UNIVERSITÀ DEGLI STUDI DI TRENTO
Facoltà di Giurisprudenza

SAGGI DI DIRITTO ECONOMICO E COMMERCIALE CINESE

a cura di

Ignazio Castellucci

2019

UNIVERSITÀ DEGLI STUDI DI TRENTO

Facoltà di Giurisprudenza

QUADERNI DELLA FACOLTÀ DI GIURISPRUDENZA

39

2019

Al fine di garantire la qualità scientifica della Collana di cui fa parte, il presente volume è stato valutato e approvato da un *Referee* esterno alla Facoltà a seguito di una procedura che ha garantito trasparenza di criteri valutativi, autonomia dei giudizi, anonimato reciproco del *Referee* nei confronti di Autori e Curatori.

ISBN 978-88-8443-832-4
ISSN 2284-2810

Il presente volume è pubblicato anche in versione cartacea, per i tipi di Editoriale Scientifica - Napoli, con ISBN 978-88-9391-499-4.

Gennaio 2019

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A Gabriele Crespi Reghizzi

INDICE

PRESENTAZIONE

Nel 2005 la Facoltà di Giurisprudenza dell'Università di Trento decide, prima in Italia, di offrire un corso di diritto cinese agli studenti del Corso di Laurea.

Idea lungimirante e feconda, arricchita dalla partecipazione di docenti cinesi che hanno condiviso l'insegnamento con il sottoscritto; e da molti eventi collaterali, spesso organizzati dagli stessi studenti, come alcuni seminari, proiezioni cinematografiche, persino una "gita scolastica" a Pechino finanziata dalla Provincia autonoma di Trento[1]. Tra i prodotti del corso – dopo qualche anno di insegnamento con dispense, e poi con un libretto più o meno artigianale di appunti rilegati – vi è anche un mio libro di testo edito con il Dipartimento, che mi risulta letto e impiegato a fini didattici anche lontano da Trento, diffondendo anche così la notorietà dell'Ateneo e delle sue attività sempre innovative[2].

Nel corso degli anni, molti bravissimi studenti hanno seguito il corso con entusiasmo, con risultati lusinghieri nelle rilevazioni del loro gradimento. La Facoltà e l'Ateneo hanno messo a disposizione i mezzi finanziari per permettere a uno o due laureandi per anno di andare in Cina a svolgere ricerche "sul campo", poi rifluite nelle loro tesi di laurea – quasi tutte premiate con il massimo dei voti e la lode.

Molti dei laureati trentini in diritto cinese, o in diritti dei paesi dell'Asia (come si chiamava il corso nei primi anni), hanno poi avuto carriere di alto profilo nelle istituzioni, in importanti studi legali interna-

[1] Si è trattato di un'esperienza formativa interamente ideata da studenti, nel quadro del progetto "Oltre i confini" della Provincia autonoma di Trento: insieme a un Funzionario provinciale ho accompagnato studenti di varie Facoltà lungo un interessante percorso, avviato con alcuni seminari svolti in Italia prima della partenza e concluso al ritorno da una bella pubblicazione, non priva di sostanza, prodotta dagli stessi studenti e pubblicata dalla Provincia: AA.VV., *Alla scoperta della Cina: incontri e riflessioni di un'esperienza formativa*, Trento, 2008.

[2] I. CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Trento, 2012; mi consta il volume è stato usato per l'insegnamento del diritto cinese, da me direttamente o da Colleghi stranieri, a Cape Town, Helsinki, Hong Kong.

zionali, o proseguendo gli studi in programmi Master all'estero, o nel dottorato di ricerca trentino; in un caso avviando una promettente carriera accademica tra l'Italia e la Cina.

Una bella conferenza si è tenuta a Trento per il decennale del corso, nel 2016, con la partecipazione di Gabriele Crespi Reghizzi e di Sandro Schipani – in diverso modo, due punti di riferimento per chi in Italia si occupa oggi di diritto cinese; e di Xue Jun, che per molti anni ha condiviso con me l'insegnamento nel corso.

In quella sede è nata l'idea di questo volume. Alla base, una considerazione molto semplice: dietro ognuna delle tesi di laurea trentine in diritto cinese vi è un lavoro serio e vera ricerca, a dispetto della giovane età e della poca o nulla esperienza dei candidati. Ho imparato molto dalle loro ricerche: con un'appropriata guida e lavorando sodo i ragazzi hanno delimitato ambiti precisi di ricerca e li hanno scandagliati, rinvenendo dati nuovi e interessanti, poi messi a sistema con il contesto e a volte valorizzati in modo nuovo; producendo così, ad oggi, una quindicina di tesi circa che complessivamente costituiscono un incremento significativo nella conoscenza del diritto cinese, nel panorama non solo italiano.

Quelle tesi sono un prodotto intellettuale fresco, bello, utile e, considerato il modesto impegno finanziario della Facoltà e dell'Ateneo, molto costo-efficiente: si tratta, alla fin fine, di un innovativo *format* di micro-finanziamento per la ricerca, in cui è valorizzato al meglio un piccolo impiego di risorse pubbliche e l'impegno di giovani brillanti; è stato quindi quasi banale pensare di renderne i prodotti disponibili mediante la pubblicazione, riconoscendo i dovuti onori ai meritevoli – piuttosto che, ad esempio, pubblicando un libro a mia sola firma costruito in parte importante sui loro sforzi.

L'insegnamento attivato a Trento, con impegno finanziario minimo, è divenuto insomma un motore di didattica innovativa, ricerca di frontiera, *placement*, grazie all'impegno dei ragazzi e al supporto della Facoltà e dell'Ateneo. E ci siamo anche divertiti!

La selezione di solo alcune tra quelle tesi ai fini di questa pubblicazione è obbligata dai limiti fisici del volume; pur sapendo che si andavano a tralasciare altri lavori ugualmente meritevoli si è dovuto sceglie-

re. Si sono scelti lavori recenti e su aree contigue, per dare attualità e coerenza alla raccolta.

Un libro occidentale sul diritto economico e commerciale cinese non può non aprirsi con la presa d'atto di diversità socio-economiche, storiche e giuridiche tra Cina e Occidente tali da impedire ogni pretesa di completezza nello spazio di un singolo volume. I saggi qui raccolti offrono tuttavia al Lettore alcuni significativi frammenti del sistema giuridico cinese; nel descriverne specifici aspetti, tentano anche di rivelarne la trama generale, e i principi socialisti sottesi ai reticolati normativi nei settori trattati (diritto societario, proprietà intellettuale, *antitrust*, e così via). Non solo ogni lavoro è pregevole e rilevante, ma il loro insieme permette di vedere i contorni e alcune caratteristiche sistemiche significative del diritto economico cinese – di cui quello che noi definiamo "diritto commerciale" è una parte.

La concezione di questo volume, infine, permette di fare a meno di alcuna postfazione o capitolo conclusivo – che non avrebbe senso in una ricerca appena avviata e certo destinata a non esaurirsi tanto presto. L'obiettivo è quello di permettere una prima acquisizione dei tratti complessivi di un sistema ancora abbastanza indefinito, oltre che in continuo stato di flusso: ha forse più senso squadernare, al termine del mio breve capitolo introduttivo, alcune chiavi di lettura per orientarsi nella lettura dei saggi presentati e nelle ulteriori letture che ci auguriamo seguiranno – con l'avvertenza che si tratta comunque di strumenti provvisori, suscettibili di affinamento e mutamenti con il progredire delle riforme cinesi e degli studi e ricerche al riguardo.

L'impegno di tutti ha dato frutti straordinari, che ripagano di un impegno della Facoltà e del sottoscritto ormai ben più che decennale, e degli sforzi degli autori dei saggi qui presentati: ringrazio loro, prima di chiunque altro. Ringrazio il Preside Giuseppe Nesi, che ha entusiasticamente aderito all'idea di pubblicare questo volume; e tutti gli Amici e Colleghi della Facoltà trentina che dal 2005 mi supportano, e sopportano. Soprattutto, ringrazio gli studenti che ho visto passare negli anni sui banchi trentini e con cui ho interagito, insegnando e imparando.

Questo libro è dedicato a Gabriele Crespi Reghizzi.

Maestro del diritto socialista e sovietico, è anche stato tra i primi italiani a fare ricerca sul diritto cinese, con particolare attenzione al diritto

economico e commerciale[3]. Il suo insegnamento rimarrà fondamentale per generazioni di studiosi della materia – fino agli autori di questi saggi e prevedibilmente anche per quelli che seguiranno. Con questa raccolta di scritti, e con animo grato, gli rendiamo affettuoso omaggio.

Trento, dicembre 2018

I.C.

[3] Sarebbe troppo lungo snocciolare qui tutti i suoi scritti di diritto socialista, sovietico, cinese, e/o sul commercio e arbitrato internazionale dei paesi socialisti. Ne cito solo due: il suo primo saggio sul diritto cinese, in ordine di tempo, è il frutto di una corposa ricerca "sul campo" svolta in piena rivoluzione culturale, quando il diritto cinese era materia davvero pionieristica, per non dire esoterica: *Legal Aspects of Trade with China: The Italian Experience*, in 9 *Harvard Journal of International Law* (1968), 85-139. Di quel periodo è anche il suo fondamentale volume *L'impresa nel diritto sovietico*, Milano, 1969, in cui è analizzato in profondità il rapporto tra economia, politica e diritto (privato, pubblico, civile, commerciale ed economico) nel contesto dell'U.R.S.S., con molti insegnamenti ancora pienamente utilizzabili, *mutatis mutandis*, per la lettura del sistema cinese di oggi.

HOMO OECONOMICUS SINICUS

FRAMMENTI DI UN'ANTROPOLOGIA DIACRONICA DEL *BUSINESSMAN* CINESE

Ignazio Castellucci

SOMMARIO: *1. A mo' d'introduzione. 2.* Homo oeconomicus sinicus. *3. Due tipi a confronto. 4. L'*homo oeconomicus socialisticus *e l'operatore economico cinese di oggi. 5. La divergenza. 6. I saggi raccolti in questo volume.*

1. A mo' d'introduzione

Non serve spendere troppo inchiostro per segnalare la rilevanza del diritto cinese in questo momento storico. Si tratta di un sistema complesso e composito, giovane ma con radici antiche, in formazione e crescita rapidissima. Il sistema giuridico cinese nel suo insieme è portatore di valori culturali, politici, economici e giuridici diversi da quelli della *Western Legal Tradition*; i suoi sviluppi nell'ultimo quarantennio possono descriversi, con sintesi accettabile, come frutti dell'ibridazione tra la venerabile tradizione giuridica e culturale cinese, il diritto socialista di matrice sovietica, e vari modelli giuridici di origine occidentale[1].

Senza voler disquisire sulle classificazioni delle aree del diritto – fluide da noi, figuriamoci da loro – rileviamo la contiguità tra due macroaree giuridiche che sovrintendono alla vita economica cinese, oggetto dei saggi raccolti in questo volume e per noi approssimativamente identificabili con il diritto dell'economia e con il diritto commerciale: la prima più pubblicistica e più segnata dalla tradizione nazionale e socialista; la seconda più influenzata dai modelli occidentali[2].

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[1] I. CASTELLUCCI, *Rule of Law and legal complexity in the People's Republic of China*, Trento, 2012, spec. Cap. I.

[2] G. CRESPI REGHIZZI, *Evoluzioni del nuovo diritto commerciale cinese*, in *Il Politico*, anno LXXI, n. 3, sett.-dic. 2006, 142-171.

La cornice e il tessuto connettivo del sistema politico-giuridico cinese è un modello generale definito dagli stessi cinesi *yīfǎ zhìguó* (依法治国), "governo dello Stato secondo la legge": la versione aggiornata in salsa cinese delle nozioni di "legalità socialista" e *rule by law* degli studi di diritto socialista del XX secolo[3].

Rispetto al modello socialista "classico" del XX secolo il sistema economico cinese di oggi include un settore privato a livello di superpotenza mondiale per quantità, qualità, innovazione. Un modello *rule by law* "a geometrie variabili" – col classico modello di legalità socialista che produce miscele diverse di normatività tecnico-giuridica e *governance* socialista, secondo il maggiore o minore interesse pubblico connesso alle diverse aree governate, o anche al singolo caso regolato – è la risposta alle esigenze normative e di governo di questa economia di mercato con caratteristiche socialiste e cinesi. Le dimensioni economiche pubblica e privata sono più vicine tra loro e più connesse che non da noi; il confine tra esse è sfumato, e più numerosi e invasivi sono i controlli pubblici, anche nel campo del diritto commerciale[4].

La compresenza di aspetti privatistici e pubblicistici nell'economia e nel diritto socialista di mercato cinese – libertà e controllo, imprese pri-

[3] Sul diritto delle esperienze socialiste europee del XX secolo esiste da decenni una ricca letteratura in lingua italiana: v., ad es., R. SACCO, G. CRESPI REGHIZZI, *Rassegna delle fonti del diritto civile, dell'economia e della famiglia nei paesi socialisti*, in *Annuario di diritto comparato e di studi legislativi* (suppl.), 1967; G. CRESPI REGHIZZI, *Lo studio e l'insegnamento del diritto dei Paesi socialisti in Italia*, in *Riv. Dir. Agrario*, 1976, 35; G. CRESPI REGHIZZI, P. BISCARETTI DI RUFFIA, *La Costituzione sovietica del 1977*, Milano, 1979; T. NAPOLITANO, *Istituzioni di diritto sovietico*, Torino, 1975; G. DE VERGOTTINI, *Diritto costituzionale comparato*, Padova, 1991, 606 ss.; G. AJANI, *Le fonti non scritte del diritto dei Paesi socialisti*, Milano, 1985; ID., *Diritto dell'Europa Orientale*, Torino, 1996. Nella letteratura internazionale, tra i moltissimi, il classico H.J. BERMAN, *Justice in the Ussr. An Interpretation of Soviet Law*, Cambridge Mass., 1963; J.N. HAZARD, W.E. BUTLER, P.B. MAGGS, *The Soviet Legal System*, New York, 1977; più recente, con riferimento alla Russia post-socialista, F. FELDBRUGGE, *The Rule of Law in Russia in a European Context*, in ID. (ed.), *Russia, Europe and the Rule of Law*, collana *Law in Eastern Europe*, Leyden, 2007, 203. Sulla nozione di *yīfǎ zhìguó* v. I. CASTELLUCCI, *Rule of Law…*, cit., *passim*; ID., *L'idea di* Rule of Law *nella Repubblica Popolare Cinese*, in R. CAVALIERI (a cura di), *Diritti, cittadini e potere in Cina*, 12 *Sulla via del Catai*, Centro Martini Martini, Trento, 2015, 59 ss.

[4] I. CASTELLUCCI, *Rule of Law…*, cit., Cap. III.

vate e di stato, mercato e resilienza delle logiche dell'economia pianificata – è chiaramente rilevabile non solo nel dato testuale di specifiche norme giuridiche, quanto soprattutto nel legame strutturale generale tra diritto e politica posto alla base del sistema socialista. Si tratta di un legame fondamentale, implicito ovunque nell'ordinamento giuridico, e "messo in chiaro" sia negli snodi critici di ogni atto normativo che nei documenti costituzionali istituzionali e politici di ogni rango.

Se i tratti generali del socialismo di mercato cinese e i relativi assetti normativi sono ormai noti anche in occidente, meno si sa sui personaggi che popolano quel mondo: chi sono, in senso politico-giuridico e socio-antropologico, gli operatori pubblici e privati di questo sistema economico (funzionari politici e amministrativi, *manager* pubblici e privati), sempre più presenti e visibili sulla scena globale?

L'*Homo oeconomicus sinicus*, l'idealtipo socio-antropologico che sintetizza i tratti essenziali del sistema economico cinese nel suo quotidiano divenire, può essere ricercato e studiato sia come oggetto in sé che come prisma per capire il sistema di cui fa parte. Non è detto che il personaggio idealizzato esista, né che ve ne sia un solo "tipo" nelle diverse epoche e contesti dell'economia cinese; ma una ricerca al riguardo forse può rivelare una plausibile *cross-section* di aspetti profondi della società cinese, attraverso i suoi operatori economici di ieri e di oggi. Avviamo quindi uno studio al riguardo con una piccola analisi comparativa, osservando l'*homo oeconomicus europaeum* e l'*homo oeconomicus sinicus* all'opera nei rispettivi contesti.

L'analisi di Weber sui rapporti tra cultura, religione ed economia capitalistica, risalente a oltre un secolo fa[5], che tante discussioni ha generato, è stata considerata da molti una semplificazione eccessiva e inapplicabile[6]; ci sembra invece che quella lettura della storia economi-

[5] M. WEBER, *L'etica protestante e lo spirito del capitalismo*, Milano, 1991 (trad. it. di A.M. Marietti); l'originale *Die Protestantische Ethik und der Geist des Kapitalismus* è del 1905.

[6] V., ad es., R.M. MARSH, *Weber's Misunderstanding of Chinese Law*, in 106 *American Journal of Sociology* (2000), 281 ss.; G. STOKES, *The Fates of Human Societies: A Review of Recent Macrohistories*, in 106 *American History Review* (2001), 508 ss.; H.M. ROBERTSON, *Aspects of the Rise of Economic Individualism: A Criticism of Max Weber and His School*, Cambridge, 1993.

ca europea abbia avuto e abbia ancora un valido fondamento[7] – a patto di non cercare relazioni lineari, semplici, quasi meccaniche, di causa ed effetto tra elementi inseriti in quadri storici complessi. Tenteremo quindi lo stesso tipo di approccio, con animo leggero e con tutti i *caveat* del caso, anche cercando di tener conto di sviluppi che Weber e altri non avevano previsto o considerato.

Se in Weber le vicende del Nord Europa protestante e calvinista sono contrapposte sia a quelle dell'Europa meridionale cattolica che a quelle della Cina confuciana, identificando ragioni di divergenza in parte sovrapponibili, sembra allora una scelta ragionevole per saperne di più quella di comparare la storia economica dell'Europa meridionale, in particolare italiana, con quella cinese. La figura del mercante può offrire un punto di osservazione interessante al riguardo.

Ridurre millennarie esperienze economiche al confronto tra due tipi sociologici alquanto generici, attraverso pochi frammenti di un quadro storico vastissimo e forse anche con qualche luogo comune di troppo, è operazione senz'altro troppo semplice – e tuttavia irresistibile: la comparazione è il mestiere (giuridico) più antico del mondo[8]. Un'analisi esaustiva richiederebbe ben altra ampiezza e profondità: ci auguriamo che queste pagine stimolino l'avvio di fruttuose ricerche sul tema.

2. Homo oeconomicus sinicus

Nel corso del XIII secolo, mentre i mercanti dei Comuni toscani e lombardi commerciavano principalmente in Europa, Genova e la Serenissima Repubblica di Venezia guardavano a Oriente. Venezia, specialmente, estendeva le sue reti diplomatiche e commerciali attraverso il Mediterraneo, il Mar Nero e oltre, fino agli emporii del medio oriente

[7] Per tutti, E. FISCHOFF, *L'Etica protestante e lo spirito del capitalismo – Storia di una controversia*, in 11 *Social Research* (1944), 53-77; trad. it. A.M. Marietti, in appendice all'edizione italiana del 1991 del saggio di Weber.

[8] S. GOLTZBERG, *Le droit comparé*, Parigi, 2018, cap. II, *Origine et développement du comparatisme*, 35.

e dell'Asia centrale[9]. Il giovane Marco Polo compie tra il 1271 e il 1295 un viaggio diplomatico e commerciale che da Venezia lo porta a conoscere paesi lontani lungo le vie terrestri e marittime della Seta, in Asia e fino in Cina – un terminale della rete economica globale che allora univa i mercanti del mondo conosciuto – e a ivi ricoprire a lungo vari ruoli politici per Kublai Khan, l'Imperatore cinese della dinastia (mongola) Yuan.

L'assetto politico del Catai è in quel momento favorevole alle attività mercantili tra la Cina, l'Asia e il mondo, con una rilevabile egemonia Yuan ben oltre i confini "naturalmente cinesi" dell'Impero, quelli più o meno stabilizzati nella dinastia precedente (Song) e nelle successive (Ming, Qing). Marco Polo riferirà nel racconto del suo viaggio di mercati fiorenti lungo la Via, della circolazione della cartamoneta inventata dall'imperatore cinese[10], di un significativo ruolo del Gran Khan nel garantire la sicurezza dei mercanti fino in Persia[11]. Quello mongolo è un impero espansivo, veloce, multietnico e multiculturale, militaresco e mercantile, col confucianesimo di stato cinese dei secoli precedenti invaso, contaminato e integrato da altre ideologie, filosofie e religioni (tra cui buddismo, Islam, cristianesimo). La sua area di influenza, anche mediante altri Khanati dell'antico impero mongolo, interessa quasi tutta l'Asia, inclusa India, Persia, medio oriente; la sua economia mercantile produrrà un'intensa circolazione di capitali in tutta l'Asia[12].

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[9] Venezia era presente a livello istituzionale in molti empori del Mediterraneo, del Medio Oriente e dell'Asia, con ambasciatori residenti impegnati nel dare assistenza commerciale ai connazionali in transito, e nello svolgere attività diplomatica e di *intelligence* economica in cooperazione con i mercanti stessi, a uso e consumo sia di questi ultimi che del governo della Serenissima; C. MARCON, N. MOINET, *L'Intelligence Économique*, Parigi, 2006, 32-33; C. JEAN, P. SAVONA, *Intelligence economica*, Soveria Mannelli, 2011, 51.

[10] *Il Milione*, cap. 95; l'introduzione della moneta cartacea risale probabilmente all'età Song, intorno all'undicesimo secolo; M. ELVIN, *The Pattern of the Chinese Past*, Stanford, 1973, 156-159.

[11] *Il Milione*, cap. 32, in Persia: "Questi sono mala gente: tutti s'uccid[o]no tra loro, e se non fosse per paura del signore, cioè del Tartaro del Levante, tutti li mercatanti ucciderebboro".

[12] Con un significativo drenaggio di risorse cinesi verso i paesi stranieri, come rileva P. SANTANGELO, *L'impero del Mandato Celeste – La Cina nei secoli XIV-XIX*, Ro-

Il clima sarà, con alti e bassi, mediamente meno favorevole alle libere attività mercantili nei successivi periodi delle dinastie Ming (1368-1644) e Qing (1644-1911) – fra crisi monetarie e agricole, *choc* demografici e politiche imperiali antimercantiliste. Si tenderà a privilegiare l'agricoltura, ad aumentare il controllo pubblico delle attività economiche, a creare vasti monopoli; in generale, a favorire la dimensione pubblica o pubblico-privata dell'economia, anche mercantile[13], e a restringere regolare e controllare i commerci con l'estero[14]. Ne scaturiranno il lento indebolimento dell'Impero, tensioni socio-economiche e, alla lunga, anche i conflitti del XIX secolo con le potenze occidentali e il Giappone che accompagneranno l'Impero verso la fine. Solo in alcune città portuali autorizzate come Guangzhou (Canton) restano relativamente vivaci le attività mercantili, tollerate anche nei periodi di maggior chiusura[15], pur regolamentate in maniera tendenzialmente stretta[16]; ma si nota ad esempio la scomparsa della moneta cartacea, già diffusa nel periodo Yuan, e persino di quella metallica[17].

Con la reazione statualista dell'età Ming e Qing torna a prevalere la cultura della tradizione confuciana, sia dal punto di vista sociale che di governo. Il mercante torna ad essere, in teoria, un soggetto "confucia-

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ma-Bari, 2014, p. 158, che produrrà nelle dinastie successive una reazione orientata a un forte controllo pubblico sull'economia.

[13] P. SANTANGELO, *L'Impero cinese agli inizi della storia globale*, Roma, 2011, vol. I, 158-205; vol. II, 48-69; ID., *L'impero del Mandato Celeste*, cit., 67 ss., 156 ss.

[14] ID., *L'Impero cinese agli inizi della storia globale*, cit., vol. II, 69 ss.

[15] Ibid. 53-54.

[16] Consiglio l'affascinante libro di T. BROOK, *M. Selden's Map of China: Decoding the Secrets of a Vanished Cartographer*, New York, 2013, sulla storia della celebre mappa di epoca Ming donata dal giurista John Selden alla Bodleian Library dell'Università di Oxford; l'Autore svolge una dettagliata ricostruzione storica per rinvenire l'origine della mappa nel contesto del controllo imperiale di età Ming sui commerci marittimi e sulle vie di navigazione nel mar cinese meridionale – tema geopoliticamente "caldo" ancora oggi, in cui si ripropone in chiave attuale lo scontro giuridico e ideologico tra Selden, teorico del *mare clausum* sottoposto alla potestà di un sovrano, e Ugo Grozio, che invece propugnò l'idea del *mare liberum*.

[17] Gaspar da Cruz, frate dominicano che visitò la Cina verso la metà del XVI secolo, tornò in Portogallo nel 1564 e pubblicò nel 1570 il suo *Tratado das coisas da China*, riferisce nel Capitolo XI del *Tratado* di come nei mercati di Canton non si usasse moneta alcuna, né cartacea né metallica, effettuandosi i pagamenti con argento a peso.

namente indecente" e "legisticamente disprezzato"[18]. Al tempo stesso, però, vanno emergendo grandi famiglie di mercanti, in grado di stabilire rapporti cooperativi col potere e anche di esprimere un crescente numero di letterati destinati al governo dell'impero. Queste famiglie svolgono grandi commerci autorizzati interprovinciali o con l'estero; ed esprimono i sempre più importanti *guanshang* – i mercanti di Stato, gestori dell'economia pubblico-privata dell'Impero: un ceto di monopolisti (sale, rame, ginseng), gestori di commesse pubbliche, *procurers* di forniture militari, esattori delle tasse, cambisti, finanzieri, etc.[19].

La tradizionale avversione dei governanti per i mercanti, a quel punto e a quel livello, è superata dalla simbiosi tra le due categorie nella pratica[20]. Lo *status* sociale dei grandi mercanti ora è elevato; essi divengono benefattori pubblici e mecenati[21]. Le famiglie maggiori integrano il sistema imperiale con funzioni di governo territoriale e sociale,

[18] L'avversione verso i mercanti è invero uno dei punti di consonanza tra le due maggiori scuole classiche del pensiero cinese, quella confuciana e quella legista: Pan Ku, storico imperiale di epoca Han, nella sua *Chien Han Shu* (*Storia della dinastia Han anteriore*), cap. 24, I, riferisce di come "con la decadenza della Casa di Chou [Zhou, nella traslitterazione oggi corrente – n.d.a.] i riti e le leggi furono sempre più trascurati… nessuno… si asteneva dal … disprezzare ciò che è fondamentale, l'agricoltura. I contadini divennero pochi e i mercanti molti… alcuni, grazie al potere del loro denaro, poterono diventare padroni degli altri"; riportato da P. FILIPPANI RONCONI, *Storia del pensiero cinese*, Torino, 1964, II ed. 1992, 23. D'altro canto nello *Shang Jun Shu* (*Il libro del Signore di Shang*), classico della letteratura legista databile attorno al IV secolo a.C., nel terzo capitolo *Agricoltura e guerra* è reiteratamente affermato che la potenza e il successo dello Stato dipendono da agricoltura e guerra, che rendono il popolo semplice, disciplinato, concentrato; mentre l'insuccesso deriva dal cedimento alle mollezze del confucianesimo (para. 2) e dall'inclinazione delle persone insignificanti a occuparsi "del commercio, dell'arte e dei mestieri, per evitare l'agricoltura e la guerra, mettendo così lo Stato in una condizione di pericolo" (para. 3). La coincidenza su questo tema di dottrine di governo autoritario e dirigista per altri versi molto distanti tra loro segnala, alla fin fine, la natura intrinsecamente libertaria e tendenzialmente insofferente al controllo pubblico delle attività mercantili.

[19] P. SANTANGELO, *L'impero del Mandato Celeste*, cit., 144 ss.; ID., *L'Impero cinese agli inizi della storia globale*, vol. II, cit., 51-68; D.A. BELL, *Confucian Constraints on property Rights*, in D.A. BELL, HAHM CHAIBONG (eds.), *Confucianism for the Modern World*, Cambridge, 2003, 219-220.

[20] M. ELVIN, *The Pattern of the Chinese Past*, cit., 292.

[21] P. SANTANGELO, *L'Impero cinese agli inizi della storia globale*, cit., vol. II, 61.

mutuo soccorso, regolazione interna[22], istruzione, polizia, esazione delle tasse[23]. Le gilde cooperano col Magistrato imperiale nel governo dell'economia, riconoscendo e tutelando gli usi, creando regole giuridiche, approntando sistemi di regolazione delle controversie mercantili[24]. Il Magistrato supervisiona le gilde e rivede le liti mercantili in grado di appello; d'altro canto egli normalmente si attiene, nel farlo, alle regole e alle decisioni corporative, cui spesso si limita a prestare il braccio della forza pubblica; e si avvale spesso del potere di rinviare le liti direttamente sottopostegli all'arbitrato presso le associazioni di settore[25].

Il modello socio-economico è fortemente caratterizzato in senso localista: anche le istituzioni corporative delle comunità mercantili – con cui il potere politico locale e il Magistrato imperiale cooperano attivamente – producono statuti, regole e pratiche di commercio e di soluzione delle controversie mercantili pensate, interpretate e applicate spesso in danno dei forestieri[26]. Solo nel 1900 le gilde locali, tradizionalmente riservate agli associati, diverranno camere di commercio pubbliche, con leggi nazionali e regolamenti locali, corti arbitrali e procedure moderne, in cui svolgere e regolare le attività intersettoriali e il commercio con gli stranieri[27]. Istituzioni e corti locali resteranno però sempre ben poco

[22] T. ZHANG, *The Laws and Economics of Confucianism*, cit., spec. 211-212; GOH BEE CHEN, *Law without Lawyers, Justice Without Courts: on Traditional Chinese Mediation*, Aldershot, 2002, 69 ss.

[23] M. ELVIN, op. cit., 292-293.

[24] R.K. WAGNER, *Alternatives to Magistrate Justice: Merchant Guild Dispute Resolution and the Foreign Trader Driven Litigation and Arbitration Reforms of Late Imperial and Early Republican China*, in 4 *J. of Comp. Law* (2009), 2, 257-290, *260*; GOH BEE CHEN, *Law without Lawyers, Justice Without Courts*, cit., 73 ss.; S.D. GAMBLE, J.S. BURGESS, *Peking: a Social Survey*, Oxford, 1921, 163-164; W.K.K. CHAN, *Merchant Organisations in Late Imperial China: Patterns of Change and Development*, in 15 *Journal of the Royal Asiatic Society of the Hong Kong Branch* (1975), 28 ss., 29; D.J. MACGOWAN, *Chinese Guilds or Chambers of Commerce and Trades Unions*, in 21 *Journal of the China Branch, Royal Asiatic Society* (1886), 133 ss.

[25] M. DYKSTRA, *Beyond the Shadow of the Law: Firm Insolvency, State-Building, and the New Policy Bankruptcy Reform in Late Qing Chongqing*, in *Frontiers of History in China*, 2013, 8(3), 406-433, 417 ss.

[26] IBID., *passim* e spec. 420-422.

[27] R.K. WAGNER, *Alternatives to Magistrate Justice: Merchant Guild Dispute Resolution…*, cit., spec. 274 ss.

indipendenti, al tempo degli *yamen* imperiali come nella Cina socialista, strutturalmente inserite nel sistema di potere locale.

Il rapporto dei corpi sociali intermedi con l'autorità imperiale è quindi, in principio, cooperativo; ma è anche segnato da forze centrifughe e tensioni. Da un lato, vi sono i tentativi o le velleità di controllo da parte di un impero inadeguato, in un contesto segnato dalla presenza di gruppi agnatizi estesi politicamente ed economicamente forti[28]. Dall'altro, vi è il contesto essenzialmente pluralista della società cinese, caratterizzato dalla centralità dei gruppi familiari, dalle associazioni professionali, delle reti di rapporti personali[29]; e le inclinazioni dei ceti emergenti, inclusi gli stessi *guanshang* e i pubblici funzionari o incaricati di servizi pubblici, a muoversi nelle zone grigie della legge imperiale, oltre che della morale corrente – quando non proprio a disapplicare, eludere, violare quella legge attuando alimentando o tollerando abusi, corruzione, evasione fiscale, contrabbando, estorsioni[30].

La crescita economico-politica dei grandi gruppi agnatizi e una certa diversificazione dei loro interessi – non più limitati all'agricoltura, e sempre più vicini alla vita delle città[31], al commercio, all'industria, all'esercizio delle attività di monopolio pubblico –, sempre con relativa avversione al rischio mercantile e preferenza per la gestione dei propri affari all'ombra del potere politico, segna dunque il modello economico-politico cinese di età Ming e Qing fino alla fine dell'Impero.

Un processo storico-economico in parte analogo sarà rilevabile nelle economie di Giappone e Corea del XIX-XX secolo, caratterizzate da uno stretto rapporto tra Stato e grandi gruppi economici familiari; l'accelerazione che si avrà in Giappone dalla seconda metà del XIX secolo produrrà *ivi* – la Cina imperiale probabilmente si muove in ritardo, e non ne avrà più il tempo – una rapida industrializzazione a opera di grandissimi conglomerati economici su base familiare: gli *Zaibatsu*,

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[28] T. ZHANG, *The Laws and Economics of Confucianism*, cit., *passim*, spec. 211-212.

[29] GOH BEE CHEN, *Law without Lawyers…*, cit., cap. 3, spec. 52-58.

[30] V. HANSEN, *Negotiating Daily Life in Traditional China: How Ordinary people Used Contracts 600-1400*, New Haven-Londra, 1995, 144-146; P. SANTANGELO, *L'Impero cinese agli inizi…*, cit., vol. II, 48-68; M. ELVIN, *op. cit.*, 248 e 290-291.

[31] M. ELVIN, *The Pattern of the Chinese Past*, cit., 250.

sciolti d'autorità dopo la seconda guerra mondiale e poi rinati con la diversa forma giuridica dei *Keiretsu*[32]. La Corea, paese economicamente ancor più arretrato e più chiuso al mondo della Cina imperiale, cessa di esistere come entità politicamente autonoma più o meno insieme alla Cina, tra la fine del XIX secolo e il 1910; colonia giapponese dal 1910 al 1945, rinasce nella seconda metà del XX secolo come una tigre (economica, nella parte meridionale; e militare in quella settentrionale), producendo al Sud la versione locale degli *Zaibatsu*, i *Chaebol* – esatta traduzione in coreano del termine giapponese –, grandi, ricchi, cooperativi con l'autorità governativa e in grado di influenzarne le politiche[33].

3. Due tipi a confronto

Emergono alcune similitudini storiche tra i due tipi dell'*homo economicus italicus* e dell'*homo oeconomicus sinicus*, sopra descritti.

La pratica della mercatura fiorisce in un'Europa politicamente frammentata a partire dal secolo XIII, specie in alcune città dell'Italia[34], nelle Fiandre e in qualche altra città d'Europa; l'allentamento dei vincoli feudali nei confronti del Papato e dell'Impero e l'autonomia delle città italiane aveva prodotto un certo numero di città libere, con economie mercantili e/o marinare in crescita.

L'evoluzione della figura del mercante caratterizza l'Italia, e poi tutta l'Europa continentale, dall'età di mezzo all'età contemporanea: inizialmente un artigiano, magari bravo e intraprendente, egli estende gradualmente le sue attività coinvolgendo i familiari, e poi cerchie crescenti di parenti, amici, dipendenti, soci, finanziatori[35]. Egli accompagna

[32] G. COLOMBO, A. ORTOLANI, capitolo *Giappone*, in M. MAZZA (a cura di), *I sistemi del lontano Oriente*, vol. V. XVII, *Trattato di Diritto Pubblico Comparato ed Europeo* diretto da G.F. FERRARI, Padova, 2019.

[33] I. CASTELLUCCI, A. SERAFINO, capitolo *Corea*, in M. MAZZA (a cura di), *I sistemi del lontano Oriente*, cit.

[34] A. SAPORI, *Il mercante italiano nel medioevo*, Milano, 1983; è la raccolta di quattro conferenze tenute da A. Sapori all'*École Pratique des Hautes Études* di Parigi nel 1948, originalmente pubblicata in francese nel 1952.

[35] A. SAPORI, *Il mercante italiano nel medioevo*, cit., *passim*, spec. 39-50.

così il passaggio dall'età dell'economia curtense, di sussistenza e di piccoli traffici, a quella di un'economia commerciale a raggio crescente – cittadina, regionale, internazionale – produttiva di nuove ricchezze attraverso lo scambio. Nasceranno, nel tempo, meccanismi di miglioramento e moltiplicazione della capacità economico-produttiva, della capacità finanziaria, di condivisione e ottimizzazione dei rischi associati alle grandi intraprese dell'età nuova che andava sorgendo[36].

Le famiglie delle *élite* cittadine, sempre più dedite ai commerci, allargano i loro interessi dalla gestione del latifondo, alle arti e mestieri, alla mercatura, alla finanza, e infine al governo della cosa pubblica: caso paradigmatico è quello dei Medici a Firenze[37].

Vi è in quel tempo, in Italia come in Cina, un vasto spazio economico puntuato dalla presenza di importanti città commerciali, in un sistema di governo centrale debole o inesistente o comunque rispettoso delle attività commerciali e delle forme di autoorganizzazione e autonomia del ceto mercantile; e di poteri locali forti e vissuti dagli interessati come estensione politica delle attività economiche delle famiglie maggiori. La diaspora mercantile cinese in molti paesi dell'Asia ha prodotto nei secoli colonie e comunità mercantili in luoghi lontani dal Regno di Mezzo, i cui operatori mantenevano i loro modi di vivere e di fare affari; così costituendo nei mercati regionali e globali di allora comunità mercantili residenti etnicamente caratterizzate, chiuse rispetto alle società ospitanti, collegate e collaboranti coi potentati familiari ed economici nelle varie provincie di origine in madrepatria[38] – similmente per certi aspetti ai *Lombardi*, come venivano chiamati i mercanti italiani nell'Europa settentrionale del XIII secolo[39]; o ai veneziani, di cui

[36] Ibid.; V. COMITO, *Storia della finanza d'impresa*, Torino, 2002, vol. I, 39-229.

[37] J. BURCKHARDT, *La civiltà del Rinascimento in Italia*, Basilea, 1860.

[38] P. SANTANGELO, *L'Impero cinese agli inizi della storia globale*, Roma, 2011, vol. II, 72; C.H. YEN, *The Chinese in Southeast Asia and Beyond: Socioeconomical and Political Dimensions*, Singapore, 2008; I. RAE, M. WITZEL, *The Overseas Chinese of South East Asia: History, Culture, Business*, New York, 2008; M. STUART-FOX, *A short History of China and Southeast Asia: Tribute, Trade, and Influence*, Crows Nest NSW, 2003; L. SURYADINATA, TAN CHEE BENG, *Ethnic Chinese in Southeast Asia: Overseas Chinese, Chinese Overseas or Southeast Asians?*, in L. SURYADINATA (ed.), *Ethnic Chinese as Southeast Asians*, New York, 1997.

[39] A. SAPORI, *Il mercante italiano nel medioevo*, cit., 9-19.

abbiamo già menzionato la rete di cooperazione e di *intelligence* pubblica-privata, politica e commerciale, in Asia e Medio Oriente.

Immerso in una realtà familista, cattolica, paternalista nella società e nelle istituzioni, il mercante italiano medievale ha qualcosa che lo accomuna al collega cinese, come emerge dagli studi storici *hic et hinde*: egli è radicato nel suo territorio, nella sua comunità e nella sua cultura locale; è dinamico, ma cosciente anche di un certo tradizionale disvalore civile o morale tradizionalmente associato al commercio presso la società dei non-mercanti. Devoto il giusto, a suo modo, e cosciente del valore sociale e commerciale della sua reputazione, egli è formalmente attento agli obblighi religiosi sociali e corporativi, e più o meno sinceramente impegnato nelle attività e reti di reti di mutua assistenza[40]. Cerca la vicinanza, il conforto del potere politico, con cui coopera traendone beneficio e tenta di entrare in simbiosi, se può; cerca al tempo stesso di perseguire l'interesse proprio e della propria famiglia, anche muovendosi ai limiti delle regole – limiti peraltro sfocati, in un contesto pluralista che sempre offre più vie per giustificare giuridicamente o moralmente le proprie condotte.

L'etica professionale e sociale della grande famiglia mercantile italiana ruota[41], come per l'omologa cinese, intorno alle idee di famiglia,

[40] Caratteristiche rilevate sia da A. SAPORI, *op. cit.*, 9-35, che, *mutatis mutandis*, in M. DYKSTRA, *Beyond the Shadow of the Law*, cit.; R.K. WAGNER, *Alternatives to Magistrate Justice: Merchant Guild Dispute Resolution…*, cit.; P. SANTANGELO, *L'impero del Mandato Celeste*, cit., 144 ss.; ID., *L'Impero cinese agli inizi della storia globale*, vol. II, cit., 51-68.

[41] La tradizionale compenetrazione tra relazioni familiari e attività economiche, sia in Cina che in Italia, si riflette nei rispettivi ambienti giuridici: la stretta correlazione tra pratiche commerciali cinesi e regole del diritto di famiglia è segnalata in T. RUSKOLA, *Corporation Law in Late Imperial China*, 2018, no. 18-444 della serie *Emory Legal Studies Research Paper*, disponibile su SSRN: https://ssrn.com/abstract=3140756. Nel diritto commerciale italiano questa storica relazione è segnalata ad es. in A. SAPORI, *op. cit.*, 9-35; G. OPPO, *Codice civile e dirito commerciale*, in *Scintilae Iuris – Studi in memoria di Gino Gorla*, Milano, 1994, t. II, 1279 ss., 1300-1301; essa continua a caratterizzare la società italiana e (l'evoluzione de)i suoi assetti normativi, come dimostra anche, ad es., la relativamente recente introduzione del "patto di famiglia" (art. 768-*bis* ss., c.c.) – su cui v. F.P. TRAISCI, *Il divieto di patti successori nella propsettiva di un diritto europeo delle successioni*, Napoli, 2014.

lavoro, impegni corporativi o comunitari per attività di *welfare*[42], comunità e *affective networks*[43] di vario tipo che includono la dimensione sia pubblica che privata. Le ricerche storiche sul carattere e le vicende delle *élite* mercantili cinesi sembrano anche generare qualche risonanza, e quelle sulle famiglie mercantili italiane rivelare qualche continuità, con le ricerche degli anni '50 e '60 del XX secolo sul "familismo amorale" in Italia[44] – avendo l'accortezza di trasporne la lettura, nelle vicende medievali, al livello delle grandi comunità locali associate a un gruppo gentilizio; mettendo insomma al centro della scena le entità che esprimono l'unità di base nel sistema sociale ed economico.

Il mercante medievale italiano è il progenitore del capitalismo familista, relazionale e sempre filo-governativo "all'italiana" che attraverserà, come un filo rosso, l'economia della penisola nel Rinascimento e in età moderna, nell'Italia unita e fino a oggi. Gli omologhi cinesi avviano grandi gruppi familiari-economici che pure stabiliranno rapporti comparabili con la e nella politica ed economia dell'Impero. *Zaibatsu* e *Chaebol* saranno i risultati in Giappone e Corea delle locali traiettorie di un fenomeno socio-economico e politico almeno in parte analogo.

Italia e Cina rappresentano due società all'avanguardia nell'economia e nella società dei secoli XIII e XIV, rimaste poi indietro con la fine del medioevo rispetto alle potenze emergenti nordoccidentali. Al di là delle letture weberiane di questa divergenza storica, certamente rilevanti, l'Italia viene senz'altro fermata dalla geopolitica d'Europa, fatta da grandi Stati nazionali emergenti alla fine del medioevo con cui le piccole entità politiche italiane non potevano competere. Non è ancora del tutto chiaro, invece, quali siano le cause che hanno determinato negli stessi secoli la fine della crescita economica cinese[45]; ma le dimen-

[42] V., ad es., J. CHAN, *Giving Priority to the Worst Off: A Confucian Perspective on Social Welfare*, in D.A. BELL, HAHM CHAIBONG (eds.), *Confucianism for the Modern World*, Cambridge, 2003, 236 ss.

[43] V., ad es., LEW SEOK-CHOON, CHANG MI-HYE, KIM TAE-EUN, *Affective Networks and Modernity: the Case of Korea*, in D.A. BELL, HAHM CHAIBONG (eds.), *Confucianism for the Modern World*, Cambridge, 2003, 201 ss.

[44] E.C. BANFIELD, *The Moral Basis of a Backward Society*, 1958; trad. it. *Le basi morali di una società arretrata*, Bologna, 1976.

[45] V. infra, paragrafo 5.

sioni e la profondità strategica dell'impero cinese permetteranno a quel sistema politico-economico – a differenza di quello italiano frammentato in comunità politiche troppo piccole per reggere l'urto della modernità – di operare relativamente indisturbato fino all'inizio del XX secolo, con un modello vecchio di almeno sei-sette secoli.

La storia cinese conferma anzi la presenza di un sistema mercantile certamente vasto, ma qualitativamente meno evoluto rispetto al coevo sistema italiano, e poi europeo, della *lex mercatoria*[46]: le ricerche sulle età Song, Yuan, Ming e Qing rivelano un'economia essenzialmente di mercanti di beni mobili, con aspetti tecnici relativamente non sofisticati, basata quasi esclusivamente su contratti di compravendita o locazione, sul prestito a usura, sulle operazioni di cambio[47], sulla società in nome collettivo[48], anche quando in Europa nascono e crescono le grandi compagnie d'oltremare, e una finanza sofisticata[49]: nelle fonti cinesi non vi sono molte tracce di strumenti giuridici complessi in campo finanziario, né di meccanismi societari di limitazione della responsabilità. D'altro canto, o forse proprio per l'assenza di meccanismi di limitazione della responsabilità, è ben sviluppato il diritto fallimentare[50]. Non risultano vicende equivalenti a quella italiana della nascita del diritto internazionale privato[51], per la probabile natura egemonica del commercio cinese e delle relative regole sui popoli con cui avevano a che

[46] Per tutti, F. GALGANO, *Lex Mercatoria*, Bologna, 1976.

[47] T. ZHANG, *The Laws and Economics of Confucianism*, cit., 260-261; V. HANSEN, *Negotiating Daily Life in Traditional China: How Ordinary people Used Contracts 600-1400*, cit., *passim*.

[48] M. ZELIN, *The Merchants of Zigong: Industrial Entrepreneurship in Early Modern China*, New York, 2005; ID., *Managing Multiple Ownership at the Zigong Salt Yard*, in M. ZELIN, J.K. OCKO, R. GARDELLA (eds.), *Contract and Property in Early Modern China*, Stanford, 2004, 230 ss.; T. ZHANG, *The Laws and Economics of Confucianism*, cit., 260.

[49] V. COMITO, *Storia della finanza d'impresa*, Torino, 2002, vol. I., 39-63, 126 ss.

[50] M. DYKSTRA, *Beyond the Shadow of the Law: Firm Insolvency, State-Building, and the New Policy Bankruptcy Reform in Late Qing Chongqing*, cit., *passim*. M. ZELIN, *Managing Multiple Ownership at the Zigong Salt Yard*, cit., *passim*.

[51] R. DE NOVA, *Historical and Comparative Introduction to Conflict of Laws*, 118 *Collected Courses of the Hague Academy of International Law*, Leyden-Boston, 1966, *passim*.

fare, e per il localismo delle istituzioni imperiali e corporative; situazione che pare confermata anche da una diffusa prassi di traduzione in lingue non-cinesi dell'Asia centrale e settentrionale di documenti contrattuali cinesi in età Yuan[52]. Ancora un esempio: l'ambiente mercantile rinascimentale italiano, sofisticato e sicuro, permette alle scritture contabili di avere il ruolo, che hanno ancor oggi nel diritto commerciale, di elemento fondante lo statuto giuridico del mercante; e di poter valere, a certe condizioni previste dagli statuti corporativi o comunali, pur non essendo all'epoca obbligatorie, come prova del credito contro il mercante avversario nel giudizio[53]. Le scritture dei mercanti cinesi coevi, al contrario, hanno la sola funzione di controllo interno e vengono tenute riservate, a tutela dei segreti dell'impresa[54] o per sfuggire al fisco[55].

Anche le attività economiche non mercantili evolvono poco, ruotando anche nei secoli successivi, principalmente, intorno alla terra agricola e alle varie forme di concessione del godimento della stessa, di cessione, di vendite *dian* (vendite con patto di riscatto)[56], mentre l'Europa avvia velocemente la sua espansione globale e industrializzazione[57].

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[52] V. HANSEN, *Negotiating Daily Life in Traditional China*, cit., 138-142.

[53] A. SAPORI, *op. cit.*, 88-96.

[54] T. BROOK, *M. Selden's Map of China*, cit., 90, 119. Un "libro segreto" era in realtà spesso presente anche nelle imprese dell'Italia in età comunale, nel quale venivano gelosamente annotati tutti gli eventi della vita aziendale; questo libro veniva spesso acquisito dai sindaci previsti dalle norme corporative ai fini delle istruttorie fallimentari, per accertare gli elementi del dissesto e per stabilire la moneta fallimentare e i diritti dei creditori; A. SAPORI, *op. cit.*, 89-90.

[55] V. HANSEN, *Negotiating Daily Life in Traditional China*, cit., 145-146; evasione fiscale che a volte era semplice difesa, a fronte della dalla rapacità di certi funzionari o incaricati di servizi pubblici: v. M. ELVIN, *The Pattern of the Chinese Past*, cit., 291.

[56] T. ZHANG, *The Laws and Economics of Confucianism*, cit., *passim*, centra tutta la propria analisi economica sulla prassi delle vendite *dian* in età Qing.

[57] L'asse dello sviluppo economico occidentale si sposta decisamente verso il nord Europa, a partire dal Cinquecento; v., ad es., G. BORELLI, *Questioni di storia economica europea*, Padova, 2011, *passim*, spec. 146 ss.

*4. L'*homo oeconomicus socialisticus *e l'operatore economico cinese di oggi*

4.1. La storia cinese tra il XIX secolo e il 1948 è caratterizzata da una grave crisi istituzionale, e dall'inadeguatezza mostrata nell'incontro-scontro con l'Occidente che determinerà la fine dell'Impero nel 1911; e poi da frammentazione politica, instabilità, conflitti interni ed esterni.

Quanto al diritto commerciale, nella tradizione imperiale larga autonomia era sempre lasciata alle istituzioni corporative; il governo imperiale era occasionalmente intervenuto specie in tarda epoca Qing per rendere più omogeneo il panorama giuridico, con leggi sia legate alla tradizione che, dalla fine del XIX secolo, a modelli occidentali[58] – specie tedeschi, direttamente o mediati attraverso l'esperienza giapponese.

Il Giappone aveva introdotto in quel periodo i c.d. "sei codici" (*Roppô*, 六法, letteralmente "sei leggi"), basati su modelli tedeschi: una costituzione, i codici civile e penale, le due procedure, il codice di commercio (*Shōhō*, 商法, 1899). Il sistema giuridico della Repubblica nazionalista, pure ispirato al modello giapponese dei "sei codici", codificato negli anni '20 e '30 del XX secolo e tuttora vigente a Taiwan, ha però rifiutato l'idea di un codice di commercio: il "sesto codice" nazionalista è in realtà l'insieme delle principali leggi commerciali ed economiche (incluse assicurazioni, società, marchi, fallimento, diritto marittimo)[59].

4.2. La Repubblica Popolare Cinese, nata nel 1949 dopo la sconfitta dell'invasore giapponese nella seconda guerra mondiale e la ritirata dei nazionalisti sull'isola di Taiwan, inizia a costruire il suo diritto e le sue istituzioni guardando al modello sovietico; la fase del maoismo radicale

[58] M. DYKSTRA, *Beyond the Shadow of the Law*, cit.; R.K. WAGNER, *Alternatives to Magistrate Justice: Merchant Guild Dispute Resolution…*, cit.

[59] T. WANG, *Translation, Codification, and Transplantation of Foreign Laws in Taiwan*, in 25 *Washington International Law Journal* (2016), 307 ss.; T. CHEN, *Transplant of Civil Code in Japan, Taiwan, and China: With the Focus of Legal Evolution*, 6 *National Taiwan University Review* (2011), 389 ss.; H. CHIU, J.P. FA, *Taiwan's Legal System and Legal Profession*, in M.A. SILK, *Taiwan Trade and Investment*, Hong Kong, 1994, 21 ss.

avviata intorno alla fine degli anni '50 produrrà tuttavia assai presto l'inoperatività delle istituzioni giuridiche, specie nel periodo (1966-1976) della "rivoluzione culturale". In campo economico si avrà una cesura radicale col passato, dal 1949 e massime nella fase maoista: il diritto formalmente scomparirà; nella sostanza resterà interstiziale e sottotraccia, "invisibile"[60], utilizzato dagli operatori economici del Paese per le esigenze del commercio estero[61].

Anche il nostro mercante cinese si eclisserà, come in immersione sotto la superficie di un mare in tempesta. Riemergerà nel 1978, "socialista di mercato", divenendo uno dei motori dell'attuale espansione geo-economica del Dragone – ancora superando con la forza dell'economia la tradizionale avversione al mercante, già tipica della tradizione sia confuciana sia legista, ora anche dei teorici del socialismo ortodosso. Così come il funzionario politico o amministrativo del Partito o dello Stato, anche il nostro moderno *guanshang*, imprenditore pubblico o privato che sia, rende vivo e operante il socialismo di mercato.

4.3. Il pensiero socialista nasce con i mutamenti socio-economici intervenuti in Europa a partire dalla seconda metà del XIX secolo. Il diritto socialista nasce dall'applicazione reale nell'Europa del XX secolo delle teorie di Marx, Engels, Lenin; e infine dall'attività di governo di Stalin nell'U.R.S.S. e dalla sua egemonia sui paesi satelliti, che ha portato il modello giuridico socialista a piena maturazione. Nella sua parabola, pur relativamente breve in termini storici, il diritto sovietico ha caratterizzato una parte importante dell'economia mondiale per una buona porzione del XX secolo, raggiungendo la sua maturità[62] nei decenni della "guerra fredda"; prima di uscire di scena in Europa (comunque lasciando un'eredità ancora presente nei diritti dell'Europa orientale)[63] ha avuto dal 1978 influenza determinante nella ricostruzione del

[60] G. CRESPI REGHIZZI, *Evoluzioni del nuovo diritto commerciale cinese*, cit., 142.

[61] G. CRESPI REGHIZZI, *Legal Aspects of Trade with China: The Italian Experience*, in 9 *Harvard Journal of International Law* (1968), 85-139.

[62] G. CRESPI REGHIZZI, P. BISCARETTI DI RUFFIA, *La Costituzione sovietica del 1977*, Milano, 1979.

[63] G. AJANI, *Diritto dell'Europa orientale*, cit.

diritto cinese, che ne conserva la struttura e molti meccanismi operativi[64].

Il diritto sovietico non ha conosciuto la figura dell'imprenditore o mercante di diritto privato, certo incompatibile con l'assetto ideologico e politico-economico dell'U.R.S.S.; ma sì ha conosciuto l'impresa[65], di proprietà pubblica, amministrata da *manager*-funzionari di nomina governativa e/o politica: un'impresa con finalità e dinamiche operative diverse da quelle occidentali, che ha una sua dimensione socio-politica oltre che economica, ma comunque attiva nell'organizzare i fattori della produzione al fine di produrre un beneficio economico – previsto a livello di pianificazione economica generale, e destinato in principio a essere acquisito dal capitalista pubblico e poi socializzato attraverso meccanismi amministrativi, anziché accumulato o goduto privatamente.

L'impostazione appena descritta probabilmente rendeva impensabile l'introduzione di un *corpus* autonomo del diritto commerciale, al di là delle leggi speciali e delle istituzioni amministrative e arbitrali dedicate al commercio estero: il diritto commerciale nasce come espressione della libertà e delle necessità operative del ceto mercantile, aperto agli usi come fatto normativo, con richiesta al potere pubblico di riconoscere e dare tutela alle forme consuetudinarie di autonomia, in un processo storico che porta il diritto commerciale all'avanguardia nell'evoluzione dell'intero diritto civile, e del negoziato di esso col potere pubblico[66] – una dinamica certamente incompatibile col sistema sovietico e con le relative esigenze politiche di controllo sulle fonti giuridiche.

Il diritto economico socialista sovietico copre tutti gli aspetti della vita economica dello Stato, delle sue imprese, dei cittadini; regola la pianificazione economica, e i rapporti fra imprese di proprietà pubblica, apparati amministrativi e politici; fornisce l'apparato di norme amministrative a servizio dell'economia pianificata, regola l'impiego dei beni

[64] I. CASTELLUCCI, *Rule of Law and legal complexity in the People's Republic of China*, Trento, 2012, spec. Cap. I.

[65] G. CRESPI REGHIZZI, *L'impresa nel diritto sovietico*, Padova, 1969, *passim*.

[66] E.B. PAŠUKANIS, *La teoria generale del diritto e il Marxismo* (trad. it. di E. Martellotti), Bari, 1975, 55; F. GALGANO, *Lex Mercatoria*, Bologna, 1976, 11.

produttivi, immobili e mobili[67], pone le sanzioni penali a tutela di detti beni e meccanismi economici, e così via. Il diritto economico socialista occupa quindi uno spazio più ampio di quello tradizionalmente associato alla nozione occidentale di "diritto commerciale", regolando da tutti i punti di vista i processi economici e la produzione di ricchezza; a esso si giustappone il diritto civile, che pure concorre a regolare l'economia in aspetti di fondo o con strumenti accessori di *macro-policy* – ad es., introducendo la soggettività giuridica e l'obbligazione giuridica come elementi di regolazione della vita economica, o incentivi alla produttività destinati al godimento privato di unità economiche e singoli[68].

4.4. L'esperienza comunista della RPC ha prodotto modelli giuridici e di governo dell'economia abbastanza diversi tra loro nelle fasi maoista – quella del "diritto invisibile" – e poi socialista-sino-stalinista[69]; in questa seconda fase, ispirata al modello generale sovietico, si è avviata la ricostruzione del sistema giuridico cinese. Il socialismo di mercato ha infine legittimato l'economia privata, e una nuova idea di legalità[70].

Chi è, oggi, l'imprenditore cinese? Nell'evidente e rapida crescita di uno strato giuridico segnato dalla recezione di modelli occidentali[71], esiste oggi in Cina uno statuto dell'imprenditore, una teoria dell'atto di commercio, un *corpus* normativo o un ambito del diritto commerciale separato e speciale? O vi sono solo norme sulle attività di mercato isolate negli interstizi del *medium* socialista, e/o al massimo civilistico?

Come visto, non si è mai avuta in Cina la vigenza di un codice o di una legge generale sul commercio, né l'applicabilità dei regimi occidentali dell'atto di commercio o sullo statuto dell'imprenditore; né in età imperiale, né al tempo della Repubblica nazionalista; né nelle diverse fasi del diritto e dell'economia della Repubblica popolare.

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[67] N. HAZARD, W.E. BUTLER, P.B. MAGGS, *The Soviet Legal System*, cit., 181-326; A.V. VENEDIKTOV, *La proprietà socialista dello Stato*, Torino, 1953, passim.

[68] G. CRESPI REGHIZZI, *L'impresa nel diritto sovietico*, cit., 14, 19-25. N. HAZARD, W.E. BUTLER, P.B. MAGGS, *The Soviet Legal System*, cit., 359-388.

[69] G. CRESPI REGHIZZI, *Evoluzioni del nuovo diritto commerciale cinese*, cit., 142 ss.

[70] I. CASTELLUCCI, *L'idea di* Rule of Law *nella Repubblica Popolare Cinese*, cit.; ID., *Rule of Law and Legal Complexity in the People's Republic of China*, cit.

[71] G. CRESPI REGHIZZI, *Cina 2003: l'osservatorio del giurista*, in *Mondo Cinese*, n. 117, ott-dic. 2003, 18 ss.; ID., *Evoluzioni del nuovo diritto commerciale cinese*, cit.

La risposta agli interrogativi sullo *status* dell'*homo oeconomicus sinicus* di oggi può esser cercata osservando, oltre all'evoluzione politico-giuridica in materia, il concreto operare del personaggio a partire dall'ultimo scorcio del XX secolo. La specificità del suo *status*, è oggi nella dimensione politico-economica socialista: e la sua attività in questa sua dimensione politica è critica nel determinarne il successo o l'insuccesso. Nel socialismo di mercato le figure e le attività pubbliche e private sfumano l'una nell'altra con minor discontinuità, dal punto di vista giuridico – specie in politica estera, sia per cultura che per politica e diritto della Cina attuale[72]. Permane un ruolo pubblico o comunitario del *businessman* cinese nel sistema politico-economico, molto chiaro

[72] Sono divenuti celebri i *Congo cases* di Hong Kong, con le corti locali che tra il 2009 e il 2011 hanno trattato un caso di esecuzione forzata su fondi giacenti in una banca locale a nome di *corporation* cinesi, società private con azionisti pubblici, che dovevano impiegarli in Congo per la costruzione di infrastrutture, nella cornice della cooperazione internazionale di Pechino in Africa. Nelle corti della città, che gode di speciale autonomia nella Repubblica Popolare Cinese e che ha una tradizione giuridica di *common law*, si sono quindi scontrate la visione occidentale sulla pignorabilità dei fondi, data la loro appartenenza a società di diritto privato, e quella socialista sulla funzione politica che quei fondi dovevano svolgere, al di là delle veste giuridica delle intestatarie, che rendeva quei fondi impignorabili – quest'ultima visione ha prevalso, dopo un'interpretazione, vincolante per le corti di Hong Kong, della *Basic Law* di Hong Kong da parte del Comitato Permanente dell'Assemblea Nazionale del Popolo; *FG Hemisphere Associates LLC v Democratic Republic of Congo & Ors* (2009) 1 HKC 111, decisa nella Hong Kong SAR *Court of First Instance* [Congo, CFI]; decisione ribaltata dalla *Court of Appeal* (2010) 2 HKC 487 [Congo, CA Feb 2010]; *leave to appeal* alla *Court of Final Appeal* della Hong Kong SAR [CFA - Corte di Ultima Istanza] emessa dalla CA (2010) 4 HKC 203 [Congo, CA May 2010]; decisione confermata provvisoriamente dalla CFA con contestuale richiesta di interpretazione al Comitato Permanente dell'Assemblea Nazionale del Popolo (2011) 4 HKC 151 [Congo, CFA June 2011]; decisione definitivamente confermata dalla CFA (2011) 5 HKC 395 [Congo, CFA September 2011] dopo l'interpretazione vincolante della *Basic Law* di Hong Kong Basic Law da parte del Comitato Permanente, 26 August 2011; I. CASTELLUCCI, *Legal Hybridity in Hong Kong and Macau*, in *McGill law Journal* (2012), 57: 4, 1, 665-720, spec. 686 ss.

nell'ambito della pianificazione[73], garantito con sempre più sofisticate tecniche di supervisione e guida politica[74].

