that there are mainly two types of combination: adoption as the dominant mechanism or transformation as the dominant mechanism. For adoption as the dominant mechanism, authors try to set criteria for transformation, and for transformation as the dominant mechanism vice versa. Scholars have also developed a unique explanation – the parallel existence of direct application (adoption) and transformation, especially in the case of the two Vienna Conventions.

4.4.3 On the Hierarchy of Treaty in the Chinese Legal System

The problem of the hierarchy of treaty in the domestic legal system is also defined as the problem of conflict solution between treaty and domestic law in China. Scholars are almost united on this question: the hierarchy of treaty is under that of the Constitution, and is the same as laws made by the corresponding legislative institutions.¹⁹⁴ Treaties can be arranged accordingly into the domestic legal system as follows: (1) Constitution; (2) basic Laws;¹⁹⁵ (3) Treaties and Important Agreements ratified by the Standing Committee, and Laws legislated by the National People's Congress and its Standing Committee; (4) Agreements and Other Treaty-natured Instruments which are approved by the State Council and do

¹⁹⁴ Chen / Zhou / Jiang, *The Relation between International Treaties and Domestic Law and the Practice in China*, p. 97; Che, *On the Application of Treaty in China*, pp. 96 and 97; Guan, *On the Application of Human Rights Treaties Concerning Private Rights*; Sun, *On the Domestic Application of Treaty in China*, pp. 130 and 131; Wang, *The Application of International Treaty in the Special Administrative Regions*, p. 60; Wu, *The Position of International Treaty in China's Domestic Law and the Avoidance and Solution of Conflicts*, pp. 126-129.

¹⁹⁵ Some authors do not take basic laws into consideration, and in their opinions treaties belong to the status directly under Constitution. Chen / Zhou / Jiang, *The Relation between International Treaties and Domestic Law and the Practice in China*, p. 97

not require the ratification by the Standing Committee, and administrative Regulations legislated by the State Council; (5) Agreements which neither require the decision on ratification by the Standing Committee nor the approval by the State Council, and Rules legislated by the governmental departments. There are several reasons for the arrangement. According to Art. 64, Paragraph 1 of the Constitution, amendments to the Constitution are to be proposed by the Standing Committee or by more than one-fifth of the deputies of the NPC to the NPC and adopted by a vote of more than two-thirds of all the deputies to the NPC. According to Art. 62, paragraph 3 of the Constitution Art. 7, paragraph 3 and Art. 40 of the Legislation Law, the NPC enacts and amends basic Laws governing crime, civil affairs, the state organs and other matters. According to Art. 64, paragraph 2 of the Constitution and Art. 23 of the Legislation Law, these basic Laws are to be adopted by the NPC by a majority vote of all the deputies. Since Treaties and Important Agreements are to be ratified or abrogated by the Standing Committee of the NPC in form of a bill¹⁹⁶, and according to Art. 31 of the Organic Law of the National People's Congress and Art. 40 of the Legislation Law the legislative bills and other bills brought before the Standing Committee for deliberation shall be adopted by a simple majority vote of all its members. This procedural difference shows that the Constitution and the basic Laws have a higher position than Treaties and Important Agreements. Since other laws which are not to be legislated by the NPC are also to be enacted and amended by the Standing Committee and such bills shall be passed by a simple majority of all members of the Standing Committee (Art. 67, Paragraph 2 of the Constitution and Art. 7, Paragraph 3 of the Legislation Law), it is believed that Treaties and Important Agreements have the same position as "other Laws" which are not legislated by the NPC. Accordingly, Agreements and Other Treaty-natured Instruments which are to be approved by the State Council (Art. 8 and 11 of the Law on Treaty Conclusion) also have the same position as administrative

¹⁹⁶ Wu, *The Position of International Treaty in China's Domestic Law and the Avoidance and Solution of Conflicts*, pp. 126 and 127.

Regulations legislated by the State Council (Art. 89, paragraph 1 of the Constitution). In addition, Agreements which only need a registration rather than the ratification or approval and are concluded by the governmental departments (Art. 5, Paragraph 3 and Art. 9 of the Treaty Conclusion Law) have the same status as Rules legislated by the governmental departments (Art. 71 of the Legislation Law and Art. 90 of the Constitution). This arrangement of the status of treaties is based on the similarity between the treaty concluding institutions and processes and the legislative institutions and processes, and the ranking of the legislative authority.

A minority of scholars agrees upon another point of view on this question: Treaties have a position beneath the Constitution but above other domestic Laws.¹⁹⁷ Some of them also believe that, based on this view, where there is a collision, treaties shall apply.¹⁹⁸ Therefore, the status of treaties in the Chinese legal system is accordingly: (1) Constitution; (2) treaties; (3) domestic laws. They raise as an argument for this arrangement that there are a great amount of domestic laws and regulations containing provisions about direct application and the priority of treaty under collision, especially the basic laws such as the General Principles of the Civil Law.

There are also other opinions which resemble the aforementioned opinions but cannot provide a detailed elaboration. For example, treaties have a lower position than the Constitution and have the same position as other domestic Laws;¹⁹⁹ or treaties have the same position as Chinese laws;²⁰⁰ or treaties take precedence over domestic laws, and multilateral treaties take precedence over bilateral

¹⁹⁷ Li, General Introduction of Treaty Law, p. 326; Liang, On the Domestic Application of Treaties and the Practice of China, p. 175; Wang, Study on the Questions of the Basic Theory of the Application of Treaties in China, pp. 132-134; Xu, Research on the Application Problem of Treaty in Special Administrative Regions, p. 86.

¹⁹⁸ Li, General Introduction of Treaty Law, p. 326; Xu, Research on the Application Problem of Treaty in Special Administrative Regions, p. 86.

¹⁹⁹ Zhu, The Implementing Mechanism of the International Covenant on Civil and Political Rights.

²⁰⁰ Liu, New Arguments on the Application of International Treaty in China, p. 146.

treaties²⁰¹, or treaties have the same position as laws enacted by the NPC or its Standing Committee²⁰².

4.4.4 Future Prospects

It is doubtless that the system of treaty application in China is still incomplete. There are many laws and regulations referring to direct application and very few concerning indirect application. Moreover, a basic standard has not yet been established among them. This leaves the courts too much discretion and also confuses their adjudicating work. Furthermore, it impairs the credibility of the Chinese government on the fulfillment of international obligations. There are several suggestions for the improvement of the system and the mechanism of treaty application.

(1) It is proposed that a provision on the status of international treaty and the application of treaty be written in the Constitution.²⁰³ Since the position of China in the international world has been greatly promoted, the discreet attitude against treaties can also be changed to an open attitude, and it is also an international trend to adopt provisions concerning treaty into the Constitution.²⁰⁴ If such a provision is not written in the Constitution, all the other laws must contain such a provision and this would raise more confusion.²⁰⁵ Even if there is not a right timing to amend the Constitution in a short term, it is still possible to adopt such a provision into quasi-constitutional laws such as the Legislation Law, or the Law on the Procedure of Treaty Conclusion.²⁰⁶

(2) By establishing a mature mechanism, specific treaties shall be taken into consideration. Chinese legislation has been standing on the side of domestic law

²⁰¹ Gong, *Theory of International Law*, p. 390.

²⁰² Jia, *Public International Law*, p. 98.

²⁰³ Shao, *The Theory and Practice of the Implementation of International Law in China*, p. 210; Liu, *New Arguments on the Application of International Treaty in China*, p. 147.

²⁰⁴ Xu, *Research on the Application Problem of Treaty in Special Administrative Regions*, p. 88.

²⁰⁵ Liu, *New Arguments on the Application of International Treaty in China*, p. 147.

²⁰⁶ Chen / Zhou / Jiang, *The Relation Between International Treaties and Domestic Law and the Practice in China*, p. 122.

and setting certain restrictions on the specific situations where treaties can be directly applied. It would be much meaningful if the methods of treaty application can be divided according to the nature of treaties, such as the mechanism of the United States. Thus, many authors suggest that China should make reference to the American mechanism, which perceives the difference of the “self-executing” and “non-self-executing” treaties.²⁰⁷ Some authors even believe that treaties have already been *de facto* divided into “self-executing” and “non-self-executing” treaties in China.²⁰⁸ The Standing Committee has the authority to legislate, revise and construe Chinese laws or may greatly influence the People’s Congress on legislation or amendment. While ratifying a treaty, it is also authorized to ratify treaties that are different from Chinese laws. Thus, it is believed that the Standing Committee can actually fully decide the way of treaty application.²⁰⁹ It is further believed that “self-executing” treaties that are permitted to be applied directly mostly relate to fields such as civil, commerce or maritime.²¹⁰ These less political treaties often involve individual rights and obligations and contain more detailed provisions than domestic law, e.g., the United Nations Convention on Contracts of International Sales of Goods. Treaties concerning economy, criminality or treaties binding the member states themselves are considered as “non-self-executing” treaties.²¹¹ It is important to notice that although human rights-related treaties greatly concern the rights of individuals, they are treated as “non-self-executing” treaties in China.²¹² The authors claim that since the Chinese approach already reflects the characteristics of the U.S. mechanism, it is possible to further refine this mechanism and make it a fixed mode for the implementation of treaties in

²⁰⁷ Li, General Introduction of Treaty Law, p. 323; Wang, The Application of International Treaty in the Special Administrative Regions, p. 75; Sun, On the Domestic Application of Treaty in China, p. 113; Wang, Study on the Questions of the Basic Theory of the Application of Treaties in China, p. 167; Zeng / Xiao, The Speeches Collection of International Law in Wuhan University, p. 76.

²⁰⁸ Zeng / Xiao, The Speeches Collection of International Law in Wuhan University, p. 77; Wang, The Application of International Treaty in Chinese Domestic Law, pp. 288 and 289; Sun, On the Domestic Application of Treaty in China, pp. 118-125; Wang, The Application of International Treaty in the Special Administrative Regions, p. 75; Mu, Research on the Questions of International Law under the Back ground of Globalization, p. 150.

²⁰⁹ Sun, On the Domestic Application of Treaty in China, pp. 118-125.

²¹⁰ Sun, The Impact of the WTO Accession on Law Application of the Courts.

²¹¹ Wang, Study on the Questions of the Basic Theory of the Application of Treaties in China, p. 167.

²¹² Wang, The Application of International Treaty in the Special Administrative Regions, p. 74.

China. The standards for the distinction between “self-” and “non-self-executing” treaties shall be defined together by the legislative institution or the construing institutions. *Li Haopei* proposes four standards for the necessity of domestic legislation: 1. when the member state must fulfill its obligations in the treaties which explicitly require domestic legislation; 2. as far as political treaties, such as alliance agreements, which confer rights and set obligations only to the governments of the member states, are concerned, when the effect of these treaties is widen to individuals and legal persons; 3. when the provisions of some treaties are too vague to be directly applied; 4. when the treaty does not have a version of native language and thus must be translated into the native language and be promulgated as law.²¹³ The standards brought forward by *Sun Huanwei* takes the Chinese conditions into account: when the treaty provisions are clear enough to be directly applied, and the colliding domestic law contains provisions on the direct application of treaties or similar provisions, such treaties should be considered as “self-executing” (although restrictive) and could be applied directly after ratification. On the contrary, when a treaty itself contains provisions such as that member states must legislate to implement the treaty, or the wording of the treaty is too general to operate, or due to other reasons, a supplementary legislation is needed, the treaty should then be considered as a “non-self-executing” treaty.²¹⁴ *Wang Yong* puts forward some complete and operative standards as follows: 1. if a treaty explicitly requires domestic legislation, it is “non-self-executing”; 2. if a treaty requires domestic supplementary legislation to extend rights and obligations to natural persons, it is “non-self-executing”; 3. if the contents of a treaty are abstract and inoperable, the treaty is “non-self-executing”; 4. if a treaty contains detailed and operable contents which are closely connected to the interests of citizens, it is “self-executing”; 5. according to the currently prevailing theories and judicial practice in China, international civil and commercial treaties are self-executing treaties, and human rights-related treaties are “non-self-executing”;

²¹³ Li, General Introduction of Treaty Law, p. 319.

²¹⁴ Sun, On the Domestic Application of Treaty in China, p. 117.

6. treaties in the field of international private law including uniform substantive law, uniform law of the conflict and uniform procedure law are “self-executing”;²¹⁵ 7. when a treaty cannot be clearly defined as “self-executing” or “non-self-executing”, it is “non-self-executing”.²¹⁶

4.5 Analysis

Until now, the study of the domestic application of international treaties has almost exclusively remained in the academic realm of international law. It is doubtless that scholars of international law have the best authority to explain a treaty’s wording and nature. However, when it enters the domestic legal system, it becomes a problem of constitutional law. Since a constitutional provision concerning the application of treaties has not yet been issued, this problem has not drawn the attention of Chinese scholars in the field of constitutional law. There are also very few academic works concerning a systematic theory on the application of treaties in domestic law.

The theory of transformation and adoption was established originally to make clear whether treaties are applied as international law or as domestic law within a state.²¹⁷ It seems that Chinese scholars have gone too far with this theory. Many scholars in China do not distinguish between the introduction of a treaty and the applicability of a treaty. They believe that all treaty provisions can be applied directly by courts and administrative bodies once they gain their domestic validity through adoption. It must be noted here that even if a treaty is adopted into a domestic system in a state and displays its validity in the state, the state may still take measures to prevent the treaty from being applied directly.

²¹⁵ See also Xiao, *On the Application of Private International Treaty in China*, p. 19.

²¹⁶ Wang, *Study on the Questions of the Basic Theory of the Application of Treaties in China*, p. 167.

²¹⁷ Zuleeg, *Die innerstaatliche Anwendbarkeit völkerrechtlicher Verträge am Beispiel des GATT und der Europäischen Sozialcharta*, p.345.

With regard to the question of the introduction of treaty, the author would support the argumentation of the single form of adoption. The provisions of direct application listed above are mostly collision provisions. A collision refers to the situation when a treaty provision and a domestic provision are both valid and applicable, but are contradictory in content. In this context, the treaty provision must have been introduced into the Chinese legal system and have been able to display its validity already.²¹⁸ Since the treaty provision is allowed to be applied as it is according to these provisions, it must have been introduced through adoption. Provisions such as those in Formulation 13 further prove that treaties do have validity, even if they cannot be directly applied. The official declarations of the Chinese delegation on many official occasions further confirm this argument. Although these declarations do not have legal effect, they are officially made by the Chinese government and clearly show the stand China holds. The judicial interpretations issued by the Supreme Court, such as the Notice on the Implementation of the United Nations Convention on Contracts of International Sales of Goods and the Notice on the Implementation of the New York Convention, also require its subordinate courts to implement treaties properly. As far as the mechanism of transformation is concerned, some authors cite the examples to support their argument of transformation, such as the Law on the Territorial Sea and the Contiguous Zone and the Law on the Exclusive Economic Zone and the Continental Shelf as a transformation of the United Nations' Convention on the Law of the Sea; the Regulation Concerning Diplomatic Privileges and Immunities, the Regulation Concerning Consular Privileges and Immunities and the Law on the Procedure of the Conclusion of Treaties as transformation of the Vienna Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations²¹⁹; the revised Trademark Law, Patent Law and Copyright Law as

²¹⁸ Chen / Zhou / Jiang, *The Relation Between International Treaties and Domestic Law and the Practice in China*, p. 92.

²¹⁹ Che, *On the Application of Treaty in China*, p. 97.

transformation of the TRIPS²²⁰; the Law on the Protection of Women's Rights and Interests as a transformation of the Convention on the Elimination of All Forms of Discrimination Against Women²²¹. Nevertheless, these examples are not supportive enough for the argument of transformation. Firstly, China has never declared transformation in laws or on other official situations and there is no sign in these laws manifesting that they are framed in reference to any treaty. Secondly, these laws have never excluded direct application of treaties. Some provisions in them, such as the Regulation Concerning Diplomatic Privileges and Immunities, even point out that, where there is a conflict treaty, provisions shall apply. Thirdly, the issuing date of some of these laws could be over ten years from the treaty concluding date. If this approach is called transformation, the meaning of transformation as a Dualistic mechanism which transforms international law into national law will vanish. Instead of calling it transformation, the author of this paper, as many other authors, would rather consider it as supplementary legislation in accordance with treaties and with Chinese conditions.²²² Beyond that, as previously mentioned, if a treaty is transformed into a domestic legal system, it should not have a position within the system. Instead, it is the transforming domestic law which has a position. However, the Chinese authors supporting the argument of transformation still render a position on treaties. This might be attributed to the confusion of the authors of the theories.

In brief, as soon as a treaty is ratified or approved in China, it enters into force and displays its validity in China. As far as the applicability of a treaty is concerned, the answer should be found in the specific treaty according to Western theories. In China, however, scholars are trying to find an answer to the question of applicability from domestic legislation. This can be ascribed to the special legislative modus in China. Many laws and regulations contain provisions of

²²⁰ Zhu, Textbook on the Theory and Cases of International Law, p. 8.

²²¹ Wang, Study on the Questions of the Basic Theory of the Application of Treaties in China, p. 167.

²²² Chen / Zhou / Jiang, The Relation Between International Treaties and Domestic Law and the Practice in China, p. 121; Xu, Research on the Application Problem of Treaty in Special Administrative Regions, p. 86; Wang, The Application of International Treaty in the Special Administrative Regions, p. 58.

direct application of treaties within the field they regulate, but they do not explicitly refer to any specific treaty. In fact, although it is the nature of the treaty which determines the applicability, it depends on the domestic law or institution to interpret the applicability. Thus, it is necessary to make an inspection on both levels. With respect to Chinese domestic law, whether a treaty or a treaty provision is directly applicable depends on the legal domain it belongs to. If it falls into a certain field where direct applicability is allowed through those domestic provisions, it may then prevail over domestic provision. If no law offers permission to the treaty or the treaty provision, it cannot be applied directly.

In the following study, the author shall make a deepened analysis into the legislative modus in China. According to the formulations outlined in the tables about Chinese legislation, many Chinese scholars have come to the conclusion that, in principle, treaties are applied directly in China, or at least treaties are “mainly” or “tend to be” applied directly.²²³ However, this conclusion is imprudent, since the direct application of treaties regulated in Chinese domestic legislations is conditioned and restricted direct application. The author would conclude by seeing the Chinese modus as restricted direct application and indirect application.

(a) Restricted direct application

According to the formulations summarized from the legislations in the tables, there are at least 14 different formulations relating to direct applicability. These formulations can basically be divided into four types. Formulations 1 to 3, placed in the first type, concern “general application” of treaty to the whole law. These provisions can be applied to the whole law to which they belong and regulate all the related matters in the law in question. However, although these provisions

²²³ Wang, *The Application of International Treaty in Chinese Domestic Law*, p. 285; Xu, *Research on the Application Problem of Treaty in Special Administrative Regions*, pp. 85 and 86; Zhang / Huang, *On the Application of the WTO Agreement in China*, p. 111; Liang, *On the Domestic Application of Treaties and the Practice of China*, p. 177. See also Wang, *Study on the Questions of the Basic Theory of the Application of Treaties in China*, p. 145, footnote 4.

permit the direct application of treaties, such direct applicability is restricted with certain conditions. According to formulations 1 to 3, treaties can only be applied when the provisions of them are different from those of Chinese laws, or domestic law does not contain provisions on certain issues. However, it is unclear which domestic institution has the authority to decide whether a treaty provision is different from Chinese law. Moreover, it is also unclear which standard the deciding institution should follow. It is even unclear which treaty or what kind of treaties can be applied. For example, Art. 268 of the Maritime Code of the PRC reads, "If any international treaty concluded or acceded to by the People's Republic of China contains provisions different from those contained in this Code, the provisions of the relevant international treaty shall apply, unless the provisions are those on which the People's Republic of China has announced reservations." The questions of who can according to what standard decide the difference between the provisions of what treaty and the Maritime Code cannot be answered. So, there is the possibility that the deciding institution makes a wrong decision and causes the treaty to be inapplicable. Even if the examining standard can be established in the future, the continuous examination also greatly hinders the effectiveness of treaty application.²²⁴ The direct applicability of treaties in China is further restricted in another sense that they are mostly written either in chapters which only relate to foreign relations, or in chapters for supplementary provisions. In this way the applicability of treaty is restricted in the limited area of foreign matters, and only private persons in foreign-related cases may benefit from the invocation of treaties as a judicial remedy.²²⁵ Such a method of applying treaties leads to the unfair result that Chinese citizens may lose the right to rely on treaty provisions which a foreign citizen has in China.²²⁶ That some provisions are written in chapters for supplementary provisions also implies the unimportant role treaties play in the Chinese legal system.

