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# An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China

SCOTT J. PALMER\*

Since Deng Xiaoping first defined the trajectory of “socialist modernization” in December 1978, the creation of an effective body of intellectual property law has become a crucial component in the Chinese government’s efforts at economic reform.<sup>1</sup> The development of a “socialist legal system” was initially conceived as a complement to new efforts at economic reform and as a source of legitimacy for the government’s reform policies.<sup>2</sup> In this regard, the promulgation of new patent, copyright, and trademark laws, as well as China’s accession to multilateral intellectual property treaty regimes, not only represent governmental efforts to facilitate foreign investment and transfer of technology, but also represent a way for the government to establish and legitimate associated “modernization” and reform policies.<sup>3</sup>

Despite the proliferation of formal legal protections for intellectual property, China’s lack of *adequate* protections has become a central issue in ongoing trade disputes with the United States. Notwithstanding a bilateral Memorandum of Understanding between China and the United States; revisions of patent and trademark law; accession to the Berne, Geneva, and Universal Copyright Conventions; the promulgation of unfair competition laws; and a Regulation on Customs Protection for Intellectual Property—China’s inability to secure intellectual property protections continue to worry the United States, even after ostensibly achieving the minimum substantive standards for member states of the World Trade Organization (WTO) as set forth in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>4</sup>

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1. *Communique of the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China* [hereinafter *Communique*], in *THE CHINA READER* 21-29 (Orville Schell et al. eds., 1999).

2. Pitman B. Potter, *Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China*, 1994 *THE CHINA QUARTERLY* 325, 325.

3. The *Communique* announced the “four modernizations” as part of the “general task” of a new phase in history and the “people’s aspirations.” The four modernizations include the modernization of agriculture, industry, national defense, and science and technology. *Communique*, *supra* note 1, at 21-22.

4. The TRIPS agreement is a product of the Uruguay Round of the General Agreement on Tariffs and

The Chinese government has found itself in a precarious position. It has created an elaborate U.S.-inspired intellectual property legal regime without the political and social foundations to insure its effective enforcement. Although China's economic reforms have been gradual,<sup>5</sup> some critics have argued that China's current system of intellectual property protection is more of a wish list for foreign investors than a realistic and effective system of enforceable rules to protect actual rights. Economic pressures and the threat of U.S.-imposed trade sanctions have provided much of the impetus for the recent development of intellectual property laws in China, but forces of social and political fragmentation have thrown Beijing's agenda in stark contrast to popular viewpoints and practices. The government has initiated changes, the terms of which it cannot easily control, delineating rules for holders of foreign and domestic "rights." It has failed, however, to establish a coherent enforcement regime that satisfies the expectations of foreign and domestic parties seeking protection of such rights.<sup>6</sup> Indeed, the future of intellectual property protection in China depends on how China will contend with a host of social, political and economic challenges, which will not miraculously disappear upon accession to the WTO.

This note will survey the development of the current intellectual property laws in China. It will accentuate social, economic, and political factors that inform the current uncertainty over the future of intellectual property rights, especially in light of China's impending accession to the WTO. Section I will discuss the role of the socialist legal system in relation to the government's goals of socialist modernization and present a working vocabulary for evaluating the complex relationship between politics and law in China. Section II will outline a brief history of the development of intellectual property law since the Third Plenary Session of the Eleventh Central Committee in 1978 and discuss relevant political and economic factors that have informed the development of China's current laws. Readers familiar with the recent history of intellectual property in China may wish to skip this section or refer to it in regard to particular issues developed in Section III of

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Trade (GATT) and the agreement establishing the World Trade Organization (WTO). See Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO], Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994).

5. For a discussion of China's gradualist economic development policy, see SUN XIUPING, ET AL., *THEORY AND REALITY OF TRANSITION TO A MARKET ECONOMY* 7 (Gao Shanquan, et al. eds., 1995).

6. For a discussion of the differing treatment for of domestic rights holders as opposed to foreign rights holders, see generally WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995).

this note. Section III will discuss the primary social and political factors contributing to the difficulty of enforcing intellectual property rights, and their potential effect on the future of intellectual property protection in China. This note will conclude with a critical evaluation of the politics of imagining intellectual property rights in China and a final assessment of domestic constraints on political culture that have limited China's ability to adequately address its enforcement problems.

## I. EVALUATING THE SOCIALIST LEGAL SYSTEM: TERMS AND PERSPECTIVES

The 1978 *Communique of the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party* (*Communique*) contemplated the development of the socialist legal system, not only as a goal in itself, but as a basis for the government's efforts at political and economic reform.<sup>7</sup> The *Communique* set the stage for economic and political reforms and announced a major policy departure from the Maoist emphasis on "protracted revolutionary struggle."<sup>8</sup> This policy departure marked a shift from government reliance on "mass movements" in an uninterrupted revolutionary process as the basis for its leadership in favor of what Pitman Potter terms "an avowed reverence for the rule of law."<sup>9</sup>

The socialist legal system was conceptualized as a panacea against the recurrence of chaos during the late-Maoist era—a proverbial "safeguard" for the people's democracy<sup>10</sup>—and as a way for the government to justify its actions in leading the country toward the realization of socialist modernization. This, in effect, established a novel and precarious interdependency between legal culture and political legitimacy in China. It was novel in that it diverged from the monolithic political primacy of the Maoist era and precarious in that it made political legitimacy contingent on forces essentially out of the government's control.

Configuring the role of socialist legality in contemporary Chinese politics by relating the "use" of legal reform to the promotion of economic change

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7. See generally *Communique*, *supra* note 1; See also Potter, *supra* note 2, at 325. "Particularly within the PRC [People's Republic of China] it has been fashionable to regard the 3<sup>rd</sup> plenum of December 1978 as the third great turning point in China's twentieth-century history, after the revolutions of 1911 and 1949." DAVID S.G. GOODMAN, DENG XIAOPING AND THE CHINESE REVOLUTION 90 (1994).

8. *Communique*, *supra* note 1, at 27.

9. Potter, *supra* note 2, at 325. For a discussion of the failure of the Maoist developmental state and the development of the ideology of the new reformers, see also GORDON WHITE, RIDING THE TIGER: THE POLITICS OF ECONOMIC REFORM IN POST-MAO CHINA 21-42 (1993).

10. *Communique*, *supra* note 1 at 26.

exposes a “chicken and egg” problem that pervades discussions of political and legal culture in contemporary China. Conceiving law as an instrument of economic and social change as opposed to a nexus of institutions and texts that develop “as a result of change elsewhere,” reflects the fundamental interpenetration of law and policy in China and serves as a fulcrum upon which regime legitimacy hinges on the effects of legal reform.<sup>11</sup> In the absence of “democratic” institutions to inform policy decisions or a foundational or constitutional apparatus to encourage and respond to social and institutional feedback, the central government has essentially wagered its legitimacy on the success of its economic and legal reforms.

The transition from a centrally-planned economy to one that is market-based was envisioned in China as the ideal product of a progressive loosening of state control over segments of the economy by “first establishing market rules and regulations, and then developing the market.”<sup>12</sup> This policy reflects China’s gradual coordination of centrally-planned and loose-market mechanisms, sometimes referred to as a “dual-track” reform procedure. The socialist legal system is intended to grant various rights, facilitate the development of new forms of property, and at the same time, account for the primacy of state interests.<sup>13</sup> When rules and regulations are made public, however, their basic principles are subject to evaluation by external standards in a constantly changing social and economic context. The public dissemination of legal rules inevitably leads to the possibility of contentious interpretations and alternative uses of legal discourse, as well as potential conflicts between the government’s views and popular conceptions of the law.<sup>14</sup>

Because the government insists that the legal system remain subservient to the political needs of a single party, the likelihood for such conflict is great. Potter explains that the Chinese government has gone to great lengths to “make certain that popular notions about law do not overreach its own view that law should be merely an instrument of rule rather than a set of generally applicable principles that regulate the state as well as the people it governs.”<sup>15</sup> He

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11. JAMES C. F. WANG, *CONTEMPORARY CHINESE POLITICS* 147-48 (6th ed. 1999).

12. XIUPING, *supra* note 5, at 217. For an overview of China’s approach to economic reform, see Barry Naughton, *The Pattern and Logic of China’s Economic Reform*, in *THE CHINA READER*, *supra* note 1, at 300.

