The Effect of China’s Law-Making Power on its Participation in the WTO DSM

Qanyi Sa

In recent years, the World Trade Organization (hereafter WTO) has been influenced by events taking place in member states, such as the United States launching a protectionist trade war. China and the US have both launched a series of disputes against each other in the WTO Dispute Settlement Mechanism (hereafter DSM), which has caused China’s engagement with the DSM to become a heated and controversial topic. During its eighteen years of participation in the DSM, China has changed from first being a silent member to a relatively active participant, and finally a more sophisticated player. Its participation in the DSM shows China’s graduate journey in its interaction with the international community and its integration in international trade governance.

The aim of this article is to examine the extent to which China’s widely dispersed legislative power has affected its participation in the DSM through an analysis of six WTO cases involving China. This article mainly focuses
on the following situation: WTO-inconsistent rules issued by the State Council and its departments, through a detailed analysis of a specific WTO dispute, namely, China – Measures Related to Demonstration Bases and Common Service Platforms Programmes DS489 (2015, the US v China) (hereafter China – Demonstration Bases) and it is vital that solutions to this problem should be proposed in terms of integrating conformity with WTO principles into China’s legal system.\footnote{1}

\section*{Introduction}

\section*{I. China’s Legislative System}

The structure of the Chinese legislature is complicated. China’s law-making power resides in both legislative authorities and administrative branches at the central and local levels.\footnote{2}

\footnote{1}WTO, China – Measures Related to Demonstration Bases and Common Service Platforms Programmes – Request for Consultations by the United States (19 February 2015) WT/DS489/1, G/L/1105 and G/SCM/D105/1. (China – Demonstration Bases Request).

\footnote{2}Articles 62 and 67 of the Constitution of the People’s Republic of China (adopted by the 5th National People’s Congress on 4
There are six levels of legal instruments included in China’s legislative hierarchy (see Table 1). First, the Constitution—criminal, civil and state organic laws enacted and amended by the National People’s Congress (NPC). Second, laws other than those enacted by the NPC, which are amended and enacted by the Standing Committee of the National People’s Congress (SCNPC). Third, administrative regulations promulgated by the State Council. Fourth, local people’s congress regulations promulgated by local people’s congresses and standing committees in provinces, autonomous regions, municipalities directly under the central government, major cities and special economic zones. Fifth, ministry rules issued by central-level ministries, commissions, agencies or entities subordinated to the State Council, and government rules published by provincial governments, autonomous regions, municipalities directly under the central government, and major cities. And sixth,

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normative documents issued by people’s congresses and governments.\textsuperscript{5}

Table 1: China’s legislative hierarchy\textsuperscript{6}

<table>
<thead>
<tr>
<th>Number</th>
<th>Institutions</th>
<th>Legal instruments</th>
</tr>
</thead>
<tbody>
<tr>
<td>First level</td>
<td>National People’s Congress</td>
<td>Constitution (\textit{xian fa}), criminal (\textit{xingshi}), civil (\textit{minshi}) and state organic (\textit{guojiajigou}) laws and other basic laws (\textit{jiben fa}).</td>
</tr>
<tr>
<td>Second level</td>
<td>Standing Committee of the National People’s Congress</td>
<td>Laws (\textit{falu}) other than those to be enacted by the National People’s Congress</td>
</tr>
<tr>
<td>Third level</td>
<td>State Council</td>
<td>Administrative regulations (\textit{xingzheng fagui})</td>
</tr>
</tbody>
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\textsuperscript{5} For more details, see Chen \textit{Chinese Law: Context and Transformation} (n 6) 255.

\textsuperscript{6} Peerenboom (n 1) 271.
First of all, the NPC is the supreme legislative organ in China. It is responsible for amending the Constitution and overseeing its enforcement; additionally it enacts and modifies basic laws related to criminal offences, civil affairs,
state organs and so forth. Secondly, the SCNPC interprets the Constitution and supervises its enforcement; it issues and revises statutes apart from those which should be enacted by the NPC. The SCNPC partially supplements and amends the laws enacted by the NPC when it is not in session and interprets other laws as well. Thirdly, the State Council has legislative power delegated from the NPC and the SCNPC. The State Council also issues administrative regulations and rules in accordance with the Constitution, and this accounts for the complexity of the legislative system in China. As the highest administrative organ of the state, the State Council not only exercises executive power but it also has inherent legislative power. In practice, the number of administrative regulations and rules implemented by the State Council and its departments considerably exceed those issued by the NPC and the SCNPC. For instance, 642 regulations or rules were enacted by the State Council and its bureaucracies by the end of March 2017, while the NPC and the SCNPC promulgated only 267 laws as of April 2018. Fourthly, the most