Gli appassionati italiani di calcio hanno potuto seguire tra il 2016 e il 2018 due diverse vicende di acquisizione di società calcistiche milanesi da parte di imprenditori cinesi: quella dell'Inter, *club* blasonatissimo e tra i più gloriosi al mondo; e quella del Milan, altro *club* blasonato: non molto se ne sa quanto ai dettagli tecnici, se non che si è trattato in ambo i casi di operazioni del valore di centinaia di milioni di euro. Ebbene, mentre l'operazione relativa all'Inter ha funzionato bene e senza particolari scossoni, l'acquisto del Milan si è risolto in un'operazione fallimentare: e ciò, pare, anche o soprattutto per il mancato gradimento dell'operazione espresso dalle autorità di Pechino, che ha comportato l'impossibilità per l'investitore Li Yonghong di impiegarvi i propri capitali situati nella Madrepatria. Impedimento che lo ha costretto ad approvvigionarsi in modi rocamboleschi e in varie giurisdizioni *offshore* dei fondi necessari a concludere l'operazione già avviata; alfine indebitandosi con un fondo speculativo nordamericano che poi, a fronte di un mancato pagamento, ha escusso il pegno sulle azioni della società, prendendone il controllo[75]. Una chiara dimostrazione di come in Cina,

[73] V. al riguardo il saggio di G. SABATINO, *Legal Features of Chinese Economic Planning*, in questo volume.

[74] Come il *Social Credit System*, iniziativa del governo della RPC resa pubblica nel giugno 2014 e volta a creare un sistema – ancora in via di progettazione e realizzazione – di attribuzione di "merito pubblico" ai cittadini e alle imprese cinesi sulla base di numerosi parametri di "affidabilità pubblica", estrapolati da sistemi di gestione di *Big Data* (dalla solvibilità civile alle preferenze personali alla rete dei rapporti interpersonali). Una traduzione in inglese del documento, a cura di R. Creemers, è online: https://chinacopyrightandmedia.wordpress.com/2014/06/14/planning-outline-for-the-construction-of-a-social-credit-system-2014-2020/. Questo sistema di controllo di massa andrà a rendere più efficace anche il controllo previsto dalla nuova Legge cinese sulla supervisione, del luglio 2018, per chiunque gestisca pubblici poteri o svolga pubbliche funzioni – e quindi anche per i *manager* delle imprese di stato, e di quelle private che operano in una cornice economica di attività economica segnata da interessi pubblici, dagli appalti alla cooperazione internazionale.

[75] La vicenda ha riempito, tra il 2016 e il 2018, le pagine dei maggiori quotidiani nazionali, generalisti e sportivi – si vedano ad es. i miei articoli al riguardo sulla testata sportiva *online* IlPosticipo.it – e probabilmente avrà ancora degli strascichi giudiziari; manca ancora un'analisi definitiva e rigorosa al riguardo, basata su tutti i dati rilevanti.

al di là del rispetto della legge, anche per gli imprenditori privati convenga muoversi nelle logiche della direttiva pubblica e politica – con vantaggi e svantaggi, conseguenti all'essere parte di una squadra di un miliardo e mezzo di persone: la vicenda è una plastica esemplificazione dei meccanismi politico-economici del socialismo di mercato.

La dimensione politico-economica e giuridica è poi colorata dal dato culturale, con gli specifici modi di essere e di pensare del *businessman* legati alla tradizione cinese – da Confucio ai legisti, da Sun Tzu a Mao Zedong. Alla fin fine, pur nei suoi diversi ruoli – quadro di partito, funzionario pubblico, *manager* dell'azienda pubblica, imprenditore privato – egli non poteva non essere il frutto dell'incrocio storico tra l'operatore economico globale, quello sovietico, e il discendente di quei mercanti cinesi che già Marco Polo ebbe a conoscere. Egli è un micro-attuatore della strategia economica del Partito Comunista e del governo di Pechino; possiede in qualche misura il DNA dell'antico mercante cinese, che opera nell'interesse della comunità di appartenenza (famiglia, unità economica, impresa, amministrazione pubblica, etc.); ed è un cittadino cinese che opera o dovrebbe operare secondo la legge – la priorità data alle tre dette tendenze può variare secondo le circostanze, con flessibilità tipicamente cinese.

5. La divergenza

Esiste una ampia letteratura sulla divergenza tra il decollo economico dell'Occidente all'avvio dell'età moderna e il decollo mancato dell'Impero cinese negli stessi secoli. Max Weber[76] aveva associato l'arretratezza economica del Celeste Impero con la cultura confuciana, e con la sua vera o presunta irrazionalità economica e attitudine alla conservazione[77], a fronte dello sviluppo del pensiero individualista occidenta-

[76] M. WEBER, *Sociologia della religione*, vol. II: *L'etica economica delle religioni universali – Confucianesimo e Taoismo*, Milano, 2002. Il saggio originale *Konfuzianismus und Taoismus* è del 1915.

[77] V., per esempio, G. MACCORMACK, *The Spirit of Traditional Chinese Law*, Athens Ga., 1996, spec. Cap. 3. Ma vi sono anche voci più recenti di senso contrario;

le[78]. Autori successivi hanno raggiunto conclusioni simili[79] – anche magari rilevando l'eccessiva semplificazione operata da Weber con *L'Etica*, o la sua inapplicabilità alla complessità di oggi, ma comunque replicandone l'approccio[80]. C'è ancora molto da studiare per comprendere le ragioni storiche dell'interruzione della crescita economica cinese, almeno in termini relativi rispetto all'occidente, dall'inizio della dinastia Ming e fino all'ultimo scorcio del XX secolo.

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v., ad es. D.A. BELL, HAHM CHAIBONG (eds.), *Confucianism for the Modern World*, Cambridge, 2003.

[78] Il dibattito storico e politico intorno ai contenuti del confucianesimo è oggi assai "sensibile" presso i cinesi: il confucianesimo – ai tempi della guerra di liberazione comunista, della nascita della Repubblica Popolare Cinese e per tutto il periodo maoista associato all'oscurantismo feudale – è stato riscoperto e rivalutato, da Jiang Zemin e specie poi nel periodo di Hu Jintao, sia come dottrina utile alla costruzione di una "società socialista armoniosa", sia come fondamento dell'identità culturale cinese, nel momento in cui la Cina riprende un posto di primo piano sulla scena mondiale.

[79] J. HABERMAS, *The Postnational Constellation: Political Essays*, 2001, 124; A. GREIF, G. TABELLINI, *Cultural and Institutional Bifurcation: China and Europe Compared*, in 100 *American Economic Review* (2010), *Papers and proceedings*, 1 ss., 5; A. MACFARLANE, *The Origins of English Individualism: Family, Property, and Social Transition*, New York, 1978. Anche tra le fonti cinesi relativamente recenti non manca chi associa il pensiero Confuciano all'arretratezza del sistema imperiale: A.H.Y. CHEN, *Towards a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law*, in 17 *UCLA Pac. Basin Law Journal* (2000), 125 ss.; ZHANG JINFAN, *Zhongguo Fazhi Tonghshi*, Beijing, 1999, 257-260 e 264-266.

[80] Un contributo recente al dibattito viene da T. ZHANG, *The Laws and Economics of Confucianism: Kinship and Property in Pre-industrial China and England*, Cambridge, 2017, 7-8, 25. Questo A. ha svolto un'indagine basata su piccoli ma precisi e solidi elementi storico-giuridici ed economici, e su documenti legali, piuttosto che in generale sul discorso culturale e sui massimi sistemi come hanno fatto Weber e altri – rafforzando così sia le sue proprie conclusioni che quelle di questi ultimi. Egli svolge una comparazione tra il regime delle garanzie reali nel diritto inglese e in quello della Cina del periodo Ming e Qing, ipotizzando cause dell'arretratezza economica cinese rispetto all'occidente prossime a quelle individuate da Weber: minor mobilità sociale, difficoltà nella circolazione della proprietà della terra, presenza e grande ruolo sociale delle reti agnatizie estese (*kinship*) riconducibili alla tradizione confuciana e resistenti rispetto alle spinte individualistiche, gerarchie sociali in cui l'anzianità anagrafica ha un ruolo relativamente maggiore rispetto al potere economico: fattori che hanno limitato la concentrazione della proprietà terriera, e quindi l'accumulazione di capitali necessaria ad avviare lo sviluppo industriale visto invece in Inghilterra.

Le letture di Weber, Habermas e altri[81] – basate sull'asserita intrinseca inefficienza economica della cultura confuciana e del familismo cinese, che avrebbero impedito lo sviluppo *ivi* di un "sano" individualismo – non paiono prive di un qualche fondamento storico, ma non bastano (più). Sono letture che non spiegano, ad esempio, le vicende nel XX secolo delle "tigri" asiatiche di cultura cinese, come Taiwan e Singapore[82]; o della Corea, il cui "successo" è spesso associato proprio alla sua cultura confuciana[83]; o della stessa Cina degli ultimi decenni. Né paiono sufficienti le letture, pure in qualche misura fondate, basate sulle vicende storico-economiche della proprietà agricola e sulla mancanza di innovazione tecnologica a partire dal XIV secolo[84]; o quella di Berman che, viceversa, vede il differenziale di sviluppo e la straordinaria crescita economica dell'Occidente come conseguenza delle riforme o rivoluzioni religiose e del pensiero *ivi*, e del connesso sviluppo del diritto occidentale specie in materia di proprietà, contratto, commercio[85]. Non è da escludere che ogni autore, dal suo punto di vista scientifico e con i dati a sua disposizione abbia còlto solo una parte del vero, come i proverbiali ciechi di fronte all'elefante.

Lecito è anche, in questo momento storico e avendo preso atto di certi limiti del modello capitalista basato sul liberalismo di stampo ot-

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[81] V. supra, note 7, 8 e 10.

[82] V., ad es., D.A. BELL, HAHM CHAIBONG, *Introduction*, in D.A. BELL, HAHM CHAIBONG (eds.), *Confucianism for the Modern World*, Cambridge, 2003.

[83] V., ad es., D.A. BELL, HAHM CHAIBONG (eds.), *Confucianism*, cit., e spec. la Parte II, "Confucian Perspectives on Capitalism", 181-253.

[84] M. ELVIN, *The Pattern of the Chinese Past*, cit., 298-314, individua le ragioni dello stallo in una sorta di "trappola dell'equilibrio (maltusiano e) alto" dell'economia cinese, molto progredita e in grado di assorbire le oscillazioni economiche e demografiche senza incentivare ulteriori innovazioni, nella tecnologia e nel modello economico generale. T. ZHANG, *The Laws and Economics of Confucianism*, cit., *passim*, individua le ragioni della divergenza tra Cina e Occidente, comparando il caso cinese col coevo caso inglese, con la maggior concentrazione nel secondo caso delle terre agricole, che ha permesso accumuli di capitale tali da permettere l'avvio della rivoluzione industriale. Quest'ultimo A. ammette, come tutti gli altri del resto, che ancora oggi non sono chiariti i motivi dell'improvviso arresto dell'evoluzione tecnologica a un certo punto della storia cinese – fatto storico certo e tuttora in cerca di una spiegazione convincente.

[85] H.J. BERMAN, *Diritto e rivoluzione* (trad. it. a cura di D. Quaglioni), Bologna, 2010, "Conclusioni", paragrafo 2.

tocentesco, chiedersi se il modello economico dell'impero cinese dell'età moderna fosse senz'altro "inferiore" e destinato a soccombere; o se, invece, avrebbe potuto evolversi e "funzionare" avendo a disposizione tempi maggiori: del resto, un modello culturale che ha tra i suoi pilastri lo studio e la riflessione deve per forza essere meno "veloce", e puntare al lungo periodo.

Le vicende di Giappone, Corea e delle altre "tigri" asiatiche fanno pensare invero alla seconda possibilità; e così l'*exploit* economico globale della nuova Cina in versione confuciano-socialista. Quello asiatico di oggi (ammesso che possa parlarsi di "un", un solo, modello asiatico) è certamente di un modello economico diverso da quello liberale ottocentesco di origine nordeuropea o nordatlantica. A ben vedere, però, le "storie di successo" asiatiche della seconda metà del XX secolo e degli inizi del XXI nascono tutte da quell'incontro-scontro tra civiltà che ha permesso l'innesto nei contesti culturali ed economici orientali di tecnologia e innovazione socio-economica occidentali – nord-occidentali, e poi anche socialiste. La mancanza di innovazione è, come visto, tra le cause segnalate in letteratura per l'arresto dello sviluppo economico cinese intorno al XIV secolo; e l'accesso all'innovazione tecnologica e socio-economica occidentale ha costituito e costituisce ancora il cuore dello sforzo delle economie e società orientali lungo le rispettive traiettorie di sviluppo economico – oltre che causa frequente di tensioni nelle relazioni commerciali est-ovest, al livello generale dei grandi negoziati politico-economici internazionali[86] come a quello particolare delle singole controversie private sui vicende di proprietà intellettuale.

6. I saggi raccolti in questo volume

I saggi raccolti in questo volume toccano aree tradizionali del diritto commerciale come la proprietà intellettuale, il diritto societario e la materia *antitrust*; un'area tipicamente socialista del diritto e dell'economia come la pianificazione economica; un'area innovativa dell'economia e

[86] Come è accaduto nei negoziati per l'accessione della Cina al WTO in relazione agli aspetti della tutela della proprietà intellettuale, tema che del resto ancora oggi genera controversie.

del diritto anche globale, legata allo sport e allo *show-biz*; un'area del diritto economico internazionale e globale come quella delle dispute sugli investimenti.

Il saggio di G. Sabatino illumina il ruolo centrale della pianificazione economica, importante ancora oggi non solo dal punto di vista politico ed economico ma anche come elemento formante del sistema di legalità socialista. Sabatino mette in chiaro la dimensione giuridica di uno dei momenti e uno dei livelli di interazione più alti tra politica ed economia sia pubblica che privata: una parte di quello che G. Crespi Reghizzi con riferimento al periodo maoista ha definito "il diritto invisibile"; il piano economico per l'economia privata è un elemento bifronte che al tempo stesso può anche leggersi come "il socialismo (relativamente) invisibile" nel mercato – il *deus ex machina* sempre presente anche nel settore privato nell'economia cinese.

R. Girotto mostra come l'apparato di legalità socialista produca, a un certo livello di evoluzione, un diritto tecnico molto sofisticato, attraverso un "ciclo delle fonti" molto specifico. Se l'interferenza politica col diritto in Cina è istituzionale, è anche vero le regole prodotte dall'azione politica e poi dall'interazione politico-giuridica se funzionali al contesto diventano sempre più stabili, e idonee a regolare l'ambito rilevante in maniera tecnica e con approccio tecnocratico. Ecco che l'opzione politica iscritta nelle origini della regola, nata vaga e "morbida", ha generato attraverso l'analisi della dottrina, l'uso giudiziario e infine la cristallizzazione legislativa una regola tecnico-giuridica abbastanza "dura", anche se diversa dai modelli occidentali e specificamente cinese. Principi e formanti, socialisti e non, provvederanno poi alle necessarie modifiche nel tempo, e all'eventuale ammorbidimento della regola fino al successivo intervento legislativo che dia di nuovo stabilità e certezza (accade anche da noi per effetto della giurisprudenza e degli altri formanti). Girotto ha descritto un "ciclo" delle fonti che applica nell'ambito privatistico, in un particolare ambito tecnicamente sofisticato del diritto commerciale, l'approccio socialista alla genesi dei documenti costituzionali e giuridici: la sperimentazione delle regole sul campo, osservata e guidata, poi seguita – e non preceduta, come da noi – dalla legificazione dello *id quod plerumque accidit*, del "noi di solito facciamo così". *Mutatis mutandis*, stabilendo un percorso vitale della norma

attraverso *mores* (pur supervisionati), *iura*, *leges*: un ciclo delle fonti che segna la nascita e l'esistenza di regole comunque meno "dure" di quelle legislative occidentali. E che include e conferma un'attitudine passiva, recettiva, più che propositiva, della legge socialista – abbinata però a un elevato grado di tecnicizzazione, e alla comparsa di formanti nuovi come la giurisprudenza più o meno vincolante su casi ricorrenti, importanti e/o specialmente difficili.

Il saggio in materia di *antitrust* di A. Ruvoletto permette di scandagliare in profondità il funzionamento del mercato cinese, e dei meccanismi di controllo che lo conformano e lo condizionano. Si nota la maggiore flessibilità delle regole, la discrezionalità dei funzionari, la tendenza alla supervisione e prescrizione piuttosto che alla sanzione; in coerenza con un modello socio-giuridico che privilegia l'aspetto autoritario, amministrativo, comunitario e organico rispetto alla dimensione legale, individualista e "contrappositiva" tra singolo e apparati pubblici.

In materia societaria, V. Tortorici evidenzia come la politica economica possa condizionare e orientare le singole operazioni transfrontaliere di *M&A*: opportuni grimaldelli nella legislazione e nelle altre fonti normative, e la presenza di interventi istituzionali di supervisione approntano, a fianco ai complessi meccanismi del diritto societario, dei *policy checks*[87] attraverso cui verificare la coerenza delle singole operazioni societarie con le scelte di *macro-policy* dell'autorità politica e di governo.

Il saggio di A. Santosuosso evidenzia, in un ambito ancora poco giuridificato, ma di crescente importanza economica e di significativa esposizione alle dinamiche giuridiche globali, quale sia l'approccio con cui l'autorità politica si accosta a un fenomeno economico nuovo, mettendo in campo tutti gli strumenti della politica e del pluralismo giuridico "amministrato" tipico della tradizione cinese – imperiale, comunista, socialista, post-socialista – per governare la complessità globale.

Il saggio conclusivo, di M. D'Agostini, rivela la transizione cinese degli ultimi decenni da un altro punto di vista: quello del paese che da obiettivo di investimenti stranieri ne diventa l'origine. Mutano così le priorità e gli interessi aggregati del sistema-paese, che rivede le sue po-

[87] I. CASTELLUCCI, *Rule of Law…*, cit., cap. III.

sizioni nei trattati bilaterali (sempre preferiti sui multilaterali) per rispecchiare il nuovo ruolo del Dragone nell'economia mondiale, specie nelle relazioni economiche sud-sud. Il discorso è di grande e crescente attualità, posto che la Cina, oltre a preoccuparsi di completare la costruzione del proprio edificio economico, sta promuovendo la sua visione egemonica, economica e giuridica, ben oltre l'ambito regionale: nei paesi africani; nei *forum* dei paesi BRICS; lungo le nuove vie della Seta della *yī dài yī lù* ("一带一路"), la *Belt and Road Initiative* con cui la Cina porge la sua sfida al mondo.

LEGAL FEATURES OF CHINESE ECONOMIC PLANNING

Gianmatteo Sabatino

1. Preliminary remarks

Over the course of its sixty-seven years of existence, the People's Republic of China enacted thirteen five-year plans, starting from 1953. The plan, as a legal tool of socio-economic policy, demonstrated a surprising capability of adjustment to the several and dramatic "revolutions" and "reforms" experienced by the PRC after 1949. Nevertheless, it is clear that Planning, in order to survive, had not only to endure profound changes both in its legal nature and in its objectives, but also to address and represent the choices of the various party leaders that marked the historical and political evolution of the PRC. The subject of

this paper is, literally speaking, the Plan as a legal instrument of governance and Public Economic Management[1].

Notwithstanding, this statement requires a thorough explanation, since speaking to a Chinese lawyer about "the Plan" will mean speaking in crossed words. Central and local governments, in the PRC, enact every year hundreds, maybe thousands of plans[2]. The five-year plan for the Economy and the Development, which is "the five-year plan" in the common knowledge, serves both as a framework and a guideline for what could be defined as a multi-level "evolutionary planning and policy-making process"[3]. This notion had also been reinforced by the change in the terminology employed to refer to the plan, which, since 2011, is defined as "规划" (*guihua*), to be translated as "programme, project, guideline" rather than "plan"[4]. Such swift in the terminology, as it will be explained in the article, reflects a broadened scope as well as the intent to part ways with the traditional soviet-inspired definition and instead represent a unique and original instrument to coordinate the national economy.

In the Xi Jinping "era" Chinese Planning has acquired a visibility and a political importance, both in the PRC and abroad, that had never

[1] The Public Economic Management (PEM) has been recently regarded as a separate subject of study within the context of the Economic Law. As far as its content is concerned, the PEM comprises legal acts and tools specifically aimed at regulating the macro-economic dynamics of the Chinese Economy. For a complete analysis of the role of PEM within the framework of Chinese legal system see Z. SINGWEN, H. DAYUAN, *Research Report on the Socialist Legal System with Chinese Charateristics*, Vol. 4, Singapore, 2014.

[2] These plans, which usually cover a five-year period, concern several policy fields: there are plans for Urban Development, for the management of renewable energy sources, for the technological and medical research, for the education, for the immigration policy, for the reform of the judicial system.

[3] The definition is from O. MELTON, *China's Five Year Planning system: Implications for the Reform Agenda, Testimony for the US-China Economic and Security review Commission*, April 22, 2015, 2.

[4] Until 2011 the official terminology referred to the plan as "计划" (*jihua*), much nearer to the notion of vertical, inflexible planning which had previously characterized the soviet experience.

been experienced before[5]. For a legal scholar, understanding the object and the functioning of the Chinese Economic Planning as a whole can be useful to explain how the Chinese Socialist Market Economy employs a wide range of legal instruments in order to tie the behaviour and the choices of the economic operators to the strategic decisions of the government and to the long term development vision of the Communist Party of China.

The scope of this article is to offer an overview of Chinese Planning Law within the context of the Socialism with Chinese characteristics. The analysis will start from a sketch of the historical evolution of Chinese economic planning; then it will move on to assess what is the legal nature of the Planning acts, how these acts are drafted, approved and implemented and how they "dialogue" with economic operators, both public and private, and with other normative acts. In the final paragraph, some recent tendencies of the Chinese planning activities will be analysed in order to state whether and how Chinese Economic planning will be able to deal with an economy that is firmly at the second place in the world ranking and is destined, in a few decades, to become the first economy in the world[6].

[5] The launch and subsequent implementation of the thirteenth and latest Five-Year Plan (2016-2020) was surrounded by a massive promotional and informational campaign aimed at reiterating the new vision of China developed under the leadership of the new Party Secretary. This campaign reached the web as well: a video explaining the main purposes of the latest five-year plan is available on YouTube at the link https://www.youtube.com/watch?v=m91zBt94Ll0 (latest access on April 23rd, 2017).

[6] During a conference held at the Festival of Economy of Trento, on June 3rd, 2016, Yu Yongding, Director of the Institute of World Economics and Politics at the Chinese Academy of Social Sciences, assumed that, in 50 years at the most, China would have surpassed the U.S.A. in terms of GDP.

2. Historical evolution of the Chinese planning system[7]

In the early Maoist China, the adoption of the first five-year plan in 1953 marked the end of the "New Democracy"[8] economic experiment. The drafting of the plan was coordinated by the National Planning Commission (created in 1952) and relied heavily on the model represented by the soviet planned economy. Farms were turned into cooperatives of about 200 families each and the industrial system was progressively transferred under public control. The State came to control the production and the supply chains, on the basis of 12 planned indicators, which fixed minimum quotas that state controlled enterprises and cooperative were actually required to exceed. Planning acts issued by national and local governments had effectively status of law and their legal value was enshrined in Article 15 of the Constitution of 1954[9].

Nevertheless, even before the Sino-soviet split (1962), Chinese economic planning, behind forms and categories borrowed from the soviet experience, always maintained some peculiar features, the most noticeable of which is the strong tendency towards a decentralized form of planning. Whereas in the USSR economic plans shifted from a centralizing approach to a decentralizing one more than once over sixty-four years, in China the central government and ministries directly con-

[7] For a thorough analysis of Chinese planning under Maoist rule see HUA YU LI, *Mao and the Economic Stalinization of China*, Lanham, 2006; K.L. DATTA, *Central Planning, A case study of China*, New Delhi, 2004; C. BRAMALL, *Chinese Economic Development*, London, 2009, p. 77-206. For an overview of China's transition to socialism and the development of CCP ideology see R.C. NORTH, *Il Comunismo Cinese*, Milano, 1966.

[8] The "New Democracy" was an experiment of economic management enacted after the end of the Chinese Civil War by the new communist leadership, with the approval of Soviet leader J. Stalin. It vaguely represented the Chinese transposition of the New Economic Policy as experienced in USSR and it led to a redistribution of the land between the peasants and a nationalization of some of the key national industrial complexes, whereas the small and medium enterprises mostly remained in private hands. About the topic, see HUA YU LI, *Mao and the Economic Stalinization of China*, cit.

[9] Here is the text of Article 15 of the 1954 Constitution: "By economic planning the state directs the growth and transformation of the national economy to bring about the constant increase of productive forces, in this way enriching the material and cultural life of the people and consolidating the independence and security of the country".

trolled only a small portion of the national economy. The core of the planning system thus resided at the local level, in the hands of provincial governments or at a lower level[10]. The second element that differentiates economic planning in the Soviet Union from the experience of Maoist China planning is the scarceness of legal sources and documents that regulated planning during the Maoist era[11]. In accordance with the political doctrine of Mao Zedong, strategic decisions regarding planning choices were mostly taken by party officers, which were effectively in charge of the productive brigades within the enterprises and of the agricultural cooperatives. The director of the enterprises was, more often than not, a purely formal role. The second Five-Year Plan, contemporary to the policy strategy of the "Great Leap Forward", represented the extreme outcome of this pattern of relationships between the administrative and political level with regard to planning. Directive and supervising powers previously attributed to central institutions were delegated to peripheral offices. Small and medium cooperatives were merged into huge communes[12] with wide planning autonomy. This revolutionary approach to planning soon showed several weak points, which ultimately led to the complete failure of the "Great Leap Forward". Planning agencies were in fact unable to gain adequate information from each productive unit about the real data regarding the out-

[10] In order to give an impression of how decentralized was the approach to planning experienced in the PRC compared with the soviet one, it can be noted that ZHOU-LI-AN, in *Incentives and Governance: China's Local Governments*, Singapore, 2010, reminds that at the height of their complexity Chinese plans fixed indicators for approximatively 600 categories of goods, whereas soviet plans, in the 1970s, directly controlled the production of over 5500 categories of goods.

[11] On the other hand, Soviet planning, since its beginning, was always governed by a series of decrees and regulations, creating a visible legal framework, though heavily intertwined with political dynamics. One of the most ambitious, although short-lived, attempts to create an organic and general legal act with regard to planning was certainly the so-called Kosygin Reform, which led to the drafting of the Regulation on State Enterprises (1965). For a deep analysis of the Soviet planning especially with regard to the Kosygin Reform see G. CRESPI REGHIZZI, *L'impresa nel Diritto Sovietico*, Padova, 1969.

[12] Farmers' communes, during the "Great Leap Forward" comprised up to 2000 families.

put of goods. Thus, planning directives and indicators, based on incomplete data, were largely misapplied and disregarded. The negative impact on the Chinese economy was so strong that in 1960 a reform of the plan, inspired by Deng Xiaoping and Liu Shaoqi, took place[13]; nevertheless, less than five years later, the first sparks of the "Cultural Revolution" prevented any attempt of structural reform from succeeding. Until the end of the Maoist era (1976) Chinese planning consistently disregarded the role of administrative officers and technical experts, instead revolving around political decisions taken, at the lowest administrative levels, by party officers.

After the death of Mao and the beginning of the "Opening up and reform" process which is, essentially, still in place nowadays, planning law endured major changes as well. Plans retained their formal status of law but had now to be applied to an economic framework which emphasized the decisional autonomy of the enterprises and sought to move from a fixed system of supply to a system where undertakings, though still State-owned, managed their supply and production chains with market mechanisms. Some authors[14] have seen in this new strategy an abandonment of the planning approach and have coined the expression "Growing out of the plan" to summarize the economic strategy adopted by the CPC from the end of the 1970s. Other authors[15] argue that economic planning was not in fact abandoned or disregarded, but it simply adapted itself, progressively, to serve the purposes of the "Socialism with Chinese characteristics". The writer of this paper supports this

[13] The reform was meant to correct some of the excesses of the "Great Leap Forward". In particular, it sought to restore the role of the director within the State enterprises, and it also favored a mild centralization of the planning administrative machine. Such a change of strategy was made possible by the effective marginalization of Mao Zedong's role within the Party after the failure of the "Great Leap Forward". In the following years, as the Great Helmsman (as was called Mao) regained prestige and consensus within the Party, the reform was repealed.

[14] B. NAUGHTON, *Growing Out of the Plan: Chinese economic reform 1978-1993*, Cambridge, 1995.

[15] See, in particular, S. HEILMANN, O. MELTON, *The reinvention of Development planning in China, 1993-2012*, in *Modern China* 39(6), 2013, 580-628; O. MELTON, *China's Five Year Planning system: Implications for the Reform Agenda*, Testimony for the US-China Economic and Security review Commission, April 22, 2015.

second thesis: starting from 1978 Chinese planning underwent a dramatic transformation. It freed itself from the rigid schemes of fixed indicators and abdicated its role in the allocation of resources. On the other hand, it increasingly employed directives as legal instruments of macroeconomic control[16].

The evolution of Chinese economic planning ran in parallel with at least three other major developments in the post Mao era: a) the renewed role of the state enterprise (and of its directive personnel) as an autonomous economic unity; b) the progressive expansion of the private sector of the economy, though closely linked both with state enterprises and political officers; c) the establishment of a legal framework of economic law, starting with the (now abolished) Law on Economic Contracts in 1981.

Each of these concurring elements within the process of evolution of modern Chinese planning will be analysed in the following paragraphs, starting from assessing the legal nature of Chinese plans.

3. Legal nature of the planning acts

In order to assess the legal value of the planning acts within the context of Chinese legal system, the focus of the analysis should regard the archetype of all planning acts: the Five-Year Plan for the Economy and Development. When dealing with the legal nature of such Plan the starting point has to be the following question: is the Five-Year Plan a statute? The answer is neither easy nor clear. As some authors (Melton) have pointed out, Chinese Five-Year Plans reflects e signs of a constantly evolving planning and of a process of development of political strategies. Behind the Soviet-inspired terminology, Five-Year Plans display several dynamic mechanisms. This dynamism may give credit to some doubts about the legal nature of the Plan. Modern plans, for the most part, do not set general and abstract rules, nor do they appear to be strictly binding for administrative authorities, State-Owned Enterprises

[16] See § 5.

or any other economic operator[17]. Instead, they outline some general policy directives, encourage public authorities to focus on specific matters and, in general, appear more similar to White Papers or Government Reports than to legal acts.

3.1. Categorization attempts

Thus, it could be argued that plans are not be ascribed to the category of "Statutes" nor to the category of "Regulatory Acts". It was certainly a statute, in its own "socialist" way, the first Five-Year Plan enacted in 1953. The same certainty cannot be reserved to the plans of the last fifteen years. Moreover, he who would argue for the purely political and "propagandistic" value of Chinese modern Five-Year Plans, could easily refer to the 2nd amendment to the Chinese Constitution of 1982, which modified Article 15 where it declared the inviolability of the planning activity of the State, and Articles 16 and 17 where they imposed on state enterprises and economic collective entities a duty to abide to planning orders and obligations. As a result, the Constitution now only proclaims the obligation, for the State and the economic entities, to operate according to and by means of law[18].

3.2. Plan as the epitome of "variable geometries" in Chinese legal system

Nevertheless, refusing to acknowledge any value, from a legal point of view, to planning acts would mean misreading the complexity of the Chinese legal system. Ignazio Castellucci, over the course of his stud-

[17] A. STEVENSON YANG, in *Great Leap Backward: China's 13th Five-Year Plan*, in China Primary Insight (J Capital Research), October, 12, 2015 (as cited in S. KENNEDY, C.K. JOHNSON, *Perfecting China Inc.-The 13th Five-Year Plan*, may 2016) states that "if you are not a Chinese government official (…) then the Plan is irrelevant". Kennedy and Johnson, in *Perfecting China Inc*, cit., also report the thought of a member of a multinational corporation operating in Beijing, according to which "plans are drawn up, then hung on the wall and ignored".

[18] The amendment, by substituting references to the plans with references to law in general, almost seems to point out that plans operate on a different level than law.

ies, developed the original concept of "variable geometries" and employed to explain the relationship between the socialist core of the Chinese legal system and the development of a rule of law legal environment in the PRC[19]. The point made in this paper is that modern Chinese planning is the ultimate expression of the "variable geometries" of Chinese legal system. In fact, it comprises soft law guidelines, recommendations, policy directives and, though to a much lesser extent than in the past, fixed indicators and orders. Each one of these legal instruments may be binding with a different intensity, depending on the issue addressed and on the political decisions behind the legal instrument employed[20]. The Plan exists and has, somewhat, a value that ultimately relies on the constitutional structure of the PRC, which sees the Communist Party retaining a strong guiding role. Therefore, guidelines and directives, when supported by a political will, are binding regardless of their formal qualification.

It is extremely interesting to refer to the conclusions of Guo Qingzhu concerning this issue[21]. This author points out two elements of interest: a) the absence of a clear distinction between the activity of "programming" and the activity of "planning"; thus, guidelines and general directives, serving programming purposes, may be very well considered as part of "economic planning"; b) a historical continuity between "old" strictly binding plans and "modern" soft law plans. After analysing the conclusions of Guo, it can be stated that the absence of a

[19] See I. CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Trento, 2012, 92-102. The concept of "variable geometries" explains how Chinese legal system reacts differently when dealing with different issues to address, and it is capable of moving from a context of socialist legality to a rule of law environment depending on the policy directives issued with regard to the single matter involved.

[20] See SHI JI-CHUN, *On the legalization of Planning*, in *Journal of Lanzhou University*, Vol. 34(4), 2006.

[21] The reference is to GUO QINGZHU, *Thought on the Evolution and Location of Administrative Planning System from the Perspective of Administrative Law*, in *Journal of Jilin Public Security Academy*, Vol. 110(1), 2010.

rule of law substrate in China prevents from drawing a clear border between "binding" and "non-binding" plans[22].

3.3. Constitutional value of planning acts

In the view of the conclusions that have been drawn, even constitutional amendments regarding planning and macroeconomic control seem to reassess a renewed value of the Plan rather than downplaying its legal relevance. Moreover, Article 62 of the Constitution reserves the approval of the Plan for the Economy and Development to the National People's Congress; on the other hand, Article 89 puts the State Council in charge of supervising the correct implementation of the Plan. Even from a constitutional perspective, so, it can be stated that at least the Five-Year Plan is officially recognized as an act with a legal nature. In second place, the role of the Five-Year Plan as a general framework for the exercise of macroeconomic control by the State is reassessed in an opinion of the State Council issued in 2005[23]. According to the opinion, the Five-Year Plan serves four main purposes of capital interest: a) Reinforcing the control upon macroeconomic dynamics; b) Regulating the economy and supervise the market; c) Managing social services of public interest; d) Striving towards a proper and rational allocation of public resources. The same vision is shared by the 13th and latest Five-Year Plan, whose second and third chapters are titled, respectively, "The guiding thinking" and "Major objectives": they lay out, in first place, a series of basic principles inspiring the development of Chinese economy: between them is the commitment to a "Law

[22] Chinese legal doctrine does not seem to be particularly interested in addressing theoretical issues regarding the legal nature of the plans, whereas European and American scholars appear, sometimes, to be almost obsessed by it. In Chinese studies, more attention is always reserved to the analysis of the developments of the contents of the Plans, rather than their legal status; this approach could be regarded as a proof of what has been affirmed in the paper with regard to the absence of a distinction between "binding" and "non-binding".

[23] *Several Opinions of the State Council on strengthening the preparation of the national economic and social development plan* (国务院关于加强国民经济和社会发展规划编制工作的若干意见), available at: http://www.gov.cn/zwgk/ 2005-10/26/content_84417.htm.

based governance"[24]. In second place, the 13th Five-Year Plan sets some of the main policy objectives that will guide the management of Chinese economy and economic regulations by the public authorities[25]. The programmatic nature of the document, which could be easily dismissed as "soft" from the legal point of view, actually reinforces the idea of a planning assisting and "inspiring" the coordination and the management of the national economy, under the constant supervision of the Party leadership.

3.4. Legal relevance of planning acts: conclusions

Is the Five-Year Plan a statute? What is its legal nature? There is no clear answer to these questions, nor would it be of real use to find one. Plans are peculiar normative acts designed specifically to serve the purpose of coordinating public control over the national economy[26]. Xu Mengzhou[27] highlights three different levels of legal relevance for the Five-Year Plans: i) a first level is ideological and political: the Plan sets the framework for the economic development of the whole nation; ii) a second level deals with the binding legal nature of the Plan, gained on

[24] The other principles concern: upholding the position of the people; deepen reform; keeping in mind both the domestic and the international situation; upholding the CPC leadership.

[25] See, for instance, the commitment to "encourage public startups and innovations" and "prioritize human resource development" (Part II, Chapters 7 and 9); to "establish a modern property rights system" and "accelerate reforms of the fiscal and tax system" (Part III, Chapters 12 and 15). On a more general level, the 13th Five-Year Plan suggests that the public management of economic resources should focus on, for example, "agricultural modernization" (Part IV); "the cybereconomy" (Part VI); the "new urbanization" (Part VIII). Setting strategic priorities in long-term development plans often corresponds, as it will be pointed out later (§ 5.3.), to specific industrial and development projects laid out specific sections of the plan.

[26] The hybrid and comprehensive nature of modern plans reflects the modern orientation of Chinese lawmaking toward a dialogic and dialectic decision-making process, in order to enable public authorities to take into account as many instances as possible. On the issue, see PENG HE, *Chinese Lawmaking: from non-communicative to communicative*, Berlin, 2014.

[27] See XU MENGZHOU, *On the Plan for Economic and Social Development and the Construction of Planning Law*, in *The Jurist*, 2012.

account of the approval from the National People's Congress; iii) a third level concerns the hybridization of legal or para-legal rules and simple guidelines.

To sum up, a plan is maybe the most complex legal act existing in the Chinese legal system, and its complexity must necessarily be deal with, without trying to transpose categories and notions that do not pertain to the culture and tradition of Chinese economic planning, but instead focusing on the variety of legal mechanisms employed by the plans and on the purposes served.

4. The planning process

As pointed out by Hu Angang, modern Chinese planning is based on the understanding of both theoretical and practical issues (i.e. concerning the national economy and development) and serves the purpose to set ideas and goals for a five-year cycle of round and comprehensive national development[28]. In order to accomplish such goal, planning must be able to respond both to the international economy dynamics and the domestic economy changes. The most harmonious and comprehensive way to deal with such expectations has been to reconsider the whole process of planning and introduce legal mechanisms of concertation, consultations and decision making revolving around the key concept of "inclusiveness"[29].

Plans are not made overnight, nor are drafted single-handedly within a room. This statement, which has always been true, gains much more significance when thinking about economic planning as a cycle rather than an activity with a starting and a finishing point (Melton). As every other feature of Chinese planning, the planning process drastically

[28] See HU ANGANG, WU DAN, YAN YILONG, 国家发展五年规划的战略分析与实践认识：以"十二五"规划为例 (*Strategic Analysis and Practice Cognition for Five-year Plan of National Development: A Case of the Twelfth Five-Year Plan*), in *Tsinghua University Journal*, no. 1 (2016), Vol. 31, 2016.

[29] As it will be later explained, the use of the term "inclusiveness" refers to the enhanced interaction between institutional, economical and social actors in the development, implementation and enforcement of the plans.

changed after 1978 too. Free from the ideological restraints of the Cultural Revolution, Chinese planning fully absorbed the instances brought on by the development of socialist market economy. In order to do this, it had to grow out from a simply bureaucratic and political dimension and become an ideal space of dialogue between political, social and economic actors.

4.1. The plan and the socialist market economy

This transformation occurred progressively. For about 15 years after the beginning of the reforms, the planning process, formally, continued abiding to a soviet-inspired model. The administrative chain which led to the approval of the Plan was rather simple: State-Owned Enterprises provided the State Planning Commission with data regarding production, then the Commission drafted a Plan which was to be approved first by the Central Committee of the Communist Party and then by the National People's Congress. The dialogue between the institutions operated both top-down and bottom-up. This means that enterprises were not actually able to determine the content of planning orders, but they had to follow political orders coming from the Central Committee. It was an effective realization of the principle of "Democratic Centralism", in its soviet-fashioned interpretation.

Notwithstanding, as soon as the first reforms empowered enterprises directors and cooperatives to produce and exchange goods on a limited market basis, the strict mechanism of traditional planning weakened. On the other hand, economic operators (at first public and then private as well) took advantage of these "weak links" and initiated, outside the "borders" of the Plan, a dialogue with administrative and political institutions. The outcome was that, despite the persistence of a closed and "vertical" planning process[30], the planning institutions grew progres-

[30] The Law on Economic Contracts of 1981 stated that contracts between enterprises had to be concluded according the indications and quotas set in the State Plan. The legal framework which led to the opening up of the planning process, though, was still retaining much of the previous strictness. Nevertheless, with the creation and spread of the Special Economic Zones and the renewed importance assigned to the role of the

sively more eager to take into account indications offered by the economic operators.

In 1993, under the leadership of Jiang Zemin, the Communist Party officially abandoned a planned economy doctrine, instead embracing the principles of socialist market economy, which has since then been the official economic model adopted by the PRC. It could be argued that this decision turned plans into purely political documents, devoid of any binding capability, and the planning process into a space of informal dialogue between the institutions and the economic operators. These conclusions, though embraced by part of the western legal studies on China's economy, are easily proved false. Indeed, modern plans are drafted and approved according to a series of stages that are partly informal and partly solemnly ritualized. The dialectic dimension is emphasized but the hierarchical one is as well. The Democratic Centralism of the Maoist era evolved into a "Confucian-Democratic Centralism" which focuses on the coordinating function rather than on the purely imperative one[31].

4.2. The National Development and Reform Commission

The institutions involved in the planning process endured a transformation as well. The State Planning Commission, in 1998, became the Development and Planning Commission and in 2003 was merged with the Office for Restructuring the Economic System and with some departments of the Economy and Commerce Commission, giving birth to the National Development and Reform Commission (NDRC). The NDRC is the authority in charge of drafting and implementing State Plans as well as regulations pertaining economic development. Once a plan is enacted, the Commission exercises a series of supervisory powers. The NDRC, from a bureaucratic point of view, has a ministry sta-

director within the enterprises, Plans gradually ceased to set indicators regarding production and supply chains, except for some highly strategic sectors of the economy.

[31] The official terminology changed as well. Starting from the 11th Five-Year Plan (2007-2012) official references to the Plan used the attribute of "coordinative" with regard to it, whereas before Plans were considered "imperative".

tus, which means it is responsible only before the State Council[32]. Nevertheless, when exercising its powers and carrying out its tasks, the NDRC directly refers and dialogues with other authorities, such as the State-owned Assets Supervision and Administration Commission (SASAC), which holds the great majority of the assets and shares of State-Controlled Companies.

4.3. The net of modern planning: phases of the planning process

The planning process could be better represented as a net, where institutional and economic operators interact over the course of five year (or the minor life cycle of a specific plan)[33]. The borderline between a plan and the next one is, however, so blurred that, as it has been stated, planning has to be regarded as a continuous work, where the end of a planning cycle coincides with the birth of another one.

In order to better point out how such a cycle is structured, the planning process can be subdivided in four major phases[34]: a) a revising phase; b) a drafting phase; c) an approval phase; d) an implementation phase.

a) The genesis of a plan (for example, of a Five-Year Plan) begins, approximately, two years and a half after the approval of the previous

[32] The NDRC comprises 23 departments as well as a general office and a series of separate offices in charge of specific sectors of the national economy. The internal structure of the Commission is described on the official website of the NDRC, at the web link http://en.ndrc.gov.cn/.

[33] On the modern planning process, its phases and diversification see S. HEILMANN, O. MELTON, *The reinvention of Development planning in China*, cit.; O. MELTON, *China's Five Year Planning system: Implications for the Reform Agenda*, cit.; WANG SHAOGUANG, YAN YILONG, *A Democratic Way of Decision-Making: Five Year Plan Process in China*, Library of Marxism Studies, Nanjing, 2016, vol. 1, p. 91 ss.; HU ANGANG, *A Plan is Born, interview with Lan Xinzhen and Yu Shujun*, in *Beijing Review*, Vol. 33, September 16, 2010; HU ANGANG, YAN YI-LONG, LIU SHENG-LONG, *The "Planning Hand" under the Market Economy: Evidence from Energy Intensity*, in *China Industrial Economics*, Vol. 7, 2010.

[34] The subdivision is obviously an oversimplification and only serves explaining purposes. Two or more phases of the planning process can be activated at the same time and the sequence of phases is not necessarily the same for every plan.

plan. The NDRC, with the aid of the National Office of Statistics, organizes working groups in charge of analysing and revising the implementation of the existing plan and formulating projections about the fulfilling of the goals set. These working groups often refer to universities, research centres and banking organizations. Every groups produces an independent report. From these reports and from the data provided by the National Office of Statistics, the NDRC commences to elaborate the guidelines for the new plan[35]. The role of technical expertise in this phase is essential and it is aimed at understanding the contradictions and critical relations in the whole development process of the nation, so to effectively assist the party in determining the strategies for the national economy both from a macro and forward-looking perspective[36]. The NDRC, by setting up the working groups, seeks to neutralize the eventual occurrence of an informative asymmetry. From the perspective of NDRC, it is preferable to use independent reports as a basis for the planning rather than data provided by State-Owned enterprises alone. Thus, the scope of the plan is broadened from the beginning, and opened to all the economic sectors as well as to social policy issues and matters. The increasing importance of the revision phase is reassessed by the circumstance that the 13th Five-Year Plan reserves, in its introduction, a whole section to the analysis of the results achieved by the 12th plan, comparing targets and outcomes[37].

b) As soon as all the revision phase is completed and enough insight concerning the implementation of the existing plan has been gained, the NDRC selects several "hot topics" usually corresponding with major issues regarding macroeconomic dynamics of Chinese economy. These topics are to be the focus of the next plan. At this stage,

[35] It can occur (as it has already occurred) that, in this preliminary phase, the NDRC organizes opinion pools or specific research projects in order to gain as much information and insight as possible.

[36] See HU ANGANG, WU DAN, YAN YILONG, 国家发展五年规划的战略分析与实践认识：以"十二五"规划为例 (*Strategic Analysis and Practice Cognition for Five-year Plan of National Development: A Case of the Twelfth Five-Year Plan*), cit.

[37] See Part I, Chapter I, box n. 1 of the 13th Five-Year Plan.

the NDRC works closely with the Leading Group for Financial and Economic Affairs, an inner group within the Communist Party's Central Committee. The group, usually headed by the CPC Secretary, is in charge of directing and coordinating the implementation of the economic policies carried out by the Party. The State-Party parallel structure ensures that the NDRC decisions are taken according to the strategy pursued by the CPC. After several main issues have been selected, the proper drafting phase begins: a series of informal consultations are carried out by the NDRC, especially with economists and other scholars, with entrepreneurs and associations of enterprises. Then, a committee of experts (usually of 50 members) is set up under the direction of the Prime Minister. This committee assists the NDRC during the drafting phase and has guiding and advising tasks; it adopts a work technique based on open discussion and sharing of opinions and criticisms.

The NDRC produces a draft version of the Plan in form of general guidelines that has to be examined by the Central Committee. If the guidelines are approved, the NDRC then drafts the final version of the Plan. At the same time, the guidelines are subjected to a second round of analysis and consultations. They are sent to organizations, associations, local governments and party cadres in order to be discussed. The Chinese People's Political Consultative Conference, whose member represents all the major groups of interests within the Chinese society, can perform an important role during this phase. Ministers and member of the CPC Politburo's Standing Committee also carry out consultations[38]. The NDRC, on the basis of the outcome of these consultations, is able to amend the draft plan in order to reach the perfect coordination between the several interests affected by the Plan. The outcome of this phase is a Plan that can be defined as "comprehensive" and "inclusive", having been drafted within the context of a "horizontal" dialogue between institutions, administrative authorities and socio-economic actors[39].

[38] The Standing Committee of the CPC Politburo, being the apex of the hierarchical structure of the Party, is effectively the highest political authority in the PRC.

[39] The "inclusive" nature of the modern Chinese planning is closely linked to its concrete capability of being binding. As it will be pointed out in the following para-

c) Once the final version of the Plan is drafted, the Central Committee examines and approves it. Then, usually in March, the Plan is to be approved by the National People's Congress. A negative outcome of the vote regarding the Plan is not a realistic turn of the events, though it would be theoretically possible. After the approval from the Central Committee (which, in this case, effectively holds the real power) the Congress would never overturn it. So, the vote holds, for the most part, a purely formal significance: it gives an official, legal sanction to the Plan which, from this moment on, enters the Chinese legal system.

d) After the final approval, the Plan can be regarded as enacted. Nevertheless, it is only the beginning of a long phase of implementation, which employs essentially two legal mechanisms: the diversification and the decentralization. When assessing the diversification of the Plan, I refer to the hundreds of special plans that, for each sector of the national economy, are enacted using the Five-Year Plan as a basis[40]. The content of most of them can be a simple reproduction of the Five-Year Plan, but they may define details as well.

The Five-Year Plan serves as a basis also for the draft of provincial and local plans. In the months following the approval of the national Plan every administrative level in the PRC initiates a planning process similar to that which has been analysed here. The outcome is a series of local plans, which reproduce the indications of the national Plans and adapt them to the specific local context.

The Plan approved in March by the National People's Congress is then effectively in action only several months later, when the "cascade" of special and local plans[41] has been enacted.

The specific features and mechanisms adopted for the effective implementation of plans will be discussed further on (see § 6). Here, it is

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graphs, local governments and enterprises will be more inclined to actually follow the planned directives since their requests and interests have been taken into account by the planning authority and incorporated into the Plan.

[40] These special plans or sector plans are drafted and approved by the competent ministry or administrative authority depending on the economic sector.

[41] See S. HEILMANN, O. MELTON, *The reinvention of Development planning in China*, cit.

important to point out that even in the implementation phase the inclusive and dialectic dimension of the planning activity retains a primary role. The effectiveness of the economic planning is founded on the balance of several interests and, in order to maintain this balance, the political leadership chose to enhance the dialectic mechanisms and the inclusiveness of the planning procedure, by opening it up not only to local governments but also to technical experts, universities, external and independent authorities and economic operators. It could be stated that, as far as planning is concerned, the Chinese legal system strives to create an order which resembles the Confucian concept of "harmony", though adapted to the instances of a modern socialist society.

5. The content of the plans. In particular, legal mechanisms employed by the Plan for the Economy and Development

At this point of the analysis, it cannot surprise that, even with regard to their content, Chinese plans employ a wide variety of legal constructions. Their use depends on the goals that are to be fulfilled and on the entities, which the specific instrument is addressed to.

5.1. Planned indicators

In Soviet planning and in Maoist China planning the most relevant legal instrument employed by the planning authorities was the "planned indicator". As it has been already noted (see § 2) the indicators, from a political perspective, corresponded to goals that the Party leadership set to be fulfilled by economic operators. The Plan set fixed quotas, which represented the production that were to be reached over the following five years. From a legal perspective, nevertheless, the planned indicator is a command rule, which, if violated or neglected, leads to the application of a penalty[42]. The object of this rule depends on the choices of the

[42] In the context of a planned economy, the penalty for an unfulfilled plan could be the dismissal or demotion of an enterprise director. It could also affect the amount of monetary reward for directors and even workers.

planning authorities, but it usually concerns macroeconomic variables[43].

In a classic socialist planned economy, indicators are binding and cannot be otherwise. A socialist market economy, instead, does not necessarily rely on binding indicators on account of its flexible and dynamic nature. Consequently, modern Chinese plans employ two different categories of planned indicators: a) binding indicators, which, as it was in Soviet plans, effectively restrains the management autonomy of the addressee and limit his/her freedom of contract. Penalties are not explicitly mentioned or laid out. In practice, they consist in a negative evaluation that the competent authorities will elaborate towards the director or public officer that has disregarded the planned indicator. In the last three Five-Year Plans, binding planned indicators were only employed with regard to social and environmental policy areas[44].

Much more frequent is instead the use of the so-called "predictive" indicators. They refer to goals and objectives, which the political leadership expects to be reached over the course of a Five-Year Plan, on the basis of a reasonable evaluation. Nevertheless, since they found on predictive estimations, if not fulfilled they do not lead necessarily to a penalty or to negative evaluations of the public officers responsible. Predictive indicators are aimed at pointing out a range of priorities that the government wants administrative offices and economic operators to focus on; they also indicate a pattern, a direction that has to guide strategic choices[45]. The distinction between binding and predictive indica-

[43] Typical planned indicators, in Maoist plans, concerned the input of goods assigned to enterprises, the output to be reached, price regulations, amount of money to be spent on salaries, numbers of people to be employed.

[44] The 10th Five-Year Plan (2001-2005) was the last one to employ binding indicators concerning the output of production. In that case, the sector involved were electronic and hi-tech components production. The 13th Five-Year Plan sets out (Part I Chapter II, box n. 2) twelve "obligatory" indicators. Nine of them cover the whole policy area of "resources and the environment".

[45] The most important predictive indicator has been, at least in the 12th and 13th Five-Year Plan, the one regarding national GDP Growth. An eventual failure to fulfil the growth rate fixed by the plan could never lead to any kind of penalty. The indicator, nevertheless, shows what pattern of economic growth the government intends to pursue. As an example, it can be noted that the lower value of the GDP Growth indicator in

tors was noted, for the first time, with regard to the 11th Five-Year Plan (2006-2010)[46] and was interpreted as the transposition in the Plan of the doctrine of Scientific Outlook on Development formulated by Hu Jintao[47]. Two categories of indicators, one more flexible and the other strictly binding, broaden the scope of the Plan and cover policy areas previously neglected.

5.2. Plan directives

Indicators, though nowadays experiencing a renewed attention, constitute only a small part of modern plans. Five-Year Plans, in 21st Century China, represent the dynamism of institutional structures when dealing with the challenges of an economy, which is constantly changing. On the other hand, the nature of the planned indicator is to set a fixed goal and is little to no sensible to the external circumstances. Consequently, indicators, although employed, are not the most common legal tool to be found in Chinese plans. Instead, recent Five-Year Plans reserve much space and dedication to small and programmatic analysis of an economic sector or a policy area. They can be defined as "directives": the planning authority, and behind it the government and political leadership, aim at defining a clear strategy for the development of a sector and thus issue these directives to guide and influence the decisions of economic operators and local governments. To a western

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the 13th Five-Year Plan reflects the doctrine of the "New Normal" embraced by CPC Secretary Xi Jinping, according to which Chinese economy must slow down its expansion and focus on redistribution of wealth.

[46] See FAN, *China's Eleventh Five-Year Plan: from "Getting rich first" to "Common prosperity*, in *Eurasian Geography and Economics*, Vol. 47 (6), 2006, pp. 708-723.

[47] The Scientific Outlook on Development (see § 9.1) is a theory formulated by the former CPC Secretary Hu Jintao, starting from the 3rd *plenum* of the 16th CPC Central Committee in 2003. It sought to expand and deepen the scope of the socialist market economy with regard to new interests and instances of the Chinese economy in the 21st Century. The theory is based on two essential assumptions: a) an outlook on development revolving around the concept of "welfare" and "well-being" of the person; b) a concept of "harmonious socialist society", aimed at striking a balance between the economic growth and the development of social services.

scholar these directives can resemble a soft law set of rules, but within the context of socialist legality they constitute orders and they are certainly binding.

Plan directives are addressed to local governments and administrative agencies. State Owned Enterprises and State Controlled Companies are also bound by the directives but, since they are mostly managed through the SASAC, it is this Commission that transposes plan directives into order for enterprises. Directives, though not officially, can bind private economic operators as well. Private enterprises, in China, are, for the most part, closely linked with party officials (see § 6) and are likely to determine their strategies in accordance with the priorities set by government plans.

Local governments, when dealing with plan directives, maintain a degree of autonomy much higher than it happens with the planned indicators. Directives do not set numerical goals or objectives to be fulfilled. They just select issues to be analysed and dealt with. The method and the degree of implementation are entirely up to the addressees of the directive[48].

5.3. Specific projects laid out in the Plan

In certain cases, a plan directive concerns a specific project of program to be launched or concluded[49]. Thus, in order to fulfil the goal of the plan, local governments have to gather the financial resources to start the programme and enterprises have to conclude the contracts necessary to store a sufficient amount of supplies, under the supervision of

[48] The relationship between the central government and the provinces in the PRC is fairly complex and, still today, it is torn between the tendency toward centralization and the necessity to delegate wide powers to the local authorities in order to enforce the political and economic strategies set by Beijing. On the issue, see ZHOU-LI-AN, *Incentives and Governance*, cit.; A. RINELLA, I. PICCININI (edited by), *La Costituzione Economica Cinese*, Bologna, 2010, p. 145-165.

[49] See, for instance, Part II, Chapter VI, box n. 3 of the 13th Five-Year Plan, which describes the policy areas, concerning sci-tech innovation, which will be covered by specific projects (e.g. deep sea stations; brain science; big data; robotics; ecc.).

the competent ministry. The program or project has then to be formally approved by the State Council in order to be launched[50].

5.4. Types of Plans

After having highlighted the different legal constructions employed by Chinese plans, it can be useful to distinguish different categories of economic plans. Heilmann and Melton[51] pointed out that Chinese planning law comprises at least five categories of plans, each characterized by a different planning technique. One of these categories has already been analysed: it is that of the National Plans for the Economy and Development, which is certainly the most important and complete, since it employs the widest variety of structures and legal instruments. Apart from it, it is possible to distinguish four types of plans: a) comprehensive plans; b) contractual plans; c) regional or macro-regional plans; d) special plans.

a) Comprehensive plans are those which cover the whole system of national economy. Within this category are National Five-Year Plans, local Five-Year Plans reproducing the national one and other plans issued, for a shorter period of time, by the NDRC aimed, for example, at amending the Five-Year Plan on account of a sudden necessity.
b) Contractual plans were issued, in the 1990s, within the context of a restructuring operation concerning the legal relationship and delegation of powers between the central government and the provincial and local ones. After the approval of the national Five-Year Plan, the central government discussed with each province special conditions or time frames for its implementation. The outcome of the discussion was a sort of new plan, a "contractual" plan, which determined the terms of the implementation of the national plans by the local entity.

[50] For example, in 2013 the State Council approved the construction of a new airport in the Beijing municipality, the Beijing Daxing International Airport. The project had already been considered in the 12th Five-Year Plan (2011-2015).

[51] See S. HEILMANN, O. MELTON, *The reinvention of Development planning in China*, cit.

c) As soon as the development of modern Chinese planning reached a high level of complexity and dynamism, contractual plans ceased to exist and were replace by systematic regional plans. A specific office within the NDRC is in charge of drafting plans specifically oriented to promote the development of the province or of geographic regions[52]. This kind of plan can also assume the form of the "authorization scheme". An authorization scheme is a normative act, separate from the plan, which authorizes the creation of a zone where different rules regarding the fiscal policy, the economic planning, the autonomy of enterprises and freedom of investment are applied. Authorization schemes are not necessarily intended for a period of five years only. More often, they can over longer time frames, such as ten or fifteen years. The purpose of an authorization scheme is to conduct an experiment of reform. As it happened with the Special Economic Zones, Chinese government wants to test a reform before enacting it on a national level. Thus, it selects one or more areas to carry it out and verify its effectiveness and outcomes.

d) Special plans are usually drafted by the NDRC and approved by the State Council. They refer to a specific sector of the national economy or to specific enterprises. The supervision and implementation are delegated to the competent ministry or government agency[53]. As it has been already stated, special plans are drafted and approved after the National Five-Year Plan and define specific strategies for each economy sector, obviously in accordance with the comprehensive plan.

[52] Some examples can be the Development Plan for the Western Provinces or the Development Plan for the Pearl River Delta.

[53] When the economic sector involved is within the competence of more than one ministry, there will be a case of joint supervision. This is case, for example, with the recent National Plan for Technology approved by the State Council on August 8, 2016.

6. The implementation phase and the interaction between institutional entities and economic operators

If planning is to be intended as a cycle where different phases pertaining to different plans intertwine and proceed together, it is easy to point out how implementation phases have a role of absolute prevalence. Notwithstanding, plan implementation has certainly not been the focus of the studies on Chinese planning over the last decade at least. Not enough attention has been given to the concrete methods of implementation and enforcement of the plan. Thus, the common knowledge that Chinese plans do not have proper legal value has been reinforced. The reality is much different. The system of legal means of implementation and enforcement of the plans is complex, dynamic and manifold. Implementation and enforcement are closely linked when dealing with the plan: only an implemented plan can make use of legal frameworks capable of forcing the will of economic operators.

Nevertheless, Chinese planning seems to suffer from a strange antinomy: on one hand the market socialism openly refuses to recognize a primary and capital role of the planned economy; on the other hand, planned directives are, in practice, always fulfilled. The government seems not to accept the possibility that a plan is completely disregarded. To reconcile this antinomy there are some points that must be taken into account: i) the plan is formally unenforceable: its indicators and directives do not provide for penalties in case of violations; ii) nevertheless, plans must be respected and fulfilled; iii) as a consequence, the implementation and enforcement of the plan is realized on one hand through the use of political evaluation of public officers and party cadres, and on the other hand through legal frameworks and tools "outside of the plan". This means that rules pertaining other branches of law can be enforced in a way that is beneficial to the fulfilment of the plans.

