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OECD Reviews of Regulatory Reform: China
Defining the Boundary between the Market and the State

Chapter 2

Regulatory Governance

Across the OECD area, the liberalisation of domestic markets and international trade, coupled with the introduction of regulatory management tools, has led to a profound reformulation of the state's role in the economy. A similar trend has emerged in the People's Republic of China since the late 1990s. Even if the process remains in its early stages, there is still evidence that the central government has begun to construct a fledgling regulatory system that gives policy makers new tools to impose and enforce economic regulation. This chapter describes how China has gradually developed capabilities for setting economic regulation and thereby guiding market dynamics through regulatory agencies, commissions and administrative procedures that nevertheless maintain an arm's-length relationship between state and market. The aim of this chapter is to promote discussion on the development of regulatory governance in China and the relevance of regulatory approaches adopted by OECD countries. It raises a wide range of issues that deserve further thought in determining regulatory options for China.

Introduction

Across the OECD area, the liberalisation of domestic markets and international trade, coupled with the introduction of regulatory management tools, has led to a profound reformulation of the state's role in the economy. Scholars have labelled this trend the "rise of the regulatory state" (Majone, 1994; Moran, 2002). OECD member countries that previously relied on industrial strategies as the basis for influencing major sectors of the economy have increasingly adopted arm's-length regulatory bodies to oversee the development and performance of markets. A vital factor behind this change has been the creation of a host of new institutions – oversight bodies, regulatory agencies, administrative courts and ombudsman commissions – to manage newly liberalised markets (Thatcher, 2005). These specialised agencies have developed a host of tools to develop evidenced-based policies and to enforce economic regulations.

A similar trend has emerged in the People's Republic of China since the late 1990s. Even if the process remains in its early stages, there is still evidence that the central government has begun to construct a fledgling regulatory system that gives policy makers new tools to impose and enforce economic regulation. China has gradually developed capabilities for setting economic regulation and thereby guiding market dynamics through regulatory agencies, commissions and administrative procedures that maintain an arm's-length relationship between state and market. This new system differs from the previous era in which the party and government dealt with the economy through open intervention, command and control regulation, and state ownership of major enterprises. This marks a fundamental transition in defining the boundary between the market and the state in China (Cheug, 2005; Pearson, 2005).

Administrative reforms launched in the late 1990s

The first 20 years of market reforms which commenced in 1978, witnessed six rounds of government reforms in China. Despite the initial downsizing that generally characterised these reforms, the long-term results were always re-expansion of the bureaucracy. In 1997, the State Council consisted of 40 ministries and commissions with some 36 000 staff members. Each economic and industrial ministry had in its purview some 80 000 to 100 000 employees in the so-called "public units", which were mostly semi-administrative in nature. All told, some 38.6 million people were on the state budget, including 8 million government functionaries and over 30 million public unit employees (Lu, 2009). The pressure to downsize this large bureaucracy mounted as the market reforms continued to expand.

While the early reforms were slow to take root, the pace accelerated noticeably in 1998, in terms of both downsizing and changes in institutional functions. The reforms were motivated by the need to have an effective bureaucracy capable of steering economic modernisation, and were focused on streamlining ministerial duties, centralising

administrative oversight and integrating merit into recruitment and promotion decisions (Chow, 2005; Lan, 1999).

1998 reforms: streamlined administrative authority and curbed bureaucratic fragmentation

The 1998 government restructuring programme reduced the number of central ministries from 40 to 29, trimming staff size by nearly half. Additional streamlining occurred within ministries, and the number of departments decreased by more than 200 (Yang, 2004). The most significant restructuring affected the industrial ministries – largely a legacy of central planning, which continued to maintain control and oversight of State-Owned Enterprises (SOEs). Many of these ministries were streamlined under the supervision of the State Economic and Trade Commission (SETC). This was particularly significant given that the previous structure gave each individual ministry informal veto power in economic policy making, which often resulted in deadlock (Shirk, 1993).

The 1998 reforms also lead to the creation of a number of "supra" regulatory bodies. These included the State Development and Planning Commission (SDPC), which had regulatory responsibility for a number of infrastructure sectors, and the SETC, responsible for industrial planning and investment regulation.

A clear objective of the programme's streamlining and integration was to promote the unity of administrative authority and to curb widespread bureaucratic fragmentation. But the shakeup in China's institutional structure was also matched by a transformation in economic philosophy. Clearly the administrative units responsible for industry under the SDRC and SETC were still charged with the formalisation and implementation of sectoral policy and regulation. However, they lost the authority to directly supervise SOEs and intervene in their affairs.

Institutional reform also took place at lower levels of government. Compared with the reorganisation of the central government in 1998, the downsizing of provincial and sub-provincial levels of government was both more significant and more difficult to implement (Yang, 2004). Even the smallest township had an administrative structure – with a full complement of administrative agencies and organs – that largely replicated those contained in the central government. Beginning in 1999, the central authorities began to formally promote local government reform to match central level reforms, following central guidelines. The industrial and commercial bureaus at lower levels of government were downsized and absorbed in provincial-level economic committees.

The next wave of reform, 2003

Following the 1998 reforms, a major issue – made all the more prominent by the abolition of the industrial administrations and the divestitures of SOEs – was how to promote the trend toward a relatively neutral regulatory state and yet maintain proper and efficient supervision over the multitude of state enterprises. The profusion of formal and *ad hoc* institutions overseeing the major SOEs elicited demands for simplification. In spring 2003, the State Council announced a new round of administrative reforms, the bulk of which affected economic institutions; mostly these focused on reducing institutional conflicts of interests and improving bureaucratic coherence. At the same time, the regulatory apparatuses in banking, food and drug administration, power, and workplace safety were elevated to higher or independent status.

The most prominent part of the 2003 plan was the dismemberment of the SETC, which had been one of China's most prominent institutions for economic governance within the State Council. The SETC's bureaus on state enterprises were transferred to a newly created State-owned Assets Supervision and Administration Commission (SASAC). The SASAC is a ministerial-ranked agency directly under the State Council, whose mandate is to promote the strategic restructuring of state enterprises and further separate government ownership, enterprise, and management. The SASAC is authorised to draft laws and regulations regarding the management of state assets, and to provide guidance for and supervision of its local equivalents, which look after the state enterprises owned or controlled by local authorities.

While most of SETC became the SASAC, the SETC's important policy and regulatory functions relating to industry – industrial planning and policy, economic operations and control, supervision of investment in technical renovation, macroeconomic policy guidance on enterprises of all ownership types, promotion of small and medium-sized enterprises, and planning for import and export of raw materials – were given back to the SDPC, rechristened the National Development and Reform Commission (NDRC). The NDRC was created with the aim of promoting coherent policy making and implementation. With the SASAC looking after key state firms, the NDRC is to become more even-handed in its policy making and regulatory functions, and formulate policies and strategies with the entire economy in mind. The removal of the word "planning" from its name affirms the trend toward using market-oriented mechanisms to manage the economy rather than reliance on approvals, permits, and microeconomic interventions.

Another area of lingering regulatory fragmentation was China's trade apparatus. The 2003 reform merged the Ministry of Foreign Trade and certain bureaus of the SETC and the former SDPC (domestic commerce regulation, plan implementation for the import and export of certain key commodities and products, including agricultural products) into a new Ministry of Commerce. This offered a more unified approach to trade regulation and facilitated China's compliance with the terms of China's WTO membership.

The emergence of "independent" regulators

With efforts to upgrade bureaucratic capabilities well under way, the State Council turned its attention to setting up new regulatory bodies. Beginning in 1992, China had established regulatory commissions governing key infrastructure sectors, including the China Securities Regulatory Commission, established in 1992; the Ministry of Information Industry, established in 1997; the China Insurance Regulatory Commission, established in 1998; the General Administration of Civil Aviation, established in 2002; the State Electricity Regulatory Commission, established in 2003; and the China Banking Regulatory Commission, established in 2003. A number of scholars noted that the establishment of these new regulatory commissions has been influenced by regulatory reform initiatives taking place in a number of OECD countries.[1]

In both established markets and transition economies, the benchmark for new regulatory agencies is the independent regulator. The reasons for setting up such an agency are well known;[2] key among them is to shield market interventions against interference from political and private interests. Establishing independent regulators can greatly improve regulatory efficiency as well. They are also a necessary institutional development for marking out the separation of the state's roles as policy maker and owner

of productive assets. This role is especially important in China, which has chosen to maintain significant ownership interest in a number of industries.