²²⁴ Wang, Study on the Questions of the Basic Theory of the Application of Treaties in China, p. 153.

²²⁵ Wang, Study on the Questions of the Basic Theory of the Application of Treaties in China, p. 153.

²²⁶ Guan, On the Application of Human Rights Treaties Concerning Private Rights, p. 45.

Formulations 4-9 can be categorized into the second type which concerns the applicability on specific matters. The provisions in these formulations only allow treaties to be applied in very specific matters. For example, Art. 16 of the Surveying and Mapping Law reads, “Surveying and mapping of international boundaries of the People’s Republic of China shall be carried out in accordance with the boundary treaties or agreements signed by the People’s Republic of China with the adjacent nations.” Art. 23, Paragraph 2 of the Fisheries Law reads, “Fishing operations on jurisdictional seas of other countries shall be approved by the department in charge of fishery administration of the State Council, and abide by relevant treaties and agreements...” The situations of treaty application are extremely complicated in this category. In some situations treaties take priority (see formulations 4, 5, and 9) and under other conditions domestic laws take priority (see formulation 6). There are even situations where treaties and domestic laws should both be abided by (formulation 7), or either treaties or domestic law should be adhered to (formulation 8). Since these regulations are very concrete, they could appear in any part of the laws. The disorder of these expressions could be attributed to the reason that, in specific situations, special means should be provided to deal with these situations. However, it is still better to precisely define the treaties that are referred to, since the situation is already described in detail.

The third type of treaty application can be found in formulation 10, which allows treaties to be applied as a standard or criterion on specific matters. For example, Art.16, Paragraph 1, Subparagraph 11 of the Foreign Trade Law reads, “it is necessary to restrict or forbid the import or export under any other circumstance as provided for in any international treaty or agreement that China has concluded or acceded to.” Such provisions consider treaty provisions only as a criterion in certain situations. With this respect, this type and the aforementioned type are too specific to be considered as a principle that, in China, treaties can be applied directly.

The last four formulations listed in the table are only some vague principles. For example, Art. 67 of the National Defense Law reads, “In its military relations with other countries, the People’s Republic of China complies with the relevant treaties and agreements that it has concluded with them or acceded to or accepted.” Since treaties can be complied with in many different ways, whether through direct or indirect application, or even through policies, these provisions are written more as some kind of announcement than detailed measures of treaty application.

As shown in the tables, there are many provisions concerning the direct application of treaties in China. Some of them also appear in important laws and regulations such as the General Principle of Civil Law. It is not hard to find that most of the treaties under the type of “general applicability” contain restrictive conditions. If treaties can only be applied directly when there is a conflict, the application of treaty is very much limited. Some authors try to rely on the provision of the General Principles of the Civil Law to widen the scope of the direct application to all the civil law-related laws and they urge that, since the General Principles of the Civil Law is one of the basic Laws in China, all the matters in the civil law scope can be handled according to treaties once there is a conflict.²²⁷ But they seem to have ignored the fact that many important laws, such as the Civil Procedure Law or the Patent Law in the field of civil law, also contain such provision of direct application, yet others, such as the Contract Law, do not. If the provision in the General Principles of the Civil Law can be applied to the whole civil field, it is not necessary to repeat this in other civil laws.²²⁸ Not to mention that such provisions are mostly regulated in the supplementary chapters or chapters relating to foreign matters. The second type also restricts the direct application of treaties to very specific situations, and under other situations treaties cannot ever be applied directly. The third type only considers treaty

²²⁷ Wang, *The Position of Treaty in Chinese Legal System*, pp. 12 and 13.

²²⁸ Sun, *On the Domestic Application of Treaty in China*, p. 123.

provisions as a standard, and treaty provisions might probably be applied in courts only as a piece of evidence rather than a legal resource. The fourth type may actually support the argument that China has taken the approach of adoption to introduce treaties into the domestic system, since treaties definitely have validity so as to be complied with. But it does not expressly support direct application.

The main reason for China to take approaches as such to apply treaties is that, there had been very little practice of treaty application until the middle of 90's. Through the years, the responsibility of international law has mostly addressed itself to the state rather than to private persons, and thus the courts' application of treaties has not been taken into account.²²⁹ Since a systematic mechanism has not been established, some provisions have been made in law to adapt new situations on treaty application.

Yet, there are several problems in these approaches. Firstly, the key to direct application of a treaty is to define which treaty or treaty provision is directly applicable. However, instead of defining the direct applicability of treaty, Chinese laws and regulations stand on the side of domestic law and try to set restrictive conditions on treaty application, which leads to the result that only under certain situations, treaty provisions can be applied directly.²³⁰ Secondly, as mentioned above, the provisions are too vague to execute. For example, the wording (formulation 1) "If any international treaty concluded or acceded to by ... China" does not point out the exact applicable treaties in question. It is recommended that future legislation may make reference to the Provisions on the Implementation of the International Copyright Treaties. Article 3 of the Provisions reads, "The international copyright treaties in this law refer to the Berne Convention for the Protection of Literary and Artistic Works and other bilateral agreements concerning copy rights concluded with other countries or acceded to by the People's Republic of China." Moreover, according to formulations 7 and 8,

²²⁹ Ahl, Die Anwendbarkeit völkerrechtlicher Verträge in China, p.150.

²³⁰ Wang, Study on the Questions of the Basic Theory of the Application of Treaties in China, p. 156.

specific matters shall be handled according to treaties and Chinese laws or according to treaties or Chinese laws. For the former, the specific matter can only be handled when there is no collision between treaties and Chinese laws. For the latter, it is very unclear whether treaties or Chinese laws can have priority to be applied. Thirdly, it is also ambiguous how to construe a conflict between treaty provisions and provisions of Chinese laws. Domestic provisions never give a clear line which institution may, according to what standard, construe the consistency of Chinese laws with treaties. In the situation where a treaty provision is interpreted as the same as a provision in domestic law, which is, in fact, different from the Chinese provision, this treaty cannot be applied directly, even if it actually deserves direct application according to Chinese law. It is also possible that the applying institution wrongly interprets the treaty provision as different from Chinese provision. The principle formed in the United States' case law may be a good example for China. There is a presumption that the U.S. Congress will not legislate against international obligations, and when an act and a treaty deal with the same subject, the courts shall construe them as both effective without acting contrary to each other.²³¹ Fourthly, the position of individuals has not been reflected in these provisions. Fifthly, this approach leaves many situations aside. For example, if the domestic provisions are not as strict as treaty provisions, or even, if the domestic provisions do not contain important contents written in treaties, is there a conflict in this case? Which law shall prevail?

(b) Indirect application through domestic supplementary legislation

In addition to the aforementioned approaches, China has also developed other indirect approaches to implement treaties and to fulfill its international obligations. For example, in the 1991 Chinese White Book for Human Rights, the Chinese government declared that "China has ratified and acceded to seven international conventions on human rights...", "China advocates international cooperation in

²³¹ Shaw, *International Law*, p.150.

intensifying human rights... But the way of each country to realize and protect human rights should not depart from the concrete conditions of this country in relation to its history, economy, politics, and culture. And sovereign states should confirm and protect the system of human rights through domestic legislation.²³² Although it is not explicitly expressed that Chinese courts cannot apply these treaties directly, until now, there has not been any treaty relating to human rights which can be directly applied as it is in China.²³³ Some authors tend to quote this statement to support the point that the Chinese government takes the method of transformation to apply treaties concerning human rights.²³⁴ However, this statement, which does not have any legal effect in the domestic area, only emphasizes the importance of domestic legislation to implement treaty. It may reflect the Chinese government's attitude toward human rights in China's situation at the present time, but cannot exclude direct application of the courts. When China's situation turns better, these treaties are still able to be directly applied. As mentioned above, the legislation considered by some authors as transforming laws for international treaties, is perceived as supplementary legislation in this study. When a treaty cannot be directly applied in China, the Chinese legislature is obliged to bring domestic law into conformity with treaty through revisions, complements, or new legislation.²³⁵ These legislations may be issued before or after the conclusion of a treaty, and sometimes the issuing date of the supplementary legislation may be years from the date of treaty conclusion. This legislation adjusts the previously contradictory legislation and brings it into consistence with treaties. They function as a complement to the existing laws rather than an embodiment of treaties, and make treaties implementable under Chinese conditions.

²³² State Council Information Office of the People's Republic of China, Chinese White Book for Human Rights.

²³³ Ahl, *Die Anwendbarkeit völkerrechtlicher Verträge in China*, p.170, footnote 198; Gong, *About the Application of Treaties of International Human Rights in China*, p. 294.

²³⁴ Ahl, *Die Anwendbarkeit völkerrechtlicher Verträge in China*, p.169; Yang, *The Problem of the Validity of Treaty to Domestic Private Bodies from the Perspective of Treaties of Intellectual Property*.

²³⁵ Wang, *Study on the Questions of the Basic Theory of the Application of Treaties in China*, p. 165.

Beyond the supplementary provisions, after China's accession into the WTO, the principle of treaty-consistent interpretation was also established for international trade administrative cases. It is foreseeable that the principle may play a more and more important role in Chinese courts.

After discussing the introduction and application of treaty in China, the hierarchy of treaty in China's legal system is another important issue. Unlike other scholars, the author of this study does not consider the artificial classification of treaties according to the similarity of the treaty concluding institutions and the legislating institutions as a proper method. Firstly, the legislative institutions in China issue not only laws, but also decisions, orders, notices, resolutions, measures and so on. Apparently these official documents have a lower position than laws and regulations, but they are issued by the same legislative institutions. Secondly, one legislative institution may have multiple powers to legislate different laws.²³⁶ For example, the People's Congresses of the Provincial Autonomous Region of the Minorities and their Standing Committees have the power to legislate local Regulations as ordinary regional People's Congresses (Art. 63 of the Legislation Law), and meanwhile have the power to legislate autonomous Regulations and separate Regulations as special institutions of the autonomous region of the minorities (Art. 66 of the Legislation Law). Although seldom, the possibility of conflict of the local Regulations and autonomous- and separate Regulations exists. In this case, it would be illogical if the one is higher than the other. Furthermore, if they are on the same hierarchy, it would be meaningless to adopt the standard according to the legislation body.²³⁷ Thirdly, the position of the basic Laws and Treaty and important Agreement is also illogical. According to many authors the basic Laws made by the NPC are higher than Treaty and important Agreements as well as other treaties. However, some basic Laws such as the General Principles of the Civil Law contain provisions wording "if there are any differences between

²³⁶ For details see Wang, Study on the Questions of the Basic Theory of the Application of Treaties in China, p. 122.

²³⁷ Wang, Study on the Questions of the Basic Theory of the Application of Treaties in China, p. 121.

treaties and this law, treaties shall apply". Obviously, the validity of the basic Laws cannot prevail over that of the Treaty and Important Agreement, and in order to fulfill international obligations, it is not likely that China would deny the validity of a treaty by invoking its domestic laws.²³⁸ In addition, in the legal hierarchy of Chinese law, all Laws have the same position, whether made by the NPC or by the Standing Committee.²³⁹ The opinion that Treaties and Important Agreements are higher than other Laws made by the Standing Committee but beneath the basic Laws is inconsequent. Therefore, the similarity of the legislative authority and procedure should not be considered as a proper standard to classify the status of treaty. Fourthly, apart from the aforementioned point, the nature of treaty should not be classified according to domestic conclusion procedure either.²⁴⁰ That some treaties are to be ratified by the Standing Committee of the NPC and some are to be approved by the State Council is only a division of the concluding procedure in an economical way and should not be considered as a division for the hierarchy of treaties.²⁴¹

In comparison to the aforementioned ranking, the arrangement that treaties have a position beneath the Constitution but above other domestic Laws sounds more rational.²⁴² Treaties do not have to be placed into the extremely complex domestic legal system and be ranked with them. Moreover, this also complies with the existing domestic provisions concerning direct application of treaties. The division of Treaty and Important Agreement, Agreement and other Treaty-natured Instrument, and Agreement which does not require ratification only demonstrate the different treaty conclusion bodies and procedures. In those domestic provisions of direct application of treaty, this division has never been

²³⁸ For example, in the Provisions on Several Questions Dealing with Foreign-Related Cases issued by the Ministry of Foreign Affairs, the Supreme Court, the Supreme Procuratorate, the Ministry of Public Safety, the Ministry of State Security, and the Ministry of Justice, it is provided that "when domestic laws or internal provisions collide with international treaty obligations committed by China, the treaty provisions shall apply (except for the ones which are declared reservations by China). Each department in charge shall not deny treaty obligations by invoking domestic laws or interior provisions."

²³⁹ Xu, Chinese Constitution, pp. 195-196.

²⁴⁰ Wang, Study on the Questions of the Basic Theory of the Application of Treaties in China, pp. 123-125.

²⁴¹ Wang, Study on the Questions of the Basic Theory of the Application of Treaties in China, pp. 123-125.

²⁴² See p. 81.

stressed. All treaties, once falling into the regulating fields of those provisions, shall apply, no matter whether they are concluded by the Standing Committee or the State Council. The status of treaties in the Chinese legal system and the resolution under collision is not explicitly written in Chinese law. The opinions which the scholars and the author of this study hold are only theoretical discussions. It does not seem to be possible to make an exact conclusion from the legislation. But it can be deduced from those provisions concerning direct application that there is an inclination that treaties are positioned beneath the Constitution and above other domestic laws.²⁴³

²⁴³ Wang, Introduction to International Law, p. 210.

Chapter 5 The Application of the WTO Agreement in China

5.1 The Direct Applicability of the WTO Agreement in General

5.1.1 The Requirements of the WTO Agreement

Certain treaties which are not designed to operate within a domestic legal system can never be connected with the rights and obligations of individuals because they only regulate the relationship between states. Others, aiming at achieving specific results within the domestic legal order of the contracting parties, regulate the relationship of the contracting parties with regard to private persons or the mutual relations of private persons.²⁴⁴ The WTO Agreements certainly have a stronger desire for implementation of the Member States than the GATT of 1947, which can be seen in Article XVI, 4 of the Marrakesh Agreement Establishing the World Trade Organization: “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.” Article XVI, 5 further stresses that “no reservations may be made in respect of any provision of this Agreement.” The GATT of 1947 also made a clear statement for the Member States to obey the WTO obligations in Article XIV, 12: “each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.” In general, the system basically obliges members to complying performance. The WTO-inconsistent measures and practices within the Member States shall be brought into compliance with the WTO obligations within a reasonable period of time.²⁴⁵ Since the implementation of the Members may influence private traders

²⁴⁴ Winter, *Direct Applicability and Direct Effect*, p. 426.

²⁴⁵ Cottier / Schefer, *The Relationship Between World Trade Organization Law, National and Regional Law*, p. 85.

on a large scale, the WTO Agreement can be classified as one of the treaties which are closely connected to private individuals.

The connection to individual rights under the framework of the WTO Agreement can be found in multiple aspects. On the WTO level, pursuant to Art.13 DSU, appropriate individuals may indirectly affect the panel decision by submitting information or advice to the panel (so called *amicus curiae briefs*). In some countries (e.g., the USA) private persons are allowed to support their country in an initiated Panel or Appellate Body process through providing information or joining consultation in their own country.²⁴⁶ Private persons may even indirectly initiate a Dispute Settlement process by applying for such before a domestic institution which may represent the relevant private persons through the Dispute Settlement process.²⁴⁷ An investigation procedure for private parties and Member States is also established in the Trade Barriers Regulation of the European Community. Such functions of private persons can only work against another Member State on the WTO level. If a Member State itself breaches the WTO Agreement, what could a private person do to protect his own interest against his own country? Furthermore, how would the national court apply the WTO Agreement? Would a mechanism be established in a Member for individuals to challenge national law which might breach the WTO Agreement? These problems are normally settled on the domestic level, since it depends on the domestic legislator or court to interpret. The debate on individual rights under the WTO Agreement brings the controversy topic: the direct effect of the WTO Agreement. The traditional meaning of direct effect is conferring rights to private persons and in a strict sense, a private person may acquire such rights without the interference of domestic legislation.²⁴⁸ In other words, the Member States are obligated to protect these private rights. Furthermore, if such a protection fails, private persons

²⁴⁶ Hilf / Oeter, WTO-Recht, pp. 549-550.

²⁴⁷ For example, in the USA such institution is the United States Trade Representative, Hilf / Oeter, WTO-Recht, p. 544.

²⁴⁸ Jennings / Watts, Oppenheim's International Law, p.292.

shall have the possibility to resort to international law for remedy.²⁴⁹ Thus, if an international treaty does not provide direct means for remedies for private persons, it does not confer rights to individuals.

If the WTO Agreements explicitly or implicitly suggest conferring rights to individuals, there should be more reasons for the Members to recognize the Agreement as having direct effect, and they will have much less discretion on the enforcement of the WTO Agreements. At present, most Member States, including the most important trading members such as the EU, the USA, Japan, India, South Africa and Canada have all rejected the direct effect of the WTO. Even the Panel concluded that “neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect”.²⁵⁰ However, it is undeniable that the WTO Agreement is not entirely silent about individual rights. Taking a look into the WTO Agreement, it is not difficult to find some provisions with protection on individual actors. The author lays out several typical provisions as follows:

(a) Publication of trade regulations:

Article X:1 of the GATT 1947:

“Law, regulations, judicial decisions and administrative rulings of general application, made by any contracting party, [...] shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy [...] shall also be published.”

Article 2 (g) of the RO Agreement:

²⁴⁹ Che, *On the Effect of International Treaties to Private Persons*, p. 49.

²⁵⁰ *United States-Sections 301-310 of the Trade Act of 1974*, at paragraph 7.72; Cascante, *Rechtsschutz von Privatrechtssubjekten gegen WTO-widrige Maßnahmen in den USA und in der EG*, pp.35-37.

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“[...] Members shall ensure that their law, regulations, judicial decisions and administrative rulings of general application relating to rules of origin are published as if they were subject to and in accordance with, the provisions of paragraph 1 of Article X of GATT 1994.”

Article 63.1 of the TRIPS:

“Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member [...], shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them.”

Similar provisions can also be seen, for example, in Article 12 and 22.2 of the Agreement on Customs Valuation and in Article 7 of the SPSM Agreement.

(b) The manner to administer Members’ domestic laws:

Article X:3(a) of the GATT 1947:

“Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.”

Article 2 (e) of the RO Agreement:

“[...] Members shall ensure that their rules of origin are administered in a consistent, uniform, impartial and reasonable manner.”

Article 61.4 of the TRIPS:

“Procedures concerning the acquisition or maintenance of intellectual property rights and [...] administrative revocation and *inter partes* procedures [...], shall be governed by the general principles set out in paragraphs 2 and 3 of Article 41.”

(c) Due process rights:

Although not directly, the WTO Agreement mandates the governments of the Members to establish certain procedures to provide indirect rights to the participants of the economic activities. The protection of due process rights is a core character of some WTO Agreements such as AD, SCM, TRIPS and GATS Agreements.²⁵¹

Article X:3(b) of the GATT 1947 requires the members to:

“maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters.”

Article 12.1 and Article 12.2 of the SCM Agreement:

“Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence [...]”

“Interested Members and interested parties also shall have the right, upon justification, to present information orally.”

Article 41.1 and 41.2 of the TRIPS Agreement:

“Members shall ensure that enforcement procedures [...] are available under their law so as to permit effective action against any act of infringement of intellectual property rights [...] These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.”

“Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.”

²⁵¹ Charnovitz, *The WTO and the Rights of the Individual*, p. 100.

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Article 61.2 of the TRIPS Agreement:

“[...], members shall ensure that the procedures for grant or registration, subject to compliance with the substantive conditions for acquisition of the right, permit the granting or registration of the right within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection.”

Article 5.2.8 of the TBT Agreements:

“When implementing the provisions of paragraph 1, Members shall ensure that a procedure exists to review complaints concerning the operation of a conformity assessment procedure and to take corrective action when a complaint is justified.”

Some examples are given as follows. Other provisions of due process rights can also be seen, for example, in: Articles 5.1, 6.1, 8.3, 11.2, 12.1, 12.2, and 13 of the AD Agreement, Articles 23, 11.1, 32.5, 19.2 of the SCM Agreement, Articles 22.2, 23.1, 26.1, 28.1, 39.2, 42, 46, 63.1 of the TRIPS, Articles 6: 2 (a), 6:3 of the GATS and so on.