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7 The Constitution, art 58 and 62.
8 The Constitution, art 67.
9 Article 9 of the 2015 Legislation Law.
10 The Constitution, art 85 and 89.
11 The Constitution, art 85.
complicated part of the law-making power is the empowerment of legislative power at local levels. Various sub-national entities are granted legislative power. (See Table 1). Lastly, various ministries and commissions subordinate to the State Council are also authorised to issue rules.\textsuperscript{13}

II. China’s Delegated Law-Making Power

This section aims to demonstrate the first situation, that is where the State Council and its departments issue a rule or regulation which is inconsistent with WTO norms, caused by China’s dispersed law-making power and explain why it affects China’s engagement with the DSM. The Protocol confirms that the principle of uniform administration will apply and administer all laws, regulations and other measures passed by central and local legislative organs in several areas. These areas cover trade in goods, services, and trade-related aspects of intellectual property rights in a uniform, impartial, and reasonable manner.\textsuperscript{14} In other words, because of the principle of uniform administration, all of China’s national and sub-national laws, regulations, and other measures should be consistent with the WTO Agreement.\textsuperscript{15} As a result, if an administrative regulation issued by the State Council or a ministry rule enacted by the

\textsuperscript{13} The Constitution, art 90.

\textsuperscript{14} Paragraph 2(A) of the Protocol.

\textsuperscript{15} Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) 1867 UNTS 154.
departments directly under the State Council violates the WTO Agreement, a large number of local legal instruments implementing such central-level legal instruments will be also found to be inconsistent with WTO principles. This is because the NPC and the SCNPC grant discretionary legislative power to various local organs. In accordance with the Legislation Law at a local level, the right to legislate is afforded to a large number of local legislative institutions. These law-making organs include local people’s congresses and standing committees of provinces, municipalities directly under the central government, autonomous regions, major cities approved by the State Council and special economic zones. It also grants law-making power to provincial governments, municipalities directly under the central government, autonomous regions, and major cities approved by the State Council (see Table 1). Until July 2016, there were approximately 9,915 local people’s congress legislations in force.

Clearly, it is a challenge for China to make a large number of instruments issued by local entities compliant with WTO rules. Prior to China’s accession to the WTO, it had undergone an overhaul of its laws, regulations, and rules.

16 See the 2000 Legislation Law, art 63 and the 2015 Legislation Law, art 72. See also Chen, Chinese Law: Context and Transformation (n 6) 251.
Before 2015, more than 2,300 laws, regulations, and rules had been drafted, revised, and abrogated at the central level. Moreover, over 190,000 regulations, rules, and other policy measures had been revamped at the local level.\textsuperscript{18} Nevertheless, China’s laws, administrative regulations, and ministry rules contain broad and vague language, and leave a large margin for local authorities to set out more detailed contents. Local regulations and rules are usually more detailed but with less strict supervision, which makes them unlikely to satisfy WTO norms. Therefore, it is common that in WTO cases, if a law, regulation, or rule is found to violate the WTO Agreement, then the substantive regulations and rules made by local authorities will also be claimed to violate the WTO Agreement by other WTO members. This section attempts to explain the situation through an analysis of \textit{China – Demonstration Bases}.\textsuperscript{19}


\textsuperscript{19} WTO, \textit{China – Measures Related to Demonstration Bases and Common Service Platforms Programmes} – Request for Consultations by the United States (19 February 2015)
In this dispute, the US alleged that China had imposed subsidies contingent on export performance for certain companies in China through certain programmes.\textsuperscript{20} The questionable programmes provided export-contingent subsidies through the setting up of Foreign Trade Transformation and Upgrading Demonstration Bases (Demonstration Bases) and Foreign Trade Common Service Platforms (Common Service Platforms). ‘Demonstration Bases’ are industrial clusters of enterprises in several Chinese industries in the areas of textiles, agriculture, medical products, light industry, special chemical engineering, new materials, and hardware and building materials.\textsuperscript{21} The US claimed that these enterprises defined as the demonstration bases were granted export-contingent subsidies by Chinese central and sub-national government bodies. It also argued that ‘Common Service Platforms’ provided benefits including discounts, free services, and cash grants to companies located in the demonstration bases. Common Service Platforms intend to provide a series of services to encourage local businesses’ development of foreign trade in different provinces in China.\textsuperscript{22} According to Article 3.2(a) of the SCM WT/DS489/1, G/L/1105 and G/SCM/D105/1. (hereafter China – Demonstration Bases Request).

\textsuperscript{20} ibid.
\textsuperscript{21} ibid.
\textsuperscript{22} See ‘Chengdu Waimao Gonggong Fuwu Pingtai’ (Chengdu Common Service Platform) (Baidu Baike, 9 April 2013) <https://baike.baidu.com/item/%E6%88%90%E9%83%BD%E5%9C%8D%E5%8A%A1%E6%9C%8D%E5%8F%B0/10360912> accessed 07 February 2019.
Agreement, subsidies contingent upon export performance are forbidden, thus China’s measures providing export-contingent subsidies are therefore inconsistent with the WTO Agreement. In this regard, the US government compiled a list covering the regulations and rules enacted by China’s legislatures at central and local levels which were suspected to violate WTO norms. For example, with regard to the ‘demonstration bases instruments’ in question, there were eight central-level WTO-inconsistent legal instruments, while fifty-one local regulations were found to violate the WTO Agreement.