2008 reforms establishing a number of "super ministries"

The most recent restructuring was institutional reform initiated in March 2008. It involved the establishment of five "super ministries" – of industry and information, human resources and social security, environmental protection, housing and urban-rural construction, and transport, plus a ministerial-level energy commission. Several agencies were consolidated to form these new super ministries. The reshuffle involved 15 government departments; it reduced the number of State Council ministries and commissions to 27 from 28.

In addition to the consolidations, the plan appears to signal a number of potentially important policy reorientations. For example, the former State Environmental Protection Administration was promoted to the Ministry of Environmental Protection. Likewise, the State Food and Drug Administration was placed under the jurisdiction of the Ministry of Health, to clarify the latter's responsibility for food and drug safety. Finally, China also established a national energy commission; an inter-ministerial consultation and co-ordination body; and a state energy bureau, which is under the jurisdiction of the NDRC. In addition, the plan calls for the NDRC to focus on macro regulation and phase out its involvement in economic micro management and the examination and approval of specific investment projects.

It is too early to make a comprehensive assessment of the plan; its impact on government efficiency will only become clear once the reorganisation is complete. Nevertheless, it seems fair to conclude that the administrative reforms carried out between 1998 and 2008 have reshaped the structure of government. This has been manifest in the abolition of industrial ministries – at one time the core of the planned economy – and the creation of regulatory agencies. The adjustment of the government structure and its associated functions, together with the evolution of the relationship between government and state enterprises, should help define the boundary of the state and the market.

Crisis and international pressure

Unexpected crisis also played a role in the development of China's regulatory system. The SARS outbreak triggered a review and reform of the public health regulatory system, making it more transparent and accountable.

The "Made-In-China" crisis of tainted food and other substandard exports in spring 2007 led to a renewed effort by the central government to enhance product safety, especially of food and drugs. A series of new rules were issued after high-level meetings on product quality and safety in Beijing in late July 2007.[3] This crisis may have been responsible for the creation of the new Ministry of Health in 2008, which assumed control of the State Food and Drug Administration – a regulatory body that had come under significant criticism in the past two years for corruption and inaction (US-China Business Council, 2008).

Finally, the contamination of a number of food products with the chemical melamine in late 2008 resulted in renewed calls for food safety regulation. As a result of the crisis, China signed a new agreement with the EU that strengthens the exchange of information

over faulty products; improves the ability to trace dangerous goods; and increases co-operation in taking those goods out of circulation.[4]

Bureaucratic reality limiting more profound change

China has made remarkable progress in creating a modern regulatory system almost entirely from scratch over the past 30 years. At the same time, China has encountered significant difficulties in remaking its system of economic governance. While many changes have been made in the formal institutional structure, the country's political system is far from converging with the dominant regulatory model that exists in a large number of OECD countries. Several bureaucratic and institutional difficulties confront China's regulatory agencies that continue to hinder reform of its system of regulatory governance.

The resilience of supra regulatory bodies

Despite efforts to empower the regulatory agencies governing key infrastructure sectors, a number of China's central institutions have remained viable and in some respects have even been strengthened in recent years (*Lin, 2003; Yang, 2004*). Comprehensive policy agencies have guided many of China's market-oriented reforms. They should not be considered anti-market, yet their continued presence in the system has helped establish the importance of key goals – potentially regressive from a pro-market point of view – such as protecting state assets, establishing national champions, and fostering certain social policies. Moreover, their overwhelming power often trumps the ability of China's new regulators to gain authority and act independently.

Several powerful organisations at the apex of the Chinese party state are involved in regulatory matters. Perhaps the most important is the National Development and Reform Commission.[5] In 2003 the NDRC consolidated authority for industrial regulation to become the primary central government institution responsible for macroeconomic management. Two of the NDRC's main functions were the approval of large investment projects proposed by state enterprises and the oversight of pricing in the infrastructure sectors. These are functions that are generally left to firms and regulators in market economies. It appears that the NDRC has lost some responsibility for industrial regulation in the last round of government reforms. At the same time it has taken on new responsibilities for energy policy. The new National Energy Commission, positioned within the NDRC, will combine some of the existing policy and regulatory functions for managing the energy sector. The exclusion of other agencies in this reorganisation, such as the State Electricity Regulatory Commission, implies that policy formulation in the energy sector could continue to be burdened with bureaucratic in-fighting.

The newly created Ministry for Industry and Information will likely play a significant role in regulation of major industries and in examining and approving new industrial investment and projects. The impact of this reorganisation may well be felt by companies in the energy, transportation and healthcare sectors, among others. It is not clear how the Ministry's examination and approval responsibilities will dovetail with regulatory responsibilities in other parts of government, *e.g.* the National Energy Commission, the Ministry of Transportation and the Ministry of Health.

Finally, the Chinese Communist Party maintains an important strategic and supervisory role in economic reform. The State Commission Office for Public Sector Reform

(OPSR) is a powerful body within the central CCP and government apparatus. Lu (2009) notes that its operation remains little known to outsiders due to the nature of its main function – reforming and restructuring government and other public institutions. It decides the authority, functions, personnel and organisational structure of all major regulatory agencies. Moreover, when conflicts over authority among different bureaucratic bodies arise, the OPSR is usually responsible for arbitration. In addition, the Party's policies are developed through "leading small groups" (*lingdao xiaozu*) – joint party-state organisations consisting of high-level officials in a given sector. These groups oversee finance, telecommunications, electric power and many other industries. Thus, through the tools of leading small groups and appointment power, the party has maintained an important degree of control over its most strategic industries (Chan, 2003).

A fragmented institutional framework

The creation of almost all of China's regulatory institutions involved a reordering of existing power within an entrenched bureaucratic machine. Although it is relatively easy to grant regulatory rights to a new organisation, it is harder to take such rights away from organisations that once asserted substantial control and often maintain ongoing interests. A consequence of various government reshuffling programmes is the highly fragmented institutional framework for policy making. Protracted negotiation and bargaining among different bureaucratic actors is endemic to the system, even more so than in the relatively fragmented systems of some other OECD countries (Eisner, 2000; Lieberthal, 1992). A major result of fragmentation is that many agencies within the government have a role in policy formulation.[6]

The difficulty arising from situations in which old bureaucracies, if not dismantled, retain an interest in regulatory policy is made worse by the fact that China's independent regulatory agencies have an ambiguous and ultimately weak status in the system. Many of the new agencies have a bureaucratic status within the political system similar to institutions that do not wield formal political authority. The three financial services regulators and the electric power regulator are *shiye danwei,* usually translated as "institutions".[7] The poor statutory demarcation of roles and responsibilities among the new regulators continues to cloud their authority, and hence their effectiveness.[8]

The independence of agencies

A deeper consideration as to the meaning of "independence" and its underlying assumptions is needed when assessing the status of regulatory agencies in China. In OECD countries the term refers to institutions that operate at arm's length from political and private interests. However, regulators in China owe their positions to the political-bureaucratic elite, and the possibilities for the exercise of independent judgements and action may be limited (Minogue, 2006). Thus, the core ideal of independent regulation in China may rest on the simplistic view given that economic governance cannot be insulated from overriding political considerations (Minogue and Carino, 2006). Creating institutions outside the realm of government does not of its own accord reduce the imperatives of politics, or render regulatory policy making any less deeply political than it already is.

Clearly, the Chinese government has seriously engaged the need to remake itself – that is, to undertake substantial administrative restructuring and institution building along lines followed by many OECD countries. Efforts to reform the administrative system and to create new institutions of the regulatory state have gone hand in hand with the

corporatisation of the economy and attempts to radically separate state firms from their former government patrons. But the attempt to add new institutions, processes and ideas, and even to eliminate some of the old hindrances, has not created a seamless transformation to a brand new system of economic governance. Rather, the new system of economic governance has, for the most part, been grafted onto other parts of the system that appear much less adaptable to change. From an institutional perspective, extremely fragmented politics characterised by protracted bargaining among interested bureaucracies remains a fact of political life, as does the conscious attention to formal government hierarchy and the positioning of units within it. Reformers designing China's new system of economic governance face the age-old problem of how to invest new regulatory institutions with authority in the context of powerful competing claimants to that authority.