This phenomenon is known in western legal system as well. When governments, especially during economic crisis or turmoil, lay down a strategy to enhance growth or prevent recession, they often intervene on several legal branches, such as company law, contract law, administra-

tive law and so on. Notwithstanding, as it is highlighted by Perkins[54], in a rule of law context such as the European one, the regulatory intervention by public authorities is aimed at preventing, removing or guiding some behaviours of the economic operators that are not considered beneficial. In a planned economy, or in a socialist market economy, public intervention has instead a strong directive and a much broader scope, as it has been already noted. Thus, enforcing the plan means influencing or imposing decisions and not merely supervising and regulating a certain behaviour.

6.1. Evolution of plan enforcement measure. The relevance of evaluation procedures

In USSR the mechanism which effectively empowered the plan to exercise its binding force over economic entities was the close link between the fulfilment of planned indicators and the career advancements of the directors and political officers. Directing an enterprise that had exceeded the goals of the plan could mean promotion or receiving monetary awards. On the other hand, not fulfilling the plan or even not exceeding its goals, could lead to demotion or dismissal. From a contractual perspective, contracts concluded in violation of the plan could be annulled and were easily challenged before the *gosarbitrage*[55]. Maoist China adopted this mechanism and applied to its first Five-Year Plans. With the beginning of the reform, the system was not overturned, but it was coordinated with the new principle of autonomy and profitability of the state enterprises. Evaluation of directors and public officers was not solely based on fulfilment of the plan but also on the ability to produce profit. A dual system developed, revolving around the two principles of responsibility toward the plan and autonomy/profitability. This system, though not without reforms, still is in place today. The coordination between the two principles is usually guaranteed by the presence, within almost every enterprise controlled by the State, of a party committee, which selects the personnel and influences strategic

[54] See D.H. PERKINS, *The Economic Transformation of China*, Singapore, 2015.

[55] *Gosarbitrage* is the Russian term for the USSR State Arbitration Tribunals reserved to Enterprises.

decisions[56]. As far as private enterprises are concerned, the mechanism operated more subtly. There is no direct presence of the party, but it is highly likely that managers and major shareholders are party members or maintain a close relationship with prominent party members.

The general supervision over the correct implementation and enforcement of the plans is carried out by the NDRC, whose departments constantly report the state of the plan implementation. If, for example, one of these reports should indicate that a state enterprise failed to fulfil a binding planned indicator, then the government, through the SASAC, would dismiss or demote the director or the manager of that enterprise. Theoretically, it is not to exclude the exercise, by the government, of the power of annulment of the contracts concluded in violation of the plan, but in the socialist market economy, this is an instrument to be used with utter care[57]. Moreover, it must be noted that it is virtually impossible that a binding indicator is not fulfilled. Such indicators are indeed always implemented by means of a complex and clear net of orders, special plans and political directives, so that it is set as a priority by all the economic operators affected by it. The NDRC, aided by the SASAC and by other competent government departments or agencies, selects the enterprises which could be at risk of not fulfilling the indicator and prepares a series of specific targets for that every single enter-

[56] On the Party control over SOEs see H. CALCINA HOWSON, *Protecting the State from Itself? Regulatory Interventions in Corporate Governance and the Financing of China's State Capitalism*, University of Michigan Public Law Research Paper no. 423, University of Michigan Law and Economics Research Paper no. 14017, January 13, 2015; D.C. CLARKE, *Corporate Governance in China: an overview*, in *China Economic Review*, Vol. 14 Issue 4, 2003, p. 494-507; C. HAWES, *Interpreting the PRC Company Law through the lens of Chinese political and corporate culture*, in *UNSW Law Journal*, Vol. 30(3), 2007, p. 813-823; S. KENNEDY et al., *State and Market in contemporary China*, cit.; W. LEUTERT, *Challenges ahead in China's Reform of the State-Owned Enterprises*, in *Asia Policy*, n. 21, 2016, p. 83-99; B.L. LIEBMAN, C. MILHAUPT, *Regulating the Visible Hand? The institutional implications of Chinese State-Capitalism*, Oxford, 2015; SHENG HONG, ZHAO NONG, *China's SOEs: Nature, performance and reform, Series on Chinese economic research*, Vol. 1, Singapore, 2013.

[57] It has to be mentioned, nevertheless, that the Law on Contracts of 1999, which replaced the Law on Economic Contracts of 1981, states that contracts concluded by state enterprises can be bound to respect obligatory tasks or orders (Art. 38).

prise. At the same time, the supervisory mechanisms starts working and produce, even in cooperation with the National Office of Statistics, detailed reports, which do not leave space for distractions. Local governments replicate this system of direction and control. Such a gigantic administrative machine ensures that binding indicators are often fulfilled even several months before the end of the five-year planning cycle. That is not, however, a common occurrence. Pervasive and rigid control over implementation is only required for the enforcement of few binding indicators with a strong political value.

6.2. Indirect implementation: most common techniques and legal mechanisms

Predictive indicators and directives are not implemented through the mechanisms that have just been analysed. The preferred methods of implementation and enforcement are, in these cases, indirect implementation instruments. It would be impossible to describe here every one of them, since they can vary depending on the circumstances as well. Nevertheless, a brief overview of the most important between them will be offered.

a) Implementation through beneficial fiscal measures: in 1983 a State Council decision abolished the mechanism which transferred to the State all the profit accumulated by State enterprises. A regime of partial fiscal autonomy was introduced, where enterprises had to pay a flat tax and could retain and manage the rest of the profit. Since then, fiscal legislation has always been an instrument to coordinate the autonomy of the single enterprise and the duty to respect and fulfil the plan. Some article of the Law on Enterprise Income Tax of 2008 appear to uphold this interpretation: article 7 assigns wide powers to the State Council when deciding which incomes can be exempted from tax; article 36 states that the State Council, when the economic and social development of the nation so requires, may design special fiscal regimes for specific enterprises. Such discretionary powers are exercised by the government in order to ensure the respect of the strategies designed for the development of the nation, and these strategies are actually plan directives. Enterprises, which

are willing to adapt their own economic plans to the objectives set in the Five-Year Plan are more likely to obtain fiscal advantages.

Tax legislation affects the implementation and enforcement of the plans even from the perspective of the State-Provinces relationship. The great reform of 1994 designed a system of fiscal revenues revolving around three categories: i) State revenues; ii) local revenues; iii) shared revenues. Compared to the previous system, based on a constant bargaining between the central and local governments with regard to the distribution of revenues, the new one is certainly more favourable for the provinces. Nevertheless, the central government retains wide discretionary powers in the distribution of shared revenues, and is likely to concede more financial resources to the provinces which put more effort into the implementation of the national Plan[58]. In second place, the 1994 reform modified the structure of the fiscal administration as well. It reinforced the hierarchical relationship between the State Administration of Taxation and the local fiscal agencies and reduced the supervisory powers that local governments had over the fiscal agencies of the correspondent level. To sum up, it can be stated that the outcome of the reform was a moderate centralization of the fiscal system. Therefore, the central government can exercise more influence on the distribution of revenues, on the basis of the Plan objectives and strategies.

b) Implementation through State aids and subsidies: the PRC Anti-Monopoly Law of 2008 does not regulate State aids. The reason for this choice is easily found: Chinese economic system employs State aids on a regular and huge basis. The first and most relevant beneficiaries of State aids are State Owned Enterprises and State Controlled Companies. Since a principle of separation between the property and the management of State enterprises has been affirmed, the use of State aids and subsidies became an instrument to ensure government control over the enterprise management.

[58] The mechanism functions at the advantage of the province as well. A province will be more inclined to follow the indications laid out in the Plan, even if they are not binding, because it will increase the bargaining power toward the State and allow obtaining fiscal advantages.

There are not clear data about the amount of State aids and subsidies received by Chinese enterprises. Nevertheless, it is known that subsidies are mostly employed by provincial and local governments[59]. Their use allows many provincial enterprises to survive, despite their financial losses.

Subsidies can be divided in two great categories: on one hand, they are conceded as aids to finance the reconstruction or renovation of underdeveloped areas or of areas hit by a calamity. On the other hand, central and local governments may subsidize specific undertakings or economic sectors which they regard as strategic for the national development. Each of these two categories is closely linked to the plan directives, since it is usually in the plans that projects of renovation and development of specific economic sectors are to be found. Therefore, subsidies are granted in accordance with the directives of the plan, and an enterprise engaged in the realization of a project included in the plan is more likely to be subsidized. This mechanism empowers central and local governments to indirectly implement the plan even with regard to the private sector of the economy. Since more than two thirds of the subsidies granted in the PRC are addressed to State enterprises (by loans or price regulations, as it will be noted later on), private undertakings has to compete to have access to a small portion of the credit granted by public banks[60]. In order to ensure their access to credit or subsidies, private undertakings may decide to carry out economic strategies in accordance with plan directives, or to invest in projects laid out by the plans.

[59] See ZHOU LI-AN, *Incentives and Governance: China's Local Governments*, cit.

[60] The four most relevant commercial banks in the PRC are the Industrial and Commercial Bank of China, the Agricultural Bank of China, the Bank of China and the China Construction Bank. These banks are all state-owned. On China's banking system and its political connections see K. PISTOR, GUO LI, ZHOU CHUN, *The Hybridization of China's Financial System*, in B.L. LIEBMAN, C. MILHAUPT, *Regulating the Visible Hand?*, cit.; N. CALCINA HOWSON, *Protecting the State from Itself?*, cit.; CAPITAL TRADE INCORPORATED, *An assessment of China's subsidies to strategic and heavyweight industries*, submitted to the US-China economic and security review commission; SHANG JIN-WEI, TAO WANG, *Do State Owned Banks favor State Owned Enterprises in China?* in *China Economic Review*, Vol. 8(1), 1997, p. 19-29.

Subsidies are sometimes granted through simple capital injections. More often, they are granted indirectly, for example through price regulations, which can allow an enterprise to benefit from a fixed price. It was more than thirty years ago when Five-Year Plans ceased to regulate extensively the prices of goods. Nevertheless, since strategic sectors of the economy are still managed solely by State enterprises, forms of price regulations exist. The authority in charge of price regulation is the Department of Prices of the NDRC. The same authority which drafts the national plans is also responsible for regulating prices of strategic resources. This circumstance implies a strong relation between price regulation and plan directives. As far as private enterprises are concerned, price control is exercised mainly through the decisions of Industrial Associations. These are associations which comprise private enterprises operating in a specific sector (e.g. cooking oil production). Although formally independent, such associations are often controlled by the CPC through the appointment of directors, which are former public officers, former managers of state enterprises or party members anyway[61]. Price regulations issued by these Associations are thus likely to benefit a sector or an enterprise which is involved in the implementation of a plan directive or project.

Extensive grants of subsidies are an issue heavily discussed by the political leadership of the Communist Party and the view on it is highly critical. Chinese state owned banks are closely linked with State Owned Enterprises, which can easily obtain loans despite fragile financial structures and conditions. Therefore, the amount of non-performing loans within Chinese banking system is huge and supports enterprises which are not profitable. On one hand, the Xi Jinping leadership upholds an economic strategy which seeks to re-

[61] About the relationship between Industrial Associations and the Communist Party see C. MILHAUPT, ZHENG WENTONG, *Beyond Ownership: State Capitalism and the Chinese Firm* (March 22, 2014), in 103 *Georgetown Law Journal* 665 (2015); C. LONG, J. YANG, *What explains Chinese private enterpreneurs' charitable behavior? A story of dynamic reciprocal relationship firms and the government*, in *China Economic Review*, Vol. 40, 2016, p. 1-16; K.S. TSAI, *Capitalism Without Democracy: The private sector in contemporary China*, Ithaca-London, 2007.

structure the whole system of State Owned Enterprises, gradually dismissing the ones which do not produce profit. On the other hand, it cannot be ignored that subsidies and loans grant is an extremely effective tool to implement plan directives and to obtain the sincere collaboration and trust of strategic State Enterprises. In view of the China membership within the WTO, the issue of subsidies will have to be dealt with, one way or another. The WTO Agreement on Subsidies and Countervailing Measures explicitly prohibits certain types of subsidies (e.g. subsidies for export operations) and limits the use of another types (sectoral subsidies). Since when China became a WTO member in 2001, the USA filed thirteen requests to the WTO asking for assessment of the legitimacy of Chinese subsidies to specific categories of enterprises.

The issue is under discussion, but its complexity prevents from assuming that a solution will be found in a few years. Subsidies still today play a crucial role in the development of Chinese economy and are one of the most effective tools to implement national and local plans.

c) Implementation through the enforcement of the Anti-Monopoly discipline[62]: despite this not being the focus of this paper, a brief assessment of how the plan can be implemented and enforced through the Anti-Monopoly legislation is to be made. The legal mechanisms which allow this kind of indirect implementation are quite easy to describe: Chinese competition law contains a series of provisions and legal frameworks which allow the competent authorities not to apply, or to apply at a lower degree, rules regarding restrictive

[62] On Chinese Competition Law, its features and connections with long-term political strategies see SHENG HONG, ZHAO NONG, YANG DUNFENG, *Administrative Monopoly in China*, Series on Chinese Economic Research, Vol. 10, Singapore, 2015; A. HUYUE ZHANG, *Bureaucratic Politics and China's Anti-Monopoly Law*, in *Cornell International Law Journal*, Vol. 47, 2014, p. 671-707; D.C.K. CHOW, *How China's Enforcement of Its Anti-Monopoly Law Poses Risks to Multinational Companies*, in *Santa Clara Journal of International Law*, 2015 Forthcoming; Ohio State Public Law Working Paper No. 294, April 27, 2015; A. EMCH, *Chinese Antitrust Institutions - Many Cooks in the Kitchen*, in *Competition Policy International*, Vol. 10 No. 1, Spring 2014, p. 217-246.

agreements, anti-competitive conducts and concentrations. Article 7 of the Anti-Monopoly Law, for example, states that

> Industries controlled by the State-owned economy and relied upon by the national economy and national security or industries implementing exclusive operation and sales in accordance with the law shall be protected by the State to conduct lawful operation by the undertakings. The State shall regulate and control the price of commodities and services provided by these undertakings and the operation of these undertakings so as to protect the interests of the consumer and facilitate technical progress. The undertakings mentioned above shall operate lawfully, honestly, faithfully, strictly self-disciplined, accepting public supervision and shall not use their dominant or exclusive positions to harm interests of consumers.

Wide discretionary powers are also exercised in the enforcement phase of the Anti-Monopoly Law. The authorities which are in charge of it (namely, the NDRC, the Ministry of Commerce and the State Administration for Industry and Commerce) do not operate on a clear definition of their tasks and their scopes of action are often intertwined. This fuzzy legal framework carves a space where selected undertakings may be openly favoured in order to become "national champions", strong enough to compete on the global market. Concentrations and dominant behaviour can be tolerated if an undertaking is willing to abide by plan directives or to carry out a project defined in the plan.

Preferential enforcement of the Anti-Monopoly Law, nevertheless, may also represent a disadvantage for the implementation of the national plan. This happens when provincial or local government, through local competent authorities, enforce the AML in such a way to protect domestic enterprises and discourage competitive conducts by other Chinese enterprises based on a different province. This protectionist approach affects the judiciary system as well. Local courts and authorities, when hearing a case filed by an enterprise coming from a different province and regarding violations of the AML, are likely to decide in favour of the domestic enterprise or to grant a very limited compensation.

These types of conduct carried out by provincial and local governments prove how much the implementation of plans happens at the provincial level, which nowadays is maybe the most relevant administrative layer as far as planning is concerned. Most of the enterprises involved in plan implementation are either owned by provincial governments or closely linked to them. This delegated exercise of implementing powers allows the plan to reach the great majority of Chinese economic units and entities, but at the same time can render more difficult, for the central government, to carry out its short-term strategies without encountering political and administrative obstacles in the protectionist approach of the Provinces.

7. Some critical aspects of the modern Chinese planning law

This paragraph is intended to offer a brief overview of some of the most critical aspects and features of the modern Chinese planning. Modern planning in China achieved undoubtedly great success. It rejuvenated a method of macro-economic control, which appeared to be destined to history bookshelves. Nevertheless, Chinese planning law still revolves heavily around political relationships and hierarchies and thus its functioning and effectiveness is not always clear. Here are listed and briefly analysed some of the major issues still to be resolved:

a) Informative asymmetry: compared to the Maoist era, modern Chinese plans have a background of more reliable and complete information. Yet, local governments and State Enterprises may be unwilling to provide the NDRC with all the economic data in their possession. The involvement of technical experts in the planning process seeks to neutralize this risk, but, nevertheless, a certain amount of informative asymmetry remains and so planned indicators may be sometimes based on misleading data.
b) Number and inner hierarchy between planned indicators: over the last fifteen years, Chinese plans saw a steady increase in the number of predictive, non-binding indicators. They are meant to define a strategy, a pattern of economic behaviour to follow, a series of general objectives and tendencies to be reached. However, predictive

indicators, in practice, do not have all the same value and importance. Routine evaluations carried out by the NDRC departments or by Party committee at the local levels can give more importance to the fulfilment of a predictive indicator rather than others[63]. Therefore, the implementation of the plan might focus on that particular indicator, leaving the other in the background. In order to encourage local governments and party officers not to neglect some policy areas considered of strategic importance, national plans have sometimes listed as binding some indicators which were predictive in the previous plans[64].

c) Wide discretion in the evaluation procedures: one of the most effective tools to implement the plan, especially with regard to planned indicators (binding or predictive), is the evaluation procedures carried out by the NDRC and concerning enterprises' directors and public officers of local Development and Reform Commissions. A parallel system of evaluation procedures is carried out by the Party and concerns local Party secretaries and cadres in charge of management and economic affairs. It is inevitable that such evaluations imply a subjective assessment of the people and policies scrutinized. Party discipline and allegiance to socialist legality might collide with nets of personal relationships between the assessors and the assessed[65]. Such nets might harm the credibility of the whole proce-

[63] Since the 1990s the predictive indicator regarding annual GDP growth was considered as the most important in all the evaluations carried out towards enterprise directors, local party secretaries and public officers. This created a pattern of behavior which the Xi Jinping leadership is trying to reverse, since concentrating solely on growth may lead to ignore other indicators, for example those regarding *per capita* income or those concerning social policies.

[64] This happened with the environmental and social policies indicators between the 11th and the 12th Five-Year Plan and the 12th and the 13th Five-Year Plan.

[65] Social sciences scholars versed in Chinese affairs and matters, are well aware of the relevance of "Guanxi" (关系), that is a series of relationships based on mutual trust, authority and often family ties. "Guanxi" has its roots in Chinese culture and can be defined as a whole way of intending human relationships. It played a crucial role in the development of private economic sector in 1980s China and it still affects either the internal management of enterprises or the administration-enterprise link. In the perspective of legal anthropologists, "Guanxi" is overall a legal system, intertwined with the

dure and lead to positive evaluations even with regard to officers of directors who have not in fact fully respected the plan. The issue has not easy solutions: anti-corruption campaigns emphasize the need to respect socialist legality and inner Party discipline is one of the most pressing issues tackled by the CPC leadership[66]. On the other hand, though, it must be noted that such phenomena of subjective evaluations and "independent" conducts are deeply rooted in Chinese social culture and are not always based on corruption: sometimes they can arise in order to "save" an unprofitable but important enterprise and, therefore, avoid a disruption of a local economy. Thus, provincial or county governments which engage in such conducts, altering the criteria of an evaluation by employing their "leverage" over Party local leaders or public officers, may be driven by the need to maintain social stability and to appease citizens. From this perspective, the proper enforcement of the plan collides with other instances regarded as equally valuable. To strike a balance could then become really hard; therefore, the plan sometimes could remain unenforced, or under enforced.

d) Lack of effective constraints over budget and resource allocation: Chinese planning system is highly decentralized and despite the efforts of the leadership to produce more precise and detailed plan directives, the transposition of them into projects with financial and material resources at their disposal, is almost entirely managed by provinces. This aspect, coupled with the bargaining techniques, which still today characterize the process of redistribution of shared fiscal revenues between the central governments and the provinc-

official one but, nevertheless, able to exercise an influence and affect the conduct of public officers, who could be inclined to abide by it rather than respecting the duty assigned to them by the State. The literature on "Guanxi" comprises many books and papers and involves many authors. Here are two titles of interests: U.C. BRAENDLE et al., *Corporate Governance in China is Economic Growth potentially hindered by Guanxi?*, 2005, available on SSRN; Y. MAO et al., *Indigenous Research on Asia: in search of the emic Components of Guanxi*, in *Asia Pac. J. Manag.*, Vol. 29(4), 2012, 1143-1168.

[66] The 6th *plenum* of the 18th Central Committee, which gathered in October 2016, focused solely on tightening Party discipline, signaling that there is still a wide spread problem of securing the fidelity of Party officers to the leadership.

es[67], drive the provincial governments to invest heavily in the projects laid out in the plan, demanding to receive more resources in exchange. The mechanism, if ensures a successful implementation of the plan, on the other hand frees provinces from any kind of budget constraint, since they can ask for more and more incentives in order to implement the plan. Modern Chinese planning, far more effective than the Maoist model, is nevertheless much more expensive for the State to sustain.

e) Judicial protectionism: this issue has already been considered (see § 6) and there is no need for it to be analysed again. It suffices to state that Chinese plans require some indirect tools of enforcement, and one of them is the selective enforcement of legal rules regarding fiscal incentives, subsidies and competition. Therefore, local governments might try to enforce the plan, while at the same time ensuring, through such selective enforcement, that local enterprises are favoured and protected against other Chinese enterprises. This mechanism, on a long-term perspective, might damage the overall national economy which benefits from the internal competition between domestic enterprises. The reassessment of Party discipline could also be viewed as an effort aimed at dissuading local Party leader to support such protectionist policies.

8. A brief comparative proposal

The analysis developed so far focused on Chinese planning assessing its specific features from a legal point of view, highlighting elements that, from a comparative perspective, could be easily put in contrast with the legal rules governing the public economic management in western countries.

This brief paragraph, instead, wants to provide a sketch of a comparative proposal aimed at pointing out some structural analogies between modern Chinese planning and a decision-making process developed by European Law. I am referring to the Open Method of Coordi-

[67] See § 6.

nation (OMC)[68]. Launched in 2000[69] by the European Council in Lisbon, the OMC was meant to stimulate member states efforts to coordinate their policies and legal frameworks with regard to policy fields where the Union did not have "hard law" regulatory powers, such as education, employment and social policies[70]. Although the results obtained in these areas undoubtedly failed the expectations, the OMC, over the last decade, experienced a renewed attention since it has, in more than one occasion, been employed to coordinate member States austerity measures in light of the economic crisis.

The OMC is an inclusive, soft law decision-making process which reassembles many of the most important features displayed by Chinese economic planning. Here are listed and briefly explained some of these analogies:

a) The use of targets: the OMC functions on the basis of a series of policy objectives set by the European Council. To each objectives (e.g. the reduction of unemployment) is associated a target, which represents a condition that each member state should reach in the following years[71]. Targets are not binding and member States have complete freedom of choice with regard to the implementation methods.

b) The inclusive nature: once targets are set, a dialogue should commence between governments and competent administrative authorities and offices of the member States. The intention is to promote a voluntary coordination, a soft planning with a broad approach in order to meet and consider the instances brought on by each Member State. The implementation process should then be reviewed periodi-

[68] See G. DELLA CANANEA, C. FRANCHINI, *I Principi dell'Amministrazione Europea*, Torino, 2013.

[69] With the Maastricht Treaty (1992) the Member States of the European Union launched an experimental project of "broad economic policy guidelines", aimed at coordinating the policies of the Member States concerning economic development. The scope of the project was then extended to employment policies with the Amsterdam Treaty (1997).

[70] The official EU parliament notes about the Open Method of Coordination indeed employ the term "soft governance", in contrast with the idea of "hard law" as regarding the fields where the Union has a direct and primary competence.

[71] The framework that is in place now sets objectives to be reached in 2020.

cally by the European institutions and agencies, which play a coordinative role.

c) The idea of mutual example and competition: the OMC encourages member States to dialogue with each other when discussing the implementation of the targets. On an ideal basis, member States with more effective and efficient administrative structures should guide other member States providing "good examples" in order to reach the objectives laid out by the Council. A similar model, with some differences, has been employed both by imperial China and the PRC, whose governments encouraged the competition between different models of development adopted in different provinces and then shaped its own comprehensive strategy of development by employing the policies which, in each local model, had worked out more effectively[72].

As it has been said before, the OMC left a long trail of criticisms behind it. In particular, the inclusive method and the idea of mutual example proved out to be ineffective and member States appear to be unwilling to engage in such a dialogue. Here what it is interesting to note is that a soft planning approach and the use of non binding targets may be seen as a similarity between the OMC and the modern Chinese planning. This could a sign that, when dealing with coordinative efforts to-

[72] A recent experience of "internal competition" saw the rise of two models of economic and social development, the Chongqing and the Guangdong models. Fueled by the alleged competition between the Party leader which guided the two provinces (Bo Xilai for Chongqing and Wang Yang for Guangdong), the confrontation displayed a more centralized, State-centered approach (in Chongqing) and a more "liberal", rule of law oriented approach (in Guangdong). The parallel path of development of these two models came to a halt in 2012, when Bo Xilai was convicted for corruption, then removed from its office and expelled from the Party. Nevertheless, the Chinese model of development designed and promoted by the Xi Jinping leadership derives some of its major features from both of those models, emphasizing a renewed State control and the guiding role of the Party but in harmony with the development of the rule of law (which is to be intended as rule of law "with Chinese characteristics" since it has its roots and legitimacy in socialist legality). On the issue, see J.P. CABESTAN, J. DOYON, F. GODEMENT, R. LAFARGUETTE, YANG CHAN, *One or two Chinese models?*, European Council of Foreign Relations, 2011; J.Y.S. CHENG, *The Chongqing Model: what it means to China today*, in *Journal of Comparative Asian Development*, Vol. 12(3), 2013, p. 411-442.

ward a comprehensive development in the context of a modern economy, the legal mechanisms designed by the PRC after the reforms seem to constitute the preferred approach even outside the socialist legal systems. What is certainly different, however, is the constitutional background, which deeply affects the functioning of these methods. In the PRC, the constitutional role of the Party as the guiding force and the existence of a parallel structure comprising CPC organs and public offices, is what makes it possible for the plan to be taken into account by all the institutions and economic operators which it is addressed to. In the EU such a structure lacks; thus member States do not even "feel" obligated to consider what the European targets say.

Once again, inclusive planning appears to be closely related to the existence of a modern socialist constitutional structure founded on the Party role as the real coordinative force.

9. Recent developments of Chinese planning law

On May 12, 2016, a decision of the European Parliament refused to assign the "market economy" status to the PRC[73]. After reading the previous paragraphs, this should not come as a surprise. Notwithstand-

[73] The decision of the EU Parliament affected the application of the more favourable measures designed by the "Anti-dumping" regulation (Reg. 1225/2009), which can only be applied to non-EU members which have market economy systems. Art. 2, § 7-c states that, in order to determine whether an economic entity operates under market economy conditions, the following requirements must be fulfilled: "decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values; firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes; the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts; the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and exchange rate conversions are carried out at the market rate".

ing, many western legal scholars produce several papers highlighting how Chinese legal system is progressively opening up to the rule of law and to reforms able to support a strong market and private economy.

In my point of view, the PRC cannot be considered as a market economy and will not be one for several decades. It is impossible to foresee how Chinese economic law will evolve in five, ten or fifteen years, but I think it can be stated that, as long as the Chinese constitutional structure will recognize the guiding role of the CPC, then Chinese economy will employ mechanisms of comprehensive public control and management.

In this paragraph, my intention is to point out how, in the Xi Jinping era, the PRC seems to have developed a series of coordinates to found and support the striving towards a balanced economy which, at lower but stable growth rates, can guarantee higher per capita incomes, better social services, an effective environmental protection and a more accessible judicial protection. In other words, PRC seems to have embraced the idea of reaching its "New Normal"[74] stage of development.

9.1. Guo Jin Min Tui

The birth of "New Normal" PRC can be traced back to the beginning of Hu Jintao's first term as CPC Secretary. When defining the "Scientific Outlook on Development" Hu offered, for the first time, a vision of Chinese development which sought to harmonize growth and sustainability[75]. Later on, his two terms as Secretary (2002-2012) were characterized by a process defined as "Guo Jin Min Tui" (国进民退)

[74] The expression "New Normal" is employed by Chinese President and Party Secretary Xi Jinping to describe his idea of development. It represents the idea of a China not focused solely on economic growth anymore, and seeks to drastically improve its quality of life.

[75] In his speech at the 17th CPC Congress in October 2007, Hu Jintao pointed out the necessity to create a strong link between economic growth, sustainability and cultural and etic advancement of the whole nation. On the concept of "Scientific Outlook on Development" see J. FEWSMITH, *Promoting the Scientific Development Concept*, in *China Leadership Monitor*, Issue n. 11, 2004. HUANG MIN, *A political philosophy interpretation of the scientific outlook on development*, in *Journal of Changchun Normal University*, vol. 35 (9), 2016, p. 40-42.

(the State advances, private sectors retreats). The 12th Five-Year Plan, drafted and approved under Hu's leadership, mentioned, between its policy directives, the reinforcement of macro-economic control and coordination of fiscal policies, industrial policies and investment policies. Moreover, between 2002 and 2012 PRC enacted several capital Laws, such as the Securities Law in 2006 and the Anti-Monopoly Law in 2007. These laws, while designing a legal framework for the economic operators where there was nothing before, also empowered public authorities to supervise and regulate entire sectors of the national economy, with wide discretionary powers deriving from many "open clauses" inserted in the statutes[76]. Chinese legislation, in balancing new and detailed rules and administrative discretion, indirectly enhanced the coordinative role of the Five-Year Plan that became, from a legal perspective, the act where the central government laid out criteria that public authorities had to follow when exercising their discretionary powers, for example favouring an undertaking over the others on account of its involvement in project of national relevance.

9.2. The State and the private economy in the Xi Jinping era

The process of enhancement of public control is still firmly in place and it has been a theoretical pillar of the Xi Jinping's leadership so far. If, as Xi said[77], "only socialism can save China", then a comprehensive and common effort is required, in order to harmonize the economic development of both great State-Owned sectors and private enterprises, which now account for more than half of the size of Chinese economy. The institution, within the CPC Politburo, of the Small Group on Economics and Finance only reinforces the idea that the Party retains a crucial role in Public Economic Management. The instrument that better can embody this institutional purpose is certainly the plan, and that is why in Xi Jinping's China Planning Law had an importance and a visibility never experienced in the past.

[76] See § 6 for an overview about the implementation of the AML and its importance in light of the plan.

[77] See XI JINPING, *The Governance of China*, Beijing, 2014.

Many of the announced reforms[78], such as the mixed-ownership experiments concerning State-Owned Enterprises, a Charity Law, a Law on private education institutes, indicate that CPC leadership intends to promote the growth of the private sector of the economy. This growth, nevertheless, will have to proceed in accordance with the political will of the leadership. It can be expected that the role of Industrial Associations or other Social organizations, as links between private economic operators and public institutions, will be strengthened and enhanced.

The 13th Five Year Plan laid out infrastructural projects, industrial projects and even an ambitious program to reform and update the entire system of Chinese manufacture industry[79]. The central government has already allocated huge financial resources for each one of these projects and will have to distribute them between enterprises willing to participate in the programs. In such a way, the implementation of the 13th will see public and private economic operators compete for resources and at the same time strive to work together for the realization of the projects. Private economic operators will have to be efficient and trustworthy for the political leadership to select them as addressees of the funds allocated. Therefore, planning law manages to promote the development of the private sector of the economy while retaining its full coordinative force. What appears to be a paradox, under the legal structures of market socialism becomes an effective governance tool.

The inclusiveness of the planning process will be enhanced as well. During the initial stages of the drafting of the 13th Five-Year Plan over eighty research projects were commissioned by the NDRC. Some of them involved foreign and international organizations (OECD, Asian Development Bank). At the same time, the institution of the Small Group on Economics and Finance sought to strengthen the relation between the Party and the NDRC and therefore the relation between technical and political legitimacy with regard to planning. The push toward a mild centralization of the State machine is also strengthened by the creation, which occurred in March 2018 by means of Law, of the State

[78] These reforms, or projects of reform, were discussed in March 2016 during the works of the National People's Congress.

[79] The reference is to "Made in China 2025", a project that has been heavily publicized on the media as well.

Supervision Commission[80], a new brick of the already complex Chinese constitutional structure, in charge of supervising the commitment to law and party discipline of the administrative offices.

The whole of the economic and productive forces of modern China are called to realize the "Chinese Dream"[81]. In order to do that, the need to protect and promote the "core socialist values"[82] has to be reassessed. The plan may be the best instrument for this purpose.

10. Conclusions

"China's latest Five-Year Plan could be its last". This is the title of a journalistic article[83]. Though, it cannot be excluded for sure a change in the forms and types of legal tools aimed at ensuring macroeconomic coordination, a sudden swift from planning seems to be unlikely. According to the author of this paper, many indications coming from recent reforms and mainly from the structure and content of the 13th Five-Year Plan, reassess the importance of planning within the Chinese Legal System. Since the beginning of Xi's tenure as CPC's Secretary, China has constantly been shaping its own governance values, revolv-

[80] In November 2016 the National People's Congress approved the institution of centralized "supervision commissions" in the municipality of Beijing and the provinces of Shanxi and Zhejiang. In the summer of 2017 the NPC's Standing Committee reviewed the results so far achieved and called for a further step. See, on the issue, the link http://news.xinhuanet.com/english/2017-01/08/c_135964658.htm. The information regarding the State Supervision Commission also borrow from the paper presented by WANG ZHIQIONG at the annual conference of the European China Law Studies Association, held in Leiden, on the 24th and 25th of August, 2017.

[81] The rhetoric of the "Chinese Dream" is a distinctive trait of the Xi Jinping's leadership. For an overview of his main speeches about the meaning of the concept, see XI JINPING, *The Governance of China*, Beijing, 2014.

[82] The reference to the "core socialist values" was introduced by a Central Committee resolution in 2006. These values comprise the idea of Marxism as a guiding set of principles, the concept of Socialism with Chinese characteristics, the idea of national and patriotic spirit (a sort of *Volksgeist* related concept) and the idea of spirit of time as a push toward reform and innovation.

[83] The article can be found at the web link http://www.chinaeconomicreview.com/china%E2%80%99s-latest-five-year-plan-could-be-its-last.

ing around the affirmation of some core values of socialism[84], as interpreted by the Chinese leadership. The plan became maybe the most significant expression, both in political and legal terms, of such values. The plan, as a single unitary act, has a comprehensive nature which allows to easily coordinate indicators (binding and predictive), directives, projects, evaluation procedures, all for the final purpose of a harmonious development.

Modern Chinese planning is an essential part of a new model of economic development that was shaped by the first reforms of the Deng Xiaoping's leadership and that, today, is able to compete with the western idea of market economy[85]. If China wants to uphold its own mod-

[84] See footnote no. 79.

[85] The number of countries which, nowadays, employ broad planning strategies such as development plans is surprisingly high, especially among the so-called developing nations (e.g. India, Indonesia, Bangladesh). However, in Southeast Asia this tendency progressively acquired the features of a sort of legal transplant of Chinese solutions, adapted to each own legal environment. Vietnam and Laos are probably the most relevant examples. Both, in the last thirty years, have embraced a model of economic development resembling the socialist market economy, with remarkable achievements.

As far as Vietnam is concerned, the starting point of its deep economic reform process is traced back to the mid-1980s and is associated with the term *doi moi* (: renovation). In 1986, the 6th congress of the Communist Party of Vietnam endorsed "an utter shift to a market-oriented modus operandi of the socioeconomic system (…) to gradually replace the centrally planned model with market principles" (see VUON QUAN HOANG et al., *The Entrepreneurial Facets as Precursor to Vietnam's Economic Renovation in 1986*, in *The IUP Journal of Entrepreneurship Development*, Vol. VIII, No. 4, 2011). For planning law, this meant greater emphasis on long-term goals and the abandonment of fixed-quotas plans, giving instead greater autonomy to single economic unities. The same year, the 4th Congress of the Laotian Communist Party formally endorsed the "New Economic Mechanism", designed to coordinate the transition toward a market-oriented economy under the Party leadership. After thirty years, both Vietnam and Laos continue drafting long-term socioeconomic development plans which ostensibly employ legal tools inspired by Chinese models. The 8th Laotian FYP (2016-2020) and the 10th Vietnamese FYP (2016-2020) both resemble their Chinese counterpart: they contain a thorough analysis of the outcomes of the previous plan, comparing targets and achievement, then proceeding to set broad policy goals, numerical targets and planning directives covering every sectors of the national economy.

In addition to this, public officers evaluation procedures based on periodical review of the compliance of strategic choices made with the guidelines set by the plan, lays out

ern, successful and convincing development model, it will probably need the Plan as the comprehensive manifesto of position both toward its citizens and the foreign countries.

Therefore, planning as an inclusive space of dialogue and definition of macro-economic strategies under the guidance of the Communist Party, will probably carry on functioning as long as the PRC as a socialist state exists. It serves the purpose to control and supervise one of the major economies in the world. In order to do so, it will carry on changing and adapting to the circumstances, following a coordinated and comprehensive pattern, striving to reach a sort of "cosmic harmony" for the Chinese society.

the idea of a "performance-based legitimacy" which strengthens the role both of the public authorities and the Party establishments. On the issue, see LE HONG HIEP, *Performance-based Legitimacy: The Case of the Communist Party of Vietnam and Doi Moi*, in *Contemporary Southeast Asia* Vol. 34, No. 2 (2012), p. 145-72.

CONCETTI IN EVOLUZIONE NEL DIRITTO DEI MARCHI CINESE, 2001-2013: L'INTERAZIONE DI LEGGE E GIURISPRUDENZA

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SOMMARIO: *1. Il diritto della proprietà intellettuale nella Repubblica Popolare Cinese: cenni introduttivi. 2. La normativa cinese sul marchio. 3. Registrazione ed amministrazione dei marchi. 4. Il ruolo del giudice nell'ordinamento cinese. 5. Le fonti del diritto cinese. 6. Sviluppo giurisprudenziale e accoglimento nella legge (I): la concezione funzionale dell'"uso del marchio". 7. Sviluppo giurisprudenziale e accoglimento nella legge (II): il parametro del rischio di confusione. 8. La* policy *guida l'evoluzione del diritto: applicazione estensiva delle norme contro lo* squatting*. 9. Osservazioni. Un'evoluzione "graduale e disomogenea" presieduta dai giudici. 10. La politica del diritto come "motore" dell'attività di "apripista" dei giudici. 11. "Contribuire all'evoluzione del diritto", ma non "creare diritto": come i Tribunali del Popolo vedono se stessi. 12. Il ruolo di alcuni formanti giuridici nell'evoluzione del diritto cinese dei marchi. 13. Epilogo: innovazioni dal 2014 al 2017.*

1. Il diritto della proprietà intellettuale nella Repubblica Popolare Cinese: cenni introduttivi

La tutela giuridica della proprietà intellettuale attribuisce a chi ha compiuto uno sforzo creativo un diritto esclusivo allo sfruttamento dei relativi risultati. Se così non fosse, il creativo sarebbe svantaggiato nella concorrenza contro chi si limita a sfruttare i risultati del suo sforzo senza averlo compiuto in proprio. La tutela giuridica della proprietà intellettuale si esprime attraverso tre principali strumenti: brevetto, marchio e diritto d'autore.

La Cina, patria delle "quattro grandi invenzioni" (carta, stampa, polvere da sparo e bussola), conosce da secoli forme di protezione delle invenzioni, dei segni distintivi commerciali, delle opere letterarie. La qualificazione teorica da dare a tali forme di protezione è oggetto di un

sempre acceso dibattito fra gli studiosi[1]. In via di prima approssimazione basti dire che la Cina imperiale non conosce una "tutela giuridica della proprietà intellettuale" nel senso che manca un *sistema di norme generali e astratte posto a tutela di diritti soggettivi aventi per oggetto beni immateriali*.

"I divieti di produrre repliche di libri datano fin dall'epoca Song [*960-1279, NdR*]": così si esprime, all'inizio del Novecento, lo storico Ye Dehui[2]. Numerosi *colophon* di edizioni a stampa di epoca Song riportano l'avvenuta dichiarazione del libro alle autorità e fanno divieto ai terzi di riprodurre l'opera[3]. Parallelamente, è documentata sin dall'epoca Song la pratica dei commercianti di usare con regolarità un certo segno per contrassegnare i propri prodotti. Nella città di Suzhou, nel 1736, le autorità locali fanno incidere su una pietra ed esporre al pubblico la pronuncia emanata contro Huang Youlong, colpevole di avere contraffatto il segno usato da un concorrente sui propri tessuti[4]. Nel 1881, l'imperatore Guangxu concede a Zheng Guanying un "brevetto" decennale relativo a una tecnica di tessitura a macchina[5]. Questi i primi

[1] Il dibattito accademico sembra riguardare principalmente: (i) le finalità – pubblicistiche o privatistiche – delle forme di tutela documentate; (ii) il configurarsi di tali forme di tutela come privilegio concesso dall'alto o riconoscimento di posizioni soggettive; (iii) la presenza o assenza di una reale attività dello stato a tutela di invenzioni, segni distintivi e opere. A mero titolo esemplificativo, contro la possibilità di rinvenire nella Cina imperiale una vera e propria "tutela giuridica della proprietà intellettuale" si sono pronunciati W.P. ALFORD, *To Steal a Book is an Elegant Offense*, Stanford, 1995 (si vedano soprattutto i capitoli introduttivi) e CHEN JIANFU, *Chinese Law: Context and Transformation*, Leiden-Boston, 2008, pagg. 565 ss.; a favore di tale possibilità si schiera invece – quantomeno relativamente al diritto d'autore – ZHENG CHENGSI, *Sulla proprietà intellettuale (知识产权论)*, Pechino, 1998, pagg. 4 ss.

[2] YE DEHUI, *Conversazioni pure nella foresta dei libri (书林清话)*, ed. a cura di LI QINGXI, Shanghai, 2008, pag. 36.

[3] Il testo di alcuni di tali *colophon* sembra voler tutelare non solo un interesse dell'editore, ma anche un interesse dell'autore. Ciò ha spinto alcuni studiosi a ritenere che nella Cina imperiale esistesse già una forma di diritto d'autore affine a un diritto civilistico: ZHENG CHENGSI, *op. cit.*, pagg. 14 ss.

[4] ZUO XUCHU, *Storia breve dei marchi cinesi moderni (中国近代商标简史)*, Shanghai, 2003, pag. 124.

[5] ZHENG CHENGSI, *op. cit.*, pag. 10.

esempi di tutela dell'opera letteraria, del segno distintivo commerciale e dell'invenzione che chi scrive è riuscito a rintracciare.

Nel suo *Nuovo trattato sull'assistenza nel governo* (资政新篇, *Zīzhèng Xīnpiān*) del 1859, Hong Rengan, esponente di spicco della ribellione Taiping, propugna l'adozione di un sistema di tutela legislativa delle invenzioni mediante brevetti di durata graduata. L'opera propone politiche per lo sviluppo economico della Cina, traendo ampio spunto dagli ordinamenti esteri.

Nel 1861 il governo imperiale istituisce l'organo dei Ministri del commercio per i mari settentrionali e meridionali, incaricati di sovraintendere al commercio estero e di amministrare la tutela dei marchi dei mercanti stranieri. I Ministri sono il primo organo amministrativo centrale cinese deputato all'amministrazione dei marchi. Nel 1890, concedono il primo marchio a un operatore cinese[6].

Nel 1898 l'imperatore Guangxu promulga il *Regolamento sulla concessione di incentivi alla tecnica*, considerato il primo atto legislativo cinese in tema di brevetti[7]. Durante i tentativi di riforma che precedono immediatamente la fine dell'Impero, il governo promulga il *Regolamento pilota per la registrazione dei marchi* (1904) e la *Legge sul diritto d'autore Qing* (1911), primi atti normativi nelle rispettive materie. Tutti rimarranno sostanzialmente lettera morta.

Varie ragioni si possono addurre a spiegare il mancato sviluppo di una "tutela giuridica della proprietà intellettuale" come sopra definita. Ragioni economiche, come la scarsa circolazione dei prodotti. Ragioni politiche: nota dominante della politica economica imperiale è il principio "privilegiare l'agricoltura e frenare il commercio" (重农抑商, *zhòngnóng-yìshāng*). Ragioni *lato sensu* giuridiche, come la scarsa propensione a tutelare le posizioni giuridiche individuali.

Più chiare, invece, le ragioni dei primi tentativi di introdurre tale tutela al crepuscolo dell'Impero: pressione delle potenze occidentali, le

[6] QU CHUNHAI, *Valutazione di fatti storici attinenti alle negoziazioni sino-estere riguardanti il Regolamento pilota sulla registrazione dei marchi alla fine della dinastia Qing (清末中外关于《商标注册试办章程》交涉史实考评)*, in *Archivi Storici (历史档案)*, 4, 2012, pagg. 87-95.

[7] WANG LING, ZHENG MIN, *Diritto commerciale internazionale (国际商法)*, Pechino, 2004, pag. 161.

quali chiedono protezione per i diritti dei propri operatori economici, e uso della proprietà intellettuale come strumento per incentivare lo sviluppo economico del Paese.

Il governo (cosiddetto "nazionalista") della Repubblica di Cina (1912-1949) disciplina la proprietà intellettuale con alcune leggi settoriali, le quali si collocano nel quadro generale del codice civile (promulgato progressivamente a partire dal 1929). A causa della forte instabilità politica e di svariati eventi bellici – il governo nazionalista non arriverà mai a controllare l'intero Paese –, tale legislazione conosce un'applicazione molto limitata.

La primissima legislazione della Repubblica Popolare (1949-oggi) riconosce taluni diritti individuali sulle opere dell'ingegno e sui segni distintivi. Il *Regolamento provvisorio sulla protezione dei diritti sulle invenzioni e del diritto di brevetto* (1950) prevede una serie di diritti dell'inventore sull'invenzione (artt. 4-7). Il *Regolamento provvisorio sulla registrazione dei marchi* (1950) prevede un diritto esclusivo al marchio (artt. 12, 18 e 29). Una serie di delibere approvate nel 1950 dall'Amministrazione statale per l'editoria sembra riconoscere all'autore taluni diritti sulle proprie opere[8].

Già nel 1957, il *Regolamento provvisorio sulla protezione del diritto d'autore su opere pubblicate* sembra vedere il diritto d'autore più come uno strumento per mantenere l'ordine socialista che come un mezzo per proteggere gli interessi dei singoli titolari[9]. Nel 1963, in piena crisi delle relazioni sino-sovietiche e alla vigilia della "Rivoluzione culturale", il nuovo *Regolamento sugli incentivi alle invenzioni* stabilisce che "tutte le invenzioni appartengono allo Stato" e prevede una generale facoltà dei terzi di sfruttare le invenzioni (art. 23). Il *Regolamento per il controllo dei marchi* emanato nello stesso anno non contiene disposizioni sulla tutela del diritto individuale al marchio[10].

[8] NIE JIANQIANG, *The Enforcement of Intellectual Property Rights in China*, Londra, 2006, pag. 180.

[9] CHEN GE, *Copyright and International Negotiations – An Engine of Free Expression in China?*, Cambridge, 2017, pag. 74.

[10] NIE JIANQIANG, *op. cit.*, pag. 180. Sulla prima legislazione della Repubblica Popolare in tema di proprietà intellettuale si veda anche T. HSIA, K.A. HAUN, *Laws of the*

La "Rivoluzione culturale" (1966-1976) paralizza per un decennio la tutela giuridica della proprietà intellettuale: "l'operaio di acciaieria non indica il proprio nome sui lingotti che ha prodotto; così l'intellettuale non ha motivo di voler apporre il proprio nome alle sue opere"[11].

Fra gli anni Ottanta e gli anni Novanta, in sintonia con la nuova politica di "riforma e apertura", la Cina aderisce ai principali accordi internazionali in materia di proprietà intellettuale[12]. Del 1982 è la prima Legge sui marchi; del 1984 la prima Legge sui brevetti; del 1990 la prima Legge sul diritto d'autore. Nasce così, per la prima volta, un sistema cinese di "tutela giuridica della proprietà intellettuale" realmente applicato.

I Tribunali, ripresa l'attività dopo la paralisi della "Rivoluzione culturale", si fanno carico dell'applicazione della normativa; a dispetto del ruolo di mera *bouche de la loi* che l'ordinamento attribuisce loro (v. § 4), daranno un contributo fondamentale non solo all'applicazione del sistema della proprietà intellettuale, ma alla sua stessa costruzione. Il presente studio ha appunto per oggetto (seppur limitatamente alla materia dei marchi) l'entità e i modi di tale contributo.

Nel 2001, per aderire all'Organizzazione Mondiale del Commercio (WTO), la Cina dovrà aderire all'Accordo sugli aspetti commerciali dei diritti di proprietà intellettuale (c.d. Accordo TRIPs) e modificare di conseguenza la propria legislazione.

L'odierno sistema cinese di tutela della proprietà intellettuale sembra nascere in risposta a pressioni estere e come strumento per attrarre investimenti e tecnologie esteri, nell'ottica dello sviluppo economico

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People's Republic of China on Industrial and Intellectual Property, in *Law and Contemporary Problems*, estate 1973, pagg. 274-292.

[11] L'affermazione, comune negli anni della "Rivoluzione culturale", è citata da CHEN GE, *op. cit.*, pag. 75; W.P. ALFORD, *op. cit.*, pag. 56; NIE JIANQIANG, *op. cit.*, pag. 181.

[12] Elenchiamo di seguito le date di adesione della Cina ai principali trattati in materia: Convenzione istitutiva dell'Organizzazione Mondiale della Proprietà Intellettuale (1980); Convenzione di Parigi per la protezione della proprietà industriale (1984); Accordo di Madrid sulla registrazione internazionale dei marchi (1989); Accordo di Nizza sulla classificazione internazionale dei prodotti e dei servizi ai fini della registrazione dei marchi (1994); Trattato sul diritto dei marchi (1994); Protocollo relativo all'Accordo di Madrid per la registrazione internazionale dei marchi (1995).

del Paese[13]. Chi scrive ravvisa un'analogia fra le dinamiche che, alla fine dell'Impero, conducono il governo Qing a tentare di tutelare giuridicamente la proprietà intellettuale e quelle che, qualche decennio fa, hanno indotto la Repubblica Popolare a ripercorrere gli stessi passi.

Nel prosieguo del presente studio tratteremo il contributo dato dai giudici – nell'interazione con il formante legislativo – alla costruzione del sistema cinese della tutela giuridica del marchio. Le conclusioni che ne ricaveremo non solo sono aperte alla verifica nei contigui campi del brevetto e del diritto d'autore, ma saranno forse applicabili per ricostruire le modalità evolutive del diritto cinese in generale.

2. La normativa cinese sul marchio

La normativa cinese sul marchio è composta da documenti di varia provenienza, natura e forza. Ai fini di questo paragrafo definiamo latamente "normativa" ogni atto promanante dallo Stato o dai suoi organi che rilevi per la soluzione delle problematiche giuridiche connesse al marchio[14].

Il "diritto cinese dei marchi" oggetto del presente studio nasce nei primi anni Ottanta, periodo in cui la politica di "riforma e apertura" (改革开放, *gǎigé kāifàng*) voluta da Deng Xiaoping dà alla Cina l'obbiettivo di dotarsi di un sistema giuridico completo ed efficiente. La *Legge Marchi della Repubblica Popolare Cinese*, promulgata nel 1982 ed entrata in vigore l'anno seguente, abroga ogni precedente atto normativo in materia (art. 43) e regola per la prima volta in maniera organica, seppure scarna, il quadro della registrazione e amministrazione dei

[13] CHEN JIANFU, *Chinese Law: Context and Transformation*, Leiden-Boston, 2008, pag. 565.

[14] La precisazione è d'obbligo. Alcuni tipi di atti normativi cinesi sono del tutto sconosciuti ai sistemi giuridici di *civil law* occidentali ed è anzi lecito dubitare che si tratti di veri e propri "atti normativi" nel senso in cui noi intendiamo questa locuzione; la maggior parte delle fonti normative, inoltre, assume nel sistema giuridico cinese un ruolo diverso rispetto a quello delle corrispondenti fonti dei sistemi di *civil law* occidentali (v. § 12).

marchi, i diritti dei titolari, le condotte di violazione del marchio altrui e la responsabilità da esse derivante.

La prima riforma della Legge Marchi, effettuata nel 1993, non comporta un ripensamento complessivo dell'assetto preesistente. Epocale è invece la riforma del 2001, coincidente con l'adesione all'Organizzazione Mondiale del Commercio (WTO). Questa, fra le altre innovazioni, prevede la ricorribilità in giudizio delle decisioni amministrative in materia di marchi; la registrazione di marchi da parte di singole persone fisiche; la tutela del marchio tridimensionale; la tutela del marchio celebre.

Infine, la riforma del 2013, entrata in vigore il 1° maggio 2014, introduce rilevanti innovazioni, alcune delle quali saranno esaminate nel presente studio.

Ai sensi della Legge Marchi del 2013 e della previgente Legge Marchi del 2001 (d'ora in poi, per brevità, rispettivamente LM 2013 e LM 2001), la registrazione e l'amministrazione dei marchi sono demandate per l'intero Paese all'ufficio centrale dell'Amministrazione Statale per l'Industria e il Commercio (国家工商行政管理总局, *Guójiā gōngshāng xíngzhèng guǎnlǐ zǒngjú*; d'ora in poi, per brevità, AIC), la quale esercita tali funzioni attraverso un Ufficio Marchi (商标局, *Shāngbiāo jú*) e un Comitato per l'Esame e l'Assegnazione dei Marchi (商标评审委员会, *Shāngbiāo píngshěn wěiyuánhuì*; d'ora in poi, per brevità, CEAM) (art. 2 LM 2013; art. 2 LM 2001).

Quanto alla fonte del diritto al marchio, la Legge Marchi accoglie una versione piuttosto rigida del modello c.d. *first-to-file*: il diritto al marchio spetta *a chi lo abbia registrato per primo*, essendo in principio irrilevante l'uso del marchio precedente alla registrazione. In questo senso il diritto cinese segue il modello dei Paesi occidentali di *civil law* e quello giapponese, preferendolo al sistema *first-to-use* dei Paesi anglosassoni[15]. Fanno eccezione al principio *first-to-file* le norme volte ad arginare la *registrazione in malafede* di marchi già usati da altri e dotati di qualche notorietà (principalmente gli artt. 15, 32, 44 LM 2013; ri-

[15] Un sistema di tutela del marchio ispirato al modello *first-to-use* è invece vigente ad Hong Kong, in continuità con la tradizione giuridica britannica. Il sistema di Macao è più vicino a quello della Cina continentale giacché, in linea con la tradizione portoghese, è improntato al modello *first-to-file*.

spettivamente artt. 15, 31, 41 LM 2001) e le norme sul *marchio celebre*, il quale può ricevere tutela a prescindere dalla registrazione (artt. 13-14 LM 2013 e LM 2001).

La violazione del marchio altrui può comportare responsabilità civile (artt. 56 ss. LM 2013; artt. 51 ss. LM 2001) e penale (artt. 61, 67 LM 2013; artt. 54, 59 LM 2001). La disposizione fondamentale in tema di violazione di marchio è l'art. 57 LM 2013 (art. 52 LM 2001), il quale tipizza le condotte di infrazione del diritto altrui. La vittima dell'infrazione può intraprendere due principali vie rimediali: l'"azione amministrativa" e l'azione in giudizio (artt. 60 ss. LM 2013; artt. 53 ss. LM 2001). I rimedi accordati in sede amministrativa sono l'inibitoria del comportamento denunciato e il risarcimento dei danni; l'Amministrazione può altresì irrogare sanzioni pecuniarie. La decisione amministrativa è ricorribile dinnanzi ai Tribunali del Popolo, i quali però possono essere aditi anche indipendentemente dall'esperimento di una previa azione amministrativa.

La Legge Marchi è corredata da un vasto ed eterogeneo catalogo di atti emanati da organi amministrativi e giurisdizionali. Si tratta principalmente dei seguenti tipi di atti: (i) *Disposizioni Attuative* emanate dal Consiglio di Stato (国务院, *Guówùyuàn*); (ii) regolamenti emanati dal Ministero del Commercio, dall'AIC, dall'Ufficio Marchi, dal CEAM e da altri organi amministrativi; (iii) testi interpretativi di fonte giudiziaria (司法解释, *sīfǎ jiéshì*); (iv) "testi divulgativi" di fonte giudiziaria o amministrativa; liste di casi esemplari; (v) atti normativi di portata generale, fra cui i *Principi Generali del Diritto Civile*, la *Legge Penale*, la *Legge di Procedura Civile* e la *Legge sulla Concorrenza Sleale*. Le fonti più interessanti ai fini del presente studio – quelle di fonte giudiziaria – saranno presentate in maggiore dettaglio al § 5.

3. Registrazione e amministrazione dei marchi

Chi intenda ottenere la registrazione di un marchio deve presentare apposita domanda all'Ufficio Marchi (art. 4 LM 2013 e LM 2001); le persone fisiche o giuridiche estere non possono condurre in prima persona gli adempimenti per la registrazione, ma devono essere rappresen-

tate da un agente autorizzato (art. 18 LM 2013 e LM 2001). Il marchio va richiesto in relazione a una specifica categoria di prodotti o servizi (art. 22 LM 2013, art. 19 LM 2001); le categorie sono stabilite da una *Classificazione di prodotti e servizi*, la quale traspone nel diritto interno la Classificazione internazionale di Nizza.

All'esito di un *esame preliminare*, il marchio è preliminarmente approvato e viene pubblicato nella gazzetta dell'Ufficio Marchi (art. 28 LM 2013, art. 27 LM 2001). Entro tre mesi dalla pubblicazione è possibile opporsi alla registrazione; qualora non sia proposta alcuna opposizione, il marchio è approvato (art. 33 LM 2013, art. 30 LM 2001)[16]. Chi si veda rifiutare la registrazione di un marchio può ricorrere presso il CEAM.

Il marchio, una volta ottenuto, è valido per dieci anni (art. 39 LM 2013, art. 37 LM 2001) ed è rinnovabile per ulteriori periodi decennali.

Il CEAM riesamina in sede amministrativa le decisioni dell'Ufficio Marchi contro cui una parte abbia proposto ricorso; vi sono però casi in cui esso è adito in prima istanza[17]. Contro le decisioni del CEAM è possibile proporre ricorso in sede giudiziaria (artt. 34, 35 LM 2013, artt. 32, 33 LM 2001): la decisione del Comitato diviene così oggetto di un processo amministrativo. Il ricorso in giudizio avverso le decisioni del CEAM è devoluto per competenza territoriale ai Tribunali del Popolo della municipalità di Pechino.

Il *corpus* di norme che presiede all'attività dell'Ufficio Marchi e del CEAM è vasto e articolato. Oltre alla Legge Marchi e alle sue Disposizioni Attuative, i principali testi sono i seguenti: (i) *Linee Guida per*

[16] V. C. DEVONSHIRE-ELLIS, A. SCOTT, S. WOOLLARD (a cura di), *Intellectual Property Rights in China*, 2011, pagg. 16-17.

[17] Le principali tipologie di casi trattate dal CEAM sono le seguenti: *i)* riesame del rigetto di domande di registrazione da parte dell'Ufficio Marchi (art. 34 LM 2013, art. 32 LM 2001); *ii)* riesame di decisioni dell'Ufficio Marchi sull'opposizione alla registrazione altrui (art. 35 LM 2013, art. 33 LM 2001); *iii)* riesame di decisioni dell'Ufficio Marchi in merito alla revoca di marchi registrati ai sensi degli artt. 44.1 LM 2013 (art. 41.1 LM 2001) (revoca del marchio per mancanza di liceità o di capacità distintiva o per registrazione ottenuta con "frode o altri mezzi illegittimi") e 49 LM 2013 (44 LM 2001) (revoca del marchio per alterazione o trasferimento non approvato dall'Ufficio Marchi o per non uso triennale); *iv)* domande di revoca di marchi registrati ai sensi degli artt. 44 e 45 LM 2013 (art. 41 LM).

l'esame dei marchi, da ultimo emanate nel dicembre 2016 dall'Ufficio Marchi e dal CEAM, le quali pongono i criteri per l'esame dei marchi ai fini della registrazione e della risoluzione delle relative dispute in sede amministrativa[18]; (ii) *Classificazione di prodotti e servizi*, emanata dall'AIC, la quale suddivide i prodotti e i servizi ai fini della registrazione dei marchi in 45 categorie, ricalcate su quelle della Classificazione internazionale prevista dall'Accordo di Nizza; (iii) *Regolamento per l'esame e l'assegnazione dei marchi*, il quale pone i criteri di base per l'attività del CEAM (la versione più recente è stata emanata dall'AIC nel 2014)[19].

4. Il ruolo del giudice nell'ordinamento cinese

Gli organi giudiziari occupano, nell'architettura istituzionale cinese, una posizione nettamente subordinata. Le Procure del Popolo e i Tribunali sono responsabili "nei confronti degli organi detentori del potere statale che li hanno creati" (artt. 128 e 133 della Costituzione della Repubblica Popolare Cinese); inoltre l'attività dei Tribunali è costantemente controllata dalle corrispondenti Procure, in quanto "organi dello Stato preposti alla supervisione legale" (art. 129 della Costituzione). A ciò si aggiungano le varie forme del controllo svolte dal Partito comunista e dai vari Comitati politico-giuridici che riuniscono organi del Partito e organi di governo[20]. Inoltre, i Tribunali del Popolo non godono di autonomia finanziaria: dipendono infatti, per il loro *budget*, dall'esecutivo del livello corrispondente[21].

[18] In precedenza vi erano le *Linee Guida per l'esame dei marchi*, emanate congiuntamente dall'Ufficio Marchi e dal CEAM nel 2005.