13. ALFORD, *supra* note 6, at 76; see also Jonathan Ocko, *Copying, Culture, and Control: Chinese Intellectual Property Law in Historical Context*, 8 *YALE J.L. & HUMAN.* 559, 565 (1996) (reviewing ALFORD, *supra* note 6).

14. Potter, *supra* note 2, at 354-57.

15. *Id.* at 326.

suggests that the vast use of "legal symbolism" during the 1989 Tiananmen crisis to challenge the Chinese Communist Party's (CCP) monopoly on political power illustrates the persistent dangers of resting political legitimacy on legal culture in China. The government's violent response to this movement was a clear indication that it would not tolerate challenges to the political primacy of the CCP. Its response also, in effect, served to underscore its view that future economic growth would not be accompanied by any fundamental political change.<sup>16</sup>

Potter has likened the precarious interrelationship of law and political legitimacy in China to riding a tiger that is difficult to dismount, in reference to the popular Chinese idiom—*qi hu nan xia*.<sup>17</sup> He evaluates the dynamics of this relationship by comparing popular assimilation of regime notions about socialist legality—focusing on notions of equality and justice and ideas about the formation and enforcement of civil obligations that "reflect the application of notions of law to policies of economic reform."<sup>18</sup> He suggests that doctrinal pronouncements about socialist legality "ring increasingly hollow" and concludes:

The regime seems unable to control the tiger of legal reform by inducing popular assimilation and acceptance of its views. On the other hand, to adopt official doctrine to make it fit more closely to popular views and ideals would entail political sacrifices that the regime does not appear prepared to make. The alternative is for it to diminish its reliance on the rule of law (figuratively slaying the tiger like Wu Song in *The Water Margin*), and rely instead on tradition, economic development or some other basis for its claim to political power.<sup>19</sup>

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16. JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 747 (1990).

17. Potter, *supra* note 2, at 325. Potter is not the only scholar to use this idiom to express the contingencies of regime legitimacy and government reform policies. Gordon White uses the idiom to reflect the interrelationship of economic success with the "credibility" of the current political regime. See WHITE, *supra* note 9.

18. Potter, *supra* note 2, at 327.

19. *Id.* at 358. It has been argued that Beijing has traded economic development for the surrender of absolute control in its continual maintenance of power, essentially positioning economic development as the crucial legitimizing force for a "decentralized" current regime. See generally WHITE, *supra* note 9; David S.G. Goodman, *How Open is Chinese Society?*, in *CHINA RISING: NATIONALIZATION AND INTERDEPENDENCE*, 27-30 (David Goodman & Gerald Segal eds., 1997).

Potter claims that the ultimate result of the current regime's "inability to induce popular assimilation of its views" is an increasingly "alienated legal culture," which poses ongoing challenges to government efforts to "derive political legitimacy from legal reform."<sup>20</sup>

One, perhaps central, characteristic of the current legal landscape in China is the government's establishment of the interrelated doctrines of legal equality and political inequality in the context of civil obligations. The new Contract Law, for example, establishes the legal equality of contracting parties and grants to all persons the capacity to enter into contracts.<sup>21</sup> There is an exception, however, which provides that contracts may not be formed when they conflict with state policies or interests.<sup>22</sup> This clause actually operates as a way for policy priorities to trump the capacity of parties to enter into contracts based on legal equality.<sup>23</sup> In other words, it articulates another aspect of the interrelationship of law and politics, the incorporation of doctrines of legal equality and political inequality into the legal system itself.

The regime's emphasis on rule of law as a basis for legitimacy also exposes the government's actions to evaluation by foreign critics who assess the successes and failures of China's legal regime in relation to the political and legal values of Western democracies. China's legal system is peculiar in that it now approximates the complexity of the legal systems of most "developed" countries.<sup>24</sup> It is, however, often criticized by Western nations for its poor protection of human rights, its rampant corruption, and its inability to provide adequate safeguards for foreign investment and intellectual property.<sup>25</sup> Western critics often tacitly assume an ideal "rule of law" system, replete with its necessary prerequisites, to serve as the vantage point for evaluating the evolution or shortcomings of China's legal culture.<sup>26</sup> For all practical purposes, a primary limitation on the benefit of such evaluations for clarifying and articulating points of issue in the Chinese context is that they often rest on

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20. Potter, *supra* note 2, at 357.

21. Zhonghua Renmin Gongheguo Hetong Fa [Contract Law of the People's Republic of China, as adopted at the Second Session of the Ninth National People's Congress (Mar. 15, 1999)], ch. 1, art. 3 (Feng Xuewei, et al. trans., 1999).

22. *Id.* at ch. 1, art. 7. The relevant section reads, "[t]he parties shall abide by the laws and administrative regulations, observe social ethics. Neither party may disrupt the socio-economic order or damage the public interest." *Id.*

23. See Potter, *supra* note 2, at 342.

24. For a discussion of the political uses and normative implications of the term "developed," see PAUL KNOX & JOHN AGNEW, *THE GEOGRAPHY OF THE WORLD ECONOMY* 20-23 (2d ed. 1994).

25. *Id.*

26. For a general discussion of the cultural politics of conceiving Chinese culture in opposition to Western, or "Occidental" culture, see EDWARD W. SAID, *ORIENTALISM* (1978).

certain fundamental social and cultural prerequisites. Such prerequisites are historically and, at times, geographically contingent, and are neither "natural" nor uncontested.<sup>27</sup> Some scholars and critics have responded to the challenges of political and legal comparative categories by attempting self-conscious and localized discourses about such topics as human rights, constitutionalism, and democracy. Michael Davis, for example, formulates the concept of "constitutional indigenization" to explain the process whereby the constitutional fundamentals of "democracy, human rights, and the rule of law" are implanted and articulated through institutions steeped in the "diverse local condition."<sup>28</sup> This model may support a more balanced critique of the interplay of constitutional "fundamentals," such as rule of law, in the ongoing discourse on China's political culture by initially accepting and assessing these fundamentals in China's own terms.<sup>29</sup>

Davis' idea of "constitutional indigenization" is also useful because it provides a model by which to evaluate the political culture of governments that claim legitimacy by virtue of the constitutional essentials of democracy, rule of law, and human rights. The current regime has adopted these categories and has indeed contemplated that the socialist legal system serve as the protector of the "people's democracy."<sup>30</sup> Moreover, the most recent constitution of the People's Republic of China suggests that a Chinese citizen shares in a wide range of human rights, comparable to those held by citizens of Western liberal democracies.<sup>31</sup> Further, the 1978 *Communique* states that the "constitutional

27. *Id.* at 3-28.

28. Michael C. Davis, *Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109, 138 (1998) [hereinafter Davis, *Constitutionalism*]. Davis has argued that to properly understand the Chinese struggle with constitutional values and human rights, one must begin with a "communications-based" theory. This theory "assumes that human rights values, whether local or universal, are developed in the context of institutions and processes and the dynamics between them," which confine the applicability and evolution of such values in a particular discursive community, which in this case is the Chinese political/legal context. Michael C. Davis, *Chinese Perspectives on Human Rights*, in HUMAN RIGHTS AND CHINESE VALUES 5 (1995) [hereinafter Davis, *Chinese Perspectives*]. For a more "universalist" account of how a modern constitutional democracy based on liberal political ideals could and would be viewed as legitimate by peoples who do not share or accept western liberal ideological cultural presumptions, see JOHN RAWLS, *THE LAW OF PEOPLES* (1999).

29. For a discussion of how traditional Chinese thought militates against a strong theory of rights and a legal and political system geared towards acknowledging and protecting those rights, see Randall P. Peerenboom, *What's Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics*, 6 HARV. HUM. RTS. J. 29 (1993).

30. *Compare Communique*, *supra* note 1, at 26, with Wei Jingsheng, *Democracy: The Fifth Modernization*, in THE CHINA READER, *supra* note 1, at 165.