The institutional framework for the creation of regulation

China has a complex array of legislative organs and agencies that have the legal right or the practical power to make variously binding regulations. The formal lawmaking structure of the Chinese regulatory system is set forth primarily by the Constitution, the Law on Legislation and the State Council's Regulation on the Procedures for the Enactment of Administrative Regulation. The National People's Congress (NPC) and its Standing Committee are at the apex of the regulatory system. Both have the power to pass primary legislation that has more authority than any other kind of legal instrument other than the Constitution. The State Council may enact administrative regulation in furtherance of constitutional and legislative objectives. The Local People's Congress – at the provincial level and for certain large cities – may enact "local regulation" to govern local issues. All the preceding regulations have the formal status of law within the Chinese legal system and are, in theory, enforceable by courts (Peerenboom, 2002, Yang 2004).

In addition to the formal structure outlined above, a number of other organs and agencies have regulatory power in China. Executive agencies of the State Council, sub-national-level government agencies and the Local People's Congress (below the provincial level) enact a host of rules, opinions and instructions that may best be described as "tertiary" regulation (Keller, 1994). The Constitution and other relevant statutes make it clear that tertiary regulation must yield before regulation of higher status. The problem is that there is no effective system either for enforcing jurisdictional and subject matter limitations on any particular body's lawmaking power, or for resolving the conflicts that consequently and invariably arise (Clarke, 2008).[9]

The court system would appear to be ideally suited to examine conflicting rules and overly ambitious claims of jurisdiction. This is not the case, however, in China. Although Chinese courts should, from a constitutional perspective, recognise and rule in accordance with high-level regulation rather than conflicting lower-level regulation, they are prohibited, constitutionally, from invalidating legislation. This prohibition is generally interpreted to mean that courts must uphold conflicting lower-level regulation, at least when it is issued from the same level of government that controls the court in question. In short, courts must either seek a resolution for the conflict from a high-level legislative organ, or rule in accordance with the lower-level regulation. Another important feature of the Chinese regulatory system that works against consistent enforcement is the dependence of courts on local government.

Regulation at different levels of government

A defining theme in Chinese economic reforms has been relations between the central and sub-national governments. Many major reform measures have touched upon these relations, which indeed have been crucial to the success of the reforms. Regulatory reform is no exception; it is an essential part of evolving central/sub-national relations. In fact, regulatory reform launched in the late 1990s can be seen as a corrective response to the problems caused by the decentralisation that had had its successes in the early period of reform.

China has a multi-level governance system with five sub-national levels: province, prefecture, county, township and village. Provincial governments sit above administratively subordinate prefecture governments, and so on down the line. The Chinese government is also divided into a broad functional system. The State Council is at the top of the government hierarchy. Below the State Council are agencies (commissions and ministries) that sit atop a functionally defined hierarchy of government units that exist at each territorial level of government. Thus, central agencies may have functional bureaus at the provincial, prefecture, county and township/village levels.

The inherent potential for conflict

This system carries an inherent potential for conflict: the functional authority between the vertical relations of administrative units *versus* the horizontal authority that emanates from the territorial government at the same level as a functional unit. The Chinese administrative system has long been characterised by the conflicts between centralised authority and the vertical structure (*tiao-tiao*) and territorial authority and horizontal structure (*kuai-kuai*).[10] These relations have been a defining and central feature the effectiveness of the regulatory regime.

Two types of political relationships further define the Chinese administrative system: those governed by binding orders, and those based on non-binding instructions. Any political unit in China has the second type of relationship with any number of other units. But it has the first type of relationship with only one, its direct "superior". A relationship based upon such binding orders is referred to as "leadership relations" (*lingdao guanxi*) while the other type is based on "professional relations" (*yewu guanxi*). In theory, centralised authority ensures that higher-level government decrees are implemented smoothly and uniformly. On the other hand, territorial authority-based leadership relations help local governments achieve a degree of independence from external influence, enhance sensitivity to local conditions in the policy process, and facilitate co-ordination between functional departments.

Early reforms and territorial authority's priority over central authority

While the specifics vary considerably, the first 20 years of economic reforms saw territorial authority take priority over central authority.[11] Early reforms in China resulted in a largely decentralised political system: leadership relations were often not with administrative superiors but *with local governments at the same administrative level* (Lieberthal and Oksenberg, 1988). The decentralisation of economic and political decision making to local governments was largely an attempt to establish the conditions necessary for markets to take root. At the same time, decentralisation also led to a high degree of local

protectionism and low national standards regarding policy implementation and enforcement.[12]

In an effort to counter these difficulties a new trend has emerged, which entails the partial centralisation of a number of key bureaucracies. This trend was started in the late 1990s in order to regulate and discipline local government agents in their management of the economy and the implementation of policy more generally (Table 2.1). Under this "centralised management" (*chuizhi guanli*) system, individual units within these bureaucracies are no longer beholden to superiors within local governments; rather, they are directly controlled by their functional administrative superiors and have only a consultative relationship with their former local government bosses. This centralisation, moreover, does not appear to be a temporary measure like the macroeconomic adjustments and retrenchment undertaken earlier.

Table 2.1. **Centralisation of regulatory institutions**

Name of agency	Centralised management	Form of integration and function	Since when
State Administration for Industry and Commerce	Yes	Sub-provincial units by province	1999
Financial services and products (insurance, banking, stock markets)	Yes	All with regional branch offices	1998
Quality and product safety (AQSIQ)	Yes	Sub-provincial units by province	2000
Environmental Protection (SEPA/MEP)	No	Regional offices, monitoring and supervision	2006
State Land	Yes	Sub-provincial units by province	2004
Statistics	Yes	All survey teams, stats collection and report	2004
Food and Drug (SFDA)	Yes	Sub-provincial units by province	2000
Occupation safety (SAOS)	Partial	Coal mining safety regulation	2005
Public health (MOH)	No		
State Audit	No		

Source: Lu, 2009.

Mertha (2005) refers to this trend as "soft centralisation", because although these bureaucracies are centralised from the township and county to the provincial level, many remain decentralised between the centre and the province. It appears that the principal beneficiaries of this shift to centralised management are the provinces, as the institutional mechanisms of personnel and budgetary resource allocations are concentrated at the provincial level. This has curbed localism to a degree. However, by transferring power from local governments to the newly centralised bureaucracies, it has also contributed to a situation in which newly strengthened provinces may play a key role in the emergence of a sort of quasi-federalism. Mertha (2005) goes on to argue that Beijing's experiment with soft centralisation, while somewhat successful, has nevertheless fallen short in its goals; thus far the transformation remains imperfect and incomplete.

Tools for regulatory quality

China has made remarkable progress in improving its legal and regulatory system, having essentially begun from scratch in 1978. Most if not all of China's regulatory environment is structured formally by a largely robust framework of laws and regulations. At the same time, its regulatory system has seen unprecedented growth with the promulgation of numerous commercial and civil laws at national and local levels. While the emphasis on lawmaking contributed to the growing authority and capacity of the

National People's Congress during this period, numerous inconsistencies and ambiguities created a level of tension within the regulatory system as a whole. Largely because of a shifting distribution of authority among the NPC, the State Council and the sub-national (primarily provincial) people's congresses, the regulatory environment is occupied by a number of agencies that have engaged in institutional turf wars at many stages of the lawmaking process.

