Ermanno DE FRANCISCO – President of Chamber at the Italian *Consiglio di Stato*

My two-weeks internship at the Supreme People's Court, Administrative Trial Division, of the People's Republic of China

I – The Exchange Program

My exchange program – organized by A.I.H.J.A. – was held from the 10th to the 21st of October 2016 in Beijing, at the Supreme People's Court (here in after: SPC) – Administrative Trial Division, of the People's Republic of China. Over those two consecutive weeks, I worked with my Chinese colleagues from Monday to Friday.

I stayed in a hotel located just a few steps away from the SPC building, in a central area just southeast of the heart of Beijing; the Forbidden City. I visited many judicial and administrative offices during my internship at the SPC, not only in Beijing: and in every circumstance I was accompanied by the hosting institution, travelling by car or taxi. Moreover, I was always provided with an interpreter and usually an assistant, or sometimes my own Tutor. My Tutor (Mr Bao Jian Geng) is a judge of the Administrative Trial Division of the SPC. As he speaks English fluently, we had many interesting discussions that allowed me to better understand the Chinese judicial system. He also helpfully suggested many practical things which made my long stay in China more enjoyable, such as recommending the hotel where I stayed which was very comfortable and was located close to the SPC building.

From my early-morning arrival at the airport in Beijing on Sunday, the 9th of October, I was fully assisted by the efficient organization of the International Department of the SPC, which met me at the international arrivals area and accompanied me to my hotel where I had my first meeting with my Tutor, who immediately invited me out to lunch at a nearby restaurant even though it was a holiday.

Nearly every work day I was invited to lunch by the Institution (Judiciary, University, or administrative) where I carried out my morning activities; and I was often invited to dinner following my afternoon internship work by my Chinese colleagues (and, once, by an Italian professor of international private law who had been working for years at the China University of Political Science and Law, as part of a collaborative program with the University of Rome, Tor Vergata: Prof. Stefano Porcelli).

After spending Sunday acclimatizing myself, on Monday the 10th of October 2016 my work began with my first visit to the SPC. My internship program at the SPC was divided into a large series of visits:

- first, to the Administrative Trial Division of the People's Republic of China;

- then to various courts (civil, criminal and administrative) of each level (District, Intermediate and High Courts) of the Municipalities of Beijing and Tianjin;

- also to two universities: the China University of Political Science and Law and the Beijing Foreign Studies University; and to the National Judges College of the People's Republic of China;

- to some leading Chinese administrative offices (Legislative Affairs Office of the State Council of the People's Republic of China – i.e. the Chinese Government; Ministry of Commerce; Department of Policy and Legal Affairs of the General Administration of Customs);

- and finally to a large private law firm (King & Wood Mallesons).

At each of these institutions, always assisted by an interpreter and almost always by an SPC Assistant, I had courtesy meetings with the presidents or vice-presidents of the courts (at the SPC, in particular, with Mr. Jiang Bixin, Vice-President and Justice of SPC; and with Mr. He Xiaorong, Chief Justice of the Adminstrative Trial Division of the SPC) and I had tours of the courtrooms or the offices, and on one occasion I was able to attend the celebration of a hearing of an administrative process at a Local Court in Beijing.

At the two universities that I visited and at the National Judges College, I was asked to give a speech to the students and judges on Italian administrative law; my presentation, done at the last minute, was followed by a brief discussion with the audience. Essentially, I tried to outline the evolution of Italian administrative law from 1865 (conventionally considered its date of birth) to the present day, highlighting the similarities and differences with Chinese administrative law (according to the little I knew of it at that point), and trying to explain as simply as possible the peculiar system in Italy which divides civil and administrative jurisdiction.

All these activities took place in English with a Chinese interpreter; except at the China University of Political Science and Law, where in the presence of an Italian professor who teaches in China and a Chinese professor who has worked in Italy as part of the aforementioned cultural exchange with the University of Rome, Tor Vergata, I was allowed to speak in Italian with translations directly into Chinese. These activities were the most culturally engaging for me; equal

to the interesting technical and operational debates, which I had at some courts with local judges dealing with administrative law disputes; as well as the many entertaining conversations I had with my Tutor on the organizational problems in China and in Italy over administrative jurisdiction of last instance.