In China – Demonstration Bases, China’s measures regulated by central and local governments are subject to the ‘prohibited subsidies’ clause under the SCM Agreement and are prohibited under the WTO system. In order to confirm whether these measures belong to ‘prohibited subsidies’, they need to fulfil three requirements: first and foremost, the measures should be regarded as subsidies; second, the

23 In the memorandum, China agreed to remove WTO-inconsistent measures at both central and sub-national levels. See WTO, China – Measures Related to Demonstration Bases and Common Service Platforms Programmes – Memorandum of Understanding Between the People’s Republic of China and the United States of America Related to the Dispute China – Measures Related to Demonstration Bases and Common Service Platforms Programmes (DS489) (19 April 2016) WT/DS489/7 (hereafter China – Demonstration Bases Memorandum). See also, Agreement on Subsidies and Countervailing Measures (15 April 1995) 1869 UNTS 14 (hereafter SCM Agreement).
measures at issue should fall under the scope of subsidies under the SCM Agreement; third, China’s measures should be identified as ‘prohibited subsidies’ under the SCM Agreement (see Figure 1).

Figure 1: Elements determining whether a measure is regarded as a prohibited subsidy under the SCM Agreement

| A. Subsidies | First, a 'financial contribution by a government or any public body' or 'any form of income or price support' Second, a 'benefit' should be conferred through a financial contribution |
| B. Subsidies under the SCM | Specificity |
| C. Prohibited subsidies | First, contingent on export performance Second, contingent on law or practice |

24 Reference materials were collected from WTO, ‘Anti-Dumping, Subsidies, Safeguards: Contingencies, etc.’ <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm#subsidies> accessed 7 February 2019.
A. Subsidies

This section aims to examine whether China’s measures in question are subject to subsidies regulation. According to Article 1.1 and 1.2 of the SCM Agreement, the definition of the subsidy is as follows: 25

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as ‘government’), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the

25 SCM Agreement, art 1.1.
practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.26

According to Article 1.1 of the SCM Agreement, two requisite elements are set forth to determine whether a measure at issue is a subsidy: the first is that there should be a ‘financial contribution by a government or any public body’ or ‘any form of income or price support’; the second is that a ‘benefit’ should be conferred through a financial contribution.27

Therefore, this section begins with an analysis of whether China’s measures are considered to be subsidies. It can be argued that China’s measures at issue were considered as

26 SCM Agreement, art 1.2.
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subsidies. The reasons are as follows. First and foremost, if the measures set forth in Ministry of Finance, Ministry of Commerce Notice on Doing Well the Administration Work of the 2013 Foreign Trade Common Service Platform Construction Fund (Notice No. 101) can be determined as subsidies. A requirement needs to be fulfilled: namely, that ‘a financial contribution’ or ‘any form of income or price’ is provided by this notice. Pursuant to Article 1.1(a)(1)(i) of the SCM Agreement as cited above, if government practice involves a direct transfer of funds including grants, loans, etc., the government practice will be deemed to be a financial contribution. China’s measures as set forth in Notice No. 101 met this threshold. This is because Notice No. 101 provided funds to enterprises in the demonstration bases. For example, Notice No. 101 stated that the central government strongly supported a series of companies in the demonstration bases covering agricultural products, light industrial technology, textiles and clothing, medical products, special chemical engineering, new materials, building materials, mechatronics, high-technology, strategic new industries, etc. It also provided a series of grants to these industries as well; for instance, fees for facilities in the Common Service Platform, fees for design, fees relating to leases and fees for employing experts for training. A number of sub-national regulations were published in order to implement Notice No. 101 such as Guangdong Province Department of Foreign Trade and Economic Cooperation, Department of Finance Notice on Doing Well the Administrative Work of the 2013 Foreign Trade Common Service Platform Construction Fund (hereafter Notice No. 12). The funds granted by the ministries
of commerce and of finance in Notice No. 101 and pertinent
government rules implementing this notice were considered
to be ‘grants’ as listed in Article 1.1(a)(1)(i) of the SCM
Agreement. According to the Oxford English Dictionary, the
definition of grants is ‘a sum of money given by a
government or other organisation for a particular purpose’.28
Clearly, the aim of these grants provided by China’s
government bodies was to enhance the development of
foreign trade in the demonstration bases. The Appellate Body
in US – Measures Affecting Trade in Large Civil Aircraft – Second
Complaint DS353 (2005, the EC v the US) mentioned that a
‘direct transfer of funds’ inscribed in paragraph (i) under
Article 1.1(a) meant, ‘conduct on the part of the government
by which money, financial resources, and/or financial claims
are made available to a recipient’.29 It also stated that grants
meant that ‘in such a transaction, money or money’s worth is
given to a recipient, normally without an obligation or
expectation that anything will be provided to the grantor in
return’.30 It can be seen that China’s measures on the
Common Service Platforms did not require the recipients to
return the money or money’s worth, and in some
circumstances the government provided partial funds to
qualified companies. For example, Ningbo City Bureau of

