

TECHNICAL ASSISTANCE COMPLETION REPORT

Division: Office of the General Counsel

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| TA No. and Name TA 3971-PRC: Enforcement of World Trade Organization Rules by the Judicial System | | | Amount Approved: \$400,000 | |
| | | | Revised Amount: \$400,000 | |
| Executing Agency: Supreme People's Court | | Source of Funding: Japan Special Fund | TA Amount Undisbursed \$25,461.13 | TA Amount Utilized \$374,538.87 |
| Date | | | Completion Date | |
| Approval 4 November 2002 | Signing 29 December 2002 | Fielding of Consultants 10 December 2003 | Original 30 June 2004 | Actual 31 December 2007 |
| | | | Closing Date | |
| | | | Original 30 June 2004 | Actual 17 December 2008 |

Description

The Government (the Government) of the People's Republic of China (PRC) made a commitment to establish a system wherein PRC courts will review the actions and decisions taken by administrative agencies in cases relating to World Trade Organization (WTO) rules and, where justified, provide remedies to the injured party. This commitment was in response to a requirement contingent to all core WTO agreements. Judicial review requirements of WTO entail subjecting government actors and agencies to national laws through administrative litigation procedures. Hence, the impact of a nation's full compliance with this WTO requirement may go far beyond the legal and judicial system.

Despite the positive prospects of further developing PRC's judicial review mechanism, the PRC court system confronted two major challenges. First, new judicial review procedures had to be delivered within the existing legal and judicial system. The PRC Supreme People's Court (SPC) decided that judicial review would be carried out in accordance with the PRC Administrative Litigation Law by the courts which were accorded jurisdiction over cases involving WTO rules. However, under the PRC legal system, the Constitution and other laws at the highest order such as government organizational laws are within the jurisdiction of the National People's Congress and its Standing Committee, not the courts. Thus, striking a balance between defining the courts' judicial review function according to WTO requirement and trying to avoid intruding into a political domain reserved for the NPC and its Standing Committee is a very important task, albeit a highly sensitive and difficult one. Second, there was an urgent need to train the judiciary in WTO rules. Furthermore, the PRC court system needs to develop its own capacity to train judges in this area.

The technical assistance (TA) was approved at the Government's request to provide assistance for enforcing WTO rules.

Expected Impact, Outcome and Outputs

The expected impact of the TA is the successful performance by the PRC of its WTO judicial review commitment and the continued success of PRC's integration with the global economic system through the establishment of a judicial review system, with emphasis on cases involving WTO rules.

The expected outcome of the TA includes the (i) improved capacity of the judiciary to review decisions or actions of administrative authorities on cases relating to WTO rules by equipping senior judges with knowledge of WTO rules and relevant domestic laws, and supporting the long-term training capacity of the National Judges College (NJC) in this area; and (ii) improved PRC's judicial review mechanisms through the study of international experiences.

The outputs of the TA include (i) trained senior judges in WTO rules; (ii) strengthened long term capacity of the NJC in conducting future training on WTO rules; and (iii) a comprehensive and in-depth study of the issues relating to judicial review of cases involving WTO rules, with the potential for generating suggestions for further improving administrative law and enforcement mechanisms.

Delivery of Inputs and Conduct of Activities

The TA commenced on March 2003 and was expected to be completed on 30 June 2004. However, the completion date was postponed 4 times from 30 June 2004 to 31 December 2007. The main reason for such postponement was that after the first two seminars which focused more closely on WTO-related judicial review issues, the EA concluded that the fundamental issue underlying the technical issues relating to judicial review function was the limitation existing in the Administrative Litigation Law. Thus, the EA proposed that the rest of the activities be focused on a broader issue—study on the possible amendment to the Administrative Litigation Law. Because of this change, more time was needed to prepare for the following activities including: (i) a domestic workshop (March 2006); (ii) an international symposium (November 2006); (iii) the compilation of the conference materials; (iv) an external study (November 2007); and (v) preparation and finalization of an internal report for the higher authority of SPC (June 2008). An administrative reason for the delay was the rotation of the key senior judge in the Administrative Litigation Division (ALD) to the High Court of Inner-Mongolia Autonomous Region for one year. This senior judge was responsible for the study on amendment to the Administrative Litigation Law. His rotation, therefore, slowed down the finalization of the internal study report.

