ABSTRACT

Over the past two and half decades, much has been written about China's ongoing economic reforms. It is now widely accepted that China's current economic course has displaced Marxist-Leninist-Mao Zedong-Thought and, in the process, has served to undermine the ideological legitimacy of the regime. As a result, many commentators have spoken of the inevitable collapse of the Chinese Communist Party's (CCP) authoritarian hold of the country. However, far fewer questions have been asked about the degree to which the CCP may maintain control of the country by utilizing a by-product of its economic exuberance, namely, law. Since the end of the Maoist era law has become a ubiquitous force in Chinese society, growing as both a condition precedent to and as a consequence of various development policies.

This thesis examines the modern interplay of ideology and law in China in the context of international expectations, and the resulting challenges to the regime's legitimacy that arise directly from these tensions. By examining the manner in which the CCP is using law as a vehicle to entrench its long-term sustainability, this thesis attempts to explain how China's continued revolutionary trajectory is being pursued. I hold that paying attention to current developments and interpretations of law in China can have salutary benefits for other Sinologists whose perspectives stand outside of the legal realm.
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The ideas contained within these pages have been nearly ten years in the making or almost a third of my life as of the time of this writing. While my approach to my conclusions have certainly changed through the years, in large measure because I have obtained a law degree in that time, I am perhaps more than ever a firm believer that policy issues deserve great attention. As a consequence, I have many people to thank for without whom I would not have had the opportunity to finally devote myself to this endeavour.

Much like the speeches of retired baseball players at their Hall of Fame Induction Ceremonies (an honour, I will regrettably never be afforded), I suspect the many thanks I issue here will be monotonous to many. Unlike such a ceremony, however, I can only hope that my best professional years lie in the future rather then in the halcyon days of my youth. Nonetheless, I am a somewhat philosophical as I end this chapter of my life devoted to academia, in large measure because I thought for so long that this is where I would stay. Of course, like in all other facets of life, careers have a way of developing in spaces where one thought it would never be possible.

So in issuing my thanks, I suppose the place to begin is with Samuel Noumoff, Associate Professor of Political Science at McGill University. I thank you for first arousing my interest in China nearly a decade ago. I also wish to thank Professor Elisabeth Spahn at the New England School of Law. Her commitment to the study of China at an institution that perceives her interest as a discreet oddity, was a refreshing diversion at times when I was forced to devote the bulk of my attention elsewhere in my pursuit of a legal degree. In a strange way, I suppose I am also indebted to the Executive
Board of the New England Law Review for 2003-2004. The trenchant criticisms I received from an assortment of characters when I was first developing these ideas—notably, from Natashia Tidwell and Sandra Callahan—I found difficult at the time to justify. However upon reflection, I hold that their critique, albeit as uneducated as it was has nevertheless aided me in producing a richer piece of work here.

In pursuit of my Master of Laws degree, my tenure here at the University of British Columbia (UBC) has been nothing short of invigorating, for both my mind and body. My sincerest thanks goes to my principal supervisor Professor Ian Townsend-Gault, who tirelessly combed my thesis drafts with the precision of a Senior Copy Editor all the while buoying my spirits with his affable nature and constant approachability. I owe a great debt as well to Professor Pitman Potter, who was extraordinarily generous with his time in a year of sabbatical. I will forever be grateful for allowing me to sit at your feet and learn. You are simply one of the most gifted intellects I have ever had the fortune of studying under. Additional thanks also goes to Professor Wesley Pue and Joanne Chung, who both made my engagement with other graduate law students here at UBC and elsewhere an enjoyable experience.