31. For a discussion of these constitutional "rights" and the absence of legal safeguards to protect them see Yu Haocheng, *On Human Rights and Their Guarantee by Law*, in HUMAN RIGHTS AND CHINESE VALUES, *supra* note 27, at 92-115.



rights of citizens must be resolutely protected” and shall not be infringed upon by anyone.<sup>32</sup> For Davis, however, conflicts over community values and interpretations of rules and regulations are necessary conditions for the “indigenization” of liberal constitutional fundamentals, a process where the political and legal fundamentals of democracy, human rights, and rule of law become imbedded in and responsive to the “diverse local condition.”<sup>33</sup> The possibility of a public dialogue, when fostered by the aforementioned core constitutional fundamentals, is an essential prerequisite for a healthy and functioning constitutional system.<sup>34</sup> Davis suggests that the development and effective operation of a constitutional system is contingent on the ability of the regime to foster a realistic discourse about current values and conditions in a context where these constitutional fundamentals articulate the empowerments and constraints of political power.<sup>35</sup> He distinguishes the ideal system from those of authoritarian regimes that rarely respect constitutional constraints and “stifle this realistic conversation and then impose or ‘implant’ alleged community values that are merely constructive of authoritarian power.”<sup>36</sup>

China’s current regime, a system that establishes economic and social rules minus the constitutional feedback loop envisioned by Davis, would most likely map onto the authoritarian side of the constitutional continuum. The current regime has refused to facilitate an open discourse on political values and yet continues to promote the idea that the Party’s interests represent those of the people.<sup>37</sup> At the same time, the regime’s reliance on the rule of law as the basis for its legitimacy has arguably alienated the Chinese government from the people it claims to serve. In other words, China’s current regime is in the midst of a constitutional identity crisis, resting its legitimacy on a “people’s democracy” dependent on the rule of law and human rights yet resisting the

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32. *Communique*, *supra* note 1, at 26; *see also* Peerenboom, *supra* note 29, at 29. China also became signatory to the International Covenant of Economic, Social and Cultural Rights (ESC) on October 27, 1997, and the International Covenant on Civil and Political Rights (CPR) on October 5, 1998, ostensibly entering into the ongoing human rights discourse associated with these two central covenants. China ratified the ESC covenant on March 27, 2001, but has yet to ratify the more controversial CPR covenant. *See, e.g., Multilateral Treaties Deposited with the Secretary General of the United Nations*, Chapter IV, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/chapterIV.asp> (last visited Apr. 4, 2001).

33. Davis, *supra* note 28, at 132.

34. *Id.* at 110–11. For a discussion of the “reasonably just constitutional society” as a realistic utopia for non-liberal non-western peoples, *see also* RAWLS, *supra* note 28.

35. Davis, *supra* note 28, at 138.

36. *Id.*

37. Randall P. Peerenboom, *Rights, Interests, and the Interests of Rights in China*, 31 STAN. J. INT’L L. 359, 380 (1995).

development of an indigenous and open constitutional dialogue about the political values of this democracy. In such a context, popular viewpoints and practices will always play second fiddle to party policy, and the development of important legal infrastructure and a responsive, or "independent" judiciary will be slow, if at all, in coming. Without a fundamental change in political culture, the effectiveness of laws and regulations in China will be dependent on the regime's ability to induce popular assimilation of its views, and without a more open constitutional dialogue, those views will remain the whim of party politics. A continuation of this arrangement will pose ongoing challenges to regime attempts to derive legitimacy from legal reform. Moreover, it will produce laws without the political and social foundations to insure their effective enforcement, it will lead to persistent problems in attracting and keeping foreign investment without the protection of an effective legal system, and it will inspire the unending criticisms of the international community for failing to live up to various "international" standards.<sup>38</sup>

## II. INTELLECTUAL PROPERTY PROTECTION IN CHINA: DEVELOPMENTS SINCE THE THIRD PLENARY SESSION OF THE ELEVENTH CENTRAL COMMITTEE OF 1978

Since 1978, China has embarked on a complete and gradual reorientation of its economy, opening its markets to foreign investment and technology and developing new laws to encourage and protect its economic development.<sup>39</sup> The development of a formalized legal system constituted a vehicle for legitimation not only at home, but also abroad.<sup>40</sup> The development of intellectual property laws in China has served to reassure foreigners parting with their technology and investment, and has channeled much needed capital to fuel China's socialist modernization.<sup>41</sup>

China began redrafting its intellectual property laws in the late 1970's as a response to the push toward modernizing science and technology, toward developing an international market economy, and in response to a need for

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38. Human rights is the classic example. For a discussion of the sources of conceptions of human rights in China, see *id.* See generally Davis, *Chinese Perspectives*, *supra* note 28.

39. See KNOX ET AL., *supra* note 24, at 364.

40. See ALFORD, *supra* note 6, at 93.

41. *Id.*

enhancing the position of intellectuals in China after the Cultural Revolution.<sup>42</sup> Soon after the Carter administration reestablished formal diplomatic relations with China, the United States and China signed the Implementing Accord on Cooperation in the Field of High Energy Physics (Physics Accord).<sup>43</sup> This agreement related only to intellectual property protection in areas of scientific cooperation. Moreover, at this time China lacked all but the most rudimentary administrative protections for copyrights and inventions.<sup>44</sup> It was, however, an important first step toward developing a broad system of intellectual property protection, and it was the first bilateral intellectual property agreement signed by China in this regard.<sup>45</sup>

Intellectual property relations between China and the United States in the post-Mao era are said to have begun with the 1979 Agreement on Trade Relations (1979 Agreement), which provided for equivalent treatment of copyright, patent, and trademark protection in both countries.<sup>46</sup> China soon began the task of implementing a broad-based intellectual property system that would facilitate economic growth and establish the basic standards of intellectual property protection contemplated by the 1979 Agreement and the Physics Accord. In response to both internal economic pressures and its obligations under both agreements, China joined the World Intellectual Property Organization (WIPO) in 1980 and enacted the 1982 Trademark Law, the 1984 Patent Law, and the 1990 Copyright Law.<sup>47</sup>

Data that supports the "success" of these first-generation intellectual property laws tends to focus on the sheer number of patent and trademark applications filed.<sup>48</sup> What is not so clear, however, is how successful these

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42. *Id.* at 65. For a discussion of the treatment of intellectuals in the Cultural Revolution, see generally SPENCE, *supra* note 16. For an outline of pre-1970's early Soviet-styled intellectual property law in China, see ALFORD, *supra* note 6, at 56-60.

43. For an excellent history of U.S. diplomatic relations with China, see PATRICK TYLER, *A GREAT WALL* (1999). For a discussion of the Physics Accord, see Naigen Zhang, *Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 63, 70 (1997).

44. *Id.*

45. *See id.*

46. Glenn R. Butters, *Pirates, Dragons, and U.S. Intellectual Property Rights in China: Problems and Perspectives of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1084 (1996).

47. Zhang, *supra* note 43, at 70.

48. ALFORD, *supra* note 6, at 82.

Official sources have exhibited great pride in the fact that during the eight years prior to the revision of the 1984 Patent Law, over 284,000 applications were filed, including over 40,000 from foreign parties representing some 65 jurisdictions, and that during the decade between the 1983 Trademark Law's promulgation and its most recent major revision, some 366,000 applications for trademark registration were accepted, including more than 53,000 from foreign parties representing some

early laws were in generating indigenous technology with a high commercial value for patents and creating a strong and transparent market for domestic trademarks.<sup>49</sup> For example, in 1992, foreigners obtained approximately two-thirds of the invention patents granted.<sup>50</sup> William Alford suggests that the phenomenon of foreign multinationals securing a disproportionate share of patents is not unusual for developing nations that have yet to generate indigenous technology with high commercial value.<sup>51</sup> He argues, however, that even the most modest stimulation of Chinese inventiveness during this period is all but indicated by these and other such numbers.<sup>52</sup> He cites a 1985-1992 study of the 12,000 largest state-owned enterprises revealing that, on average, they had filed less than a single patent application per year.<sup>53</sup>

The 1980s saw the development of a Chinese economy that seemed to encourage mass infringement despite increased enforcement efforts.<sup>54</sup> China's publishers' liberal and unauthorized reproductions of domestic and foreign materials and rampant unauthorized use of the registered trademarks of foreign and domestic companies soon attracted the attention and stoked the fears of the international community.<sup>55</sup>

In the early 1990s, it was evident that China's new intellectual property laws were effectively unenforceable. Moreover, administrative authorities had very little guidance on how to proceed with resolving disputes.<sup>56</sup> The new trademark, patent and copyright laws allowed for recourse to the people's courts but emphasized administrative solutions.<sup>57</sup> The Copyright Law, for example, included detailed administrative remedial measures, such as fines and apologies, but little in the way of procedural guidance.<sup>58</sup>

In 1991, China was deemed the "single largest pirate world-wide," according to the United States Trade Representative (USTR), Joseph Massey.<sup>59</sup>

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68 jurisdictions.