[19] In precedenza vigeva il *Regolamento per l'esame e l'assegnazione dei marchi* del 2005.

[20] I. CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Trento, 2012, pagg. 39 ss.

[21] I. CASTELLUCCI, *op. cit.*, pag. 41.

Secondo l'art. 126 della Costituzione,

> i Tribunali del Popolo esercitano il potere giudiziario in modo indipendente, in conformità con le previsioni di legge, e senza essere soggetti ad interferenze da parte di qualsiasi organo amministrativo, organizzazione pubblica o individuo.

Si ritiene tuttavia correntemente che nella previsione non rientri il Partito comunista, il cui ruolo di guida è enfatizzato dal Preambolo della stessa Costituzione[22]. Xiao Yang, presidente della Corte Suprema dal 1998 al 2008, ha affermato: "Il potere dei Tribunali di giudicare in modo indipendente non significa in alcun modo indipendenza dal Partito. Al contrario, esso incarna un alto grado di responsabilità di fronte agli impegni del Partito"[23].

Analogamente, Luo Gan, capo della Commissione giuridico-politica del Comitato Centrale del Partito Comunista dal 1998 al 2007, ha spiegato: "Tutte le attività di applicazione del diritto devono essere guidate dal Partito […] La posizione politica corretta è quella presa dal Partito"[24].

Il diritto cinese non riconosce valore vincolante al precedente giudiziale. La regola è seguita con maggior rigore che nei Paesi occidentali di *civil law*, nei quali il precedente, pur formalmente disconosciuto come fonte del diritto, in realtà assume spesso capitale importanza.

Ciò riflette uno dei principi-cardine dell'ordinamento cinese, per cui *il giudice non è in alcun modo creatore di diritto*. Il diritto è posto unicamente dai *rappresentanti del popolo*; vale a dire, dal Congresso Nazionale del Popolo e dal suo Comitato Permanente. A tali organi spetta

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[22] *Ivi*.

[23] TANG ZHENGXU, *Un corretto concetto di autorità giudiziaria è il significato appropriato della rule of law (正确的司法权威观是法治的应有之意, Zhèngquè de sīfǎ quánwēi guān shì fǎzhì de yīngyǒu zhī yì)*, in *China Court Daily (中国法院报, Zhōngguó fǎyuàn bào)*, 18 Ottobre 2007, pag. 1.

[24] LUO GAN, *Gli organi politici e giuridici adempiono un'importante missione storica e un dovere politico nella costruzione di una società armoniosa (政法机关在构建和谐社会中担负重大历史使命和政治责任, Zhèngfǎ jīguān zài gòujiàn héxié shèhuì zhōng dānfù zhòngdà lìshǐ shǐmìng hé zhèngzhì zérèn)*, in *Seeking Truth (求是, Qiúshì)*, 3, 2007, pag. 2.

in esclusiva anche l'interpretazione delle norme da essi promulgate, in quanto i frutti dell'interpretazione del diritto sono essi stessi diritto: "Il Comitato Permanente del Congresso Nazionale del Popolo esercita le seguenti funzioni e poteri: […] (4) interpretare le leggi" (art. 67 della Costituzione).

In tale quadro il giudice è *mero applicatore* della disposizione scritta, con una concezione che ricorda da vicino il giudice *bouche de la loi* di Montesquieu[25]. Non potendo il giudice creare diritto né interpretarlo, è da escludere che le sue decisioni possano assumere valore vincolante per i casi futuri.

Dall'altro lato, il giudice cinese è investito di una quantità di compiti sconosciuti ai giudici occidentali. L'art. 2 della Legge di Procedura Civile, nell'elencare i fini dell'attività giudiziaria[26], ne cita almeno quattro ignoti al giudice occidentale di *civil law*: *i)* "distinguere il giusto dallo sbagliato", *ii)* "educare i cittadini", *iii)* "mantenere l'ordine sociale" e *iv)* "garantire l'imperturbato progresso della costruzione socialista".

I compiti di "distinguere il giusto dallo sbagliato" e "garantire l'imperturbato progresso della costruzione socialista" rispondono, fondamentalmente, a uno Stato che si fa *portatore di valori politici*. Il giudice, in quanto organo dello Stato, è tenuto a contribuire con la propria attività alla realizzazione dei programmi statali[27] e fa propria una visione statale di "giusto" e "sbagliato", determinata dagli obiettivi politici posti di volta in volta.

Nei compiti di "educare i cittadini" e "mantenere l'ordine" emerge il legame fra il sistema giuridico della Repubblica Popolare e il pensiero tradizionale cinese.

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[25] I. CASTELLUCCI, *op. cit.*, pag. 25.

[26] Art. 2 della Legge di Procedura Civile: "La Legge di Procedura Civile della Repubblica Popolare Cinese mira a proteggere l'esercizio dei diritti processuali delle parti, assicurare l'accertamento dei fatti da parte dei Tribunali del Popolo, distinguere il giusto dallo sbagliato, applicare correttamente la legge, esaminare prontamente i casi civili, sancire i diritti e le obbligazioni civili, imporre le sanzioni per gli illeciti civili, proteggere i legittimi diritti e interessi delle parti, educare i cittadini alla volontaria obbedienza alla legge, mantenere l'ordine sociale ed economico e garantire l'imperturbato progresso della costruzione socialista".

[27] I. CASTELLUCCI, *op. cit.*, pag. 30.

La tradizione giuridica cinese (espressione da usare, beninteso, con le dovute cautele) è data principalmente dal combinarsi di due correnti filosofiche: la scuola confuciana (儒家, *rújiā*) e la scuola legista (法家, *fǎjiā*). La prima vede tendenzialmente di cattivo occhio il diritto positivo (法, *fǎ*), preferendo a esso la buona osservanza delle regole sociali tradizionali (礼, *lǐ*). Il popolo deve essere guidato innanzitutto dal buon esempio e dall'autorevolezza del sovrano:

> Voi governate, perché mai dovreste uccidere? Desiderate il bene e il popolo sarà buono. L'eccellenza morale dell'uomo nobile di animo è simile al vento, quella dell'uomo dappoco all'erba. Quando il vento spira, l'erba inevitabilmente si flette[28].

Dà cattiva prova di sé il sovrano che non sa farsi obbedire se non con la coercizione.

All'estremo opposto si colloca la scuola legista, secondo cui un *corpus* di norme chiare, pubbliche e inflessibili è l'unico modo per assicurare la disciplina fra il popolo:

> Le leggi consistono nel rendere pubblici gli editti negli organi governativi e nell'imprimere nei cuori il carattere ineluttabile delle pene, essendo le ricompense riservate a coloro che osservano la legge e i castighi a coloro che infrangono i decreti. Ecco ciò che reggono i ministri[29].

Risultando dalla mescolanza di tali due correnti, il pensiero "giuridico" cinese riconosce da millenni al "diritto" la funzione di educare chi vi è sottoposto all'obbedienza spontanea e di contribuire al mantenimento dell'ordine pubblico[30]. Tale concezione non sembra essere venuta meno con l'avvento della Repubblica Popolare. Citiamo dal c.d. "Libretto rosso" di Mao Zedong:

> Nella soluzione delle contraddizioni nel popolo, gli ordini amministrativi e i metodi di persuasione e di educazione s'integrano a vicenda.

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[28] CONFUCIO, *Dialoghi*, a cura di T. Lippiello, Torino, 2006, pag. 141.

[29] HAN FEIZI, *Han Feizi*, 43. L'edizione di riferimento è *Collezione delle scuole di pensiero classiche* (诸子集成, *Zhūzǐ jíchéng*), Hong Kong, 1978, pag. 304.

[30] Sul pensiero di Confucio e dei legisti in merito al governo dello Stato, v. A. CHENG, *Storia del pensiero cinese – vol. I*, Torino, 2000, pagg. 52-70 e 231-248.

> Occorre che gli ordini amministrativi emessi per mantenere l'ordine nella società siano insieme accompagnati da un lavoro di persuasione e di educazione, poiché il mero ricorso agli ordini amministrativi è, in numerosi casi, del tutto inefficace[31].

5. Le fonti del diritto cinese

Le fonti del diritto cinese includono, schematicamente: (i) la legge (法律, *fălǜ*), emanata dal Congresso Nazionale del Popolo o dal suo Comitato Permanente; (ii) i "regolamenti amministrativi" (行政法规, *xíngzhèng fǎguī*), variamente denominati *Regolamenti* (条例, *tiáolì*), *Regole* (规定, *guīdìng*), *Misure* (办法, *bànfǎ*), ecc.; (iii) i "regolamenti dipartimentali" (行政规章, *xíngzhèng guīzhāng*), variamente denominati *Regole* (规则, *guīzé*), *Spiegazioni* (解释, *jiěshì*), ecc.; (iv) i testi interpretativi emanati da giudici. Per ricostruire il diritto vivente occorre inoltre considerare: i testi "divulgativi" emanati da giudici; le dichiarazioni di indirizzo politico; le raccolte di casi esemplari; i commenti di giudici a sentenze. Di seguito ci concentriamo sulle fonti promananti dai giudici, perlopiù sconosciute all'esperienza italiana e occidentale.

I testi interpretativi emanati da giudici. Il potere di interpretare leggi e dcreti è riconosciuto alla Corte Suprema dall'art. 33 della Legge Organica sui Tribunali del Popolo (1980). I testi interpretativi della Corte Suprema sono variamente intitolati *Interpretazioni* (解释, *jiěshì*), *Regole* (规定, *guīdìng*), *Avvisi* (通知, *tōngzhī*), *Risposte* (答复, *dáfù*), *Opinioni* (意见, *yìjiàn*).

L'adozione e il ruolo di tali documenti sono disciplinati dalle *Disposizioni sul lavoro di interpretazione giudiziale*, emanate dalla stessa Corte Suprema nel 1997 e riviste nel 2007. Le *Disposizioni* ripartiscono le "interpretazioni giudiziali" in quattro categorie: "interpretazioni (in senso stretto)", "regole", "risposte" e "decisioni" (art. 6). Fra queste, solo le "interpretazioni" in senso stretto sono giuridicamente vincolanti al pari della legge (art. 5) e possono essere citate nelle sentenze dei Tribunali del Popolo (diversamente dai precedenti

[31] MAO ZEDONG, *Citazioni del presidente Mao Tse-tung: il libro delle guardie rosse*, Milano, 1979.

giudiziali e dalle opere a contenuto dottrinale, che non sono mai citati in sentenza).

I testi "divulgativi" emanati da giudici. Si tratta di documenti in cui i giudici rendono conto della propria attività, la motivano e ne propagandano i metodi e i risultati. Essi sono destinati non solo alla cerchia dei giuristi, ma anche al pubblico generale. Sono pertanto generalmente redatti in un linguaggio più semplice rispetto a quello delle sentenze e degli scritti dottrinali; in essi le considerazioni tecnico-giuridiche, trattate in maniera stringata, sono affiancate da retrospettive storiche, informazioni statistiche, grafici, ecc. I testi divulgativi non hanno carattere vincolante. Un ottimo esempio è il *Sommario di trent'anni di attività giudiziaria sul marchio dei Tribunali di Pechino*[32] (d'ora in poi, per brevità, "Sommario"), pubblicato nel 2012 dalla Sezione Proprietà Intellettuale dell'Alto Tribunale del Popolo di Pechino in occasione del trentennale della promulgazione della prima Legge Marchi cinese.

I commenti di giudici a sentenze. La circolazione di commenti a sentenze redatti dagli stessi giudici che le hanno pronunciate (o che hanno concorso alla loro pronuncia) va collegata, in primo luogo, al ruolo "pedagogico" che il sistema giuridico cinese conferisce ai giudici (v. § 4): il giudice spiega al pubblico le ragioni del proprio *modus operandi*, in maniera da imprimere in esso una consapevolezza del diritto che lo spinga a ottemperarvi spontaneamente. Inoltre, il giudice rende conto del proprio operato ai colleghi, ai superiori e all'opinione pubblica.

Le raccolte di casi esemplari. La Corte Suprema del Popolo e alcuni Tribunali di livello elevato sono soliti pubblicare annualmente liste (generali o per materia) di casi esemplari. In tali raccolte si selezionano quelle sentenze che appaiono particolarmente degne di essere additate come esempi di buona applicazione della legge. Riassunti

[32] Il documento, steso dal giudice Zhong Ming, della Sezione Proprietà Intellettuale dell'Alto Tribunale del Popolo di Pechino, è riportato in appendice ad AA.VV. (SEZIONE PROPRIETÀ INTELLETTUALE DELL'ALTO TRIBUNALE DEL POPOLO DI PECHINO), *Judge's Analysis on Difficult Trademark Cases Handled by Beijing Courts – 2012 (北京法院商标疑难案件法官评述 – 2012, Běijīng fǎyuàn shāngbiāo yínán ànjiàn fǎguān píngshù – 2012)*, Pechino, 2012.

delle vicende processuali e le relative "massime" sono resi disponibili al pubblico e costituiscono un importante oggetto di studio per accademici e professionisti.

Le dichiarazioni di indirizzo politico. I Tribunali del Popolo, come gli (altri) organi amministrativi, sono sovente destinatari di direttive politiche emanate soprattutto dalla Corte Suprema del Popolo. L'esempio più evidente è dato dalle dichiarazioni politiche della Corte Suprema del Popolo, le quali tendono a modificare o correggere la rotta seguita dalla giurisprudenza in considerazione di obbiettivi generali di *policy*.

Molte delle direttive politiche diramate alle amministrazioni e ai Tribunali del Popolo sono riservate o implicite. Di tali direttive chi scrive non potrà rendere conto.

6. Sviluppo giurisprudenziale e accoglimento nella legge (I): la concezione funzionale dell'"uso del marchio"

La LM 2001 fa riferimento all'"uso del marchio" negli artt. 52 n. 1 (violazione di marchio)[33], 44 n. 4 (revoca del marchio)[34] e 31 (registrazione in malafede)[35]; l'art. 13 (marchio celebre)[36] fa riferimento impli-

[33] Art. 52 LM 2001: "Ognuna delle condotte seguenti costituisce violazione del diritto esclusivo all'uso di un marchio registrato: (1) uso di un marchio identico o simile al marchio registrato su beni dello stesso tipo o su beni simili senza l'autorizzazione del titolare del marchio registrato; […]".

[34] Art. 44 LM 2001: "Ove nell'uso di un marchio registrato si verifichi una delle seguenti condotte, l'Ufficio Marchi ordina la rettifica della situazione entro un termine o la revoca del marchio registrato: […] (4) cessazione dell'uso del marchio registrato per tre anni consecutivi".

[35] Art. 31 LM 2001: "La domanda di registrazione di marchio non deve violare diritti preesistenti di terzi, né può chi propone la domanda affrettarsi a registrare con scorrettezza un marchio già usato da un'altra parte che goda di rilevante influenza".

[36] Art. 13 LM 2001: "Ove un marchio [richiesto per] beni di tipo identico o simile sia riproduzione, imitazione o traduzione del marchio celebre altrui non registrato in Cina e sia suscettibile di causare confusione, la relativa richiesta di registrazione non può essere accolta e il suo uso è vietato.

Ove un marchio [richiesto per] beni di tipo diverso o dissimile sia riproduzione, imitazione o traduzione del marchio celebre altrui registrato in Cina e fuorvii il pubbli-

cito all'uso del marchio (poiché la celebrità di un marchio non registrato non può che derivare dal suo uso); tuttavia, la LM 2001 non definisce il concetto di "uso del marchio".

Stando all'art. 3 delle Disposizioni attuative della Legge Marchi del 2001 (di seguito "DALM 2001"), l'uso del marchio include l'uso "su beni, imballaggi o contenitori dei beni o nei documenti relativi alle transazioni commerciali" e "nella pubblicità, nelle fiere e nelle altre attività commerciali".

Durante il decennio di applicazione della LM 2001, i Tribunali hanno risolto svariate questioni pratiche sviluppando in misura considerevole le scarne disposizioni di legge.

Concezione funzionale dell'uso del marchio. Secondo la "concezione funzionale dell'uso del marchio"[37], si può dire che un marchio sia "usato" ai sensi della LM solo se l'uso soddisfa la primaria funzione di identificare certi beni come prodotti o messi in commercio da un dato soggetto[38].

Le *Interpretazioni su alcune questioni riguardanti l'applicazione del diritto nell'esame di casi concernenti controversie civili sul marchio* del 2002 ("Interpretazioni 2002") mostrano un risalente riconoscimento di tale concezione, disponendo che due marchi sono in conflitto se la loro simultanea presenza sul mercato porta "il pubblico rilevante a ingannarsi circa la provenienza dei beni" (art. 9).

In "TOEFL" i tribunali di Pechino ritengono che l'uso del marchio in funzione meramente descrittiva non sia "uso" ai fini dell'art. 52

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co rendendo probabile una lesione degli interessi del titolare del marchio celebre registrato, la relativa richiesta di registrazione non può essere accolta e il suo uso è vietato".

[37] V. WANG CHAOZHENG, *On the Choice of a Trademark Coexistence System – Rediscussing the Improvement of Art. 52 TML*, in *Intellectual Property Rights Annual Journal – 2012*, 2012, pag. 148.

[38] Più precisamente, un test trifasico aiuta a stabilire se in un dato caso vi sia effettivo "uso del marchio": a) il marchio è usato in attività commerciali; b) il marchio è usato per identificare la provenienza dei beni; c) attraverso l'uso del marchio, il pubblico è reso cosciente della diversa provenienza di beni dello stesso tipo. Si veda il *Sommario*: AA.VV. (SEZIONE PROPRIETÀ INTELLETTUALE DELL'ALTO TRIBUNALE DEL POPOLO DI PECHINO), *op. cit.*, pag. 401.

LM 2001 (nonostante l'argomentazione giuridica sia piuttosto debole)[39].

La "teoria dell'uso descrittivo" acquista sfumature particolari quando il caso coinvolge segni che appartengono al patrimonio della cultura tradizionale cinese: è quanto avviene ad es. in "Zhang Yi Si"[40].

[39] Giudizio di primo grado: *Educational Testing Service, Inc. c. Beijing Xindongfang Private School*, Trib. Int. Pechino 1° Sez. prop. int. ist. in. n. 35/2001, (2001) 一中知初字第 35 号. Giudizio di secondo grado: *Beijing Xindongfang Private School c. Educational Testing Service, Inc.*, Alto Trib. Pechino ist. fin. n. 1393/2003, (2003) 终字第 1393 号. L'esistenza della violazione – riproduzione e vendita non autorizzata e sistematica di materiali per l'esame TOEFL – e la malafede di Xindongfang Private School sono rese chiare dai fatti del caso; il Tribunale Intermedio ritiene che la convenuta abbia violato il diritto d'autore e il marchio di ETS. L'Alto Tribunale riforma parzialmente la sentenza, ritenendo che l'uso del marchio di ETS sul materiale per i *test* prodotto da Xindongfang sia solo diretto a "descrivere il prodotto" collegandolo al rinomato *test* TOEFL di ETS. Il tribunale sembra suggerire che la funzione distintiva dei marchi sia "naturalmente" indebolita nel settore dell'editoria, dato che "le pubblicazioni sono un prodotto particolare, per il quale la distinzione della provenienza è normalmente svolta dall'[indicazione dell'] autore della pubblicazione e dell'ente presso cui lavora". Ai sensi dell'art. 22 della Legge sul diritto d'autore, la mancanza di violazione di marchio esclude altresì che vi sia violazione del diritto d'autore quanto alla riproduzione di materiali per l'uso nelle lezioni. La sentenza di primo grado rimane immutata, invece, quanto alla riproduzione e vendita del materiale per l'uso al di fuori delle lezioni. Pertanto, il risarcimento disposto scende da RMB 5.000.000 a RMB 3.500.000. Come un accademico cinese ha detto all'autore, "questa sentenza è priva di argomentazione giuridica".

[40] Giudizio di primo grado: *Dong Yun c. Amministrazione del Parco di Beihai (Pechino)*, Trib. Base Xicheng civ. ist. in. n. 5410/2012, (2012) 西民初字第5410号. Giudizio di secondo grado: *Dong Yun c. Amministrazione del Parco di Beihai (Pechino)*, Trib. Int. Pechino 1° Sez. civ. ist. fin. n. 8879/2012, (2012) 一民终字第 8879 号. Dong Yun ha registrato l'espressione "Zhang Yi Si", la quale trae origine dal cerimoniale di corte della dinastia Qing, come marchio per esibizioni teatrali; agisce contro l'amministrazione del parco di Beihai (Pechino) per avere usato la stessa espressione nella pubblicità delle esibizioni ivi tenutesi per il Capodanno cinese. Stando alla sentenza, l'uso di un marchio unicamente per descrivere i beni o i servizi non è "uso" ai sensi dell'art. 52 LM 2001; il tribunale sembra inoltre suggerire che i marchi "presi a prestito" dalla traduzione sono di per sé incapaci di svolgere una piena funzione distintiva, in quanto il pubblico continuerà a collegare il segno all'elemento tradizionale in questione piuttosto che a un particolare operatore del mercato.

Uso "genuino" del marchio. In secondo luogo, i tribunali esigono, per evitare la revoca ai sensi dell'art. 44 n. 4 LM 2001, che l'uso del marchio sia "genuino".

È insufficiente usare il marchio "solo sulla carta", ossia in nessuna reale attività commerciale ("Mingjue")[41]. È altresì insufficiente usare il marchio in pochissime – seppur reali – transazioni, con l'unico scopo di scongiurarne la revoca; il mero uso in transazioni fra licenziante e licenziatario è di per sé inadeguato a evitare la revoca, in quanto non è idoneo a rendere il pubblico conscio della diversità di provenienza dei beni ("Daqiao")[42].

"Marchi popolari". La prova dell'uso previo del marchio è essenziale per ottenere protezione contro lo *squatting*[43] ai sensi degli artt. 13 e 31 LM 2001; un interessante problema riguarda il "riscatto" di "marchi popolari" che il titolare del "marchio ufficiale" non può dimostrare di avere "usato"[44]. Il marchio ufficiale e le sue eventuali

[41] Giudizio di primo grado: *Yuejin Automobile Group Co., Nanjing Automobile (Group) Corp. e Nanjing Mingjue Industry Co., Ltd. c. Xu Bin*, Trib. Int. Nanchino 3° Sez. civ. ist. in. n. 416/2007, (2007) 宁民三初字第 416 号. Giudizio di secondo grado: *Xu Bin c. Yuejin Automobile Group Co. e Nanjing Automobile (Group) Corp.*, Alto Trib. Jiangsu civ. prop. int. ist. fin. n. 0184/2012, (2012) 苏高民知终字第 0184 号. I giudici negano che il mero inserimento di un marchio in una lista di marchi pubblicata da una rivista specializzata per fini promozionali, in assenza di qualsiasi concreta attività commerciale, debba essere considerato "uso" ai sensi dell'art. 44 n. 4 LM 2001.

[42] Giudizio di primo grado: *Hangzhou Paint Co., Ltd. c. CEAM (terzo: Jin Lianqin)*, Trib. Int. Pechino 1° sez. amm. ist. in. n. 2131/2009, (2009) 一中行初字第2131号. Giudizio di secondo grado: *CEAM e Jin Lianqin c. Huzhou Paint Co., Ltd.*, Alto Trib. Pechino amm. ist. fin. n. 294/2010, (2010) 高行终字第 294 号. Il marchio in questione è stato usato solo in una transazione fra licenziante e licenziatario, per l'esiguo importo di RMB 1.800. Liu Xiaojun, magistrato dell'Alto Tribunale di Pechino, definisce tale uso "uso simbolico del marchio" (象征性使用商标); si veda LIU XIAOJUN, *Symbolic Use of Trademark Is Not Enough to Preserve the Effectiveness of its Registration*, in *China Court Daily*, 26 agosto 2010, pag. 7.

[43] L'espressione *squatting* si riferisce alla condotta di chi registra a nome proprio un marchio già usato da altri, con il fine di sfruttarne illegittimamente il prestigio o di ricattare l'utente legittimo.

[44] I consumatori cinesi spesso si riferiscono a prodotti marchiati con un nome diverso dal marchio ufficiale (per una classificazione dei "marchi popolari", si veda LI CHEN, *Procedural Reflections on Cases of Bad Faith Registration of "Popular Versions of Trademarks"*, in *Intellectual Property*, 5, 2010, pagg. 54-58. Talora la versione popola-

versioni popolari contano come entità totalmente distinte ai fini del giudizio (come si vede, ad es., in "Viagra")[45]. La mera – anche se indiscutibile – connessione del marchio popolare con un produttore nella mente del pubblico non è sufficiente a integrare "uso" ("Sony Ericsson")[46]: un marchio popolare si considera "usato" da chi lo ri-

re di un marchio è registrata da una persona diversa dal titolare del marchio "ufficiale"; quest'ultimo, pertanto, invoca la tutela dell'art. 13 e/o 31 LM 2001, ma per ottenere tale tutela deve dimostrare di avere usato la *versione popolare* del marchio, che è quella che intende recuperare, essendo irrilevante l'uso del marchio ufficiale. È questo il problema centrale di svariati casi celebri; fra questi abbiamo scelto "Sony Ericsson", "Viagra", "Land Rover" e "Guangzhou Honda". In "Sony Ericsson" e "Viagra", il titolare del marchio ufficiale non riesce a "recuperare" per sé il marchio popolare; in "Land Rover", il "recupero" ha luogo perché il titolare del marchio ufficiale riesce a dimostrare una connessione fra sé e il marchio popolare; in "Guangzhou Honda", il "recupero" ha luogo perché la compresenza di due marchi simili è ritenuta contravvenire all'art. 28 LM 2001.

[45] Giudizio di primo grado: *Pfizer, Inc. e Pfizer Pharmaceutics (China) Co., Ltd. c. Beijing Health New Concept Great Pharmacy Co., Ltd., Jiangsu Lianhuan Pharmaceutics Corp. e Guangzhou Welman Pharmaceutics Co., Ltd.*, Trib. Int. Pechino 1° Sez. civ. ist. in. n. 11354/2005, (2005) 一中民初字第11354号. Giudizio di secondo grado: *Guangzhou Welman Pharmaceutics Co., Ltd.* c. Pfizer, Inc., e *Pfizer Pharmaceutics (China) Co., Ltd*., Alto Trib. Pechino civ. ist. fin. n. 905/2006, (2006) 高民终字第905号. Giudizio di riesame: *Pfizer, Inc. e Pfizer Pharmaceutics (China) Co., Ltd. c. Guangzhou Welman Pharmaceutics Co., Ltd. et al.*, civ. app. n. 312/2009, (2009) 民申字第312号. In questo celebre caso, Pfizer non riesce a "recuperare" il marchio "Weige" registrato da Welman Pharmaceutics. Per un'analisi sia giuridica sia culturale, si veda: D. CHOW, *Lessons from Pfizer's Disputes Over its Viagra Trademark in China*, in *Maryland Journal of International Law*, 27-1, 2012, pagg. 82-110.

[46] Giudizio di primo grado: *Sony Ericsson Mobile Communications China Co., Ltd. c. CEAM (terzo: Liu Jianjia),* Trib. Int. Pechino 1° Sez. amm. ist. in. n. 196/2008, (2008) 一中行初字第196号. Giudizio di secondo grado: *Liu Jianjia c. Sony Ericsson Mobile Communications China Co., Ltd. e CEAM*, Alto Trib. Pechino amm. ist. fin. n. 717/2008, (2008) 高行终字第717号. Sony Ericsson chiede la revoca del marchio "Suo'ai", registrato dalla concorrente Suo'Ai Digital, ai sensi dell'art. 31 LM 2001. Nonostante dimostri che il marchio popolare "Suo'ai" è comunemente usato dal pubblico in relazione ai prodotti Sony Ericsson, Sony Ericsson non riesce a provare di avere mai prodotto, venduto o pubblicizzato beni con tale nome o di essersi mai identificata con tale nome in Cina. Di conseguenza, Suo'Ai Digital riesce ad assicurarsi il nome attraverso il quale i consumatori cinesi comunemente si riferiscono ai prodotti Sony Ericsson.

vendica solo se questi lo ha usato "di propria iniziativa" (主动, *zhǔdòng*) ("Land Rover")[47].

Una novità si rinviene in "Guangzhou Honda"[48]. Honda non ha "usato" il marchio popolare "Guangben" nel senso richiesto dalla prassi giudiziale; tuttavia, la connessione esistente nella mente dei consumatori fra Honda e "Guangben" acquista rilevanza in relazione al rischio di confusione[49], con il risultato che Honda riesce a "riscattare" il marchio popolare indipendentemente dalle norme contro lo *squatting*. La sentenza sembra forse aprire il cammino per il riconoscimento della sussistenza di "uso del marchio" a prescindere dall'iniziativa della parte interessata, in quanto è ovvio che la confusio-

[47] Giudizio di primo grado: *Land Rover Co. c. CEAM (terzo: Geely Group Co., Ltd.)*, Trib. Int. Pechino 1° Sez. prop. int. amm. ist. in. n. 1043/2011, (2011) 一中知行初字第1043号. Giudizio di secondo grado: *CEAM e Geely Group Co., Ltd. c. Land Rover Co.*, Alto Trib. Pechino amm. ist. fin. n. 1151/2011, (2011) 高行终字第1151号. Nonostante non abbia mai prodotto, venduto o pubblicizzato i suoi prodotti in Cina con il nome "Luhu", Land Rover dimostra che BMW – all'epoca dei fatti controllante Land Rover – si è riferita ai propri prodotti con il nome "Luhu" in una serie di dichiarazioni pubbliche; pertanto, BMW si è identificata con tale marchio popolare, il che è reputato costituire "uso" ai sensi dell'art. 31 LM 2001. Land Rover ottiene pertanto la revoca del marchio "Luhu" registrato dalla concorrente cinese Geely.

[48] Giudizio di primo grado: *Guangzhou Linye Electromechanical Technologies Co., Ltd. c. CEAM (terzi: Guangzhou Honda Automobile Co., Ltd. e Honda Technology Research Industry (China) Investment Co., Ltd.)*, Trib. Int. Pechino 1° Sez. prop. int. amm. ist. in. n. 3140/2010, (2010) 一中知行初字第3140号. Giudizio di secondo grado: *Guangzhou Linye Electromechanical Technologies Co., Ltd. c. CEAM*, Alto Trib. Pechino amm. ist. fin. n. 163/2011, (2011) 高行终字第163号; *Guangzhou Linye Electromechanical Technologies Co., Ltd. c. CEAM*, Alto Trib. Pechino amm. ist. fin. n. 174/2011, (2011) 高行终字第174号. Come avviene in "Land Rover", l'attrice riesce a "recuperare" il proprio marchio, ma ciò avviene per motivi diversi. Il CEAM, in una decisione poi confermata dai tribunali, revoca il marchio "Guangben" registrato dalla convenuta perché il nome "Guangben" è "facilmente interpretato dal pubblico rilevante come facente riferimento a Guangzhou Honda" e, pertanto, deve essere considerato "simile" al marchio "Honda" ai sensi dell'art. 28 LM 2001, peraltro non invocato dall'attrice. Art. 28 LM 2001: "Ove […il marchio di cui si chiede la registrazione] sia identico o simile a un marchio registrato usato in connessione con gli stessi beni o beni simili, la registrazione è rifiutata dall'Ufficio Marchi dopo esame e del marchio non è data pubblicità". LI CHEN, *op. cit.*, saluta il caso come una "rivelazione". Per un'interessante comparazione, si vedano i casi "Shanggong" e "Quaker" al § 8.

[49] Si veda anche il § 7.

ne è impossibile se due marchi non sono simultaneamente "usati" sul mercato. Tuttavia, tale considerazione rimane inespressa.

Recepimento delle regole in atti normativi. Le *Opinioni della Corte Suprema su alcune questioni relative ai casi coinvolgenti l'autorizzazione e l'affermazione dei diritti al marchio* del 2010 (le "Opinioni 2010") contengono alcune indicazioni interessanti sull'applicazione dell'art. 44 n. 4 LM 2001, richiedendo che vi sia "*effettivo* uso del marchio" (art. 20); ciò conferma il principio espresso in "Mingjue" e "Daqiao".

La LM 2013 dedica un nuovo articolo all'uso del marchio, replicando la definizione dell'art. 3 DALM, ma aggiungendovi il riferimento alla funzione di tale uso[50]; ratifica con ciò l'evoluzione della giurisprudenza dell'ultimo decennio in merito all'applicazione degli artt. 52 e 44, n. 4 della LM 2001.

La LM 2013 non introduce specifiche disposizioni in tema di "marchi popolari".

7. Sviluppo giurisprudenziale e accoglimento nella legge (II): il parametro del rischio di confusione

Gli artt. 28 e 52 LM 2001[51] regolano il conflitto di marchi attraverso il solo parametro della "somiglianza" fra i marchi e i beni coinvolti, senza riferimento al rischio che vi sia confusione fra essi. Tuttavia, tale parametro appare già nelle Interpretazioni 2002, secondo cui due marchi vanno considerati "simili" ai sensi degli artt. 28 e 52 ove sia probabile che fra essi *vi sia confusione*[52].

[50] Art. 48 LM 2013: "L'uso del marchio ai sensi della presente Legge si riferisce all'apposizione del marchio sui prodotti, sugli imballaggi o sui contenitori dei prodotti e sui documenti relativi a transazioni sui prodotti o all'uso del marchio in pubblicità, esposizioni e in altre attività commerciali *al fine di contraddistinguere l'origine dei prodotti*" (corsivo dell'autore).

[51] Si vedano, rispettivamente, le note 58 e 41.

[52] Ai sensi delle Interpretazioni 2002, due o più marchi andranno considerati "simili" se i loro principali fattori costitutivi "sono simili e possono perciò facilmente portare il pubblico rilevante a ingannarsi circa la provenienza dei prodotti o a credere che la loro origine abbia una certa connessione con i prodotti recanti il marchio dell'atto-

Somiglianza e rischio di confusione. Il parametro è applicato con coerenza nella prassi recente, come esemplificato da "Lacoste"[53] e "Nine Deer King"[54]. In entrambi in casi, nonostante i marchi e i beni coinvolti siano davvero piuttosto simili[55], ciascuno dei marchi ha acquisito un certo grado di distintività in un preciso segmento di mercato. Ciò, da una parte, permette ai consumatori di distinguere effettivamente la provenienza dei beni e, dall'altra, fa apparire improbabile che l'uso di un marchio simile a quello della controparte sia fatto con il fine di approfittare del suo prestigio. In divergenza (solo superficiale) dal testo di legge, il quale non ammette la compresenza di marchi "simili", entrambi i marchi sono lasciati sopravvivere.

Rischio di confusione e classificazione ufficiale di prodotti e servizi. L'emergere del rischio di confusione come parametro per interpreta-

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re" (art. 9). Sono "beni o servizi simili" quelli che hanno uguale funzione, uso, produttori, canali di vendita, gruppi di consumatori, o "beni che il pubblico rilevante normalmente considera come aventi una certa connessione e [il cui smercio con lo stesso marchio], pertanto, causerebbe facilmente confusione" (art. 11).

[53] Giudizio di primo grado: *Lacoste S.A. c. Crocodile International Pte Ltd. e Shanghai Orient Crocodile Garments Co., Ltd. (sede di Pechino)*, Alto Trib. Pechino civ. ist. in. n. 29/2000, (2000) 高民初字第29号. Giudizio di secondo grado: *Lacoste S.A. c. Crocodile International Pte Ltd. e Shanghai Orient Crocodile Garments Co., Ltd. (sede di Pechino)*, Corte Supr. 3° Sez. civ. ist. fin. n. 3/2009, (2009) 民三终字第3号. Il caso ha avuto risonanza internazionale; è uno dei *Dieci grandi casi di protezione giudiziale della proprietà intellettuale decisi dai Tribunali cinesi nell'anno 2010*. Si veda il commento del magistrato della Corte Suprema del Popolo Wang Yanfang: XI XIAOMING (a cura di), *Commenti e annotazioni sui casi-guida della proprietà intellettuale in Cina – Vol. III*, *op. cit.*, pagg. 20-26.

[54] Giudizio di primo grado: *Jiangsu Nine Deer King Apparel Co., Ltd. c. CEAM (terzo: Inner Mongolia King Deer Cashmere Co., Ltd.)*, Trib. Int. Pechino 1° Sez. amm. ist. in. n. 302/2009, (2009) 一中行初字第302号. Giudizio di secondo grado: *Jiangsu Nine Deer King Apparel Co., Ltd. c. CEAM*, Alto Trib. Pechino ist. fin. n. 727/2009, (2009) 高行终字第727 号.

[55] In "Lacoste", entrambi i marchi coinvolti rappresentano un coccodrillo, mentre le sole differenze degne di nota sono date dalla direzione della testa del coccodrillo e le lettere latine sotto la figura; in "Nine Deer King", i marchi coinvolti sono "鹿王 King Deer" e "九鹿·王 Nine Deer King". In entrambi i casi, i prodotti coinvolti sono capi d'abbigliamento e appartengono alla medesima classe della classificazione ufficiale dei prodotti.

re la nozione di "somiglianza" ai fini degli artt. 28 e 52 LM 2001 si nota anche con riferimento all'altro, più tradizionale *standard* dato dalla *Classificazione di prodotti e servizi*. I vantaggi della classificazione ufficiale sono ovvi: essa è scritta, stabile e uguale per tutti[56]. Tuttavia, versioni successive della classificazione possono differire, o la classificazione può distribuire uno stesso tipo di prodotto in categorie diverse unicamente in base alla destinazione d'uso, come accade in "Adidas"[57]; da tali casi il valore della classificazione ufficiale esce ridimensionato, lasciando spazio al parametro del rischio di confusione.

[56] Come affermato dall'Alto Tribunale di Pechino nel 2007, "nel decidere sulla somiglianza dei prodotti occorre dare quanto più possibile la priorità alla Classificazione, al fine di garantire l'oggettività, la giustizia e la stabilità del giudizio sulla somiglianza dei prodotti". Il comunicato intitolato *Problemi nell'applicazione del diritto nei casi di controversie civili concernenti marchi* (商标民事纠纷案件中的法律适用问题, *Shāngbiāo mínshì jiūfēn ànjiàn zhōng de fǎlǜ shǐyòng wèntí*), del 10 Maggio 2007, è consultabile presso l'archivio *online* dell'Ufficio Statale per la Proprietà Intellettuale (*SIPO*, *State Intellectual Property Office*) all'indirizzo http://www.sipo.gov.cn/mtjj/2007/201310/t20131024_855484.html.

[57] *Adidas International c. Jinggu International Trade Co., Ltd. e Dongguan Jingu Composite Materials Co. Ltd.*, Trib. Int. Dongguan 3° Sez. civ. ist. in. n. 142/2010, (2010) 东中法民三初字第142号. I beni in questione sono "borse da viaggio" e "borse sportive". Nella classificazione ufficiale del 2002, nella cui vigenza la convenuta ha registrato il proprio marchio, la classe 18 include le "borse da viaggio", ma non le "borse sportive"; la classificazione del 2007, vigente al momento del giudizio, include le "borse" in genere. Inoltre, vi sono ovviamente borse che possono essere usate sia per i viaggi sia per lo sport, in base alle personali scelte di ciascun consumatore. La sentenza, a suo tempo segnalata fra i *Cinquanta casi tipici di protezione giudiziale della proprietà intellettuale decisi dai Tribunali cinesi nell'anno 2010*, indica due parametri per risolvere questo genere di casi: a) se il convenuto, nell'usare il proprio marchio, abbia ecceduto l'ambito dei beni per i quali la registrazione è stata concessa; b) se la condotta del convenuto causi confusione nel consumatore medio. Si veda il commento al caso redatto dal magistrato del Tribunale intermedio di Dongguan Cheng Chunhua, in XI XIAOMING (a cura di), *Commenti e annotazioni sui casi-guida della proprietà intellettuale in Cina – Vol. III*, *op. cit.*, pagg. 384-385.

In "GoldenBud"[58], il rischio di confusione e la classificazione ufficiale si scontrano frontalmente; l'Alto Tribunale di Pechino fa prevalere il primo[59].

Disomogenea applicazione del parametro del rischio di confusione. In vigenza della LM 2001, il parametro del rischio di confusione non è applicato uniformemente. Ad esempio, in "Honghe Hong"[60], non vi è alcun rischio di confusione; gli attori non possono, di fatto, essere danneggiati in alcun modo dall'uso che del marchio fa la convenuta; ciononostante, il Tribunale Intermedio di Foshan e l'Alto Tribunale

[58] Giudizio di primo grado: *Anheuser – Busch c. CEAM (terzo: Hunan Zhuzhou General Beer Factory)*, Trib. Int. Pechino 1° Sez. amm. ist. in. n. 51/2007, (2007) 一中行初字第51号. Giudizio di secondo grado: *CEAM* c. *Anheuser – Busch*, Alto Trib. Pechino amm. ist. fin. n. 417/2007, (2007) 高行终字第417号.

[59] Le "birre" e le "bevande alcoliche (eccetto le birre)" sono incluse, rispettivamente, nelle classi 32 e 33 della classificazione ufficiale e pertanto normalmente non andrebbero considerate simili; tuttavia, in questo specifico caso vi è rischio di confusione, perché: a) la birra e le altre bevande alcoliche condividono una composizione, una funzione e un *target* di mercato comuni; b) il soggetto che richiede il marchio contestato per "altre bevande alcoliche" è conosciuto dal pubblico primariamente come produttore di birra. Il marchio contestato, pertanto, non può essere registrato.

La sentenza suscita una reazione da parte del CEAM, secondo il quale la valutazione "caso per caso" minaccia "l'uniformità, la continuità e la stabilità dei parametri per giudicare la somiglianza di beni": v. il comunicato intitolato *A fronte dei superamenti della Classificazione di beni e servizi è opportuno mantenere il coordinamento* (对《类似商品和服务区分表》的突破宜协调一致, *Duì "Lèisì shāngpǐn hé fúwù qūfēnbiǎo" de tūpò yí ziétiáo yīzhì*), in *Comunicazioni sugli affari giuridici del Comitato Esame ed Assegnazione Marchi dell'Ufficio Centrale dell'Amministrazione Nazionale per l'Industria e il Commercio* (国家工商行政管理总局商标评审委员会法务通讯 *Guójiā gōngshāng xíngzhèng guǎnlǐ zǒngjú shāngbiāo píngshěn wěiyuánhuì fǎwù tōngxùn*), 8, Pechino, 2007.

[60] Giudizio di primo grado: *Shandong Taihe Century Investment Co., Ltd. e Jinan Honghe Beverages Preparation Business Dept. c. Yunnan Honghe Guangming Co., Ltd.*, Trib. Int. Foshan 3° Sez. civ. ist. in. n. 98/2004, (2004) 佛中法民三初字第98号. Giudizio di secondo grado: *Yunnan Honghe Guangming Co., Ltd., c. Shandong Taihe Century Investment Co., Ltd. e Jinan Honghe Beverages Preparation Business Dept.*, Alto Trib. Guangdong 3° Sez. civ. ist. fin. n. 121/2006, (2006) 粤高法民三终字第121号. Giudizio di riesame: *Yunnan Nancheng Real Estate Investment Co., Ltd. c. Shandong Taihe Century Investment Co., Ltd. e Jinan Honghe Beverages Preparation Business Dept.*, Corte Supr. ries. n. 52/2008, (2008) 民提字第52号.

del Guangdong appoggiano le ragioni degli attori e condannano la convenuta a un risarcimento di RMB 10.000.000[61].

Recepimento delle regole in atti normativi. Complessivamente, in vigenza della LM 2001 il rischio di confusione, pur non menzionato dalla legge, è divenuto il principale parametro per valutare la "somiglianza" di marchi e beni. Marchi e beni di fatto simili sono stati ritenuti non "simili" in quanto difficilmente confondibili ("Lacoste", "Nine Deer King"), mentre beni diversi sono stati ritenuti "simili" in quanto facilmente confondibili ("GoldenBud"). L'innovazione non nasce dal nulla: è stata incoraggiata dalle Interpretazioni 2002 e, forse, dal fatto che l'art. 13 LM 2001 prevede un identico requisito con riferimento ai marchi celebri non registrati[62].

Le Opinioni 2010 precisano alcune regole già contenute nelle Interpretazioni 2002, riportando alla mente alcuni dei casi visti in questo paragrafo[63]. La revisione legislativa del 2013 ha riformulato l'art. 52, oggi art. 57, menzionandovi espressamente il rischio di confusione[64].

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[61] Honghe Guangming, la quale produce birra a marchio "Honghe Hong" da anni ma non è riuscita a ottenere la registrazione del marchio, si difende contro due società che sono titolari di un marchio "Honghe" ma non lo hanno mai usato sul mercato. La Corte Suprema del Popolo riduce l'importo del risarcimento a RMB 20.000, ma non sconfessa l'argomentazione delle corti inferiori.

[62] V. nota 44.

[63] L'art. 15 delle Opinioni 2010 si riferisce al rischio di confusione in genere, precisando che la classificazione ufficiale dei beni è un parametro meramente opzionale (v. "Adidas" e "GoldenBud"); l'art. 1 suggerisce che è appropriato concedere protezione più ampia ai marchi aventi maggiore reputazione sul mercato.

[64] Art. 57 LM 2013: "Qualsiasi condotta che rientri fra le seguenti costituisce violazione del diritto esclusivo all'uso di un marchio registrato: (1) usare un marchio identico a un marchio registrato in connessione con gli stessi beni, senza l'autorizzazione del titolare del marchio registrato; (2) usare un marchio simile a un marchio registrato in connessione con gli stessi beni, o [un marchio] identico o simile a un marchio registrato in connessione con gli stessi beni o con beni simili, senza l'autorizzazione del titolare del marchio registrato, quando ciò possa causare confusione nel pubblico; […]". Il vecchio art. 52 n. 1 è stato scisso in due disposizioni più specifiche, l'una riguardante i marchi e beni *identici* – per i quali non occorre alcun "test del rischio di confusione" –, l'altra riguardante i marchi e beni *simili* – per i quali vi è reale conflitto solo se è proba-

8. La policy *guida l'evoluzione del diritto: applicazione estensiva delle norme contro lo* squatting

La LM 2001 contiene due disposizioni *ad hoc* contro lo *squatting*: l'art. 31, più generale[65], e l'art. 15, di portata specifica[66]. Altre disposizioni, quale l'art. 28[67], possono essere invocate contro lo *squatter*. I Tribunali del Popolo – soprattutto quelli di Pechino – hanno spesso esteso l'ambito applicativo di tali norme per coprire "casi limite".

Art. 31 LM 2001: registrazione in malafede. L'art. 31 è stato applicato a tutela di interessi i quali non costituiscono alcuno specifico "diritto" ai sensi delle norme in tema di proprietà intellettuale.

Ciò accade in "007 BOND"[68]. L'Alto Tribunale di Pechino ritiene che la società Danjaq LLC abbia un "diritto preesistente" alla dicitura "007 BOND", ma tale diritto non è definito in alcun modo. Il Tribunale non afferma che Danjaq abbia uno specifico "diritto preesistente", ma solo che il suo interesse è legittimo e *può rientrare nella nozione* di "diritto preesistente": il problema teorico della definizione della posizione di Danjaq passa in secondo piano di fronte alla necessità pratica di frenare lo *squatting*[69].

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bile la confusione. La soluzione ricorda più da vicino quella adottata in Italia dall'art. 20 del d.lgs. n. 30 del 10 febbraio 2005 (c.d. "Codice della proprietà industriale").

[65] V. nota 43.

[66] Art. 15: "Ove un agente o rappresentante, senza l'autorizzazione del preponente [o rappresentato], cerchi di registrare a proprio nome il marchio del preponente e il preponente sollevi obiezione, la registrazione è rifiutata e l'uso del marchio è vietato".

[67] V. nota 58.

[68] Giudizio di primo grado: Prima Sezione del Tribunale Intermedio del Popolo di Pechino, *Danjaq, LLC c. CEAM (terzo: Xie Huazhen)*, Trib. Int. Pechino 1° Sez. prop. int. amm. ist. in. n. 2808 (2010), (2010) 一中知行初字第2808号. Giudizio di secondo grado: Alto Tribunale del Popolo di Pechino, *CEAM e Xie Huazhen c. Danjiaq LLC*, Alto Trib. Pechino amm. ist. fin. n. 374 (2011), (2011) 高行终字第374号.

[69] Dato che i marchi "007" e "Bond" non sono (ancora) registrati, l'unico modo di accogliere la pretesa di Danjaq sarebbe ai sensi dell'art. 31. Tuttavia, il CEAM ritiene che i marchi "007" e "BOND" non rientrano nell'ambito di tutela della Legge sul diritto d'autore, in quanto "non riflettono totalmente il contenuto di un'opera letteraria o artistica"; pertanto, rigetta l'opposizione di Danjaq alla registrazione da parte di Xie Huazhen. Il Tribunale Intermedio di Pechino, invece, accoglie l'opposizione di Danjaq ai sensi dell'art. 10.1, n. 8 LM 2001. L'Alto Tribunale di Pechino dichiara l'art. 10 inap-

Sembra inoltre che il piuttosto gravoso onere della prova ai sensi dell'art. 31[70] possa essere mitigato quando la malafede dello *squatter* è molto evidente. È quanto accade in "Kinex"[71], ove l'Alto Tribunale di Pechino dispone la revoca del marchio contestato nonostante le carenze formali e sostanziali delle prove prodotte: la scelta di allentare le maglie dei requisiti in materia di prove "è utile ad arginare le condotte di *squatting*"[72].

Art. 28 LM 2001: somiglianza di marchi e beni. L'art. 28, pur talvolta usato contro gli *squatters*[73], non fa alcun riferimento alla malafede: menziona solo la somiglianza di marchi e beni. Tuttavia, la presenza di uno stato di malafede può portare il giudice a considerare "simili" marchi o beni la cui somiglianza non sarebbe altrimenti altrettanto

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plicabile al caso, in quanto "non concerne le questioni relative a diritti privati"; tuttavia, accoglie la pretesa di Danjaq ai sensi dell'art. 31, poiché le opportunità commerciali connesse ai nomi "007" e "BOND" devono essere attribuite unicamente al soggetto il cui sforzo creativo ed economico li ha portati alla fama internazionale.

[70] L'azione *ex* art. 31 richiede all'attore di dimostrare il previo uso del marchio, nonché una certa influenza di mercato raggiunta attraverso tale uso. Anche i requisiti formali sono severi, dato che gli elementi di prova provenienti dall'estero debbono essere autenticati, legalizzati presso l'ambasciata o consolato cinese competente e tradotti in cinese.

[71] *Wuxi Hongfei Industry & Trade Co., Ltd. c. CEAM (terzo: Kinex Co.)*, Trib. Int. Pechino 1° Sez. prop. int. amm. ist. in. n. 1665/2010, (2010) 一中知行初字第1665号. La slovacca Kinex si oppone *ex* art. 31 alla registrazione di un marchio "KINEX" da parte della concorrente cinese Wuxi Hongfei. Le prove fornite da Kinex per dimostrare che il suo marchio è noto da anni fra i produttori cinesi di cuscinetti industriali e, pertanto, che Wuxi Hongfei ha richiesto la registrazione del marchio contestato con l'intento di approfittare del prestigio di Kinex, presentano carenze. Taluni elementi di prova (principalmente fatture) mancano di traduzione e/o autentica; taluni non collegano i beni a uno specifico marchio; gli importi e i quantitativi di prodotto coinvolti dalle transazioni documentate sono piuttosto esigui. Le posizioni degli organi decidenti divergono: l'Ufficio Marchi e il Tribunale Intermedio di Pechino ritengono le prove insufficienti, mentre il CEAM e – alla fine – l'Alto Tribunale di Pechino accolgono la pretesa di Kinex.

[72] Si veda il *Sommario* a pag. 409.

[73] Si veda "Guangzhou Honda" (§ 6): in una situazione in cui l'art. 31 è normalmente inefficace nel frenare lo *squatting*, l'applicazione dell'art. 28 permette a Honda di "riscattare" la versione popolare del proprio marchio.

ovvia. In "Shanggong"[74], ciò accade in relazione alla somiglianza fra i beni; in "Quaker"[75], con riferimento alla somiglianza fra i marchi. Quando è registrato un marchio il quale assomiglia a un marchio noto dello stesso settore, in assenza di una ragionevole giustificazione, la registrazione è probabilmente fatta per avvantaggiarsi della popolarità del marchio noto; pertanto, due marchi e/o due beni devono essere considerati "simili" se sono abbastanza vicini da rendere possibile la realizzazione del disegno illecito dello *squatter*.

Art. 15 LM 2001: registrazione in malafede da parte di agente. Quanto all'art. 15 LM 2001, il concetto di "agente o rappresentante" è stato variamente interpretato dai giudici; nel complesso, è stato sensibil-

[74] Giudizio di primo grado: *Shanghai Utensils Factory Co., Ltd. c. CEAM*, Trib. Int. Pechino 1° Sez. prop. int. amm. ist. in. n. 1778/2010, (2010) 一中知行初字第1778号. Giudizio di secondo grado: *Shanghai Utensils Factory Co., Ltd. c. CEAM*, Alto Trib. Pechino amm. ist. fin. n. 1389/2010, (2010) 高行终字第1389号. Shanghai Utensils Factory richiede la revoca di un marchio molto simile al suo, registrato da Fenghua Utensils Factory. Sia il CEM sia il Tribunale Intermedio di Pechino rigettano la pretesa: a seguito di valutazione basata solo sulla classificazione ufficiale, i beni in questione non sono ritenuti simili, in quanto il marchio dell'attrice è registrato per alcuni beni della classe 8, mentre il marchio della convenuta si riferisce ad altri beni della classe 8 e ad alcuni beni della classe 9. Infine, l'Alto Tribunale di Pechino ritiene i beni simili ai fini dell'art. 28, tenendo conto dell'evidente malafede di Fenghua: è possibile, se occorre, adottare uno *standard* di giudizio severo, che "tenga pienamente conto dei diritti e interessi dei consumatori e degli operatori economici dello stesso settore, argini efficacemente le condotte di (pre)registrazione sleale, enfatizzi la protezione dei diritti e interessi preesistenti di altri soggetti relativi a marchi che godano di rinomanza e capacità distintiva relativamente forti ed elimini quanto più possibile il rischio di confusione dei simboli commerciali".

[75] *Fujian Nan'an Fule Food Industry Co., Ltd. c. CEAM (terzo: Quaker Oats Co., Ltd.)*, Trib. Int. Pechino 1° Sez. prop. int. amm. ist. in. n. 1096/2011, (2011) 一中知行初字第1096号. L'americana Quaker chiede la revoca di un marchio registrato da Nan'an Food Industry. La registrazione di Nan'an è stata fatta in una situazione di malafede piuttosto evidente: anni prima, Nan'an ha registrato un marchio "贵格" (*Guìgé*), omofono del marchio "桂格" (*Guìgé*). Avendo ottenuto la revoca del marchio della concorrente, Quaker registra per sé il marchio "贵格"; in seguito, però, Nan'an "ritenta" con un marchio "贵格金穗王" (*Guìgé Suìwang*), il quale è oggetto della sentenza in parola. Date dati circostanze, il CEAM e il Tribunale Intermedio di Pechino dichiarano i marchi "Guìgé" e "Guìgé Suìwang" – i quali, peraltro, sono accompagnati da figure molto diverse – simili ai sensi dell'art. 28 LM 2001.

mente esteso, entrando infine in collisione con i limiti posti dalla lettera della legge.

In "Toubaoxilin"[76], il CEAM e l'Alto Tribunale di Pechino ritengono che il concetto di "agente" ai sensi dell'art. 15 ricomprenda anche i distributori; l'Alto Tribunale di Pechino riforma la sentenza, ritenendo che "agente" sia solo il soggetto che "gestisce le questioni relative al marchio" in nome e per conto del titolare; la Corte Suprema del Popolo rovescia di nuovo l'esito della causa, abbracciando la nozione più estesa di "agente".

In "Kaimo"[77], l'Alto Tribunale di Pechino ritiene che il socio non nominato legale rappresentante della società non ne sia "agente" ai

[76] Giudizio di primo grado: *Sichuan Huashu Veterinary Pharmaceutics Co., Ltd. c. CEAM (terzo: Chongqing Zhengtong Pharmaceutics Co., Ltd.)*, Trib. Int. Pechino 1° Sez. amm. ist. in. n. 437/2005, (2005) 一中行初字第437号. Giudizio di secondo grado: *Sichuan Huashu Veterinary Pharmaceutics Co., Ltd. c. CEAM e Chongqing Zhengtong Pharmaceutics Co., Ltd.*, Alto Trib. Pechino amm. ist. fin. n. 93/2006, (2006) 高行终字第93号. Giudizio di riesame: *Chongqing Zhengtong Pharmaceutics Co., Ltd. e Comitato Esame e Assegnazione Marchi c. Sichuan Huashu Veterinary Pharmaceutics Co., Ltd.*, Corte Supr. amm. ries. n. 2/2007, (2007) 行提字第2号. Dopo avere creato un nuovo prodotto e avere richiesto senza successo la registrazione di un marchio "Toubaoxilin", Zhengtong Pharmaceutics stipula un accordo generale di distribuzione con Huashu Pharmaceutics: le vendite saranno fatte da Huashu, che curerà anche il confezionamento, mentre i prezzi saranno stabiliti da Zhengtong. "Toubaoxilin" è usato come nome del prodotto, mentre "Huashu" ne è il marchio. Poco dopo, Huashu ottiene la registrazione di un marchio "Toubaoxiling"; subito dopo la cessazione dell'accordo di distribuzione, Huashu conviene Zhengtong per violazione di tale marchio. Zhengtong reagisce chiedendo al CEAM la revoca del marchio di Huashu ai sensi dell'art. 15 LM 2001.

[77] Giudizio di primo grado: *Hangzhou Kaimo Trade Co., Ltd. c. CEAM (terzo: Kelly Moore Paint Co., Inc.)*, Trib. Int. Pechino 1° Sez. amm. ist. in. n. 118/2005, (2005) 一中行初字第118号. Giudizio di secondo grado: *Hangzhou Kaimo Trade Co., Ltd. c. CEAM e Kelly Moore Paint Co., Inc.*, Alto Trib. Pechino amm. ist. fin. n. 197/2006, (2006) 高行终字第197号. Le vernici prodotte dalla statunitense Kelly Moore sono distribuite in alcune province cinesi da Kingway Corp.; uno dei direttori generali di Kingway è anche il socio di maggioranza della società cinese Hangzhou Kaimo, la quale vende, fra l'altro, vernici Kelly Moore. "Kaimo" (楷模) è una trasposizione cinese abbreviata di "Kelly Moore"; Hangzhou Kaimo registra un marchio corrispondente. Hangzhou Kaimo indubbiamente conosce il prestigio dei prodotti di Kelly Moore ed è animata dall'intento di approfittarne; tuttavia, è problematico arginare tale condotta in

sensi dell'art. 15; se la società in questione è a sua volta agente di una ulteriore società, egli non può essere considerato "agente" di quest'ultima. Con ciò si riforma la sentenza del Tribunale Intermedio di Pechino, secondo cui una connessione meramente "personale" fra società può rientrare nel concetto di "agenzia" ai sensi dell'art. 15: ciò che realmente ha rilievo, ai fini di questa norma, è se il titolare del marchio contestato, all'epoca della domanda di registrazione, conosceva il marchio simile di un altro soggetto *in virtù dei suoi rapporti commerciali con tale altro soggetto*.

Analogamente, in "Seal King"[78], l'Alto Tribunale di Pechino modera l'interpretazione estensiva del concetto di "agente" data dai giudici inferiori: un marchio non può essere revocato ai sensi dell'art. 15 se la sua registrazione è stata richiesta prima che le parti costituissero un rapporto di agenzia. Il Tribunale Intermedio di Pechino ha invece ritenuto applicabile l'art. 15 in quanto, al momento della domanda di registrazione del marchio contestato, la convenuta – sebbene non fosse ancora "agente" dell'attrice – stava già negoziando con essa un accordo di distribuzione e pertanto sicuramente conosceva il marchio in questione in virtù delle negoziazioni.

Varie concezioni della nozione di "agente" collidono nei casi visti. In anni recenti, la "frontiera" sembra essere formata da quei casi in cui lo *squatter* conosce il marchio e il suo prestigio grazie ai suoi rapporti commerciali con il legittimo utente – il che soddisfa la *ratio*

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base all'art. 15, in quanto la connessione fra Hangzhou Kaimo e Kelly Moore – pur indiscutibile – è soltanto *indiretta.*

[78] Giudizio di primo grado: *Wangjia Industry Co., Ltd. c. CEAM (terzo: Shishi United Adhesive Products Co., Ltd.)*, Trib. Int. Pechino 1° Sez. amm. ist. in. n. 780/2006, (2006) 一中行初字第780号. Giudizio di secondo grado: *Shishi United Adhesive Products Co., Ltd. c. CEAM e Wangjia Industry Co., Ltd.*, Alto Trib. Pechino amm. ist. fin. n. 143/2007, (2007) 高行初字第143号. Wangjia Industry è titolare di svariati marchi "Wangjia" e "Seal King", registrati a Taiwan; nel 1995, la società del Fujian ShishiUnited richiede la registrazione di un marchio "Wangjia" e di un marchio "SK"; alcuni mesi dopo, il rappresentante legale di Shishi firma un accordo quinquennale di agenzia in esclusiva con Wangjia. È incontrovertibile che Shishi United fosse a conoscenza dei marchi di Wangjia e della loro rinomanza, dato che le due società erano impegnate nelle negoziazioni per l'accordo di agenzia; tuttavia, al tempo della domanda di registrazione di Shishi United, il rapporto di agenzia non era ancora stato costituito.

dell'art. 15[79] – ma non vi è formalmente un rapporto giuridico fra i due soggetti.

Recepimento delle regole in atti normativi. L'art. 12 delle Opinioni 2010 rifiuta, in principio, la ricostruzione del concetto di "agente" a prescindere dall'esistenza di un rapporto contrattuale; tuttavia introduce alcune eccezioni, le quali chiaramente rispecchiano "Kaimo" e "Seal King"[80].