Overall, the performance of the consultants was satisfactory. The performance of both executing agencies, ALD of the SPC, and ADB were highly satisfactory. Two different sets of inputs were designed for the two components of the TA.

A. Capacity building on WTO rules. This component of the TA was highly productive. Four training sessions were conducted by ILI, an American consulting firm engaged for 6.5 person-months. These training sessions (i) provided needed assistance in equipping judges with knowledge of WTO rules and (ii) helped the NJC and its local branches in developing future training on the same subject. Two individual domestic consultants were engaged for three person-months each and acted as coordinators and interpreters and facilitated the training activities provided by ILI. Aside from the lectures, experienced government officials from the Ministry of Foreign Trade and Cooperation and Administration of Customs were invited as resource persons to share experiences in trade administration. Other TA inputs for this component were in the form of (i) acquisition, translation and production of training materials; (ii) office equipment for the consultants; (iii) counterpart contributions in the form of staff resources for administrative work in organizing the training sessions; (iv) accommodation and travel expenses for the training participants; and (v) training classrooms.

B. Judicial review. This component of the TA supported the organization and conduct of three domestic workshops and one international symposium. TA inputs included the logistics for the events and the expertise provided by the international and local experts. There was no major deviation from the planned inputs and actual activities except that a domestic individual consultant was hired for one person month to write a summary of the three workshops prior to convening the international symposium. This summary provided the basis for discussing and choosing the topics for the subsequent international symposium. The report also served as background information for the resource persons and speakers who were invited to attend the international symposium. The TA also supported an external study for the ALD judges to aid them in their exchange with foreign counterpart experts and institutions. The inputs for this component included (i) ALD's presentation on WTO requirements and PRC's commitment therewith; (ii) a briefing on the status of the application of the Administrative Litigation Law and issues in applying the Administrative Litigation Law; and (iii) issues at the local level relating to the Administrative Litigation Law, as discussed by participants from local level courts. The inputs were very productive and of high quality. They resulted in conference materials which included thoughts on recent reform efforts and up-to-date judicial practice based on the contribution of top Chinese and foreign experts from academia and the PRC judiciary. The reports and conference summary went straight to the SPC and were helpful in formulating reform proposals regarding the Administrative Litigation Law.

Evaluation of Outputs and Achievement of Outcome

A. Capacity building on WTO rules. The objectives of the training component of the TA were achieved: (i) it provided a timely response to the urgent need of equipping PRC judges with a detailed knowledge of WTO rules, procedures, and history; and (ii) it developed the capacity of the PRC court system to conduct ongoing training on selected topics such as WTO rules. The training materials were of high quality and highly commended by the participants and the NJC. The materials provided a compendium of knowledge regarding the (i) history and background of the WTO; (ii) WTO rules and the major areas covered by these rules; (iii) jurisprudence involving WTO rules; and (iv) WTO's dispute resolution mechanisms. Apart from these materials, ILI and the individual domestic resource persons provided other materials which focused on PRC's experiences. The training sessions were also well attended by senior judges and NJC faculty. The SPC and the NJC rated the training sessions as successful because these responded to the urgent need of equipping judges with basic knowledge on the sources of law and methodology in applying WTO rules. The training sessions also helped NJC develop a permanent WTO curriculum. Additionally, the NJC was able to develop its network of and connections with domestic experts. After the training sessions under the TA, the NJC conducted several trainings on WTO rules within the court system where the SPC Executive Vice President, an expert in Foreign Trade Law, made presentations.