*Id.*

49. *Id.* at 84.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 85.

55. *Id.* at 86.

56. *Id.* at 76-77.

57. Foreigners have recourse to the court system in China, but only at the level of the intermediate people's courts and above. For a discussion of China's judicial system and its relation to intellectual property disputes, see generally Naigen Zhang, *Intellectual Property Law in China: Basic Policy and New Developments*, 4 ANN. SURV. INT'L & COMP. L. 1 (1997).

58. ALFORD, *supra* note 6, at 80.

59. *Id.* at 86.

The USTR moved to identify China as a "priority foreign country" and began investigations for possible trade sanctions under the so-called Special 301 provisions of the recently amended Trade Act of 1974.<sup>60</sup> By classifying China as a "priority foreign country," the United States was actually able to gain leverage in ensuing negotiations over intellectual property concerns without actually initiating a Special 301 action.<sup>61</sup>

Ensuing negotiations between the United States and China halted the Special 301 investigation initiated by the USTR and ultimately resulted in the landmark 1992 Memorandum of Understanding on the Protection of Intellectual Property (1992 MOU).<sup>62</sup> The 1992 MOU was the first agreement signed by China that focused on legislation.<sup>63</sup> It required China to revise its Patent Law to cover chemical inventions, to extend patent protection to 20 years, and to limit its use of compulsory licenses.<sup>64</sup> Moreover, it required China to accede to the Berne and Geneva Conventions and change its laws accordingly.<sup>65</sup> It also required China to enact regulations against unfair competition in accordance with Article 10<sup>bis</sup> of the Paris Convention.<sup>66</sup>

Following the 1992 MOU, China acceded to the Berne Convention and the Universal Copyright Convention in October 1992, and the Geneva Phonograms Convention in April 1993.<sup>67</sup> China amended all of its effected laws, promulgated new patent regulations, acceded to the Patent Cooperation Treaty in September 1993, and recognized the protection of computer software as literary works according to relevant provisions of the Berne Convention.<sup>68</sup> An "Unfair Competition Law" was adopted in September 1993 according to the provisions of the 1992 MOU, and China's Trademark Law was revised in February 1993 to include, most notably, criminal penalties for trademark violations.<sup>69</sup>

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60. For an explanation and history of Special 301 and USTR procedure for bringing an action under the provision, see generally Theodore H. Davis, *Combating Piracy of Intellectual Property in International Markets: A Proposed Modification of the Special 301 Action*, 24 VAND. J. TRANSNAT'L L. 505 (1991).

61. Richard J. Ansson, Jr., *International Intellectual Property Rights, The United States, and The People's Republic of China*, 13 TEMP. INT'L & COMP. L.J. 1, 12 (1999).

62. Butterson, *supra* note 46, at 1084; see also Weiqiu Long, *Intellectual Property in China*, 31 ST. MARY'S L.J. 63, 90 (1999).

63. Zhang, *supra* note 43, at 72-73.

64. Memorandum of Understanding on the Protection of Intellectual Property, Jan. 17, 1992, U.S.-P.R.C., 34 I.L.M. 676, 677-78 (1995). See also Zhang, *supra* note 43, at 73.

65. Zhang, *supra* note 42, at 73.

66. *Id.*

67. Butterson, *supra* note 46, at 1089.

68. *Id.*

69. *Id.* at 1089-90.

The 1992 MOU also saw the Chinese government stretching the bounds of ostensible constitutional authority with respect to demands for increased administrative protection for intellectual property.<sup>70</sup> In a recent study of China's intellectual property laws, Weiqiu Long questions the constitutional basis for the government's sweeping reforms.<sup>71</sup> He claims that the 1992 MOU demanded too much of the government, especially with respect to the extension of administrative power to protect pharmaceutical and agrochemical products of the United States.<sup>72</sup> His observations rest on the distinction between regulations and laws, the latter being primary and the result of deliberation by the National People's Congress (NPC) or its ancillary organs.<sup>73</sup> He claims that "[t]hese types of regulations conflict with the Chinese Constitution because an administrative regulation cannot create rights that are non-existing in current law and legal principles."<sup>74</sup> In other words, the United States has demanded protection for rights that are not recognized by any legitimate constitutional authority in China.<sup>75</sup> This stretch of constitutional authority, however, seems hardly a crisis for a constitutional system in which political values are determined by the vicissitudes of CCP policies. Nevertheless, China's willingness to make such legal concessions in response to outside pressures marks an attitude of reform-minded political accommodation that must not go unnoticed.

Despite the promulgation of new laws and China's accession to various international conventions, these laws went unenforced. A new confrontation between the United States and China was brewing, and in early 1995, USTR Michael Kantor listed China as a "priority foreign country," and Special 301 investigations were resumed.<sup>76</sup> China once again averted a trade war with the United States by agreeing to a new bilateral accord, the 1995 Enforcement Agreement, designed to eliminate the rampant piracy of intellectual property.<sup>77</sup>

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70. Long, *supra* note 62, at 91.

71. *Id.* at 70-71; see also ZHONGHUA RENMIN GONGHEGUO XIANFA [Constitution] (1982).

72. See MURRAY SCOTT TANNER, *THE POLITICS OF LAWMAKING IN CHINA* (1999), for an excellent discussion of the NPC and the politics of lawmaking in China. For a discussion of the difference between laws and regulations see Philip Baker, *Party and Law in China*, in *STATE AND LAW IN EASTERN ASIA* (1996).

73. *Id.*

74. Long, *supra* note 62, at 91.

75. *Id.*

76. Ansson, *supra* note 61, at 11.

77. Letter from Michael Kantor, U.S. Trade Representative, to Wu Yi, Minister of Foreign Trade and Economic Cooperation of the People's Republic of China (Annex I) (Feb. 26, 1995), reprinted in 34 I.L.M. 881 (1995). See also *1995 Trade Barriers Estimate*, Office of the United States Trade Representative (1995), at [http://www.ustr.gov/html/1995\\_china.html](http://www.ustr.gov/html/1995_china.html) (visited April 1, 2001).

The agreement included provisions to improve enforcement of China's new intellectual property laws. It requires an inter-agency task force to conduct raids on manufacturing and retail facilities, curtailing local protectionism. Moreover, it bans the export of pirated products; it requires that all rules and regulations be published, it requires the adoption of technical identification systems for cataloging intellectual property rights, and it requires more educational programs for China's lawyers, businessmen, and consumers through various intellectual property publicity campaigns.<sup>78</sup> China pledged to improve its Customs Service, in effect, modeling it on the U.S. Customs Service, and in July 1995, the State Council promulgated a Regulation on Customs Protection for Intellectual Property.<sup>79</sup>

The 1995 Enforcement Agreement also included a plan for implementing a comprehensive administration system that would expand the supervision of intellectual property affairs to various State Council departments in charge of science, technology, foreign trade, foreign affairs, press and publication, broadcasting, film, television, justice, public security, patent, copyright, industrial and commercial administration, customs, and the departments in charge of the relevant industries.<sup>80</sup> This system was envisioned as leading to comprehensive coverage and protection of intellectual property through the eventual establishment of provincial, regional, and municipal working groups. Through these groups, the relevant administrative authorities would coordinate their activities in implementing and enforcing China's intellectual property laws.<sup>81</sup>

Despite China's strong commitments to enforcement and a 1996 Foreign Ministry statement extolling the marked improvements in protections for intellectual property rights, piracy in China continued to grow.<sup>82</sup> Piracy of CD-ROMs is said to have increased by one hundred percent in 1995, despite Chinese claims to the contrary.<sup>83</sup> In addition, piracy for motion pictures and

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78. Butterson, *supra* note 46, at 1090-91.

79. Long, *supra* note 62, at 93.

80. *Id.* at 93; Butterson, *supra* note 46, at 1091.

81. Butterson, *supra* note 46, at 1092.

82. *Id.* at 1093. For example, 1995 losses for copyrighted materials alone were US\$ 1.835 billion, exclusive of losses for piracy of business software, up from US\$ 866 million for 1994. *Id.* The 1996 National Trade Estimate for China reported losses to intellectual property violations for 1995 at approximately \$2.2 billion, in addition to losses suffered in third country markets. See, 1996 Trade Barriers Estimate, Office of the United States Trade Representative (1996), at <http://www.ustr.gov/reports/nte/1996/china.html> (visited Apr. 4, 2001).