L'art. 15 è stata l'unica disposizione contro lo *squatting* a essere sostanzialmente cambiata dalla riforma del 2013. Il nuovo comma 2 accoglie l'orientamento secondo cui il solo requisito essenziale per l'applicazione dell'art. 15 è la presenza di un rapporto commerciale grazie al quale lo *squatter* sia venuto a conoscenza del marchio della controparte[81].

L'*enforcement* delle norme in tema di *squatting* mostra una notevole tendenza a espanderne l'applicazione per mezzo di un'interpretazio-

[79] V. MA DONGXIAO, *An Incomplete Adjustment: a Comment on the Concept of "Agent" of Art. 15 TML*, in *Lawtime.cn*, http://www.lawtime.cn/info/zscq/sbqlw/2010121055173.html.

[80] Art. 12 delle Opinioni 2010: "Ove l'agente o rappresentante quanto al marchio, ovvero l'agente o rappresentante nel senso del distributore, del responsabile o di altra relazione di agenzia per la vendita, registri a proprio nome senza autorizzazione un marchio rispetto al quale egli agisce come agente o rappresentante, i Tribunali del Popolo devono determinare la registrazione come atto di registrazione sleale da parte dell'agente o rappresentante [ai sensi dell'art. 15 LM]. Nella pratica, alcune registrazioni di questa natura sorgono mentre sono in corso negoziazioni per stabilire un [rapporto di] agenzia o rappresentanza; vale a dire, la registrazione sleale precede l'instaurazione dell'agenzia o rappresentanza. La condotta deve essere considerata come atto di registrazione sleale da parte dell'agente o rappresentante [*si veda "Seal King", NdR*]. Colui che richieda la registrazione di un marchio agendo in collusione con detto agente o rappresentante può essere considerato come agente o rappresentante. Tali condotte di registrazione collusiva possono essere presunte in base a speciali relazioni di identità fra chi ha richiesto la registrazione del marchio e detto agente o rappresentante [*si veda "Kaimo", NdR*]".

[81] "Ove si richieda la registrazione di un marchio identico o simile al marchio non registrato di un terzo già usato in precedenza per beni identici o simili, e il richiedente sia al corrente dell'esistenza di detto marchio del terzo *perché ha con tale terzo rapporti contrattuali o professionali o altri rapporti diversi da quello indicato nel comma precedente*, qualora detto terzo proponga opposizione la registrazione non è accordata" (corsivo dell'autore).

ne ampia od originale dei concetti della legge. Il Sommario dedica un punto della parte sui *Principi per l'applicazione della legge* alla necessità di "arginare le condotte di preregistrazione del marchio in malafede, [per] proteggere l'ordine dell'economia di mercato [e] la concorrenza leale", "in base alle pertinenti politiche giudiziarie della Corte Suprema del Popolo"[82]; molti dei casi che abbiamo visto in questo paragrafo sono citati come esempi[83]. Il presupposto sembra essere che la necessità di porre freno allo *squatting* autorizzi i giudici, in determinati casi, a "piegare" o "plasmare" le disposizioni di legge.

L'interpretazione estensiva arriva a un punto di stallo quando incontra la barriera del testo di legge. È quanto accade con l'art. 15: la lettera della legge richiede che fra colui il quale richiede il marchio e l'utilizzatore previo vi sia un rapporto di "agenzia". L'art. 15.2 LM 2013 rimuove l'ostacolo.

9. Osservazioni. Un'evoluzione "graduale e disomogenea" presieduta dai giudici

In tutti gli argomenti che abbiamo toccato – concetto di "uso del marchio", uso del rischio di confusione come parametro per giudicare la somiglianza di marchi e beni, espansione del campo applicativo delle norme anti-*squatting* – l'innovazione giuridica segue un moto ascensionale dall'*enforcement* quotidiano alla "codificazione" nella legge. Le Disposizioni Attuative e le Interpretazioni che seguono da vicino l'entrata in vigore di una legge promanano dall'AIC e dalla Corte Suprema del Popolo. I Tribunali del Popolo e le amministrazioni sviluppano poi ulteriormente le soluzioni pratiche, spesso discostandosi sensibilmente dalla lettera della legge. Pertanto, la successiva revisione della legge spesso non introduce reali innovazioni, ma piuttosto ratifica *ex post* i principali risultati raggiunti applicando la precedente versione della legge.

[82] Si veda il *Sommario*, pag. 408.

[83] Si tratta di "007 BOND", "KINEX", "Shanggong" e "Quaker": si veda il *Sommario*, pagg. 408-409.

La revisione legislativa rappresenta uno "spartiacque" meno definito rispetto a quanto avviene in molti ordinamenti occidentali. Molte norme operazionali applicate durante la tarda vigenza della LM 2001 equivalgono o sono molto simili a quelle poste dalla LM 2013. Ciò trasmette la sensazione di una transizione graduale e priva di "salti".

Di converso, l'applicazione delle disposizioni di legge può essere piuttosto disomogenea, in ogni momento dato, nella prassi di autorità diverse. Per il periodo dal 2001 al 2013, in una linea ideale la quale abbia come punto d'inizio la LM 2001 e come punto finale la LM 2013, sembrano esservi voci "d'avanguardia", le quali si avvicinano alla norma della LM 2013, e voci "di retroguardia", le quali si attengono al testo della LM 2001 e non applicano una nuova norma operazionale finché essa non è sancita nel testo di legge del 2013 (il precedente giudiziale – si ricorderà – non ha forza vincolante)[84]. In tale contesto, la revisione di legge ha l'importante effetto di "livellare" le soluzioni al livello raggiunto dalla giurisprudenza d'avanguardia in vigenza della vecchia legge.

La Corte Suprema del Popolo e i Tribunali del Popolo di Pechino sembrano essere la maggiore fonte di pronunce "d'avanguardia", fungendo da guida e modello per l'intero giudiziario cinese[85]. Le soluzioni

[84] L'esempio più evidente è "Honghe Hong": ad anni 2000 inoltrati, quando ormai la Corte Suprema del Popolo e l'Alto Tribunale di Pechino usano il rischio di confusione come principale parametro per valutare i casi di allegata violazione di marchio, due tribunali del Guangdong decidono senza tenerne alcun conto. Le sentenze che ne risultano sono palesemente irragionevoli, eppur legittime. Analogamente, in un'epoca in cui l'"agente" di cui all'art. 15 LM 2001 tende ormai a divenire una definizione onnicomprensiva (v. la posizione del Tribunale Intermedio di Pechino in "Kaimo" e "Seal King"), rimane tuttavia perfettamente legittimo interpretarla come riferita unicamente al soggetto incaricato di gestire questioni relative al marchio (v. la posizione dell'Alto Tribunale di Pechino in "Toubaoxilin").

[85] Il fatto che la Corte Suprema del Popolo giochi un ruolo di guida è in buona parte autoevidente. L'osservatore esterno è più impressionato dal fatto che un ruolo di guida spetta anche ai giudici della capitale: in effetti, Pechino sembra fungere da "modello" per il Paese da molti punti di vista. In WU HANDONG *et al.*, *知识产权制度变革与发展研究 – Study on the Reform and Development of Intellectual Property System*, Pechino, 2012, il capitolo dedicato allo *Studio comparato delle strategie per la proprietà intellettuale di province e città* (pagg. 285 ss.), prima di descrivere le strategie locali, delinea il ruolo che le specifiche province o città svolgono nel contesto nazionale. Il paragrafo dedicato a

innovative da essi supportate, esemplificate in testi interpretativi (*Interpretazioni* e *Opinioni* della Corte Suprema del Popolo), divulgativi (*Sommario*) ed esemplari (liste di "casi guida"), si diffondono in maniera discendente dai "giudici d'avanguardia" ai "giudici di retroguardia".

10. La politica del diritto come "motore" dell'attività di "apripista" dei giudici

Non si può fare a meno di domandarsi quale motivazione soggiaccia all'azione di "apripista" dei "giudici d'avanguardia"; il Sommario, nella parte dedicata ai *Risultati e metodi del lavoro giudiziario sui marchi*, contiene significative indicazioni al proposito.

Il lavoro giudiziario in tema di marchi mira a "creare un ambiente giudiziario propizio allo sviluppo dell'economia di mercato"[86] e a promuovere "l'armonia sociale"[87]. Un altro, più specifico obbiettivo proclamato dal Sommario è relativo all'attività contro lo *squatting*: si veda il § 8. Altri scopi dell'attività giudiziaria sorgono dalle direttive di altri organi statali: l'Alto Tribunale di Pechino "riforma e perfeziona il sistema di esame giudiziale sul marchio applicando le *Linee Generali*"[88] e afferma di "applicare le politiche della Corte Suprema del Popolo"[89].

La legge, pertanto, non è la sola base delle sentenze: la *policy* si mescola alle considerazioni tecnico-giuridiche nell'applicazione della leg-

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Pechino precisa che "Pechino è la capitale nazionale, il centro politico e culturale del Paese, e il suo sviluppo ha sempre più bisogno del sostegno della proprietà intellettuale" (pag. 288).

[86] *Sommario*, pag. 395.

[87] *Ibidem*, pag. 396. Lo *slogan* enunciato è "La conciliazione prima di tutto, la sentenza vi va combinata, usare la sentenza per promuovere la conciliazione" ("调解优先, 调判给合, 以判促调", *Tiáojiě yōuxiān, tiáopàn gěihé, yǐ pàn cù tiáo*). L'attuale ordinamento cinese, in linea con una tradizione millenaria, attribuisce ai giudici un ruolo conciliatorio molto importante; tale ruolo sembra essere attribuito anche a organi non giudiziari.

[88] *Ibidem*, pag. 398. Il riferimento è alle *Linee Generali della strategia nazionale della proprietà intellettuale*, adottate dal Consiglio di Stato il 5 Giugno 2008, traduzione inglese in http://english.gov.cn/2008-06/21/content_1023471.htm.

[89] *Ivi*.

ge. Abbiamo visto un caso, "TOEFL", in cui il giudice non menziona espressamente la *policy*, ma la debolezza dell'argomentazione giuridica fa apparire probabile che il dispositivo sia stato almeno in parte determinato da considerazioni politiche. Tali casi di "politica *sopra* il diritto" appaiono tuttavia infrequenti nel campione esaminato.

Più frequentemente l'elemento politico, invece che soppiantare quello legale, lo modella e lo guida ("politica *del* diritto"): i giudici manipolano i concetti di legge per adattare l'*enforcement* a direttive politiche. Ciò ben si addice a un ordinamento il quale rigetta il principio della separazione dei poteri[90] e tende a vedere gli organi giudiziari semplicemente come un tipo di organo amministrativo, vincolato a perseguire gli scopi generali segnalati dallo Stato[91]. L'attività dei giudici incanala, pertanto, l'evoluzione del diritto e condiziona le novelle legislative successive: tale attività è indubbiamente "creativa" e fa del giudice un "creatore di diritto", nel senso che di fatto altera le norme operazionali in tema di marchi.

11. "Contribuire all'evoluzione del diritto", ma non "creare diritto": come i Tribunali del Popolo vedono se stessi

I giudici cinesi "d'avanguardia" sono consci – e si dichiarano orgogliosi – del ruolo che giocano nell'evoluzione del diritto dei marchi. Secondo il *Sommario*, i giudici di Pechino "sono perseveranti nel dare uguale importanza al disbrigo dei casi e alla ricerca; forniscono materiale per lo sviluppo del sistema giuridico e della teoria giuridica del marchio"[92].

Un primo riferimento è fatto a "Fengye"[93], in cui, nel 1994, i tribunali di Pechino dichiarano il c.d. *reverse counterfeiting* illecito ai sensi

[90] I. CASTELLUCCI, *op. cit.*, pag. 24.

[91] *Ibidem*, pagg. 40-41.

[92] *Sommario*, pag. 396.

[93] *Beijing Clothing Industry (Group) Factory No. 1 c. Beijing Baicheng Light Engineering Development Co., Ltd. et al.*, Trib. Int. Pechino prop. int. ist. in. n. 566/1994, (1994) 中经知初字第566号.

della Legge sulla concorrenza sleale, allora di recente promulgazione[94]; la sentenza porta all'espressa inclusione del *reverse counterfeiting* nell'art. 54 n. 2 LM 2001[95]. Il *Sommario* cita poi "Tianchao"[96], in cui i giudici di Pechino dichiarano illeciti ai sensi dell'art. 38 LM 1993 gli atti preparatori di violazione di marchio[97]; l'orientamento espresso in "Tianchao" confluisce nella riforma del 2001, la quale, con l'art. 57 LM, introduce la *tutela cautelare* per le cause riguardanti marchi[98].

[94] L'espressione *reverse counterfeiting* si riferisce alla condotta di chi acquista beni marcati, per poi rimuovere il marchio originale e vendere i beni con il proprio marchio. Il problema giuridico posto da tale condotta è che essa intuitivamente danneggia chi ne è vittima, ma non ricade in alcuna delle fattispecie di violazione contemplate dall'art. 38 della Legge Marchi del 1993 (l'omologo dell'art. 52 LM 2001 e dell'art. 57 LM 2013).

[95] Secondo l'art. 52, n. 4 LM 2001, costituisce violazione del marchio altrui la condotta consistente nell'"alterare senza autorizzazione il marchio registrato altrui e vendere beni contrassegnati dal marchio alterato".

[96] Giudizio di primo grado: *Beijing Tianchao Fine Chemicals Co., Ltd. c. Beijing Tongzhou Yunhe Chemical Factory*, Trib. Int. Pechino 2° Sez. prop. int. ist. in. n. 124/1998, (1998) 二中知初字第124号.

Giudizio di secondo grado: *Beijing Tongzhou Yunhe Chemical Factory c. Beijing Tianchao Fine Chemicals Co., Ltd.*, Alto Trib. Pechino prop. int. ist. fin. n. 63/1999, (1999) 高知终字第63号.

[97] Il Tribunale Intermedio di Pechino raggiunge tale risultato includendo la condotta in parola nella clausola residuale dell'art. 38 n. 4 LM 1993. Secondo l'art. 38 LM 1993, commette violazione di marchio altrui: *i)* chi usa un marchio identico o simile a detto marchio registrato su prodotti identici o simili, senza l'autorizzazione del titolare; *ii)* chi vende prodotti nella consapevolezza del fatto che recano un marchio registrato contraffatto; *iii)* chi contraffà il marchio registrato di un terzo o ne fa rappresentazioni non autorizzate, o vende dette contraffazioni o rappresentazioni; *iv)* chiunque *causi, in altro senso, un pregiudizio al diritto esclusivo di un terzo a usare il marchio*. Il giudice adotta dunque una interpretazione ampia del concetto di "pregiudizio". Dall'altro lato, l'Alto Tribunale di Pechino ricollega la condotta alla fattispecie *sub i)*, espandendo – sembra – il concetto di "uso del marchio".

[98] Art. 57 LM: "Ove il titolare di un marchio registrato od altro soggetto interessato provi che un altro soggetto ha intrapreso o presto intraprenderà condotte che violano il suo diritto esclusivo a usare il marchio registrato e che tali condotte, se non prontamente arrestate, causeranno danno irrimediabile ai suoi legittimi diritti e interessi, può, prima di iniziare un'azione, chiedere al Tribunale del Popolo un'ingiunzione che inibisca dette condotte e tuteli le sue risorse […]".

Tali casi, come vari altri visti nel presente studio, dimostrano un approccio decisamente "creativo" all'applicazione della legge. La domanda sorge spontanea: l'Alto Tribunale di Pechino e gli altri giudici "d'avanguardia" sconfessano il ruolo di *bouche de la loi* che l'ordinamento formalmente attribuisce loro?

In realtà, i giudici sembrano rinvenire la causa del processo innovativo principalmente in fattori diversi dalla propria azione creativa. Le disposizioni di legge sono spesso interpretate in base al loro "spirito" (立法本意, *lìfǎ běnyì*); talora le innovazioni nell'applicazione di una data norma non fanno che renderla coerente con altre norme correlate[99]. Le innovazioni sono presentate come nascenti da una corretta interpretazione della legge in sé, più che da un *input* dell'organo che la applica.

I giudici sembrano cercare costantemente una "ratifica" delle loro innovazioni da parte del legislatore e della Corte Suprema del Popolo (la quale, secondo R. Peerenboom, attraverso le sue Interpretazioni esercita "un generale potere normativo di fatto"[100])[101]. Il riconoscimento dei frutti dell'innovazione giurisprudenziale nei testi legislativi e interpretativi è quindi non solo chiaro nei fatti, ma anche sistematicamente enfatizzato dai giudici stessi per sottolineare la validità del proprio *modus operandi*. In tale contesto, "applicazione della legge" si riferisce

[99] Ad esempio, il parametro del rischio di confusione è un'innovazione rispetto ai marchi comuni, ma non rispetto ai marchi celebri, per i quali esso è menzionato dall'art. 13 LM 2001. Pertanto l'art. 13, nonostante non si applichi ai marchi comuni, è certamente uno dei dati di partenza dello sviluppo del parametro rispetto ai marchi comuni.

[100] R. PEERENBOOM, *Courts as Legislators: Supreme People's Court Interpretations and Procedural Reforms*, in *Regulating Enterprise: The Regulatory Impact on Doing Business in China*, 2007, all'indirizzo http://www.fljs.org/sites/www.fljs.org/files/publications/Peerenboom.pdf.

[101] Il *Sommario* sottolinea ripetutamente il fatto che soluzioni sperimentate dai giudici di Pechino sono poi confluite nella Legge Marchi o in atti normativi della Corte Suprema del Popolo. È quanto accade per le citate sentenze "Fengye" e "Tianchao" (*Sommario*, pag. 397); il *Sommario* menziona poi il riconoscimento dell'argomentazione di "Toubaoxilin", "Kaimo" e "Seal King" da parte delle Opinioni 2010 (*ivi*) e l'inserimento di "Lacoste" in una lista di casi-guida (*ibidem*, pag. 404); lo stesso accade con vari altri casi che non abbiamo menzionato nel presente studio.

non solo al rispetto di regole già emanate, ma anche all'azione autonoma avallata *ex post* dalla legge.

I Tribunali del Popolo possono essere visti come "creatori di diritto" che rimangono celati per loro stessa iniziativa, fondamentalmente attribuendo le innovazioni al legislatore.

12. Il ruolo di alcuni formanti giuridici nell'evoluzione del diritto cinese dei marchi

In conseguenza delle osservazioni svolte finora, vari tipi di documenti giuridici cinesi acquisiscono un significato diverso dai loro (eventuali) omologhi del *civil law* occidentale.

La legge, in principio unica fonte di diritto vincolante, sancisce soluzioni già affermate (solo) nella prassi, ma non è necessariamente concepita come strumento per risolvere questioni dubbie, ruolo che – come si è visto – è attribuito in larga misura alla giurisprudenza. La sua ragion d'essere va forse trovata, piuttosto, nel fatto che essa uniforma le soluzioni da applicare.

La revisione legislativa sembra avere un forte valore declamatorio. Essa funge da "pietra miliare", riassumendo lo stato della legge piuttosto che modificarlo[102]: è non solo un *corpus* normativo valido per il fu-

[102] Tali caratteristiche sono rese più evidenti dall'aspetto esteriore della revisione legislativa. La Legge Marchi è stata emendata a intervalli decennali piuttosto regolari (1982, 1993, 2001, 2013), a prescindere dall'entità delle innovazioni da apportare; *idem* per la Legge sui brevetti, promulgata dapprima nel 1984 e poi emendata nel 1992, 2000 e 2008, e per la Legge sul diritto d'autore, promulgata nel 1990 ed emendata nel 2001 e nel 2010. La legge non subisce formali modifiche durante tutto il decennio di vigenza. Si confrontino, ad esempio, le leggi italiane, le quali in genere non hanno uno schema di revisione a intervalli regolari. Quando la legge è emendata inserendovi nuovi articoli, si usano per essi gli avverbi numerali latini *bis*, *ter* e così via, per evitare di alterare la numerazione dell'intero articolato. Nell'ordinamento cinese, le innovazioni "aspettano" la successiva revisione della legge per confluire nella stessa; la revisione è una riformulazione integrale, che cambia la numerazione degli articoli. Il risultato è una numerazione che muta periodicamente e non usa artifici analoghi ai nostri avverbi numerali.

turo, ma anche la proclamazione del raggiungimento di certi risultati[103].

La giurisprudenza ha un'influenza determinante sulle norme operazionali. Essa si esprime non solo attraverso le sentenze, ma anche attraverso vari tipi di testo fondamentalmente sconosciuti in Occidente, i quali sopperiscono in parte alla situazione di intrinseca incertezza data dal carattere scarno dei testi normativi e dall'assenza di precedente vincolante[104].

Le interpretazioni della Corte Suprema del Popolo hanno la medesima forza vincolante della legge che interpretano[105]: qui, il "creatore di diritto nascosto" si manifesta nel modo più esplicito[106].

I testi "divulgativi" emanati da giudici, come il Sommario, talora esprimono l'argomentazione giuridica di un caso in maniera più soddisfacente di quanto faccia la relativa sentenza; inoltre, i testi divulgativi collegano fra loro sentenze che condividono la stessa *ratio*, evidenziando così gli orientamenti di *policy* e le tendenze evolutive.

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[103] Fenomeni simili si verificano per la stessa Costituzione della RPC: un buon esempio è lo sviluppo attraverso cui, dal 1988 al 2004, essa ha riconosciuto sempre maggiore rilevanza al settore privato dell'economia. Sul punto si veda I. CASTELLUCCI, *op. cit.*, pag. 94 e R. PEERENBOOM, *op. cit.*

[104] L'autore ha chiesto a vari giuristi cinesi, sia accademici sia avvocati: "Perché ci sono liste di casi-guida formulate dalla Corte Suprema del Popolo?" La risposta è stata sempre all'incirca del seguente tenore: "Perché la Cina non è un ordinamento di *common law*". Menzionando il *common law* il giurista cinese si riferisce all'assenza di precedente vincolante, a mitigare i cui effetti destabilizzanti giungono i documenti diversi dalle sentenze emanati dai giudici.

[105] I. CASTELLUCCI, *op. cit.*, pag. 31.

[106] Il ruolo di creatore di diritto della Corte Suprema del Popolo non è una novità introdotta dalla Repubblica Popolare, ma potrebbe essere – almeno in parte – un'eredità dei poteri esercitati in precedenza dal Daliyuan (大理院) dal 1906 al 1928. Il Daliyuan emanava "interpretazioni" e "opinioni", molte delle quali contribuirono a formare il Codice civile della Repubblica di Cina del 1929, proprio come oggi molte delle norme contenute nei testi interpretativi della Corte Suprema del Popolo sono poi sancite nella legge. Si vedano K. BERNHARDT, *Women and Property in China, 960-1949*, Stanford, 1999, pag. 76, e M. KUO, *The Legislative Process in Republican China: the 1930 Nationalist Family Law and the Controversy Over Surnames for Married Women*, in *Twentieth-Century China*, vol. 36, n. 1, 2011, pag. 48.

Infine, le liste di casi-guida costituiscono un punto di riferimento prezioso per i professionisti del diritto; R. Peerenboom ha definito il loro valore "quasi-precedential"[107].

13. Epilogo: innovazioni dal 2014 al 2017

Varie le novità introdotte nel sistema cinese dei marchi fra l'entrata in vigore della Legge Marchi del 2013 e quest'anno 2017. Di seguito accenniamo a quelle che riguardano più da vicino l'oggetto del presente studio.

Nel 2014 il governo cinese ha istituito tre tribunali specializzati in materia di proprietà intellettuale a Pechino, Shanghai e Guangzhou. Nel gennaio 2017 è stata decisa l'istituzione di nuove sezioni specializzate per la proprietà intellettuale presso i Tribunali intermedi delle città di Chengdu, Nanchino, Suzhou e Wuhan. Nel maggio 2017, fonti non ufficiali hanno rivelato l'esistenza di un progetto per l'istituzione di una corte d'appello nazionale per la proprietà intellettuale[108].

Il Regolamento attuativo della Legge Marchi del 2013, emanato pochi giorni prima della Legge stessa, è entrato in vigore simultaneamente. Alla fine del 2016 l'AIC ha emanato una nuova versione delle Linee Guida per l'esame dei marchi. La *Classificazione di prodotti e servizi* è stata anch'essa emendata alla fine del 2016.

Il 12 gennaio 2017 la Corte Suprema del Popolo ha emanato un documento denominato *Disposizioni della Corte Suprema del Popolo su alcune questioni concernenti la trattazione dei casi amministrativi concernenti la concessione e l'affermazione dei diritti di marchio*, in vigore dal 1° marzo 2017 (le "Disposizioni 2017").

L'art. 16 Disposizioni 2017 ha precisato le circostanze in presenza delle quali la domanda di registrazione va rifiutata ai sensi dell'art. 15.2

[107] R. PEERENBOOM, *op. cit*.

[108] L'esistenza del progetto è stata rivelata dal prof. Wu Handong nel corso di un simposio tenutosi il 10 maggio 2017 a Chengdu: https://chinaipr.com/2017/05/11/spc-puts-national-appellate-ip-court-on-its-agenda/.

LM 2013 (v. § 8)[109]. L'art. 26 Disposizioni 2017 reitera e precisa ulteriormente le regole già esistenti in tema di "uso del marchio"[110].

Le Disposizioni 2017 precisano il contenuto dei "diritti preesistenti" di cui all'art. 32 LM 2013 (corrispondente all'art. 31 LM 2001)[111]. Dopo una disposizione di carattere generale (art. 18) ai sensi della quale i "diritti preesistenti" di cui all'art. 32 includono i "diritti civilistici" e gli "altri diritti e interessi legittimi meritevoli di tutela", una serie di disposizioni pone specifici requisiti per i casi in cui il diritto preesistente invocato consista nel diritto d'autore (art. 19), nel diritto al nome (art. 20) e nel diritto al nome commerciale (art. 21).

Le citate norme riempiono di contenuto il generico dettato dell'art. 32 LM 2013 e riportano alla mente i casi citati nel § 8.

Si è fatto notare come le Disposizioni 2017 siano giunte a breve distanza dalla sentenza di riesame sul caso "Jordan"[112], in cui la Corte Suprema del Popolo ha tutelato il diritto al nome di Michael Jordan

[109] Possono essere considerate come "altri rapporti diversi da quello indicato nel comma precedente" ai sensi dell'art. 15.2 LM 2013 le seguenti situazioni, sussistenti fra colui che richiede la registrazione del marchio e l'utilizzatore precedente: (i) parentela; (ii) rapporto di lavoro dipendente; (iii) contiguità delle sedi operative; (iv) abortita negoziazione per rapporto di agenzia o rappresentanza; (v) abortita negoziazione per la stipulazione di un contratto o l'inizio di rapporti commerciali.

[110] Possono rilevare come "uso del marchio" ai fini dell'art. 49.2 LM 2013 (revoca per non uso triennale): (i) l'uso da parte del titolare; (ii) l'uso da parte di terzi su licenza del titolare; (iii) qualsiasi altra modalità d'uso, purché non contro la volontà del titolare. Eventuali "piccole" differenze fra il marchio usato e quello registrato sono tollerate. L'uso, per rilevare come tale, deve essere "effettivo". Vi è "giustificato motivo" per il mancato uso del marchio se il titolare ha compiuto i necessari atti preparatori per farne uso, ma "circostanze oggettive" gli abbiano impedito di usarlo.

[111] Art. 32 LM 2013: "La domanda di registrazione di marchio non deve violare diritti preesistenti di terzi, né può chi propone la domanda affrettarsi a registrare con scorrettezza un marchio già usato da un'altra parte il quale goda di rilevante influenza".

[112] Il caso, ampiamente riportato dalla stampa internazionale, si è svolto attraverso una molteplicità di sentenze. Fra queste, giudizio di primo grado: *Michael Jeffrey Jordan c. CEAM (terzo: Qiaodan Sports Co., Ltd.)*, Trib. Int. Pechino 1ª Sez. amm. prop. int. ist. in. n. 9163/2014, (2014) 一中行(知)初字第9163号; giudizio di secondo grado: *Michael Jeffrey Jordan c. CEAM*, Altro Trib. Pechino amm. prop. int. ist. fin. n. 1915/2015, (2015) 高行（知）终字第1915号; giudizio di riesame: *Michael Jeffrey Jordan c. CEAM*, C. Supr. amm. ries. n. 27/2016, (2016) 最高法行再27号.

contro una società che aveva registrato per i propri articoli sportivi una molteplicità di marchi "乔丹" (*Qiáodān*, trasposizione cinese del cognome "Jordan") in base all'art. 31 LM 2001 (applicato *ratione temporis*). Secondo la Corte, il cestista vanta un diritto sul proprio nome; tale diritto si estende alla trasposizione cinese del nome, che Michael Jordan ha usato "attivamente" in Cina. Infatti, nel decidere se uno straniero possa invocare il diritto al nome in relazione alla trasposizione cinese di esso, è necessario tenere conto delle "abitudini di denominazione" del pubblico rilevante. Il punto non può non ricordare i casi concernenti "marchi popolari" (v. § 6).

Song Xiaoming, presidente della terza sezione civile della Corte Suprema, nel presentare le Disposizioni 2017 nel corso di una conferenza stampa ha richiamato i parametri chiariti nel caso "Qiaodan"[113]. Nel corso della stessa conferenza stampa è stato citato, fra gli altri, il caso "007 BOND" (v. § 8)[114].

Tali dati, seppur sommari, fanno intravedere, per il periodo successivo al 2013, un percorso evolutivo sostanzialmente analogo a quello descritto per l'arco 2001-2013: promulgazione della legge, immediatamente seguita dal regolamento attuativo; successiva elaborazione giurisprudenziale; a circa tre anni dall'entrata in vigore della legge, un'interpretazione giudiziale interviene a precisarne le regole, recependo i risultati consolidatisi nella trattazione dei casi.

Le Interpretazioni 2002 e le Opinioni 2010, promulgate in vigenza della LM 2001, rimangono in vigore. Si tratta di Interpretazioni e Opinioni "su alcune questioni"; la promulgazione di nuove Disposizioni riguardanti anch'esse "alcune questioni" non ne implica l'abrogazione. Si va così formando, accanto alla legge, un *corpus* interpretativo di fonte giurisprudenziale.

[113] LUO SHUZHEN, *La Corte Suprema del Popolo emana una interpretazione giudiziale sulla concessione e l'affermazione del diritto al marchio (最高人民法院发布商标授权确权司法解释)*, in *People's Court Daily*, 12 gennaio 2017, pag. 1 e pag. 4.

[114] *Ivi*.

COMPETITION LAW IN THE PEOPLE'S REPUBLIC OF CHINA

LENIENCY POLICY IN CHINA'S FIGHT AGAINST CARTELS

Alexia Ruvoletto

1. Introduction: China's competition system

Market players can limit competition in different ways: by setting the price of a product by themselves or in agreement with other market players, by fixing the quantities of the product to be manufactured (thus impacting the demand offer mechanism) or by dividing the territory where the product is to be distributed and agree on respective areas of influence with the other players in the market. The main idea at the origins of competition law is that every market player has to compete with other players at the same free market conditions. This ensures that all enterprises and individuals enjoy the same opportunity to access the market and make profits. The other idea behind competition law is that this will ensure that the prices are set based on the demand-offer interplay to the benefit of the consumers.

The same ideas are shared to a certain extent by the Chinese legislator who, after China's accession to the WTO has been under great pressure from the Western countries to adopt a "international-standard-based" competition system. However, this is only part of the picture

when it comes to China as many other factors play in the way the competition system was structure and is enforced.

Indeed, the most peculiar feature of the Chinese system is the way competition law is used as a tool for the Chinese authorities to exercise control and regulate the market so that the Chinese Government policies are implemented.

Another distinctive feature of the Chinese system is the presence of three different competition authorities: the Ministry of Commerce (MofCOM), the National Development (NDRC) and Reform Commission and the State Administration for Industry and Commerce (SAIC).

According to the San Ding (document set out by the State Council to define duties and competences of the ministries) MofCOM deals with merger control while NDRC and SAIC deal with all the other competition infringements (restrictive agreements and abuse of dominant position) with the only difference that NDRC is competent for all infringements where market players set a fix price for a certain product, while SAIC is competent for all infringements that do not impact directly the price of the product. As explained below the areas of competence can overlap in many practical cases especially if we consider that all monopolies and oligopolies achieve their profits by ultimately influencing the price of commodities so that it is difficult to distinguish between related and non-related-price conducts.

The competition and lack of coordination between the different agencies not only impacts on competition rules enforcement but also on the international cooperation with other foreign competition authorities for example in the US, the EU and Japan. The latter need in many cases to liaise with the three authorities separately which inevitably multiplies the efforts and time required to reach effective cooperation agreements with China in the field of competition.

As regards to the legal framework, the most important legislation in the field of competition is the Anti-monopoly law enacted in 2008. Other notable laws dealing with certain aspects of competition are the Anti-unfair competition law enacted in 1993 and the 1998 Price law. The AML however is the only legislation focusing on competition. The Anti-unfair competition law contains the prohibition of abuse of monopoly while the Price law defines illegal pricing activities.

2. The fight against cartels: background

Cartels are secret agreements concerning price fixing or limitation of production output. Due to their secret nature, they are very hard to uncover and represent a challenge to an effective enforcement of antitrust law[1].

Both a leniency program and the possibility for individuals to bring private claims against cartel members are powerful weapons in the fight against cartels.

Leniency programs are paramount in order to uncover secret agreements such as cartels since they provide an incentive for cartel members to come forward and report a cartel to the authorities[2].

Private litigation is also very important, since it is the only way for individuals to enforce antitrust law themselves and seek compensation for damages caused by monopolistic conducts, cartels included[3].

However, the relation between these two institutions can be tricky: if on the one hand private litigation can have a deterrence effect on cartels, on the other hand damages awarded by courts to injured parties constitute in practice additional fines when information disclosed in a leniency application is used to corroborate a private claim[4]. The possibility for individuals to bring civil claims seeking compensation for damages caused by cartels is likely therefore to reduce the attractiveness of a leniency program and ultimately undermine its effectiveness[5].

[1] P. CASSINIS, *I Programmi di Leniency e il Rilievo per l'Antitrust Private Enforcement*, in L.F. DI PACE (edited by), *Dizionario Sistematico della Concorrenza*, Napoli, 2013 at 397.

[2] P. CASSINIS, *supra*, note 1 at 398.

[3] H.S. HARRIS JR, P.J. WANG, Y. ZHANG, M.A. COHEN, S.J. EVRARD, *Anti-Monopoly Law and Practice in China*, Oxford, 2011 at 302.

[4] J. GREEN, I. MCCALL, *Leniency and Civil Claims: should leniency programs extend to private actions?*, in *Competition Law Insight* (2009), online at http://www.europe-economics.com/publications/2009cli_1.pdf (last accessed 25.01.2017).

[5] Ibidem.

3. The Anti-Monopoly law and peculiarities of the Chinese competition regime

In August 2007 China introduced its first comprehensive anti-monopoly regulation, the Anti-Monopoly Law (hereinafter the AML), thus joining the club of more than 80 nations in the world to adopt an antitrust law regime[6]. Notwithstanding opposition and criticism, the drafting of a new anti-monopoly law kicked off in 1994 due to mainly two factors: an internal factor and an external one.

Firstly, concern over the so-called Administrative Monopoly, which was considered an obstacle to China's economic reform, led to the appeal for effective anti-monopoly measures able to tackle monopolistic activities performed by government agencies and officials.

Secondly, after China's accession to the WTO in 2001 and China's opening up to the world economy, international pressure was exercised upon adopting an antitrust regulation not only in the interest of foreign investors but also in order to counteract the establishment of foreign monopolies in the Chinese market[7].

Apart from these political considerations, the legal reason that moved the Chinese legislator to draft and then enact the Anti-Monopoly Law of 2007 was that of bringing some order in the fragmented and chaotic regulatory framework of competition in China[8]. Article 1 sets forth the main goals of the Law that are substantially the same as can be found in other competition law regulations in the US or the EU.

What is strictly peculiar about the Chinese regime is instead the reference to the aim of "promoting the healthy development of a socialist market economy"[9] which may enable government authorities to loosely

[6] Press release "China adopts Anti-Monopoly Law" online at: http://english.gov.cn/2007-08/30/content_732466.htm (last accessed 18.06.2017).

[7] Y. JUNG, Q. HAO, *The New Economic Constitution in China: A Third Way for Competition Regime?*, in *Northwestern Journal of International Law & Business*, 2003 at 9.

[8] For the entire list of legal instruments see M.M. DABBAH, *The Development of Sound Competition Law and Policy in China. An (Im)possible Dream?*, in *World Competition*, 30(2), 2007, 347.

[9] Art. 1 of the AML.

enforce or exercise discretion whenever enforcing competition rules[10]. Although other non-competition related interests are also taken into account in other competition regimes, commentators worry about the emphasis placed on those interests in the Chinese system: Di Federico, for instance, refers to Art. 22 of the Electric Power Law to argue that in some cases, Chinese authorities may even encourage monopolistic conducts whenever public interest so requires[11]. It has to be noted, however, that in both US and EU it took a considerable amount of time to fully elaborate the objectives of their antitrust regimes[12]. Political considerations when applying competition law are present not only in the Chinese system but also in the EU one.

The integration aim is notably the main political interest pursued in general by the European Court of Justice in every field of law, not only in competition.

From a comparative law perspective, it should be noted that since competition law is a legal transplant in the quite recent Chinese legal system, it would not be appropriate for China to adopt a regime that is suitable only for a fully-fledged market economy[13]. As Frazer wrote in 1990:

> The choice between "Chicago or not" is not a choice between "economics or not". The choice, rather, concerns the appropriate use of economics in the application of competition policy… This may result in the efficiency model of Chicago being used exclusively, or in combination with other goals[14].

[10] I. CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Trento, 2012 at 86.

[11] G. DI FEDERICO, *The New Anti-Monopoly Law in China from a European Perspective*, in *World Competition* 32, no 2, 2009 at 260.

[12] G. MINKANG, C. BING, *A Review of China's Anti-Monopoly Law*, in *Jindal Global Law Review* 187, March 2011 at 18.

[13] M. FURSE, *Competition Law Choice in China*, in *World Competition* 30 (2) 2007 p. 323-340.

[14] T. FRAZER, *Competition Policy after 1992: The next step*, in 53 *MLR* 609, 1990 at 620.

As far as the AML scope of application is concerned, it is rather noteworthy that the Law upholds the effect theory in order to extend its jurisdiction outside the territory of the PRC[15]. Article 3 outlines three main monopolistic conducts: a) monopoly agreements, b) abuse of dominant position, c) concentration of business operators that may have the effect of eliminating or restricting competition. The socialist element is also present at Article 4 which provides that the State shall "implement competition rules suitable for the socialist market economy", nonetheless the second part of the article restates the aim of perfecting "a united, open, competitive and well-ordered market system" which suggests that the Chinese Legislator considers that competition already exists in China.

This assumption has been regarded with scepticism by Western commentators and attributed to the attempt to attract foreign investments and align China with international economic trends[16]. Western commentators, however, seem to neglect the fact the Chinese legal system is not a rule of law one, at least not completely, but rather characterised by "variable geometries" where laws are drafted in a Western way in the private sector and maintain the typical socialist character in sensitive areas related to the public sector[17].

Now, being competition an area in which the private sphere and the public one are tightly entwined, it is arguable that the AML is subject to both models. Like Article 4 many provisions in the AML work just as political proclaims and goals rather than strictly enforceable norms in a way that could be compared to EU non self-executing directives[18]. As a matter of fact, it has been reported by commentators[19] and politicians[20]

[15] Art. 2 of the AML.

[16] G. DI FEDERICO, *supra*, note 11 at 267.

[17] I. CASTELLUCCI, *Rule of law…*, *supra*, note 10 at 99.

[18] Ibidem.

[19] S. K. MEHRA, Y. MENG, *Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law*, in *49 VA.J.INT'LL.*, 2008 at 241.

[20] BOHUA ZHOU, *Address*, in *International Symposium on Enforcement of Anti-Monopoly Law*, STATE ADMINISTRATION OF INDUSTRY AND COMMERCE, no 2 (2008).

that the AML has been enacted without any final resolution on how and to which degree it will be enforced.

Article 12 provides two legal definitions: business operator and relevant market. The broad definition of business operator stems from the same ratio as the one elaborated by the European Court of Justice[21] which is that of extending the AML scope to every entity operating in the market regardless of its legal nature, provided that it exercises an economic activity.

As for the definition of relevant market, which is broad and quite vague, it must be pointed out that MOFCOM issued Market Definition Guidelines as the European Commission did in its Communication of 1997[22]. Article 13 and Article 14 tackle monopoly agreements: the former deals with horizontal agreements, the latter with vertical ones. Notably, Art. 13 sets forth four prohibited conducts that can be found also in Art. 101 of the TFEU and a fifth one constituted by boycotting transactions: the emphasis placed by the Chinese Legislator on this conduct is due to the experience in the Chinese aviation sector where this practice is quite common[23]. The Article concludes with a catch-all clause that allows for discretion by the Anti-Monopoly Law Enforcement Agency under the State Council.

As far as vertical agreements are concerned, there is no consensus amongst the economists whether such agreements do have the effect of restricting or eliminating competition or not.

The Chinese Legislator decided to tackle them only as far as price fixing and price resale maintenance agreements are concerned. Comparing Art. 14 with Art. 101 TFEU, it can be noted that under China AML practices such as applying "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage" or making "the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts" are not considered harmful to competition.

[21] C-41/90 Hofner vs. Macroton case.

[22] *Commission Notice on the definition of relevant market for the purposes of Community competition law*, in OJ C 372, 09.12.1997, p. 5-13.

[23] G. DI FEDERICO, *supra*, note 11 at 253.

Di Federico argues that this exclusion is very dangerous and can badly affect China's effective power of tackling cartels whose success is often ensured by vertical agreements[24]. Nonetheless, another catchall clause is also present in Art. 14 enabling a bolder intervention by the authorities in case of necessity[25].

It is most certainly true that the AML is not as advanced as other antitrust law regimes in Western countries, but this should not prevent from appreciating the full significance and impact of this step in the Chinese legal system. Indeed Western observers have been quite harsh in their critics and "have come to bury China's AML in its infancy"[26]. Observers, both Western and Chinese, have pointed out few shortcomings of the AML. Most of them are due to China's still transitional economy, some others depend on the still premature state of Chinese legal system. These aspects will be analyzed here below.

a) Administrative monopolies

Administrative monopolies is an issue strictly related to State-owned enterprises (hereinafter SOEs). When China embarked in its economic reform in the late 70s the entire industrial system was based on planned economy. At the top of the hierarchy stood the State Planning Commission who was in charge of controlling the entire Chinese economy through ministries, each one of them in charge of a different industrial sector. Ministries used to manage undertakings belonging to their assigned sector either directly or through corporations.

This system ensured that Party diktats were effectively conveyed to individual enterprises and then implemented. Needless to say, this system was affected by a high degree of economic inefficiency, therefore the 1978 economic reform had for its main goal to tackle this problem: individual undertakings were granted rights in exchange for a higher degree of efficiency in their performance.

In 1980 when the Chinese economic reform took a dramatic turn towards market economy, SOEs gained more autonomy and a larger

[24] G. DI FEDERICO, *supra*, note 11 at 255.

[25] Art. 14 of the AML paragraph 3.

[26] S.K. MEHRA, Y. MENG, *Against Antitrust…*, *supra*, note 19 at 383.

share of profits following the so-called "contract responsibility system"[27]. Despite the reform, China's economy is still subject to consequences and flaws deriving from the planned economy era: administrative monopolies is precisely one of them. Although the AML does not provide a definition of administrative monopoly, it can be described as a monopoly created by administrative agencies[28].

This phenomenon is paramount in Chinese Antitrust Law due to its massive presence in the Chinese market: we can find it notably in three domains: a) regulatory state agencies that engage in discriminatory practices in those sectors where the State retained its regulatory power, in order to favour businesses affiliated with the agency[29] as an example, in 1999, in the airline sector, China's Bureau of Civil Aviation prohibited airlines from offering air ticket discounts based on the adverse effect competition had on the development of the airline industry[30]; b) in sectors where industrial associations and not the state agencies are in charge of regulation: the major participants in these associations, that have the right to impose sanctions for anticompetitive practices, are frequently SoEs that might implement those practices as well[31]; c) local protectionism: local governments engage in anticompetitive practices that create market entry barriers for non-local undertakings[32].

The main problem related to administrative monopolies is that they cause inefficiency, waste and duplication and they prevent rational use and distribution of economic resources[33].

Whether to tackle administrative monopolies in the AML was subject to discussion and controversy: on the one hand fighting against this phenomenon means going against local governments and state agencies for which the Chinese political system is not prepared.

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[27] H.C. CHENG, *China's New Anti-Monopoly Law: Big Trouble in Little China?*, 2008, available at http//ssrn.com/abstract=1344921.

[28] B.M. OWEN, S. SUN, Z. WENTONG, *China's Competition Policy Reforms: the Anti-monopoly Law and Beyond*, in *75 Antitrust Law Journal no 1*, 2008 at 243.

[29] H.C. CHENG, *supra*, note 27.

[30] B.M. OWEN, *supra*, note 28 at 245.

[31] H.C. CHENG, *supra*, note 27.

[32] B.M. OWEN, *supra*, note 28 at 246.

[33] H.C. CHENG, *supra*, note 27.

The "central vs local government" issue has its roots in Chinese history[34]. As the proverb goes: "天高皇帝远" Heaven is high and the Emperor is far away. Whenever an order or political directive is given from the above (the central government) it has to be enforced by the local level who will exercise its own discretion and decide to which extent the order has to be implemented. Therefore, in policy makers' mind it was neither obvious nor predictable if provisions against the local governments' interests, such as those enshrined in the AML, would be effectively enforced or not.

On the other hand, many commentators pointed out that without specific provisions addressing this phenomenon, the AML would have not been an effective antitrust tool and certainly not up to the Legislator will to establish a new competition framework for China to be on the same page with international practice[35]. In the end, a whole chapter dealing with administrative monopolies was introduced in the latest text of the AML.

To begin with, Article 8 sets out a general prohibition for administrative organs to abuse their powers with the purpose of restricting or eliminating competition[36]. Then the AML proceeds to outline different types of abuses in chapter V. Article 32, while restating the general prohibition enshrined in Art. 8, outlines a specific anticompetitive conduct, notably abusing administrative power by requiring organizations or individuals to deal, purchase or use only commodities provided by designated business operators[37]. From Art. 33 to Art. 35 the Law goes into detail outlining some specific practices. Nevertheless, the finding of one of the outlined conducts does not per se lead to a sanction, since the "abuse of administrative power" is required for the Law to be enforced. Now, it is not clear, in the absence of any authentic interpretation or any jurisprudential guidance, what the term "abuse" means and

[34] B.M. OWEN, *supra*, note 28 at 249.

[35] Ibidem.

[36] Art. 8 of the AML reads: «No administrative organ or organization empowered by a law or administrative regulation to administer public affairs may abuse its administrative powers to eliminate or restrict competition».

[37] Art. 32 of the AML.

from its exact definition depend the scope and the degree of enforcement of Chapter 5 provisions[38].

In addition, some commentators argue that since the AML is supposed to work as a *lex generalis* administrative monopolies could easily find a shelter in *leges speciales* related to some sensitive sectors (energy, telecommunications etc.)[39]. Nevertheless, it should be noted that the strong and peremptory phrasing of the specific anticompetitive conducts prohibitions indicates the strong political will to tackle this phenomenon on the central government's behalf[40]. Some Chinese commentators also point out that, following the example of the US, there should be no need for specific provisions concerning administrative monopolies since they should be dealt with as any other kind of monopoly[41].

Another issue concerning the effectiveness of AML against administrative monopolies is raised by Article 51 of the Law dealing with liabilities for infringement of prohibitions at Art. 32 and followings: the article in discourse suggests that the Anti-monopoly Law Enforcement Agency "may offer suggestions to the relevant superior authority regarding how to handle the abuse according to the law" meaning that it is not the above mentioned agency the one to be in charge of enforcing those prohibitions.

Some commentators observe that this is an implicit confession on the Legislator's behalf about the fact that it is not possible to tackle this phenomenon only through the Chinese legal system. Nonetheless Antitrust law is not the sole tool through which the problem of administrative monopolies can be solved: more institutional and economic reforms are required especially as far as the government structure is concerned. Suggestions have been made for China to follow the path of United States federal structure even in the Antitrust law domain according to the "federalism doctrine" which entails a clear cut definition of competences between the central government and local governments[42].

[38] H.C. CHENG, *supra*, note 27.

[39] G. DI FEDERICO, *supra*, note 11 at 253.

[40] H.C. CHENG, *supra*, note 27.

[41] GU, H.C. CHEN, *supra*, note 12 at 15.

[42] B.M. OWEN, *supra*, note 28 at 262.

A similar framework is adopted also by the European Union where Article 101 TFEU provides that the EU Commission is competent only for anticompetitive conducts that affect the commerce between Member states, leaving to the National States Competition Agencies the duty to enforce EU competition law and National competition law when the anticompetitive conduct has not a EU-wide dimension.

It does not seem likely for China to adopt any of these two solutions unless one admits the possibility for the Chinese Legal system to develop in a Western-like rule of law one, which is not probable in the foreseeable future[43]. Nevertheless, the development of local competition authorities cooperating with the central agencies in a way that could remind us of the EU Competition Network might be a more feasible approach. Despite all of the above, recent practice appears to confirm NDRC willingness to tackle and punish also administrative monopolies. More specifically, in 2015, for the first time, the authority investigated and sanctioned a cartel among top state-owned telecommunications companies in the Yunnan Province. Surprisingly, the NDRC issued a RMB 13.18 million fine against the provincial industry regulator who turned out to be the cartel organizer with the support of the local government[44].

b) Vague wording and legal uncertainty

As the above mentioned example concerning the term "abuse" shows, there is a high risk for some legal terms included in the AML to be interpreted "softly" so that the rights and obligations enshrined in the law are less effective than one could wish for. Many commentators notably criticized the broad language and undefined terms of the law because of the unpredictability and legal uncertainty that enterprises and

[43] I. CASTELLUCCI, *supra*, note 10 at 145.

[44] M. HAN, D. BOYLE, *A Review of Non-Merger Antitrust Enforcement and Litigation Developments in the PRC in 2015*, in *Competition Policy International Antitrust Chronicle*, available at https://www.competitionpolicyinternational.com/wpcontent/uploads/2016/02/A-review-of-non-merger-antitrust-enforcement.pdf (last accessed 21.01.2017).

their counsellors have to face whenever dealing with Chinese Antitrust authorities[45].

Another example of this broad wording can be found in Article 7 of the AML. The second paragraph, in the view of some observers, may shelter and also encourage monopolistic conducts by the SOE since the only limitation to their activity is to

> operate according to law, be honest, faithful and strictly self-disciplined and accept public supervision, and shall not harm the consumer interests by taking advantage of their controlling or exclusive dealing position.

Moreover according to those critics[46] it is not clear which role should the Enforcement Authority play in case of violation of the obligations enshrined in this paragraph.

c) Discrimination against foreign undertakings

International concerns at the first enactment of the AML focused also on the risk for the law to be enforced only against foreign enterprises[47]. These perplexities have been certainly justified by some Chinese officials' statements on how the AML could be an effective tool against foreign multinational firms seeking to impose their monopoly on the Chinese market[48].

Moreover it is the "national security" clause in Article 31 that raises the most concerns. Article 31 deals with mergers and acquisitions stating that whenever a foreign investor participates in a concentration of business operators the procedure has to be examined in the light also of the national security interest. The provision does not develop further on the concept of "national security" providing reasonable doubt that this

[45] H.C. CHENG, *supra*, note 27.

[46] C.W. HITTINGER, J.D. HUH, *The People's Republic of China Enacts Its First Comprehensive Antitrust Law: Trying to Predict the Unpredictable*, in 4 *N.Y.U.J.L & BUS*. 245, 2007 at 246.

[47] I. CASTELLUCCI, *supra*, note 10 at 127.

[48] GU, H.C. CHEN, *supra*, note 12 at 14.

broad term will be used by Chinese officials to prevent any undesired concentration of undertakings[49].

However, it is necessary to point out that first, a merger review based on national security criteria is not unknown in other competition law regimes such as the US and the EU ones.

In the EU for example, during the oil crisis in the 70s it was a general trend to secure national interests in that particular industry[50]. Secondly, Article 31 does not per se deal with national security, but rather refers to provisions on merger and acquisitions. Finally, it should not be forgotten the role politics plays in the Chinese Legal system, enterprises and their counsellors should not seek guidance in the AML alone, they should instead interact and negotiate their business operation with Chinese authorities since even officials' words can be included in the sources of Chinese Law[51].

With respect to the AML it should be also noted that Chinese politicians have reassured foreign investors on the non-discriminatory character of the AML which, by the way, does not formally distinguish between Chinese enterprises and foreign ones when prohibiting monopolistic conducts[52].

Despite the shortcomings outlined above, the AML represents a huge step in the direction of a sound competition law regime in China. The critics analysed in this chapter are certainly good inputs for further reform but they seldom take into account the fact the Chinese Legal System and so Chinese Antitrust Law will not necessarily develop into a rule of law system in a way that resembles Western countries legal regimes. It has to be noted that those drawbacks are essentially linked to historical and cultural limits such as: the fact that the AML was enacted mainly under the pressure from the international community, the fact that there was no culture for competition or market economy before the economic reform of the late 70s, last but not least, the necessity for

[49] Ibidem.

[50] Ibidem.

[51] I. CASTELLUCCI, *supra*, note 10 at 25.

[52] GU, H.C. CHEN, *supra*, note 12 at 18.

ruling and administrating a massive territory with very different economic conditions (notably Eastern and Western parts of China)[53].

In the end, as Cheng pointed out it would have been easier for China to enact antitrust norms by coping and pasting the high standards of developed countries, but the result might have been less satisfactory since "the law is a historical and social product" which has to fit in a complex reality in order to be successfully enforced and respected[54].

When transplanting Antitrust Law in the Chinese Legal System a question has been raised on whether to adopt an American or European approach. Comparative jurists argue that the Chinese AML follows to a certain extent the European model[55]. The reason for this particular choice lies in the peculiarities of the European approach to antitrust which make it a model more suitable to Chinese legal system. First, it is useful to remind the differences between the US system and the EU one. The main discrepancy concerns the rationale and the aim of Antitrust law. The American model, under the influence of the Chicago economic school focuses more on economic efficiency: the State has to intervene in the least possible way, if at all[56]. According to this economic theory, it is the State in its attempt to regulate the economy that creates a monopoly[57]. Competition Law in the EU took instead a social kind of goal: the creation of a single and integrated market between the EU Member States[58].

Not less important, the main rationale of EU competition law is constituted by consumer protection, an aim that is reached only indirectly through economic efficiency in the Chicago School way of thinking. Another striking difference is constituted by the role played by the Antitrust Authorities. The U.S. Justice Department and Federal Trade

[53] Ibidem.

[54] Ibidem.

[55] I. CASTELLUCCI, *supra*, note 10 at 127; H.C. CHENG, *supra*, note 27 at 13; G. DI FEDERICO, *supra*, note 11 at 252.

[56] H.C. CHENG, *supra*, note 27.

[57] The Business Dictionary *Chicago School of Economics* online at http://www.businessdictionary.com/definition/Chicago-school-of-economics.html (last visited 25.01.2017).

[58] GU, H.C. CHEN, *supra*, note 12 at 17.

Commission might seem similar to the EU Commission for duties and breadth of their powers, but indeed the latter has a much more incisive role in enforcement and in outlining competition policy[59]. The EU Commission has been indeed defined as the "rulemaker, policeman, prosecutor and judge" of EU Competition law[60]. China, unlike Western countries, not only had to deal with future potential monopolies but also had to dismantled the ones already put in place during the planned economy era. This is the main reason why Chinese policy makers decided to tackle administrative monopolies in the AML. Now, such a phenomenon, unknown in US Antitrust, is instead dealt with in EU competition law[61]. Therefore, this is probably the first reason why the AML drew inspiration from the TFEU rather than from the Sherman Act. Another aspect that makes the European system and the Chinese one to a certain extent similar, is the emphasis put on non-competition objectives such as public interests, the single market or in the Chinese case the development of a socialist market economy[62]. Finally, the fact that the EU is a civil law system had certainly an influence on the Chinese policy makers that conceive Chinese legal system more like a civil law one rather than a common law system.

Despite the similarities with the EU competition regime, the Chinese one is more likely to develop in a third way system with Chinese characteristics. One should not forget that Chinese Antitrust has its own peculiarities and shortcomings that no other system in the western countries has. These shortcomings will probably not be solved through the establishment of rule of law or through a development of a strong judicial system but rather by means of cooperation and dialogue amongst local and central authorities as well as with all the stakeholders involved[63].

[59] H.C. CHENG, *supra*, note 27.

[60] R.T. JONES, *American Antitrust and EEC Competition Law in Comparative Perspective*, in *90 LAW Q. REV.*, 1974 at 195.

[61] S.K. MEHRA, Y. MENG, *supra*, note 19 at 403.

[62] G. DI FEDERICO, *supra*, note 11 267.

[63] S.K. MEHRA, Y. MENG, *supra*, note 19 at 420.

4. Leniency policy and private antitrust litigation

4.1. Introduction

Leniency programs are important tools to facilitate the detection of cartels.

Leniency is essentially a reduction of fines or the granting of partial or total immunity upon cooperation with the antitrust authorities. Total immunity is awarded to the first firm to come forward and report a cartel thus triggering the so-called "race to the courthouse", a sort of competition between cartel members to be the first to report it.

Leniency is therefore a destabilizing factor in a cartel because it puts firms in a prisoner dilemma situation undermining the trust they have in one another and because it provides incentives to report the anti-competitive conduct to the authorities and cooperate with them in the investigation[64].

It is rather important for every antitrust regime to have a leniency program because of its deterrence potential: knowing that one between them might report the cartel to an antitrust authority without punishment, represents a major disincentive for undertakings to engage in a secret agreement in the first place[65].

4.2. Leniency policy in the Chinese legal tradition

The idea of a reduction or disapplication of fines upon cooperation with the competent authority is not foreign to the Chinese legal tradition.

More specifically, we can find the same concept in Chinese ancient criminal law in the two paradigms of voluntary surrender and leniency for meritorious service.

Li Junfeng argues that the AML leniency program somehow incorporates these two systems[66], Richean Li disagrees on the point, claim-

[64] Ibidem.

[65] Ibidem.

[66] L. JUNFENG, *Leniency Program in Anti-monopoly and its Sinolization*, in *Frontiers of Law China* 2009, 4(2) at 272.

ing that the current leniency program is just the product of a legal transplant from other competition regimes, notably the EU, German, Japan and US ones, and the result of a political choice to adopt an effective antitrust regime in line with international practice[67].

In this article, we take the stand that although Richean Li's argument is more convincing, the two paradigms may play a role in how leniency is culturally perceived and therefore enforced by antitrust authorities. We argue that the fact that in Chinese legal tradition there was already the idea of leniency may have an influence on the current leniency. These two systems are therefore worth consideration.

According to Li Junfeng's definition, voluntary surrender means that: «an offender takes initiatives to surrender to the competent authority and truthfully report the facts of his crime»[68]. The first recollection we have of this system is during the West-Zhou period when it was first reported in the book of Shangshu Kanggao[69] that because a man committed a crime out of negligence, he was not sentenced to death. This, though without the volunteer surrender element, was the first application of a lenient treatment reported[70].

During the Qin Dynasty, the concept was formally established in the Shuihudi Tomb Qin Bamboo slip "Questions and Answers of Laws" that reports that if someone steals above 100 coins but then surrenders, he shall be punished only by penal servitude or fine[71].

The Code of Tang Dynasty was the first to set up a fully-fledge leniency program based on conditions and exemptions. First, for a leniency application to be accepted the crime had not to be already discovered. Second, the surrendering party was to provide self-incriminating information even against his own interest. Third, the "leniency applicant" had to be honest and thorough. Fourth, the application was to be filed to

[67] Annex, Interview with prof. Richean Li.

[68] L. JUNFENG, *supra*, note 66 at 272.

[69] The Book of Shangshu is one of the five Confucian Classics for more information visit http://www.chinaknowledge.de/Literature/Classics/shangshu.html.

[70] D. KONG, *Study on the Historical Evolution of Chinese System of Voluntary Surrender*, in *Journal of Politics and Law*, Volume 2 no 2 June 2009 at 80.

[71] Ibidem.

the competent official[72]. The Tang Code provided also for some exemptions under which the lenient treatment was not granted, for instance, when the criminal had fled and once caught offered resistance, when the crime in question was rape, or when the crime had caused damages to public goods and its consequences could not be erased[73].

Ming and Qing Dynasties further developed the voluntary surrender system. For example, the Ming Li Law provided that the thief who had stolen goods and then repented and returned them to the owner without any damage, could be considered as a voluntary surrender[74].

The principle was then maintained by Koumingtang during the Nationalist period and taken on by the Communist Party of China[75]. The concept of leniency is currently included in the 1992 Constitution of the Communist Party of China where Article 39 provides that a Party member under probation shall have his rights restored if he rectifies his mistakes[76].

Rectification is indeed a sort of inner-party leniency policy. It was first developed along with Mao Zedong's leadership consolidation in 1948 as a policy to phase out divergences and non-desirable party members. The party member who did not comply with the majoritarian party line was invited to rectify his or her position in exchange for exemption from punishment. The refusal to cooperate could lead to major consequences such as purge and the use of physical violence and ultimately even to death penalty[77]. In Mao's view rectification is the main education tool in order for party members to stick to the mainstream political line of the party. Huge "Rectification campaigns" are launched every time the highest Party leaders esteem a group of party members is

[72] Ibidem at page 81 point 4.

[73] Ibidem.

[74] Ibidem at page 83 point 6.

[75] L. JUNFENG, *supra*, note 66 at 273.

[76] Article 39 of the Constitution of the Communist Party of China provides: «A Party member who during that time truly rectifies his or her mistake shall have his or her rights as a Party member restored. Party members who refuse to mend their ways shall be expelled from the Party».

[77] F.C. TEIWES, *The Origins of Rectification: Inner-Party Purges and Education before Liberation*, in *The China Quarterly* 75, 1976 at 52.

shifting off the party line or if there is a general behaviour to be counteracted and discouraged[78].