B. Judicial review. The study conducted under the TA involved two important areas: (i) the issue of judicial review as required by the PRC's WTO agreement, and (ii) the ongoing reform of the PRC's judicial system. The quality of the individual presentations varied. However, the outputs were generally of high quality considering that they were a combination of the works of international and domestic experts. SPC was very happy with the outputs and found them timely. The TA assisted the SPC in analyzing the procedural components of the Administrative Litigation Law and its application in the context of meeting the PRC's WTO requirements. The in-depth discussions at the domestic workshops resulted in proposals for revising the Administrative Litigation Law in order to broaden the jurisdiction of the courts—from one which requires that an administrative law claim must identify the specific administrative action which caused specific damage to a specific grievous party. Two versions of the proposed amendments were presented by participants from academia. ALD also informed participants of the major points of its proposed revisions but did not reveal its draft amendments in consideration of the highly sensitive nature of such issues in the PRC. Despite this, it is undeniable that without the opportunities which arose from PRC's WTO membership and its commitment to develop a judicial review system, the discussions and resultant proposals for any amendment of the Administrative Litigation Law would not have taken place. The TA-assisted activities initiated and undertaken by ALD yielded significant strategic impacts on legal reform and the promotion of the rule of law and thus went way beyond the primary objective of simply meeting WTO judicial review requirements.

Overall Assessment and Rating

The objectives of the TA were met and exceeded. The TA was successful.

Major Lessons

Joining the WTO opened many opportunities for deepening PRC's reform. One major opportunity for reform is promoting judicial review. Together with the Administrative Licensing Law (for which ADB provided drafting support under TA 3279-PRC for Development of Economic Laws), judicial review constitutes an important dimension of law and rights. Through judicial review, a nation can seek to

curtail and reduce the abuse and/or misuse of administrative power by subjecting administrative decisions and actions to review by the courts. Seizing this kind of opportunity should be encouraged. However, handling this kind of work is highly sensitive. Thus, it requires very good judgment and sense based on a proper understanding of PRC's political, legal and judicial systems.

Providing assistance in the legal sector by focusing on a specific area very often has a long term impact. As shown in this TA, improving PRC's judicial review of WTO-related cases was eventually linked to the issue of expanding the judiciary's role by revising PRC's Administrative Litigation Law. Thus, ADB and EA were faced with the dilemma of whether the TA should be completed when the specific focus was covered and analyzed and then claim that TA objective as been accomplished, or whether further endeavors should be made to tackle more fundamental legal issues. This dilemma resulted in the delay of the TA completion.

Building the capacity of the PRC judicial system to satisfy WTO requirements showed the importance of deepening the judges' understanding of the jurisprudence behind the laws. However, since the judiciary still plays a passive role compared to the decision- and law- making authorities, there is a continued risk that judges will only understand the law as a set of rigid rules and interpret and apply the law in a technical manner, losing sight of the jurisprudential aims which underpin these rules. Further, given the large size of the PRC judicial system and the limited resources of external assistance agencies, it is difficult for such capacity building activities to be visibly and immediately strategically significant. Nevertheless, ADB's experience from this TA indicates that capacity strengthening in selected areas of law through continuing legal training programs may generate such visible, immediate impacts. In order to have visible and immediate capacity building impacts, training exercises in the PRC must (i) emphasize not only strengthening judicial knowledge of rules but also the jurisprudence behind such rules; (ii) use an approach which combines lectures and case discussions; and (iii) follow a pattern of concentrated course training plus self-preparation and study by participants. The TA also confirmed that it is not realistic to expect the NJC to operate as a normal educational institute. Rather, the NJC should remain an institution responsible for providing continuing training and a forum for legal research and discussion. To further develop its strengths in providing training and forum, the NJC must continue to develop a local network of trainers on various subject matters rather than rely upon international experts. Developing such long term institutional capacity should rely on local expertise resources considering that international consulting services can only provide a one-time service or emergency response, as seen in the TA.

Recommendations and Follow-Up Actions

It is recommended that ADB focus its law-related interventions in the PRC on administrative law as well as litigation and procedural law development and capacity-building. With respect to capacity building in the judicial system, it is recommended that ADB choose appropriate topics and provide training through continuing legal education programs with a particular emphasis on jurisprudence.

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