83. Butterson, *supra* note 46, at 1094-95.

computer software increased as well.<sup>84</sup> Estimates for the piracy of entertainment software alone was about US\$ 1.29 billion per year in 1996, and illegal use of pirated software has continued unabated in state-owned companies, government ministries, private companies, and among private individuals.<sup>85</sup>

The United States began to doubt the ability of Beijing to implement the 1995 MOU and to question Beijing's apparent reluctance to punish pirates, and in May 1996, the USTR again declared China a "priority foreign country," threatening to impose \$2 billion in trade sanctions for failure to comply with the 1995 MOU.<sup>86</sup> China averted these sanctions by conciliatory actions aimed at establishing the structural changes envisioned by the agreement.<sup>87</sup> In addition, in August 1996, China issued Regulations on the Certification and Protection of Famous Trademarks to attempt to bring its trademark regulations up to par with WTO member countries.<sup>88</sup> Also, China increased its enforcement by conducting nationwide raids on manufacturing and distribution networks of pirated products.<sup>89</sup>

Since 1997, China has initiated numerous measures to remedy enforcement problems, and bring its intellectual property protections further in line with WTO member nations.<sup>90</sup> In April 1997, the United States Information Technology Office finalized a cooperation agreement to perform title verifications for the U.S. software industry in China, which allows U.S. companies to monitor Chinese production of CD-ROMs.<sup>91</sup> In 1998, the government instituted the Patent Software User Recognition Plan to limit

84. *Id.* at 1095-97.

85. *Id.* at 1096.

86. Ansson, *supra* note 61, at 12.

87. This resulted in the signing of yet another intellectual property accord in June 1996, which clarified the procedure China was to take in implementing the 1995 MOU. *See, 1997 Trade Barriers Estimate*, Office of the United States Trade Representative 52 (1997); *Id.*

88. *Id.*

89. *Id.*

90. In 1984 China became a permanent observer of meetings of the GATT Council, and attended the Uruguay Round leading to the establishment of the WTO in 1994. There is little doubt that China has viewed membership in the GATT/WTO as consistent with its new-found international standing and the full acceptance of its part in the international economic community—something it has desired for two decades. In this regard, China has been developing its Intellectual Property legal regime as a part of its aspirations to become a major player in the international economy, and thus, to portray U.S. pressures as the sole motivator of China's Intellectual Property laws would be misleading. For a discussion of the political and economic incentives for China's membership in the GATT/WTO, see Stuart Harris, *China's Role in the WTO and APEC*, in *CHINA RISING*, *supra* note 20, at 135-43.

91. Butterson, *supra* note 46, at 1090.



licenses to companies using patented software.<sup>92</sup> The government also established a new intellectual property office to oversee the legal protection of intellectual property rights, to coordinate regulations and enforcement mechanisms, and to implement international agreements.<sup>93</sup> In short, China has shown an increased willingness to address those problems that led the USTR to threaten trade sanctions in 1996, and has worked diligently to attempt to bring its intellectual property laws up to par with WTO minimum standards.

Since 1995, China has established a system of intellectual property protection that has come exceedingly close to achieving the minimal substantive standards of the TRIPS Agreement.<sup>94</sup> In a 1999 Trade Barriers Estimate by the USTR, China's intellectual property protection received a favorable review.

Based on the 1995 and 1996 bilateral IPR agreements and extensive follow-up work with the Chinese officials, China now has a functioning system to protect intellectual property rights (IPR). Enforcement of intellectual property has become part of China's nationwide anti-crime campaign; the Chinese police and court system have become actively involved in combating IPR piracy. According to Chinese Government statistics, China seized some 35 million illegal audio-visual products from 1994 to year-end 1998. It has shut down or fined 74 assembly operations for pirated VCDs and seized over 20 million smuggled VCDs during the same period.<sup>95</sup>

In a recent assessment by the International Institute for Economics, China received a good rating for its intellectual property protection.<sup>96</sup> However, despite the November 1999 bilateral agreement between the United States and

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92. Long, *supra* note 62.

93. *Id.*

94. *Id.* at 97. For an overview of the TRIPS agreement, see *WTO Intellectual Property*, at [http://www.wto.org/wto/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/wto/english/tratop_e/trips_e/intel2_e.htm). Also for an economic assessment of China's accession to the WTO, and an assessment of its impact on the economic and policy interests of the U.S. and China, see Daniel H. Rosen, *China and the World Trade Organization: An Economic Balance Sheet*, Institute for International Economics, International Economics Policy Briefs (June 1999), at <http://www.iie.com/NEWSLETR/news99-6.htm>. For a discussion of recent copyright reforms and TRIPS compatibility, see Long, *supra* note 62, at 93-97.

95. *1999 Trade Barriers Estimate*, Office of the United States Trade Representative 61 (1999), at [http://www.ustr.gov/pdf/1999\\_china.pdf](http://www.ustr.gov/pdf/1999_china.pdf). (visited Apr. 4, 2001). See also Long, *supra* note 61.

96. *Id.* at 10.

China for admittance into the WTO, there are still several areas of concern regarding China's intellectual property protection that have bearing on China's compliance with WTO standards.<sup>97</sup>

One potential problem is that China's administrative legal regime lacks the procedural transparency expected of WTO countries by virtue of the 1994 WTO draft protocol.<sup>98</sup> This protocol supplements the prior requirements of Article X of the General Agreement on Tariffs and Trade (GATT). It essentially requires institutional transparency arrangements, such as the publication of all regulations and the enforcement of only published laws or regulations, or independent review of administrative actions regarding trade issues.<sup>99</sup> The Ministry of Trade and Economic Cooperation (MOFTEC) has established a legal gazette for the publication of regulations and administrative rules related to trade, but the gazette does not include the important "normative documents" that announce policy changes affecting the administration of existing rules and regulations.<sup>100</sup> As a result, administrative rules and regulations remain opaque, general, and all too susceptible to the vicissitudes of party policy.<sup>101</sup>

Additional problem areas include the non-existence of a feedback loop, or consultation loop with either the general public or foreigners, and a lack of judicial review.<sup>102</sup> An important feature of the transparency requirements of the WTO protocol is the "right of comment," or public consultation.<sup>103</sup> Some consultation may take place during legislative drafting, but virtually no such consultation occurs during the drafting of lower level administrative rules and regulations.<sup>104</sup> China's lack of judicial review is another major obstacle in achieving transparency, an obstacle that reflects a mere separation of administrative functions rather than a true separation of powers.<sup>105</sup> China's local courts are often staffed by poorly trained judges, some of whom have little, if any, formal legal training, and tend to have strong personal and

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97. See Joseph Fewsmith, *China and the WTO: The Politics Behind the Agreement*, National Bureau of Asian Research Report (November 1999), at <http://www.nbr.org/publications/report.html>.

98. See Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT'L L. & FOREIGN AFF. 1, 12 (1998).

99. *Id.*

100. *Id.* at 13.

101. *Id.*

102. *Id.*

103. See Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, 33 I.L.M. 1144 (1994), art. XII. See also Ostry, *supra* note 98, at 13.

104. *Id.* at 13-14.

105. *Id.* at 14.

professional ties to the local community.<sup>106</sup> Local protectionism and an inability to secure reliable information for the effective resolution of commercial disputes have become major problems.<sup>107</sup> The WTO dispute settlement mechanism relies on evidence often gathered by local courts and administrative agencies, and local protectionism could pose major problems for the effective collection of important information.<sup>108</sup>

Some scholars suggest that the establishment of a WTO-compatible administrative system in China will require more than mere mechanics, and will require the establishment of the rights-based regime said to be lacking in China.<sup>109</sup> For example, Alford suggests that a system of state determination that inhibits the free flow of ideas is "fundamentally incompatible with one of strong intellectual property rights in which individuals have the authority to determine how expressions of their ideas may be used and ready access to private legal remedies to vindicate such rights."<sup>110</sup> To the extent that the WTO represents the ideological interests of the United States and other Western nations, one would expect that support for China's admission to the WTO would be billed as a victory for liberal and democratic values, in addition to being a victory for western economic interests.<sup>111</sup>

On August 25, 2000, China adopted a revised version of the Patent Law, and the government is currently considering revisions to its Copyright and Trademark laws that would bring them into full compliance with the TRIPS agreement.<sup>112</sup> China's 1991 Copyright Law is in conflict with the TRIPS agreement in three areas that are likely to be addressed in an upcoming revision. First, TRIPS Article 13 provides that exceptions for exclusive rights can only be confined to areas that do not conflict with the "normal exploitation of the work," which, while ambiguous, may require a refinement of "fair use"

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106. *Id.* at 15.