(d) Requirement on conformity:

Article XVI.4 of the Marrakesh Agreement Establishing the WTO:

“Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.”

Article 61.1 of the TRIPS:

“Members may require, as a condition of the acquisition or maintenance of the intellectual property rights [...], compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement.”

Article 18.4 of the AD Agreement:

“Each Member shall take all necessary steps, of a general or particular character, to ensure, [...] the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.”

Similar provisions are also found, for example, in Article 22.1 of the Agreement on customs valuation, Article 9 of the PSI Agreement, and Article 32.5 of the SCM Agreement.

5.1.2 Discussions in Western Countries

As previously mentioned,²⁵² the concept of direct effect in this study focuses basically on conferring rights to private persons and shall hereby be understood in this narrow sense. Although this concept can almost be seen as a synonym in the academic field to the concept of direct applicability, which focuses more on the institutional measures, the author will point out the slight difference in the later discussions about China. In this part of the study this distinction is not yet manifest and the phrases “direct effect” and “direct applicability” can be understood as synonyms.

Authors from the WTO Members have discussed the question of direct effect from the GATT time to the WTO time. They endeavor to dig answers from the text of the WTO Agreement and raise the pros and cons of the direct effect based on their own analysis.

With respect to the views of the advocates of the direct effect, it is argued that the WTO Agreement, in comparison to its predecessor GATT 1947, is much more like regulating rules, since it encompasses more detailed provisions, restrictive application of exceptional provisions, and the well-operating Dispute Settlement Mechanism.²⁵³ These are detailed enough for national courts to apply.²⁵⁴ This

²⁵² See p. 21.

²⁵³ Ritzgen, *Geltung und Anwendbarkeit völkerrechtlicher Verträge*, p. 131.

view is especially stressed to the TRIPs, and it is believed that Members are obliged and designated to protect individual rights.²⁵⁵ Authors in opposition to the ECJ's refusal of the direct effect of the WTO Agreement claim that there is not a big difference between the GATT dispute settlement mechanism and those found in other international agreements to which the ECJ has granted direct effect, thus this should not be an excuse for denying direct effect.²⁵⁶ Besides this, the direct effect of trading treaties is considered as an effective weapon against inherent protectionism of the Member States.²⁵⁷ Since the right of individuals to trade with foreigners is a fundamental human right, the recognition of direct effect of the WTO Agreement may help prevent the erosion of a state's sovereignty and assure a government's adherence to international obligations of non-discrimination and liberalized market-access.²⁵⁸ Moreover, it is a common trend to regard individuals and business entities as subjects of international law, especially in the light of human rights. If a person is closely affected by the international law, he deserves to be granted certain rights in the enforcement of international law.²⁵⁹ It is also claimed that "WTO rules which had passed the test of direct democracy enjoy the same democratic legitimation as national statutes".²⁶⁰ Direct reliance on treaties by individuals also brings more efficiency to the implementation of treaties and guarantees consistency in the application.²⁶¹ Beside the views on the legal aspects, there are also political and economic concerns. In addition to economic integration, direct effect can prompt a deeper

²⁵⁴ Cited from Cottier / Schefer, *The Relationship between World Trade Organization Law, National and Regional Law*, p. 97, footnote 37.

²⁵⁵ Ritgen, *Geltung und Anwendbarkeit völkerrechtlicher Verträge*, p. 131; Drexel, Nach "GATT und WIPO", p. 777; Groh / Windisch, *Die Europäische Gemeinschaft und TRIPS*, p. 497.

²⁵⁶ Berkey, *The European Court of Justice and Direct Effect for the GATT*, p. 636.

²⁵⁷ Tumlrir, *International Economic Order and Democratic Constitutionalism*, p. 82.

²⁵⁸ Tumlrir, *International Economic Order and Democratic Constitutionalism*, p. 82; Petersmann, *Rights and Duties of States and Rights and Duties of Their Citizens*, pp. 1087-1128.

²⁵⁹ Lukas, *The Role of Private Parties in the Enforcement of the Uruguay Round Agreements*, pp. 182 and 183.

²⁶⁰ Cited from Cottier / Schefer, *The Relationship between World Trade Organization Law, National and Regional Law*, p. 97, footnote 47.

²⁶¹ Jackson, *The Jurisprudence of GATT and the WTO*, p. 346; Lukas, *The Role of Private Parties in the Enforcement of the Uruguay Round Agreements*, pp. 185 and 201.

social and political integration which enhances social tolerance and the prospects for political maturation and cooperation.²⁶²

The critics of direct effect raise their arguments from a practical starting point and consider the interests of a state as having enormous importance. With regard to the opinion of the European Court of Justice, it is believed that, unlike the EU Agreements, which aim at the economic integration between the Community and its treaty partners, the GATT's goal is the reduction of tariffs and the elimination of discrimination between the Member States. Since it does not pursue a unified market like the Community, the Member States are allowed to preserve a diversity of market structures as long as they do not differentiate unfairly, and thus it may not require an enhanced implementation and a uniform application of its provisions.²⁶³ Furthermore, the goal of the GATT can only be reached on a macroeconomic level rather than a microeconomic level with respect to individuals.²⁶⁴ Even when the WTO does aim at the harmonization of the legal system and the economic integration of its Member States, considering the vast variety of the legal systems of the members, such an aim is unrealistic.²⁶⁵ Furthermore, the combination of reciprocity and MFN further promotes tariff reductions through active participation of individuals in lobbying their governments. Direct effect may hinder this since the individuals may ask one member to unilaterally liberalize its trade measures rather than forcing all members to do so.²⁶⁶ The other predominant opinion takes the fairness of the trading environment into consideration. Trading partners who do not recognize the direct effect of the WTO Agreements place themselves in a favorable position, which is fundamentally unfair to the trading partners who recognize that.²⁶⁷ The ECJ intends to avoid the situation where the Community is forced to fulfill

²⁶² Abbott, *Regional Integration Mechanisms in the Law of the United States*, pp. 157 and 158.

²⁶³ Berkey, *The European Court of Justice and Direct Effect for the GATT*, p. 632.

²⁶⁴ Berkey, *The European Court of Justice and Direct Effect for the GATT*, p. 654.

²⁶⁵ Hilf / Oeter, *WTO-Recht*, p. 563.

²⁶⁶ Berkey, *The European Court of Justice and Direct Effect for the GATT*, p. 655.

²⁶⁷ Kuijper, *The New WTO Dispute Settlement System*, p.64.

obligations by private persons in their national courts, whereas other Members do not have to do so.²⁶⁸ Some detailed regulations and principles are also sometimes quoted as denying reasons. For example, the ECJ considers the flexibility of the safeguard clause in GATT 1947 as one of the reasons for denying direct effect.²⁶⁹ The non-discrimination can only be applied between Member States rather than individuals because it is actually impossible to ignore the natural differences of individuals in factor endowments and technology, since without them no economic welfare gains can be produced.²⁷⁰

Western scholars further claim that the various independent interpretations of the domestic courts may block the efficiency of the WTO Agreements and the dispute settlement procedures.²⁷¹ Authors also argue that the intricate legal questions in the framework of the WTO should be best resolved in the appropriate forum such as the WTO panels and Appellate Body rather than in the domestic courts.²⁷² From a perspective of state policy, it is claimed that direct effect may be dangerous for democracy and democratic representation of individuals.²⁷³ The argument rises from the concern that “some constitutions provide for very little democratic participation in the treaty-making process [...] it is argued, the need to obtain parliamentary approval of the act of transformation serves as an important democratic check on the treaty-making process.”²⁷⁴ Direct effect also conflicts with the legitimate desire of legislators to reword treaty language to match domestic circumstances, especially those treaties whose official language differs from that of the implementing state.²⁷⁵ Legislatures may sometimes wish to have certain discretion on imposing a domestic interpretation on a treaty norm through

²⁶⁸ Meng, Gedanken zur Frage unmittelbarer Anwendung von WTO-Recht in der EG, p. 1075.

²⁶⁹ Berkey, The European Court of Justice and Direct Effect for the GATT, p. 633.

²⁷⁰ Berkey, The European Court of Justice and Direct Effect for the GATT, p. 654.

²⁷¹ Croley / Jackson, WTO Dispute Procedures, Standard of Review, and Deference to National Governments, 209.

²⁷² Eeckhout, P., The Domestic Legal Status of the WTO Agreements: Interconnecting Legal Systems, p. 57 and 58.

²⁷³ Cottier / Schefer, The Relationship between World Trade Organization Law, National and Regional Law, p. 98.

²⁷⁴ Jackson, The Jurisprudence of GATT and the WTO, pp. 345-346.

²⁷⁵ Jackson, The Jurisprudence of GATT and the WTO, p. 346.

transformation or conceive other considerations, and under direct effect such “internal power struggles” cannot be manipulated.²⁷⁶

There is an intermediate position among these debates. It focuses on giving direct effect to the reports and decisions made by the WTO dispute settlement system rather than the WTO Agreement themselves.²⁷⁷ German authors *Hörmann* and *Neugärtner* have elaborated their idea: “An obligation for the Member States to grant direct effect to the reports and decisions would not deprive the discretion and the negotiation freedom from the Member States. The risk that there might be disunified application and interpretations on the WTO Agreement thus does not exist because the Dispute Settlement Body already ascertained the breach of the WTO Agreement.”²⁷⁸ However, they set the trust in the DSB as a prerequisite and admit that such a measure is still immature.²⁷⁹ *Cottier* further argues that the enforcement of direct effect on reports “removes the possibility to choose not to perform and instead pay compensation or accept retaliations, if this option is deemed to be more favorable.”²⁸⁰

Beyond these discussions, authors provide several solutions. It is firstly urged that individuals such as an exporter shall have the opportunity in domestic judicial proceedings to challenge a trade-restrictive domestic law based on a violation of the WTO Agreement.²⁸¹ By doing so, it is suggested that customary international law should adopt a good faith obligation to ensure the direct application of treaties.²⁸² Furthermore, in order to avoid the situation where the national courts from different Member States might apply the WTO Agreement differently or make different interpretations, the foundation of a cooperative procedure between

²⁷⁶ Jackson, *The Jurisprudence of GATT and the WTO*, p. 346.

²⁷⁷ Bossche, *The Law and Policy of the World Trade Organization*, p.67.

²⁷⁸ Hilf / Oeter, *WTO-Recht*, pp. 563-564.

²⁷⁹ Hilf / Oeter, *WTO-Recht*, p. 564.

²⁸⁰ Cottier / Schefer, *The Relationship Between World Trade Organization Law, National and Regional Law*, p. 98.

²⁸¹ Lukas, *The Role of Private Parties in the Enforcement of the Uruguay Round Agreements*, p. 185.

²⁸² Jackson, *The Jurisprudence of GATT and the WTO*, p. 344; Lukas, *The Role of Private Parties in the Enforcement of the Uruguay Round Agreements*, p. 185.

the DSB and the national courts is proposed. Since such a procedure leaves no room for a possible trading-policy negotiation between the Member States, and Member States might lose their autonomy to decide the domestic validity of the WTO Agreement, it is also suggested that a corresponding preliminary decision procedure should be established.²⁸³

5.2 The Direct Applicability of the WTO Agreement in China

5.2.1 Academic reviews

China's accession into the WTO has brought heated discussion on the topic of the application of the WTO Agreement among Chinese academics. Based on the supporting and objecting views of the Western scholars worldwide, Chinese scholars also bring forward their views with respect to the special situations in China. It should be noted that since the introduction of treaty and the applicability of treaty are not distinguished in the Chinese academic field, the opinions on the introduction of the WTO Agreement will be discussed in combination with the opinions on the applicability of the WTO Agreement. Moreover, Chinese authors also seldom emphasize the distinction between direct effect and direct applicability. However, they normally use direct applicability to discuss related questions.

Beside the similar arguments raised by the Western scholars, Chinese scholars also put forward arguments considering the Chinese situation, and most of them deny direct applicability. It is noteworthy that most of the scholars, including those who favor direct applicability, deny the legal status of individuals as a subject in international law. To them, private persons and companies can be conferred with rights or charged with obligations under international law, but they

²⁸³ Hilf / Oeter, WTO-Recht, p. 562.

do not fall into the regulating realm of international law, for they cannot take on the obligation as the states.²⁸⁴

5.2.1.1 Arguments Denying Direct Applicability

(a) The nature of the WTO Agreement is *sui generis* and is “public law”-inclined.

Chinese scholars have their own understanding on “public” and “private” international treaties. In their opinions, “private” international treaties adjust the relationship between the private persons, or the private person and the state, whereas “public” international treaties regulate the relationship between states and such treaties do not have direct effect.²⁸⁵ The WTO Agreement contains provisions relating to private persons and, because of its complexity and universality, it is distinguished from other public international treaties. However, it is eventually based on the negotiations between the Member States, and thus is not designed to regulate the relationship between equal private persons in terms of civil law. It regulates the trading relationship between the states.²⁸⁶ It is further claimed that the civil provisions concerning direct applicability in Article 142 of the General Principles of the Civil Law cannot be applied to the WTO Agreement.²⁸⁷

(b) The WTO Agreement and the Protocol on the Accession of China do not require direct applicability.

It is argued that the WTO Agreement only requires the Member States to fulfill their treaty obligations, but it does not require direct application of the

²⁸⁴ Kong, China and International Economic Law under the Background of WTO Accession, p. 82, Footnote 1.

²⁸⁵ Yang, The Problem of the Validity of Treaty to Domestic Private Bodies from the Perspective of Treaties of Intellectual Property, p. 37.

²⁸⁶ Chen / Yang, On the Application of the WTO Agreement in China from the Perspective of International Law and Domestic Law; Che, On the Application of Treaty in China, p. 99; Zeng / Xiao, The Speeches Collection of International Law in Wuhan University, pp. 75 and 113.

²⁸⁷ Yang, The Application of the WTO Agreement in China, p. 39.

Members.²⁸⁸ Rather, from the Panel Report it is clearly to see that the direct application is decided by each Member State.²⁸⁹ Since the subject of the commitments is each government from the perspective of international law, it is the Chinese government, rather than any institution, any person, or other subjects that could take on this duty.²⁹⁰ It is also believed that the language of the WTO Agreement is vague and complex, and is not designed for the domestic courts to apply.²⁹¹ Some authors raise that, in comparison to the unified international treaties such as the Hague Rules, the CISG, or the Hamburg Rules, which intend to create rights for the private person, the WTO Agreement has not yet reached such a degree from its nature and character,²⁹² not even the TRIPS.²⁹³

Another controversial argument bases on the understanding of Article 67 and Article 68 of the Report of the Working Party on the Accession of China. In Article 67, China commits that “its laws and regulations pertaining to or affecting trade were in conformity with the WTO Agreement and with its commitments so as to fully perform its international obligations.” And “the WTO Agreement would be implemented by China in an effective and uniform manner through revising its existing domestic laws and enacting new ones fully in compliance with the WTO Agreement”. This commitment is often quoted to prove that China applies the WTO Agreement indirectly through revising existing laws and enacting new laws.²⁹⁴

(c) Direct applicability weakens China’s sovereignty.

²⁸⁸ Che, *Several Questions on Chinese Government’s Fulfillment of the Obligations of the WTO Agreement after China’s WTO Accession*, p. 7; Zhang / Qiu, *The Application of the European Court of Justice of the WTO Agreement and the Illumination to Chinese Courts*, p. 81.

²⁸⁹ Zhang / Qiu, *The Application of the European Court of Justice of the WTO Agreement and the Illumination to Chinese Courts*, p. 82.

²⁹⁰ Zhang / Qiu, *The Application of the European Court of Justice of the WTO Agreement and the Illumination to Chinese Courts*, p. 82.

²⁹¹ Cao / Wang, *Applying the WTO Rules in Chinese Courts*; Fang, *Research on the Position of the WTO Agreement in China and the Modus of Application*.

²⁹² Che, *Several Questions on Chinese Government’s Fulfillment of the Obligations of the WTO Agreement after China’s WTO Accession*, p. 5.

²⁹³ Yang, *The Problem of the Validity of Treaty to Domestic Private Bodies from the Perspective of Treaties of Intellectual Property*, p. 39.

²⁹⁴ Kong, *The Domestic Application of the WTO Law*, 2002.

Many Chinese scholars take the protection of national interests into consideration. Authors agree that the accession of a treaty is a limitation to national sovereignty and the reason China chooses to accede to the WTO and give up certain economic sovereignty is to gain more national interests.²⁹⁵ It is not necessary to sacrifice national interests for the sake of “global interests”.²⁹⁶ Since almost all the other Members, especially important trading partners such as Japan, the USA, the European Union, have denied the direct applicability, it would be unfair to apply the WTO Agreement directly from a single side, and it would jeopardize national economic interests.²⁹⁷ If direct applicability is allowed in China, foreign citizens may also invoke the WTO provisions directly. Moreover, if the country of the foreign citizens does not allow direct applicability, Chinese citizens may fall into an unfavorable situation in comparison to foreign citizens in China.²⁹⁸ It is imprudent to claim direct applicability in China.²⁹⁹

(d) Chinese legislations do not support direct applicability.

Some authors point out that treaty is not a legal source in China, since the Constitution does not prescribe that treaty is a part of Chinese law.³⁰⁰ According to existing legislation, direct application requires respective executing order in law.³⁰¹ The provision concerning direct application in the General Principles of Civil Law is only an inclination, and treaties are mostly applied directly in the field of civil law.³⁰² The provision cannot be applied to the WTO Agreement

²⁹⁵ Cheng, *The Application of the WTO Law in European Community from the Judgments of the European Court of Justice*, p. 572; Mu, *Research on the Questions of International Law under the Background of Globalization*, p. 155.

²⁹⁶ Cheng, *The Application of the WTO Law in European Community from the Judgments of the European Court of Justice*, p. 572.

²⁹⁷ Mu, *Research on the Questions of International Law under the Background of Globalization*, p. 155.

²⁹⁸ Fang, *Research on the Position of the WTO Agreement in China and the Modus of Application*.

²⁹⁹ Che, *Several Questions on Chinese Government's Fulfillment of the Obligations of the WTO Agreement after China's WTO Accession*, p. 11.

³⁰⁰ Wan, *International Treaty Law*, p. 192.

³⁰¹ Che, *Several Questions on Chinese Government's Fulfillment of the Obligations of the WTO Agreement after China's WTO Accession*, p. 9.

³⁰² Che, *On the Application of Treaty in China*, p. 99; Chen / Yang, *On the Application of the WTO Agreement in China from the Perspective of International Law and Domestic Law*.

which is classified as a commercial and economic treaty³⁰³, nor does it mean China has established such a regime.³⁰⁴ Another argument is that Chinese officials have made great efforts to bring laws and regulations in conformity with the WTO Agreement through revising and abolishing contradictory laws and regulations. These measures also show that China is to transform the WTO Agreement rather than to apply it directly.³⁰⁵

(e) The Chinese Courts are not eligible and suitable to apply the WTO Agreement directly.

Some authors suspect the competence of the Court to apply WTO Agreement. According to Art. 126 of the Constitution and Art. 4 of the Law of the Court Organization, the Chinese courts are only authorized to apply laws, among which treaties are excluded.³⁰⁶ Moreover, the qualification of Chinese courts is another barrier of the direct application. The direct application of the WTO Agreement at each court level may arouse disunity regarding the understanding of the WTO provisions, especially of the ambiguous or fundamental rules.³⁰⁷ Moreover, since many of the judges are ex-serviceman further employed by the judiciary system after retirement, and only 5% of the judges possess a university degree, it is doubtful whether all the judges can correctly understand and construe the content and other related materials of the Agreement.³⁰⁸ Moreover, it is argued that the judicial institutions shall follow the legitimate procedures provided by domestic law. Direct application of treaty would impede the jurisdiction of the judicial institutions.³⁰⁹

³⁰³ Zhang / Qiu, The Application of the European Court of Justice of the WTO Agreement and the Illumination to Chinese Courts, *Journal of Comparative Law*, p. 81.

³⁰⁴ Chen / Yang, On the Application of the WTO Agreement in China from the Perspective of International Law and Domestic Law.

³⁰⁵ Kong, China and International Economic Law under the Background of WTO Accession, p. 94.