The Legislation Law

Faced with the possibility of regulatory inconsistency derailing economic reforms, in the early 1990s China's political leadership began to consider a law on lawmaking so as to set out a more clearly defined and uniform regulatory hierarchy.[13] The *Legislation Law* represents a significant attempt to produce a more orderly and open legislative system in China.[14] The Law addresses substantive and procedural issues in the regulatory process and is a key instrument for the quality of lawmaking in China. Importantly, it sanctions, though does not require, the use of public legislative hearings as a mechanism for incorporating greater citizen participation in the legislative process. The submission of the Legislation Law coincided with a dynamic period for the development of rule of law in China.[15]

In order to be effectively implemented, the Legislation Law had to address a variety of challenging and sensitive issues. These include the vertical division of central and local legislative powers, the horizontal distribution of legislative powers between the National People's Congress and State Council hier-archies, the relationship between laws and regulations issued by compet-ing authorities, supervisory authority over laws, administrative regulations and rules, legal interpretation, and legislative processes and procedures.

A key governance challenge relates to the emergence of a quasi-federalist system in China. This has been characterised by an emerging division of legislative power among central and local legislatures and governments. The high degree of discretionary power at the local level has resulted in widespread local protectionism and attendant abuses of the legal system, corruption and uneven application of laws.

The Legislation Law addressed directly the division of authority between the NPC and sub-national people's congresses, which were determined to secure the rights of their locales. The Law clearly spells out the broad areas in which the central government has exclusive regulatory authority. This was met with resistance from provincial government, which argued that the authority of localities should be defined as well. In this regard, the Law formalised the long-standing practice of drafting "advance legislation"*(xianxing lifa)*. This ensures local government's ability to pass regulation in areas not yet legislated by the centre under the condition that it can be voided later once the national government has legislated. Both the NPC and local governments seemed to be in favour of this arrange-ment since it facilitates local experimentation, which often serves as pilot for national legislation.

Increasing progress in improving regulatory transparency

China has been making ever increasing progress in improving regulatory transparency and open access to government information. This is a considerable achievement given the 2000-year-old legacy of administrative secrecy which long predates the current Communist party regimes (Horsley, 2006). Lack of access to information was particularly acute during

the central planning era, when the Chinese government monopolised the production and dissemination of all types of information, including those in the area of law and regulation. But from the late 1970s, Chinese leaders began to see the need for more open availability to information in support of economic development. By the late 1990s, programmes to promote regulatory transparency – under which government agencies at all levels would release ever increasing amounts of information about their functions and activities, and provide services over the Web – had become widespread. This trend was formalised in China's accession commitments to the WTO, which called for making trade-related rules and requirements readily available to both domestic and foreign firms.

In 2001, the State Council issued *Regulations on the Procedures of Making Administrative Rules and Regulations,* to standardise the rulemaking procedures and so improve the quality of the processes. The creation and revision of regulation is by law delegated to the State Council and its administrative institutions. This legal base aims to bring better analysis and concentrate activities by specialisation, but also seeks more co-ordination and improves supervision. One of the latest efforts of the State Council was the establishment of the *Guideline for Advancing Administration in Accordance with the Laws*, issued in 2004. The intention was to set up a framework for continuing to build a law-based society. In addition to the above rules, individual agencies with regulatory functions have their own guidelines for the drafting of normative documents.[16] These internal provisions are based on the *Regulation on the Procedures for the Formulation of Rules* and are integrated with the specialised requirements of the respective regulatory departments. These procedures establish the basic principles for regulatory transparency.

Public consultation procedure

Public consultation is not a legally guaranteed right at present. Nevertheless, provisions for public consultation are included in the *Ordinance Concerning the Procedures for the Formulation of Administrative Regulations* and the *Regulation on the Procedures for the Formulation of Rules*. Similar provisions can be found in the rules of some individual departments and local governments for drafting regulations.

During the authorisation and application phase of drafting local government regulations, the public are entitled to apply for authorisation of regulations. However, there is no such stipulation in the administrative rules and regulations on the procedures for the drafting of regulations in government ministries and commissions. During the drafting period, the primary means of consultation include symposia, panel discussions and hearings. For those involving the immediate interests of citizens or where great differences of opinion exist, a hearing must be held and the results made public.

The *Regulation on the Procedures for the Formulation of Rules* sets forth four procedural requirements for holding a hearing.

- The hearing should be open. The drafting unit should publicise the time, place and content of the hearing 30 days prior.
- Related departments, organisations and citizens attending the hearing should be entitled to question and express opinions on the regulation being drafted.
- Accurate notes should be taken during the hearing to record speakers' opinions and the reasons for their opinions.
- The drafting unit should carefully study opinions presented in the hearing. The drafted regulation, when submitted for approval, should mention any conflicting opinions

presented at the hearing, their reasons, and how a settlement was reached to resolve such differences.

The *Regulation for the Formulation of Rules* stipulates that opinions from concerned parties shall be recorded and listed during the drafting of administrative and local rules. Experts shall be called upon to expound on professional or technical issues related to the drafting of regulations. During the period of examination, the investigating organ shall examine whether the drafting organ has correctly handled opinions on the draft regulation from different organisations, institutions and individuals. In the case that "no hearing record" or "no record of different opinions" is provided, the investigating organ shall "postpone or return to the drafting unit."

Improvements in these regulations indicate that the Chinese government is aware of the necessity and importance of ensuring public openness. However, current regulations do not provide complete guarantees. A formal standard for determining whether regulatory affairs are important or bear upon a citizen's immediate interests does not exist. The regulatory organ has full control of the right to decide whether a hearing is held and how the hearing is organised. Despite the requirement that different opinions be recorded in the draft regulation for examination, there are no requirements regarding the authenticity or scope of the opinions recorded. No regulations are available concerning participants in, or the effectiveness of, the hearing. The hearing functions merely to provide information to the regulatory department for decision making. Furthermore, a number of non-compulsory clauses accord the investigating organ excessive discretion, which makes it possible to exclude the public from regulation drafting procedures. At the same time, the public lack the means to appeal in such cases.

A major initiative to open access to government information

The *Regulations on Open Government Information* (OGI Regulations) marks a turning point in making Chinese government operations and information more transparent.[17] These regulations provide the legal basis for China's first nationwide government information disclosure system. Moreover, under China's unitary legal system, the OGI Regulations will not only apply to central government agencies but also extend the disclosure obligation downward through the Chinese government hierarchy to the provinces, counties and townships, the country's lowest level of government.

The stated purpose of the OGI Regulations is to ensure access to government information in accordance with the law; enhance the transparency of government work; promote law-based government administration; and have government information used in service of citizens' productivity and livelihood as well as social and economic activities. The Regulations define "government information" subject to disclosure more broadly than some local provisions, as "information recorded or preserved that is issued or obtained by administrative agencies in the course of carrying out their duties." They establish two methods of accessing government information: dissemination by government agencies on their own initiative, and disclosure in response to requests for information within 15-30 business days. The OGI Regulations stipulate the types of information to be disseminated by government agencies on their own initiative generally and at different levels, as well as various means of disseminating information. For example, they call for publicising information through official websites (of which there are already more than 10 000 throughout the country), government gazettes, news conferences and broadcast

media, community bulletin boards and reading rooms established in archive offices, public libraries, community centres and government agencies.

The OGI Regulations also follow earlier local OGI provisions in stipulating in some detail the categories of information that government agencies at different levels should ordinarily make public on their own initiative. This detailed approach to information dissemination, not frequently encountered in international practice, makes sense in the Chinese context given the lack of a tradition of public records and other forms of government transparency. The Regulations call for disclosure on the government's own initiative of information relating to government structure, functions and procedures as well as information that affects the "vital interests" of the public and matters that society broadly needs to know about or participate in.

Another aspect in which the OGI Regulations appear to depart from prior Chinese as well as OECD practice is the narrowly described scope of information that can be requested from government agencies.[18] Experience under existing freedom of information systems in OECD countries demonstrated the importance of not subjecting information requests for non-published records to any needs test or limitations. Given that one of the goals of the Chinese OGI system is to curb corruption and ensure good governance, it is important that citizens and the media be able to utilise the information request function to understand and better supervise government, as well as to more effectively engage in economic activities.

Central register

China does not yet have a central register of the supervisory regulations; that is being developed. However, it has established a uniform record-filing system for rules and regulations. Local decrees enacted according to legal authority and procedure by the following bodies shall, within 30 days of the date of promulgation, be submitted to the State Council for filing: the People's Congress of a province, autonomous region, municipality under the central government or large city, and the standing committee thereof; Special Administrative Regions (SAR), if the decree is enacted according to legal authority and procedure by the People's Congress of the province or city where the SAR is located, and the standing committee thereof; and the People's Congress of the autonomous prefecture or county.