107. *Id.*

108. *Id.*

109. *Id.* at 18.

110. ALFORD, *supra* note 6, at 119.

111. For example, California Representative David Drier called China's admission to the WTO a "win-win-win for American workers, American businesses, and American values." See Eric Schmitt, *White House Says Votes are Lacking on Chinese Trade*, N.Y. TIMES, March 10, 2000, at A1. For a discussion of the WTO and human rights, see Steve Charnovitz, *Symposium: The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: The Globalization of Economic Human Rights*, 25 BROOKLYN J. INT'L L. 113, 113 (1999). See also, *The Clinton Administration Statement on Permanent Normal Trade Relations for China*, available at <http://www.mac.doc.gov/china> (last visited May 14, 2001).

112. For a discussion of issues of current concern, see Zheng Chengsi, *WTO and Chinese IP Laws*, in CHINA PATENTS & TRADEMARKS I and II (2000); Jeffrey Layman, *IPR Protection after WTO: Copyright Law and Enforcement Under the TRIPs Agreement*, in CHINA WTO: Shaping the Future (David Packer ed., 2000).

standards in the upcoming revision. Second, Article 11 of TRIPS provides that members must provide copyright holders with an exclusive right to prohibit commercial rental or copying of copyrighted works, a right that is not clearly defined in China's Copyright Law or the 1992 *Provisions on the Implementation of the International Copyright Treaties*.<sup>113</sup> Third, the enforcement provisions of TRIPS require the availability of appropriate remedies for aggrieved parties, but China's Copyright Law lacks a similar provision, and reports of arbitrary damage awards ordered by Chinese judges may indicate the necessity of such a provision in the upcoming revision. In addition, China's 1993 Trademark Law will require certain modifications, particularly in the area of protection of well-known marks.<sup>114</sup>

Since 1978, China has created a system of intellectual property laws that, facially resembles the intellectual property legal regimes of most WTO member states by virtue of substantive "rights" recognized, and the apparent protections afforded to the owners of such rights. China's upcoming intellectual property law revisions will be minor compared to the changes that were instituted in the 1980s and 1990s, and are likely to reflect more technical substantive calibrations to TRIPS than any wide sweeping change. Many critics, however, especially those that assume a liberal democratic "rule of law" perspective to assess the success of China's reforms—an ideal that is informed by an effective "constitutional" system—will continue to raise concerns over the ability of the current regime to effectively protect intellectual property rights.<sup>115</sup> The regime has been criticized as creating legal institutions but not a "legal system,"<sup>116</sup> as interpreting "rule of law" as "rule by law,"<sup>117</sup> and as perpetuating an increasingly alienated legal culture by passing laws that are essentially unenforceable.<sup>118</sup> The politics behind the creation of intellectual property protection in China are complex, but have served the interests of the United States by securing the legal groundwork for the meaningful protection of American intellectual property in China, while also transforming the Chinese intellectual property landscape into familiar territory.<sup>119</sup>

China's admission to the WTO may be heralded as a victory for Western

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113. See, e.g., Shishi Guoji Zhuzuoquan Tiaoyue De Guiding art. 14 (Cn.).

114. See *2000 Trade Barriers Estimate*, Office of the United States Trade Representative 50 (2000), at [http://www.ustr.gov/pdf/2000\\_china.pdf](http://www.ustr.gov/pdf/2000_china.pdf) (visited Apr. 4, 2001).

115. See, e.g., Ostry, *supra* note 98; ALFORD, *supra* note 6; Ocko, *supra* note 13.

116. Ostry, *supra* note 98, at 14-15, citing Stanley B. Lubman, *There's No Rushing China's Slow March to a Rule of Law*, L.A. TIMES, Oct. 19, 1997, at M2.

117. *Id.* at 15.

118. See Potter, *supra* note 2.

119. ALFORD, *supra* note 6, at 118-19.

economic—and perhaps “moral”—interests in China. But such claims are misleading since they overlook persistent differences in political culture that pervade the legal and socio-economic landscape in which intellectual property protections are realized. In addition, these claims ignore cultural differences that may greatly effect the development of an ideal rights-based intellectual property regime. Alford, in his assessment of U.S. policy toward China concerning intellectual property, comes to a similar conclusion.

[I]n its choice of means and ends, the United States has, in effect, devoted considerable diplomatic capital to securing concessions that fail meaningfully to speak to the chief impediments to the development in China of respect for legality and, through it, of a greater commitment to the protection of intellectual property rights.<sup>120</sup>

### III. BASIC ISSUES AFFECTING THE FUTURE OF INTELLECTUAL PROPERTY ENFORCEMENT IN CHINA

Since beginning its reforms in 1978, China has overcome numerous obstacles in establishing its current intellectual property system, a system that promises the same protections of WTO member countries. But critics point to a number of persistent social, political, economic, and basic cultural constraints to China's ability to develop an efficient system of intellectual property protection that tend to receive little attention in China and in the West. These constraints include the development of regionalism and local protectionism, a growing divide between regime ideas of socialist legality and popular conceptions of justice, the alleged paucity of “rights” consciousness, and the lack of a political culture to support a legal system to properly enforce legal rights and entitlements.

Perhaps one of the greatest problems that Beijing faces in administering its intellectual property regime is the result of China's economic development—namely, decentralization, regionalism, and the development of local “duke economies.”<sup>121</sup> Indeed, the Third Plenary Session of the Eleventh Central Committee in 1978 encouraged local political autonomy and the

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120. *Id.* at 118.

121. See CHINA DECONSTRUCTS: POLITICS, TRADE AND REGIONALISM (David S.G. Goodman, et al. eds., 1994).

decentralization of economic management.<sup>122</sup> The combination of decentralization and market forces have contributed to a phenomena in which the centers of economic power have moved away from Beijing and the political center to the localities.<sup>123</sup> Coastal and border areas have been encouraged to use their geo-political locations and comparative advantages for trade and foreign investment with the outside world.<sup>124</sup>

Some scholars have suggested that this arrangement may ultimately lead to political disintegration through such mechanisms as bureaucratic fragmentation. Moreover, it may diffuse bureaucratic interests and contribute to the development of local economic parochialisms.<sup>125</sup> David Goodman and Gerald Segal, however, argue that the tensions between the center and the regions are not necessarily harbingers of political disintegration.<sup>126</sup> They argue that the CCP has always encouraged a degree of elasticity in national policy implementation and has combined regional political leadership with local flexibility to "ensure that regionalism has been a constant feature of China's political process and not necessarily a symptom of political disintegration."<sup>127</sup>

Nevertheless, China's ability to enforce its intellectual property laws on its own territory has been effected by the decentralization of economic power, the complexity and inefficiency of its administrative system, and the tendency for courts to protect local interests.<sup>128</sup> The complex administrative plan contemplated by the 1995 Enforcement Agreement was intended to remedy some of the problems of intellectual property enforcement through a centrally

122. See *Communique*, *supra* note 1, at 23-24.

123. See CHINA DECONSTRUCTS, *supra* note 121, at 2-7.

124. *Id.* One important example of this phenomenon was the creation of "special economic zones" and "open cities" as test centers for market liberalization. In a speech to the Thirteenth Congress of the CCP in October 1987, Zhao Ziyang outlined a trajectory of economic reform that became the general model for market opening. See Zhao Ziyang, *Advance Along the Road of Socialism with Chinese Characteristics*, in THE CHINA READER, *supra* note 2, at 50, 68.

In pursuing reform, we must stress experimentation, encourage exploration, seek practical interim methods and measures, and advance one step at a time. Because conditions are different in different areas, we cannot simply ask all areas to do the same thing at the same time. In the autonomous minority nationality areas and outlying districts in particular, we should adopt prudent measures which suit the local conditions, while in the special economic zones we can afford to be more flexible.