28 ‘grant’, (OED Online, OUP June 2013)
<https://www.oxfordlearnersdictionaries.com/definition/english
/grant_2> accessed 7 February 2019.
29 WTO, United States – Measures Affecting Trade in Large Civil
Aircraft – Second Complaint – Appellate Body Report (12 March
30 ibid para 616.
Foreign Trade and Cooperation, Bureau of Finance Notice on Doing Well the Administrative Work of the 2013 Foreign Trade Common Service Platform Construction Fund (Notice No. 97) provided less than 50% of the actual money of the programme to recipients and the amount of money the government was able to grant was less than 3 million yuan. Therefore, there can be little doubt that China’s measures were financial contributions.

With regard to the first requisite element set forth to determine a subsidy, it is necessary to examine whether China’s measures were initiated by the government or at the direction of the government or any public organ. The term ‘government’ can include both central government and sub-national government bodies. For example, the Guangdong Province Department of Foreign Trade and Economic Cooperation set up the designated programmes and the amount of money to fund based on the assessment and the

examination reports. The Guangdong Province Department of Foreign Trade and Economic Cooperation first issued the designated programmes report and then the Guangdong Province Department of Finance reviewed the report and distributed money to the designated programmes based on the financial budget. Local financial departments subordinate to the Department of Finance in Guangdong Province were to then comply with the rules set out in this regulation and allocate funds to related companies. Another example is Notice No. 97. According to Article 5, the Bureau of Foreign Trade and Economic Cooperation and the Bureau of Finance in Ningbo City had the responsibility of distributing the special funds. In particular, these two governmental organs determined which demonstration base was entitled to receive grants. They organised the application of the programmes and provided details on how to support such programmes. These two governmental organs also monitored the construction, operation, and provision of public services. It can be seen from the above provisions that the Common Service Platforms were administered by various departments at different levels of governments including the central government, local governments at the provincial level, and certain cities such as

33 Notice 12, art 6(d).
34 ibid.
35 ibid.
36 Notice No.97, art 5.
37 ibid.
Qingdao, Wuzhou, and Xuchang.\footnote{Qingdao City is one of the major cities designed as such by the State Council, so it has legislative power. With regard to Wuzhou City and Xuchang City, they do not belong to the list of major cities, so they do not have legislative power. This case was brought before the 2015 Legislative Law was revised. Therefore, whether a city in this case had legislative power should apply to 2000 Legislative Law.} Therefore, it can be confirmed that China’s measures as set forth in Notice No. 101 and pertinent sub-government measures implementing Notice No. 101 were financial contributions conferred by the central and local governments of China.

Second, it is necessary to examine whether such measures confer a benefit. According to the Oxford English Dictionary, a ‘benefit’ is ‘a payment made by the state and an insurance scheme to someone entitled to receive it’.\footnote{‘benefit, n’ (OED Online, OUP June 2013) <https://www.oxfordlearnersdictionaries.com/definition/american_english/benefit_2> accessed 7 February 2019.} Notice No. 101 de facto stipulated that these special funds given to certain enterprises in the demonstration bases were under the administration of Chinese government bodies. As pointed out above, it can reasonably be said that China’s measures on the Common Service Platforms were ‘a payment made by the state’ as defined by the Oxford English Dictionary. In Canada – Measures Affecting the Export of Civilian Aircraft DS70 (Brazil v Canada, 1997) (hereafter Canada – Aircraft), the Appellate Body described the principles of benefit as follows: the marketplace provides an appropriate basis for the
comparison in determining whether a “benefit” has been “conferred” as the trade-distorting potential of a “financial contribution” can be identified based on whether the recipient has received a “financial contribution” on more favourable terms than those available to the recipient in the market.\textsuperscript{40}

As analysed above, China’s measures were intended to provide grants to certain enterprises in the demonstration bases and such grants were conferred by government agencies. Compared to enterprises which received no such financial contributions granted by China’s measures, the recipients were clearly better off. Therefore, China’s measures undoubtedly provided a benefit.