³⁰⁶ Zhong / Shu, The Application Modus of the WTO Agreement in Chinese Legal System, p. 174.

³⁰⁷ Fang, Dong, Research on the Position of the WTO Agreement in China and the Modus of Application.

³⁰⁸ Ahl, Die Anwendbarkeit völkerrechtlicher Verträge in China, p. 163; Cao, WTO and China's Judicature, pp. 254 ff; Gao, China's Participation in the WTO, p. 19.

³⁰⁹ Chen, Also on the Application of International Treaty in China, pp. 77 and 78.

(f) Other factors impeding direct applicability:

Sometimes, the government is confronted with the pressure from nationalists or domestic interest groups which are against the implementation of the WTO Agreement.³¹⁰ The disunity of the central government and local government and the inadequate credibility of the jurisdiction and administration are also negative factors.³¹¹ The monopolization of the state-owned enterprises, corruption of administrative institutions, low standards of environment and labor, and investment inspection further worsen the conditions of direct applicability of the WTO Agreement.³¹²

5.2.1.2 Arguments Favoring Direct Applicability

In contrast to the many academics against direct applicability, there are only very few authors favoring direct applicability.

(a) The ultimate effect of international law covers individuals.

It is claimed that, although international law has binding force on the states and other subjects of international law, the ultimate effect of international law covers enterprises and private persons. Without domestic application, international obligations can in no way be fulfilled.³¹³

(b) The WTO Agreement does contain contents of direct application.

Henry Gao, a professor from the University of Hong Kong, supports his argument of direct applicability by quoting Paragraph 75 of the Report of the Working Party on the Accession of China: “All individuals and entities could bring to the attention of the central government authorities cases of non-uniform application of

³¹⁰ Kong, *China and International Economic Law under the Background of WTO Accession*, p. 76.

³¹¹ Kong, *China and International Economic Law under the Background of WTO Accession*, p. 79.

³¹² Kong, *China and International Economic Law under the Background of WTO Accession*, pp. 83 and 84.

³¹³ Xiao, *The Application of the WTO Agreement in China from the Perspective of Treaty Law Theory*, p. 39.

China's trade regime, [...] Such cases would be referred promptly to the responsible government agency, and when non-uniform application was established, the authorities would act promptly to address the situation utilizing the remedies available under China's laws, taking into consideration China's international obligations and the need to provide a meaningful remedy." He considers this paragraph as an implication of direct application and holds that the rights of individuals and entities to invoke China's commitments are explicitly recognized. He further claims that if Paragraph 67 of the Working Party Report can be explained as referring to transformation, it does not stress the exclusion of direct application as another option. Even if it has to be interpreted that way, since it is not included in the final Protocol, it is not part of the commitments.³¹⁴ Other authors quote Article 68 to support this view. The representative of China confirmed in Article 68 that "administrative regulations, departmental rules and other central government measures would be promulgated in a timely manner". If these regulations "are not in place with such time frames, authorities would still honor China's obligations under the WTO Agreement and Draft Protocol." This Article is considered as a commitment of direct applicability, at least during the transition period.³¹⁵

(c) Direct applicability corresponds to existing legislative and judiciary practice.

Chinese legislation and judicial interpretations concerning application of treaty are cited as a proof of direct application.³¹⁶ Some authors raise the argumentation that the WTO Agreement is too comprehensive and too complicated to be fully transformed into domestic law. The task of legislation would be very laborious and time-consuming, and it is also difficult to transform all the WTO provisions into Chinese law.³¹⁷

³¹⁴ Gao, *China's Participation in the WTO*, pp. 18 and 19.

³¹⁵ Zhang / Huang, *On the Application of the WTO Agreement in China*, p. 112.

³¹⁶ Zhou, *The Peaceful Development of China and International Law*, pp. 287-290; Xiao, *The Application of the WTO Agreement in China from the Perspective of Treaty Law Theory*, pp. 39 and 40.

³¹⁷ Zeng, *The Application of the WTO Agreement in China and the Transformation of China's Legal Construction*, p. 43.

(d) Direct applicability is an international-friendly approach.

Chinese academicians have been greatly influenced by the “Open-Door-Policy” after the 1980’s, and some of them insist on strict obedience of international obligations. Direct applicability of the WTO-Agreement is seen as a promotion of international contact and cooperation, and it further supports the development of the whole international law.³¹⁸

5.2.1.3 Possible solutions

In discussing the question of direct applicability of the WTO Agreements, Chinese scholars have brought forward proposals to accommodate China’s situation.

A majority of Chinese scholars urge the necessity of immediate legislation and revision of the existing domestic law in conflict. The adjustment of domestic law is considered as the best way to avoid the violation of international obligations to properly fulfill WTO obligations.³¹⁹ In the opinion of Chinese scholars, these adjustments of laws are perceived as a kind of transformation.³²⁰ They may involve constitutional provisions and provisions regulating the marketing bodies, provisions maintaining marketing order, provisions improving macro-economic control, and other trading law provisions concerning, for example, the elimination of quantitative restrictions and marks of origins.³²¹ Moreover, a transformation order of the People’s Congress should also be issued to exclude direct applicability.³²² Authors asking for this approach mostly hold a negative attitude toward direct applicability. It is argued that direct applicability should be

³¹⁸ Ahl, *Die Anwendbarkeit völkerrechtlicher Verträge in China*, p. 154.

³¹⁹ Cao, *The Influence and Thoughts of the WTO Accession to China’s Jurisdictional Work*, p. 63; Du, *On the Relationship between the WTO Rules and Domestic Law and Indirect Application in China*, p. 114.

³²⁰ See also Ahl, *Die Anwendbarkeit völkerrechtlicher Verträge in China*, p. 241.

³²¹ Cao, *The Influence and Thoughts of the WTO Accession to China’s Jurisdictional Work*, pp. 63 and 64; Zhang / Huang, *On the Application of the WTO Agreement in China*, p. 113; Du, *On the Relationship between the WTO Rules and Domestic Law and Indirect Application in China*, p. 115.

³²² Zhang / Qiu, *The Application of the European Court of Justice of the WTO Agreement and the Illumination to Chinese Courts*.

completely denied, and instead, transformation shall be taken as the proper method with the assistance of complementary legislation and deliberative adoption.³²³ In addition, international treaty and foreign law shall only be taken into consideration as facts which are to be proven by the person involved.³²⁴

Some authors hold the argument that, in principle, direct applicability shall be denied, yet under certain circumstances, it is permitted. It is suggested that a legislative modus should be adopted in the Legislation Law. The WTO provisions concerning abstract principles shall be provided with a detailed legislation modus, whereas those that are more detailed can be permitted with direct invocability.³²⁵ Furthermore, laws and regulations, especially the so-called “internal directives”³²⁶ which are in contradiction with the WTO Agreement shall be abolished.³²⁷ *Kong Xiangjun* brings forward another argument on the grounds of the Paragraph 67 and 68 of the Working Party Report.³²⁸ He first argues that the WTO Agreement can neither be directly invoked by any individuals, legal persons, or other organizations before the court, nor can the provisions of it be invoked by the court as a legal foundation of judgment. To be more exact, individuals cannot raise civil litigation or administrative litigation based on the WTO Agreement, nor can they claim for damages according to others’ violation of the WTO Agreement, nor can they initiate an administrative litigation according to an administrative act in conflict with the WTO Agreement. The Court, as well as the administrative institutions, must perform its judicial duty (or administrative duty) pursuant to the existing domestic law even if it is in contradiction with the WTO Agreement. He further adds that, under specific circumstances, the WTO Agreement can be

³²³ Mu, *Research on the Questions of International Law under the Background of Globalization*, p. 156; Cao, *The Influence and Thoughts of the WTO Accession to China’s Jurisdictional Work*, p. 63.

³²⁴ Du, *On the Relationship between the WTO Rules and Domestic Law and Indirect Application in China*, p. 114.

³²⁵ Du, *On the Relationship between the WTO Rules and Domestic Law and Indirect Application in China*, p. 114.

³²⁶ The Chinese government may sometimes release “internal directives” to the subordinate departments. These documents include policies and regulations which the subordinate governmental departments are required to follow.

³²⁷ Zhang / Huang, *On the Application of the WTO Agreement in China*, p. 113; Mu / Xian, *The Question of the Domestic Application of the WTO Agreement in China*, p. 61.

³²⁸ Kong, *The Domestic Application of the WTO Law*.

directly applied as an exception. According to Paragraph 68 of the Working Party Report, the “authorities” can directly apply the WTO Agreement when China’s commitments cannot be fully implemented in a period of time. He also recognizes that whether Paragraph 68 can be understood in this way requires an official explanation. Another author bases the reason for direct applicability within the transitional period on Article 142 of the General Principles of the Civil Law.³²⁹

Zeng Lingliang brings forward another representative view that China should combine adoption and transformation, and supplementary legislation.³³⁰ He proposes a mechanism in which the WTO Agreement should be directly applied: “Adoption can be applied for situations such as: 1) the basic rules in the WTO (the Foreign Trade Law has already done so); 2) in the fields where the WTO Agreement can easily be implemented (e.g., laws directly adjusting goods trading); 3) newly enacted laws, to be enacted laws, and laws with few amendments. Transformation can be applied for situations such as: 1) the WTO provisions need to be improved, especially in the transitional period (such as in the RO and in the GATS); 2) the WTO provisions require the Member States to enact laws to ensure implementation; 3) legislation for China’s special situations. Further amendments and complementary legislation are required for situations such as: 1) existing legislation is challenged by the Member States and decided by the WTO as being in contradiction to the WTO and thus are required to be revised; 2) in the fields where there is a legislation vacuum and the WTO requires legislation. He concludes that WTO provisions that are adopted can be directly applied by Chinese courts, and those that are transformed do not have direct applicability.

There are also authors suggesting a mixed form which is based on a clear understanding of the concepts of transformation and adoption. *Mu Yaping* proposes that adoption shall be the main measure to implement the WTO and

³²⁹ Kong, *China and International Economic Law under the Background of WTO Accession*, p. 90.

³³⁰ Zeng, *The Application of the WTO Agreement in China and the Transformation of China’s Legal Construction*.

transformation a subsidiary measure.³³¹ Where there is related legislation in China, amendments to the existing legislation can be made as a transformation to match the requirements of the WTO; where there is a gap in the legislation, transformation can help fill it. As for most of the WTO provisions, it is proper to admit their domestic validity. Yet, the direct applicability of these adopted provisions is another question.

Xiao Youxian tries to discriminate between the direct and indirect application with other standards.³³² He proposes that the mechanism regulated in the WTO Agreements such as the protection of intellectual property, foreign investment treatment, the administration on import and export, and Anti-dumping can be transformed into Chinese law. On the other hand, some other general rules which are applied to all the Members do not have to be transformed, such as the general most-favored-nation treatment and the national treatment. The clearness of the WTO provisions is considered as another standard. Those that are less clear can be refined through domestic legislation, and those that are clear enough can be applied directly. In addition, the provisional provisions, Minister declarations and memos are also to be excluded from direct applicability.

Cheng Baozhi puts forward another criterion for direct applicability.³³³ From his perspective, if a private person challenges the inconformity of the domestic provision with the WTO Agreement, and claims compensation for his damaged interests aroused by the non-performance of the government of the WTO obligations, the court shall reject the direct effect of the WTO Agreement. Conversely, if the damage is aroused by the non-performance of the WTO rights conferred to the governments, and this person invokes the WTO Agreement to require the court to take judicial review, the court shall recognize the direct effect

³³¹ Mu / Xian, *The Question of the Domestic Application of the WTO Agreement in China*.

³³² Xiao, *The Application of the WTO Agreement in China from the Perspective of Treaty Law Theory*, p. 41.

³³³ Cheng, *The Application of the WTO Law in European Community from the Judgments of the European Court of Justice*, p. 576.

of the WTO Agreement. This argument pays great attention to China's economic interests and puts individual interests aside.

In addition to the above-mentioned approaches, some authors propose to take into account the invokability of the private persons of the DSB reports before a Chinese court. It is argued that after a decision of the DSB is made, if the losing party refuses to abrogate or adjust the conflicting domestic law or measure, and chooses to make compensation to the counter party or to wait for retaliation, it is the private persons who suffer.³³⁴ It is thus suggested that if the losing party deliberately refuses to implement the DSB reports, which causes continuous direct damages to a private person, the person shall have the right to claim for the damages before the court. It should be noted here that the DSB decisions are not to be invoked as a legal source, but rather facts, and the court still has the right to choose the invokability.³³⁵ Furthermore, private persons who suffer from the damage, and private persons who suffer from the direct influence by retaliation shall be included as plaintiff.³³⁶ With regard to the court, it is claimed that the court shall pay attention to new research and updating data of DSB decisions and, when necessary, the court should take the WTO cases into consideration as well.³³⁷ However, since Chinese government tends to settle the cases privately rather than let them go all the way to an international tribunal, the direct applicability of DSB reports might not be a feasible solution in the short term.

Under the influence of several cases in the EU and other countries, Chinese scholars have reached a uniform opinion that the principle of "treaty-consistent-interpretation" shall be established in Chinese courts as well. This principle can reduce the negative influence on China caused by the refusal of

³³⁴ Chen / Kuang, *The Influence and Remedy of the Non-Implementation of the DSB Report on Private Party*, p.43.

³³⁵ Chen / Kuang, *The Influence and Remedy of the Non-Implementation of the DSB Report on Private Party*, p. 44.

³³⁶ Chen / Kuang, *The Influence and Remedy of the Non-Implementation of the DSB Report on Private Party*, p. 44.

³³⁷ Zeng, *The Application of the WTO Agreement in China and the Transformation of China's Legal Construction*, p. 45.

the direct effect, and accords with the developing trend of international law.³³⁸ According to Article 9 of the Provisions of the Supreme People's Court on Several Issues on Trying Cases of International Trade Administrative Cases, where there are two or more rational interpretations in Chinese laws and regulations, and one among them is in conformity with provisions of international treaties which China has concluded, such interpretation shall apply unless reservation is declared. Some authors perceive this provision as a legislative practice for the "treaty-consistent-interpretation" which, however, needs to be refined.³³⁹ Beside the conditions regulated in the above provision, authors make more interpretations on this principle: if the domestic provision is clear and legible, but the court deems that the interpretation of it obviously collides with the WTO Agreement, the court shall take measures to avoid the collision by presuming that the legislative institution did not deliberately make laws in contradiction with the WTO Agreement; if the domestic provision in question is ambiguous or diverse from the WTO Agreement in its meaning, the court shall interpret it as in accordance with the WTO Agreement, namely, shall interpret it in the spirit of the WTO; if the relative WTO provisions have not been transformed into domestic law, the court can apply the WTO provisions as a nomological reference in a case.³⁴⁰ It is also proposed that, although the court shall not directly apply the WTO provisions as a direct legal resource in the main part of the judgment, it shall be allowed to elaborate the relationship between the WTO law and the domestic law in the judgment, especially when the WTO law is applied as a nomological reference.³⁴¹ It is further argued that the interpretations of the relative WTO provisions made by the Panel and Appellate Body should only be references for the Chinese courts and do not have any binding effect.³⁴²

³³⁸ Zhang / Qiu, *The Application of the European Court of Justice of the WTO Agreement and the Illumination to Chinese Courts*, p. 82.

³³⁹ Cheng, *The Application of the WTO Law in European Community from the Judgments of the European Court of Justice*, p.578.

³⁴⁰ Kong, *The Domestic Application of the WTO Law*.

³⁴¹ Kong, *The Domestic Application of the WTO Law*.

³⁴² Zhang / Qiu, *The Application of the European Court of Justice of the WTO Agreement and the Illumination to Chinese Courts*, p. 83.

Authors have raised some requirements on the Chinese courts in dealing with WTO-related cases. It is urged that the power of judiciary interpretation shall fall into the competence of the Supreme Court, and the interpretations occasionally made by the junior courts should be strictly forbidden.³⁴³ Furthermore, all the WTO-related cases shall fall into the jurisdiction of the Intermediate People's Courts or their upper courts.³⁴⁴ This consideration comes from the fact that the Basic Courts lack professional knowledge and practice in international law.³⁴⁵

5.2.2 The Practice of the Application of the WTO Agreement in China

5.2.2.1 The Conclusion Procedure

The conclusion procedure of the WTO Agreement is accomplished through two instruments, namely the Decision of the Standing Committee of the National People's Congress on China's Accession to the World Trade Organization on August 25, 2000:

"The Report on the Progress of China's Accession to the World Trade Organization, which was made by the Ministry of Foreign Trade and Economic Cooperation upon authorization by the State Council, was read and examined at the 15th meeting of the Standing Committee of the Ninth National People's Congress. At this meeting, the efforts made by the Chinese government for China's accession to the World Trade Organization were sufficiently affirmed.

[...]

On the basis of the new situation after the 15th meeting on China's negotiations for accession to the World Trade Organization, it is hereby decided at this meeting to approve the State Council, in compliance with the above principles, complete the negotiation for accession to the World Trade Organization and appoint representatives to sign the Protocol on China's

³⁴³ Cao / Wang, Applying the WTO Rules in Chinese Courts.

³⁴⁴ Cao / Wang, Applying the WTO Rules in Chinese Courts.

³⁴⁵ Cao / Wang, Applying the WTO Rules in Chinese Courts.

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Accession to the World Trade Organization. The procedure for China's accession to the World Trade Organization will be completed upon approval by the president of China.

(This decision is published on the 9th of November, 2001)”

and the Instrument of Ratification on China's Accession to the WTO of the President:

“According to the decision of the 17th Meeting of the Standing Committee of the Ninth National People's Congress of the People's Republic of China, the President of the People's Republic of China hereby ratifies the Protocol of China's Accession to the World Trade Organization signed by the plenipotentiary of the People's Republic of China, the Minister of the Ministry of Foreign Trade and Economic Cooperation Shi Guangsheng on the 11th of November 2001 in Doha.

The People's Republic of China will fully comply with the contents in the Protocol.

[...]

President, Jiang Zemin

Minister of Ministry of Foreign Affairs, Tang Jiaxuan

11th November 2001, Beijing”

From the instruments about China's accession in the WTO, it is clear to see that the conclusion of WTO Agreement is in the name of the People's Republic of China. As stated in the Working Party Report,³⁴⁶ the President issued the Instrument of Ratification according to the decision of the Standing Committee. The WTO Agreement, as defined by Article 7 of the Law on the Procedure of

³⁴⁶ Article 67 of the Working Party Report: “[...] According to the Constitution and the Law on the Procedures of Conclusion of Treaties, the WTO Agreement fell within the category of ‘important international agreements’ subject to the ratification by the Standing Committee of the National People's Congress.[...]”

Treaty Conclusion, is categorized in Treaties and Important Agreements. However, the Ratification Decision of the Standing Committee was not fully corresponding to the procedure. According to Article 7, Paragraph 3 of the Law on the Procedure of Treaty Conclusion, after being signed, a treaty or an Important Agreement “shall be submitted by the Ministry of Foreign Affairs or by the department concerned under the State Council in conjunction with the Ministry of Foreign Affairs to the State Council for examination.” “It shall then be submitted by the State Council to the Standing Committee of the National People’s Congress for decision on ratification. The President of the People’s Republic of China shall ratify it pursuant to the decision of the Standing Committee of the National People’s Congress.” Obviously, the Decision on Ratification of the WTO Agreement made by the Standing Committee was issued in advance of the date of signature. Some scholars criticize that it is more like a pre-authorization for the accession negotiations and signature process rather than a ratification instrument as prescribed in the Law.³⁴⁷ Since this kind of authorization is not done as prescribed in the Constitution, the Decision is unconstitutional.³⁴⁸ Regardless of the constitutionality of the Decision, it is at least clear that, after being signed, the WTO Agreement was not submitted to the State Council for final examination or review, let alone the final decision of ratification by the Standing Committee. That the Standing Committee previously made the Decision may demonstrate the eager will of the Chinese government to accede to the WTO Agreement at the end of the negotiations.³⁴⁹ But still, the National People’s Congress, as the paramount power in China, can change or repeal improper decisions made by the Standing Committee (Article 62, Paragraph 1, Subparagraph 11). If the authorization act of the Standing Committee on the WTO conclusion is considered as improper by the National People’s Congress, it could be repealed any time and the domestic validity of it

³⁴⁷ Zhang, On the Amendment on the Constitutional Procedure of the Ratification of Treaties, p. 18.