According to Article 8 of Ordinance on the *Archivist Filing of Regulations and Government Rules,*"the filed and registered regulations and rules shall be promulgated by Legislative Affairs Office of the State Council on monthly basis. Scope of compiling and publishing the collection of regulations and rules shall be based on the promulgated contents of regulations and rules." In addition, the China National People's Congress website (*www.npc.gov.cn/zgrdw/home/index.jsp*) provides a database of regulations and rules.

Quality of legal drafting

Despite marked improvements in the standard of legal drafting in China over the past decade, regulation still tends to be drafted in language that is less than plain. Legal drafting tends to be characterised by broadly worded assertions and general catch-all clauses (Clarke, 2007). Basic law is customarily written ambiguously in the form of principle-like pronouncements, often providing only vague parameters of regulation.[19] There may be a rationale behind this approach. The drafting of law with greater detail and more precisely tailored regulations should promote economic development by increasing certainty and

more clearly defining market rules. However, detailed law limits the flexibility that the Chinese government currently enjoys in its ability to respond to rapid change, which is emphasised as an important virtue by China's political leadership.

The attitude until fairly recently towards lawmaking favoured short-term flexibility and the advantages of ambiguity over long-term considerations. This is still particularly true in the field of administrative regulation, for which adaptability is upheld as a meritorious feature. Consequently, most economic law in China has been meant only to outline basic policy, allowing any problems that arise to be solved on a case-by-case basis. More recently the NPC, in its effort to take control of most lawmaking, emphasises the stability (*wendingxing*) of law as a countervailing force to the principles elucidated above. To the extent that law does not contain a high degree of detail, however, it is still unable to ensure the stability of administrative regulations that are issued in its wake.

Administrative regulations are enacted to implement basic law and to add some detail to many of the matters left outstanding by the higher law. However, they too almost invariably exhibit the features outlined above, especially in controversial areas where a consensus among the drafters or between powerful interest groups has not been forged. Administrative regulations issued by the State Council also tend to exhibit the above features, as do lower-level rules enacted by State Council departments and local governments. Although the style of lawmaking in the economic sphere, particularly related to trade and investment legislation is less ideological and more concrete than are other types of laws, this is only a matter of degree and has by no means precluded foreign economic legislation from exhibiting the features listed.

Administrative and judicial review

The Chinese government has sought to strengthen various mechanisms for limiting administrative power and providing individuals with legal remedies against government agencies that have exceeded or abused their powers. At present, two procedures exist for disputes involving the central or local government: the first is an administrative review called administrative reconsideration, while the second is a judicial review referred to as administrative litigation. While these two procedures offer individuals important rights to seek legal redress, further reforms are needed to fully realise the potential of these mechanisms.

Administrative reconsideration

Administrative reconsideration is a form of alternative dispute resolution established under Administrative Reconsideration Law (ARL), which became effective in 1999. The scope of administrative reconsideration includes most enforcement actions and lower-level normative documents. The criterion of administrative reconsideration review for a specific administrative action is, "the facts are clearly recognised, the evidence for the action is conclusive, the application of grounds is correct, the procedure is legitimate, and the content of the action is proper."[20]

Administrative reconsideration is a common means for reining in administrative discretion and making administrative agencies act in accordance with law. It has several advantages over judicial review. Administrative review bodies may have a better understanding of the issues than courts of general jurisdiction, particularly with regard to highly technical matters. They may also have a better sense of the realities of running the

government and the difficulties of setting policies. Administrative reconsideration is also often faster and less expensive than litigation in court.

Despite the potential value of administrative reconsideration, it has not in fact been a very effective means of reining in administrative discretion. Relative to the total number of specific acts, the number of administrative reconsideration cases is small (Yang, 2004). The effectiveness of administrative reconsideration has been hampered by a number of factors, including the low level of legal awareness on the part of citizens; concerns of retaliation from administrative organisations; the failure of agencies to comply with procedural requirements – including the requirement to inform parties of the right to reconsideration; and the fear of losing face, causing agencies to settle disputes with disgruntled parties. There are, however, obstacles specific to administrative reconsideration, including problems with jurisdiction, scope of review, limits on standing, procedural shortcomings, and exclusion of certain normative documents from review (Yang, 2004).

Like the courts, reconsideration offices are subject to a wide range of external pressures, primarily from local governments. However, they also have the problem of being part of the agency that made the administrative decision under review. Some legal systems in OECD countries attempt to obtain greater independence by staffing the reconsideration offices with personnel who are provided similar tenure to judges, and whose promotion and other personnel matters are handled by a different government agency. They also require that the person who investigated the complaint not be the same person who hears the case, and impose strict limits on *ex parte* communications between the agency personnel and the reconsideration body personnel. At present, China has no such restrictions.

There are also various procedural problems that limit the effectiveness of administrative reconsideration. The deadline for challenging a decision is short – 60 days from the time the affected party becomes aware of the decision, except in unusual circumstances.[21] Moreover, the ARL spells out very few procedural requirements. The decision to hold a hearing is left to the reconsideration office. If a hearing is held, the parties are often passive and unclear as to their rights to participate at the hearing, although they may retain counsel.[22] The ARL provides that applicants may review the evidence supplied by the defendant agency except where state secrets are involved. However, it does not expressly give the applicant a chance to respond to any of the evidence provided by the agency. The review body can carry out investigations or take depositions from interested parties, but whether to do so is up to the review body.

To enhance the functions of the administrative reconsideration system, local governments and relevant administrative departments in various regions have introduced a number of innovations and reforms in recent years, by introducing public trials, hearings, conciliations and expert consulting mechanisms into administrative reconsideration procedures and implementing them in practice.[23]

Administrative litigation

If an individual or enterprise does not wish to pursue administrative reconsideration or, having pursued it, is dissatisfied with the decision, administrative litigation with the appropriate People's Court is an alternative approach. The Administrative Litigation Law (ALL), which came into effect in 1990, governs the administrative procedures for litigation.

The administrative litigation is limited in scope and only covers "concrete administrative acts".[24] It provides two criteria for review: the "legitimacy" review is the principal form and the "rationality" review is used in exceptional circumstances. Legitimacy review mainly determines whether the major evidence is reliable and sufficient; whether the application of law and regulation are correct; whether there is any violation of legal procedures; and whether there is any failure or delay in performing legitimate duties. Rationality review determines whether there is any abuse of power or whether the administrative penalty is obviously unfair.

In terms of application of law, the courts review the administrative actions in accordance with laws, administrative regulations, local regulations, autonomous regulations and separate regulations. When making reference to rules and regulations, the courts are required to judge whether the provisions therein are legitimate and effective. The specific application explanations and other normative documents formulated by administrative agencies do not have the binding effect of laws and regulations on the courts.

The overall effectiveness of administrative litigation has been limited, judging by the relatively small number of suits relative to the extremely large number of administrative acts and decisions that could be challenged.[25] To some extent, the limited effectiveness of administrative litigation is due to underlying shortcomings of the Administrative Litigation Law. For instance, standing requirements limit the effectiveness of judicial review in China. The ALL allows parties to bring suit when their "legitimate rights and interests" are infringed upon by a specific administrative act of an administrative organ or its personnel.[26] The requirement that one's legitimate rights and interests be infringed upon appears to have been construed narrowly to prevent those with only indirect or tangential interests in an act from bringing suit.

A difficult issue faced by all judicial systems is how deferential judges should be to administrative agencies. In China, courts do not have the power to review abstract acts (generally applicable administrative rules). They may only review specific acts, and then only for their legality rather than for their appropriateness.[27]

The courts in China have not been proactive in using their powers to review agency acts. The ALL authorises the court to annul or remand for reconsideration administrative decisions if the agency makes its decision without sufficient essential evidence, incorrectly applies laws or regulations, violates legal procedures, exceeds its authority or abuses its authority.[28] Similarly, "exceeding authority" and "abuse of authority" permit a wide range of interpretation, and have been interpreted in other countries to include principles of proper purpose, relevance, reasonableness, consistency with fundamental rights and proportionality.