\textbf{B. Subsidies under the SCM Agreement}

In order to ascertain whether a subsidy is within the meaning of the SCM Agreement, the second element should be met. This is that the subsidy at issue shall be ‘specific’ in light of Article 2.1 of the SCM Agreement.\textsuperscript{41} In other words, it should not only fulfil the requirement of being ‘a financial

\footnotesize{\textsuperscript{40} WTO, \textit{Canada – Measures Affecting the Export of Civilian Aircraft – Appellate Body Report} (2 August 1999) WT/DS70/AB/R para 157 (hereafter \textit{Canada – Aircraft Appellate Body Report}).

contribution conferring a benefit’ by a government or at the direction of the government or any public body, but it is also necessary to prove that the subsidy is ‘specific’. Article 2.1 (a) of the SCM Agreement clarifies what ‘the specificity of a subsidy’ means, which is as follows:

In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as certain enterprises) within the jurisdiction of the granting authority, the following principles shall apply: Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.\(^\text{42}\)

Clearly, China’s measures met the requirement of this provision because of the ‘specificity’ of China’s measures in question. The grants provided by China’s measures set up two requirements limiting the scope of recipients in order to limit access to certain enterprises: (1) China’s measures narrow down the scope of categories of industries that the grants were aimed at, for instance agriculture, textiles and clothing, and special chemical engineering; (2) According to measures conducted by China, it offered grants to ‘certain industrial clusters of enterprises’ which were considered as ‘the demonstration bases’. Taking Notice No. 101 as an

\(^{42}\) SCM Agreement, art 2.1(a).
example, the subsidies it granted were specific to a group of enterprises or industries: (1) these enterprises were within a series of sectors such as agriculture, medication, and textiles, and clothing; (2) Notice No. 101 further specified that the grants were for enterprises that were deemed to be demonstration bases. Additionally, China’s measures pointed out that the grants were specific to a group of enterprises or industries which can be seen from conditions which were required by the demonstration bases. The grants only provided to the demonstration bases which fulfilled the following requirements: industrial scope, the development of technology, export scope, the degree of the upgrade, and transformation of foreign trade, etc. Therefore, China explicitly restricted access to these special funds that granted to the demonstration bases. The measures were consequently subsidies which fell within the scope of the SCM Agreement.

C. Prohibited Subsidies

As a next step, it was necessary to determine what kind of subsidies China’s measures were subject to and whether these measures were inconsistent with the SCM Agreement. There are three types of subsidies under the SCM Agreement: (1) ‘prohibited subsidies’ which are regulated in Part II; (2) ‘actionable subsidies’ in Part III; and (3) ‘non-actionable subsidies’ in Part IV in Article 1.2 of the SCM Agreement.\footnote{Article 1.2 of the SCM Agreement} With regard to prohibited subsidies, these are forbidden in
the SCM Agreement. For actionable subsidies, if the measures in question satisfy certain requisite elements, they are considered as actionable subsidies.\textsuperscript{44} Non-actionable subsidies lapsed on 31 December 1999.\textsuperscript{45}

Based on an analysis of these three types of subsidies, China’s measures were subject to ‘prohibited subsidies’ in light of Article 3.1(a) of the SCM Agreement.\textsuperscript{46}

Based on Article 3.1(a), if China’s measures were to be regarded as prohibited subsidies, several requisite elements needed to be fulfilled (see Table 2).

First of all, such prohibited subsidies should be contingent on export performance. In \textit{US – Tax Treatment for ‘Foreign Sales Corporations’} DS108 (1997, the EU v the US), the Appellate Body explained that the prohibited subsidy conferred by a granting authority should be conditional or dependent on export performance.\textsuperscript{47} Also in \textit{Canada – Aircraft}, the Appellate

\begin{itemize}
\item \textsuperscript{44} WTO, ‘Understanding the WTO: The Agreements: Anti-dumping, Subsidies, Safeguards: Contingencies’ <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm> accessed 18 February 2020.
\item \textsuperscript{46} SCM Agreement, art 3.
\item \textsuperscript{47} WTO, United States – Tax Treatment for ‘Foreign Sales Corporations’, Second Resource to Article 21.5 of the DSU by the
Body and the Panel upheld that in the case of prohibited subsidies, there must be a relationship of conditionality or dependence between the subsidy at issue and the anticipated exportation or export earnings. In this case, the challenged legal instruments were Notice No. 101 and pertinent local rules implementing it. The Common Service Platforms Programme intended to establish a platform serving foreign trade through granting funds and other financial support. The purpose of Notice No. 101 on the Common Service Platforms Programme was to encourage an upgrade and transformation of foreign trade, to increase the competition of foreign trade, and to enhance the level and the quality of foreign trade. For example, Zhejiang Province Department of Commerce, Department of Finance Notice on Doing Well the Administrative Work of 2013 Foreign Trade Common Service Platform Construction Fund (Notice No. 84) which implemented Ministry of Finance, Ministry of Commerce Notice on Doing Well the Administration Work of the 2013 Foreign Trade Common Service Platform Construction Fund. Notice No. 84 specified two types of supported