The latest rectification campaign has been launched in June 2013 by President Xi Jinping with a speech at the Party's Mass Line Education and Practice Movement Conference in Beijing. The problems the Party leadership wants to tackle are corruption of party cadres and notably the "fours forms of decadence" of formalism, bureaucratism, hedonism and extravagance whose main effect is that of separating the Party from the masses[79]. This campaign may have dramatic effects on how antitrust law is enforced, especially with respect to administrative monopolies. Loose enforcement by local officials may indeed be punished as a Party disciplinary misconduct and therefore tackle the issue of local protectionism.

We argue that rectification may also have an impact on how antitrust leniency is conceived, since this is what party officials have in their cultural and political background when they enforce competition law.

In the current People's Republic of China laws, there are still two provisions dealing with surrender leniency: Article 67 of the Criminal Law[80] and Article 19.4 of the Law of Administrative Punishments of Public Security[81].

Li Junfeng draws a very interesting comparison between the current criminal and administrative law leniency and the one set forth by the AML. The main difference is according to Li, in the purpose of the le-

[78] Ibidem at 40.

[79] Xi: Upcoming CPC campaign a "thorough cleanup" of undesirable practices publish by Xinhua online at http://news.xinhuanet.com/english/china/2013-06/18/c_132465115.htm (last accessed 25.01.2017).

[80] Article 67 of the Criminal Law provides: «Anyone who voluntarily surrenders and reports his crime faithfully after having committed a crime shall be deemed as voluntary surrender. Those criminal elements who surrender voluntarily may be given a lighter or mitigated punishment, and those of them whose crimes are relatively minor may be exempt from punishment».

[81] Article 19.4 of the Law of Administrative Punishments of Public Security «Anyone who surrenders voluntarily and makes a statement faithfully about his violation to the public security organ shall be given a mitigated punishment or may be exempt from punishment».

nient treatment: in the AML the main aim is that of rewarding the surrender in order to get complete and insider evidence of other cartel participants, criminal leniency instead has the only purpose of prosecuting the person who turns himself in[82]. Another major difference is that AML leniency combines the model of voluntary surrender and meritorious service, whereas the Chinese criminal law leniency recurs to these two models separately or sometimes jointly[83].

In Li's definition meritorious service «refers to the acts in the interest of the society, including prosecution and revelation of crimes of others, provision of clues to investigation of a case and assistance in seizing suspected offenders». In Qin Dynasty Code, though the term meritorious service was not expressly mentioned, a case is reported where a criminal was exempted from punishment on the basis he had helped discover other criminals[84].

In the Code of Tang Dynasty Article 38 exempted the minor crime perpetrator from punishment upon cooperation in seizing perpetrators of severer crimes[85]. Other more recent dynasties kept and developed the principle, which is still mainstream in the Chinese communist Party criminal policy[86].

In nowadays China, the provisions dealing with leniency for meritorious service are contained in Article 68 of the Criminal Law[87] and Article 19.5 of the Law of Administrative Punishments of Public Security[88]. In the light of these provisions, Li outlines the following differences between the AML leniency and the leniency for meritorious service. First, the antitrust leniency requires the applicant to reveal infor-

[82] L. JUNFENG, *supra*, note 66 at page 273.

[83] Ibidem.

[84] Ibidem at 274.

[85] Ibidem.

[86] Ibidem.

[87] Article 68 of the Criminal Law provides: «Where a criminal has the performance of meritorious service, including revealing the crimes of others which has proved to be true through investigation, or providing important clue to enabling other case to be solved, his punishments may be mitigated or exempted».

[88] Article 19.5 the Law of Administrative Punishments of Public Security provides: «Anyone who has performed meritorious service (…) shall be given a mitigated punishment or may be exempt from punishment».

mation concerning the other cartel members behaviour, whereas the Chinese criminal law one does not specify which kind of behaviour the applicant needs to confess, provided that it reaches the aim of seizing other offenders. Second, the antitrust leniency requires all information to be disclosed completely and truthfully, in the Chinese criminal law leniency the extent of the immunity will vary according to the degree of completeness of the revealed information[89]. Li concludes by reducing the discrepancies between leniency for meritorious service, leniency for voluntary surrender and leniency under the AML to mere technicalities[90]. Such a conclusion seems rather inaccurate, however it is indisputable that the basic principles beneath the two classical models of leniency are in some way identifiable in the new AML leniency program[91].

5. Leniency policy in the AML and implementing provisions

The legal basis for establishing a leniency program is set in Article 46 of the AML. Paragraph two provides:

> where an operator takes initiatives to report the relevant information on a monopoly agreement to the anti-monopoly enforcement agency and provides important evidence, the anti-monopoly enforcement agency may mitigate or exempt the punishments on it or him at discretion[92].

The leniency program has been developed following the model of the Administrative Punishment Law[93] at Article 27[94], which seems to

[89] L. JUNFENG, *supra*, note 66 at 274-275.

[90] Ibidem.

[91] Ibidem.

[92] Article 46 of the AML.

[93] H.S. HARRIS, P.J. WANG, Y. ZHANG, M.A. COHEN, S.J. EVRARD, *supra*, note 3 at 290.

[94] Article 27 of the Administrative Punishment Law provides: «Parties shall be given lenient or reduced administrative punishment including circumstance in which they: i) voluntarily eliminate or reduce the damaging consequences of their unlawful acts; ii) commit violations under other people's coercion or; iii) have received credit for

corroborate Li Junfeng's argument about the AML leniency being the result of the combination of leniency for voluntary surrender and leniency for meritorious service[95].

In order to fully understand Chinese antitrust leniency, it is necessary to refer to the implementing rules of NDRC and SAIC. The lack of a clear-cut criterion to establish the competence of the two agencies is especially troublesome when prosecuting cartels, since market or customer allocation cartels may trigger jurisdiction of both agencies[96].

As for leniency according to the NDRC rules, Article 14 allows for discretion on whether to grant immunity to the first firm to confess its involvement in a cartel and provide "important evidence" on the illicit agreement[97]. Paragraph 3 of the same Article provides a very generic definition of "important evidence" without mentioning if it includes specifically the behaviours of other cartel members or not[98]. The same discretion will be exercised in determining whether to grant partial immunity or not to subsequent applicants[99]. Moreover, the provisions seem not to exclude the possibility for a cartel leader to come forward and apply for leniency[100].

Concerning the kind of evidentiary support required of an applicant for leniency, the NDRC does not provide any guidance on whether the evidence must be put in writing or if oral statements are accepted as

assisting in the investigation of unlawful acts. Parties that have committed minor unlawful acts without causing damage and promptly correct their mistakes are not to receive administrative punishment».

[95] L. JUNFENG, *supra*, note 66 at 276.

[96] P.J. WANG, Y. ZHANG, S.J. EVRARD, H.S. HARRIS JR, *China's new leniency procedure in cartel investigations*, in *Jones Day Commentary*, January 2011, online at http://web.resource.amchamchina.org/article/2011/01/21/30980f815031325f227e64c7bc96bab0.pdf (last accessed 25.01.2017).

[97] Article 14.2 of the NDRC Procedural Rules provides: «Where an undertaking voluntary reports to the government price authority about the circumstances of the price monopoly agreement reached and provides important evidence, the government price authority may discretionally reduce or exempt the penalty for that undertaking».

[98] Article 14.3 of the NDRC Procedural Rules provides: «The term "important evidence" refers to the evidence which will play a key role for the government price authority to ascertain the existence of a price monopoly agreement».

[99] H.S. HARRIS, P.J. WANG, Z. COHEN, S.J. EVRARD, *supra*, note 3 at 291.

[100] P.J. WANG and others, *China's new leniency…*, *supra*, note 96 at 3.

well. Generally speaking, when firms engage in a cartel, they make sure that all the exchange of information between them is made orally and that all written traces of their agreement are destroyed in order to avoid prosecution. It is therefore very important for a leniency program that actually works to give the applicant the opportunity to provide evidence of the occurred agreement by means of oral statements. This happens under many leniency programs around the world, but apparently not in China, where practice shows that Courts and agencies privilege written evidence over oral one[101]. As far as fines are concerned, Article 14.2 of the NDRC Procedural rules suggests that only the first business operator to come clean may be granted full immunity whereas the second one and other subsequent applicants may receive only partial immunity[102].

However, there is no sign of a marker system by which an undertaking may protect its first place position[103], this means that no guarantee is given to the leniency applicant concerning the amount of fine it will be imposed on it. Other questions concerning NDRC leniency remain unanswered: is a firm that applies for leniency compelled to confess its involvement in a cartel? Is a leniency applicant bound to end its participation in the cartel? Some scholars argue that these should be prerequisites to the leniency application[104].

The above questions found a partial answer in NDRC Draft Guidelines for the application of Lenient Treatment Rules in Horizontal Monopoly Agreement Cases (hereinafter Draft Leniency Guidelines) published in February 2016.

[101] H.S. HARRIS and others, *Anti-Monopoly*, *supra*, note 3 at 292.

[102] Article 14.2 of the NDRC Procedural Rules provides: «The first undertaking which voluntarily reports about the circumstances of price monopoly agreement reached and provides important evidence may be exempted from penalty; the second undertaking which voluntarily reports about the circumstances of price monopoly agreement reached and provides important evidence may be granted an at least 50 percent reduction of penalty other undertakings which voluntarily report about the circumstances of price monopoly agreement reached and provide important evidence may be granted an at most 50 percent reduction of penalty».

[103] H.S. HARRIS and others, *Anti-Monopoly*, *supra*, note 3 at 292.

[104] Ibidem.

First of all the Draft Leniency Guidelines introduce a kind of marker system by awarding full immunity for the first firm to apply for leniency before the relevant agency initiates an investigation.

The first rank will be granted on the condition that all other required actions are obligations are fulfilled. In any case, fines will be reduced by 80%.

The actions and obligations include (i) ending all violations; (ii) reporting of any other leniency application to agencies competent in other jurisdictions; (iii) providing evidence and information to the relevant agency and cooperate with it on a continuous basis; (iv) not providing false information or concealing or destroying relevant evidence; (v) not disclosing any information without the agency's prior consent; (vi) not engaging in any conduct or action which could potentially jeopardize the investigation[105].

When more leniency applications are filed with respect to the same cartel, the antitrust authority will determine a chronological order which will be adjusted based on the fulfilment by the respective applicant of the above actions and obligations.

The second and third applicant may benefit from fine reductions ranging from 30% to 50% and up to 30% respectively.

Under Article 6 of the Draft Leniency Guidelines a cartel participant must include in its leniency application the following information related to the reported monopoly agreement: (1) main details of the participants (including name, address, contact information and details of the participants representatives, etc.); (2) details related to the contacts, communications and meetings between the participants (such as date and location); (3) details of the products or services involved (such as price and quantities); (4) the geographical scope and size of the market; (5) the duration; (6) a description of the evidence submitted.

In addition, the Draft Leniency Guidelines provide for the possibility for a leniency applicant to start pre-filing consultations with the antitrust authority also anonymously. The consultations can both end up in

[105] Article 6 of the Draft Leniency Guidelines.

a formal written application or in an oral one which will be recorded in written minutes[106].

Concerning the much advocated confidential treatment of the disclosed information, it is noteworthy that the Draft Leniency Guidelines now provide that if the applicant is denied leniency, the disclosed information cannot be used by the antitrust authority in determining the responsibility and punishment of the leniency applicant in an unlawful conduct[107].

Finally, cartel organizers and participants who forced others to participate in a cartel can only be awarded a reduction of fines but will generally not be eligible for total immunity[108].

Leniency is not the only remedy at the firms' disposal, suspension of investigation is also available. A suspension is granted by NDRC upon offering and concrete implementation of commitments to end the anticompetitive conduct[109]. It goes without saying, that when an investigation is suspended, fines are too.

Notwithstanding the uncertainties surrounding the leniency program under the NDRC rules – uncertainties that have now been addressed at least in part by the new Draft Leniency Guidelines – recent practice by the Chinese Antitrust authorities can provide useful insights for all potential leniency applicants.

In 2012, the Guangdong Price Bureau published the outcome of a cartel investigation involving sand dredging companies[110]. The sudden increase in the price of sand, impacting dramatically on the building of infrastructures, raised the State suspicion so that an investigation was initiated and carried out by the Guangdong price bureau under the su-

[106] Article 5 of the Draft Leniency Guidelines.

[107] Article 16 of the Draft Leniency Guidelines.

[108] Article 10 of the Draft Leniency Guidelines.

[109] Article 15 of NDRC Procedural Rules provides: «Application for suspension of the investigation shall be submitted in writing, with details of the following: 1) Facts concerning the suspected monopolistic conduct 2) Commitments to take concrete measures to eliminate the consequences of the suspected monopolistic conduct 3) Timing for implementing the commitments 4) Other issues necessary for commitments».

[110] News Release in Chinese available at http://www.gdpi.gov.cn/zwdt/417463.jhtml and on the NDRC price bureau website http://jjs.ndrc.gov.cn/gzdt/t20121026_510834.htm (both last accessed 30.01.2014).

pervision of the Anti-Monopoly Price Bureau of the National Development and Reform Commission[111]. Due to the difficulty in collecting evidence because of the secrecy of the cartel, the local price bureau decided to favour leniency in order to break down the cartel. It thus found out that 20 sand dredging companies where gather in the so-called "Sea Sand Association" which had the purpose of establishing the amount of an exploitation fee constituting part of the price of sea sand and therefore causing the augmentation[112]. This case is important mainly for two reasons: first, it is now clear that by "important evidence" NDRC does not mean written documents exclusively, since in this case even text messages and phone calls where accepted as valid evidence. Second, the identified cartel leader was granted a reduction in punishment. As we observed above, NDRC Procedural rules are silent in this respect, thanks to this case we may now assume that these provisions allow for this opportunity for the cartel leader. However, as we will see below, SAIC leniency rules expressly exclude such a possibility, it will be up to the antitrust authorities to clarify this point[113].

Finally, some commentators argue that such a decision has to be interpreted as a signal that transparency is increasing in the Chinese Antitrust framework, since it proves that authorities are: first, starting to understand the importance of leniency, and second willing to publish their decisions in order to give guidance to the business community[114]. We take the stand that if we agree with the first point since leniency is undoubtedly a useful tool to detect secret cartels, the second argument sounds a bit too optimistic considering the fact that if the Guangdong price bureau decided to publish its decision this time, that does not mean that other competition authorities will in the future. Furthermore, one should bear in mind that under Article 44 of the AML the competi-

[111] S. NING, K. PENG, Y. ZHANG, *Price Bureau Uncovered and Punished a Price-Fixing Cartel under the Leniency Program* October 29, 2012 available at http://www.chinalawinsight.com/2012/10/articles/corporate/antitrust-competition/price-bureau-uncovered-and-punished-a-price-fixing-cartel-under-the-leniency-program/.

[112] Ibidem.

[113] Ibidem.

[114] Ibidem.

tion agencies "may" publicize their decision, but are not bound to do so[115].

Another more recent case concerns a price-fixing cartel between souvenirs shops in Henan, the so-called Crystal souvenirs case. The Henan NDRC price bureau found that several souvenirs shops had engaged in an agreement under which they commit themselves to maintain a certain price for products and share the revenues based on their market share. One of the three defendants was granted full immunity on the basis of its cooperation and because it provided important evidence[116].

Let us now get into details about leniency under the SAIC rules. As in NDRC leniency, SAIC Rules on the Prohibition of Monopoly Agreements allow for discretion on the agency's behalf whether to grant immunity or not[117]. Commentators[118] claim that for the first undertaking to turn itself in and provide important evidence the immunity "should" be granted, according to a literal translation of Article 12[119].

We argue that due to the lack of rule of law in the Chinese legal system, "should" instead of "may" does not really make any difference in indicating the degree of discretion that an antitrust authority can exercise[120]. It is noteworthy, however, that contrary to the NDRC rules, Article 12 gives no guidance on the percentages of fines reduction for

[115] Article 44 of the AML.

[116] H. HA, J. HICKIN, P. MONAGHAN, *China*, in N. PARR, E. BURROWS (edited by), *Cartels, Enforcement, Appeals & Damages Actions*, 2013, published by Global Legal Group at 44.

[117] Article 11.1 of SAIC rules on the Prohibition of Monopoly Agreements provides: «Undertakings that report to the AIC authority a monopoly agreement and provide important evidence on their own initiative may be granted a mitigated penalty or be exempted from penalty».

[118] H.S. HARRIS and others, *Anti-Monopoly*, *supra*, note 3 at 293.

[119] Article 12 of SAIC rules on the Prohibition of Monopoly Agreements provides: «For the first undertaking that voluntary self-reports to the AIC authority the monopoly agreement, provides important evidence, and cooperates with the investigation comprehensively and voluntarily, penalty should be exempted. For other undertakings that voluntarily self-report the monopoly agreement, and provide important evidence, penalty shall be mitigated discretionally».

[120] Annex, Interview with prof. Richean Li.

subsequent applicants[121]. Nevertheless, we can infer some general criteria on how to define "important evidence" from Article 11.3 of SAIC rules like for example the parties involved, the product concerned, or the rules of implementation of the cartel[122]. Some commentators argue that although different from the definition under NDRC rules, the substance of the evidence required should be essentially the same[123]. While NDRC rules seem to allow the possibility, SAIC rules expressly prevent the cartel organizer from seeking leniency[124]. In the absence of a distinction, as it happens in the EU system, between the leader and the instigator of the cartel, it must be assumed that the notion of organizer encompasses both the two functions[125]. SAIC rules provide also for an alternative to leniency, just like NDRC rules, i.e. the possibility of a fines reduction upon offering of commitments once the investigation has started or upon ending the anticompetitive conduct[126].

To date SAIC ruled in 21 cartel cases recurring to leniency just in one case, the Yongzhou concrete cartel case in November 2015. SAIC is now expected to publish draft leniency guidelines as NDRC did[127].

We have here above analysed the Chinese leniency program, at least in the way it presents itself on paper. But studying a Chinese piece of legislation having regard to the letter of it is usually a tiresome and useless job if we neglect the context of those provisions and in general the reality of Chinese society. Therefore we went to interview Richean Li, Chinese researcher and expert of competition law at the University of International Business and Economics in Beijing, to have direct insider

[121] H.S. HARRIS and others, *Anti-Monopoly*, *supra*, note 3 at 293.

[122] Article 11.3 of SAIC rules on the Prohibition of Monopoly Agreements provides: «Important evidence refers to evidence that is sufficient to initiate an investigation or that plays a pivotal role in finding a monopoly agreement by the AIC authority, including information on the parties to the agreement, the products involved, the form and content of the agreement, and specific details of implementation of the agreement».

[123] H.S. HARRIS and others, *Anti-Monopoly*, *supra*, note 28 at 294.

[124] Article 20 of the SAIC Procedural Provisions.

[125] H.S. HARRIS and others, *Anti-Monopoly*, *supra*, note 3 at 294.

[126] P.J. WANG and others, *China's new leniency…*, *supra*, note 96 at 4.

[127] S. NENG, K. PENG, S. GAO, *Cartel leniency in China: overview* available at http://uk.practicallaw.com (last accessed 23.01.2017).

[127] Annex, Interview with prof. Richean Li.

impressions on how leniency and in general the AML is enforced in the Chinese business community[128]. Richean Li confirmed many of the main objections that scholars generally move to the Chinese leniency program.

In a global perspective, a leniency program is defined as successful if: 1) it is equipped with severe sanctions; 2) the perceived risk of detection by cartel members is high; 3) there is transparency and predictability with respect to the sanctions, exemptions and immunity[129].

If we evaluate the Chinese leniency program in the light of these international standards[130]we will spot the following shortcomings.

First, sanctions as set forth in Article 46 of the AML are not severe enough, especially if compared to those applicable in the EU. This provides less incentive for a cartel member to come forward and "betray" the others in order to avoid major penalties[131].

Second, since there is less incentive for a cartel member to report the cartel, there are fewer chances for the illicit agreement to be discovered and therefore a general lessened perception of the risk of being caught[132].

Third, a lack of general transparency and predictability, which is a typical character of the Chinese legal system, adds to the low perception of the risk for cartel members to be caught and on the other hand provides less incentive for a cartel member to seek for leniency, since no guarantee is given that immunity will be eventually granted[133].

Forth, although both SAIC and NDRC rules, and of course the AML, provide an obligation for the antitrust authorities to keep all information disclosed confidential, this is no guarantee for a leniency applicant that his trade secrets will not be revealed[134]. This results in an

[128] Annex, Interview with prof. Richean Li.

[129] International Competition Network, *Anti-Cartel Enforcement Manual* 2009 online at http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf (last visited 25.01.2017).

[130] A. EICHNER, *Battling Cartels in the New Era of Chinese Antitrust Enforcement*, in *Texas International Law Journal* Vol. 47, 2012 at 611.

[131] Ibidem.

[132] Ibidem.

[133] Ibidem at 612.

[134] Annex, Interview with prof. Richean Li.

exponential augmentation of costs for a company considering to apply for leniency and makes the leniency program less attractive. The lack of confidentiality has a considerable impact on private antitrust litigation, since information disclosed during a leniency application can be used as a ground for private civil claims[135]. We will analyse this aspect further on in this chapter.

Another shortcoming pertaining to the general structure of the Chinese legal framework is that conflicting sources of law provoke confusion and ultimately lack of enforcement. It is undisputable that the AML has been enacted with the aim of being the principal legal instrument of reference for competition, nevertheless there is no express provision that abrogates the competition corpus that was in force ante-AML[136]. These different sources envisage different antitrust agencies; the fact that the AML maintained this multi-agencies enforcement framework generates confusion for a potential leniency applicant who is not in the position to know to which authority he should submit his leniency application[137].

Finally, it should be noted that at present, cartel prosecution is not a top priority for the antitrust agencies: cartels seem just not to be an issue[138]. This is probably due to the fact that many key officials are appointed from the companies they are then supposed to prosecute, with consequential conflict of interest and a general laissez-faire attitude vis-à-vis cartels[139].

On the one hand, the fact that cartel prosecution is not a priority is generally due to the lack of culture for competition. One should not neglect that competition is a concept deeply rooted in the Western legal tradition. We consider it to be very unlikely for China to develop a conception of competition similar to the Western one, for the simple reason that it is not compatible with the Communist ideology and the Confucian tradition.

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[135] C-360/09. Pfleiderer AG. v. Bundeskartellamt.

[136] L. JUNFENG, *supra*, note 66 at 277.

[137] M. FAURE, G. XU, *Economics and Regulation in China*, Abingdon, 2013 at paragraph 6.3.4.

[138] Annex, Interview with prof. Richean Li.

[139] L. JUNFENG, *supra*, note 66 at 277.

On the other hand, some of leniency and AML shortcomings have to do with political problems such as corruption and cronyism, that are beyond competition itself[140].

In the next paragraph, we will go through solutions to leniency program shortcomings proposed by commentators, we will endeavour to assess if those solutions are feasible and likely to take place in the Chinese legal framework.

6. The future of Leniency in China. Recent developments and practice

Even if, as we have seen above, cartels do not seem to raise much concern in the Chinese public opinion at the moment, it is likely they will catch more attention as soon as they acquire an international dimension and have severe consequences on the Chinese consumers' welfare.

In the past, cartelists used to put their illicit agreement in writing but now that wrongdoers have started to be more refined and subtle, leniency will be probably the only way for the antitrust agencies to obtain direct evidence of a cartel. Leniency will therefore start to play a pivotal role with respect to cartel prosecution in the near future[141]. This prediction is, by the way, confirmed by the recent case of the Sea Sand Cartel, in which the secrecy of the agreement and the fact that no written documents were available led the Price Bureau of Guangdong to recur to leniency[142].

A precondition to leniency coming to the stage is that some of the issues mentioned above are solved. First, Li suggested an increase in public fines as a way to enhance the deterrent effect as well as the appeal of leniency[143]. This is certainly a feasible manoeuvre since it does not involve much controversy or risk of turf-battles between the several antitrust agencies.

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[140] Annex, Interview with prof. Richean Li.

[141] Annex, Interview with prof. Richean Li.

[142] N. NING, K. PENG, Y. ZHANG, *supra*, note 111.

[143] L. JUNFENG, *supra*, note 66 at 278.

Second, Eichner argues that clarifying the allocation of work between SAIC and NDRC, especially for those grey-area cartels that involve both price-related and non-price-related issues, would be more compatible than the idea of merging them with respect to Chinese anti-cartel enforcement model[144].

Furthermore, Eichner claims that China could draw a valuable lesson from the leniency program under Canadian competition law. The Canadian anti-cartel enforcement model is based on two agencies: the Competition Bureau who is charge of investigating and collecting evidence, and the Public Prosecution Service responsible for deciding whether to prosecute criminal violations of the Competition Act.

The Competition Bureau is also the agency in charge of receiving all leniency applications, according to Eichner, such mechanism would at the same time increase predictability and transparency in the Chinese system and be compatible with a multi-agencies framework[145]. Indeed, we consider such a triage duty would fall under the competencies of the authority who is in charge of coordinating antitrust enforcement between the several agencies.

Third, Eichner esteems China lawmakers should consider including "hypothetical leniency" in the Chinese leniency program following the UK model. Hypothetical leniency can be described as the possibility of filing for leniency in an anonymous way indicating a fictional scenario so that the company can be informed beforehand about the treatment it will be granted[146].

We consider such a proposal to be feasible but at the same time costly for the antitrust authority who needs to dedicate time and energy of its staff in order to respond to such hypothetical applications. In the UK, a limitation to hypothetical leniency is that the firm must have "genuine intention to confess"[147]. We have doubts on whether such a limitation would work in a rule-by-law system as China's, there is a concrete possibility such limitation would add to the uncertainty and ultimately undermine the effectiveness of hypothetical leniency.

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[144] A. EICHNER, *supra*, note 130 at 613-614.

[145] Ibidem.

[146] See A. EICHNER, *supra*, note 130 at 616.

[147] Ibidem note 221.

We esteem that another feasible reform would be adding a marker system following the EU model so that firms actually have guarantee on the fact the file for leniency first or subsequent positions. This would be a major step in ensuring the predictability of the granting of immunity or lenient treatment. The NDRC Draft Leniency Guidelines appear to be in line with the above suggestions. More information will be available when the Draft Leniency Guidelines will be adopted.

In the meantime there are recent leniency cases that are indeed worth mentioning and that can shed some light on the recent trends adopted by the Chinese antitrust authorities.

Leniency was applied in August 2014 to Japanese car parts manufacturers who participated in a price-fixing cartel. More specifically Hitachi and Nachi were exempted from the fines for being the first companies to come forward and provide important information on the monopoly agreement. The cartel participants that came forward after Hitachi and Nachi were fined from 4 up to 8% of their 2013 revenue[148].

In 2014 NDRC started an investigation based on a leniency application on an international cartel involving eight cargo ocean carriers. The NDRC investigation followed that of foreign antitrust authorities of jurisdictions such as Japan, U.S.A., Canada and South Korea. The investigation concluded on 28 December 2015 with the granting of full immunity to the first company to come forward Japanese carrier Nippon Yusen Kabushiki Kaisha (NYK Line). The other companies were fined for a total amount of RMB 407 million accounting for four to nine percent of the revenue generated in China in 2014[149].

As a final remark, some commentators predict that Chinese leniency will be favoured also by external pressure. Firms will be encouraged to apply for leniency in China every time they are involved in an international cartel and they are afraid that information disclosed in a leniency application to another foreign authority may be used as ground to start proceedings in China[150]. Indeed, the above mentioned cargo ocean carriers case demonstrates that Chinese antitrust authorities are today more

[148] News paper article at: http://www.chinadaily.com.cn/business/motoring/2014-08/20/content_18454397.htm.

[149] M. HAN, D. BOYLE, *supra*, note 44.

[150] P.J. WANG and others, *China's new leniency…*, *supra*, note 96 at 5.

eager to prosecute international cartels which were already subject to investigations by other foreign antitrust authorities than before. In addition, it is noteworthy that the Chinese antitrust authorities are eager to cooperate with other foreign antitrust authorities therefore bringing a Chinese contribution to competition enforcement worldwide[151].

7. Private and public antitrust enforcement: the tricky relation between leniency and civil litigation

When exploring the tricky relation between leniency and private litigation, the first issue that needs to be addressed is confidentiality.

Under Chinese competition law, the obligation for antitrust authorities to keep revealed business information confidential is enshrined in several provisions. Article 41 of the AML, Article 12 of the SAIC procedural rules and Article 9 of the NDRC procedural rules expressly state that the antitrust authority and its staff «shall keep all the business secrets obtained in the course of enforcement confidential»[152].

Two problems emerge with regard to confidentiality: first, it is not clear if evidence disclosed during a leniency application may be included in the notion of "business secrets" and thus not be used as evidence in a follow-on civil claim[153]. Second, notwithstanding the provisions, as stated above, there is no guarantee that powerful antitrust authorities will abide to the obligation of confidentiality[154]. Moreover, the Supreme People's Court new judicial interpretation concerning antitrust private litigation does not clarify the relations between leniency and antitrust litigation, although Article 11 seems to suggest that sensitive information may lead to application of protective measures, at the

[151] M. HAN, D. BOYLE, *supra*, note 44.

[152] Article 41 of the AML, Article 12 of the SAIC Procedural Rules and Article 9 of the NDRC Procedural Rules.

[153] H. ZHAN *Evidence Rules in Private Antitrust Litigation in China*, in *Competition Policy International* (2012) online at: https://www.competitionpolicyinternational.com/assets/Free/cpiasiazhan.pdf.

[154] Annex, Interview with prof. Richean Li.

Court's discretion of course[155]. Some authors argue that the leniency applicant should have the right to withhold sensitive evidence during a follow-on civil claim under the AML[156].

It is also noteworthy that the AML and its implementing rules represent, at least on paper, an exception compared to the general rules set forth in the SPC judicial interpretation on evidence in civil proceedings[157]. According to Article 17, trade secrets are not privilege and may be object of a discovery order by a People's Court[158]. Thus, the explicit diverging provisions concerning business secrets may reveal the intention by the Chinese legislator to grant leniency applicants more protection in case of civil claims brought against them.

In addition, not even information exchange between a leniency applicant and his attorney are covered by attorney-client privilege. Although the PRC Law of Attorneys and the Code of Ethics for Attorneys provide that lawyers shall not disclose any trade secret-related information, this obligation does not prevent government agencies and courts to have access to that information[159].

Such breakthroughs may make a Western observer shiver, but indeed the question of confidentiality and right of access is related to the general Chinese conception of individual rights and the broader relation between individual and community. According to the Confucian tradition, individual rights are incompatible with the man being a social be-

[155] H. ZHAN, *supra*, note 153.

[156] Ding LIANG China chapter-Competition Litigation in the International Comparative Legal Guide to: Competition Litigation 2014 6th edition online at: http://www.dittmar.fi/sites/default/files/publications/2013_09_ICLG_Competition_Litigation_2014.pdf.

[157] H. ZHAN, *supra*, note 153.

[158] Article 17 of the Provisions of the Supreme People's Court on Evidence in Civil Proceedings reads: «If any of the following conditions is met, a party concerned and his agent ad litem may apply for the investigation and collection of evidence by the people's court: (1) The evidence under the investigation and collection application is documentary materials that are kept by relevant State instrumentalities and need to be obtained by the people's court ex officio;

(2) Materials involving a State secret, a trade secret or individual privacy;

(3) Other materials that a party concerned and his agent ad litem are unable to collect by themselves due to objective reasons».

[159] H.S. HARRIS and others, *supra*, note 3 at 296.

ing. In other words the fact of belonging to a community immediately puts the interests of such a community ahead of those of the individual[160].

Confidentiality is not the only issue when it comes to the complicated relation between leniency and follow-on civil claims.

Indeed, the threat of damages resulting from civil claims may act as a deterrent for a potential leniency applicant to come clean since they would eventually replace the fines that the leniency applicant has sought to avoid by applying for leniency in the first place[161].

However, several commentators argue that this is, on a close observation, not true, since the perspective of the cartel being discovered and thus the obligation to pay damages in combination with public fines, should still constitute a valid deterrent from the setting up of a cartel in the first place and an incentive to file for leniency[162].

Authors[163] base their argument notably on the 2007 International Competition Network (ICN) report which reads[164]:

> As the predominant experiences of the [*national authorities*] show, leniency applicants will decide to make their application in the knowledge that the risk of fines and/or criminal sanctions can be reduced or eliminated, whilst the risk of a damage claim will in any event exist. The applicant knows, in a cartel case, that there is always the possibility that another cartel member will make the application for leniency, leaving the other cartel members exposed both to the risk of public penalties as well as compensation of damages without benefit. Hence, several [authorities] also referred to the race between cartel members as an incentive to seek a leniency application.

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[160] H. ROSEMONT JR, *Why Takes Rights Seriously? A Confucian Critique*, in *Leroy Rounner*, Notre Dame, 1988 at 167.

[161] E.M. IACOBUCCI, *Cartel class actions and immunity programmes*, in *Journal of Antitrust Enforcement*, Vol. 1, no 2, 2013 at 274.

[162] E.M. IACOBUCCI, *supra*, note 161; W.P.J. WILS, *The Relationship between Public Antitrust Enforcement and Private Actions for Damages*, in *World Competition*, Volume 32, no 1, March 2009 at 20.

[163] E.M. IACOBUCCI, *supra*, note 161 at 276.

[164] International Competition Network: Cartels Working Group, Interaction of Public and Private Enforcement in Cartel Cases Report to the ICN Annual Conference (Moscow, May 2007) available at http://www.internationalcompetitionnetwork.org/uploads/library/doc349.pdf (last accessed 08.02.2017).

In the European Union a huge debate has followed the famous landmark case Pfleiderer AG v. Bundeskartellamt[165]. The facts of the case consist of an enterprise request for access to documents disclosed during a leniency application in order to issue a civil claim being denied by the German competition authority. The European Court of Justice, consulted on the matter, ruled that the EU law did not per se provide any obstacle to the access to documents related to a leniency procedure for third parties who suffered damages due to a cartel. Advocate General Mazák in his opinion drew a distinction between pre-existing documents and self-incriminating evidence with only the latter being at risk of decreasing the attractiveness of a leniency program[166].

According to the ECJ however it was up to the National Courts to determine whether to grant access to such documents after a balancing test of the public and private interests[167].

A recent interesting development in this debate can be found in the EU Commission Directive Antitrust Damages Actions (the Directive) was signed into law on 26 November 2014 and which was to be implemented by the Member States by 27 December 2016. More specifically, Article 6 provides that National Courts are not supposed to issue disclosure orders directed to leniency statements[168]; if by any chance such information is disclosed by a competition authority it will be inadmissible in a civil action[169]. Moreover the same Directive provides shelter for

[165] C-360/09 Pfleiderer AG v. Bunderskartellamt.

[166] P. CASSINIS, *supra*, note 1 at 400.

[167] See *Pleiderer* case point 33.

[168] Article 6 of the Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union reads: «Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence: (a) leniency corporate statements».

[169] Article 7 of the Directive reads: Member States shall ensure that evidence falling into one of the categories listed in Article 6(1) which is obtained by a natural or legal person solely through access to the file of a competition authority in exercise of his rights of defence under Article 27 of Regulation no 1/2003 or corresponding provisions of national law is not admissible in actions for damages.

leniency applicants when it comes to compensate damages to third injured parties[170].

There is no trace of such a debate taking place in China at the time of writing, even though a discussion is likely to take place following the issue of the Draft Leniency Guidelines.

The NDRC Draft Leniency Guidelines have been warmly welcomed by scholars and practitioners as providing much needed clarity not only, as mentioned, with respect to the procedure to be followed when applying for leniency but also with respect to the confidential treatment of the disclosed information.

Indeed, Article 16 of the Draft Leniency Guidelines provides that the information will not be disclosed by the relevant antitrust authority without the applicant's prior consent nor will they be produces as evidence in a civil litigation proceeding, except as otherwise provided by the law.

However, even though the Draft Leniency Guidelines will likely provide, if adopted, much more clarity on the leniency application procedure and tackle the confidentiality issue in a way which appears to favour leniency programs over antitrust civil litigation (along the lines of the EU Directive on Antitrust Damages Actions) we will need to wait for their concrete implementation by the Chinese authorities to make a more thorough assessment.

In the meantime, the following considerations can be made.

First, in the absence of any individual right of access to documents it is to be expected that Courts will always exercise their discretion on whether to disclose sensitive information released in a leniency application. The same of course applies to antitrust authorities in possession of sensitive documents[171].

[170] Article 11.2 of the Directive provides: "Member States shall ensure that an undertaking which has been granted immunity from fines by a competition authority under a leniency programme shall be liable to injured parties other than its direct or indirect purchasers or providers only when such injured parties show that they are unable to obtain full compensation from the other undertakings that were involved in the same infringement of competition law".

[171] Annex, Interview with prof. Richean Li.

Second, it is typical of the Chinese legal system to leave uncertainty on whether sanctions will be applied and in what amount, and this character may provide an incentive for abiding to the AML voluntarily.

Third, since under the AML fines are relatively low compared to other jurisdictions[172], the threat of being sentenced to compensate damages to private claimants in addition to public penalties may concur to deter cartels conducts; especially if the degree of discretion is so high, both on the public authorities and the courts sides with respect to the amount of penalties and damages. Moreover, even if we take the stand that encouraging private litigation can undermine leniency, a solution some commentators put forward is that of increasing public fines in order to increase the attractiveness of leniency[173].

Fourth, as we said before, it is very likely that leniency will develop with respect to international cartels able to have dramatic impact on the Chinese economy, rather than with respect to internal market cartels who are yet not perceived as an illegal conduct per se[174].

Finally, if we think of Chinese leniency policy and antitrust litigation in terms of rule of law, we cannot help but draw the conclusion of its being inadequate compared to other competition regimes around the world. However, not being a rule of law system does not guarantee China will not be able to build an effective leniency program, as being a rule of law system does not.

8. Conclusions

Since the enactment of the AML, China has rapidly equipped itself with the necessary tools to counteract cartels both in the Chinese market as well as internationally.

More specifically, Chinese antitrust authorities have been quite active in cartel prosecution and punishment in the latest years.

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[172] A. EICHNER, *supra*, note 130 at 604.

[173] W.P.J. WILLS, *supra*, note 162 at 30.

[174] Z. LI, *Taking a Close Look at the Supreme People's Court's Guidance for Private Antitrust Litigation*, in A. EMCH, D. STALLIBRASS (edited by), *The Anti-Monopoly Law: the first five years*, Alphen Aan Den Rijn, 2013 at 297.

On the other hand consumers have been unexpectedly eager to recur to Article 50 of the AML entitling them to claim for damages resulting from anticompetitive conducts, although the Chinese Courts have been quite prudent in awarding said damages as a recent case before the High Court of Beijing shows[175].

The consumers' eagerness to bring follow-on claims calls into question the need to solve the tricky relation between the leniency program and private antitrust enforcement in an effective way.

The Chinese legislator appears to have solved the issue – by issuing the NDRC Draft Leniency Guidelines – in a way similar to the European Union antitrust regime i.e. by prohibiting the information provided to the antitrust authorities when applying for leniency from being admitted as evidence in follow-on claims.

Only time will confirm whether the NDRC Draft Leniency Guidelines will be adopted and whether they will be loosely enforced or not.

We do not expect Chinese law – and more specifically antitrust law – to develop into a rule-of-law system, for the reasons explained above. However the NDRC Draft Leniency Guidelines, if adopted, will at least provide much welcome clarity to all cartel participants on the procedure to be followed when applying for leniency. In addition, Chinese antitrust authorities seem now more eager to publish their decisions so that cartel participants can now know what to expect as a result of their cooperation.

The NDRC Draft Leniency Guidelines cannot but benefit the entire Chinese antitrust system and in general the Chinese economy with all the actors involved including foreign companies operating in China. The extent of said benefit will however be determined by the Chinese

[175] In August 2016 the Beijing High People's Court upholding the first instance decision of the Beijing Intellectual Property Court rejected a follow-on private claim brought against Abbot Laboratories Trading and Beijing Carrefour Commercial for lack of adequate evidence of a vertical anticompetitive agreement. The judgment proves that the Courts place a high burden of the proof on plaintiffs in follow-on claims. The Court's decision is available online in Chinese at http://wenshu.court.gov.cn/content/content?DocID=7ad234f9-cfdc-453a-ae0a-a8f22dc22004&KeyWord=%E9%9B%85%E5%9F%B9 (last accessed 23.01.2017).

authorities' political willingness to enforce the NDRC Leniency Guidelines and on how they will be enforced.

ANNEX
Interview with prof. Richean Li[176], University of International Business and Economics-Competition law center, Beijing[177]

Question 1

Leniency is not a notion unknown to the traditional Chinese legal culture: the concept of leniency for voluntary surrender dates back to the West Zhou dynasty whilst that of leniency for meritorious service can be found in the Qin Code and Tang Code. Would you say this tradition has an impact on the modern concept of leniency set forth in the AML? Do you think it can still exercise its influence in the future of antitrust leniency policy?

First of all, I can see your point, but I do not really think that the concept of leniency goes back to Ancient China I think it is quite the contrary, i.e. before the AML nobody in China had any idea of what leniency was. The only leniency we had before can be found in Chinese criminal law as a deal given upon self-incrimination, but that is actually a disregard of the principle of due process. Leniency is completely a new institute that has been transplanted from US and the EU. I do not really think the Chinese authorities are very familiar with leniency, the

[176] Richean Zhiyan Li is an adjunct researcher at the Beijing-based Competition Law Center, University of International Business & Economics. He researches and writes on China's antimonopoly law, and dedicates to helping China's integration into the international competition community. His publications in English include:

- Co-author with Peter Kochenberger and Pierpaolo Marano, Conflict of Interest of Insurance Brokers: Recent Developments in US and China and Prospects for the Regulation in the European Union, Bruylant/Ant.N. Sakkoulas (jointly), June 2010
- Unraveling the Jurisdictional Riddle of China's Antitrust Regime, CPI Antitrust Chronicle, February 2011 (2)
- A Practical Guide to Investing in Corporate China, Rivista di diritto societario interno, internazionale comunitario e comparato, Vol. 2/2010, November 2010
- China's Emerging Cartel Law, Criminal Practice and Procedure Committee Newsletter, December 2008, American Bar Association Section of Antitrust Law
- Co-author, China Comes Long Way in Short Time with Transformation to Open Market, Insurance Day, U.K., February 14, 2001.

[177] This interview was conducted on 19 October 2013. Please note that this interview might not fully reflect the interviewee's current opinions.

way they apply leniency is very unclear. In the Infant formula case, they spotted 9 wrongdoers out of which 6 or 7 wrongdoers were punished and 3 or 4 got away with it, but the authorities did not explain what they did in exchange for forgiveness and they also didn't explain to other firm how to do to get the same reduction so it was quite arbitrary.

Question 2

Scholars and practitioners are very concerned with the absence of rule of law and clear rules on how to approach an authority for a leniency application. Do you share the same concern?

Well, yes but fortunately the courts are doing a much better job than antitrust agencies. Chinese courts tend to write long opinions, they already published three decisions so far but only two were in favour of the plaintiff, normally the plaintiff loses in antitrust litigation.

Interviewer: do you think this better job performed by the Courts has something to do with the recent judicial interpretation issued by the Supreme Court on how to handle cases of horizontal agreements?

LI: Yes, but the shifting of the burden of the proof did not have major consequences on the lack of antitrust enforcement since the judicial interpretation is not applicable to the agencies. The basic reason is the absence of rule of law and lack of transparency. In the agencies' intention business have to subdue to their investigation and either plead guilty or confess. No details are given on what to expect. Merger filing instead is much clearer.

Question 3

Uncertainty over each different antitrust agency's scope of jurisdiction can be a problem: what do you think about the suggested idea of merging them into one authority?

The three agencies are all very powerful in China and none of them wants to lose its power. So I do not expect them to merge in the future.

Question 4

Is there a political debate going on about leniency policy? What are the Chinese government main priorities in antitrust?

No, I do not think so because cartels have not attracted much attention so far. Politicians do not spot yet the value of a leniency program. If you look at the Chinese market you will see it is full of cartels. Cartels are still not perceived as a big issue but in 4-5 years it probably will be. As for international cartels, other remedies will be put in place like exchanging information and punishing the Chinese members of the cartel.

China signed memoranda with other foreign antitrust agencies but they are bound to remain just on paper.

Question 5

In Chinese Antitrust laws there are no provisions on confidentiality related to the disclosure of sensitive information during a leniency application. Does this mean they could be used in private antitrust litigation in order to support claims? Would this endanger the leniency program itself?

The agencies tend not to disclose sensitive commercial information. First of all, because confidentiality is not an issue in China.

Take the example of a patent application. The patent office has to keep the information disclosed confidential but by paying a discreet sum of money a firm can always obtain those information.

There is really no way to guarantee confidentiality. Even if in the law it is written that agencies have to ensure confidentiality, that is not what necessarily happens in reality. This issue, however, is related to other problems that are beyond competition and pertain more to the political sphere.

Even if a court ruled that information is to be kept confidential I do not think the agencies would really comply with the judgment.

I think confidentiality will be a great problem especially in international cartel investigations. It will be a big problem for foreign companies if they apply for leniency in China and information leak.

Question 6

Are state-owned enterprises an issue in cartel prosecution?

Many state companies are involved in cartels. In this case agencies would tend not to take action against those.

Question 7

What is the future of Chinese Leniency program? Do you think it will pursue more the EU or the US model? Some scholars argue Chinese leniency needs public law liabilities for natural persons and an increase in fines, what is your view about these proposals?

It is difficult to predict. I would say leniency will become very important. Few years ago people used to have written agreements for cartels, now not anymore because they have become subtler so leniency will be the only way to detect cartels.

The problem is that agencies are not articulating the leniency program well and as a company you will think twice before applying for leniency to the Chinese authorities because you never know what will happen. Leniency will be more important but the results will be uncertain.

Question 8

The recent judgment of the Shanghai court of Appeal in Rainbow v. Johnson & Johnson seems to have attained the rank of landmark case in antitrust private litigation.

The court elaborated four factors to assess if a retail price maintenance restricts or eliminates competition, but in the same case the NDRC seems to have conducted only a simple quantitative test regardless of the four factors.

How would you comment on this? Will the NDRC adjust to the ratio of Rainbow v J&J?

The NDRC does not esteem that many tests are needed since catching the wrongdoers is enough. As I said before agencies are not bound to follow court rulings.

COMPANY AND FOREIGN INVESTMENT LAWS WITH CHINESE CHARACTERISTICS

AN EXAMPLE ON HOW TO MIX MARKET RULES AND SOCIALIST PRINCIPLES

Vittorio Tortorici

SUMMARY: *1. Introduction. 2. Company and foreign investment laws with socialist characteristics. 3. Empirical research on Chinese outbound M&As: results and findings.*

1. Introduction

This chapter sketches some of the legal tools that have been used in China to ensure that the development of company and foreign investment laws was consistent with the socialist foundations of the Chinese legal system[1]. The underlying assumption is that in the process of gradually opening-up and transitioning to a market economy the Chinese lawmakers have created a business legal framework wherein a series of policy checks and approvals by national or local administrative authori-

[1] There is a growing body of scientific literature on the influence of political and ideological determinants on Chinese company law. Among others see further C. HAWES, *Interpreting the PRC Company Law through the Lens of Chinese Political and Corporate Culture*, in *The University of New South Wales Law Journal*, vol. 13, no. 2, 2007, p. 36-42; N.C. HOWSON, V. KHANNA, *The Development of Modern Corporate Governance in China and India*, in *Law & Economics Working Papers*, Paper 22, 2010, p. 560; R. TOMASIC, *Company law implementation in the PRC: the rule of law in the shadow of the state*, in *Journal of Corporate Law Studies*, vol. 15, no. 2, 2015, p. 285-309; J. WANG, *Corporate governance in China*, in R. TOMASIC (ed.), *Routledge Handbook of Corporate Law*, Abingdon, 2016, p. 183-211.

ties guarantee the coherence of public and private companies' choices with the socialist value system of the People's Republic of China[2].

Specifically, among foreign investment laws, the review and approval process of outbound mergers and acquisitions (hereinafter "M&A") by Chinese administrative authorities will be used as an example to evidence how areas of law that in Western countries are usually "related to private economy and market institutions, in China are bordering what, in a socialist approach, can still be considered an administrative matter, or a matter having some kind of public relevance"[3].

This chapter does not envisage being a definitive guide to Chinese M&A laws but to fill a gap in the current scientific literature by stressing the uniqueness of the administrative procedure of review and approval as a form of policy check to regulate and guide outbound Chinese M&As. In fact, despite the abundance of materials on Chinese cross-border M&A legislation, most of the literature on this topic is

[2] This assumption draws inspiration from the "policy checks" theory as described in I. CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Trento, 2012, p. 102, wherein: "These controls are scattered all over the legal framework of the socialist market. They are sort of 'policy checks', enabling the public regulators to intervene at the micro-level, on individual economic actors and/or operations… Good examples of this are given by the licensing process, which allows the government to decide whether a given private subject may have access to the market or not; or by the need of specific administrative authorizations to engage in specific activities or for specific transactions or economic projects; or by other types of occasional or regular controls and reviews of private activities, associated with administrative sanctions of variable gravity". On this point see further I. CASTELLUCCI, *Reflections on the legal features of the socialist market economy in China*, in *Frontiers of Law in China*, 2011.

[3] I. CASTELLUCCI, *Rule of Law with Chinese Characteristics*, in *Annual Survey of International & Comparative Law*, Vol. 13: Iss. 1, Article 4, p. 54. It shall be underlined that in China both inward and outward investments are subject to an administrative procedure of review and approval carried out by a number of different authorities. However, this chapter focuses only on the procedure applied to acquisitions of Chinese companies abroad (hereinafter referred to as outbound or outward M&As) mainly for the following reason: while there are numerous countries that have implemented a form of administrative review and approval of foreign inward investments, only China has in force a form of control over investments made by local companies out of its borders; such uniqueness is exemplary in showing how the Chinese legal system still differs largely from current Western models.

aimed at giving a practical description of such regulations without contextualizing them within the overall socialist legal framework. Conversely, this research tries to look at this topic from another point of view and highlight the legal infrastructure that allow to harmonize private interest with the interests of the Chinese Communist Party and of the socialist state[4].

The chapter proceeds as follows. Part 2 briefly reviews the main socialist features of Chinese company and foreign investment laws, specifically ones applied to outbound M&As; Part 3 presents the results of a qualitative survey that was carried out in 2014 with 15 different practitioners in the Chinese cross-border M&A space to prove the above mentioned assumptions and offers some conclusions.

2. Company and foreign investment laws with socialist characteristics

As mentioned above, Chinese company and foreign investment laws clearly exemplify how market mechanisms and political macro-control may be complementarily used to ensure the coherence of private choices with a "socialist market system"[5].

[4] It should not be overlooked that, since China is a one-party state, "the Party is the state, and vice versa" and, accordingly, it makes no sense to separate the interests of the Chinese Communist Party from the Chinese national interests; see J. WANG, *Corporate governance in China*, cit., p. 187.

[5] In March 2010, during the Third Session of the eleventh National People's Congress, former Premier Wen Jiabao provided an exemplary definition of a socialist market economy as the economic system that make use of both "market mechanisms and macro-control", which means that "at the same time as we keep our reforms oriented toward a market economy, let market forces play their basic role in allocating resources, and stimulate the market's vitality, we must make best use of the socialist system's advantages, which enable us to make decisions efficiently, organize effectively, and concentrate resources to accomplish large undertakings". As highlighted by Naughton, the above definition shall be read taking into account that the notion of macro-control in China is different from the one used in the Western countries: while the latter generally refers to setting interest rates, governing the money supply, and setting other macroeconomic parameters, conversely in China is intended as a defining attribute of "the centralized, hierarchical system of administrative control that the Communist Party

The current Company Law of the People's Republic of China was adopted at the 18th Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on 27 October 2005 and entered into force on 1 January 2006 (hereinafter referred to as the "Company Law")[6]. As of today, this law is the main legislative text for any typology of Chinese corporation and regulates the organization and behaviour of companies, the protection of shareholders and creditors' rights and the promotion and development of a market based economy with socialist tracts[7].

The Company Law regulates two types of corporations: the limited liability company (hereinafter "LLC") and the joint stock limited company (hereinafter "JSLC")[8]. Also, in the Company Law there are spe-

operates in China"; see further B. NAUGHTON, *Reading the NPC: Post-Crisis Economic Dilemmas of the Chinese Leadership*, in *China Leadership Monitor*, No. 32, p. 4.

[6] Among the main subsequent amendments to the Company Law shall be mentioned the one occurred on 28 December 2013 with the Amendment to the Company Law of People's Republic of China, which later entered into effect on March 1 2014. In particular, in order to reduce administrative burdens and simplifying the registration process for companies in China, the amendments modified three significant aspects: (i) removal of the minimum registration capital requirements for any company establishment; (ii) replacement of the paid-up capital registration system with a subscribed capital registration system; and (iii) removal of the requirement to pay in cash at least the 30 per cent of the registered capital contribution.

[7] For more practical information on Chinese company law and corporate governance matters see, among others: M. GU, *Understanding Chinese Company Law*, Hong Kong, 2017; C. LIU, *Chinese Company and Securities Law*, The Hague, 2016; G. PISACANE, *Corporate Governance in China: The Structure and Management of Foreign-Invested Enterprises Under Chinese Law*, Springer, 2017; J. WANG, *op. cit.*; S. WEI, *Corporate Law in China: Structure, Governance and Regulation*, Hong Kong, 2015.

[8] The rules governing these two kinds of corporations are equivalent to the rules on limited liability companies and on companies limited by shares that are commonly found in other jurisdictions (e.g. the German GmbH and the AG). In particular, the Chinese LLC is akin to the concept of the privately/closely held company (i.e. fewer shareholders, interests not tradable to the general public on a stock exchange and a board made up of the direct representatives of the shareholders) whether the joint stock limited company is similar to what in Western jurisdictions is recognised as an equity or joint stock company (i.e. liquid interests and clear distinction between management and ownership). It is worth mentioning that the distinction between the Chinese LLC and JSLC closely resembles the one occurring in Italian company law between the

cial provisions for limited liability companies with a sole shareholder, wholly state-owned companies and listed companies[9]. Furthermore, even if not directly regulated by the Company Law, the latter is also the point of reference for all companies participated by one or more foreign equity investors (better known as foreign invested enterprises or FIEs)[10]. The relationship between the Company Law and the laws on FIE is in terms of *lex generalis – lex specialis*: the FIEs are governed by special laws but, whenever the special law is silent on a specific issue, the provisions contained in the Company Law shall apply. Therefore, since most of the special laws on foreign corporate vehicles do not deal with topics like corporate governance, substantially the two basic structures designed by the Company Law form the basis for all Chinese FIEs.

From a general perspective, the main features of Chinese companies do not differ from what are generally considered to be the typical attributes of a corporation. According to Kraakman and Hansmann, most of the companies globally share five characteristics: (i) legal personality separate from its owners; (ii) limited liability regime for owners and

S.r.l. and the S.p.A. (for example, as for the Italian S.r.l., the capital of the LLC is not represented by shares but by quotas that are nominal and cannot be traded on the open market).

[9] Chinese listed companies are also subject to the Securities Law of the People's Republic of China (adopted on and effective as of December 29, 1998) and to the Code of Corporate Governance for Listed Companies in China (issued by the China Securities Regulatory Commission and by the State Economic and Trade Commission on January 7, 2001). Furthermore, it is mandatory for the listed companies in China to comply with the listing rules promulgated by Shanghai Stock Exchange or by Shenzhen Stock Exchange, depending on their venues of listing.

[10] As of today, the three main types of foreign invested enterprises are the Sino foreign equity joint venture enterprise, the Sino-foreign cooperative joint venture enterprise and wholly foreign-owned enterprise. The aforementioned special legislations for FIEs are the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, the Law of the People's Republic of China on Sino-foreign Cooperative Enterprises and the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises. In the business practice it is also often mentioned the foreign invested commercial enterprise (so called FICE), which is only a type of wholly foreign-owned enterprise or joint venture that is authorized to engage in wholesale and/or retail trade.

managers; (iii) shared ownership by investors of capital; (iv) delegated management under a board structure; and (v) transferable shares. These features are usually recurrent in most of the company laws across the world and have been originated by a mixture of historical and economic reasons. With respect to the abovementioned characteristics, the Chinese company law is not an exception and has embraced the general principles behind most of the company laws around the world. For instance, Article 3 of the Company Law accepts the idea of separate legal personality by stating that:

> Companies shall be enterprise legal persons and shall have independent corporate property and enjoy corporate property rights. Companies shall be liable for its debts to the extent of all their assets. Shareholders of a limited liability company shall be liable to the company to the extent of the capital contributions they have made, and shareholders of a company limited by shares shall be liable to the company to the extent of the shares they have subscribed for.

However, such similarities shall not misguide the reader. In fact, even if there is a significant convergence with other jurisdictions, the Chinese model of company law presents some peculiar characteristics due to the transplant of commercial law institutions from different legal traditions in the framework of a socialist country. For example, with regard to the rules on corporate governance, at first glance China's system seems aligned with one of the two models globally dominant: the "two-tier structure" adopted by civil law countries as Germany or Japan[11]. According to this model, the corporation is structured with a dual board: the board of directors along with a supervisory board. Generally, their powers are divided as follows: the board of directors runs the normal operations while the board of supervisors appoint the directors,

[11] A. GODWIN, *The Internal Logic behind the Evolution of Company Law in China – Do Legal Origins Matter?*, in *Australian Journal of Asian Law*, Vol. 14, No. 2, Article 5, 2013, p. 13: "It is clear that China was heavily influenced by the civil law experience in countries such as Germany when it adopted the dual board structure, with a board of directors and a supervisory board". As well known, the other model is the so-called one-tier structure typical of Anglo-American legal systems. According to this model the only corporate body is the board of directors, which is normally dominated by non-executive directors elected by shareholders.

determine their compensation, oversee their activities and review the company's major business decisions. Formally, China has embraced the two-tier model and, therefore, in addition to the shareholders' meeting, companies are internally structured into two main bodies: the board of directors and the supervisory board. However, there are important differences between the traditional two-tier structure and its Chinese version. First of all, the role of the shareholders in China stands out in comparison with the classic two-tier system to an extent that some authors talk of "shareholder primacy"[12]. Throughout the whole Company Law, there are several provisions that highlight the preeminent role of the shareholders over the other stakeholders in the governance of the company. Firstly there is the formal recognition of the shareholder's meeting as the company's main organ of power, clearly uphold in Article 36 and 98 of the Company Law[13]. In line with this, among the powers of the shareholders' meeting the Chinese legislator has not only included the acts of disposition but also some important acts of management[14]: shareholders not only supervise and control directors and supervisors' activities but have also the power to directly decide about the

[12] According to Wang the general shareholders' meeting is called the "power organ" (*quanli jigou*) of the company, indicating that the shareholders in China are more powerful than their counterparts in some other jurisdictions, see J. WANG, *Corporate governance in China*, cit., p. 188. For more information on the importance of shareholders in the Chinese corporate governance system see also D.C. CLARKE, *Law without Order in Chinese Corporate Governance Institutions*, in *Northwestern Journal of International Law & Business*, Vol. 30, 2010, p. 131-199; C.X. WENG, *Inside or Outside the Corporate Law Box? Shareholder Primacy and Corporate Social Responsibility in China*, in *European Business Organization Law Review*, Volume 18, Issue 1, 2017, p. 155-191.

[13] See Article 36 of the Company Law: "The shareholders' meeting of a limited liability company shall be composed of all the shareholders. The shareholders' meeting shall be the organ of authority of the company and shall exercise its functions and powers according to this Law". See Article 98 of the Company Law: "A shareholders' general meeting of a company limited by shares shall consist of all the shareholders of the company, shall be the organ of authority of the company and shall exercise its functions and powers according to this Law".

[14] See Article 38 of the Company Law.

business policy and investment plans of the company[15]. Conversely, in the classic two-tier board structure these two functions are respectively reserved to the board of supervisors and/or to the board of directors. The formal recognition of the shareholders' power to control and supervise the directors' activities is a bold evidence of the influence that owners might exert on the life of the company. Furthermore, according to Article 33 and Article 97, the shareholders have the right to examine the company's bylaws, the minutes of meetings of the board of directors, the resolutions passed at meetings of the board of directors and the board of supervisors and the financial and accounting reports of the company as well as to make suggestions or inquiries about the business operations of the company[16]. In sum, even though formally in China the board of directors is the main executive organ of a company and the ultimate responsible for the management of its operations, the shareholders exert a pivotal role on the fundamental choices of the corporation, which might originate from the fact that in the Chinese context the majority shareholder is usually the state[17].

Another noteworthy difference with the traditional two-tier board structure is the composition and role of the supervisory board[18]. As mentioned above, in a classic two-tier board system the board of directors performs the general management decisions while the supervisory board oversees the directors and intervenes for the approval of major business decisions. Similarly, the Chinese Company Law states that the supervisory board shall monitor the board of directors and the senior management and calls up a temporary shareholders' meeting whenever the board of directors fails to do so[19]. However, despite these similarities, in practice there are major differences with the reference model in terms of the real extent of the supervisors' power[20]. In China, in con-

[15] I. DEMURO, *I rapporti tra assemblea e amministratori nella gestione delle società*, cit., p. 106.

[16] See Article 33 and 97 of the Company Law.

[17] J. WANG, *Corporate governance in China*, cit., p. 197.

[18] See Articles 53, 54, 117 and 118 of the Company Law.

[19] See Article 54 of the Company Law.

[20] Y. KANG, L. SHI, E.D. BROWN, *Chinese corporate governance: history and institutional framework*, Santa Monica (California), 2008, p. 13.

trast with the traditional two-tier structure, shareholders appoint the components of both two boards; therefore, being that Chinese supervisors do not have the power to select or, if necessary, dismiss the directors or the key executives, the question arises whether the supervisory board has enough power to efficiently control the actions of the board of directors. This doubt is further reinforced by the fact that, in reality, Chinese supervisory boards are "established in formal terms, but ignored or misunderstood over the life of the company"[21] and that supervisors often "lack the knowledge and experience to effectively supervise the directors and management"[22].