Regulatory impact analysis

Regulatory impact analysis (RIA) is a core tool for regulatory quality. Its definition nonetheless varies greatly. The OECD defines RIA as "a systematic policy tool used to examine and measure the likely benefits, costs and effects of new or existing regulation" (OECD, 2008, p. 14). There is a tendency to view RIA simply as the final document that accompanies a regulatory policy proposal, or as an analytical method often associated with cost-benefit analysis. While RIA takes the tangible form of an analytical report that supports decision makers, the notion of RIA should be understood more widely as an

integral part of the regulatory reform programme, embracing an institutional, organisational and procedural dimension. RIA is a *process* of evidence-based decision making. Its use should assist governments in making their policies more efficient, legitimate and predictable.

Use of regulatory impact analysis has remained limited in China, which does not yet have institutions established to implement RIA programmes. However, the nationwide review accompanying the implementation of the *Administrative Permission Law*[29] indicates that the thinking of China's regulatory authorities is evolving along conceptual lines leading in the direction of RIAs.

RIA is a process that assists policy makers; it does not substitute for their decisions. The OECD formulated ten fundamental questions that comprise the 1995 *OECD Checklist for RIA* (Box 2.1). The Checklist should help the Chinese authorities develop regulations that are systematically assessed to ensure that they meet their intended objectives efficiently and effectively in a changing and complex world.

Box 2.1. **The OECD Reference Checklist for Regulatory Decision Making**

1. **Is the problem correctly defined?** The problem to be solved should be precisely stated. Evidence of its nature and magnitude should be provided, along with the reasons it has arisen (identifying the incentives of affected entities).
2. **Is government action justified?** Government intervention should be based on explicit evidence that government action is justified, given the nature of the problem, the likely benefits and costs of action (based on a realistic assessment of government effectiveness), and alternative mechanisms for addressing the problem.
3. **Is regulation the best form of government action?** Regulators should carry out, early in the regulatory process, an informed comparison of a variety of regulatory and non-regulatory policy instruments, considering relevant issues such as costs, benefits, distributional effects and administrative requirements.
4. **Is there a legal basis for regulation?** Regulatory processes should be structured so that all regulatory decisions rigorously respect the "rule of law"; that is, responsibility should be explicit for ensuring that all regulations are authorised by existing higher-level regulations, are consistent with treaty obligations, and comply with relevant legal principles such as certainty, proportionality and applicable procedural requirements.
5. **What is the appropriate level (or levels) of government for this action?** Regulators should choose the most appropriate level of government to take action – or, if multiple levels are involved, should design effective systems of co-ordination between levels of government.
6. **Do the benefits of regulation justify the costs?** Regulators should estimate the total expected costs and benefits of each regulatory proposal and of feasible alternatives, and should make the estimates available in accessible format to decision-makers. The costs of government action should be justified by its benefits before action is taken.
7. **Is the distribution of effects across society transparent?** To the extent that distributive and equity values are affected by government intervention, regulators should make transparent the distribution of regulatory costs and benefits across social groups.
8. **Is the regulation clear, consistent, comprehensible and accessible to users?** Regulators should assess whether rules will be understood by likely users, and to that end should take steps to ensure that the text and structure of rules are as clear as possible.

Box 2.1. **The OECD Reference Checklist for Regulatory Decision Making** *(cont.)*

9. **Have all interested parties had the opportunity to present their views?** Regulations should be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties such as affected businesses and trade unions, other interest groups, and other levels of government.
10. **How will compliance be achieved?** Regulators should assess the incentives and institutions through which the regulation will take effect, and should design responsive implementation strategies that make the best use of them.

Source: OECD (1995).

Keeping regulation up to date and improving the business environment

Efforts to simplify administration

While all governments impose certain regulatory requirements on business and citizens, Chinese government agencies inherited from the era of central planning an elaborate system of licensing and approval requirements. The introduction of market reforms provided an important opportunity to reduce the scope and impact of many regulatory requirements that were once widely used in central planning. Yet China has continued to have one of the most elaborate administrative approval systems in the world,[30] one which empowers government agencies to make decisions that are often best left to the market. Such a system, moreover, generates numerous rent-seeking opportunities for bureaucrats and serves as a powerful incentive for them to block regulatory reforms.

Along with the downsizing and streamline of the administration, the Chinese leadership has also recognised that the power of the administration must also be limited. Central to these efforts was an administrative simplification drive to reduce the number of government approvals and licences. These reforms have most commonly been described in China as "administration in accordance with law" (*yifa xingzheng*); they include efforts to limit bureaucratic discretion, to improve administrative transparency and to recast the administration as a public service. This initiative appears to have been motivated by a number of factors, including the priorities of improving bureaucratic efficiency, curbing corruption within the Chinese administration and complying with the terms of WTO membership.

Even though reform of the administrative approval system was part of the overall government reforms beginning in 1998, there were few tangible results early in the process. In 2001 however, the central leadership, having completed the central government downsizing and reorganisation, took up the cause of reforming administrative approvals and licensing with renewed effort. In August 2002, the State Council announced that its departments had made an inventory of 4 159 administrative approvals and licensing requirements.[31] The State Council departments recommended retaining 3 297 items and scrapping the rest. After vetting these recommendations, the State Council announced the cancellation of 789 approval items from 56 governmental departments on 1 November 2002. In line with the drive to improve economic performance, 560 of the administrative approvals and licensing requirements that were scrapped were economic in nature. A few months later, the State Council announced the abolition of a second batch of 406 items.

Following the State Council announcement, individual government departments followed with details of respective reforms under their authority.[32] As most central government requirements have local equivalents, the State Council's announcement also gave new impetus to provincial and municipal efforts to rationalise administrative approval and licensing regimes at the sub-national level.

To sustain and consolidate these reforms, the State Council Office of Legal Affairs prepared the Administrative Licensing Law (ALL), which took effect on 1 July 2004. The ALL represents a systematic effort to delimit the scope of administrative licensing and specify the standards and norms for the establishment of administrative requirements. It stipulates that only the National People's Congress and provincial-level People's Congress (under certain circumstances) have the authority to establish administrative licensing requirements. While the State Council can impose interim administrative approval requirements, it needs to seek formal legislative enactment through either the NPC or its standing committee in a timely manner. More stringently, provincial-level governments cannot implement interim requirements for more than a year without securing formal legislative enactment through the corresponding legislatures, and even then only within certain limits. In a major departure from past practice, agencies within the State Council or local governments can no longer impose administrative licensing requirements on their own.[33]

The ALL also sets forth a set of principles for the establishment of administrative approval and licensing requirements. In general, the ALL confines licensing requirements to areas concerning national security, public safety, macroeconomic control, ecological and environmental protection, and personal health and safety. While the ALL allows for exceptions, the regulation of professions, industries and legal persons as well as equipment, products and commodities must be justified on the basis of public interest. Under this principle, a rule of minimalism applies: no administrative approval requirement should be established where citizens, legal persons, and organisations can decide for themselves where the market is sufficient, where the industrial association or intermediaries can self-regulate, or where the administrative agency can supervise after the event. Against the background of excessive government interference in business and personal life, the balance of the ALL is tilted toward the protection of the rights and interests of businesses and citizens. Many articles in the ALL are designed to promote transparency, fairness, and good service.

The growth of e-government

In China, the state of e-government reflects the transitional nature of contemporary Chinese society toward a "socialist market economy". The country's information society, which is just beginning to develop, has persisting digital divides, *i.e.* diffusion and access to information and communication technologies (ICT) are uneven. Although Internet penetration has grown rapidly in wealthy urban areas, it remains fairly low in per capita terms. Despite these drawbacks, China's leadership has set out to promote e-government with an eye on its relationship with broader reforms in law, administrative institutions and macroeconomic management.

Achieving China's ambitious e-government programme will first entail meeting a number of implementation challenges, many of which are more general challenges for the Chinese administration such as the legal and budgetary framework and inter-agency collaboration. The OECD generally advocates that the current commitment to reform

through e-government should be used to bring pressure to bear on addressing a number of priority areas.