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*European Union Communities – Appellate Body Report (13 February 2006) WT/DS108/AB/RW2 para 11*


*Zhejiang Province Department of Commerce, Department of Finance Notice on Doing Well the Administration Work of 2013 Foreign Trade Common Service Platform Construction Fund, Zhejiang Province Department of Commerce, Department of Finance, Zhe Cai Qi [2011] No. 88 (29 July 2013).*
demonstration bases to which Notice No. 84 intended to offer grants through the Common Service Platforms Programme. Among them, the first category of demonstration bases were demonstration bases supported by Ministry of Commerce in terms of agriculture, light industrial technology, textile and appeal, medical, special chemical engineering, new materials, metal building materials, electromechanical engineering, high-tech and new strategic industries and other demonstration bases at national level.50

In China – Demonstration Bases, the US argued that another legislation relating to demonstration bases programme was inconsistent with the Agreement on Subsidies and Countervailing Measures and it was Ministry of Commerce Letter on Carrying Out the Cultivation Work for the Foreign Trade Transformation and Updating Demonstration Bases (Letter No.62).51 The Foreign Trade Transformation and Updating Demonstration Bases in this legislation fell within the scope of the first category of bases in Notice No. 84. In Letter No.62, three categories of model demonstration bases were supported by the central government: sector-type


50 See Notice No.84, art 2.1.
bases, enterprise-type bases, and mix-type bases. The criteria for recognising these three types of bases included two requirements: the scope and the level of export of the bases and the enhancement of the upgrade and transformation of exportation. Both of these two requirements are contingent on export performance. Therefore, it can be concluded that China’s measures at issue were subsidies contingent upon export performance. This can be illustrated by the memorandum concluded in China – Demonstration Bases. China confirmed that Letter No.62 ceased to be in force and new central base measures would not cover any text referring to export performance as the aim of the programme or any criteria based on export performance.

Second, China’s measures in question satisfied another requirement of ‘prohibited measures’, which is that the prohibited subsidies under the SCM Agreement should be contingent in law or in practice. It can be argued that China’s measures granting subsidies are contingent in law. In China – Demonstration Bases, with regard to Common Service Platforms WTO-inconsistent instruments, the US listed eight central-level legal instruments on the Common Service Platforms including Notice No. 101, which have been

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52 Letter No.62, art 2.2 (a) of Annex 1.
53 Letter No.62, art 2.2 (b) of Annex 1.
54 Letter No.62, art 2.2 (c) of Annex 1.
56 WTO, China – Demonstration Bases Request.
57 WTO, China – Demonstration Bases Memorandum, art 4(b).
discussed above.\textsuperscript{58} The adverse effect was that ninety-eight local-level legal instruments were found to violate the WTO rules due to implementation of the eight central-level regulations.\textsuperscript{59} Specifically, a large number of provincial governments, municipalities directly under the central government, and major cities have published similar notices to implement Notice No. 101, such as the Departments of Commerce and Finance in Shandong Province, Hebei Province and Tianjin Municipality.\textsuperscript{60} Even in some autonomous regions, government agencies issued related notices to support the Common Service Platforms Programme, for example Xinjiang Uygur Autonomous Region. Some major cities designated by the State Council such as Qingdao City of Shandong Province enacted

\textsuperscript{58} WTO, \textit{China – Demonstration Bases Request}.
\textsuperscript{59} \textit{ibid}.
\textsuperscript{60} Tianjin Municipality Department of Commerce, Department of Finance Notice on Doing Well the Administration Work of the 2013 Foreign Trade Common Service Platform Contracture Fund, Tianjin City Department, Department of Finance, Jin Cai Er [2013] No.9. Shandong Province Department of Finance, Department of Commerce Notice on Doing Well the Administration Work of the 2013 Foreign Trade Common Service Platform Contracture Fund, Shandong Province Department of Finance, Department of Commerce, Lu Cai Qi [2013] No.38 (31 July 2013). Hebei Province Department of Finance, Hebei Department of Commerce Notice on Doing Well the Administration Work of the 2013 Foreign Trade Common Service Platform Contracture Fund, Hebei Province Department of Finance, Department of Commerce, Ji Cai Qi [2013] No.9 (10 April 2013).
government rules to implement Notice No. 101. As some cities have not been granted legislative power, they have published normative documents to implement pertinent legal instruments on the Common Service Platforms Programme. For instance, the Bureau of Finance and Bureau of Commerce of Wuzhou City in Guangxi Province, which published a normative document to implement Guangxi Province Department of Finance, Guangxi Province Department of Commerce Notice on Doing Well the Administrative Work of the 2013 Foreign Trade Common Service Platform Construction Fund (hereafter Notice No. 34). The US persuasively argued that these legal instruments violated WTO rules. Therefore, it can be concluded that China’s measures conferring grants through the Common Service Platforms Programmes were prohibited subsidies under the SCM Agreement.