II - The Chinese Administrative Justice System and the Comparative Law Aspects in my Exchange

The Chinese system of administrative justice is relatively young, at least when compared to the Italian one, because the ability to impugn an administrative act was introduced only towards the end of the last century, with the reforms of 1980 and 1989. The first of these was only for companies that carried out international business activities and the second was in general terms for all parties subject to Chinese law. The reforms came with a number of limitations, so you might say that administrative justice was born in China in 1989, which is a hundred years to the day after the conventional birth of Italian administrative justice with the institution of the IV Section (the first jurisdictional) of the Council of State of the Kingdom (at that time) of Italy.

A thorough reform of the young Chinese system of administrative justice occurred in 2015, after its first 25 years of activity. In essence, in the same amount of time it took in Italy for the abolition of the previous Administrative Courts and the transfer of administrative disputes to civil courts (1865) and the establishment of a real general administrative jurisdiction (1889). It could therefore be assumed that 25 years is the right timeline for the informed development of a major judicial reform, which undoubtedly includes the introduction of a system of administrative justice in a country that previously was deprived of such. In effect, the principle of general enforceability before the administrative courts was introduced in China in 2015, albeit with some exceptions.

Today, acts of the local and provincial administrative authorities and administrative acts issued by the ministries – but not jet, generally speaking, those of the Government (also known as the State Council) – can all be impugned.

With regard to the local and provincial authorities, the People's Republic of China is formally divided in 34 provincial-level administrative divisions, or first-level administrative divisions which are the highest-level Chinese administrative divisions: 23 of them are classified as provinces (including Taiwan Province, which is claimed but not actually controlled by the People's Republic of China), four municipalities, five autonomous regions, and two Special Administrative Regions.

Acts of greater political importance for the People's Republic of China are not open to challenge (as many acts of the State Council).

The boundaries of this significant exception to the general principle of the impugnability of administrative acts still seem to be the subject of interpretative activities by the Administrative Trial Division of the SPC, which my Tutor and I often discussed.

In perhaps not particularly accurate terms from a technical standpoint, it is tempting to somehow compare this system of exemption from judicial control to that which traditionally also in Italy excluded the possibility of challenging so-called "political acts". *Political acts* – in this meaning – is probably to be understood in a much broader meaning than is now attributed to this term in Italy; that is, as it was considered the nineteenth century, when administrative jurisdiction was first established in Italy.

In China there are also several other exceptions to the general principle of the impugnability of administrative acts. Still, since 2015 the principle of the general impugnability of those types of acts has certainly been introduced in Chinese administrative law, with some peculiar cases of acts not subject to judicial review, remaining.

The implementation of this new principle (which somehow overthrew that of the typical characteristics of challengeable acts between 1989 and 2014), is demonstrated in practical terms by the fact that all Chinese courts (from the Local Courts to the SPC) have consistently presented to me that from 2015 to 2016 they have observed a real quantitative explosion of administrative judicial litigation: (+ 300% only in 2015 compared to 2014, and with a tendency to further similar successive increments, as I was told in one of the courts which I visited). This is perhaps becoming the main organizational problem of the Administrative Divisions of Chinese courts.

The depth of the 2015 reform is further demonstrated by the fact that, as a result of it, actions are allowed in China not only for the annulment of administrative acts prejudicial to the interests of the citizen (such as expropriation of assets and settlement of relevant compensation) but also against the lack of government response to the requests made by citizens and by the failure to obtain the required documents (as in Italy, where actions are allowed against silence and for access to administrative documents), with the possibility to act in virtually every case in which the plaintiff complains of the failure to comply with its duty by various public entities. Two reported examples of this, being against the material expropriation and violation of the duties of the public, have been indicated as the most frequent ones and amount to about two-thirds of the administrative litigation processed at one of the courts that I visited. Summary procedures for these types of proceedings

exist in China, as well as mediation processes which, unlike in Italy, are carried out with the aid of the court, seeking to avoid or close proceedings by agreements between the city and the authority. This is a particularly strong theme (despite the uniqueness of the jurisdiction; which is articulated in specialized sections for administrative law established at each Court) in China: connecting administrative and civil matters.

Alternative solutions to jurisdictional resolutions on administrative matters are far more developed in China than they are in Italy. In particular, I was brought on a tour of the "Reconsideration Office" of the State Council's Department for Legislative Affairs Office, a sector of the principal legislative office of the Government that, upon request by the interested parties, reviews and amends (as necessary) acts of the administrative authorities (also local ones). The office appeared to be quite efficient and useful, probably thanks to the centralization of all administrative power by the Chinese Government.