A key goal for the Chinese authorities is to make greater use of one-stop shops. Making one-stop service a reality requires more than electronic service portals. The Chinese government will need to look at how it can streamline and improve the horizontal and vertical relationships within government in order to increase co-ordination and collaboration for seamless service delivery. Deeper back-office reform is needed in order to improve customer focus and data sharing among bodies and to eliminate institutional barriers that lead to redundant systems and inconsistent programme rules. In addition to its guiding principles, China needs more detailed implementation plans that specify priority orders, procedures and ways of adjusting to a changing environment.

Conclusion

The aim of this chapter is to promote discussion on the development of regulatory governance in China and the relevance of regulatory approaches adopted by OECD countries. A wide range of issues deserve further thought in determining regulatory options for China.

The understanding of the "regulatory state" notion itself is currently modest for even OECD countries, and greater consideration is presently needed to improve the knowledge of components such as "regulation inside government". The regulatory state model may even have limited direct relevance and utility for states such as China. Likewise, the difficulties of achieving independence outside the political-bureaucratic elite compromise the possibility of independent regulatory judgement and action. Moreover, the notion of regulatory agencies outside the influence of politics seems remote, given the deeply political nature of regulatory policy making and the broader domination of politics in regulatory governance. Traditional analyses of the performance of regulatory state components are also often not as strong as would be ideal. And as well as the professionalism required from the new regulators, the biggest challenge of all may be the underlying sense of trust required from both citizens and institutions as to the legitimacy of the new rules of the game.

Greater experimentation with aspects of regulatory systems may thus be required of China in its path forward, along with an improved knowledge base of both Chinese regulatory systems and what works in reality. Suggestions for relevant regulatory reforms in China will therefore need to ensure that there is a greater likelihood of the public interest being met in practice than private interests. Reforms may also usefully focus on improving regulatory relationships and efficiency inside government, as well as looking carefully at the cultural, historical and political parameters built within traditional Chinese regulatory and governance systems. Better regulation through indirect means may also be possible. Increasing the transparency of public sector institutions and government decision-making and activities will no doubt provide progressive incentives for changed behaviour. Similarly, improvements in real transparency and strengthened accountability to citizens may provide as much regulatory leverage as institutional reforms in the future.

A major intellectual challenge is to better understand how countries review, learn, revise and improve their regulatory systems as experience is gained. Part of this learning will involve assessing the degree to which China might take on ideas from other countries by way of copying, emulating, harmonising or adapting, as distinct from "home-growing"

regulatory solutions. And where ideas are gleaned from international experience, should reformers rely on the most common (and probably reliable) practices of governments, or those outliers most visible on a "best-practice frontier" and popular among the international community selling and advocating regulatory ideas? In translating regulatory models, crucial assumptions such as the power and legitimacy of a democratic polity are often taken for granted. These include a rule of law underpinning commercial contracts; an independent judiciary upholding regulatory decisions; consumer voices giving feedback on essential services; and a wide range of transparency and accountability mechanisms. The extreme position of transferring the regulatory state model from OECD countries into China may even be a "fatal remedy". Such a transplant risks the criticism of naivety in the attempt to remove politics from the institutions of regulation, and an overly anxious preoccupation with the notion of independence.

Caution and learning are thus needed in articulating regulatory reform options rather than haste towards simple reform models. The extent to which regulatory regimes from other jurisdictions can be usefully adapted to existing governance systems in countries such as China – as well as whether existing regulatory schemes can successfully be improved through "home-grown" solutions – remain open questions.

Policy options for consideration

1. Create an institution responsible for the overall quality of regulations.

The review of other OECD countries shows that having a specific institution responsible for the overall quality of regulation located as close as possible to the centre of government can be a valuable asset for regulatory governance. This institution should be responsible for taking decisions and making the final trade-offs on policies and their legal implementation. China currently lacks such an institution, despite the many players involved in the preparation of laws and regulations and especially in vetting their legal quality. The Legislative Affairs Office of the State Council (LAO) currently assumes some responsibility for regulatory quality though it has a number of other duties as well. The State Council could consider strengthening the LAO, or creating a separate institution that would in time have the mandate to promote the quality of new regulations by taking into account their costs and the induced effects on society. They would also have the task of regularly assessing the cost of existing regulations, and making recommendations to the State Council to reduce that cost. This institution could render an advance opinion on regulatory quality at the time regulatory and legislative bills are sent to the State Council. To prevent it from being overwhelmed by a flood of new regulations, this institution could be selective in scrutinising initiatives, depending on their economic impact. Finally, it could encourage public debate over regulatory quality issues and in this way play an educational role, particularly *vis-à-vis* the National People's Congress.

2. Institute an effective practice of regulatory impact analysis as a strategic tool to support regulatory policy.

In many OECD countries, the effective and systematic use of regulatory impact analysis (RIA) is a key component in ensuring regulatory quality. While China conducts some *ex ante* assessments, these are not co-ordinated and do not systematically take into account the overall costs and benefits of regulations from a social and economic perspective. This situation could be improved by using the RIA process as a systematic framework to rationalise existing practice and to ensure a relevant and consistent *ex ante*

evaluation. This improvement would also allow for a sounder *ex ante* decision-making process, in terms of an evidence-based economic approach. In time, RIA would need to be made a part of the legal framework governing the preparation of regulations, in order to ensure that a real impact analysis is conducted. To confine the RIA to significant proposals (perhaps a hundred a year), the quality institution described above could define precise criteria for identifying regulations subject to the assessment requirement, and it could have the power to demand a RIA in certain cases. A methodological guide and training materials should be prepared for this purpose, for example by the institution responsible for the quality of regulation.

3. Improve the efficiency of the consultation process, making consultation of third parties systematic to improve transparency.

Many OECD countries have a transparent and systematic process of public consultation to enhance the quality of the regulatory process by guaranteeing that the impact on citizens and businesses is taken into account. China has made enormous progress in developing its public consultation procedures, especially since its membership into the WTO. At the same time, the efficiency of the consultation process in China could be improved through more transparent and systematic processes. In particular, consideration might be given to requirements for government agencies to identify explicitly the range of "stakeholders" with whom they should interact on a frequent basis in the development of new regulations. Likewise, the regulatory quality institution mentioned above, could systematically audit these interactions in order to ensure a sufficient and appropriate consultation. Such an active approach is likely to yield important benefits in the context of a fundamental shift in cultural attitudes which existing government policies on regulatory management and reform lack. This could constitute an important part of the process of developing a broad constituency in favour of reform.

4. Pursue and extend the move towards simplification by introducing sunset clauses and introducing instruments to measure and monitor the simplification process.

China has recently expanded its efforts at administrative simplification. The experience of many OECD countries shows that administrative simplification is key to minimising the cost of regulation. The Chinese approach needs to consider the entire stock of existing regulations in order to reduce the cost overhang. Automatic sunset clauses are an important tool that could be introduced in Chinese regulation. This would reverse the burden of proof and force the administration into a systematic review of regulations, under threat of their expiry at a certain date. While such an approach may well be foreign to the Chinese tradition, an educational effort focusing on its expected benefits could help move things forward. In addition, a statistical effort to measure the economic burden of regulations – whether an individual measure or a whole complex set of regulations – could help steer the current simplification efforts towards maximising their economic benefits and fixing clear objectives for the future.

5. Improve legal certainty by enhancing the transparency of procedures to implement the law.

Legal certainty and transparency are key elements for the quality of regulation. Yet while the Chinese regulatory system is consistent from a legal perspective, elements of weakness are apparent, particularly regarding the enforcement of laws and regulations. Judicial interpretation will be a key element at clarifying laws and regulations. In addition, it is likely to

involve far more proceedings in which government agencies are parties, than in the past. Efforts now underway to improve the qualification and training of judges and other officials in the judiciary will help improve enforcement. However, further efforts may be needed to better insulate the judiciary from undue influence, including from government and political officials.