Based on the analysis of whether China’s measures relating to the Common Service Platforms violate the WTO Agreement, it is evident that detrimental effects were brought about by China’s dispersed legislative powers. In China – Demonstration Bases, the main WTO-inconsistent legal instrument was Notice No. 101. Because of this, forty-seven local implementing rules violated the WTO Agreement as well. These legislative authorities were at the provincial, municipal, autonomous regional, and major city levels. In this case, the situation was made even worse as some cities were not granted the legislative power to enact government rules. However, they did have the power to issue normative
documents in order to implement rules at the provincial level which intended to implement Notice No. 101.\textsuperscript{61} For example, according to a normative document issued by Xuchang City which implemented the Bureau of Finance and Bureau of Commerce in Henan Province Notice on Doing Well the Administrative Work of the 2013 Foreign Trade Common Service Platform Construction Fund, Henan Province granted funds and other financial supports to ten Common Service Platforms in the demonstration bases specialising in the exportation of hair products.\textsuperscript{62}

With regard to the amount of grants to the ten Common Service Platforms, Henan Province Department of Commerce and Department of Finance provided 70% of actual expenses to certain enterprises.\textsuperscript{63} Similar provisions can be found in the Wuzhou Notice. The Bureau of Finance and Bureau of Commerce of Wuzhou City in Guangxi Province published a normative document to implement Notice No. 34 which offered a two-year period of grants.\textsuperscript{64} As pointed out above,

\textsuperscript{61} Article 63 of the 2000 Legislation Law.
\textsuperscript{63} ibid art 3.2.
\textsuperscript{64} Wuzhou City Bureau of Finance, Bureau of Commerce Notice on Doing Well the Administration Work of the 2013 Foreign
China was supposed to apply and administer all laws, regulations, rules, and other measures concerning trade in goods, services, trade-related aspects of intellectual property rights, or the control of foreign exchange at the central level and the sub-national level in a uniform, impartial, and reasonable manner.\textsuperscript{65} The aforementioned legal instruments issued by the Bureaus of Finance and Commerce in Xuchang City and Wuzhou City were subject to normative documents because these two cities do not belong to the comparatively larger cities.\textsuperscript{66} Thus, these two legal instruments can be considered as ‘other measures’ of Article 2(A)2 of the Protocol.

If taking account of all the WTO-inconsistent instruments issued by local governments intended to implement Notice No. 101, the total number is forty-seven. Even worse, in \textit{China – Demonstration Bases}, the US listed ninety-eight WTO-inconsistent legal instruments relating to the Common Service Platforms Programme at the sub-national level. Apart from \textit{China – Demonstration Bases} (2015, the US v China), China has faced similar situations in five other cases.\textsuperscript{67}

\textsuperscript{65} Protocol, art 2(A)2.

\textsuperscript{66} See notes 7, 42, 70 and 71.

\textsuperscript{67} WTO, China – Grants, Loans and Other Incentives – Request for Consultations by the United States (7 January 2009) WT/DS387/1, G/L/879, G/SCM/D81/1 and G/AG/GEN/79. WTO,
The dispersed legislative powers have done great harm to China’s conformity with WTO principles, as one WTO-inconsistent central-level legal instrument can generate a massive number of local government rules and normative documents which are inconsistent with WTO principles. It is difficult for China to find a defence to justify this situation. Among the above six cases, China has settled four of them by concluding memorandums (DS387, DS380 and DS389; DS489) and the other two are pending in the process of consultation (DS450 and DS451). Based on the results in the above four cases, it is likely that China will use the same strategy to settle the final two cases through memorandums. Thus, it is difficult for China to defend itself when more than one hundred central and local legal instruments are claimed to violate WTO rules by other WTO members.
III. Integrating Conformity with WTO Principles into China’s Legal System

China ensures that its domestic laws, regulations, rules, and other measures are in conformity with WTO norms by focusing on the supervision and modification of inconsistencies in its domestic instruments. China has not implemented a law which integrates WTO norms. Admittedly, the supervision and revision of conflicting domestic instruments are very important to ensure the uniform administration of domestic instruments, which is a stringent requirement of the WTO. Nevertheless, the most important way of preventing inconsistencies between domestic instruments and WTO principles involves more than the supervision and modification of inconsistencies in China’s domestic instruments.

Integrating domestic legal instruments with international legal standards such as WTO principles requires not only the processes of supervision and modification, but also an equally important actual law-making process. The relevant laws on supervision mechanisms in China’s legal system are restricted to regulating the consistency of China’s domestic instruments rather than stipulating to what extent the domestic instruments should be in conformity with WTO rules and regulations. As a consequence, several legal loopholes exist. China has established three mechanisms to ensure the integrity of its central and local legal instruments.