³⁴⁸ Zhang, On the Amendment on the Constitutional Procedure of the Ratification of Treaties, p. 18.

³⁴⁹ In comparison to the ratification procedure of many other important treaties, the ratification of the WTO Agreement was surprisingly fast. The representative of China handed in the Decision of Ratification at the time of signature, which allowed the Protocol to enter into force 30 days after the signature.

could be pending. Moreover, since the power of treaty conclusion has not been assigned to the National People's Congress, the hierarchy of the WTO Agreement could be another problem. Most Chinese scholars analogize the act of treaty conclusion to the act of legislation and claim that the position of Treaties and Important Agreements is under the Constitution and basic Laws made by the National People's Congress and above other laws made by the Standing Committee. Nevertheless, in some basic laws such as General Principles of the Civil Law made by the National People's Congress, it is clearly prescribed that, in conflict, treaties shall prevail. Such provisions contradict the aforementioned presumption of the hierarchy of treaties.³⁵⁰ It is thus urged that the power of treaty conclusion should be directly assigned to the National People's Congress to avoid such situations.³⁵¹

Since the Instrument of Ratification issued by the President seems to have confirmed the ratification decision, and Chinese government is unlikely to deny its long lasting efforts made during the accession negotiations, the Decision of Ratification of the WTO Agreement is not quite possible to receive any challenge.

5.2.2.2 The attitude of the Working Party Report and the Chinese Legislature

Article 67 of the Report of the Working Party on the Accession of China reads:

“[...] China would ensure that its laws and regulations pertaining to or affecting trade were in conformity with the WTO Agreement and with its commitments so as to fully perform its international obligations. For this purpose, China had commenced a plan to systematically revise its relevant domestic laws. Therefore, the WTO Agreement would be implemented by

³⁵⁰ Liu, *The Domestic Application of Treaties and the Construction of China's Legal System*, p. 145.

³⁵¹ Liang, *On the Domestic Application of Treaties and the Practice of China*, p. 176; Zhang, *On the Amendment on the Constitutional Procedure of the Ratification of Treaties*, p. 18; Wang, *Study on the Questions of the Basic Theory of the Application of Treaties in China*, p. 64.

China in an effective and uniform manner through revising its existing domestic laws and enacting new ones fully in compliance with the WTO Agreement.”

From the wording of this paragraph, Chinese authors incline to the opinion that China is taking the mechanism of transformation to implement the WTO Agreement.³⁵² However, this Article does not seem to be persuasive enough to fully prevent the WTO Agreement from being seen as domestic law and being directly applied in courts, since Article 68 of the Working Party Report further provides:

“The representative of China confirmed that administrative regulations, departmental rules and other central government measures would be promulgated in a timely manner so that China's commitments would be fully implemented within the relevant time frames. If administrative regulations, departmental rules, or other measures were not in place within such time frames, authorities would still honour China's obligations under the WTO Agreement and Draft Protocol. The representative of China further confirmed that the central government would undertake in a timely manner to revise or annul administrative regulations or departmental rules if they were inconsistent with China's obligations under the WTO Agreement and Draft Protocol.”

This statement may arouse the question: if the WTO Agreement is transformed into domestic laws and cannot display its validity and effect in China, how can it be “honoured” by authorities? The wording that China will implement the WTO Agreement “in an effective and uniform manner through revising its existing domestic laws and enacting new ones” does not mean that if these laws are not yet in position, the Agreement cannot have any validity in China at all.³⁵³ Furthermore, China committed in Article 72 and Article 75 of the Working Party

³⁵² Cai, *Privates Structural Participation in the Multilateral Trade System*, p. 271.

³⁵³ For example, the Judge of the Supreme People's Court, Kong, Xiangjun understands this Article as referential application, which means that in a trial, the courts may refer to the WTO Agreement rather than directly apply it. Kong, *Trials of International Trading Administrative Cases Relating to WTO Rules*, p. 13. From his view, it can be drawn that the WTO Agreement does have certain domestic validity, although indirectly.

Report to establish a mechanism so that all individuals and entities could bring to the attention of the central government cases of non-uniform application in trade regime, and if such non-uniform application exists, the authorities should act promptly to handle the cases by utilizing available remedies, taking into consideration China's international obligations and the need to provide a meaningful remedy. These commitments prove that the WTO Agreement actually shall have validity in the domestic area, although not directly. According to the characteristics of Chinese legislation, there are many provisions of direct application of international treaty, especially those that allow treaty provisions to be directly applied where conflict between the treaty provision and the domestic provision exists. It is notable that only when both provisions have domestic validity and might be applicable, such a conflict could exist, and the question of the choice of application could come up. If treaties are transformed in China, they do not have any domestic validity at all, not to mention the possibility of application. As previously mentioned, international treaties are integrated into the Chinese legal system through adoption.³⁵⁴ In the author's view, the introduction of the WTO Agreement is not an exception. According to the Chinese legislation concerning treaty application, direct application of certain treaties or treaty provisions has never been excluded. Furthermore, Chinese legislation on transformation of all the international agreements is far less than supportive. The Working Party Report further confirms the validity of the WTO Agreement in China. Therefore, the WTO Agreement is adopted in China as other treaties. It is only under adoption that the discussion of direct applicability and direct effect in domestic law makes sense.

As far as the question of direct applicability is concerned, if an international treaty is directly applicable in a state, it must have a nature which allows it to be applied as such. This nature, however, if not explicitly written in the treaty, is determined by the intention of the Member States and through the interpretation of their

³⁵⁴ See pp. 87-89.

courts.³⁵⁵ From China's present legislation one can hardly draw the conclusion that the direct application of the WTO Agreement is totally excluded. In the previous chapter, it has made clear that Chinese legislation tends to apply treaties in some limited realms through provisions of direct application. These provisions are found in civil laws, administrative laws, environmental laws, procedural laws and so on. Accordingly, if a treaty provision falls into the realms of these laws, it shall still be applied directly or be handled in the way as prescribed in these laws. Some authors argue that, according to Chinese legislation, not all treaties can be directly applied.³⁵⁶ The treaties which can be directly applicable are mostly civil- and commercial treaties and regulate the relationship between private persons and between private persons and government.³⁵⁷ Since the WTO Agreement is not one such treaty, it shall not be applied directly.³⁵⁸ However, Chinese legislation seems to have a different standpoint. It is, rather, the legal field regulated in domestic law than the nature of treaty that decides the direct applicability. The expression that "if any international treaty concluded or acceded to by the People's Republic of China contains provisions different from those in certain law, the provisions of the international treaty shall apply" does not mention the type or the character of the treaty, rather, it pays more attention to the regulating field of the law against which the treaty provision collides. If the treaty provision falls into this field, it shall be applied.

In fact, the situation of inconformity with the WTO Agreement already exists in practice. Taking the Administrative Procedure Law as an example, the provisions on the eligibility of the plaintiff, the scope of suability, and the institution of final judgment all differ from the requirements of the WTO Agreement. As provided in Article 72 of the Administrative Procedure Law, if a treaty contains provisions different from those in the Administrative Procedure Law, the treaty provisions

³⁵⁵ Hilf / Oeter, WTO-Recht, p. 552.

³⁵⁶ Cao, WTO and China's Judicature, p. 253.

³⁵⁷ Che, On the Application of Treaty in China, Law Science Magazine, p. 98.

³⁵⁸ Che, On the Application of Treaty in China, Law Science Magazine, p. 98.

shall apply, unless there is a reservation. Thus, it seems that China's legislature holds an open attitude also to the direct application of the WTO Agreement. At least, such a possibility cannot be excluded merely from the wording of the legislation. It should be noted here that only treaty provisions that meet the prerequisite, namely where there is a collision, or there is no reservation etc., may be applied directly.

Turning back to Article 67 of the Working Party Report, the wording "the WTO Agreement would be implemented by China [...] through revising its existing domestic laws and enacting new ones fully in compliance with the WTO Agreement" cannot totally exclude direct effect and direct application, since the fact that the legislatures and administrative bodies implement the WTO Agreement through legislation and the fact that the judicature provides judiciary remedy are two different questions.³⁵⁹

5.2.2.3 The attitude of the Supreme People's Court

After WTO accession, there has not been a case challenging the unconformity of an act of a public law body, or requesting the review of a conflicting Chinese law or regulation. Therefore, the attitude of the Chinese court can only be drawn from some official speeches or instruments.

Shortly before China's accession into the WTO, for the sake of the increased economic activities in foreign trade and foreign investment, the Supreme People's Court issued the Notice on Several Notable Questions on Trying and Implementing Cases of Foreign-Related Civil- and Commercial Law. The Court stressed in the Notice that, by trying cases concerning civil- and commercial law, international treaties shall prevail over domestic law, unless there is a reservation. The President of the Supreme People's Court *Xiao Yang*, also expressed this stand in the Working Report of the Supreme People's Court on the Fourth Session of

³⁵⁹ Cai, *Privates Structural Participation in the Multilateral Trade System*, p. 271.

the Ninth National People's Congress in 2001.³⁶⁰ In the preparation for the WTO accession, he emphasized the "strict application" of the domestic law and the international treaties China ratified and acceded to. Until then, the Supreme Court had stuck to the stand of the legislature. However, this attitude was changed soon after the accession of WTO.

In a speech at the news conference for the promulgation of the Provisions of the Supreme People's Court on Several Issues on Trying Cases of International Trade Administrative Cases³⁶¹, *Li Guoguang*, the then Vice-President of the Supreme Court, expressed his understanding on Article 67 of the Working Party Report. He specially emphasized that "China does not apply the WTO Agreement directly. Instead it would implement, namely transform the WTO Agreement by revising existing laws and making new laws." He further explained that, "as for the Chinese courts, this contains two meanings: the individuals and enterprises cannot directly invoke the WTO provisions to lodge a complaint or defend before the court; the court cannot apply the WTO Agreement as grounds of judgment." He also stated that Article 7 and Article 8 of the Provisions on Several Issues on Trying Cases of International Trade Administrative Cases clearly reflect this spirit.

Since the Provisions are closely related to the implementation of the WTO Agreement, the Provisions shall be inspected. Article 7 of the Provisions prescribes:

"According to Article 52, Paragraph 1 of the Administrative Procedure Law and Article 63, Paragraph 1 and 2 of the Legislation Law, in trying administrative cases relating to international trade, the People's Courts shall follow the Laws and administrative Regulations of the People's Republic of China as well as the local Regulations which relate to or affect

³⁶⁰ Xiao, Working Report of the Supreme People's Court.

³⁶¹ The Provisions were issued less than a year after the accession to the WTO and were designed to provide a response to the judicial review regime of the WTO Agreement. See *Judicial Review against Administrative Actions Relating to International Trade*, *People's Daily*.

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international trade and are enacted by the local legislatures within the statutory legislative authority. [...]"

Article 8 of the Provisions prescribes:

"According to Article 53, Paragraph 1 of the Administrative Procedure Law and Article 71, 72 and 73 of the Legislation Law, by trying administrative cases relating to international trade, the People's Courts shall refer to the Rules of departments which relate or affect international trade and are enacted by the departments under the State Council within their respective authority in accordance with Laws and the administrative Regulations, Decisions and Orders of the State Council, and shall refer to the Rules of the local governments, which relate to or affect international trade and are enacted by the People's Governments of the provinces, autonomous regions, municipalities directly under the Central Government, cities where the People's Governments of the provinces and autonomous regions are located, cities where the special economic regions are located, and relatively large cities approved by the State Council in accordance with Laws, administrative Regulations and local Regulations."

Article 52 and 53 of the Administrative Procedure Law mentioned in Article 7 and 8 of the Provisions respectively regulate the laws and regulations the courts should follow in a trial. All these provisions do not mention international treaties. Article 7 of the Provisions specially highlights laws and regulations of the "People's Republic of China".

From the wording, it does not seem that the Court intends to apply the WTO Agreement directly. However, it is doubtful whether this attitude can defy the legislature, since Article 72 of the Administrative Procedure Law provides that:

"If an international treaty concluded or acceded to by the People's Republic of China contains provisions different from those found in this law, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations."

The relationship of these legal norms is interesting. Although Li, Guoguang explained that the Provisions on Several Issues on Trying Cases of International Trade Administrative Cases are intended to give a response to the WTO accession, such an aim cannot be deduced from the wording of the Provisions and the Provisions do not specially refer to the WTO Agreement. *Kong Xiangjun*, another judge of the Supreme Court, also stresses the close connection of the Provisions and the WTO Agreement. But he claims that the application scope of the Provisions is not only limited to cases relating to the WTO Agreement. It should also be applied to other international administrative cases such as other bilateral treaties or multilateral treaties in the area of trade, investment, intellectual property, and so on.³⁶² Therefore, the Provisions should not be seen as an order of transformation or a transforming law or interpretation of the WTO Agreement. On the other hand, since the Provisions are only a judicial interpretation of the Supreme Court³⁶³, they shall not exceed the validity of the law it interprets and affiliates to. Therefore, the validity of the Provisions cannot withstand that of the Administrative Procedure Law. Article 72 of the Administrative Procedure Law is an exception clause to Articles 52 and 53 of the Administrative Procedure Law. Articles 7 and 8 of the Provisions, being the interpretations of Articles 52 and 53, shall also not exclude the direct application of treaty of Article 72.

Moreover, Article 72 of the Administrative Procedure Law is laid down in the chapter on Foreign-related Provisions, and the Provisions on Several Issues on Trying Cases of International Trade Administrative Cases fall into this realm. If the WTO Agreement also falls into the category of “treaty” in terms of Article 72, Article 72 should be considered as leaving room for the direct application of the WTO Agreement, and Articles 7 and 8 of the Provisions, as well as Article 67 of the Working Party Report cannot prevent private persons from invoking the WTO Agreement directly before the courts. Judge *Kong Xiangjun*, by introducing the

³⁶² See Kong, *Trials of International Trading Administrative Cases Relating to WTO Rules*, p. 9.

³⁶³ See pp. 61 and 62.

Provisions on Several Issues on Trying Cases of International Trade Administrative Cases, also mentions this question.³⁶⁴ He claims that Article 72 of the Administrative Procedure Law only applies to issues concerning administrative litigating procedures, thus the Provisions do not collide with the Administrative Procedure Law. However, this view is doubtful since the WTO provisions concerning judicial review can hardly not to be seen as administrative procedural provisions.³⁶⁵ Many of its provisions, such as judicial review, may require domestic remedy in administrative procedures. Therefore, Article 72 of the Administrative Procedure Law shall at least have binding force in the area of judicial review. Another argument is that, because of the complexity and the immense influence of the WTO Agreement, the Chinese representative did not accept the advice of direct application in the accession negotiations.³⁶⁶ International trading treaties which broadly regulate the relationship of international trading do not fall into the category of “international treaty” in terms of the Administrative Procedure Law.³⁶⁷ This view is not persuasive because, in the concluding procedure, WTO was clearly categorized in the “Treaty and Important Agreement” according to the Constitution. Just because the Supreme Court is not intended to apply the WTO Agreement shall not challenge the stability of Chinese laws.

As previously mentioned, strictly speaking, judicial interpretations of the Supreme Court do not have legal binding force and they shall not exceed the meaning of the laws they interpret. Notwithstanding, they have a special position and can at least guide the trying work of the subordinate courts. In order to maintain a uniform jurisdiction in China, the Supreme Court may, in practice, prevent the subordinate courts from applying the WTO Agreement directly through this judicial interpretation.³⁶⁸ In the court’s system, judges have not reached a unified

³⁶⁴ Kong, *Trials of International Trading Administrative Cases Relating to WTO Rules*, p. 13.

³⁶⁵ Cai, *Privates Structural Participation in the Multilateral Trade System*, p. 270, footnote 1.

³⁶⁶ Kong, *Trials of International Trading Administrative Cases Relating to WTO Rules*, p. 12.

³⁶⁷ Gong, *Analysis on the Judicial Interpretation on International Trade Administrative Cases*, p. 115.

³⁶⁸ Ahl, *Die Anwendbarkeit völkerrechtlicher Verträge in China*, p. 270.

opinion. Some judges of the Supreme People's Court show a supportive attitude towards direct application,³⁶⁹ whereas others accept direct application with exceptions during the transitional time.³⁷⁰ Some judges in the subordinate courts even claim that where Chinese laws are blank in certain issues, the WTO Agreement shall be applied directly if it contains such regulations and, when in conflict, the WTO Agreement shall apply.³⁷¹

Although from the Provisions, the Supreme People's Court has not shown an open attitude for the direct application of the WTO Agreement in the courts, from the perspective of the existing laws and regulations, direct effect and direct applicability should not be seen as totally excluded. Especially in the transitional time, as mentioned in Article 68 of the Working Party Report, it seems to be reasonable to authorize the courts with the competence of direct application and confer private persons with the right of invocation of the WTO provisions.

5.2.2.4 Direct Effect of the WTO Agreement?

Although Chinese courts are unlikely to apply the WTO Agreement out of the attitude of the Supreme Court, Chinese legislation leaves certain room for direct application. In other words, the legislation may recognize the WTO Agreement as an objective law which must be complied by domestic public law bodies. The precondition of the discussion of direct effect thus exists. As discussed in the last paragraph, in practice, Chinese courts refuse direct application, which means that the courts reject the subjective rights of private persons to invoke WTO provisions

³⁶⁹ Wan (Vice-President and Judge of the Supreme People's Court), *Accession to the WTO and the Judicial Reform in China*; Cao (Former Judge of the Supreme People's Court) / Wang, *Applying the WTO Rules in Chinese Courts*; Cao (President of the Supreme People's Procuratorate), *WTO and China's Judicial Review*, p. 257. The reason for the adoption of the opinion of the President of the Supreme People's Procuratorate here is that in China, the Procuratorate belongs to part of the judicial system. For details see Wan, *Accession to the WTO and the Renewal of the Judicial Concept and the Judicial Reform*.

³⁷⁰ Kong (Judge of the Supreme People's Court), *The Domestic Application of the WTO Law*, pp. 144-152. The Ministry of Foreign Trade and Economic Cooperation of the PRC also suggests this way of understanding, see Kong, *Trials of International Trading Administrative Cases Relating to WTO Rules*, p.13.

³⁷¹ Sun (Vice-President of the High People's Court of Jiangsu Province), *The Impact of the WTO Accession on Law Application of the Courts*.

directly to claim material rights under the WTO provisions.³⁷² Such rights include the rights which are infringed by a specific administrative act. It is also widely accepted that the WTO does not directly confer rights to private persons in international academic circles. However, this does not mean that private persons cannot invoke WTO provisions to challenge a domestic law or an administrative regulation which is in contradiction with the WTO provisions either.³⁷³ Therefore, even if the Chinese courts do not allow private persons to directly invoke WTO Agreement to directly claim rights under the WTO Agreement, it does not necessarily mean that private persons cannot invoke WTO provisions to challenge the legality of certain abstract administrative acts and compel administrative institutions or legislations to amend laws and regulations.³⁷⁴ The next part will inspect the possibility of such a claim in China's judicial review system.

Judicial review is a frequently used legal term in the Anglo-American legal system, but it never appears in Chinese laws. This term may find its corresponding Chinese legal usage in the administrative procedure regime, namely "administrative litigation".³⁷⁵ However, "administrative litigation" in China diverges from the judicial review regime of the Anglo-American legal system. In China, the power of review of constitutionality of Chinese laws is authorized to the legislating bodies rather than the jurisdiction. The jurisdiction, namely, the courts, is only allowed to review specific administrative acts. To understand this, it is necessary to briefly introduce the Chinese administrative procedure regime. In Chinese academic circles and legislatures, acts conducted by the administration are divided into two groups: abstract administrative acts and specific administrative acts. Abstract administrative acts refer to the administrative acts conducted by the administrative bodies to unspecific

³⁷² Cai, *Privates Structural Participation in the Multilateral Trade System*, p. 237.

³⁷³ Such as in *Nakajima v Council*, the Court points out that the applicant is not relying on the direct effect of GATT 47 and Antidumping Code. In fact, he is "questioning the applicability of the new basic regulation by invoking one of the grounds for review of legality referred to in Article 173 of the Treaty, namely that of infringement of the Treaty or of any rule of law relating to its application". See Case C-69/89, [1991] ECR I-2069, Paragraph 28.

³⁷⁴ Cai, *Privates Structural Participation in the Multilateral Trade System*, p. 271.