In general terms, however, the use of administrative courts is not conditional upon the prior implementation of a mandatory appeal to the administration which adopted the contested measure, or to a superior body, except in cases relating to tax and customs disputes. In fact, in China (unlike in Italy) such disputes fall under the jurisdiction of the Administrative Divisions of the Courts.

Limited to this specific area of tax and customs disputes, however, it is truly impressive how few appeals are filed, and even more so, of the number those accepted: less than a thousand in the whole of China, many of which are not accepted for substantive or procedural reasons, with a tendency towards a further reduction of appeals in recent years. The only explanation that aligns with this data would be tied to the involvement of the taxpayer in the tax payment process (and particularly, in customs) and the effective possibility to obtain a review of the administrative act upon request by the interested party. Nonetheless, the small number of complaints in this area remains difficult to understand, in consideration not only of the size of the Chinese economy, but also the numerical data (indeed apparently normal: for example 10% collected and 20% defined with satisfying transactions for the plaintiff, according to the data for the 4th Intermediate People's Court of Beijing) of the ordinary administrative litigation that I was shown by the different courts that I visited.

Returning to more general considerations on the Chinese administrative process, my impression is that currently a formal distinction between the different types of actions to be proposed before the administrative judge hasn't been developed yet, because of a more pragmatic approach, to the questions that the plaintiff (who can be an individual or a commercial company)

may propose to the courts, prevails. In China, the defendant can be a local or national public administration or even a Ministry; but, generally speaking, not [yet] the Central Government. However – as I understand it from conversations with my Tutor and from specific questions that were posed to me by my Chinese colleagues whom I met with at the various courts that I visited – I would say that it is possible to imagine a starting process for a concretely effective form of protection which is not dissimilar from the Italian one, which is derived from the variety of legal actions (even of condemnation and compliance) provided for (since 2010) the italian Code of Administrative Procedure. Nevertheless, it should be noted that it is a path that, in China, is just at the beginning: so I do not think that definitive conclusions can be drawn about it.

In China the administrative trial takes place, basically, in two degrees of merit, together with a potential for review before the SPC. In particular, in relation to the object of judgment and to the Authority that adopted the contested measure, the two degrees take place in front of the District, Intermediate, or High Courts. Only two degrees are possible in minor cases (District and Intermediate Court), in other cases the process begins before the Intermediate Court and the second position is held at the High Court. In cases of particular importance there are provisions which allow the process to be introduced directly before the High Court, but this prevision seems not to have had significant implementation yet. According to Chinese law, even the SPC "shall have jurisdiction as a court of first instance over grave and complicated administrative cases in the whole country ".

Any appeal after the first two degrees, takes place before the higher court and therefore before the SPC in all cases in which a High Court has judged the merits (there are about 31 High Courts in all of China [not including Hongkong, Macao and of course Taiwan] because they are located in each provincial-level administrative division). According to the different cases, the panel hearing in the courts of merit is usually composed – for administrative cases – by three judges; or, for the simplest cases and only in first instance, one professional judge and two jurors (citizens). China, as Italy as well, doesn't have any public prosecutor to attend administrative proceedings.

For each degree of judgment in China there is a maximum duration period for the process of a few months. The effective compliance with such terms constitutes one of the main concerns for all Chinese administrative courts. This is especially true in the face of the enormous explosion of administrative litigation, which derived from the 2015 reform, particularly as there has not yet been an appropriate increase in the number of judges employed by the Administrative Divisions of the various courts (including the SPC). In 2016, in one of the courts that I visited (which had 14 judges and as many assistants in the Administrative Division) the number of cases assigned to each judge

increased from about 100 to nearly 200 cases annually. This increased workload doesn't seem easily going to slow down and this is one of the biggest concerns of the individual Chinese judges with whom I spoke: who, at the moment, do not see any solution to this problem.

As it's evident from what has been already said, the Chinese judicial system is basically a kind of "civil law jurisdiction"; it means, in other words, that it's based on written law rather than the constraint of case law. The Chinese model, in fact, knows a single jurisdiction (analogous, I would say, to the Spanish model), in which there is an "Administrative Division" at every judicial office. Nevertheless, I perceived a full awareness of the Chinese judges regarding the complete substantive and procedural autonomy of administrative law with respect to civil and criminal law.