*Id.* Although Zhao was purged in 1989, much of his economic agenda was subsequently adopted—while his radical ideas for political reform were abandoned. *Id.*

125. See CHINA DECONSTRUCTS, *supra* note 121. See also Michael D. Swaine, *China Faces the 1990's: A System in Crisis*, in THE CHINA READER, *supra* note 2, at 103, 103.

126. See CHINA DECONSTRUCTS, *supra* note 121, at 3-18.

127. *Id.* at 4.

128. See e.g., *id.* at 343-45; see also Ocko, *supra* note 13, at 557.

coordinated system. But the underlying tensions persist, and Beijing most likely will continue to face difficulty enforcing international accords on its own territory.<sup>129</sup>

Beijing has found that it has little control over some of the most important elements of its foreign economic policy. Goodman and Segal suggest that control over some aspects of the regime's foreign relations power has also been decentralized, and "no one, except assorted individuals acting independently, has taken up that power."<sup>130</sup> This exacerbates the development of an increasingly alienated legal culture and further limits Beijing's ability to control the proverbial tiger of intellectual property reform. This may lead to persistent enforcement problems even after China's entry into the WTO. Although Beijing has increased the relative efficiency of its administrative apparatus, it still must rely on local authorities and administration to provide important data and to ensure the protection of intellectual property rights. Perhaps the best way for the United States and other foreign actors to secure their interests in China is to focus on the localities.<sup>131</sup> Goodman and Segal advise, "[i]f the outside world seriously believes that it can best accommodate China's rising power by weaving it into webs of interdependence, then the strongest webs will be built on regional and local lines."<sup>132</sup>

Economic and bureaucratic decentralization, and the relative fragmentation of central power over regional economic actors, may also contribute to China's increasingly alienated legal culture and further inflame the regime's legitimacy problems. The regime's inability to centralize control over China's vast economy and to effectively coordinate the enforcement of its new laws and regulations accentuates the differences between Beijing's ideas about socialist legality and popular notions of justice. China's lack of an effective constitutional system that fosters public dialogue about political values isolates the regime from the people it claims to govern. Potter claims that in post-Mao China, regime notions of justice reflect the idea that "relationships within society are considered just based on compliance with state rules and procedures rather than on substantive conditions and consequences."<sup>133</sup> Potter claims that

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129. See CHINA DECONSTRUCTS, *supra* note 121, at 344.

130. *Id.* at 343.

131. The 1997 title verification agreement with the U.S. Information Technology Office may be a step in this direction. See Ansson, *supra* note 61, at 13. This agreement allows U.S. software companies to monitor individual Chinese CD-ROM plants across the country, thereby committing the U.S. to a more proactive and local involvement in the enforcement of intellectual property rights in China. *Id.*

132. CHINA DECONSTRUCTS, *supra* note 121, at 352.

133. Potter, *supra* note 2, at 341.

regime ideals of justice inform regime notions about political inequality by reference to formal laws and regulations, "an approach strengthened further by the regime's control over the process of regulatory enactment and dissemination."<sup>134</sup> Rampant piracy, local protectionism, selective enforcement, and minimal damage awards may suggest a disjunction between official and popular views of justice, undermine regime efforts to create a system of effective intellectual property protection, and challenge regime legitimacy by perpetuating the alienation of legal culture. Potter claims that a wide gap exists between popular and regime ideals of legality and justice, a gap that poses significant challenges to regime attempts to derive political legitimacy from hollow legal reforms.<sup>135</sup>

The Kellogg's Corn Flakes case is perhaps a good example of the complexities of enforcement in light of China's unique political and legal landscape. In 1994, Kellogg sued a Chinese company selling cereal in packaging that was essentially identical to the packaging used by Kellogg—from a transliteration of the Kellogg name written in its distinctive script, to famous Kellogg copyrighted slogans replicated on the box.<sup>136</sup> In a lower Chinese court, Kellogg lost its case for trademark infringement. The lower court, relying on a "tendentious line of reasoning and reading of the evidence,"<sup>137</sup> not only found for the Chinese party, but ordered Kellogg to pay court costs and damages.

Kellogg then appealed to the provincial high court, which, just after the United States and China signed the 1995 MOU, overturned the initial decision. Although the high court provided sound legal reasons, critics suggest that the court acted with instruction from political authorities.<sup>138</sup> If the critics are correct in their evaluation, this case may be illustrative of several of the points discussed above. First, it exemplifies the tendency of lower level courts to favor local interests, even if the court lacks sufficient evidence to support its decision. Second, the outcome at the court of first instance may be further justified by a jurisprudential emphasis on the centrality of legal formalism and procedural compliance over the substantive consequences or equitable nature of the outcome.<sup>139</sup> And third, the ultimate outcome illustrates the absence of judicial

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134. *Id.*

135. *Id.* at 338–41.

136. Ocko, *supra* note 13, at 577.

137. *Id.*

138. *Id.*

139. Ideals of justice in post-Mao China have tended to on the enforcement of state law and the doctrines of legal equality and political inequality that lay their foundation. Potter claims the influence of regime views on legal equality has created a preoccupation with



independence, regardless of whether, as in this case, it actually proved favorable for U.S. businesses.<sup>140</sup>

Scholars often argue that at the root of China's inability to ensure adequate protections for intellectual property, and perhaps the root of Beijing's inability to curtail widespread piracy and flouting of its intellectual property laws, is the fact that China has historical and cultural roots that are profoundly different from Western countries, and that such roots militate against the establishment of an effective intellectual property rights system in China.<sup>141</sup> Alford claims that "laws premised on the values and institutions of an economically advanced capitalist democracy will not generate identical results when transplanted to a different setting. Rules that presume an independent judiciary, a professionalized bar, powerful interest groups and a rights-conscious populace fall chiefly on deaf ears in contemporary China."<sup>142</sup>

Some scholars claim that a rights consciousness is sorely lacking in China, and the lack of such a consciousness explains, at least in part, how some Western legal notions are incommensurable with Chinese sensibilities. Peerenboom suggests that rights consciousness entails "a culture of rights, an attitude among the people that the government cannot do to them as it wishes."<sup>143</sup> Peerenboom and others have suggested that Chinese Confucian-influenced ideas of propriety (*li*) and personal relationships (*guanxi*) trump foundationalist claims to natural rights.<sup>144</sup> In addition, the Chinese term for rights, *quanli*—the first character, *quan*, meaning to weigh or balance, and *li*, meaning interests or selfish interests—literally implies a weighing or balancing of interests, an etymology that "lends itself to a conception of rights understood as contingent interests rather than as moral principles."<sup>145</sup> Peerenboom claims

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legal formalism as the criterion for findings of justice. This has led not only to the problem of regarding the content of laws and regulations as equivalent to practice, but also to formalistic reliance on institutions and procedures without regard for substantive justice.

Potter, *supra* note 2, at 338.

140. In this case, the government is apparently making a policy statement in opposition to local interests. It is precisely situations such as this that cause critics to allege that China's legal system is best characterized as "rule by law" as opposed to "rule of law"—or in Potter's terms, the use of law as an instrument of rule rather than a set of independently applicable legal principles. It is in this context that the policies whose enforcement is sought through formalistic compliance with state rules and legal procedures are assumed to be *a priori* just. See *id.* at 338-41.

141. ALFORD, *supra* note 6; Ocko, *supra* note 13. But see, Butterton, *supra* note 46.

142. William P. Alford, *Pressuring the Pirate*, L.A. TIMES, Jan 12, 1992, at 5, available at WL 2993460, quoted in Butterton, *supra* note 46, at 1107.