³⁷⁵ Kong, *Trials of International Trading Administrative Cases Relating to WTO Rules*, pp. 8 and 10.

counterparts, such as issuing administrative regulations, declarations, announcements, decisions, and so on.³⁷⁶ These acts are repeatable, and the counterpart is not a specific person or a group.³⁷⁷ Correspondingly, specific administrative acts refer to the administrative acts conducted by the administrative bodies to specific counterparts, such as administrative penalties, administrative licenses, administrative impositions, and so on. These acts are not repeatable and are made toward specific issues.

In the field of the Chinese administrative law, only litigation against specific administrative acts is regulated. Article 2 and Article 5 of the Administrative Procedure Law respectively prescribe that, private persons or other organizations have the right to litigate a lawsuit when they consider their lawful rights and interests as infringed by the specific administrative acts conducted by administrative bodies or personnel and, by trying such cases, the courts shall examine the legality of specific administrative acts. In Article 12 of the Administrative Procedure Law, the review on specific administrative acts rather than abstract administrative acts is further confirmed. The courts do not accept suits against administrative regulations, decisions, or orders with general binding force, neither do they accept suits against specific administrative acts which are final and binding as prescribed in law.³⁷⁸ In the Provisions of the Supreme People's Court on Several Issues on Trying Cases of International Trade Administrative Cases, the Supreme Court sticks to the regulations of the Administrative Procedure Law by stating that "If a natural person, a legal person or other organization considers that a specific administrative act relating to international trade conducted by the body or organization with administrative powers, as well as the staff thereof, of the People's Republic of China have infringed upon his/its legitimate rights and interests, he/it may litigate an

³⁷⁶ Jiang, *Administrative Law and Administrative Litigation*, p. 242.

³⁷⁷ Zhang, *New Study on the Administrative Law*, pp. 111-112; Yang, *Administrative Law and Administrative Procedure Law*, p. 50.

³⁷⁸ For details, see Article 1 of the Interpretation of the Supreme People's Court on Several Questions about the Implementation of the Administrative Procedure Law.

administrative suit before the people's court pursuant to the Administrative Procedure Law as well as other relevant laws and regulations.”³⁷⁹

It is widely acknowledged that, according to the Administrative Procedure Law and other administrative laws, abstract administrative acts are obviously excluded from judicial review in China.³⁸⁰ In fact, not only these administrative acts, but also other laws made by the legislature cannot be reviewed by courts if they are in conflict with the Constitution or higher laws.³⁸¹ Laying harsh critics aside, solely the issue whether this special review regime breaches the WTO requirements yields broad discussions in China.

The requirements on reviews within the frame of WTO are mainly provided in the GATT 94 (Article X: 3) AD Agreement (Article 13), SCM Agreement (Article 23), TRIPS (Article 41.4), Customs Valuation Agreement (Article 11), the Government Procurement Agreement (Article 20), GATS (Article 6), and so on. In the Protocol on China's Accession, Article 2 (D) Judicial Review clearly provides China's commitment on review:

“1. China shall establish, or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative acts relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the TRIPS Agreement. Such tribunals shall be impartial and independent of the agency entrusted

³⁷⁹ Article 3 of the Provisions of the Supreme People's Court on Several Issues on Trying Cases of International Trade Administrative Cases.

³⁸⁰ A Judge of the Supreme People's Court Kong, Xiangjun, holds the opposite view. In his opinion, since Article 11, Paragraph 2 of the Administrative Procedure Law, which prescribes the range of litigation, additionally provides that “Beside the provisions set forth in the preceding paragraphs, the people's courts shall accept other administrative suits which may be brought in accordance with the provisions of relevant laws and regulation”, this paragraph can be interpreted as including abstract administrative acts. (See Kong, *The Requirements of the WTO on Judicial Review and the Task and Challenge of the Chinese Judicial Review*, p. 20.) However, his argument is not representative, and cannot defy Article 12 of the Administrative Procedure Law, which explicitly excludes abstract administrative actions.

³⁸¹ The powers of review on the laws and regulations are authorized to the legislatures themselves, the so called “legislative review”. For details, see the Legislation Law.

with administrative enforcement and shall not have any substantial interest in the outcome of the matter.”

“2. Review procedures shall include the opportunity for appeal, without penalty, by individuals or enterprises affected by any administrative act subject to review. If the initial right of appeal is to an administrative body, there shall in all cases be the opportunity to choose to appeal the decision to a judicial body. Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any right to further appeal.”

Pursuant to this Article, China shall review “all administrative acts relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X: 1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the TRIPS Agreement.” The laws, regulations, judicial decisions and administrative rulings of general application referred to in the Article X: 1 of GATT are those pertaining to the classification or the valuation of products for customs, to rates of duty, taxes or other charges, and to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments there for, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use. In addition, agreements affecting international trade policy between the governments or governmental agencies of two contracting parties shall also fall into the scope of review. The scope of review in the Protocol has *de facto* greatly exceeded the requirement of Article X: 3, which only calls for review to administrative act relating to customs matters.³⁸² Article VI: 1 of GATS refers to all measures of general application affecting trade in services, and Article VI: 2 specially requires Members to provide review and appropriate remedies for administrative decisions affecting trade in services. Article XXVIII further explains that “measures” mentioned in the Agreement means any measure by a Member, whether in the

³⁸² Wang, WTO Agreement and Judicial Review, pp. 28 and 29; Kong, The Requirements of the WTO on Judicial Review and the Task and Challenge of the Chinese Judicial Review, p. 19.

form of a law, regulation, rule, procedure, decision, administrative act, or any other form. Since the Protocol calls for the review of Article VI as a whole, rather than Article VI: 2, the Protocol again widens the scope of the review as required in Article VI: 2. The TRIPS contains some provisions concerning review on specific issues. However, the Protocol only generally calls for review of all administrative acts relating to the implementation of laws, regulations, judicial decisions, and administrative rulings of general application referred to in relevant provisions of TRIPS. This commitment can also be considered as one that surpasses the requirements of TRIPS.³⁸³

A great many of Chinese scholars consider the WTO Agreement and China's commitments as containing review of abstract administrative acts.³⁸⁴ Some scholars try to support their stand from the perspective of GATS provisions and claim that the GATS clearly refers to all measures in form of laws, regulations, rules, procedures, decisions, administrative acts, or any other forms.³⁸⁵ Some authors also base their arguments on Article X of the GATT 1994.³⁸⁶ However, it is debatable on the scope of the requirements on review. One opinion is that the review regime established by the WTO is a generally applicable principle and all abstract administrative acts shall be adopted into the scope of judicial review.³⁸⁷ This view is, however, criticized as a widened interpretation of the WTO Agreement.³⁸⁸ The WTO shall not be seen as an "international constitution", since it only relates to governmental acts which influence economic interests of other Members, and only regulates governmental acts regulated in GATT and

³⁸³ Wang, WTO Agreement and Judicial Review, p. 29.

³⁸⁴ See e.g. Sun, Rethinking China's Judicial Review under the Frame of the WTO, p. 18; Kong, The Requirements of the WTO on Judicial Review and the Task and Challenge of the Chinese Judicial Review, p. 19; Chen, On the Improvement of the Administrative Litigation Regime in International Trade under the Frame of the WTO, p. 55; Ma / Ge, WTO and the Development of China's Administrative Litigation Regime, p. 28.

³⁸⁵ Chen, On the Improvement of the Administrative Litigation Regime in International Trade under the Frame of the WTO, p. 55; Zhang, Re-Discussion on the Suability of Abstract Administrative Actions in China within the WTO Environment, p. 25; Ma / Ge, WTO and the Development of China's Administrative Litigation Regime, p. 28.

³⁸⁶ Cai, Privates Structural Participation in the Multilateral Trade System, p. 272.

³⁸⁷ Jiang, WTO and China's Judicial Review System.

³⁸⁸ Ma / Ge, WTO and the Development of China's Administrative Litigation Regime, p. 28.

other Agreements.³⁸⁹ Another argument calls for a partial adoption of abstract administrative acts in the areas that are prescribed in the WTO Agreement.³⁹⁰ Some authors agree that, although the WTO Agreement has limited requirements on judicial review, a full-scale judicial review system shall be established.³⁹¹ Another group of Chinese authors argues that the WTO Agreement does not make a clear distinction between abstract and specific administrative acts.³⁹² In such situations, the maintenance of this division is doubtful.³⁹³ The adoption of abstract administrative acts into the scope of judicial review is, however, an indication of rule by law in a government, and from the angle of practice, it is, at least, not a big obstacle to take review on abstract administrative acts beneath local rules.³⁹⁴ There are also authors claiming that the WTO Agreement only involves judicial review on specific administrative acts,³⁹⁵ and the Chinese judicial review system does not diverge from that of the WTO requirement.³⁹⁶ It is argued that China's "legislative review" system has the same effect of judicial review in Western countries and is in conformity to the principle in the WTO which does not require the judicial review to be construed as calling for the Members to establish an institution which contradicts the constitution or legal system of the Members.³⁹⁷ Moreover, the Chinese theory on the differentiation of abstract and specific administrative acts is also confusing.³⁹⁸ The WTO Agreement, -except the GATS, only requires review on specific administrative acts. Although the "administrative decisions" in the GATS can be explained as including abstract administrative acts, the Administrative Reconsideration Law

³⁸⁹ Gan, *WTO and Judicial Review*, p. 137.

³⁹⁰ Gan, *WTO and Judicial Review*, pp. 137-139.

³⁹¹ Ma / Ge, *WTO and the Development of China's Administrative Litigation Regime*, pp. 28 and 29.

³⁹² See, e.g., Kong, *The Domestic Application of the WTO Law*, p. 235; Wang, *WTO Agreement and Judicial Review*, p. 30.

³⁹³ Wang, *WTO Agreement and Judicial Review*, p. 30.

³⁹⁴ Kong, *The Domestic Application of the WTO Law*, p. 235; Gan, *Judicial Review against Abstract Administrative Actions*, p. 52; Ma, *On the Influence of the WTO to China's Judicial Review System*, p. 71.

³⁹⁵ Wang, *WTO Agreement and Judicial Review*, p. 30, Footnote 2.

³⁹⁶ Cao, *WTO and China's Judicature*, p. 284; Zeng, *China's Accession into the WTO and the Improvement on its Judicial Review Regime*, p. 266.

³⁹⁷ Article VI: 2 (2) of the GATS. See Cao, *WTO and China's Judicature*, p. 284.

³⁹⁸ Cao, *WTO and China's Judicature*, p. 284.

generally satisfies the requirement of Article VI: 2 (2), which accepts administrative review as the final procedure of review.³⁹⁹

Despite the academic discussions, the Supreme Court is not inclined to and prepared for the judicial reviews on abstract administrative acts.⁴⁰⁰ This attitude is already confirmed in the Provisions of the Supreme People's Court on Several Issues on Trying Cases of International Trade Administrative Cases. Since Judge *Kong, Xiangjun*, as an important participant of this judicial interpretation, does not mention the reason while introducing the Provisions⁴⁰¹, Article 3 of the Provisions might be read as the understanding of the Supreme Court on the WTO requirements, or it might, in fact, be restricted by Article 2 and other provisions of the Administrative Procedure Law.⁴⁰² Until now, China is still unable to fully comply with the WTO Agreement on this point.

5.2.2.5 The Impediments of Direct Application in the Court System

5.2.2.5.1 Dependent Judicature

Unlike many other democratic countries which have established independent court systems and endowed the judges with discretionary power, the court system in China demonstrates a lot of particularities due to its dependent structure. Although it is stressed in the Constitution that the people's courts exercise judicial power independently, and shall not be interfered by any administrative body, public organization, or individual (Article 126 of the Constitution), the courts in China can hardly meet this requirement. Since the WTO Agreement requires an

³⁹⁹ Zeng, *China's Accession into the WTO and the Improvement on its Judicial Review Regime*, pp. 263 and 264; Article 7 of the Administrative Reconsideration Law allows private persons to require additional judicial review on abstract administrative actions, but do not allow them to litigate a suit relying solely on this ground.

⁴⁰⁰ Although in some cases Chinese courts begin to take review on abstract administrative acts, they cannot make judgment on the legality of such acts, otherwise they may confront the pressure from the People's Congresses or administrative institutions. In most cases, the courts avoid this question and apply higher laws directly without judging the legality of the laws. For details on this question, see Gan, *Judicial Review against Abstract Administrative Actions*, *The People's Judicature*, Issue 4, 2002.

⁴⁰¹ Kong, *Trials of International Trading Administrative Cases Relating to WTO Rules*.

⁴⁰² Cai, *Privates Structural Participation in the Multilateral Trade System*, p. 275.

independent judicial regime in many respects as well, the judicial system is confronted with the problem of the compliance of the WTO requirements. The dependent structure of China's judicature can be seen in the following respects.

(a) Dependence on legislature

In China, judicature and legislature are closely connected. Since the National People's Congress is the highest organ of state power (Article 57 of the Constitution), it generates all the other organs of the state (Article 3 of the Constitution) as well as the courts. Each level of the people's congress has the power to generate and depose the president of the courts of its level (Article 63 of the Constitution and Article 36 of the Organic Law of the People's Courts), and the courts shall be responsible to the People's Congress and their standing committees which create it. (Article 128 of the Constitution and Article 17 of the Organic Law of the People's Courts). Vice-presidents, members of the Judicial Committee, department heads, division heads, and judges are nominated by the presidents of the Standing Committees of the People's Congress at the corresponding level for appointment or removal (Article 11 of the Law of Judges). The president of the court at each level shall attend the People's Congress and report to the People's Congress and its Standing Committee of the corresponding level about its work (Article 8 and Article 9 of the Organic Law of the National People's Congress, Article 16 of the Organic Law of the Local People's Congress and Local People's Governments, Article 17 of the Organic Law of the People's Courts). It is not rare to see that the presidents of the people's courts are the deputies of the People's Congress at the same time. The People's Congress may influence the adjudicating work of the court through the appointment of personnel and supervisory power (Article 3 of the Constitution).⁴⁰³ The courts also depend

⁴⁰³ Ahl, Die Anwendbarkeit völkerrechtlicher Verträge in China, p. 305; Xu, Independence of Judicature in China from the Perspective of Judicial Power.

on the legislature for the interpretation on the selection of the application of certain laws.⁴⁰⁴

(b) Dependence on administration

The courts are financially dependent on the governments of their corresponding levels. The local governments decide and distribute outlay for the courts of their levels and the salary of the judges.⁴⁰⁵ This source of financing causes great troubles for the courts, since the local government may intervene in the judicial work of the judges by threatening with the reduction of outlay.⁴⁰⁶

(c) Dependence on the Communist Party

In China, as the comprehensive influence of the Communist Party is everywhere, so is it in the courts too. The people's courts, people's procuratorates, public security bureaus, state security bureaus and other judicatory institutions are generally called "Politics and Judicature System"⁴⁰⁷. The Communist Party establishes a "Politics and Judicature Committee"⁴⁰⁸ in each aforementioned institution. The Committee is authorized to deliver the Party's policy to these institutions and supervise the implementation of the policy. It may also direct the work in the Politics and Judicature System. In practice, especially in local courts, the Committee severely impedes the independent judicial work of the judges through their power of guidance and supervision on the work of the court. In some regions, the head of the local government may be the secondary head of the Committee of the corresponding level, and the Committee in the court may also be a branch of the Committee of the corresponding level at the same time.⁴⁰⁹

Taking a look at the members of the Supreme Court, where most of the heads are

⁴⁰⁴ See 5.2.2.5.4 Problem of the Competence of Judges in the Application of Law.

⁴⁰⁵ Wan, Accession to the WTO and the Renewal of the Judicial Concept and the Judicial Reform.

⁴⁰⁶ Wang, Independence of the Judge, p. 123.

⁴⁰⁷ In Chinese: 政法系统 (Zhengfa Xitong).

⁴⁰⁸ In Chinese: 政法委员会 (Zhengfa Weiyuanhui).

⁴⁰⁹ Wang, Independence of the Judge, p. 123.

Party members, so is it also in the local courts. While the policy of the Communist Party permeates in the local governments and the local courts through many ways, the judges cannot avoid being influenced by the administration and the Party.

(d) Dependent Relation inside the Court System

The internal structure of the Chinese court system is quasi-administrative, and the judges are included in the system of civil servants. If not otherwise provided in law, the examination, promotion, bonus, punishment, and other administration of the judges shall follow the Civil Servant Law. Inside the courts, the collegial system⁴¹⁰ is adopted and from the first instance, the courts are required to compose a collegial panel⁴¹¹ of judges and people's assessors to exercise the judicial work collectively (Article 10 of the Organic Law of the People's Courts). If the panel cannot reach an unanimous decision, the cases are then frequently transferred to a special committee called "Judicial Committee"⁴¹² for decision.⁴¹³ The Judicial Committee is a special and the most contentious agency established in Chinese courts. It is endowed with the power to discuss important or difficult cases and other issues in the judicial work and to summarize judicial experience (Article 11 of the Organic Law of the People's Courts). Since the Judicial Committee is the highest power in courts⁴¹⁴, it is often criticized that the decisions of important or difficult cases are not purely made on the basis of hearing during the trial, but rather made under the discussion of the Judicial Committee behind the trial.⁴¹⁵ Furthermore, due to the "collective" decision, the judges do not have to be personally responsible for the decision of the cases and may elude condemnations when a mistake occurs.⁴¹⁶ Beside the judicial work in specific cases, the relationship between the superior courts and inferior courts is also

⁴¹⁰ In Chinese: 合议制 (Heyizhi).

⁴¹¹ In Chinese: 合议庭 (Heyiting).

⁴¹² In Chinese: 审判委员会 (Shenpan Weiyuanhui).

⁴¹³ He, Two Problems in the Judicial Administration Regime of China, pp. 124-125.

⁴¹⁴ He, Two Problems in the Judicial Administration Regime of China, pp. 124-125.

⁴¹⁵ Ahl, Die Anwendbarkeit völkerrechtlicher Verträge in China, p. 306.

⁴¹⁶ Wang, Independence of the Judge, p. 125.

bureaucratic. According to Article 127 of the Constitution, the superior courts shall supervise the judicial work of the inferior courts. In practice, this supervisory power may sometimes turn to the advisory guidance which the inferior courts make reference to when they encounter difficult cases.⁴¹⁷ Furthermore, there is a strict performance evaluation system on the judges inside the courts. Since a wrong verdict may directly influence income and promotion, the judges often ask for opinions of the superior courts.⁴¹⁸

5.2.2.5.2 Insufficiency of Professionals in the Courts

In comparison to many other developed countries, the average educational level of Chinese judges is much lower. In the past, the composition of courts' personnel mostly relied on the veterans who were rewarded with a position in the courts after their loyal service in the People's Liberation Army.⁴¹⁹ Although professional education and training of the judges has gradually been stressed in recent years,⁴²⁰ it is undeniable that many of the judges are still lacking in legal expertise and formal legal education due to the low requirements of the old system, not to mention foreign languages and the ability to correctly understand international treaties. Thus, it would be a great challenge for many judges to master the WTO Agreement.⁴²¹

5.2.2.5.3 Problem of Uniform Application

In the Protocol on Accession, it is prescribed that "the provisions of the WTO Agreement and this Protocol shall apply to the entire customs territory of China, [...]" and "China shall apply and administer in a uniform, impartial and

⁴¹⁷ He, *Two Problems in the Judicial Administration Regime of China*, pp. 124-125.

⁴¹⁸ Research Team of the Jiangsu High Court, *Forming the Community of the Profession of Judge*, p. 15.

⁴¹⁹ He, *Army Veterans Enter the Court*.

⁴²⁰ The 1983 Organic Law of the People's Court adds a paragraph in Article 34 which requires the judicial staff of the People's Courts to master professional legal knowledge. A system of uniform judicial examination was established in 2001 for the qualification for judges, lawyers, and notaries.