The first mechanism involves the responsibility of higher entities for maintaining the unity of regulations and rules
made by lower-level organs through amendment and repeal of conflicting provisions. The second mechanism is to file laws, regulations, and rules with superior authorities in order to preclude conflicts among different instruments. The third method to reconcile inconsistencies among domestic instruments is the review of inconsistent provisions by the SCNPC. Article 99 of the 2015 Legislation Law states that a number of state authorities including the State Council, the Supreme People’s Court, Central Military Commission, social organisations, enterprises, and citizens have the authority to submit a written request to the SCNPC to review conflicting instruments. However, it does not specify what local authorities should do if they find that superior laws, administrative regulations, or ministry rules violate WTO principles. Yet the Protocol declares that China is supposed to establish a complaints mechanism allowing individuals and enterprises to notify the national authorities of non-uniform application of the trade regime.

However, local authorities cannot notify national authorities about WTO-inconsistent laws, regulations, or ministry rules passed by the central organs through this complaints mechanism, because this complaints mechanism is

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68 Article 97 of the 2015 Legislation Law.
69 See Article 98 of the 2015 Legislation Law.
71 Article 99 of the 2015 Legislation Law.
72 Section 2(A)(4) of the Protocol.
specifically for individuals and enterprises. China lacks a specific complaints mechanism through which local organs may notify the authorities of WTO-inconsistent legal instruments made by higher-level organs.

Even certain Chinese regulations that stipulate its accession to the WTO do not integrate conformity with WTO norms into China’s domestic instruments. Instead, they are limited to highlighting the importance of the integrity of domestic instruments. For example, China published the Ordinance on the Archives Filing of Regulations and Government Rules in order to prepare for its participation in the WTO (the Ordinance). 73 The Ordinance only demonstrates how to reconcile inconsistencies between superior and inferior domestic instruments; it does not demonstrate the necessity of ensuring the conformity of domestic laws, regulations, rules, and other measures with WTO norms. For instance, Article 15 of the Ordinance sets out to resolve inconsistencies between ministry rules and government rules, and Article 13 explains how to sort out conflicts between local regulations and ministry rules. 74 Neither of them mentions how domestic legal instruments should comply with WTO principles. China has also issued certain regulations which declare the importance of ensuring that domestic instruments comply

74 Article 15 of the Ordinance.
with the WTO Agreement. However, the legislations’ content largely focuses on the modification of the WTO-inconsistent domestic instruments without indicating that central and local instruments should comply with the WTO Agreement in the law-making process. For instance, the Opinion on Cleaning the Local Regulations, Local Government Rules and Other Policy Measures to Adapt to China’s Accession to the WTO simply mentions that China is to maintain the integrity of its domestic instruments with the WTO Agreement, and that the pertinent organs need to clean up any WTO-inconsistent provisions. It also articulates that the contents and requirements of the instruments need to be revised or abolished as necessary.\textsuperscript{75}

Furthermore, this is confirmed by related local government rules for the implementation of the Opinion on Cleaning the Local Regulations, Local Government Rules and Other Policy Measures to Adapt to China’s Accession to the WTO. These local government rules include Articles II and III of the Ningbo City Opinion on Cleaning the Local Regulations, Local Governmental Rules and Other Policy Measures to Adapt to China’s Accession to the WTO and Article V of the

Hubei Province Opinion on Cleaning the Local Regulations, Local Governmental Rules and Other Policy Measures to Adapt to China’s Accession to the WTO.\(^7^6\)

The majority of the contents of these documents concentrate on the amendment of WTO-inconsistent legal provisions. Although these documents illustrate the uniformity principle of the WTO Agreement, there is a lack of concrete content stipulating how to integrate consistency with WTO norms into the domestic law-making procedure, the supervision procedure, and the revision procedure at the same time. Maintenance of the uniformity of WTO principles in the law-making process is essential to prevent China from adopting WTO-inconsistent instruments. Based on this point, it is necessary for China to enact a law or a provision which specifies the conformity of China’s domestic instruments with the WTO Agreement in the supervision, revision, and law-making processes rather than separating these three procedures.

### III. Conclusion

This Article has argued that China’s dispersed law-making power is an important factor which increases the likelihood of China’s participation in the WTO DSM. It first examined

the reasons why China’s scattered law-making power affects China’s involvement in WTO disputes through a detailed analysis of an individual case, *China – Demonstration Bases*, in order to explain why a high-level WTO-inconsistent legal instrument can cause a substantive number of WTO-inconsistent local instruments upon implementation of this superior legal instrument. The main reason is undoubtedly because China’s dispersed law-making power causes violations of the principle of uniform administration to which China committed itself in the Protocol. Therefore, it is important to first acknowledge the significant and detrimental effects China’s dispersed law-making powers has on the country’s likely increased participation in the WTO DSM, and it is vital that solutions to this problem should be proposed in terms of integrating conformity with WTO principles into China’s legal system.


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