6. Clarify and rationalise the distribution of powers across levels of government.

In a number of OECD countries, decentralisation has been a means of bringing rule setting closer to users and setting the regulatory process at the most appropriate level. China has been engaged in a significant decentralisation effort over the past 20 years, during which considerable powers have been transferred to local authorities. In many ways this has been a positive move. However, the inextricable overlap of powers among the levels of government is detrimental to an efficient regulatory process. A more rational distribution of regulatory powers among the various levels of sub-national authorities would help to clarify the situation. In addition, greater awareness of regulatory quality among local authorities will be essential in light of their growing responsibilities. The process of decentralising responsibilities must be accompanied by clear and effective accountability requirements at all local levels, administrative as well as judicial.

7. Rationalise the framework of independent regulators.

The administrative status of Chinese regulators is highly heterogeneous. Several regulatory agencies were consolidated into a number of the "super" ministries (*e.g.* industry, energy, transportation, food and drug, and environmental protections). At the same time, China's financial service regulators were not consolidated in a single ministry. Procedures for consultation between regulators and the competition authority (which is also spread across three agencies) are neither systematic nor mandatory for all existing regulators with an economic role. Perhaps an independent experts' group could review the institutional architecture for market-oriented regulation and determine if a new harmonised framework would improve efficiency and competition in regulated areas of the economy.

Notes

1. Aberbach and Christensen (2003); Hasnie (2002); and Kamarck (2002) observe that the Chinese government has become aware of the institutional framework of independent regulators in large part through its contacts with international organisations. Moreover, in China's World Trade Organisation agreement on services, the country made commitments with regard to the impartiality of its regulators. It determined "that for the services included in China's Schedule of Specific Commitments [including financial and telecommunications services], relevant regulatory authorities would be separate from, and not accountable to, any service suppliers they regulated, except for courier and railway transportation services" (*WTO, 2001*).
2. There is a rich body of theoretical and empirical research covering independent regulators in network industries. For reviews see Laffont and Tirole (1993, 2000); Levy and Spiller (1994); and Newbery (1999).
3. Taking what *The New York Times* (29 July 2007) called "extraordinary steps", Premier Wen Jiabao spoke at the meeting and responded directly to the international media coverage.
4. Reported in the *International Herald Tribune*, 18 November 2008.
5. The NDRC is informally referred to as the "little State Council".
6. DeWoskin (2001) explains that in telecommunications regulation, the formal regulator – the Ministry of Information Industry (MII) – must routinely negotiate with the People's Liberation Army, which is responsible for information security concerns; the Ministry of Finance, which oversees accounting; and, on the regulation of Internet access, the State Administration of Radio,

Film, and TV, the State Secrets Bureau, the Ministry of Public Security, the Ministry of Commerce, and the State Administration for Industry and Commerce. The need to deal with all these actors is in addition to the leading small group in telecommunications; the NDRC; the SASAC; and the CPC.

7. Lam and Perry (2001) explains that the *shiye danwei* are subordinate in the State Council hierarchy to traditional "administrative agencies" (*xingzheng jiguan*), such as ministries, and "governmental organisations" (*jigou*).
8. Walter and Howie (2003) report that the status of the securities regulator, the CSRC, has been clearly marked out but only after protracted struggles.
9. Chen (2004) goes on to note that while the NPC Standing Committee has the constitutional right to review and invalidate regulation passed by lower-level bodies, it has been reluctant to exercise this right and very few administrative or local regulations have been overturned.
10. For a description and analysis of the *tiao/ kuai* regime, see Lieberthal (2004).
11. Lieberthal (2004) notes that the Chinese call this "making *tiao* serve *kuai*".
12. There has been some debate over the extent of local protectionism and its effects on the national economy. Naughton (2003) finds that local protectionism has little, if any, effect on cross-border trade when aggregated to the provincial level. Nevertheless, Mertha (2005) points out that local protectionism is widely *perceived* as a genuine problem by the authorities in Beijing, which does make it an important policy concern.
13. Paler (2005) develops the idea of a "uniform legal hierarchy", which refers to the ordering of the effect of laws and regulations in China's unitary system. This hierarchy begins with the Constitution, and moves down to national laws (promulgated by the NPC and the NPCSC); administrative regulations (promulgated by the State Council); and finally local regulations (issued by provincial people's congresses and local government agencies).
14. The Legislation Law (*lifa fa*) was passed by the NPC on 15 March 2000 and came into effect on 1 July 2000.
15. There is an extensive body of literature the development of rule of law in China; Paler (2005) on the Legislation Law itself, Yang (2004) on various intuitional and anti-corruption aspects, and Peerenboom (2002) for an overall assessment.
16. These regulatory procedures include the Provisions of China Banking Regulatory Commission on Legal Work by the China Banking Regulatory Commission, Measures for the Procedure for Formulating Regulations on Environmental Protection by the State Environmental Protection Administration, Regulation of the Ministry of Information Industry on the Procedures for the Formulation of Rules by the Ministry of Information Industry, Provisions of Ministry of Land and Resources on the Procedures for the Formulation of Rules by the Ministry of Land and Resources, Regulation of Procedure for Making Traffic Law by the Ministry of Communications, Provisions of China Insurance Regulatory Commission on the Procedures for the Formulation of Rules by the China Insurance Regulatory Commission, etc.
17. The OGI Regulations were promulgated by the State Council 24 April 2007 and came into effect on 1 May 2008.
18. Article 13 provides that citizens, legal persons and other organisations may request government information that has not already been disclosed on the government's own initiative "in accordance with the special requirements of their own production, livelihood, scientific research, etc."
19. Keller (1994) notes that China has adopted a rationale that lends itself to the creation of laws that may be adjusted according to human behaviour. Such laws are customarily expressed as general principles (*you yuanze xing*) which are inherently flexible (*you linghuo xing*) in application.
20. See ARL, Article 28. An English version of the Law can be found at *www.lehmanlaw.com/resource-centre/laws-and-regulations/administration/administrative-reconsideration-law-of-the-peoples-republic-of-china-1999.html*.
21. ARL, Article 9. The ARR only provided for 15 days.
22. ARL, Article 10. The ARL reflects the belief that administrative reconsideration should differ from judicial review and that reconsideration procedures should be simpler.
23. For instance, in Heilongjiang province, the "Three-Trial Decision Making System" is implemented during the decision-making process for administrative reconsideration to ensure the objectivity and fair handling of administrative reconsideration cases by means of collective case handling. A number of other regional innovations to administrative reconsideration are reported in Zhou, 2005.

24. The reviewable administrative acts are enumerated in ALL, Article 11, Section 1. They include actions infringing on the rights of a person and property rights – such as administrative penalty, administrative compulsory measures, administrative licence and administrative omission.

25. Statistics show that the people's courts at various levels in China have accepted administrative cases totalling 639 736 between 2000 and 2006. In addition, the courts have accepted over 2 million non-litigation administrative cases in the same period. See *www.lawyee.net/News/Legal_Hot_Display.asp?RID=724*.

26. See ALL, Article 2. An English version of the ALL can be found at *www.cecc.gov/pages/newLaws/adminLitigationENG.php*.

27. See ALL, Article 5.

28. See ALL, Article 54.

29. The National People's Congress adopted the Law on Administrative Permission, which took effect on 1 July 2004. Implementation of the Administrative Permission Law aimed to further improve China's investment environment and protect foreign investors from losses resulting from policy changes, political corruption and abuse of power by local officials.

30. The World Bank *Doing Business 2009* (*www.doingbusiness.org/Documents/CountryProfiles/CHN.pdf*) notes that starting a business in China requires 14 procedures, takes 40 days, which ranks China 151 out of 181 countries surveyed. In terms of requirements for construction permits, it requires 37 procedures and takes 336 days to build a warehouse in China, which ranks the country 176 (out of 181).

31. Yang (2004) notes that of these regulations, 1 657 were established on the basis of laws and administrative regulation, 733 were established on the authority of the Party Central Commission and State Council directives, and the rest were based on departmental regulation and directives.

32. For example, according to a list of 32 approval requirements scrapped by the China Securities Regulatory Commission, foreign securities firms would no longer need to get "primary" approval to set up representative offices or to appoint chief representatives; law firms would no longer need approval to do securities law business; and securities firms would not need regulatory permission to underwrite corporate bonds or to establish investment consulting units.

33. This means that about half of the existing administrative requirements will need to be either reauthorised by the legislatures or modified/abolished.

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