In the Chinese administrative process, even before the SPC, assistance of a lawyer is not required, although citizens may seek the assistance of a lawyer (with costs, however, much lower than in Italy), and they can also obtain it from the same office in the Court where they personally go to seek justice. In such offices (which appear all new and functional, as are most offices in China) I noticed a large number of facilities (support staff, information sheets, instructions for completing the forms) designed to help the presentation of judicial claims.

The Chinese administrative process takes place with a substantially oral mode and the public administrations are defended by their own officials. If the parties reach an agreement in the course of the discussion before the judge, the process ends; otherwise, the judge decides the case.

Among other things, I was struck by the median age of Chinese judges, which is considerably younger (even at the SPC) than at the Italian courts. Not only is the retirement age lower in China than the average one in Europe, but the Chinese have also probably made great efforts to recruit new judges in recent years.

There is significant participation of political assemblies (both national and local) in the selection of Chinese judges. Nevertheless, all administrative judges that I met impressed me quite a lot with the scientific maturity with which they deal with the administrative procedural law issues (despite China has only recently introduced a true justiciable administrative law into its legal system) which, even in Italy, result in ongoing cultural debates. Such as, for example, the problems related with the limitations of impugnable administrative decisions, the substantive and formal conditions for granting the sought protection and, last but not least, the need for full independence of the administrative judge for decisions on cases against public administrations (the Chinese word "dulì", which means independence, was often used during our meetings).

III - Ideas and Benefits of the Exchange

In this very interesting experience, I seemed to detect that the Chinese Administrative Courts have not yet fully developed an awareness of the distinction between precautionary protection and decisions on the merits of the case. Rather, I would say that "*interim*" measures are not yet used on a large scale in the Chinese administrative process. However, I am convinced that the above-mentioned further quantitative explosion in administrative disputes will need to implement (sooner or later) a summary protection in the most urgent cases, like those in Italy which prevalently consist of provisional and "*interim*" suspensions of the effects of the impugned measure, until is reached the decision on the merits. This is especially true when it is no longer objectively possible to decide all administrative cases within a few months, as prescribed by Chinese law. This would allow the courts to decide the merits subsequently, without any particular loss for the part that has already rapidly obtained the protective order.

In more general terms, I believe that Chinese administrative law is enjoying a period of great development, especially as a result of the 2015 reform, whose consequences are not completely predictable. Probably for this reason, I would also say that the Administrative Trial Division of the SPC (including through the International Department of the SPC) is currently dedicating a great attention to comparative administrative law, particularly in relation to its procedural aspects. In effect, some Chinese administrative judges participate in periods of study abroad or cultural exchanges (even similar to mine). My Tutor, for example, was recently in Hungary for this reason. I think that they are particularly interested in continental European experiences (those of "civil law"), and among those, the Italian experiences.

Even Roman Law draws the attention of the Chinese administrative courts and, of course, even that of the university professors with whom I spoke. I was able to exchange some views on Roman Law with my extremely interested Chinese colleagues. For example, we analysed the most correct meaning to be given to the phrases "*Salus populi suprema lex*" or "*salus rei pubblicae suprema lex* ". Therefore, I consider that cultural exchanges – like this one in China, at which I have been able to take part – are of enormous cultural benefit. The benefit is not only individual, for those who participate as guests and host, but also for the institution where the participant belongs; providing, of course, that she/he manages somehow to include as many colleagues as possible in her/his experience.

Not by chance, my stay in China ended with the shared hope that more exchange visits can be organized within a reasonable period of time, even at the level of presidents or vice-presidents of

the Chinese and Italian administrative courts of last instance, for which the exchange of experiences on organizational profiles of the courts could be particularly useful.

In conclusion, and despite the fact that China is far from being a European country, its administrative law system looks quite enough similar to that of the continental European tradition, and it is really useful for all countries to better know each other and their most relevant juridical topics, problems and solutions.

Therefore, my exchange experience in China was extremely interesting and positive.

It allowed me not only to gain a broad knowledge of the practical workings of the Chinese administrative jurisdiction, but it also gave me the opportunity to work closely with my new Chinese colleagues who were very welcoming every day. I really hope to be able to participate in another exchange program in the future.

Ermanno de Francisco