Furthermore, the minor role played by the supervisors is also evidenced by the fact that in Chinese listed companies is required the presence of independent directors albeit the supervisory board. This aspect of the Chinese corporate governance is paradoxical, being that supervisors and independent directors usually represent the answer that different jurisdictions have designed to solve the same agency problem[23]. The solution normally provided in the two-tier structure is focused on the adoption of a supervisory board whereas in the Anglo-Saxon context, since the board of directors is the only governance body, it has been required the presence in the board of some external non-executive members that are deemed to exercise an independent and critic judgment (*i.e.* independent directors). Interestingly, the Chinese corporate governance system adopted both solutions[24]. Hence, according to Arti-

[21] N.C. HOWSON, V. KHANNA, *op. cit.*, p. 541.

[22] Y. KANG, L. SHI, E.D. BROWN, *op. cit.*, p. 13. The same concept is also underlined in N. HUYGHEBAERT, L. WANG, *Expropriation of Minority Investors in Chinese Listed Firms: The Role of Internal and External Corporate Governance Mechanisms*, in *Corporate Governance: An International Review*, 20 (3), 2012, p. 308-332.

[23] As defined by Hansmann and Kraakman "an 'agency problem' – in the most general sense of the term – arises whenever the welfare of one party, termed the 'principal', depends upon actions taken by another party, termed the 'agent'. The problem lies in motivating the agent to act in the principal's interest rather than simply in the agent's own interest". See H. HANSMANN, R. KRAAKMAN, *Agency Problems and Legal Strategies*, in R. KRAAKMAN (ed.), *The Anatomy of Corporate Law*, Oxford, 2009, p. 21.

[24] According to some authors, the choice to have independent directors alongside a supervisory board offers a significant example of the traditional pragmatic approach

cle 123 of the Company Law, in addition to a supervisory board a listed company shall have independent directors, whose function might often overlap with supervisory board since both oversee and report on the management performances[25].

Perhaps even more peculiar of Chinese company laws compared to international standards is the relevance of the so-called "politics" account[26], which manifests itself primarily through some general clauses underlining the primacy of the public interest over the other stakeholders. Accordingly, Article 1 of the Company Law stresses that the purpose of such law is to maintain the socialist economic order and promote the development of the socialist market economy as well as the protection of the legitimate rights and interests of companies, shareholders and creditors[27]. Article 5 of the Company Law further strengthens this idea by stating that:

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taken by the Chinese legislator in the field of commercial laws. As suggested: «the coexistence of the supervisory board and the independent directors demonstrates a strong feature in the mentality of China's corporate reform, namely, an approach of "crossing the river by feeling the stone", because, although the reformers were eager to learn from foreign experience, they were unsure as to which model was suitable to China»; see L. TAN, J. WANG, *Modelling an Effective Corporate Governance System for China's Listed State-Owned Enterprises: Issues and Challenges in a Transitional Economy*, in *Journal of Corporate Law Studies*, Vol. 7, No. 1, 2007, p. 147.

[25] See Article 123 of the Company Law. This provision was then completed by the Code of Corporate Governance of Listed Companies, issued by the China Securities Regulatory Commission on January 7, 2001, which stated that, in a listed company's board of directors, it is necessary at least the presence of two independent directors and that they must constitute at least the third of the total number of directors; for more information on independent directors in Chinese listed companies see Articles 49 and 50 of the Code of Corporate Governance for Listed Companies.

[26] N.C. HOWSON, V. KHANNA, *op. cit.*, p. 560.

[27] See Article 1 of the Company Law. The importance of mixing harmoniously Western market based law institutions and the socialist environment is also highlighted by some terminological choices; for instance, when defining the concept of corporate ownership, the legislator did not use the term "ownership" but rather "enterprise legal person property rights" in order to avoid creating ambiguity in what was still a socialist market economy; on this point see J. WANG, *Company Law in China: Regulation of Business Organizations in a Socialist Market Economy*, Cheltenham, 2014.

> when undertaking business operations, a company shall comply with the laws and administrative regulations, social morality and business morality. It shall act in good faith, accept the supervision of the government and the general public, and bear social responsibilities.

In line with the above, there are three articles of the Company Law that particularly stress the relevance of the "politics" account in the life of a Chinese corporation. Firstly, Article 17 of the law explicitly underlines the social duties of any Chinese company:

> protect the lawful rights and interests of its employees, conclude employment contracts with the employees, buy social insurances, strengthen labour protection so as to realize safe production […] reinforce the vocational education and in-service training of its employees so as to improve their professional quality.

In the same spirit, which is to ensure that companies fairly pursue public interests and social responsibilities, the Company Law requires both the mandatory presence of members of trade unions in the supervisory board and the creation of an inside representative of the Communist Party. Article 18 imposes the organization of inside labour unions and strengthens the importance of involving workers in the company's life by requiring the workers' consent for the major decision on the future of the company[28]. Article 19 states that companies should facilitate the activities of the Chinese Communist Party by establishing in every company an internal political committee in accordance with the Constitution of the Party. The importance of such corporate body in the life of the company is not clear since its role and powers are not specifically defined; however, its importance in the Chinese corporate governance shall not be undermined because of its vague wording because it is in line with the legislative technique used when mentioning the role of the Communist Party in the economy[29].

[28] See Article 18 of the Company Law.

[29] J. WANG, *op. cit.*, p. 33. It is worth mentioning that in 2017, with the intent to reinforce the control over listed state owned enterprises and to police against corruption in state firms, some of the largest Chinese listed companies have been pushed to amend their articles of association by assigning a stronger role to the above-mentioned internal Communist Party committee. While in the past the latter has mainly had a symbolic

Despite their generic wording, the above mentioned clauses are not merely hortatory and leave the judiciary a significant margin of appreciation: since the latter in China is subordinated to the administration, a rigorous interpretation of such general clauses may favour political and policy inputs even up to the point to sacrifice company shareholders' interests to larger political and social goals[30].

All the previously mentioned elements highlight that, despite the apparent convergence with the rules most commonly adopted at the international level, Chinese company laws presents some unique features that derive from its socialist legal foundations: the prime position

role and has dealt with personnel matters, it is now given a sort of veto power on key decisions since the board of directors shall consult the internal party committee on relevant policy changes, key appointments and important investments. This might lead in the future to questions regarding the independence and the monitoring effectiveness of boards in Chinese companies. On this matter see S. YAM, *The hammer and sickle are making their way into some Hong Kong public companies*, in *South China Morning Post*, 30 May 2017; J. HUGHES, *China's Communist party writes itself into company law*, in *The Financial Times*, 14 August 2017; T. MITCHELL, *China's Communist party seeks company control before reform*, in *The Financial Times*, 15 August 2017.

[30] On this idea see further C. HOWES, *op. cit*., p. 822-823. For these reasons, it seems that in China there is a different understanding of the general purposes and functions of a business enterprise, which is seen more as a "legal creature rather than a contractual product", which is why some authors suggest that the Chinese system embrace the concession theory of the origin of a company; see J. WANG, *op. cit.*, p. 20: "From a theoretical perspective, the origin of the company can be explained by two conflicting theories, namely the concession theory and the contract theory. The concession theory claims that the corporation is a creation of the state and the its legal power is derived from the state. In contrast, the contract theory maintains that the corporation is an association formed by the shareholders through agreement, namely it is a nexus of contracts rather than a creation of the state. As we will see from provisions of the Chinese Company Law, there is no doubt that the company is viewed as a legal creature rather than a contractual product". This theory might also draws from the fact that the legislator specifies that each company come to existence only with the release of the business licence from the State Administration of Industry and Commerce and not at the moment of the deed of incorporation. In the same line see also A. SERRA, *La legge cinese sulle società di capitali. Profili generali*, in L. FORMICHELLA (ed.), *Le nuove leggi cinesi e la codificazione: la legge sulle società*, Torino, 2011, p. 17-18.

of the public over privates' interests and the relevant role played by administrative authorities over public and private companies' choices.

These distinctive features of the Chinese legal framework are not limited to the rules applied to corporations but also extend to the field of foreign investment laws and, specifically, on rules applicable to outbound M&As. In fact, despite the long march towards a more market-oriented economy, in China the private choice to invest overseas is still subject to an administrative procedure of review and approval aimed to ensure the adherence of such outward investments to the Chinese national development and economic priorities. Through these form of policy check the State in China plays the gatekeeper's role and retains the power to discretionally intervene and "rectify" the outward investment choices of domestic businesses.

In general, Chinese outbound investments, even in the form of M&As, are subject to various screening procedures, licensing requirements and approvals by central and local administrative authorities, whose evaluation is widely discretional and depends on the structure of the deal, the nature of the target and the industrial sector, and the value of the transaction[31]. The procedures are frequently cumbersome and

[31] In general there are three major governmental bodies whose approval or recordation a Chinese company shall obtain when investing overseas: the National Development and Reform Commission (in certain circumstances even involving the State Council), the Ministry of Commerce, and the State Administration of Foreign Exchange. In addition, in some scenarios there may be other administrative authorities involved in the process such as the State-owned Assets Supervision and Administration Commission, if the acquisition is conducted by a State Owned Enterprise, or the China Securities Regulatory Commission, when the transaction involve companies which are listed on Chinese stock exchanges. Also, when the transaction regards a financial Chinese company it may be necessary to obtain the approval of the China Banking Regulatory Commission or of the China Insurance Regulatory Commission. As previously mentioned, the description of the Chinese legal framework on cross-border M&A has already been extensively covered in current literature; for more practical information on this subject see: W.F. CHEN, *Cross-border M&A in China: Law and Practice*, Hong Kong, 2009; O. COISPEAU, S. LUO, *Mergers & Acquisitions and Partnerships in China*, Singapore, 2015; L. GUO, C. RIZZI, J. CRISTIAN, *M&A e takeovers. Nuove forme di investimento in Cina per le imprese italiane. Le tecniche ed il contesto*, Milano, 2012; J.Z. LI, *Invest in China - A Practical Legal Guide to Mergers and Acquisition*, Beijing,

based on rules that are vaguely formulated, allowing for significant measure of administrative discretion. For such reasons the success of a cross-border M&A with a Chinese company is linked to the political and institutional environment more than in most of the advanced Western economies. As an example it is helpful to consider the criteria that the National Development and Reform Commission (hereinafter "NDRC") shall use when reviewing an overseas investments project. In addition to common sense requirements such as "the possession of the sufficient investment strength", NDRC reviews the relevant investment on the basis of general principles such as "the demands of sustainable development of the economy and society" or the "development of strategic resources required for developing the national economy"; moreover, such governmental authority has to check whether outbound investments comply with the "laws, regulations, industry policies and overseas investment policies of the State", if it adheres to the "principle of mutual benefit and common development", if it does not "jeopardize national sovereignty, security and public interest" and is coherent with the "relevant provisions of the state on the administration of capital accounts"[32]. As with the NDRC, the Ministry of Commerce and its local offices are also entitled of a wide discretion in accomplishing its function. For example, Article 9 of the Measures for Overseas Investment Management states that the permission to invest offshore will be refused whenever it might endanger "the state sovereignty, national security and public interests of China"[33].

As seen in company law, the lack of transparency and the generic wording of these criteria of approval consent a large discretion in enforcing these rules and allow administrative authorities deciding wheth-

2007; M. ROOS, *Chinese Commercial Law: A Practical Guide*, Leiden, 2010; STAMFORD LAW CORPORATION, *Mergers and Acquisition in China*, Singapore, 2007; C.L. WOLFF, *Mergers and Acquisitions in China: Law and Practice*, Hong Kong, 2015; L. ZUOHENG, *Invest in China: A Practical Legal Guide to Mergers and Acquisitions*, Beijing, 2007.

[32] See Article 18 of the Interim Measures for the Administration of Examination and Approval of the Overseas Investment Projects.

[33] See Article 9 of the Measures for Overseas Investment Management (adopted on March 16, 2009 and effective as of May 1, 2009).

er a cross-border M&A shall be approved or not based on its adherence to domestic public interests. This legal technique is so deeply embodied in China's legal system that is far from disappearance despite the recent progresses towards a lighter and more transparent regime.

In fact, with respect to outbound M&A it shall be mentioned that in the last years Chinese lawmakers have implemented many reforms to offer a friendlier regulatory environment and further support the development of the "Going Out" strategy.

In 2014 the Administrative Measures for Verification and Record-filing on Outbound Direct Investments Projects established a new regime that made filing for registration, without any substantial review by national and local regulators, the main procedure for Chinese outward investments. Another major change dates back to December 27 2014, when the NDRC further amended the above regulation so that only Chinese outward investments involving sensitive countries or industries or investments exceeding USD 2 billion will need State Council verification through NDRC or its provincial development and reform commissions[34].

Nevertheless overseas investments are still subject to a rigid system of controls and approvals (often referred to as "road pass system") when a Chinese investor is to participate in an overseas bidding or undertake an overseas acquisition and the investment by such Chinese investor is greater than US$300 million: in such case it must submit an information report to NDRC or its local office and obtain the project confirmation letter issued by NDRC within twenty working days after acceptance of application before it can commence any substantive work (*e.g.* signing binding documentation, making binding offers, commencing foreign investment review processes in the relevant jurisdictions, *etc.*). Therefore, despite significant simplifications, the importance of

[34] The definition of sensitive countries include for example countries with no diplomatic relations with China, or sanctioned, or countries in war. Among the sensitive sectors there are telecommunications, media, cross-border water resources and energy infrastructures like pipelines or electricity networks.

obtaining NDRC consent still has a significant impact on the transaction[35].

On April 13 2016 the Ministry of Commerce and the NDRC released the Draft Decision on Revising the Administrative Measures on Approval and Record-filing of Outbound Investment Project, which has further streamlined the administrative procedure for overseas investment replacing the residual road pass system with a simpler filing regime, with applicants obtaining only an acknowledgement of filing from the NDRC within seven working days after receiving the application. The same shift from an approval-based procedure to a mere record-filing regime has also taken place with respect to the MOFCOM outbound regulatory regime.

However, it shall be pointed out that the above-mentioned trend towards a simpler and more relaxed outbound regulatory approval regime faced a sudden turnaround on August 18 2017, when the State Council published a set of guidelines on overseas investment formulated by the National Development and Reform Commission, the Ministry of Commerce, the People's Bank of China and the Ministry of Foreign Affairs. This change was originated by the government's concern that several Chinese companies had not made outbound investments with the required careful and systematic planning resulting in significant losses and ruining China's image abroad as a responsible investor. Also, it was deemed that some companies had not focused enough on investments beneficial to China's economic development and that had increased capital outflows. Accordingly, in the new guidelines the authorities had outlined a number of core overseas investment principles for Chinese companies, reinforcing the idea that the Chinese government still plays a pivotal role in guiding outbound investments and that monitor their conformity with national priorities. Furthermore, the guidelines classify overseas investments into three categories for which different

[35] V. BATH, *'One Belt One Road' and Chinese Investment*, in X. CHAO, L.C. WOLFF (ed.), *Legal Dimensions of China's Belt and Road Initiative*, Hong Kong, 2016.

policy approach will be adopted: encouraged investments; restricted investments and prohibited investments[36].

The above-mentioned setback evidences the duplicity of the Chinese legal framework on foreign investments: while moving towards a simpler approval procedure more aligned with the international business practices, China intends to maintain its "government approval system" where investments abroad are firmly monitored and reviewed to certify their adherence to the socialist legal framework and to national development goals.

3. Empirical research on Chinese outbound M&As: results and findings

As seen in the previous section, despite the progress towards more simplification and transparency, the socialist features of Chinese commercial laws are far from disappearance. China still remains a socialist state with planned economy influences and therefore, when dealing with Chinese counterparties in an M&A transaction, it should be kept in mind that the central and local government bodies have great power over companies' decision making process at various levels and that the likelihood of a successful deal depend also on its adherence to Chinese overseas investment policies[37].

[36] The encouraged investments are the ones where Chinese companies are pushed to actively engage in such as Investments that strengthen cooperation with overseas high-tech and advanced manufacturing companies; the restricted investments are ones not aligned with China's national development, macroeconomic, international cooperation and foreign policies whereas the prohibited category comprises different kind of investments that endanger or may endanger China's national interests and national security.

[37] The same concept is reported also in P.K. SAUVANT, V.Z. CHEN, *China's Regulatory Framework for Outward Foreign Direct Investment*, in *China Economic Journal*, 7(1), 2014, p. 141-163, according to which "one cannot therefore understand China's OFDI institutions without understanding China's national development objectives, particularly the promotion of industrial transformation. Through scrutiny by the MOFCOM and the NDRC (or their local equivalents), China's government extends special support to FDI projects that make a particular contribution to the country's national development objectives". Also, in line with this in scientific literature it has been

To prove the above-mentioned assumptions and to better understand the impact of the administrative review and approval process on commercial practices, the research was accompanied by a qualitative survey with practitioners active in the Chinese cross-border M&A space. In particular, from a methodological point of view, the survey was conducted in 2014 as a series of 15 interviews with different business consultants and lawyers, including senior associates and partners from major Italian and international law firms. The research was conducted primarily through semi-structured interviews (9 of which were conducted in person, with an average duration of one hour, and 6 held by phone); in particular it was asked: (i) what do you believe are the main legal risks and barriers when engaging in M&A activity with a Chinese counterparty? (ii) in your experience, is the current regulatory regime on Chinese outward investments a potential obstacle? If any, which aspects of this regime were the most relevant to the closing of the transaction? (iii) which are the main motives that influence cross border M&A formation by Chinese firms in foreign markets? (iv) how relevant were cultural differences at the pre-deal stage?

From the findings of the survey four elements have been particularly reported as crucial when conducting a cross-border M&A with a Chinese counterparty: (i) the understanding of the specific issues related to the Chinese administrative overseas investments' approval procedure, especially in terms of time constraints and of specific contract clauses; (ii) the positive relationship found between the public ownership of the Chinese acquirer and the successful closing of the deal; (iii) the importance of having local political support for the success of the transaction; and (iv) the role of the legal advisors in bridging the cultural and legal gaps between Chinese and Western parties[38].

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reported out that cross border M&A deals in China involving strategic sectors or state owned enterprises were less likely to be successful than those bringing technology or capital to restructure local enterprises; in particular, "if the acquisition is considered as safe and helpful for the country's development… it is more likely to be completed"; J. ZHANG, X. HE, *Economic Nationalism and Foreign Acquisition Completion: the case of China*, in *International Business Review*, 23 (1), 2014, p. 24.

[38] The references made in this paragraph to specific business cases, such as the 2012 acquisition of the Italian yacht manufacturer Ferretti by the Weichai Holding

The first important element that came to light during the survey was the impact of the Chinese overseas investment regime on the negotiations. In particular, the influence of such mandatory review and approval procedure was relevant in terms of the time-sensitiveness of the Chinese party and of the need to include certain specific contractual clauses. With respect to the timeframe, it was reported that regulatory approvals by Chinese authorities might delay the acquisition process and make the overall timetable uncertain since the approval time is variable and delays of up to one year from the announcement of the offer are not uncommon. Where in some cases approvals were obtained quickly or even prior to announcement, in other transactions regulatory approvals took a longer period of time or were not obtained at all. This time uncertainty is further complicated by the fact that Chinese regulatory agencies do not often work together, which had often required the acquirer to seek independent approval from many different governmental agencies. These delays and uncertainties concerning the approval from the competent Chinese authorities have often caused in selling foreign companies the request to "a better price and a financial inducement designed to 'underwrite' that the bidder getting the requisite PRC regulatory approvals"[39]. Another aspect commonly observed was the difference between the pace of the pre-deal phase of an M&A with a Chinese counterparty compared to international business practices: most of the times the Chinese purchasers had pushed their foreign counterparties to put together several documents earlier in comparison with international standards only in order to meet the Chinese administrative approval procedure's tight schedule. For instance, in the acquisition of the Italian yacht manufacturer Ferretti by the Weichai Holding Group, the Italian vendors had to sign a binding commitment that would have ensured the feasibility of the envisaged transaction in advance compared to usual business practice only to meet the deadlines

Group (hereinafter "Weichai") are mainly based on in-person or telephone interviews with the transaction participants and publicly available information including press reports, parties' disclosure documents and law firm publicity material.

[39] A. LUMSDEN, L. KNIGHT, *First You Get The Money*, Corrs Chambers Westgarth, 17 December 2013 (available at http://www.corrs.com.au/thinking/insights/first-you-get-the-money/).

provided for the NDRC's requirement for the approval of the project application report[40].

In addition to time constraints, it had been repeatedly pointed out the common request by the Chinese party to insert a specific condition precedent in the final agreement, which was to subject to effectiveness of the purchase agreement to the prior approval by the domestic competent authorities. For example, during the negotiations of the Ferretti acquisition it was fiercely discussed the purchaser's request to insert a specific condition precedent in the final agreement: specifically the acquirer asked to make the agreement conditional on obtaining all the required approvals by the competent Chinese governmental agencies[41]. This type of condition is usually satisfied but in this case the vendor refused categorically because it was going through serious financial distress and it was almost on the edge of bankruptcy; therefore the main shareholders were facing serious risks by not filing for the bankruptcy of the company and postponing instead the solution of this situation by extending a line of credit to a nearly insolvent company. The failure of the negotiations and the subsequent certain bankruptcy would have likely originated a criminal liability for fraudulent bankruptcy and, consequently, the uncertainty associated with the above condition precedent was perceived a further unacceptable risk. In the end the compromise reached between the Chinese purchaser and the Italian counterparts was that if at the end of the transaction Weichai did not have the

[40] See Article 16 and 17 of the Interim Measures for the Administration of Examination and Approval of the Overseas Investment Projects.

[41] As reported in the survey, in Chinese overseas purchase agreements is quite common to find clauses on the effectiveness of the contract as the following one: "The effectiveness of this agreement shall be subject to the obtaining of any needed authorization or clearance of any competent PRC authority (including, but not limited to Economy, Trade & Information Commission of […], Foreign Exchange Administration Bureau of […]) (hereinafter the "Chinese Authorizations") on or before […]. It is understood that all parties will use their joint best efforts to promptly file all the relevant applications and to accelerate the application process". Also, in the approvals and conditions for the contract it is often mentioned that the completion of the potential transaction is subject to regulatory filings with certain Chinese governmental agencies such as the local branches of the Development and Reform Commission and/or of the State Administration of Foreign Exchange.

permission to proceed with the transaction and to move the money out of China, the selling shareholders would have been entitled of a bank guarantee made available by Weichai and would have used the proceeds to temporarily held Ferretti equity. In this hypothesis, Weichai would still have had the opportunity to invest and acquire control of Ferretti at a later stage thanks to an option to buy back the seventy-five per cent from the creditors within December 31st of 2012 and restore the originally planned transaction. The same condition precedent was also requested in the acquisition of the Italian fashion house Krizia by the Chinese company Shenzen Marisfrolg Fashion. However, in this context such clause was included in the final agreement because it did not present the same downsides of the Ferretti operation, where the financial distressed position of the seller made too risky to insert such condition. However, the uncertainty on the timing and the final outcome of the Chinese administrative procedure notably affected also this second transaction. In fact, since the acquired business was a fashion company and there was the need to present the collection for the next season, in the first framework agreement it was drafted that the Italian seller would take care of this duty in the lack of a timely approval.

The second noteworthy finding of the survey was the positive relationship found between the public ownership of the Chinese acquirer and the successful closing of the deal. The nature of the ownership appears to affect the transaction especially on one crucial factor: while private enterprises going overseas look primarily on medium profit potential and cash-flow, state owned enterprises tend to seek long-term strategic investment and have lower risk aversion in the short term. Accordingly it was reported that whenever the Chinese purchaser were a state owned enterprise it was likely to endure in the M&A despite regulatory or operational difficulties. In the Ferretti acquisition for example it was observed that, despite the significant liabilities and risks of acquiring a failing business, the Chinese purchaser had persisted in such investment in order to meet the local development goal to expand the shipbuilding industry in the Shandong Province[42].

[42] Similar findings were reported in G.J. HUPPER, *Lawyering in Chinese outbound investment: the Shuanghui-Smithfield transaction*, in S. LIU, D. WILKINS (ed.), *The Chinese Legal Profession in the Age of Globalization: The Rise of the Corporate Legal*

Another relevant finding is the common perception among respondents of the importance for the Chinese acquirer to have domestic political support in order to conclude a successful transaction. In fact, the majority of the interviewed practitioners indicated that that most of the problems linked to the administrative review and approval process were due to the failure in previously building political support among critical public stakeholders; conversely, developing partnerships with the relevant authorities via the Chinese local advisors even before the start of the negotiation had been decisive in solving key regulatory issues in later stages of the operation and, specifically, to ease the administrative review and approval procedure.

Another significant aspect reported was the cultural and legal gaps among Chinese and Western counterparties whose overcoming was only possible thanks to the mediation of the legal consultants. For instance, in the Ferretti acquisition there was a strong pressure from the Chinese party on shortening the length of the Italian court's procedure to approve the debt restructuring agreement. The purchaser appeared to be very frustrated and struggled to accept that there was no possible way to influence the procedure or its eventual outcome. This aspect resonates with the absence in China of the theory on the separation of powers and with the fact that Chinese courts still operate as specific organs of the State and implement the State policy at a local level through the legal system, judicial directives, hierarchies and internal procedure[43]. As another example, in the Krizia asset acquisition a rather problematic approach was reported regarding employment law issues inherent to the acquisition of the undertaking together, which was originated by the difficulty to grasp the role of the labour unions in Italy while in China they are controlled by the central authorities. For all the above reasons the contribution of Chinese legal advisors had been in-

Sector and Its Impact on Lawyers and Society (forthcoming). In particular, it is worth noticing that in the description of the reasons of the successful acquisition of Smithfield Corporation by Shuanghui International Holdings Limited was cited the fact that the purchase was "not coincidentally, consistent with Chinese government policy".

[43] I. CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, cit., p. 30.

dispensable to the successful closing of an acquisition. They did not solely provide assistance on the legal and technical differences between different jurisdictions but had acted as a bridge for cross-cultural understanding and communications and had been crucial in supporting Chinese executives that often lack experience in cross-border transactions.

In conclusion the findings of the survey has reinforced the idea that, despite the progress towards more simplification and transparency, socialist features of Chinese commercial laws as the administrative approval procedure on outbound investments are still key components of the local legal infrastructure and are widely used to ensure adherence of these transnational operations to national development priorities and to maintain the socialist governance of the market environment. However, since the first "Going Out" initiatives, this close-tie between Chinese companies and the governmental authorities have driven suspicions about real overseas investments' motives by Chinese firms in trade partners and have pushed several Western countries to implement some form of administrative review and approval of foreign investment that have already been used to block some Chinese outbound M&A proposals such as in the UNOCAL bid or in the Rio Tinto case[44].

For these reasons, it is likely that the future success of Chinese overseas investment initiatives such as the "One Belt, One Road" project will largely depend on the ability of China to loose government's control on outbound investments even by making more transparent the review and approval regulatory framework, which may likely lessen in host countries the fear of Chinese investments as an extension of the central government's industrial policy. How it will be done without undermining the institutional foundations of socialist market economy and its legal infrastructure is one of the main challenges that the Chinese lawmakers will face in the next years.

[44] On the debate over some notable Chinese acquisitions abroad, especially around the attempt of China National Offshore Oil Corporation to acquire the US based energy company UNOCAL, and on its implications see N.C. HOWES, *China's acquisitions abroad – global ambitions, domestic effects*, in *Law Quadrangle Notes*, No. 3, 2006, p. 73-84.

SPORTS LAW IN CHINA

FROM THE ORIGIN TO CHINA'S 2015 FOOTBALL REFORM

Alessio Santosuosso

1. Introduction

From the time of Confucius's teachings, through to the birth of the Chinese ancient ball-game of *cùjú* (蹴鞠)[1], the evolution of Olympic sports, the adoption of the Sports Law in China in 1995, the moments of glory in the celebration of Beijing 2008 Olympic Games, and to the release of China's 2015 Football (and Sports) Reform, it is clear a long time has passed. Those episodes, nowadays, may seem like a distant memory in light of the Government's objective to raise the value of China's sports industry to RMB 5 trillion by the end of 2025.

The truth is that Chinese interest in sports as a whole has generally never been about a personal joy or pleasure, but about politics and eco-

[1] B. COHEN, *Ancient Chinese Football*, in A. WILD (ed.), *CAS and Football: Landmark Cases*, The Hague, 2012.

nomics, as a path to ruling legitimacy, geopolitical standing and projection of power[2]. The rise of China's sports industry is, in fact, just a piece of the plan – a reform able to guarantee a substantial financial and organisational support to make China ready to host the World Cup competition by 2050 – as massive capital flows have been currently spreading in and out of China under the influence of the concept of "quánqiú zhìlǐ tǐzhì" (全球治理体制), "global governance", in the implementation both of the "One Belt One Road" Initiative (OBOR), and the "Zhōngguó mèng" (中国梦), "Chinese Dream", i.e. "the great rejuvenation of the Nation".

With a combination of legal research, journalistic research and field observation[3], this work aims both to outline what sports legal framework China's 2015 Football (and Sports) Reform fits into and to identify its Chinese characteristics.

The legal dimension of sports in China is still in its early stages, with some areas under construction, although, since 1995, Chinese sports have been developing within the legislative framework delineat-

[2] W. WAN, *China's Xi Jinping loves football so much he's put it on the national curriculum - but can he secure the World Cup?*, published on 25 February 2015, available online at: http://www.independent.co.uk/news/world/asia/chinas-xi-jinping-loves-football-so-much-hes-put-it-on-the-national-curriculum-but-can-he-secure-the-10071110.html.

[3] Besides my semesters as an exchange student of Chinese language and Chinese law at Tongji University, the University of Finance and Economics and the University of International Studies in Shanghai, other learning experiences turned out to be unique in the development of my research:

- under the supervision of Professor Ignazio Castellucci, University of Trento's resource sharing allowed me to access several articles on China's sports law delivered by the Hellenic Centre of Research on Sports Law (HCRSL) in Athens, where the foremost experts in the field, including Professors Wang Xiaoping and Huang Shixi, have carried out research as members of the International Association of Sports Law (IASL);
- attendance at the 2017 World Football Forum in Changsha, where all the most important representatives of the world's sports industry participated in order to debate the implications of China's football reform plan at national and international level;
- a personal visit to WSS in Wuhan, a local football school founded by Cristiano Govoni and affiliated to Italian club AC Chievo Verona, where I had the opportunity to really understand how strongly appreciated (but not well-played) the game of football is to the Chinese young generation.

ed by the Law of the People's Republic of China on Physical Culture and Sports ("the Sports Law" hereinafter), which marked the start of a long and tortuous path towards the establishment of a more complex regime of Chinese athletic activity, during a critical phase of transformation from a planned to market economy. A wider interweaving of other dimensions of law and rules, and thus systems, gravitates around the heart of the system, giving it a clear semi-open and pluralistic connotation.

From an overall perspective, China's sports legal framework suffers from serious shortcomings in its implementation and it is in need of refinement of most of its provisions to prevent the danger of handicapping development of China's sports activities. To this end, China's 2015 Football Reform definitely represents a ripe opportunity to pay more attention to recovery and further progress.

2. What Is Sports Law in China?

2.1. The Chinese Separation Theory

If we wanted to grasp the essence of sports law in China – in other words: does China's sports law exist as an independent substantive area of the law?[4] – Chinese jurisprudence, according to the common separation theory, would maintain that China's sports law is ready to be considered as an independent and separate field of law[5].

In general, the evidence lies in the fast-growing spread of regulation and case law concerning the sports industry, reflected by the consequent and increased involvement amongst practitioners, and by the greater appeal amongst academic scholars. Sports law as an amalgam of interrelated legal disciplines involving several substantive areas of the

[4] T. DAVIS, *What is Sports Law?*, 11 *Marq. Sports L. Rev.* 211, 2001, available online at: http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1517&context=sportslaw. See also: Y. TANG, *The Concept of Sports Law in China*, in *ISLR/Pandektis*, Vol. 10: 3-4, Athens, 2014.

[5] S. GARDINER, *Sports Law*, Oregon, 2006.

law represents the starting point of a new legal era[6]: in fact, an identifiable body of principles and doctrines specifically related to sports law began emerging and it has been growing and consolidating. Nowadays, sport undoubtedly has become a massive economic activity which needs and deserves to be treated and regulated like any other kind of business.

2.2. The Plurality of China's Sports Legal Branch

Chinese jurisprudence also maintains that sports law in China represents a special branch in the legal system, at the same level and with the same amount of force of the traditional legal branches, i.e. civil law, criminal law and procedure law[7].

From a Chinese perspective, the definition of sports legal branch requires a twofold analysis in terms of content and form. As regards to the content, firstly, sports legal branch is substantially a collection of norms in order to adjust certain social relationships[8], especially all the norms regulating sports-related behaviours and social relationships. Secondly, its norms often belong to more than one legal branch, such as labour law, anti-trust law, criminal law or tort law. Thirdly, such a unique object adjusted within the sports branch represents the standard to define this branch[9]. Fourthly, the cognition itself of sports legal branch has been mutating over the course of time. In the first instance, it strictly relates to the legal system of a certain place and time, where and when certain legislative, enforcement and judicial trends spread and develop. In the second instance, its classification is conveniently useful for purposes of clarity and simplification, but it is quite often arduous to draw out. For instance, by making projections of the future, the combination of the development of sports practice-rule of law might

[6] S. GARDINER, *Sports Law*, Oregon, 2006.

[7] Y. TANG, *The Concept of Sports Law in China*, in *ISLR/Pandektis*, Vol. 10: 3-4, Athens, 2014.

[8] Y. TANG, *The Concept of Sports Law in China*, in *ISLR/Pandektis*, Vol. 10: 3-4, Athens, 2014.

[9] Y. TANG, *The Concept of Sports Law in China*, in *ISLR/Pandektis*, Vol. 10: 3-4, Athens, 2014.

lead towards a change in the pattern of the sports legal branch, which is consistently in dialogue and in exchange with the other legal branches.

When focusing, instead, on the form of China's sports law, we need to outline its six legal sources[10]. Firstly, the Constitution (宪法, *xiàn fǎ*), according to Article 21, inspires all the system of sources, obliging both the state and the government to "develop physical culture and promote mass sports activities to build up the people's fitness". Secondly, the Law of the People's Republic of China on Physical Culture and Sports (the "Sports Law" hereinafter) falls into the category of laws (法律, *fǎ lǜ*), which, according to the Law on Legislation (2000), are made by the National People's Congress (NPC) and its Standing Committee. It was adopted on 28thAugust 1995 and it still remains the cornerstone of sports legislation. Thirdly, Anti-Doping Regulations[11], National Fitness Regulations, Regulations on the Protection of Olympic Symbols, and the recent China's 2015 Football Reform, which were released by an Order of the State Council and signed by the Premier[12], are among the main examples of administrative regulations (刑侦法规, *xíng zhèng fǎ guī*) in the sports field. Fourthly, especially as concerns competitive sports, mass sports and school sports fields, Local Regulations (地方刑法规, *dì fang xíng fǎ guī*) and Autonomous Regulations (自治條例, *zì zhì tiáo lì*), which are respectively taken by the provincial people's congresses and their standing committees, and by the people's congresses of the ethnic autonomous areas (and then submitted to the higher level people's congresses for approval before entering effect), have been constantly issued. Fifthly, Measures for the Management of School Sports among Children and Adolescents, for example, fall into category of Rules (府規, *guī zhāng*), which includes Local Rules (地方政府規, *dì fang zhèng fǔ guī zhāng*) and Departmental Rules (部門規

[10] L. ZHANG, *A Guide to Chinese Legal Research: Who Makes What?*, published on 30 January 2014, available online at: http://blogs.loc.gov/law/2014/01/a-guide-to-chinese-legal-research-who-makes-what/?loclr=bloglaw.

[11] See also: *New anti-doping rules unveiled in China*, published on 11 December 2014, available online at: http://mobile.ytsports.cn/news-147.html.

[12] L. ZHANG, *A Guide to Chinese Legal Research: Administrative Regulations and Departmental Rules*, published on 8 April 2014, available online at: https://blogs.loc.gov/law/2014/04/a-guide-to-chinese-legal-research-administrative-regulations-and-departmental-rules/.

章, *bù mén guī zhāng*). Sixthly, at international level, the International Convention against Apartheid in Sports, for instance, adopted and opened for signature and ratification by the UN General Assembly resolution 40/64 of 10th December 1985, was signed by China in 1987, but it has not been ratified yet.

Putting together what has been said both in terms of the content and form of the sports law, the sports law in China is fully definable as "the sum of legal norms of different sources to adjust social relationships under the circumstance that people engage in physical movements in order to maintain and promote their health and to enjoy competition"[13].

But we must go further: the sports legal system in China is an example of legal pluralism, i.e. "the presence in the (sports) social field of more than a legal order"[14]. Legal systems, especially sports legal systems, "typically combine in themselves ideas, principles, rules, and procedures originating from a variety of sources", and the law, especially sports law, "manifests itself in a variety of forms and a variety of levels"[15].

In China, we can identify four dimensions of sports law[16]:
- national sports law;
- international sports law;
- global sports law; and
- domestic sports autonomous rules.

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[13] Y. TANG, *The Concept of Sports Law in China*, in *ISLR/Pandektis*, Vol. 10: 3-4, Athens, 2014.

[14] J. GRIFFITHS, *What is Legal Pluralism?*, in 24 *J. Legal Pluralism & Unofficial L.* 1, 1986. Regarding to the vast literature on legal pluralism, see also: B. TAMANAHA, *Understanding Legal Pluralism: Past to Present, Local to Global*, in 30 *Sydney Law Review* (2008), 375; M. GUADAGNI, *Legal Pluralism*, in P. NEWMAN (ed.), *The New Palgrave Dictionary of Economics and the Law*, Basingtoke, 1998, 542; W.F. MENSKI, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge, 2002; I. CASTELLUCCI, *How Mixed Must a Mixed System Be?*, vol. 12.1 *Electronic Journal Of Comparative Law* (May 2008), http://www.ejcl.org/ 121/art121-4.pdf.

[15] M.B. HOOKER, *Legal pluralism: an introduction to colonial and neo-colonial laws*, Oxford, 1975.

[16] X. HUI-YING, *Reflections on Several Basic Issues of Sports Law Concepts*, in *ISLR/Pandektis*, Vol. 10: 3-4, Athens, 2014.

Firstly, national sports law embodies the main formal legal source, as it is created by the national sovereign legislative authority, the state is responsible for its enforcement and courts can apply it directly. The Sports Law of 1995 was designed not only in order to protect the citizens' right to participate in sports, but also to deal with several sports development-related issues, such as goals, tasks, responsibilities, organisation, funding for security, facilities construction and use, role of local sports organisations and clubs[17].

National sports law widely differs from folk law, which consists of a set of rules deriving from national customs and habits, by definition not released by the legislative authority, but used and implemented by the Chinese Olympic Committee and national sports federations. It is therefore an informal legal source, useable as evidence in court. Only in the case of adoption within a formal source by the state, can it acquire legally binding force.

National sports law and folk law are different from *lex ludica* too. The rules of the game, in fact, belong to a kind of private governance system, immune from legal intervention and best enforceable by a specialised forum or arbitral body composed of sports legal experts[18].

Secondly, *extra*-national sports law also has a strong influence on China's sports legal system through the basis of Article 9 of the Sports Law, which "encourages international exchanges in sports", inspired by "the principles of independence, equality, mutual benefit and mutual respect", respecting "the State's sovereignty and dignity" and observing the international treaties concluded or acceded to.

In the field of *extra*-national sports law, we need to draw a preliminary distinction between international sports law and global sports law. While international sports law embraces general principles of public international law connected to sport, such as the principle of individual responsibility or due process, international conventions and treaties, global sports law is made up of rules created by international non-

[17] X. HUI-YING, *Reflections on Several Basic Issues of Sports Law Concepts*, in *ISLR/Pandektis*, Vol. 10: 3-4, Athens, 2014.

[18] K. FOSTER, *Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport's Jurisprudence*, in R.C.R. SIEKMANN, J. SOEK (eds.), *Lex Sportiva: What is Sports Law?*, Hague, 2012.

governmental organisations in order to globally regulate the phenomenon of sport. *Lex sportiva*, deriving from the jurisprudence of the Court of Arbitration for Sport, and rules made by the International Olympic Committee, for example, fall within the scope of the latter.

General principles of international sports law are legally binding in China to a greater extent than national sports law, as the State has the natural obligation to comply with them in order to safeguard human values, promote international dialogue and follow international trends. As regards conventional international sports law, instead, the obligation to respect and the subsequent binding force come into existence at the time of ratification by the Chinese state.

Global sports legal rules produce the universal effect that international sports law cannot have[19]: they shall always take effect on everybody, irrespective of whether they are adopted, signed, ratified or known. They are an a-national law ("a law without a nation")[20], which builds a separate and globally autonomous legal order[21], made of several and heterogeneous legal sources, which is imposed upon national governments and therefore needs the support of an enforcement power of a higher level than any national authority. Global sports law is mainly created by private institutions which deal with sports-related affairs world-wide, such as the International Olympic Committee, the international federations and the World Anti-Doping Agency[22], whose deliberations can only be challenged in front of the Court of Arbitration for Sport, which, since the 1980's, has produced a huge number of arbitral awards and contributed with its jurisprudence to the interpretation and unification of sports rules at a global level under the name of *lex sportiva*.

As matter of fact, however, global sports law seems to not have binding force as much as national sports law in the Chinese sports legal environment, since it lacks national legislative origin. It is treated as an informal legal source, needing to be adopted in accordance with the legislative procedure in order to acquire formal status. It can still be

[19] D. PANAGIOTOPOULOS, *Sports Law. Lex Sportiva & Lex Olympica*, Athens, 2011.

[20] D. PANAGIOTOPOULOS, *Sports Law. Lex Sportiva & Lex Olympica*, Athens, 2011.

[21] K. FOSTER, *Is there a Global Sports Law?*, in *Entertainment Law*, Vol. 2, No. 1, Spring 2003.

[22] Available online at: https://www.wada-ama.org/en/what-we-do/the-code.

useful in court as supporting evidence. It might be added, though, that something has been changing in this respect. In the case of what happened during the Beijing Olympic Games in 2008, when, although Article 15 of Law of the People's Republic of China on the National Flag stated that China's national flag, if displayed among other flags, shall be placed either at the centre above them or in a prominent position, Chinese authorities were specifically ordered to comply with the Olympic Charter's provisions, according to which the Olympic flag shall fly for the entire duration of the Olympic Games from a flagpole placed in a prominent position above the national flags. In other words, even if the Olympic Charter did not belong to China's legally binding law, a trend of submitting its legal force to one of a higher status began (and is still) emerging.

Lastly, there are rules made by sports organisations independent and autonomous from the government. This is the field of the sports industry, where sports associations produce and implement their own charter, guild regulations and industry standards, the rules of which adjust the relationship between athletes, coaches, clubs, sport associations, and maintain the order in sports industry, governing their smooth operation and protecting the interests of their members[23]. These sets of rules are founded on the principle of autonomy in adjusting the sports association's structure and affairs, including organisational rules, codes of conduct, dispute settlement rules and practice principles[24]. The CFA, for example, has its own constitution and functioning rules (The Football Association Chart) and internal dispute settlement system (Working Rules Football Association Arbitration Committee)[25].

[23] X. HUI-YING, *Reflections on Several Basic Issues of Sports Law Concepts*, in *ISLR/Pandektis*, Vol. 10: 3-4, Athens, 2014.

[24] X. HUI-YING, *Reflections on Several Basic Issues of Sports Law Concepts*, in *ISLR/Pandektis*, Vol. 10: 3-4, Athens, 2014.

[25] X. HUI-YING, *Reflections on Several Basic Issues of Sports Law Concepts*, in *ISLR/Pandektis*, Vol. 10: 3-4, Athens, 2014.

3. China's Sports Legal System

3.1. Law of the People's Republic of China on Physical Culture and Sports

The State Physical Culture and Sports Commission (SPCSC) governed Chinese sport activity until 1995. Three administrative rules of the State Council and 523 regulations of the SPCSC formed the regulatory framework for its policies and decisions, which were complemented by provincial sports commissions' decisions[26].

The current Sports Law was enacted in 1995 and lightly revised in 2009 and 2016[27]. It charted a new direction – it specifically provides a comprehensive framework where its legislative-level policy declarations can combine with and be complemented by, in the first place, subsequent regulations of the State Council or the General Bureau of Physical Culture and Sports, and in the second place, the provincial legislation.

3.1.1. The Guiding Principles and the Three Reasons for the Enactment

The Constitution of the People's Republic of China includes a substantial reference to sport among the General Principles, precisely in Article 21: "The State develops physical culture and promotes mass sports activities to improve the people's physical fitness".

In fact, the Chinese legislator chose the more comprehensive concept of 'physical culture', which better fits the other areas of the Constitution. For instance, according to Article 46, "the state trains juveniles to all round development in morality intelligence and physique", while Article 89 determines that "the State Council exercises the power of leading and managing educational, scientific and physical work".

In line with the Constitution, the Sports Law also operates on the ideas of 'mass exercise' and 'serving the people', which inspire all the

[26] J.A.R. NAFZIGER, W. LI, *China's Sports Law*, in *ISLR/Pandektis*, Vol. 4:2, Athens, 1998.

[27] See: *Sports Law revised by Standing Committee of People's Congress*, published on 11 November 2016, available online at: http://mobile.ytsports.cn/news-2993.html.

Chinese sports legal system, in particular Chapter II (community sports), Chapter III (school sports), Chapter V (sports associations) and Chapter VI (conditions of guarantee) of the Sports Law itself. It directly comes from Chairman Mao's doctrine, according to which sport shall be accessible to anybody and shall serve anybody, because a healthy body and a sound mind are the foundations of a strong socialist nation. To this end, in 1952, the government enacted the first National Physical Training Programme, and, in 1995, the current National Fitness Programme[28].

The final drafting process of the Sports law came to life in 1993, due to the awareness of a strong need to find a solution to three crucial issues which had been emerging in China since the early 1980s.

Firstly, the economic opening to the outside world with Deng Xiaoping's 'open door policy' at the end of the 1970s gave a strong shake-up to China's sports dynamic, with the relevant sports applications which entered a fast-developing era and began playing a leading role in an environment of steady politics, a progressing society and an improvement of living standards[29]. A few longstanding problems, however, still remained, such as the lack of guarantee to people's right to participate in sports activities, the insufficient condition of sports infrastructure and the underdevelopment of sports administrative departments in coordinating and supervising sports enterprises.

Secondly, the scourge of doping among Chinese athletes, which had been constantly denied by the government on the basis of the principle 'friendship before competition', came to light in November 1994, when the Olympic Council of Asia officially notified the Chinese Olympic Committee that eleven athletes had tested positive for a banned substance during the Asian Games in Hiroshima, despite the fact the COC,

[28] See: *Nationwide Physical Fitness Program*, available online at: http://www.china.org.cn/english/features/Brief/193374.htm; *National Fitness Program takes root in China*, updated on 11 August 2010, available online at: http://www.chinadaily.com.cn/sports/2010-08/11/content_11135296.htm; *An Outline of the National Fitness Programme of China (June 1995)*, updated on 8 June 2005, available online at: http://en.olympic.cn/sport_for/nfp_project/2005-06-08/121888.html.

[29] S. HUANG, *The Practice of China's Sports Law*, in *Sports Law (Lex Sportiva) in the World, Regulations and Implementation*, Athens, 2004.

in 1989, had adopted the 'three stricts' against doping (strict ban, strict testing and strict penalties)[30], and had established the China Doping Control Centre, as well as an anti-doping Commission[31]. The Chinese Olympic Committee promptly intervened, by requesting all national sports associations to adhere to anti-doping administrative rules and by expressing its willingness to cooperate with international sports federations in their efforts to solve the problem.

Thirdly, the alleged abuse of human rights by the government since 1989, when Chen Xitong decided to unleash the famous massacre on Chinese citizens at Tiananmen Square, highlighted the serious shortcomings of human rights' legal protection, causing enormous damage to China in terms of international prestige and credibility in the sporting community. In 1993, for example, the International Olympic Committee thus preferred selecting Sydney over Beijing as the host country for the 2000 Olympic Games.

In view of all this, the State Council submitted the draft to the NPC in May 1994, while three research units were sent around the provinces to collect opinions, with a special regard to the development of mass sports activities, the training and management of the athletes, and the development of the sports industry. Provinces, autonomous regions, municipalities, central departments and mass organisations received the draft and participated in several consultative sessions together with the NPC's Legal Affairs Committee, which led to the official draft being deliberated. The adoption of the Sports Law occurred on 28th August 1995, after a three-day review of the draft by the NPC's Standing Committee.

3.1.2. Style, Structure and Table of Contents

The Sports Law consists of eight chapters in which fifty-six articles provide a general outline of China's sports legal system, through policy

[30] J.A.R. NAFZIGER, W. LI, *China's Sports Law*, in *ISLR/Pandektis*, Vol. 4:2, Athens, 1998.

[31] See also: *China's Basic Stand on Anti-Doping*, available at: http://en.olympic.cn/china/introduction_1.html.

declarations, which instruct, stipulate and assure China's sports affairs[32].

In Chapter I (General Provisions), sport is designed as a means for enhancing public health and social development. In Chapter II (Community Sports) and Chapter III (School Sports), the Maoist concepts of nation-building and mass exercise, which are especially promoted by the State, communities and schools, inspire the entirety of the system. Chapter IV (Competitive Sports), firstly, deals with the organisation of the State, communities and schools, and secondly, concerns the process for resolving sports-related disputes, the prohibition of doping, corruption and gambling. In Chapter V (Sports Associations), the Chinese Olympic Committee develops the Olympics and gives the sports associations a central role in administering sports. In Chapter VI (Safeguard Conditions), the national and provincial governments allocate the necessary financial sources, evaluate chances of further investments and implement them, in supporting sports activities. Chapter VII (Legal Liability) outlines some general principles related to unlawful acts, such as sports gambling and doping; administrative sanctions and criminal investigation are the consequences, although the law does not set forth specific penalties. In Chapter VIII (Supplementary Provisions), the Central Military Commission is responsible for regulating sports activities in the armed forces.

Provisions on mass sports training, sports associations and competitive sports formulate an integral part of the Sports Law, thus deserving a special analysis.

3.1.3. Mass Sports Training[33]

The idea of mass exercise permeates all of China's sports legal system, enshrined both in the Constitution and in the Sports Law. It especially acquires a leading role in pursuing and ensuring the national priorities of enhancing people's health and promoting social development,

[32] S. HUANG, *The Practice of China's Sports Law*, in *Sports Law (Lex Sportiva) in the World, Regulations and Implementation*, Athens, 2004.

[33] S. HUANG, *The Practice of China's Sports Law*, in *Sports Law (Lex Sportiva) in the World, Regulations and Implementation*, Athens, 2004.

as mentioned in the General Provisions of the Sports Law, with the State, communities and schools operating as the main promoters, as shown in the following two chapters, i.e. Community Sports and School Sports. Article 11 of the Sports Law provides to that end that "the State implements the National Fitness Programme", which is a specially designed operational plan which requires the State Council to decision-making with regards to funding mass sports, training sports instructors, opening all-state owned sports ground and facilities to the public and prohibiting them to be used otherwise[34].

In order to complement this plan, the Sports Law introduced six measures:

- introduction of a technical skill-grading system for social sports instructors who instruct social sports activities (Article 11);
- setting of essential requirements by government at all levels for people to participate in sports activities (Article 12);
- support to aged and disabled people in engaging in sports activities (Article 16);
- introduction of mandatory daily sports activities into school programmes (Article 19);
- mandatory celebration of annual sporting competitions at school (Article 20);
- construction and regular maintenance of sports facilities by the government at all levels (Article 45).

Article 11 completes the overall framework with special regard to the strengthening of people's physique, by establishing physical exercise standards, which acts as a reinforcement measure to the monitoring of people's physiques.

[34] HUANG S., *The Practice of China's Sports Law*, in *Sports Law (Lex Sportiva) in the World, Regulations and Implementation*, Athens, 2004

3.1.4. Competitive Sports

Chapter IV of the Sports Law deals with competitive sports under three crucial aspects:
- the development and the protection of high-level athletes;
- the ban on doping, and the prohibition of corruption and gambling;
- the process for resolving sports-related disputes.

First of all, the government sees the ranking system as the most efficient way to improve Chinese athlete performances, as provided in Article 30, which extends the practice of a skill-grading system to referees and coaches as well. Three mechanisms also combine to safeguard the athlete's interests. Besides the payment of allowances and bonuses in amounts that correspond to the ranking of athletes, Article 28 grants preferential treatment to outstanding athletes providing for college enrolment and job security. Furthermore, the recruitment system is reinforced with experts seeking out talented young kids to send them to special schools for full-time or part-time training.

Secondly, Article 34 fixes the ban on using illicit substances and being treated with illegal therapies, requiring special government drug-testing agencies to regularly conduct anti-doping tests, as well as the prohibition on gambling on sports competitions. Any violation shall be subject to administrative and criminal action, in addition to the sports associations' sanctions, as Chapter VII provides for. Since 1995, however, only the sports associations' actions have turned out to be effective[35]. International Olympic Committee's and international federations' rules and procedures shall also apply in the fight against doping, especially to the drug-testing procedures conducted by governmental agencies: state officials shall be punished with administrative sanctions in the case of any violation occurring under their supervision[36]. In the case of fraud or other acts violating the discipline or sports rules, such as bribery, corruption, destruction of state sports and violation of public order during sports activities, Articles 50, 51 and 53 state that adminis-

[35] S. HUANG, *The Practice of China's Sports Law*, in *Sports Law (Lex Sportiva) in the World, Regulations and Implementation*, Athens, 2004

[36] However, the Sports Law does not specify what kind of administrative sanctions shall be imposed.

trative, civil and criminal sanctions might apply, beside the relevant sports associations' punishment. Both for the prohibitions and the other illicit behaviours, the application and enforcement of sanctions not only follow the rules of administrative, civil and criminal law, but also adhere to judicial interpretations, which, although not formally recognised by China's legal system, have a significant influence on adjudications and on legal grey areas[37].

Article 35 concludes with a special regard to intellectual property. It simply does not go beyond setting the limit of an *ad hoc* national protection to titles, emblems, flags and mascots of major competitions. Regulations on Protection of Olympic Logos were, for instance, released during the Beijing Olympic Games in 2008.

Thirdly, Article 33 states that

> disputes arising in competitive sports activities shall be mediated and arbitrated by sports arbitration institutions. Measures for the establishment of sports arbitration institutions and the scope of arbitration shall be prescribed separately by the State Council.

The choice of sports arbitration shows the Legislator's will of sticking to the Chinese tradition of non-adjudicative dispute resolution mechanisms – the Confucian concepts of 面子 miànzi ("save face") and 河蟹héxiè/和睦hémù ("harmony") – in the field of sports too. However, China has been currently facing a social transformation process, and it thus seems that it is not ready to provide for a complete sports disputes resolution system yet, especially in regard to the sports arbitration component, though certain initiatives give an overall impression of a common multi-level commitment towards its establishment. First of all, a few sports federations have established their own internal arbitration departments, setting up permanent or temporary internal arbitration bodies. In the football field, for example, the Chinese Football Association created its own permanent arbitration body dealing with internal football disputes. On the occasion of official national sports competitions, instead, sports federations usually set up appropriate arbitral of-

[37] S. HUANG, *The Practice of China's Sports Law*, in *Sports Law (Lex Sportiva) in the World, Regulations and Implementation*, Athens, 2004.

fices in a temporary manner. Secondly, several research institutions and academic exchange activities have been transversally focusing their studies on the arbitration channel in China as the most efficient method of resolving sports dispute, capturing the interest of the Chinese government and society. After the founding of the Chinese Research Association of Sports Law in 2005, a systematic study on national and international sports law became prominent. Nearly twenty academic conferences on sports arbitration took place in China, feeding the debate between the national legislative department, the State council legislative affairs office, sports administration officials, legal experts, lawyers and competitive sports experts. Researchers thus produced over 400 papers on sports arbitration, most of which were published in the Chinese language at national level[38].

The setting up of sports arbitration system must fit into the Chinese existing regulatory framework in a flexible manner. There are currently three laws which deal with the mechanism of arbitration in their provisions:

- the Sports Law (1995);
- the Arbitration Law of People's Republic of China (1994);
- the Legislation Law of People's Republic of China (2000).

The content and the scope of these laws are quite different, thus this represents the main obstacle for the set up, and the relevant proper functioning of the system. Making a careful choice of the most appropriate legislative basis is therefore necessary. Among the few suggestions made by the sports legal experts[39], Professor Wang Xiaoping[40]

[38] X. WANG, *The Construction and the Future of Arbitration for Sport in China*, in *ISLR/Pandektis*, Vol. 8: 1-2, Athens, 2009.

[39] The first opinion consists of releasing the Regulations on Sports Arbitration in the form of a new-born administrative law, relying on the combination of three provisions of different natures: Article 33 of the Sports Law, Article 18 of the Provisional Regulations on Doping Use in Sports, Article 46 of the Anti-Dope Regulations. According to the second opinion, the sports arbitration system should be built upon a specific Sports Arbitration Law made by the NPC and its Standing Committee. The legal basis in this respect is made up of two provisions included in the Legislation Law, i.e. Article 8 and Article 9.

adopts a practical, comprehensive approach to the matter, and sets forth the following two steps:

- the drafting and the implementation of the Regulations for Sports Arbitration as short-term priority;
- the promulgation of the Law for Sports Arbitration after a high-level of specialised expertise has been acquired.

In line with his proposal, three guidelines may be identified to govern the construction process.

First of all, the experience of the international and foreign sports arbitral institutions. Since the establishment of the Court of Arbitration for Sport (CAS) in Lausanne in 1984, operators in the sports sector have been facing the rapid development of a global sports arbitration system centred around the dispute resolution activity of a private arbitral body, characterised by a high degree of convenience. Particularly, this global system guarantees not only efficiency and low costs, but above all a better understanding of sports and relevant legal implications.

Secondly, both (some) rules of the Arbitration Law and resort to labour law. Experts will have to carefully assess the applicability of existing rules and principles belonging to other laws. In fact, the Arbitration Law drew out some norms the compatibility of which with sports disputes has proven to be difficult. By way of example, Article 2, which states that "contractual disputes and other property disputes between citizens, legal persons and other organisations of equal rights may be subject to arbitration", fits the field of sports only in part: it merely works in the case of contracts signed among parties placed at the same level, such as sports clubs, teams, athletes and managers. The reality of relationships in sport, however, is often more complicated than that, given that most disputes arise out of unequal professional relationships between subjects of different levels, such as the position of the athlete in front of his federation. In all such cases, the application of arbitration designed by the Arbitration Law does not apply because it is inappro-

[40] Professor Wang Xiaoping is a world leading expert of Chinese and international sports law. He works at China University of Political Science and Law in Beijing. He is Vice Director of China's Sports & Law Research Centre.

priate, and the labour disputes settlement system's provisions should be used and deemed to serve as a model.

Thirdly, the experience of China International Economic and Trade Arbitration Commission (CIETAC). CIETAC's regulatory framework seems ready to be complemented with the component of sports arbitration. A couple of CIETAC Arbitration Rules' provisions could be used as legal basis in order to view the sports disputes as a specific issue and to establish a special court for sports disputes belonging to CIETAC. According to Article 4 of the CIETAC Arbitration Rules, the CIETAC may establish, at its own discretion, arbitration centres for specific business sectors and issue arbitration rules accordingly. In addition, in the case of the parties' agreement to appeal their dispute in front of the arbitration centres for a specific business sector and the dispute falls within the scope of the relevant rules, the agreement shall prevail; if not, CIETAC Arbitration Rules shall apply. Letting the CIETAC create a special set of sports arbitration rules – a kind of "recycled system" – might be the right solution in the overall development of China's sports arbitration: these rules would be non-governmental in nature and would not violate the Sports Law and the Legislation Law. However, a non-unsurmountable obstacle still remains: at present, sports arbitration in China seems not to have a civil or commercial nature.

3.1.5. Sports Associations

Most Western countries usually enact a sports association system, according to which sports associations fully administrate sports affairs in a managerial and independent manner. China's application of sports associations, in fact, is far from fine-tuned.

Before 1995, state administrative organs used to adopt a comprehensive and direct management system over sports, and sports associations merely used to operate as administrative units within state organs, secured with very limited spending powers. With the entry into force of the Sports Law, China's sports state management became closer to the western model, particularly by giving more and more functions to sports associations in the administration of sports organisations and competitions, whilst the General Bureau of Physical Culture and Sports

still continued fulfilling some crucial responsibilities, such as formulating sports policies, providing limited funding to sports associations, regulating sports lotteries and selecting sports officials and other staff[41].

After 1995, on the route towards the self-determination of sports associations from the state administration, the multi-faceted public nature of their management powers caused serious slowdowns. In fact, the government set up sports associations, providing them with a kind of monopolistic management power and supervision function in relation to sports and to the relevant sports industry. According to most Chinese scholars, the origin of these powers derives not only from the State legislative authorization, but also from the internal consensus from members within the sports associations[42].

Firstly, some provisions, such as Article 29 of the Sports Law, which assigns the national association of a certain sport the power to deal with the registration of the athletes, and Article 31, which provides sports associations with the administrative power of managing the relevant national competition, legislatively grant state administrative powers to sports associations. Other provisions, such as Article 36, portray the public sports organisations' commitment to organise and conduct sports activities in accordance with their articles of association. Article 49 gives public sports organisations the power of punishment in the case of frauds, discipline violations or violations of sports rules during performance of sports activities, in accordance with the relevant articles of association. All this strongly affirms the sports industry's autonomy. Accordingly, the state authorisations attempt to guarantee two main objectives:

- that sports associations have and exercise limited powers in accordance with the law, avoiding illegal interfering from other offices, units and individuals;

[41] J.A.R. NAFZIGER, W. LI, *China's Sports Law*, in *ISLR/Pandektis*, Vol. 4:2, Athens, 1998.

[42] X. ZHANG, J. ZHAO, *Public Power Sources of China's Sports Associations and Analysis of Relevant Problems*, in *ISLR/Pandektis*, Athens, Vol. 11: 1-2, 2015.