143. Peerenboom, *supra* note 29, at 35.

144. See *Id.* at 44-47; see also DAVID HALL & ROGER AMES, THINKING THROUGH CONFUCIUS (1987).

145. Peerenboom, *supra* note 37, at 365-66. Note that the term *li* in *quanli* is not the same as that

that this reading of *quanli* is consistent with Confucian social ideals, and according to Confucius, the proverbial sage ruler (*junzi*) was to do the balancing.<sup>146</sup> The upshot of such claims is that these Confucian-influenced ideas are present in current political and legal discourse, affect current Chinese political thought, and stifle the development of a Western-styled rights based legal system in China. Randal Edwards claims that "China's leaders today, like the imperial and bureaucratic rulers of the past, hold that rights flow from the state in the form of a gratuitous grant that can be subjected to conditions or abrogation by unilateral decision of the state."<sup>147</sup> This is in contrast to Western notions of the state as the protector of natural human rights or rights to private property. In short, Chinese political and cultural sensibility does not lend itself to a respect for legality and for rights as these things are conceived of in the West, and because of this, rights in China will always be "rights with Chinese characteristics"—characteristics that may be incommensurable with their Western counterparts.<sup>148</sup>

But claims of cultural incommensurability may provide only a small, and perhaps insignificant, portion of the debate concerning the development of a workable system of intellectual property protection in China. Culture is never monolithic and simple rational narratives are of limited use, especially in contexts where economic, political, social, and cultural discourses collide. For instance, Glen Butterson argues that economic forces may offset the effect of cultural constraints in the Chinese context.<sup>149</sup> In economic terms, lax enforcement produces huge disincentives for advanced industries to invest in, or transfer technology to states that encourage or tolerate piracy.<sup>150</sup> Butterson claims that, "in the developing country context, public and private actors would do well to foster institutions and practices that will generate respect for intellectual property rights, and encourage foreign investment by advanced intellectual property producers."<sup>151</sup> China has, arguably, made great strides in this regard and has shown encouraging signs that respect for such rights is growing. China also shows signs that an effective institutional infrastructure is developing. But China's transformation from a system that "effectively

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translated as "propriety" above.

146. *Id.* at 366.

147. R. Randal Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 41, 44-45 (R. Randal Edwards et al. eds., 1986). See also Peerenboom, *supra* note 29, at 40.

148. Peerenboom, *supra* note 29, at 56-57.

149. See Butterson, *supra* note 46, at 1117-18.

150. *Id.*

151. *Id.* at 1117.

subsidizes piracy and taxes adherence to law, to one which effectively subsidizes adherence to the law and taxes piracy”<sup>152</sup> depends as much on the ability of an increasingly alienated regime to induce popular assimilation of an intellectual property system that may, in some respects, be a political and cultural mismatch, as it does on economic forces that support a cost-benefit analysis in favor of protection. Perhaps, in light of the regimes current legitimization crisis, reliance on something other than rule of law—e.g., economic development—would be a wise choice, if that choice has not already been made.<sup>153</sup> But, as suggested in evaluations by both Potter and White, the regime is riding a tiger that may prove virtually impossible to dismount.<sup>154</sup>

Alford, in his assessment of the development of intellectual property laws in China, argues that China’s political culture is the most important factor in explaining the “relative insignificance of the idea of intellectual property in the Chinese world.”<sup>155</sup> Alford’s idea of political culture emphasizes the central importance of state control over the flow of ideas for purposes of legitimization and power in China,<sup>156</sup> an emphasis that informs the realization and interpretation of the “constitutional essentials” of democracy, rule of law, and human rights.<sup>157</sup> Although political culture is subject to continual evolution and change, Alford doubts that the passage of laws, and the creation of a complex apparatus to enforce those laws, can—by itself—affect any real significant and lasting change in China.<sup>158</sup> He claims that the beginning of such change is evident, but “the state’s ambivalence about the very rights it has been busy creating, and its concomitant hesitance to cede to individuals a greater capacity for enforcing them, raises questions as to the potential of such steps genuinely to transform fundamental tenets of Chinese political culture.”<sup>159</sup>

Both China and the United States agree that China’s membership in the WTO is an inevitable step toward integrating China and its economy more fully into the international political and economic order. Membership in the WTO will limit the ability of the United States to use Special 301 and other unilateral mechanisms to pressure China into complying with U.S. interests without

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152. *Id.* at 1118.

153. *See, e.g., WHITE, supra* note 10.

154. *See Potter, supra* note 2, at 325; *see also WHITE, supra* note 10.

155. ALFORD, *supra* note 6 at 119.

156. *Id.*

157. *See Davis, Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values, supra* note 28, at 138.

158. ALFORD, *supra* note 6, at 120.

159. *Id.*

involving the dispute resolution mechanisms of the WTO.<sup>160</sup> This will change the rules of engagement between the United States and China and provide both countries with a "neutral" context for solving intellectual property disputes.<sup>161</sup> But it is doubtful that admission to the WTO will produce the political and "moral" changes in China that many scholars see as necessary for the development of a truly effective system of intellectual property protection. Thus, China is likely to encounter ongoing difficulties in this regard.<sup>162</sup> Perhaps the conditions that are necessary for success in the current global economy are precisely those conditions that breed protection for intellectual property in the domestic context—perhaps a particular species of Western political culture.<sup>163</sup> Nevertheless, China's regime has a rough ride ahead and it is in the interests of the United States and the international community to see that China overcomes its current problems and that the future of intellectual property protection in China is a bright one indeed.

## VI. CONCLUSION

China has developed a system of intellectual property protection that, for the most part, meets the substantive standards of most WTO member states. However, China's political culture—a culture that stifles the free flow of ideas and fails to support a transparent legal system—as well as its bureaucratic and economic decentralization, may hinder its ability to establish a truly effective system despite its apparent compliance with international substantive standards. So long as the regime seeks increased involvement in an international economic order that champions ideas and values of Western liberal democracies, the outside and inside pressures on the regime to account for its differences in the

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160. See, e.g., David B. Dreyfus, *Confucianism and Compact Discs: Alternative Dispute Resolution and its Role in the Protection of United States Intellectual Property Rights in China*, 13 OHIO ST. J. ON DISP. RESOL. 947, 959-961 (1998). See generally, *WTO Intellectual Property*, *supra* note 94 (providing an overview of dispute settlement procedures under TRIPS).

161. See Dreyfus, *supra* note 160, at 959-61. Some critics, however, have argued that the U.S. will be forced to rely on Special 301-type unilateral measures to give effect to the provisions of TRIPS because the WTO dispute settlement process will ultimately prove to be inadequate. See Robert J. Pechman, *Seeking Multilateral Protection for Intellectual Property: The United States "TRIPS" over Special 301*, 7 MINN. J. GLOBAL TRADE 179 (1998).

162. Beijing's desire and willingness to join the WTO entails a commitment to sustaining substantial political and short-term economic costs. These political and economic concessions are offset by a belief that international economic interdependence does not necessitate the social and political changes of a "Western liberal kind." Harris, *supra* note 90, at 152. For an argument that a homogenization of domestic political forms is necessary in the evolution of an international society, see generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1993).

163. See ALFORD, *supra* note 6, at 123.

success of legal and economic reform will be more and more difficult to sustain, especially if the ultimate success of these reforms is dependent on a change in political culture. The significance of this conclusion is likely to be debated *ad infinitum* by economists, political scientists, and cultural studies scholars. But one thing remains clear, as the current regime continues to use legal institutions to maintain its political dominance, grants of legal equality, and legally recognized rights will be continually susceptible to the whims of CCP politics.

The enforcement of substantive standards has been and remains a primary concern for the Chinese government and for the United States—a concern that is rooted in the regime's current legitimation crisis and apparent inability to control its localities. But regime ideas of justice, emphasizing compliance over substantive conditions or consequences, may actually perpetuate problems of local favoritism when enforcement is sought in local courts. In short, China's unique political culture, socio-economic constraints, and complex bureaucracy places enormous limits on the regimes ability to ensure an efficient system of domestic intellectual property protection.

The politics of imagining intellectual property rights in China has been limited by outside pressures on the regime to fashion intellectual property laws on U.S. terms, and on domestic pressures to pass laws that ensure the ongoing successes of economic development without compromising regime power and legitimacy. Economic conditions and incentives seem to have created the conditions for the development of and a respect for a growing intellectual property rights consciousness despite alleged cultural obstacles to the contrary. But some scholars suggest that further political liberalization and a greater commitment to the institutions, personnel, and values needed to support a rights based legality are necessary for any real lasting change.<sup>164</sup> Alford states,

The challenges so posed are daunting, for by its very nature, political culture comprises enduring values and practices central to a nation's identity, which foreigners, perforce, should not too readily assume they have either the moral authority or capacity meaningfully to influence. Nonetheless, it is here that attention should be focused, for a state that encounters serious difficulties in protecting its citizens' basic civil and political rights is unlikely to be able to protect their

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164. *Id.* at 120.

property rights, which in turn means that it will be even less likely to protect the highly sophisticated property interests of foreigners.<sup>165</sup>

China has made great strides toward developing an effective system of intellectual property protection, but the future of intellectual property enforcement ultimately depends on how China will contend with the social, political, and economic challenges that it currently faces.

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165. *Id.*