⁴²¹ Gao, *China's Participation in the WTO*, p. 19.

reasonable manner all its laws, regulations and other measures [...]”⁴²². Many scholars and traders suspect the uniform application due to severe protectionism in the local governments. The local courts are also involved. For example, the trial system in China is a two-tier trial system, and in some regions where protectionism prevails, local courts may drive down the first instance so that the final trial cannot reach central courts.⁴²³ The Provisions of the Supreme People’s Court on Several Issues on Trying Cases of International Trade Administrative Cases relieve this problem to some extent by providing that the first instance of cases relating to international trade administration falls into the jurisdiction of the intermediate people’s courts.⁴²⁴ The Administrative Procedure Law also confers the intermediate people’s courts with the jurisdiction of the first instance of cases relating to customs. Cases of confirmation of patent rights,⁴²⁵ anti-dumping cases, anti-subsidy cases shall also be tried directly by the high courts or by the intermediate people’s courts appointed by the high courts.⁴²⁶ The intermediate people’s courts are also endowed with jurisdiction of the first instance of important foreign-related cases in the civil area⁴²⁷. These provisions may help to prevent the local governments from putting pressure on local courts. Since the judges of the intermediate courts generally have a higher level of legal expertise, they might be able to handle the WTO-related cases better than the lower courts.

In order to avoid insufficient protection of the two-tier trial system, China has also established a trial of adjudication supervision⁴²⁸ which has gradually become a “third trial”.⁴²⁹ This procedure allows cases which have already reached a valid judgment, whether from the first instance or the second, to be tried again if there

⁴²² Article 2 (A) 1 of the Protocol on the Accession of the People’s Republic of China.

⁴²³ Wan, Accession to the WTO and the Renewal of the Judicial Concept and the Judicial Reform, p. 29.

⁴²⁴ Article 5 of the Provisions of the Supreme People’s Court on Several Issues on Trying Cases of International Trade Administrative Cases.

⁴²⁵ Article 14, Paragraph 1 of the Administrative Procedure Law.

⁴²⁶ See respectively Article 5 of the Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Laws in the Trials of Anti-Dumping Administrative Cases; Article 5 of the Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Laws in the Trials of Countervailing Administrative Cases.

⁴²⁷ Article 19, Paragraph 1 of the Civil Procedure Law.

⁴²⁸ In Chinese: 审判监督程序 (Shenpan Jiandu Chengxu).

⁴²⁹ Zhang, The System Defects of the Two-Tier Trials and Improper Application, p. 27.

in deed exists a mistake.⁴³⁰ Although the trial of adjudication supervision does not affect the enforcement of the valid judgment, it is criticized that this procedure impairs the stability of the valid judgment, since the lost party may keep appealing for the last chance.⁴³¹

5.2.2.5.4 Problem of the Competence of Judges in the Application of Law

In China, the courts only have limited competence in deciding the application of law. The Legislation Law sets up several rules for the courts on the application of law. The Legislation Law arranges the Chinese law in a rank through Articles 78 to 82, and the courts shall firstly follow the principle of *lex superior derogat inferiori* by applying laws. When there is a conflict between Laws, administrative Regulations, local Regulations, autonomous Regulations and separate Regulations and Rules made by the same institution, the principles of *lex specialis derogat legi generali* and *lex posterior derogate legi priori* shall apply (Article 83 of the Legislation Law). Until now, the courts still have the discretion in selecting the proper law to apply. However, Article 85 further regulates that when the provision of the new general Law collides with that of the old special Law on the same issue, and it is unable to decide which one applies, the Standing Committee of the NPC shall make the decision. Likewise, each institution shall make the decision on the application of the laws it legislates (Article 85 and Article 86, Paragraph 1 of the Legislation Law). When the provision of the local regulations collides with that of the Rules of the department of the State Council on the same issue, and it is unable to decide which one applies, it shall resort to the opinion of the State Council. The State Council has the authority to decide the application of the local Regulations, but it is not empowered to decide the application of the Rules of the department of the State Council. Moreover, in this case, it shall submit the issue to the Standing Committee for decision (Article 86, Paragraph 2 of the Legislation Law). When there is a conflict between the provisions of the Rules of the

⁴³⁰ For details, see Chapter 16 of the Civil Procedure Law.

⁴³¹ Wan, Accession to the WTO and the Renewal of the Judicial Concept and the Judicial Reform, p. 29.

department of the State Council and that of the Rules of the local governments on the same issue, the State Council shall decide the application (Article 86, Paragraph 3). The Law of the Application of Law for Foreign-Related Civil Relations also confers some power to the courts on the application of laws relating to private international law.

From the afore-cited provisions of the Legislation Law it is to see that the courts only have the power to decide the application of Law when they are able to make a decision by following the principles of the *lex superior derogate legi inferiori*, the *lex specialis derogat legi generali*, and the *lex posterior derogate legi priori*.⁴³² If these principles cannot solve the conflict of laws, the courts shall then resort to the legislative institutions. By applying the principles, it is noteworthy that even when the courts have the competence to choose, e.g., the higher law, they cannot announce the nullification of the lower law. Thus, it is not proper to consider the competence of the courts to choose the application of the higher law as the power of judicial review.⁴³³ Rather, it is more connected to the question of interpretation.

In practice, the competence of the courts on the selection of law may be confronted with barriers, especially by applying the principle of *lex superior derogate legi inferiori*. As mentioned previously, the local courts often encounter pressure or even threats from the local governments. In such situations, the courts can hardly apply a higher law which contains different provisions from the lower local law. If a judge makes a negative comment about the lower local law, he may be inculpated or even lose his position in the court.⁴³⁴

⁴³² There are also authors who believe that Chinese courts do not have the competence to make a decision to reject the application of a lower Law, administrative Regulation, or local Regulation. See Li, Do Courts Have the Competence to Reject the Application of Local Regulations?

⁴³³ Kong, On the Competence of the Judge on the Selection of Application in the Collision of Legal Norms, p. 5.

⁴³⁴ Kong, On the Competence of the Judge on the Selection of Application in the Collision of Legal Norms, p. 3; Ahl, Die Anwendbarkeit völkerrechtlicher Verträge in China, p. 310.

Since the judicial interpretations play an important role in the practice as previously mentioned, it is recommended that the courts interpret the lower local law as in conformity with the higher law.⁴³⁵ If the conflict cannot be avoided through this way as an expedient method in the transitional period, they may apply the higher law without giving a reason.⁴³⁶

As far as the application of the WTO Agreement is mentioned, since the WTO Agreement is adopted into the Chinese legal system as “Treaty and Important Agreement”, it shall have its position as those in the legal system. However, since the hierarchy of treaty in China does not have a clear line in legislation yet, the problem of the hierarchy of the WTO Agreement would also be a puzzle for the courts in practice.

5.2.2.6 Indirect Application

If a WTO provision does not fall into the legal field of any Chinese law which contains provisions of direct application, or if it is rejected by the court of direct application, it is still valid and influential in China.

5.2.2.6.1 Treaty-Consistent Interpretation

Article 9 of the Provisions of the Supreme People’s Court on Several Issues on Trying Cases of International Trade Administrative Cases provides:

“If there are two or more reasonable interpretations for a specific clause of the law or administrative regulation applied by the people’s courts by trying an international trade administrative case, and among which one interpretation is consistent with the relevant provisions of the international treaty that the People’s Republic of China concluded or entered

⁴³⁵ Kong, On the Competence of the Judge on the Selection of Application in the Collision of Legal Norms, p. 8.

⁴³⁶ Kong, On the Competence of the Judge on the Selection of Application in the Collision of Legal Norms, p. 8.

into, such interpretation shall apply, with the exception of the clauses on which the People's Republic of China has announced reservation.”

In the Provisions, the principle of treaty-consistent interpretation was adopted for the first time in the court system. In the academic field, it is believed that the principle excludes the direct application of the WTO Agreement.⁴³⁷ Judge *Kong Xiangxi* agrees that this principle is an alternative method of direct application of the WTO Agreement.⁴³⁸ In fact, this principle cannot exclude the direct application, since the direct application of the WTO Agreement is limited in the legal field regulated in the laws containing direct application as previously mentioned. Even legislation cannot exclude direct application, not to mention the Provisions of the Supreme Court. However, since direct application is limited in certain fields, and Chinese courts are unlikely to apply the WTO Agreement directly at present, the principle of treaty-consistent interpretation is an indispensable complement. It may effectively prevent China from breaching its WTO obligations. It should be noticed here that the principle only solves part of the problem. If every possible interpretation is against the WTO Agreement, the Chinese courts are still confronted with the question of direct application.

5.2.2.6.2 Supplementary Legislation

The process of accession into the WTO obviously accelerated the pace of China's law-making, which was an interaction with the WTO accession process. As China was applying for the accession into the multilateral trading system, it had to regulate its market through laws to show the world its ambition. The more comprehensive the reform went, the more hopeful China had the chance to join the WTO. Now that China has already acceded to the WTO, it has its obligation to go further with the legal reform to meet the demands. Around the WTO accession

⁴³⁷ Hung, *China's WTO Commitment on Independent Judicial Review*, p. 77.

⁴³⁸ Kong, *The Domestic Application of the WTO Law*, p. 153.

period and in the post WTO accession period until now, a large amount of legislation has been revised, released or abolished.⁴³⁹

From 1997 to 2007, there were around 220 major laws promulgated by the NPC and its Standing Committee, among which more than 80% were civil, economic and administrative laws.⁴⁴⁰ From 2000 to the end of 2001, nearly 30 ministries of the state council were requested to take review to more than 2,300 laws and regulations in line with the WTO demands, among which 830 were abolished and 325 were to be amended.⁴⁴¹ In the field of trade in goods and technologies, the Customs Law, Law on Import and Export Commodity Inspection, Anti-Dumping Regulation, Countervailing Regulation, Regulation on Safeguard Measures, Regulation on the Administration of the Import and Export of Goods and the Regulation on the Administration of the Import and Export of Technologies were either amended or enacted. In the field of trade in service, the Insurance Law, Regulation on the Administration of Foreign-Funded Banks, Regulation on the Administration of Foreign-Funded Insurance Companies, Provisions on the Administration of Foreign-Funded Telecommunications Enterprises, Measure for the Administration of Chinese-Foreign Cooperative Audio-Video Product Distribution Enterprises, Measure for the Administration of Securities Investment Fund Management Companies, Rules for the Establishment of Foreign-Shared Securities Companies, Securities Law, Banking Supervision Law, Regulation on the Management of Travel Agencies, etc. were enacted or amended. In the field of foreign investment, the Law on Foreign-Capital Enterprises, Law on Chinese-Foreign Contractual Joint Ventures, Law on Chinese-Foreign Equity Joint Ventures, and in the field of IPR protection, the Patent Law, Trademark Law, Copyright Law and their respective implementing regulations, Regulation on the Protection of Layout Design of Integrated Circuits, Regulation on the Protection of Computer Software, Regulation on the Customs Protection of Intellectual

⁴³⁹ See table 1 in Appendix I.

⁴⁴⁰ Li, *Thirty Years of China Reform*.

⁴⁴¹ Gong, *Let History Remember*.

Property and their implementing regulations were enacted, amended or abolished. The Foreign Trade Law and the Criminal Law also include the contents of the Protection of Intellectual Property.

In the Chinese legal framework, among all the laws and regulations which are related to the WTO requirements, the Foreign Trade Law lies at the center. The Law is applied as an outline of the foreign trade regime of China and counts on a large number of laws and regulations for detailed implementation. One of the important aims of the legislation of the Law in 1994 was the resumption of the GATT⁴⁴². In 2004, the Law was substantially revised so as to bring its content into conformity with the WTO, and to legislate the implementing mechanism and procedures which may bring benefit to China according to the WTO.⁴⁴³ Therefore, it is of special importance to inspect the revisions of the new Law. The revision was drastic since only six articles remain unaltered out of forty-four articles of the old Law. Three chapters and 26 articles were newly added. Among all the revised articles, the most noticeable one was the liberalization of foreign trading rights. Under the old Law, only a very limited number of enterprises were authorized trading rights because of the licensing system (Article 9 of the 1994 Foreign Trade Law). In accordance with China's WTO commitments⁴⁴⁴, the new law widens the scope of import and export traders to "any legal person, other organization, or individual" (Article 8 of the 2004 Foreign Trade Law). In the past, many private persons who are competent enough to handle a foreign business had to affiliate themselves with qualified companies and engage in foreign business in the companies' names.⁴⁴⁵ In order to avoid giving "supra-national treatment" to foreign individuals, China grants foreign trading rights to private persons, although it was not an obligation under the Accession Protocol. The new Law

⁴⁴² Wu, Explanation about the Protocol of Foreign Trade Law of the People's Republic of China.

⁴⁴³ Yu, Explanation about the Amendment Protocol of Foreign Trade Law of the People's Republic of China.

⁴⁴⁴ Section 5 of the Accession Protocol, "China shall progressively liberalize the availability and scope of the right to trade so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customers territory of China...Such right to trade shall be the right to import and export goods.

⁴⁴⁵ Feng, On the Amendment of the Foreign Trade Law, p. 112.

further replaces the strict examining system for the qualification of foreign trading rights by a simple registration procedure (Article 9 of the 2004 Foreign Trade Law). The elimination of this threshold not only answers WTO commitments but also brings transparency and fairness to the foreign trading market. Article 15 of the new Law prescribes the automatic licensing system which also accords with the WTO commitment.⁴⁴⁶ Beside these provisions fulfilling the WTO obligations, the new Law also takes advantage of the benefits of the WTO Agreement to protect China's own interests, such as Chapter Five, entitled "Protection of Trade-related Intellectual Property Rights".⁴⁴⁷ The new Law, modeled after the Special 301 Clause of the U.S. Trade Act of 1974, connected the IPR with foreign trade for the first time. Considering the situation that, in the past years, the IP (especially patents) applications from developed countries have largely increased in China, and as a result many Chinese enterprises could not step over this "barrier" to develop their own technologies,⁴⁴⁸ the aim of the new chapter five mainly focused on the limitation of the IP owner's right, rather than the protection of it. Besides, the new Law adds Chapter Seven, the chapter of the procedure and the content of foreign trade review to protect its own industry against, e.g., trade remedy measures launched by other Member States. Chapter Eight further prescribes the investigation of foreign trade barriers, including anti-dumping measures, subsidy countervailing measures, and safeguards. To some extent, some provisions in the new Law indicate that, as a late-comer, China's trade remedy measures are much more advanced than that of many other WTO members.⁴⁴⁹ The new Foreign Trade Law was significantly revamped. Its nature of being an outline and principle determines that it cannot be specific enough to operate. Under the instruction of it, many laws and regulations in the field of foreign trade have been overhauled.

⁴⁴⁶ China committed in Paragraph 136 of the Working Party Report that it will bring its automatic licensing system into conformity with Article 2 of the Agreement on Import Licensing Procedures.

⁴⁴⁷ Zhao, Important Amendment of the Foreign Trade Law, p. 36; Gao, China's Participation in the WTO, pp. 24-25.

⁴⁴⁸ Han, Limitation on Intellectual Property Rights.

⁴⁴⁹ Gao, China's Participation in the WTO, p. 32.

To pave the way for a sustainable economic development, the field of administrative law has been reviewed. The Administrative Procedure Law (1989), State Compensation Law (1994) and the Administrative Reconsideration Law (1999) provide proper means for remedy for administrative infringement. The Administrative Penalty Law (1996) is hailed for its recognition of procedural justice. The Price Law (1997) sets down a procedural mechanism for the pricing acts of the government especially the hearing procedure. The Legislation Law (2000) and the Regulation on the Procedure of the Formulation of Administrative Regulations (2001) prescribe detailed provisions on administrative legislation. The Administrative License Law (2003) streamlines the licensing procedure and aims to prevent corruption. Among them, the Administrative Penalty Law and the Administrative License Law so far stipulate the most comprehensive procedural requirements.⁴⁵⁰ The entry into the WTO also motivated the birth of the Administrative License Law, which was reported as “another milestone of the Chinese democracy course after the 1989 Litigation Law and 1996 Penalty Law.”⁴⁵¹ Now there is an almost unified voice among the Chinese scholars that a comprehensive administrative procedure Law be drafted on the basis of the existing framework.

During the reform time, and especially in the transitional period after WTO accession, these supplementary legislations may conflict with each other, especially the lower laws such as local Rules. In practice, local Rules are sometimes even more important than state laws, since in most areas the principal laws and administrative regulations leave large discretion for implementation by local rules, which are, however, mostly issued by authorities with vested interests.⁴⁵² An interesting phenomenon may sometimes occur that a local government with certain economic independence issues a pioneer law much ahead of the central legislation. On the other hand, there have also been lots of examples

⁴⁵⁰ Chen, Chinese Law, p.228

⁴⁵¹ Ma, Administrative License Rebuilds a Government of Credibility, Efficiency, and Responsibility.

⁴⁵² Chen, Chinese Law, p.252.

of *ultra vires* acts by local governments that contradict the WTO requirement of “uniform” and the central government does not seem to have a strong measure to supervise this.⁴⁵³ Since the power division of the central and local governments has been a sensible topic until now, the requirement of the WTO Agreement on uniform implementation⁴⁵⁴ is still difficult to meet in a short term.

Furthermore, behind the glorious progress, these pieces legislation made in such a short time are not satisfying in their quality. Many of them still scarcely resemble a modern legal idea. For example, abstract administrative acts and final decisions issued by administrative institutions according to law cannot fall into the jurisdiction of the People’s Court. These acts of legislation need further adjustment and the WTO principle of transparency can only be insured by a complete and clear legal system.

⁴⁵³ Liu, Problems of the Administrative Law on the Domestic Implementation of the WTO Rules, pp.62 and 63 and p.71.

⁴⁵⁴ Protocol on the Accession of the People’s Republic of China, Section 2 (A) and (B).

Chapter 6 Conclusion

China has now been a Member State in the WTO for 10 years. After so many years' discussion in academic circles, the question of the application is still unclear. This study takes a deepened look into the theory of the application of treaty in domestic law. The study absorbs the academic achievements of Western and Chinese scholars and makes a comprehensive review of Chinese legislation, official documents, administrative and judicial interpretations, and judicial judgments. Based on these materials, this study aims at providing a systematic theoretical framework for China's academicians and at introducing China's mechanism of application of the WTO Agreement to international academicians and trading partners. Furthermore, this investigation analyzes the question of the application of treaty in China in all aspects and specially focuses on the application of the WTO Agreement in China.

Through the inspection in hundreds of pieces of important Chinese legislation, the author found that, unlike many other countries whose constitutions explicitly prescribe the position of international treaty, the Chinese Constitution does not include any provisions as such. This is the reason why it is extremely difficult to interpret China's attitude toward international treaty. However, hints can be found in other single laws. In China, many laws contain provisions of the direct application of treaty. The author categorizes these provisions according to different formulations into 14 types and presents them in the form of tables. Some of the provisions set prerequisites to direct application of treaty, such as "where there is a difference in treaty, the treaty applies", some permit the direct application to specific matters, some take treaty provisions as a criterion for certain issues, and others only generally commit to the compliance of treaty without any detail.

The author further inspects the interpretations of laws. In China, interpretations of laws are generally divided into legislative interpretation, judicial interpretation, and administrative interpretation according to the different interpreting institutions. According to the Legislation Law, the power of legislative interpretation is authorized to the Standing Committee of the National People's Congress. Moreover, these interpretations have the same position as Laws made by the Standing Committee and the National People's Congress, which are included in the above examination of legislation. The judicial interpretations, issued by the Supreme Court and the Supreme Procuratorate, have a very subtle position. Strictly speaking, they cannot be arranged into the Chinese legal hierarchy and do not have legally-binding force. On the other hand, as an internal reference, they play a very important role in the court system. Administrative interpretation refers to the interpretations issued by the State Council and other Administrative institutions. In the judicial interpretations and administrative interpretations, some of them strictly require the automatic application of certain treaties, some of them expressly refer to a specific treaty or treaty provisions to deal with the issue in question, others of them generally mention that certain issues shall be handled according to international treaty or within the treaty commitments, and still others are detailed instructing rules for the implementation of certain treaties.

Beyond the interpretations, other official documents such as the decisions of the Standing Committee or diplomatic declarations are also reviewed. On many official occasions, Chinese representatives have stated China's attitude toward international treaties. One of the most representative declarations stated that, when China acceded to a treaty, it became binding as soon as it entered into force, and it was not necessary to draft special laws to ensure conformity. This statement describes the general situation in China, and many official documents confirm this statement. On the other hand, some documents only stress that China issues related laws and regulations and China will fully comply with certain treaties. Direct application is not mentioned.

Judicial judgment is another important source of this study. There have been many cases in which the Chinese courts have directly applied international treaties. In very rare cases, Chinese courts also reject direct application on the reason that the prerequisite of application does not exist.