- that sports associations exercise powers legally, preventing negative influences on their members, whilst providing them with legal relief and protection[43].

Secondly, the functions of macroeconomic regulation and control, which are typically governmental and need participation and assistance from the sports associations in order to become fully accomplished, are, instead, totally commissioned to the sports associations by the Chinese government. In cases where the government wishes to adopt new policies or development plans, for example, sports associations are required to conduct preliminary investigations and research on the state of the sports industry and its legal framework.

Last but not least, part of the sports associations' management powers is born by contract[44]. The members of sports associations simply endow their association the powers of exercise through certain institutions and procedures, on the legal basis of a signed contract between sports associations and their members. Turning to Chinese football, for instance, according to Article 7 of the Articles of Association of the Chinese Football Association, the Chinese Football Association shall ensure its members a long list of responsibilities and duties in their best interest, especially relating to the management of football as a whole, the study and drawing up of development plans, policies, guidelines, supervision of the works, construction of clubs and cultivation of local talents. In addition, the management of national teams at all levels, the implementation and organisation of the national competition system, and the programme and code of refereeing, etc.[45].

In view of all this, Chapter V of the Sports Law is therefore a positive step forward in the process of transformation of China's sports associations into non-governmental associations of athletes governing

[43] X. ZHANG, J. ZHAO, *Public Power Sources of China's Sports Associations and Analysis of Relevant Problems*, in *ISLR/Pandektis*, Athens, Vol. 11: 1-2, 2015.

[44] X. ZHANG, J. ZHAO, *Public Power Sources of China's Sports Associations and Analysis of Relevant Problems*, in *ISLR/Pandektis*, Athens, Vol. 11: 1-2, 2015.

[45] X. ZHANG, J. ZHAO, *Public Power Sources of China's Sports Associations and Analysis of Relevant Problems*, in *ISLR/Pandektis*, Athens, Vol. 11: 1-2, 2015.

athletes and athletic activities[46]. First of all, they apparently have their own managerial responsibilities and independence. According to Article 36, they create their own rules in accordance with the Sports Law and GBPCS guidance, they live and function following their own rules, they are empowered to raise funds from private sources and have the capacity to earn a profit from their own organised events. According to Article 50, they are finally entitled to apply sanctions in the case of doping and gambling infractions, with the support of a new-born supervisory authority.

3.2. The Overall Framework

Despite its negative light on the world stage[47], since the entry into force of the Sports Law, China's sports legal system has internally evolved in a significant way through the interventions of the State and local governments, as well as of sports federations. In particular, China's 2015 Football Reform and the project of construction of the Chinese Arbitration of Sport[48] fits into the wider framework of international policy and national legislation, where the protection of sports has been shaped, specifically, by the issuance of seven sports administrative laws and legal regulations by the Chinese government, the establishment of more than 150 sport governing rules and instructional by-laws,

[46] J.A.R. NAFZIGER, W. LI, *China's Sports Law*, in *ISLR/Pandektis*, Vol. 4:2, Athens, 1998.

[47] During the 1996 Olympic Games in Atlanta, the large Chinese delegation led by Wu Shaozu, Minister of the SPCSC, and Yuan Weimin, Deputy Minister of the SPCSC, adopted a strategy of constant protest: they blamed the Organising Committee because of poor administration, the anti-Chinese bias among judges, the lack of good Chinese food, the faulty bus system and the non-neutral commentary of Chinese teams' and athletes' performances. Such a confrontational and combative behaviour by the Chinese government did not improve China's international prestige and fuelled skepticism about its image of support for sports diplomacy, inspired by sportsmanship itself. In J.A.R. NAFZIGER, W. LI, *China's Sports Law*, in *ISLR/Pandektis*, Vol. 4:2, Athens, 1998.

[48] See X. WANG, *The Construction and the Future of Arbitration for Sport in China*, in *ISLR/Pandektis*, Vol. 8: 1-2, Athens, 2009.

and the adoption of over 160 local sports regulations and municipal chapters by the local governments.

4. Legal Issues in the Development of China's Sports Industry

4.1. From the Open-Door Policy to China's 2015 Football Reform

The complexity of China as a whole has been affecting the course from fulfilling the original purpose of overcoming the shortage of sports funds necessary for improving the prowess of Chinese athletes, towards the consolidation of a profitable Chinese sports industry. The transformation was rapid but extremely challenging, developing in a changeable environment with persistent contrasts between the modern and the archaic, reform and conservatism, advancement and complacency, and western capitalism and the remnants of the Marxist system. The result is a dishevelled mass made of severe structural conflicts, which originated in the transition from a sport-centered system, towards one that is marketing-centered[49].

In order to properly understand where China's sports industry is now, we need to go briefly through a couple of the developmental stages, delineated following the 1979 Chinese economic reform[50]:

- the exploratory phase from 1979 to 1992;
- the real development phase from 1993 to China's 2015 Football Reform.

Although the economic reform was officially released in 1979, only with the sport institute reform of 1984, the State gave up being the only funder and controller[51] of competitive and non-competitive sports. It started encouraging organisations with adequate economic capital to

[49] S.Y. XINQUAN, *Sport Sponsorship in China: A Strategic Investment*, Master's thesis at University of British Columbia, 2005.

[50] S.Y. XINQUAN, *Sport Sponsorship in China: A Strategic Investment*, Master's thesis at University of British Columbia, 2005.

[51] The State Sport Committee of China used to be sole governmental sports organisation responsible for controlling competitive and non-competitive sports. Afterwards, it was renamed State General Administration of Sport (SGAS).

invest in sport properties, and users therefore began utilising more and more sports facilities, of which availability in the past was gratis but extremely limited. In the 1990s, following the All-Sport Committee Directors Conference on "nurturing sport market and speeding up sport industrialisation", it was clear that the real development process had taken off. The government strengthened its macro-control over sports and played a crucial role in guiding, supervising and coordinating the relationship between government agencies and non-governmental sport organisations. The former eighty governmental sports agencies started working under the direction of the sports associations and centres. The Training and Competition Department took on a new profile, with twenty newly established sports-training centres responsible for all training and competition of their relevant sports, managed at the national level, alongside receiving financial support both from the government and sponsors[52].

On the road towards the professionalisation of competitive sport, besides the function of Chinese sports lottery as a source of sports funding, Article 42 of the Sports Law finally showed up, encouraging public and private entities to raise funds for and sponsor sports activities. In 1995, it was already clear that commercial operations would have led to the establishment of a modern, Western-style organisational structure, facilitating the constant development of a ever more dynamic and profitable sports industry[53]. The confirmation directly came from the State Council in March 2015, when it released "The Overall Plan for Chinese Football Reform and Development", an ambitious state reform plan for sport and physical education, with a particular emphasis on football. In fact, sport embodies huge businesses, and football industry is among the most profitable ones. The Government's objective was clear – to raise the value of China's sports industry to RMB 5 trillion (EUR 760 billion) by the end of 2025 in order to contribute 3% of the GDP. At present, while Chinese investments in sports have been intelligently made overseas, the local situation of competitive and non-competitive

[52] S.Y. XINQUAN, *Sport Sponsorship in China: A Strategic Investment*, Master's thesis at University of British Columbia, 2005.

[53] J.A.R. NAFZIGER, W. LI, *China's Sports Law*, in *ISLR/Pandektis*, Vol.4:2, Athens, 1998.

football has serious deficiencies, despite the apparent richness shown by the several incoming transfers of world-famous players and coaches. Regarding the management system and the growth of a promising youth, and considering the relevant regulatory framework, there is still a long way to go.

4.2. The Chinese Sports Lottery and the Establishment of a Football Lottery on Local Football Games

From 2010 to 2014, the Chinese lottery market saw an increase in sales at a compound rate of approximately 23%, reaching over RMB 382 billion of sales in 2014. Such a record-breaking amount enabled the lottery authorities to distribute over RMB 162 billion to public projects in 2014 for the first time in Chinese history, in accordance with the regulations of 1999, which require thirty percent of the lottery's revenues to be utilised for "good causes". What does the expression "good causes" stand for? It might mean sports development, for instance.

P.R.C. Ministry of Finance is generally responsible for administering, regulating and supervising the national lottery industry, while the State Council is in charge of authorising the issuance of new lotteries. In China, there are currently two authorised lotteries, i.e. the Welfare Lottery[54] and the Sports Lottery.

In relation to the latter, its development process consists of two phases. In 1984, the State Council firstly issued sports lotteries, which represented a localised and temporary matter. In 1994, the China Sports Lottery Administration Centre set up the Chinese National Sports Lottery and the issue took on crucial importance, by collecting funds for sports development, sporting events and maintaining sports facilities, through the issuance of lottery tickets.

Currently, the Sports Lottery, similarly to the Welfare Lottery, is very common and well accepted among the Chinese people, with lottery tickets sold all over the country, particularly in the East. In 2001, a new kind of football lottery managed to breakthrough in China's lottery

[54] See: *Welfare Lottery Benefits China*, published on 2 August 2000, available online at: http://en.people.cn/english/200008/01/eng20000801_47017.html.

history: the buyer guesses the winner of a game before buying the lottery ticket, using his understanding and foresight of the teams and games in hopes that technical and intellectual factors have an impact on his chances to win[55]. Another essential innovation regarded the fact that playing on Chinese Super League's games was not allowed anymore: Chinese people could bet only on the British Premier League and the Italian Serie A, which were considered as the most well-developed and stable football leagues in the Western world.

However, a major regulatory deadlock has remained since then. Faced with the fast development of Chinese sports and football lottery industries, the Regulation released in 1994 on the Management of the Welfare Lottery represented the only form of existing regulatory framework, without any reference to sports lottery and too backwards-facing contemporary issues. The Regulations on Administration of Lotteries, approved and promulgated in 2009 by the State Council in order to supervise the entire lottery industry, restored a little order. Their original aim was to promote the organised and healthy development of Chinese lottery by clarifying many issues, such as lottery administrative system, lottery issuance and sales, drawing and prize collection, lottery fund management and penalties in case of breach of the rules. In March 2015, the State Council firmly changed tack with China's Football Reform, providing for the establishment of a national football lottery on Chinese football games. The main reason was creating an additional source to provide financial support to the overall construction plan, which involves thousands of new football fields, 50,000 football training schools by 2025 and elite academies.

Due to the numerous shortcomings of the regulatory framework, the National People's Congress is well aware that a new and proper lottery law is urgently needed. Among the few ideas, Professor Huang Shixi[56]

[55] Before 2001, people used to win through a random selection of numbers.

[56] Professor Huang Shixi, one of China's top experts in the field of sports law, works at Shandong University. He is the director of Sports Law Association of China Law Society and he is a part of the board of directors of the International Association of Sports Law (IASL). See: *Sports Law Center of Shandong University, China*, available online at: http://www.asser.nl/sportslaw/about-the-centre/community/sports-law-centres/sports-law-center-of-shandong-university-china/.

suggests a legislative draft including the empowerment of the government to control the form and procedures of sports lotteries, to take measures to maintain sport lotteries and to impose control on the use of funds collected through them[57].

4.3. The Western-Oriented Club System with Chinese Characteristics

In 1992, the Chinese Football Association launched the club system as a new model to organise China's sports, following the pattern laid down by Western tradition and driven by the need to equip athletes with necessary non-governmental funding for their sports facilities, training, technical equipment and financial incentives[58]. In 1993, professional football clubs were set up in the eleven experimental cities, through the cooperation between the local sports committees, companies and local companies. The Sichuan Nande Soccer Club in Chengdu was the first borne out of the system[59]. In 1994, the Marlboro Football League officially started a new era of Chinese professional football[60]. For the first time in Chinese history, football overcame table tennis in terms of popularity and the Marlboro Football League raised around RMB 7 million amongst all the participants. Under the SPCSC's policy of commercialisation of sports, the other most popular sports, such as

[57] S. HUANG, *The Practice of China's Sports Law*, in *Sports Law (Lex Sportiva) in the World, Regulations and Implementation*, Athens, 2004.

[58] J.A.R. NAFZIGER, W. LI, *China's Sports Law*, in *ISLR/Pandektis*, Vol. 4:2, Athens, 1998.

[59] The Sichuan Nande Soccer Club was born from the sponsorship by the Nande Economic Group, the Sichuan Provincial Sports Commission and the Information Research Institute of the State Sports Commission. It was an economic entity, it had legal status and independent accounting. Its registered capital amounted to 10 million yuan (EUR 1.400.000). It allocated 500,000 yuan (EUR 66,000) every year for its management and functioning, club's commercial activities' income excluded (training, competition, awards, staff salaries). In J.A.R. NAFZIGER, W. LI, *China's Sports Law*, in *ISLR/Pandektis*, Vol. 4:2, Athens, 1998.

[60] The Marlboro Football League refers to the National Football Jia A League, or Jia-A, which was the top tier of professional football in China from 1994 to 2003, under the administration of the Chinese Football Association. The denomination 'Marlboro' comes from the sponsorship agreement signed between the League and the American cigarette giant, which lasted from 1994 to 1998.

basketball, volleyball and table tennis, took more interest in the commercialised club system, which was seen as an efficient and revenue-saving alternative to the traditional state monopoly. As a result, they established their own professional leagues and relevant championships, respectively in 1995, 1996 and 1998. The club system expanded to the point that, at the beginning of the twenty-first century, there were already 128 professional or semi-pro clubs across the country.

As to the actual features of Chinese professional sports clubs, most Chinese clubs did not operate under the mechanisms of a market economy and their nature, as well as their internal management and operational patterns, were not well-defined[61]: they did not have any full independence and autonomy, since the governmental departments were used to exerting strong pressure on clubs' operations and management. In 1999, for instance, Dalian's local government deliberated to buy Sun Jihai, the famous Chinese fullback who had been sold to Crystal Palace, back to Dalian Wanda Shide Club, his former team, in a desperate attempt to strengthen the team to avoid a probable relegation.

Such an undefined and fluctuating situation remained unchanged until the release of China's 2015 Football Reform, when the government apparently realised the urgency of getting a move in remedying the lack of law governing professional sports club dynamics and the imperfect regulatory framework concerning the relations between sports clubs and other subjects, such as sports administrative departments, sports teams, athletes and coaches. As external observers, we now have no recourse other than to closely follow developments, while remaining aware that both commercialisation of sports and the relevant governmental policies will play a fundamental role in shaping future of China's sports club system[62].

[61] S. HUANG, *The Practice of China's Sports Law*, in *Sports Law (Lex Sportiva) in the World, Regulations and Implementation*, Athens, 2004.

[62] See: *China's sports reform and brand-new opportunities: Part II*, published on 29 October 2015, available online at: http://mobile.ytsports.cn/news-1674.html; *Chinese sports industry ready to further commercialize and grow*, published on 18 September 2014, available online at: http://mobile.ytsports.cn/news-55.html; *Repucom EVP Mike Wragg: One of important things for China is the commercialization of sport*, published on 15 July 2016, available online at: http://mobile.ytsports.cn/news-2766.html;

4.4. The Chinese Forms of Sports Sponsorship

Sponsorship within sport is a lucrative and world-wide business and, consequently, there are many avenues through which a company can promote their product name to reach many potential customers[63].

Generally, we can identify four main patterns[64]:

- sponsorship of individual sporting teams.

  It consists of showing the name of a company on the team shirt, usually either on the front or on the back[65]. The Chinese Fun88, for example, will appear on Newcastle United's jersey from 2017 to 2020[66]. There are often also subsidiary agreements: for example, the sporting team is obliged to display the names of the companies who

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ESA Chairman Karen Earl: China is becoming more globalized, so sponsorship will increase there, published on 18 May 2016, available online at: http://mobile.ytsports.cn/news-2531.html?cid=2wd=Laworder=1.

[63] L. COLANTUONI, *Sponsorship Agreements in Sports: Recent Cases and Issues in Football, Rugby and Ice-Hockey*, in *ISLR/Pandektis*, Vol. 10: 1-2, Athens, 2013. See also: S. SANTINI, *Sponsor e squadre sportive: obblighi, contratti e vantaggi*, published on 2 February 2010, available online at: http://www.lastampa.it/2010/02/02/italia/i-tuoi-diritti/consumatore/approfondimenti/sponsor-e-squadre-sportive-obblighi-contratti-e-vantaggi-F2OEL7GRQXf8d0WUrw09sJ/pagina.html; R. TURNER, *Sports sponsorship*, updated on 17 October 2014, available online at: https://www.twobirds.com/~/media/sports-sponsorship.pdf?la=en; *Corporate Sponsorship Law and Legal Definition*, available online at: https://definitions.uslegal.com/c/corporate-sponsorship/; A. TERZIU, *Sponsorship Revenue of Football Clubs*, available online at: https://lawinfootball.wordpress.com/2014/05/10/sponsorship-revenue-of-football-clubs/; J. BELZER, *The (R)evolution of Sports Sponsorships*, published on 22 April 2013, available online at: https://www.forbes.com/sites/jasonbelzer/2013/04/22/the-revolution-of-sport-sponsorship/#4b70a1816c90; J. JACOBS, P. JAIN, K. SURANA, *Is sports sponsorship worth it?*, published in June 2014, available online at: http://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/is-sports-sponsorship-worth-it.

[64] L. COLANTUONI, *Sponsorship Agreements in Sports: Recent Cases and Issues in Football, Rugby and Ice-Hockey*, in *ISLR/Pandektis*, Vol. 10: 1-2, Athens, 2013.

[65] See: *Football teams with different shirt sponsors for different competitions*, available online at: https://www.inbrief.co.uk/football-law/different-sponsorship-for-different-football-competitions/.

[66] Fun88 (founded in 2008) is a Chinese online gaming company that offers sports betting, live casinos, slots and keno games in Asia.

have signed sponsorship agreements with the team on the billboards around the sports ground.

- sponsorship of governing bodies.

  Enterprises often become a sponsor of a sports governing body. For instance, the Wanda Group will support FIFA until 2030[67]. This means that, by using its international appeal, the Chinese company will bring youth from all around the world closer to the game using a series of unique initiatives across all FIFA competitions. It will also benefit from the promotion of FIFA Competitions across Wanda properties, which will be implemented through various means, such as the use of the Official FIFA mascot and the implementation of a FIFA youth development programme in China.

- sponsorship of events.

  At FIFA World Cup, for instance, the official FIFA partners appear as the companies who are sponsoring the event. Not only do all the billboards show the names of the sponsors, but also, as in the case of the Wanda Group, the Chinese company will benefit, among other things, from the awarding of FIFA World Cup tickets.

- sponsorship of sportsmen/sportswomen.

  Sportsmen and women attract different types of sponsorship, and providing the athlete with his/her sports equipment (the "tools of the trade")[68] is one method of many. For example, Adidas provided Jeremy Lin, the world-famous Chinese NBA player, with his basketball shoes.

Turning to China, during the Cultural Revolution, sponsorship of sports events did not even exist, as sports were directly funded by the Chinese government. With the end of the Revolution, as well as with the opening policy to the outside world, the Chinese government progressively allowed for it, initially, only from public sources, and then, also from private enterprises. It quickly took root as a marketing tool

[67] See also: *More Chinese sponsorship for FIFA*, published on 2 June 2017, available online at: http://www.salford.ac.uk/news/articles/2017/more-chinese-sponsorship-for-fifa.

[68] See: *Tools of the trade in football*, available online at: https://www.inbrief.co.uk/football-law/footballers-tools-of-the-trade/.

amongst both foreign and Chinese companies[69], and nowadays, names, trademarks and logos both from domestic and foreign goods adorn Chinese sports halls, reflecting a spirit of commercialisation and globalisation[70]. At the same time, sports lotteries have begun functioning as special sources of sports funding – a kind of "mass sponsorship" for sport[71], which caught on after Wu Shaozu, Minister of the SPCSC, had come back from an institutional visit in Italy at the end of the twentieth century, which convinced him to finance the development of the system on the model of Italian sports lotteries[72].

Regarding the relevant regulatory framework, the usual concerns of incompleteness and inconsistency remain[73]. The Chinese legislator simply includes, according to Article 3 of the Sports Law, the State's encouragement to "enterprises, institutions, public organisations and citizens to run and support sports undertakings" as part of the plan for the national economy and social development, and, according to Article 42, calls upon organisations and individuals "to donate to and sponsor" sports activities. The shortcomings assume particular importance and have to be soon remedied, as sports sponsorship in China has recently been incessantly developing in four different but related formats[74]:

- commercial sponsorship is undertaken with governmental administrative guidance.

  The government's guidance control on corporate sport sponsorship decisions is total. In this way, the corporate sponsors are able to express their support to the government.

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[69] LAM, *Into the Big League*, in *Chinese Bus. Rev.*, 1994.

[70] *Chinese Companies and Sports Sponsorships: Trends and Guidelines*, published on 11 August 2016, available online at: https://chinaselaw.wordpress.com/2016/08/11/chinese-companies-and-sports-sponsorships-trends-and-guidelines/.

[71] S. HUANG, *The Practice of China's Sports Law*, in *Sports Law (Lex Sportiva) in the World, Regulations and Implementation*, Athens, 2004.

[72] J.A.R. NAFZIGER, W. LI, *China's Sports Law*, in *ISLR/Pandektis*, Vol. 4:2, 1998.

[73] See: S.B. SMITH, A. BREZINE, *Top Ten Issues in Sponsorship and Licensing Agreements That Are Most Likely to Lead to Disputes and Litigation*, Association of Corporate Counsel (ACC), published on 9 December 2011, available online at: http://www.acc.com/legalresources/publications/topten/sla.cfm?makepdf=1.

[74] S.Y. XINQUAN, *Sport Sponsorship in China: A Strategic Investment*, Master's thesis at University of British Columbia, 2005.

- commercial sponsorship is undertaken with governmental assistance.
  Basically, the government creates a bridge between business corporations and sport organisations through the introduction of programmes often implemented in provincial sport sponsorships. In fact, the provincial government permits local companies to sponsor provincial sport teams.
- sports clubs use celebrity athletes to attract corporate sponsors.
  Corporate sponsors express their financial commitment to sports clubs based upon the creation of personal relations between celebrities and corporate managers.
- sports sponsorship arrangements are derived purely from corporate willingness to be involved.
  Chinese domestic corporations seldom adopt this format because they have not realised the significance of the cost-effective benefits which commercial sport sponsorship may have yet.

The evolution of commercial sports sponsorship in China, and its almost non-existent regulatory framework, reflect the fluctuating and not well-defined nature of its relevant market. Firstly, because, for a long time, sports have been only considered as a celebration of the nation and a convenient route towards social gain. Secondly, market-centered sports sponsorship is not really and deeply embedded into the market, shown by the lack of application of pure commercially-driven sponsorship. Thirdly, the Chinese sponsorship market is basically taking its first steps, in comparison to the mature and well-established Western situation[75]. All of these factors together highlight both the state of transition in which Chinese sports sponsorship is currently living, and the need of governmental assistance for its development in the cases where market support for specific sports lacks[76].

[75] See: M. THOMAS, *What's up with Chinese Global Sports Sponsorship?*, published on 5 February 2016, available online at: https://www.linkedin.com/pulse/whats-up-chinese-global-sports-sponsorship-mark-thomas-马健明.

[76] S.Y. XINQUAN, *Sport Sponsorship in China: A Strategic Investment*, Master's thesis at University of British Columbia, 2005.

4.5. Waiting for China's Own Sports Intermediaries

A professional athlete's most trusted ally is his agent, who also represents his friend, advisor, mentor, business associate and, in many cases, lawyer[77]. An athlete's agent may deal with a variety of complex marketing, legal and financial issues on behalf of his client, such as routinely researching and making contact with convenient business opportunities, negotiating contracts regarding team ownership and potential endorsers, managing the image, public relations, and so forth.

His role is essentially the inevitable outcome of the development of the commercialisation and professionalisation of sport[78]. Since the birth of the modern sports market in the 1980s, however, the Chinese government has never shown any real intention to implement an effective legal system in looking after the athletes' rights and interests, and has only just conferred such a fundamental function to the foreign figure of the sports agent. Foreign professionals took advantage of that and managed to establish a *de facto* monopoly within the sports sector, especially in football. In the beginning of the twenty-first century, for example, International Sports and Leisure (ISL), a Swiss sports marketing company well-known in Europe, took over the management of the Chinese national football team thanks to a five-year agreement. Over the last decade, foreign professionals have been dealing with most transfers of foreign footballers in China, exploiting the Chinese sports market in order to get larger cuts. GestiFute agency[79], for instance, could build a

[77] D. SEARLS, *Responsibilities of a Sports Agent*, available online at: http://work.chron.com/responsibilities-sports-agent-12927.html. See also: D. HEITNER, *Analysis Of "So You Want to Be a Sports Lawyer, Or Is It A Player Agent, Player Representative, Sports Agent, Contract Advisor, Family Advisor Or Contract Representative?"*, published on 3 September 2006, available online at: http://sportsagentblog.com/2006/09/03/analysis-of-so-you-want-to-be-a-sports-lawyer-or-is-it-a-player-agent-player-representative-sports-agent-contract-advisor-family-advisor-or-contract-representative/.

[78] S. HUANG, *The Practice of China's Sports Law*, in *Sports Law (Lex Sportiva) in the World, Regulations and Implementation*, Athens, 2004.

[79] GestiFute is a company managing the careers of professional sportsmen, led by the agent Jorge Mendes. It was founded in 1996 and currently has offices in Porto and Lisbon. The discovery and promotion of young talents is also one of its main aims, providing them with careful career planning. In recent years, the agency has become a

real bridge between Brazilian and Chinese football, where dozens of Brazilian football players have already moved to the Chinese Super League to apparently participate in the rejuvenation of Chinese football[80].

The situation is apparently getting way out of control, and the most common question remains. How will China conquer, for the first time, what should have been its own empire from the very beginning? Sharing Professor Huang Shixi's view, the need for China's own sports agents is evident. As larger and larger sums of money continue flowing externally, this does not mean that China does not need foreign professional assistance. The lack of relevant provisions on sports agents in the Sports Law, as well as in regulation, needs to be remedied, so that, with a regulated emergence of local sports agents, players markets will function in a locally-reasonable manner rather than remain uncontrolledly exploited by foreigners[81].

5. Towards the World Cup

At present, the Sports Law of 1995 represents both the first and only milestone in China's sports regulatory framework, considered as a requirement to finally make the Constitution alive with the substantial development of 'physical culture', 'mass sports activities' and 'people's physical fitness', to enable the rapid and healthy development of sports enterprises, to fight against the long-aged scourge of doping and to prevent shameful situations happening before the international stage once more.

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key player in the emerging Chinese market having sold 30% of its shares to Shanghai Foyo Culture and Entertainment – a marketing and Chinese football agency, subsidiary of China's biggest investment conglomerate Fosun International. See: P. RUSSO, *M L'orgia del potere. Controstoria di Jorge Mendes, il padrone del calcio globale*, Florence, 2016.

[80] See: E. MACKENNA, *China Is Latest Destination for Brazilian Stars*, published on 1 February 2016, available online at: https://www.nytimes.com/2016/02/02/sports/soccer/in-the-brazilian-soccer-market-the-buyers-are-now-chinese.html?_r=0.

[81] S. HUANG, *The Practice of China's Sports Law*, in *Sports Law (Lex Sportiva) in the World, Regulations and Implementation*, Athens, 2004.

It is basically a two-sided legislative text. On the one hand, it is a dated declaration made of state-centred provisions. It prioritises centralised policy-making and administrative discretion in governing sports activity, with the ultimate goal to establish a dynamic and decentralised organisation under governmental policy and supervision. It generally indicates responsibilities, prohibitions and sanctions, which do not work efficiently due to its administrative discretion. The same level of vagueness affects the non-governmental sports associations' activities, which are just confined to appropriate roles, which the State shall define. On the other hand, the will to decentralise is apparent from the treatment granted to non-governmental associations and clubs, which are entitled to administer sports activities, and are also competent to impose anti-doping sanctions and apply fair-play measures, in an overall system where sports lottery and private sponsorship participate as a vital instrument of funding and promotion.

Arbitration and mediation by an appropriate body apparently replace litigation in the courtroom, with the firm intention to avoid the risks and complexity of dispute avoidance and resolution. However, at present, China is not ready to provide for a complete sports disputes resolution system yet, especially in regard to the sports arbitration component, though certain initiatives give an overall impression of a common multi-level commitment towards its establishment.

China's sports legal system has evolved in a pluralistic way through the interventions of the State and local governments, as well as of sports federations. In particular, China's 2015 Football Reform and the project of construction of the Chinese Arbitration of Sport fits into the wider framework of international policy and national legislation, where the protection of sports has been shaped, specifically, by the issuance of seven sports administrative laws and legal regulations by the Chinese government, the establishment of more than 150 sport governing rules and instructional by-laws, and the adoption of over 160 local sports regulations and municipal chapters by the local governments.

From the flexible nature of the law and of its interpretation, to the importance of blank areas and unspoken elements as potential scopes of policy or administration intervention, it is also crucial to identify a series of China sports legal system's characteristics:

- the concept of sports law as "the sum of legal norms of different sources to adjust social relationships under the circumstance that people engage in physical movements in order to maintain and promote their health and to enjoy competition";
- the overall multi-level cooperation of provinces, autonomous regions, municipalities, central departments and mass organisations with the NPC's Legal Affairs Committee in creating, conserving and developing China's sports law;
- the strong commitment of Chinese Olympic Committee to fight the scourge of doping, both at administrative level and in dialogue with the international federations;
- the co-existence of the rules of administrative, civil and criminal law, as well as of judicial interpretations, in the application and enforcement of anti-doping sanctions;
- the will of sticking to the Chinese tradition of non-adjudicative dispute resolution mechanisms in the field of sports too;
- the positive steps forward in the process of transformation of China's sports associations into non-governmental associations of athletes governing athletes and athletic activities;
- the flexibility of the legal system in relation to China's sports industry, i.e. a dishevelled mass made of severe structural conflicts, which originated in the transition from a sport-centered system, towards one that is marketing-centered;
- the need for remedying the lack of law governing professional sports club dynamics and the imperfect regulatory framework concerning the relations between sports clubs and other subjects;
- the need for legislative intervention with regard to the establishment of a national football lottery on Chinese football games;
- the evolution of commercial sports sponsorship in the absence of relevant regulatory framework;
- the lack and the consequent need of provisions on sports agents in the Sports Law, as well as in regulation.

In need of refinement, consistency and completeness, combining Chinese legal characteristics with international experience might be the right path in order to prevent the danger of handicapping development of China's sports activities. International sports legal exchanges and

cooperation may help, along with Chinese sports legal experts, especially after the founding of the Chinese Research Association of Sports Law in 2005, carrying out a systematic study on national and international sports law, showing a firm multi-level and comprehensive commitment towards the establishment of an efficient indigenous arbitration system suitable for the sports protection in China. Adopting an open international and global vision may be necessary in order to focus on Chinese sports reform and development in a more practical way, with the world's most advanced modern sports legal systems used for reference, and encouraging learnings from the practice and experience of developed countries, whilst keeping Chinese characteristics.

Considering all of the strong efforts directed towards the improvement of such a fluctuating sports legal system, from the drafting of the 2015 Football Reform to the projects of construction of a Chinese arbitration institution, China has been trying its best (and will make it) under the leadership and teachings of President Xi Jinping to learn from other countries, explore new ways and generate new ideas to grow in an independent, fair, effective manner, always maintaining its Chinese characteristics, all in pursuit of the traditional Chinese Dream and, why not, the new one too – the victory of the FIFA World Cup.

INTERNATIONAL INVESTMENT PROTECTION IN CHINA

Matteo D'Agostini

1. Introduction

A bilateral investment treaty (BIT) is an international investment agreement (IIA): «an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory»[1].

China entered its first BIT in 1982 with Sweden. Since then, over the last decades, China has actively entered into new BITs. The United Nations Conference on Trade and Development (UNCTAD) statistics show that China is a party to 129 BITs[2], second only to Germany[3].

This study aims to investigate the evolution of Chinese BIT practice and the link between Chinese economic policy and treaty making activity. In particular, the focus is on two key provisions in international investment agreements: the arbitration clause and the national treatment clause.

[1] Source, UNCTAD website, http://investmentpolicyhub.unctad.org/IIA.

[2] Source, UNCTAD International Investment Agreements Navigator, available at: http://investmentpolicyhub.unctad.org/IIA (last visited on the 12/10/2017).

[3] UNCTAD, Recent Developments in international investment agreement, IIA Monitor No. 3, 2007, 2. Germany ranks first with 134 BITs concluded.

In order to achieve these objectives, I conducted an analysis of Chinese international investment agreements[4], focusing on the two provisions mentioned above. The literature on the topic is scarce; nevertheless, the work of N. Gallgher and W. Shan has been of great help in reconstructing the evolution of Chinese BIT practice.

2. International investment agreements and international investment: from the Open Door Policy to the One Belt, One Road Initiative

IIAs are an important tool of international economic policy. In particular, legal scholars attribute to BITs a "signaling effect"[5]: investment treaties, in specific circumstances and for specific countries, «could signal that a host country's attitude towards foreign direct investment has changed and its investment climate is improving»[6].

This is certainly the case of China. The People's Republic of China was established in 1949. At that time, communist ideology rejected the notion of private property and anti-imperialist sentiments spread throughout the country; as a result FDI was not welcomed in the country[7].

This attitude lasted until 1979, when China endorsed the Open Door Policy. In this period, lasting from 1979 to 1991, «the new leadership headed by Deng Xiaoping took a pragmatic view towards the future of China and socialism, and decided to implement in China a socialist system with Chinese characteristics»[8].

Accordingly, China adopted a two-tier approach to encourage FDI flow based on two pillars: adopting a coherent system of private law[9] and

[4] Available at the United Nations Conference on Trade and Development website: http://investmentpolicyhub.unctad.org/IIA.

[5] M. SORNARAJAH, *The International Law on Foreign Investment*, New York, 2010, 172.

[6] UNCTAD, *World Investment Report*, 2003, 89.

[7] A. BERGER, *China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making*, Washington, 2008.

[8] N. GALLGHER, W. SHAN, *Chinese Investment Treaties: Policies and Practice*, New York, 2009, 6.

[9] For an understanding of the rule of law in China, see I. CASTELLUCCI, *Rule of Law and Legal Complexity in the People's Republic of China*, Trento, 2012.

entering into investment treaties[10]. In particular, on 29 March 1982, China signed the first BIT with Sweden. By the early 1990s, China had entered into 30 BITs covering most investment partners, including Germany (1983), France (1984), Italy (1985), the Netherlands (1985), and Singapore (1986). In 1990, China signed the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID)[11], which took effect on January 1, 1993; China became also a funding member of the MIGA Convention[12].

Through the adoption of the 'open door policy' and the establishment of a domestic and international legal framework, China paved the way for future surges of foreign direct investment (FDI) in the country[13], as Chart 1.1. points out.

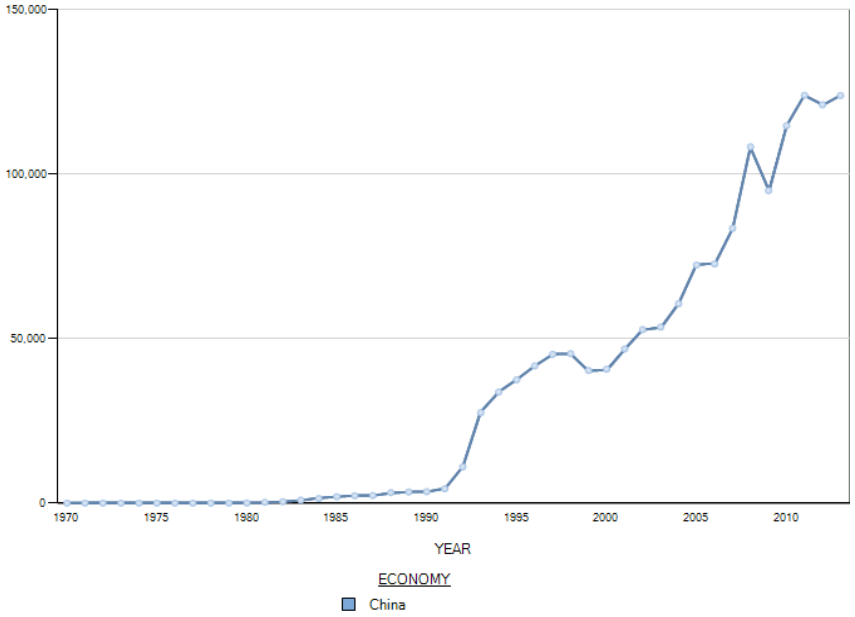
[10] N. GALLGHER, W. SHAN, *supra*.

[11] The International Centre for Settlement of Investment Disputes (ICSID or the Centre) is established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention). The Convention was formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank), with the purpose of promoting foreign investment, by creating a framework for the protection of international investment: in specific, ICSID provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.

[12] The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) of 1988. MIGA is a member of the World Bank and aims to promote foreign direct investment (FDI) into developing countries. MIGA provides political risk insurance guarantees to private sector investors and lenders.

[13] N. GALLGHER, W. SHAN, *supra*, 7.

Chart 1.1.: Foreign direct investment fluxes in China



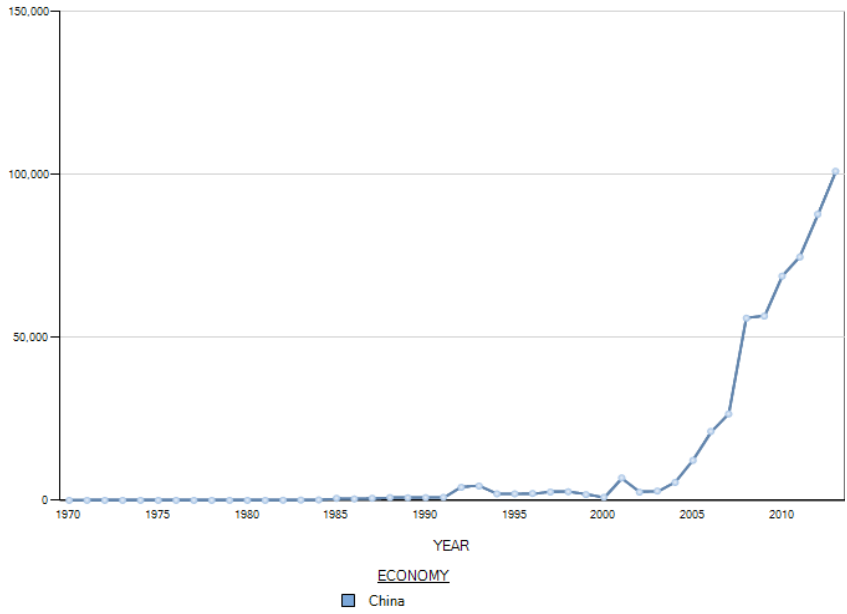
MEASURE: US Dollars at current prices and current exchange rates in millions
DIRECTION: Inward
Source UNCTAD Statistics

After 1991, in fact, China experienced an exponential growth of FDI, from merely $4.3 billion in 1991 to $45.2 billion in 1997. A second wave of FDI took place after China accession to the World Trade Organization (WTO)[14] in 2001; statistics show (*see* Chart 1.1.) that FDI in China almost doubled within five years of WTO admission, from $40 billion in 2000 to more than $75 billion in 2005. As a consequence of the rapid increase in FDI, trade surplus, and *forex* reserve, the Central Committee of the Communist Party of China (CPC) implemented the so-called 'Going Abroad' strategy, a program of outward

[14] The World Trade Organization was established in 1995, many of its agreements are related to foreign direct investment such as the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMs).

direct investment (ODI)[15]. Since 2004, Chinese ODI has rocketed from around $5.5 billion in 2004 to over $100 billion in 2013 (*see* Chart 1.2.).

Chart 1.2.: Outward Chinese direct investment fluxes



MEASURE: US Dollars at current prices and current exchange rates in millions
DIRECTION: Outward
Source: UNCTAD Statistics

Along with these policies, in 2013, China launched the One Belt, One Road Initiative (OBOR): the program involves China investing billions of dollars of infrastructure investment in countries along the old Silk Road linking it with Europe. Interestingly, China is spending roughly $150bn a year in the 68 countries that have signed up to the scheme[16]. The 2015 «Vision and Actions on Jointly Building Silk Road

[15] N. GALLGHER, W. SHAN, *supra*, 12.

[16] See The Economist Explains at https://www.economist.com/blogs/economist-explains/2017/05/economist-explains-11.

Belt and 21st-Century Maritime Silk Road»[17] summarises the objectives of the scheme as follows:

> The Silk Road Economic Belt focuses on bringing together China, Central Asia, Russia and Europe (the Baltic); linking China with the Persian Gulf and the Mediterranean Sea through Central Asia and West Asia; and connecting China with Southeast Asia, South Asia and the Indian Ocean. The 21st-Century Maritime Silk Road is designed to go from China's coast to Europe through the South China Sea and the Indian Ocean in one route, and from China's coast through the South China Sea to the South Pacific in the other.

In conclusion, it is possible to identify three periods of FDI and ODI growth in China: from the endorsement of the 'open door' policy to 1991; from the ICSID accession to 2004; from the implementation of the 'Going Abroad strategy' to the launch of OBOR.

3. The Evolution of Chinese BIT Program

In this scenario, Chinese BITs have not merely adjusted to new trends of FDI and ODI, but have actively facilitated and promoted them. The three periods of FDI and ODI growth are mirrored by three generations of Chinese BITs that are discussed in more detail below. This evolution will be exemplified through the analysis of two key provisions: the arbitration clause and the national treatment standard.

3.1. First generation of BITs (1982-1989)

China signed the first BIT with Sweden in 1982. The first Model BIT was formulated around 1984, after the China-France BIT was signed[18] and incorporated all the basic provisions found in the German-

[17] Available at: http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html.

[18] Model BITs are of importance in understanding the evolution of the BIT practice of a country, as their succession indicates also the changes in policies and attitudes towards foreign investment. Model BITs serve as a negotiation instrument, a template that a country may use to implement its foreign policy abroad. Thus, they are not bind-

Pakistan BIT[19]. The key feature of this Model BIT is embedded in Art. 9, Par. 2 and 3[20], dedicated to the settlement of investor-states disputes. In fact, «dispute resolution provisions in BITs have become as important, if not more so, than the substantive protections granted by states under the same BITs»[21]. This is the case also for the Chinese Model BIT. Traditionally, in the first generation of Chinese BITs, China restricted the investor-state dispute settlement to disputes over compensation in the case of expropriation[22]. In line with the format adopted by many communist states, these disputes were to be settled in local courts, with the exception of controversies concerning the amount of compensation for expropriation, which could be submitted to an *ad hoc* tribunal.

Also, at this phase, China has been reluctant to provide the National Treatment (NT) standard[23] in its investment treaties[24]. A reason behind this policy is that, similarly to other developing countries, the national economy and industries were too weak to withstand international com-

ing instruments of international law. Note, however, that China does not use BIT models in negotiations.

[19] The first BIT was signed by Germany and Pakistan, in 1959, and its substantive provisions have been commonly reproduced in subsequent BITs.

[20] Article 9, Par. 2-3 reads as follows:

If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment.

If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations…it may be submitted at request of either party to an ad hoc arbitral tribunal.

[21] N. GALLGHER, W. SHAN, *supra*, 299.

[22] A. BERGER, *The Politics of China's Investment Treaty-Making Program*, in T. BROUD, A. PORGES, M. BUSCH (eds.), *The Politics of Intrenational Economic Law*, New York, 2011, 174.

[23] The purpose of the national treatment standard is to promote equal treatment between foreign and domestic investors. In sum, NT «aims at creating a level playing field between local and foreign investors as a prerequisite for equal competition».

[24] S. SCHILL, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15, *Cardozo J. Int' & Comp*., 2007.

petition and needed protection – this need was especially adverted for state-owned enterprises[25].

The UK BIT of 1986 was the first BIT to include a NT clause[26]. The clause reads:

> Either contracting party shall to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations to the investment of nationals or companies of the other Contracting Party the same treatment as that accorded to its own nationals or companies.

Nevertheless, this NT provision does not create a hard obligation but a «best effort» requirement through the reference to domestic law and the limitation of the obligation to accord national treatment «to the extent possible»[27].

The Japan BIT was the second to include a NT Clause. The wording of Article 3, par. 1) of the Sino-Japan BIT from 1988 implies a rather strong national treatment provision in comparison to the Sino-UK BIT:

> The treatment accorded by either Contracting Party within its territory to nationals and companies of the other Contracting Party with respect to investments, returns and business activities in connection with the investment shall not be less favourable than that accorded to nationals and companies of the former Contracting Party.

This provision, however, is being qualified by further explanations of the term «less favourable» in paragraph 3 of the Sino-Japans BIT's protocol:

> For the purpose of the provision of paragraph 2 of Article 3 of the Agreement, it shall not be deemed 'treatment less favourable' for either Contracting Party to accord discriminatory treatment, in accordance with its applicable laws and regulations, to nationals and companies of the other Contracting Party, in case it is really necessary for the reason of public order, national security or sound development of national economy.

[25] A. BERGER, *China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making*, cit., 8.

[26] N. GALLGHER, W. SHAN, *supra*, 167.

[27] N. GALLGHER, W. SHAN, *supra*.

Thus, this clause allows the host State to discriminate against a foreign national, when such discrimination is permitted by law or «in case it is really necessary for the reason of public order, national security or sound development of national economy»[28].

Discussing the reasons of treaty making activity of states, Sornarajah clearly identifies the policies behind the first generation of Chinese BITs:

> The underlying reasons for the treaty activity of any one state does not remain constant. China again provides an example. It was in earlier times a recipient of capital. When it announced its 'open door' policy, there was a need to signal this fact, and it signaled its willingness to give guarantees of protection by signing treaties. It married this with its existing philosophy by confining arbitration to disputes as to the quantum of compensation and required a compulsory period of negotiation prior to arbitration. China's more recent treaties are, however, premised on the fact that the current significant outflows of foreign investment from China need to be protected. Its newer treaties are becoming very similar to those which Western industrialized states sign[29].

3.2. Second Generation of BITs (1990-1997)

China formally signed the ICSID Convention in 1990 and ratified it in 1993. The embracement of ICSID membership was the result of the great benefits generated by the *open door policy* in terms of economic development, and the idea that this was the way forward for China[30]. Nevertheless, when ratifying the convention, China notified the Centre that it would submit to ICSID jurisdiction only «disputes over compensation resulting from expropriation and nationalization»[31]. This choice indicates certain skepticism – shared by other developing countries – towards the jurisdiction of the Centre, seen as a threat to state sovereignty and national jurisdiction.

[28] See Paragraph 3 of the Sino-Japans BIT's protocol of 1988.

[29] M. SORNARAJAH, *supra*, 174.

[30] N. GALLGHER, W. SHAN, *supra*, 38.

[31] China's reservation pursuant to Article 25(4) of the Convention.

The first example of BIT including an ICSID arbitration clause is the Lithuania BIT signed in 1993[32]. Art. 8, par. 2 of the Lithuania BIT provides:

> If the dispute cannot be settled through negotiations within six months, the investor of the one Contracting Party shall be entitled to submit the disputes as it chooses to either:
> a) to a competent court of the Contracting Party in which the investment has been made; or
> b) the dispute relating to the amount of compensation and other disputes agreed upon by both parties may be submitted to the International Centre for the Settlement of Investment Disputes between States and Nationals of other States.

The disputes that are referred to the ICSID are only the disputes relating to the amount of compensation in the case of expropriation; all other disputes must be dealt with in local courts. In fact, China, in this phase, was still adopting a rather conservative approach to investment protection, effectively limiting the scope of international arbitration.

With respect to the national treatment standard, in this phase, many BITs made the NT standard contingent only to the domestic legislation of the host country. This drafting of NT provision was firstly included into the Spain BIT of 1992. This NT provision was firstly included into the Spain BIT of 1992 and was then incorporated in subsequent BITs. For example, the Latvia BIT (2004) provides:

> Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favourable than that accorded to the investments and associated activities by its own investors.

Such clauses allow China to discriminate against foreign investors by changing old or enacting new legislation in favour of domestic investors. Nevertheless, the provision appears to prevent discriminatory measures that are not imposed by formal laws and regulations[33]. In fact,

[32] N. GALLGHER, W. SHAN, *supra*, 39.

[33] N. GALLGHER, W. SHAN, *supra*.

the clause does not include any reference to necessity, public order, national security or the development of national economy.

This drafting technique represents yet another example of China's ambivalent approach to investment protection in this phase: expansive, on the one hand, and conservative, on the other.

3.3. Third Generation of BITs (1998-Present)

In the late 1990s, China felt the need for the adoption of yet another model of BIT, which would further liberalize the international regime of investment protection in China.

There are a number of reasons behind this choice of the Chinese authorities[34]. First, China's ODI towards the rest of the world was surging (*see* Chart 1.2.), thus increasing the need of protecting Chinese investors abroad[35]. Secondly, the global geo-political environment had changed:

> the world had experienced dramatic changes in the aftermath of the collapse of the Soviet Union: the former USSR states, the Eastern European states, and even the Latin American states had also adopted neoliberalist investment policies, trying to bring their laws and treaty practice in line with international practice, in an effort to attract FDI[36].

Thus, the competition for FDI intensified, warranting the adoption of more liberal BIT model.

This new model was implemented for the first time in the China - Barbados BIT of 1998. Among the most notable features of the Barbados BIT, Art. 9 introduces unlimited access to ICSID arbitration for all investor-state disputes[37]:

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[34] N. GALLGHER, W. SHAN, *supra*, 41.

[35] See C. CAI, *Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice*, in *Journal of World Investment and Trade*, 2006.

[36] N. GALLGHER, W. SHAN, *supra*.

[37] Other features, such as National Treatment provisions, will be discussed in further chapters.

> If any dispute referred to in paragraph 1 of this Article cannot be settled within six months following the date on which the written notification of the dispute has been received by one party from the other party to the dispute, the investor shall have the right to choose to submit the dispute for resolution by international arbitration to … the International Centre for the Settlement of Investment Disputes (ICSID).

Therefore, not only disputes «relating to the amount of compensation» but «any dispute» shall be arbitrated before the ICSID. This shift in the drafting technique is reflected in most BITs signed after 1998. For example, the BIT between Germany and China provides:

> 1) Any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.
> 2) If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration.

Similarly to the Barbados BIT, «any disputes concerning investments» can be referred to the ICSID or to an *ad hoc* tribunal[38].The BIT with the Netherlands and Finland provide other examples of BIT concluded with developed countries containing this provision.

This expansion of investment protection is reflected also in the drafting of the national treatment clause. For example, the China-Spain BIT of 2005, differently from the one signed in 1992, includes no reference to national laws[39].

However, in the Chinese BIT practice with developing countries the essence of the new Chinese policy can be truly understood:

[38] China has been part to a handful of proceedings before the ICSID. So far, only two arbitration requests have been registered against China at the Secretary General of the ICSID.

[39] Article 2, par. 3 of the 2005 BIT reads as follows: Each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favourable than that which it accords to the investments and associated activities by its own investors.

> The essence of China's new BIT policy, however, is that comprehensive investor-state dispute settlement procedures have been introduced first and foremost in treaties signed with developing countries which, as a group, are the main destination of Chinese outward FDI. It shows China behaving like a FDI-exporting country, trying to increase the legal protection of its own foreign investments. Against this background, the (re-)negotiation of older BITs with among others The Netherlands, Finland and Germany is regarded as a mere consequence of this change[40].

As Berger notes, the more liberal stance taken by the Chinese government since the Barbados BIT is linked to the fact that China had begun to negotiate BITs with developing countries from the position of a capital-exporter, thus insisting on stronger protection of its own investments[41]. In fact, it is not a coincidence that the change in Chinese BIT policy overlapped in time with the announcement of the «Going Global» strategy[42] and OBOR, that marked the transition from *regulation* to *encouragement* of Chinese outward direct investment[43]. Since the 1990s, Chinese OFDI has been increasingly directed towards developing countries[44] and China has signed by far more treaties with developing countries than developed countries[45]. The investment agreement between China and the Association of South East Asian States (ASEAN) represents a good example of this new trend.

4. The ASEAN-China Investment Agreement

The ASEAN-China investment agreement was signed on the 15 of August 2009: this is the last of a series of agreements that created the

[40] A. BERGER, *China and the Global Governance of Foreign Direct Investment. The Emerging Liberal Bilateral Investment Treaty Approach*, Bonn, 2008, 22.

[41] A. BERGER, *supra*.

[42] A. BERGER, *supra*.

[43] N. GALLGHER, W. SHAN, *supra*, 627.

[44] A. BERGER, *supra*, 11.

[45] A. BERGER, *supra*, 18.

ASEAN-China Free Trade Area (ACFTA)[46]. The agreement has been modified, in 2015, to incorporate the economies of Cambodia, Laos, Myanmar and Vietnam. It is important to note that the agreement covers many states on the OBOR Maritime Routes.

Increasingly countries are resorting to free trade and investment agreements, rather than BITs[47]. The reason behind this trend is that «such broader agreements can better respond to the needs of today's economic realities, where international trade and investment are increasingly interconnected»[48]. In fact, the purpose of free trade agreements is not only to protect foreign investors against illegal host state activity, as in traditional BITs, but also to facilitate foreign investors' access into host state markets.

Negotiations with ASEAN countries commenced in 1997, when the South-East Asian countries were severely hit by the East Asian financial crisis. Gao describes this process as follows:

> Whatever its cause, one consequence of the crisis was that people have lost faith in global institutions such as the IMF and World Bank, which were allegedly responsible for the Crisis with their highly-intrusive policy suggestions. Thus, in his speech at the first China-ASEAN summit held in December 1997, President Jiang Zemin calls for the two sides to build a "Good Neighboring Partnership of Mutual Trust". In November 2000, the two sides further agreed in another Summit to explore ways to further enhance integration and economic cooperation between the two regions, including the possibility of establishing a free trade area. After the Summit, an ASEAN-China Expert Group on Economic Cooperation was established to conduct feasibility studies on an ASEAN-China FTA. In October 2001, the Expert Group issued its report and concluded that an FTA would be in the interests of both parties. At the ASEAN-China Summit held a month later, the two sides decided to establish an ASEAN-China Free Trade Area ("ASEAN-China FTA")

[46] For a detailed discussion of the issues that emerged in the negotiations see H. CHEN, China-ASEAN investment agreement negotiations : the substantive issues, Journal of World Investment and Trade, 2006.

[47] A. BERGER, *Investment rules in Chinese preferential trade and investment agreements: Is China following the global trend towards comprehensive agreements?*, 2013, 4.

[48] UNCTAD, World investment report 2012: towards a new generation of investment policies, Geneva, 2012, 86.

> within 10 years. One year later, the Framework Agreement on Comprehensive Economic Co-Operation between ASEAN and the People's Republic of China was signed, and this marked the start of the tariff-reduction process leading to the eventual elimination of tariffs among the two sides[49].

The approved version of the agreement, with regards to the arbitration clause, embraces a broad formulation: art. 14 provides that a dispute concerning an alleged breach of obligation under the articles of the agreement may be submitted under the International Centre for Settlement of Investment Dispute (ICSID) Convention.

As to the NT provision, it is interesting to note that investment liberalization is considered the key issue in the investment negotiations between China and ASEAN countries[50]. In particular, ASEAN countries insisted for a pre-establishment National Treatment clause, whereas China strongly opposed it on the grounds that the Chinese economy was in transition and the reform of state-owned companies was still incomplete[51]. This issue created a long deadlock that lasted many years. Finally, the issue was resolved in favour of China. In fact, the provision of the National Treatment clause[52] is diluted by a disclaimer for non-conforming measures[53]. Thus, the provision allows China to preserve legislation inconsistent with the NT obligation. This for ASEAN countries represents a major deficiency in the agreement[54].

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[49] H. GAO, *China's Strategy for Free Trade Agreements : Political Battle in the Name of Trade*, in R. BUCKLEY, R. HU, D. ARNER (eds.), *East Asian economic integration: Law, Trade and Finance*, Cheltenham, 2011, 3.

[50] H. CHEN, *supra*, 148.

[51] A. BERGER, *Investment rules in Chinese preferential trade and investment agreements: Is China following the global trend towards comprehensive agreements*, cit., 2.

[52] Article 4 reads: "Each Party shall, in its territory, accord to investors of another Party and their investments treatment no less favourable than it accords, in like circumstances, to its own investors and their investments with respect to management, conduct, operation, maintenance, use, sale, liquidation, or other forms of disposal of such investments".

[53] See Article 6, «Non-Conforming Measures».

[54] A. BERGER, *supra*.

In conclusion, Chinese Open Door policy inaugurated in 1978 marked a significant shift in Chinese attitude towards foreign investment. The evolution of this new trend led eventually to the lunch of OBOR.

In this scenario, bilateral and multilateral investment agreements plaid and important role. In the first phase, when China was mostly a recipient of foreign capital, they signalled the «willingness to give guarantees of protection». Later, when China became a major exporter of capital, IIAs were used to protect Chinese investment abroad.

Overall, these economic policy changes led to an expansion of international investment protections. In particular, this is highlighted by the drafting techniques of two key clauses of investment agreements: the investor-state dispute settlement (ISDS) and the national treatment (NT). In fact, most recent BITs provide for ICSID investor-state dispute settlement mechanism. Also, the trend is toward a broad formulation of the NT provision. However,

> Chinese treaties since 2008 have not shown the same degree of internal consistency as earlier agreements – perhaps, to some extent, due to the need to engage in lengthy and complex negotiations in the case of agreements with developed countries[55].

The ASEAN-China Comprehensive agreement on investment represents an example of this new, more complex, approach.

5. Chinese Approach to Investment Arbitration

In order to better understand Chinese practice in the field of investment arbitration, it is important to take into account cultural and sociological factors. Wang summarizes the Chinese approach to disputes with foreign investors as follows:

[55] V. BATH, *One Belt, One Road and Chinese Investment, Legal Studies Research Paper no. 16/98, 2016, Sydney, 7*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2866169.

> In both traditional and contemporary Chinese culture, litigation is not encouraged. The Government also takes great care about disputes with foreign investors, as it fears that such disputes, if not properly handled, will affect the image of the country's environment for foreign investment and, in the end, the in-flow of foreign capital and technology. To resolve disputes with foreign investors without resorting to litigation, mechanisms such as Complaint Centres, Mediation Panels and Working Panels[56] have been established at different administrative levels throughout China. As early as the 1980s, the Chinese government had paid special attention to disputes with foreign investors. Where environmental considerations, city planning or public concerns meant that a foreign investment project had to be relocated, instead of paying compensation the Chinese government on many occasions helped the foreign investors find another location for the project and offered more preferential terms[57].

In particular, Confucianism, the dominant cultural influence in Chinese society, strongly discourages social conflicts because they are perceived as interfering with natural order: in this context, harmonious relationships are more appreciated than individuals' rights[58]. Thus mediation and compromise, rather than litigation, is the favoured means of resolving disputes involving investors[59]. The Chinese approach to dispute resolution, based on mediation and negotiation, may explain why China has been part to just a handful of proceedings before the ICSID[60].

Only two arbitration requests have been registered against China at the Secretary General of the ICSID. The first case, Erkan v. China[61], involved a lease investment worth US$ 6.000.000 in the Chinese province of Hainan by one of Erkan's subsidiaries, the Sino-Malaysia Culture &

[56] For example The Ministry of Commerce also promulgated, in 2006, The Interim Measures on Complaints from Foreign-invested Enterprises, establishing the National Complaint Centre for Foreign-invested Enterprises.

[57] G. WANG, *Chinese Mechanisms for Resolving Investor-State Disputes, Jindal Journal of International Affairs*, 1 (1), 2011, 215.

[58] M. MOSER, *Law and Social Change in a Chinese Community*, New York, 1982, 66.

[59] G. DERNELLE, *Direct Foreign Investment and Contractual Relations in the People's Republic of China*, 6 *DePaul Business Law Journal*, 1994, 331.

[60] G. WANG, *supra*, 223.

[61] *Ekran Berhad v. People's Republic of China*, ICSID CaseNo. ARB/11/15 (Date Registered May 24, 2011).

Art Co. Ltd., whose right of leasehold land was revoked by the local authorities on the ground that the investor had failed to develop the land as stipulated under local legislation. The case was suspended pursuant to the parties' agreement on 22, July, 2011[62]. The second case was filed by a Korean investor, Ansung[63], alleging that the Chinese local government entities interfered in the investor's development project for a golf country club, depriving the investor of the use and enjoyment of his investment through various acts and omissions, forcing Ansung to dispose the entire investment to a Chinese purchaser. In this case, the arbitral tribunal held that the investor's claim was time-barred, thus dismissing the case.

However, Chinese investors have become more active in taking advantage of the PRC's extensive network of investment treaties[64]. The first case brought under a Chinese BIT was, in fact, a case brought by a Chinese investor against Peru, Tza Yap Shum v. Republic of Peru[65], where the tribunal held that the Peru's taxing authority, the Superintendencia Nacional de Administración Tributaria ("SUNAT")'s imposition of interim measures (resulting from the imposition of back taxes and fines) constituted an indirect expropriation of Tza's investment[66]. The second ICSID arbitration under a China BIT is Ping An[67], a major Chinese insurance and financial services company, seeking compensation in relation to its investment in Fortis, a Belgian-Dutch financial institution that was bailed out by Belgium in 2008. The Tribunal was constituted in February 2013 and the dispute is still pending[68].

[62] For a detailed analysis of the case see Q. TONG How Exactly does China Consent to Investor-State Arbitration: On the First ICSID Case Against China, 5(2) CONTEMP. ASIA ARB. J. 265: 267.

[63] *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25 (Date registered November 4, 2014).

[64] *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25 (Date registered November 4, 2014).

[65] *Tza Yap Shum v Republic of Peru* (ICSID Case No. ARB/07/6).

[66] Note that the China-Peru BIT provided under Article 8(3): «If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Para. 1 of this Art., it may be submitted at the request of either party to the international arbitration of ICSID».

[67] *Ping An Life Insurance Company of China v. Kingdom of Belgium* (ICSID Case No. ARB/12/29).

[68] *Ansung Housing Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25 (Date registered November 4, 2014)*.

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