Through the review of the Chinese academicians, the author clarifies the line of Chinese theories on the relationship between international law and domestic law, the treaty implementing mechanism, the hierarchy of treaty in Chinese law, and the direct applicability of treaty in China. On the relationship between international law and domestic law, Chinese scholars are influenced by the Chinese philosophy of moderation, which always shuns contradiction and searches for a middle way. The theories brought forward by them neither completely lean to the theory of Monism nor Dualism. For example, the most prevailing school, the “theory of inter-relation”, claims that the relationship of international and domestic law is a “unity of opposites”, also known as a “dialectic relationship”.⁴⁵⁵ On the treaty implementing mechanism, most Chinese scholars accept that treaties are mainly introduced into China’s legal system through adoption. Among them, many hold the view that China takes the approach of a mixed form of adoption and transformation. Very few scholars claim that China introduces treaties into domestic legal system solely through transformation. It should be noted here that many Chinese scholars, although they base their arguments on German theories, do not distinguish the theory of the introduction of treaty from the theory of the direct applicability of treaty. They intend to believe that the mechanism of adoption equals to the direct applicability of treaty, and the mechanism of transformation means indirect applicability of treaty. On the hierarchy of treaty in China’s legal system, scholars tend to arrange treaties into the domestic legal system according to the similarity of the treaty concluding institutions and the legislating institutions. Most scholars have reached a uniform opinion that the hierarchy of treaty in the Chinese legal system is: (1)

⁴⁵⁵ Liang, *International Law*, p. 13.

the Constitution; (2) basic Laws; (3) Treaties and Important Agreements ratified by the Standing Committee, and Laws legislated by the National People's Congress and its Standing Committee; (4) Agreements and Other Treaty-natured Instruments which are approved by the State Council and do not require ratification by the Standing Committee, and administrative Regulations legislated by the State Council; (5) Agreements which neither require the decision on ratification by the Standing Committee nor approval by the State Council, and Rules legislated by governmental departments. Beside these basic theories, Chinese scholars further propose several suggestions for the improvement of the Chinese system and the mechanism of treaty application.

Based on these materials, the author makes a detailed analysis and brings forward her own opinion. Since the theory of transformation and adoption was established originally to make clear whether treaties are applied as international law or as domestic law within a state,⁴⁵⁶ it seems that Chinese scholars have gone too far with this theory. With regard to the question of the introduction of treaty, the author supports the argumentation of the single form of adoption. In Chinese legislation, the provisions of direct application are collision provisions. In the author's view, a collision refers to the situation when a treaty provision and a domestic provision are both valid and applicable, but are contradictory in content. The treaty provision must have domestic validity to be applicable in the domestic sphere. The official documents and interpretations further prove this view. As far as the applicability of a treaty is concerned, the answer should be found in the specific treaty according to Western theories. In China however, scholars try to find an answer from domestic legislation. This may be ascribed to the special legislative modus in China, since many laws contain provisions of direct applicability rather than referring to the specific treaty in question. Because of this special legislative characteristic, the author does deepened analysis into the

⁴⁵⁶ Zuleeg, Die innerstaatliche Anwendbarkeit völkerrechtlicher Verträge am Beispiel des GATT und der Europäischen Sozialcharta, p.345.

legislative modus. The author then concludes in seeing the Chinese modus as restricted direct application and indirect application. Those domestic provisions of direct application of treaty are restricted direct application, since legislation set certain prerequisites to the direct application such as the existence of collision or reservation, etc. Indirect application is reflected in China's supplementary acts of legislation, which are explicitly or implicitly aimed at the implementation of treaties. After WTO accession, the principle of treaty consistent interpretation has also been adopted by the courts in international trade administrative cases. It is foreseeable that the principle may be a more and more important measure of indirect application. On the problem of the hierarchy of treaty in China, the author does not agree with the prevailing argument of the Chinese scholars. The artificial classification is based on the similarity of the treaty concluding institution and the legislating institution. Legislative institutions in China not only issue laws, but also decisions, orders, notices, resolutions, measures, and so on. These documents apparently have a lower position than laws and regulations. Besides, one legislative institution may have multiple powers to legislate different laws.⁴⁵⁷ The position of the basic Laws and Treaties and Important Agreements is also illogical. Accordingly, the opinion that Treaties and Important Agreements are higher than other Laws made by the Standing Committee, but beneath the basic Laws is inconsistent. The author therefore believes that the ranking that treaties have a position beneath the Constitution but above other domestic Laws is more reasonable.

After making clear China's approach on the application of international treaty, the author turns to the application of the WTO Agreement in China. From the requirements of the WTO Agreement, it can be seen that the WTO Agreement does not seem to confer rights to individuals. However, it does provide certain protections for individuals. Western scholars raise pros and cons of the direct

⁴⁵⁷ Wang, Study on the Questions of the Basic Theory of the Application of Treaties in China, p. 121.

applicability of the WTO Agreement. Based on these views, Chinese scholars also bring forward their own opinions with respect to the special situations in China.

Research on the practice of the application of the WTO Agreement in China begins with the conclusion procedure. The author found that the treaty ratification procedure does not fully accord with the ratification procedure regulated in the Constitution and the Legislation Law. Since the Chinese government is unlikely to deny its long lasting efforts made during the accession negotiations, the ratification procedure of the WTO Agreement will not likely receive any challenges.

In Article 67 of the Working Party Report on the Accession of China, it is stated that “the WTO Agreement would be implemented by China in an effective and uniform manner through revising its existing domestic laws and enacting new ones fully in compliance with the WTO Agreement.” Chinese scholars incline to explain this statement as China is taking the mechanism of transformation to implement WTO Agreement.⁴⁵⁸ However, Article 68 states that when Chinese laws are not in position, Chinese authorities shall still honour China’s WTO obligations. The author claims that in order to “honour” WTO obligations, the WTO Agreement shall have validity in the domestic sphere. Furthermore, as discussed above, Chinese legislation does not exclude direct applicability of international treaties, nor does it exclude the direct applicability of the WTO Agreement, which means that the WTO Agreement is adopted into the Chinese legal system as well as other treaties. However, the Supreme People’s Court seems to hold a different view. Shortly after China’s accession into the WTO, the Court released an important judicial interpretation which is said to be designed to provide a response to the judicial review regime of the WTO Agreement.⁴⁵⁹

Article 7 and Article 8 of this judicial interpretation stress the requirement on the

⁴⁵⁸ Cai, *Privates Structural Participation in the Multilateral Trade System*, p. 271.

⁴⁵⁹ *Judicial Review against Administrative Actions Relating to International Trade: From October 1, 2002 Chinese Courts are Ready to Accept Administrative Law Suits Litigated by Foreigners*, *People’s Daily*, September 7, 2002, Page 3.

subordinate courts of the application of domestic law by trying international trade administrative cases. The Vice-President of the Supreme Court, *Li Guoguang* explains these Articles as the rejection of the direct applicability of the courts and the direct invocability of the private persons. The author does not agree with this view and claims that these Articles are only judicial interpretations and they cannot defy the law they interpret. Since this judicial interpretation is issued to interpret the Administrative Procedure Law, Article 72 of the Law, which contains the provision of direct application of treaty, is obviously a higher provision than the provisions in the judicial interpretation. Notwithstanding, judicial interpretations have a special position and can at least instruct the trying work of the subordinate courts. In order to maintain a uniform jurisdiction in China, the Supreme Court may in practice prevent the subordinate courts from applying the WTO Agreement directly through this judicial interpretation.⁴⁶⁰

Although Chinese courts are unlikely to apply the WTO Agreement out of respect for the attitude of the Supreme Court, Chinese legislation leaves certain room for direct application. Thus, there is still space to discuss the direct effect of the WTO Agreement. That the courts are unlikely to apply the WTO Agreement may lead to the result that certain subjective rights of private persons to invoke WTO provisions directly to claim material rights under the WTO provisions may be rejected as well.⁴⁶¹ However, this does not mean that private persons cannot invoke WTO provisions to challenge a domestic law or an administrative regulation which is in contradiction with the WTO provisions either.⁴⁶² The author therefore then examines China's judicial review regime. In the field of Chinese administrative law, only litigations against specific administrative acts are regulated. Abstract administrative acts such as issuing Regulations,

⁴⁶⁰ Ahl, *Die Anwendbarkeit völkerrechtlicher Verträge in China*, p. 270.

⁴⁶¹ Cai, *Privates Structural Participation in the Multilateral Trade System*, p. 237.

⁴⁶² Such as in *Nakajima v Council*, the Court points out that the applicant is not relying on the direct effect of GATT 47 and Antidumping Code. In fact, he is "questioning the applicability of the new basic regulation by invoking one of the grounds for review of legality referred to in Article 173 of the Treaty, namely, that of infringement of the Treaty or of any rule of law relating to its application". See Case C-69/89, [1991] ECR I-2069, Paragraph 28.

declarations, announcements and so on, as well as the judicial review of Laws and Constitution are excluded in the judicial review. However, WTO Agreement explicitly requires the judicial review on abstract administrative acts and laws. On this point, China cannot yet fully comply with the WTO requirements.

Until now, there have been a lot of impediments preventing Chinese courts from applying the WTO Agreement directly. China has not yet established an absolutely independent judiciary system and uniform application is still a great obstacle. In addition, the judges have a relatively low level of educational and are not authorized with enough power on the application of law.

If a WTO provision does not fall into the legal field of any Chinese law which contains provisions of direct application, or if it is rejected by the court of direct application, it may maintain its validity through indirect application. Since WTO accession, Chinese courts have adopted the principle of treaty-consistent interpretation into their adjudicating work and legislative bodies have released a large amount of laws in conformity with the WTO Agreement. Although the pieces of legislation made in such a short time are not completely satisfying in their quality, China's efforts and will to fulfill its WTO obligations are well demonstrated.

Although China is not likely to apply the WTO Agreement at this moment, its acts of legislation leave enough room for interpretation. China, as a country of limitless potential, is becoming more and more influential on the world stage. If one day the possibility of direct application of the WTO Agreement becomes a reality in China, it may make a remarkable impact on other Member States and even prevail over the Member States. Before this day, the author sincerely hopes that this study may help international academicians understand the Chinese approach on treaty application, especially the WTO Agreement, and inspire discussions on some questions which are worthy of further research.

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Appendix I Tables

Table 1: Important Changes in Legislation after the WTO

Accession of China

Major trade-related laws and regulations enacted, amended or abolished for the entry into the WTO and after the entry into the WTO in the Chinese legal system			
Constitutional laws	1999 (amended), 2004 (amended)		Constitution of the PRC
	2000 (enacted)	NPC	Legislation Law of the PRC
Civil laws	1999 (enacted)		Contract Law of the PRC (At the same time the Law of the PRC on Economic Contracts Involving Foreign Interest (1985) was abolished.)
	2001 (amended)		Trademark Law of the PRC
	2001 (amended)		Copyright Law of the PRC
	2000 (amended), 2008 (amended)		Patent Law of the PRC
	2007 (enacted)		Real Right Law of the PRC
	2007 (amended)	Standing Committee of NPC	Civil Procedure Law of the PRC
	2007 (enacted)		Labor Contract Law of the PRC
	2010 (enacted)	Standing Committee of PRC	Law of the Application of Law for Foreign-Related Civil Relations of the PRC
Commercial and economic laws	1999 (enacted)		Law of the PRC on Sole Proprietorship Enterprises
	1999 (amended)		Accounting Law of the PRC
	2000 (amended)		Law of the PRC on Foreign-Capital Enterprises
	2000 (amended)		Product Quality Law of the PRC
	2000 (amended)		Law of the PRC on Chinese-Foreign Contractual Joint Ventures
	2000 (amended)		Customs Law of the People's Republic of China
	2001 (enacted)	State Council	The Regulation on the Protection of the Lay out Design of Integrated Circuits
	2001 (amended)		Law of the PRC Concerning the Administration of Tax Collection
	2001 (amended)		Law of the PRC on Chinese-Foreign Equity Joint Ventures
	2001 (enacted)	State Council	Regulation of the People's Republic of China on the Administration of Import and Export of Goods
	2001 (enacted)	State	Regulation of the People's Republic of China on the

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		Council	Administration of Import and Export of Technologies
2001 (enacted)	State Council	State Council	Regulation of the People's Republic of China on the Administration of Foreign-funded Insurance Companies
2001 (enacted) 2006 (abolished)	State Council	State Council	Regulation of the People's Republic of China on the Administration of Foreign-Funded Financial Institutions
2001 (enacted)	State Council	State Council	Regulation of the People's Republic of China on International Ocean Shipping
2001 (enacted)	State Council	State Council	Regulation on the Administration of Foreign Law Firms' Representative Offices in China
2001 (enacted) 2004 (abolished)	MOFTEC, Ministry of Culture	MOFTEC, Ministry of Culture	Measures for the Administration of Chinese-Foreign Cooperative Audio-Video Product Distribution Enterprises
2001 (amended)	State Council	State Council	Regulation on the Management of Travel Agencies
2001 (enacted)	State Council	State Council	Regulation on the Protection of Computer Software (Its predecessor enacted in 1991 was abolished in the same year)
2002 (enacted)	MOFTEC	MOFTEC	Provisional Rules for the Investigation of Foreign Trade Barriers
2002 (amended)			Law of the PRC on Import and Export Commodity Inspection
2002 (enacted)			Law of the PRC on the Contracting of Rural Land
2002 (enacted) 2004 (abolished)	China Securities Regulatory Commission	China Securities Regulatory Commission	Rules on the Establishment of Foreign-Shared Fund Management Companies
2003 (amended)			Law of the PRC on Commercial Banks
2003 (enacted)	Standing Committee of NPC	Standing Committee of NPC	Administrative License Law of the People's Republic of China
2001 (enacted) 2004 (amended)			Anti-Dumping Regulation of the PRC
2001 (enacted) 2004 (amended)			Countervailing Regulation of the PRC
2001 (enacted) 2004 (amended)			Regulation of the PRC on Safeguard Measures
2004 (amended)			Foreign Trade Law of the PRC
2004 (enacted)	China Securities Regulatory Commission	China Securities Regulatory Commission	Measures for the Administration of Securities Investment Fund Management Companies
2004 (enacted)	Ministry of Commerce,	Ministry of Commerce,	Measures for the Administration of Chinese-Foreign Cooperative Audio-Video Product Distribution

		Ministry of Culture	Enterprises
	1999 (amended), 2004 (amended)		Company Law of the PRC
	2004 (amended)		Negotiable Instruments Law of the PRC
	2004 (amended)		Securities Law of the PRC
	1998 (amended) 2004 (amended)		Land Administration Law of the PRC
	2006 (enacted)		Regulation of the People's Republic of China on the Administration of Foreign-Funded Banks
	2003 (enacted) 2006 (amended)		Banking Supervision Law of the PRC
	2006 (amended)		Audit Law of the PRC
	2002 (enacted) 2007 (amended)	China Securities Regulatory Commission	Rules for the Establishment of Foreign-Shared Securities Companies
	2007 (amended)		Law of the PRC on Urban Real Estate Administration
	1999 (amended) 2007 (amended)		Law of the PRC on Individual Income Tax
	2001 (enacted) 2008 (amended)	State Council	Provisions on the Administration of Foreign-Funded Telecommunications Enterprises
	2002 (amended) 2009 (amended)		Insurance Law of the PRC

Table 2: Treaty concluding procedures under the Constitution of China*

Type of treaty	Standard procedure	Accession into multilateral treaty	Acceptance of multilateral treaty
Treaties and Important Agreements which require the ratification of the Standing Committee, namely: (1) Treaties of friendship and cooperation, treaties of peace and other political treaties; (2) Treaties and Agreements relating to territory and delimitation of boundary lines; (3) Treaties and Agreements relating to judicial assistance and extradition; (4) Treaties and Agreements which	Signature → Examination by the State Council → Decision on ratification by the Standing Committee → Ratification by the President according to the decision made by Standing Committee → Subsequent formalities by the Ministry of Foreign Affairs.	Examination by the Ministry of Foreign Affairs or with other departments of the State Council → Review by the State Council → Decision on the accession by the Standing Committee → Subsequent formalities by the Ministry of Foreign Affairs.	Examination by the Ministry of Foreign Affairs or with other departments of the State Council → Decision on the acceptance by the State Council → Subsequent

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contain provisions inconsistent with the laws of the PRC; (5) Treaties and Agreements which are subject to ratification as agreed by the contracting parties; (6) Other Treaties and Agreements subject to ratification.			formalities by the Ministry of Foreign Affairs.
Agreements and Other Treaty-natured Instruments which are subject to approval as required by the State Council or as agreed by the contracting parties.	Signature→ Approval by the Standing Committee→ Subsequent formalities by the Ministry of Foreign Affairs.	Examination by the Ministry of Foreign Affairs or with other departments of the State Council→	Decision on the accession by the State Council→ Subsequent formalities by the Ministry of Foreign Affairs.
Agreements which do not require the decision on the ratification by the Standing Committee or the approval by the State Council.	When concluded in the name of governmental departments: registration in the Ministry of Foreign Affairs. Other agreements: record in the State Council.		

*This table is made in reference to Han, On the Application of Treaty

Appendix II

Index of Chinese Laws, Regulations, and other Legislation

Administrative License Law	行政许可法
Administrative Penalty Law	行政处罚法
Administrative Procedure Law	行政诉讼法
Administrative Reconsideration Law	行政复议法
Anti-Dumping Regulation	反倾销条例
Banking Supervision Law	银行业监督管理法
Basic Law of the Hong Kong Special Administrative Region	香港特别行政区基本法
Civil Aviation Law	民用航空法
Civil Procedure Law	民事诉讼法
Civil Servant Law	公务员法
Common Program of Chinese People's Political Consultative Conference	中国人民政治协商会议共同纲领
Constitution	宪法
Contract Law	合同法
Copyright Law	著作权法
Countervailing Regulation	反补贴条例
Criminal Law	刑法
Customs Law	海关法
Detailed Rules on the Implementation of Patent Law	专利法实施细则
Detailed Rules on the Implementation of the Law on the Prevention and Control of Water Pollution	水污染防治法实施细则
Education Law	教育法
Enterprise Income Tax Law	企业所得税法
Environmental Protection Law	环境保护法
Extradition Law	引渡法
Fisheries Law	渔业法
Foreign Economic Contract Law	涉外经济合同法
Foreign Trade Law	对外贸易法
Frontier Health and Quarantine Law	国境卫生检疫法
General Principles of the Civil Law	民法通则
Income Tax Law for Enterprises with Foreign Investment and Foreign Enterprises	外商投资企业和外国企业所得税法
Insurance Law	保险法
Interim Regulation on Notarization	公证暂行条例
Law of Exclusive Economic Zone and the Continental Shelf	专属经济区和大陆架法
Law of Judges	法官法
Law of Court Organization	法院组织法

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Law of the Application of Law for Foreign-Related Civil Relations	涉外民事关系法律适用法
Law on Chinese-Foreign Contractual Joint Ventures	中外合作经营企业法
Law on Chinese-Foreign Equity Joint Ventures	中外合资经营企业法
Law on Control of the Entry and Exit of Aliens	外国人入境出境管理法
Law on Foreign-Capital Enterprises	外资企业法
Law on the Control of the Exit and Entry of Citizens	公民出境入境管理法
Law on the Procedure of Treaty Conclusion	条约缔结程序法
Law on the Protection of Rights and Interests of Women	妇女权益保障法
Law on Diplomatic Personnel Stationed Abroad	驻外外交人员法
Law on Individual Income Tax	个人所得税法
Law on Import and Export Commodity Inspection	中华人民共和国进出口商品检验法
Law on National Defense	国防法
Law on the Administration of Tax Collection	税收征收管理法
Law on the Entry and Exit Animal and Plant Quarantine	进出境动植物检疫法
Law on Physical Culture and Sports	体育法
Law on the Prevention and Control of Environmental Pollution by Solid Wastes	固体废物污染环境防治法
Law on the Protection of the Rights and Interests of Returned Overseas Chinese and the Family Members of Overseas Chinese	归侨侨眷权益保护法
Law on the Red Cross Society	红十字法
Legislation Law	立法法
Marine Environmental Protection Law	海洋环境保护法
Maritime Code	海商法
Measure for the Administration of Chinese-Foreign Cooperative Audio-Video Product Distribution Enterprises	中外合作音像制品分销企业管理办法
Measure for the Administration of Securities Investment Fund Management Companies	证券投资基金管理公司管理办法
Measure for the Collection of Income Taxes of Foreign Shipping Companies from Transport of Freight	外国公司船舶运输收入征税办法
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