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To my sixth grade teacher Ms. Schmidt—
who taught me the value of studious maturity
and that rambunctiousness was best left for recess
I. INTRODUCTION

During the last few years much has been written about China’s decision to affiliate itself with the World Trade Organization (WTO), and as a direct result, the imminent collapse of communism in the world’s most populous country. Many of the books and articles which have been consulted in the composing of this thesis reflect a

1 Perhaps unconventionally for a LL.M. thesis at a Canadian institution, I have utilized the legal citation system published by The Harvard Law Review Association. This system, "THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass’n et al. eds., 17th ed. 2000)," is the standard for footnoting in North American Law Reviews and Journals. I have used this format because I am most familiar with it being legally trained in the U.S., but also because I believe it to be superior to other citation systems that I have consulted. With that said, The Bluebook does not provide clear guidance in all cases; particularly, for some of the international sources that were used throughout the course of this project. In those few instances where citation methods are not provided for, I have made a conscious effort to create a citation that is as consistent as possible to The Bluebook’s format, all the while providing the reader with an easily identifiable reference.

2 See generally GORDON G. CHANG, THE COMING COLLAPSE OF CHINA, (2001) (concluding that because of China’s economic exuberance of the 1980s and 1990s, the Party cannot sustain the political control necessary to remain in power); THOMAS C. FISCHER, THE UNITED STATES, THE EUROPEAN UNION, AND THE “GLOBALIZATION” OF WORLD TRADE Chapter 12, 177 (2000) (arguing that “China’s civilian government is firmly committed to separating the Communist Party and the state from their business interests as soon as possible. ...This reform process, which might take just a few years under the right conditions, will be a real test of the government’s political and economic acumen.”); MINXIN FEI, FROM REFORM TO REVOLUTION: THE DEMISE OF COMMUNISM IN CHINA AND THE SOVIET UNION (1994) (suggesting that the emergence of political and economic demanding entities has destroyed the Chinese regime’s ability to maintain political power); William I. Friedman, One Country, Two Systems: The inherent conflict between China’s Communist Politics and Capitalist Securities Market, 27 BROOKLYN J. INT’L L. 477, 480 (2002) (“Hence, it is inevitable that China’s current government will fall at the expense of its securities market”); Michel Oksenberg, Confronting a Classic Dilemma, 9 J. DEMOCRACY 33 (1998) (suggesting that “China’s leaders are likely to find introducing democracy at lower levels of the system and firmly committing themselves to the attainment of full democracy over a protracted period to be an increasingly attractive option.”); Henry S. Rowen, The Short March: China’s Road to Democracy, 45 NAT’L INTEREST 61-69, (1996); Willy Wo-Lap Lam, China’s ‘dangerous’ class divide set to stay, at http://www.asia.cnn.com/2002/WORLD/asiapcf/east/09/02/willy.column (last visited Aug. 12, 2005) (quoting “[o]ver the long haul, what [Chairman] Jiang’s critics call the political disenfranchisement of the economically disadvantaged classes could be ripe for [political] disaster.”); An Inside Look at Global Issues for Corporate Legal Executives, CHINA 2002: A Legal Guide to WTO’s Newest Member, CORP. LEGAL TIMES, (Chicago) Feb. 2002 (noting that “China’s November [sic] 2001 admittance to the World Trade Organization could be … the death knell of Communist Party Leadership”); Intimations of mortality, THE ECONOMIST (London), June 30, 2001, 21-23 (“…optimistic Chinese intellectuals believe that economic globalisation will, over time, transform China politically as well.”).
uniform belief regarding this eventual end, while only the timeframe for this forthcoming collapse remains an issue in the eyes of various commentators.³

Until now, the discussion of China sustaining a viable socialist state has primarily centered around microeconomic development strategies. Such analyses typically comment on the seemingly incompatible nature of China's capitalist practices with an overall socialist mandate that has led to the aforementioned conclusions. Since the end of the Maoist era, a few of the favorite sources of tension that are often cited as evidence for the apparent disarray of Chinese socialism include: the increased division of generalized labour in favor of specificity, the resulting rise in economic disparity between technological and manual labour forces and between urban and rural residents, and finally, the abandonment of collectivization practices. However, none of these inquiries have yet to tackle this question from a jurisprudential perspective—that is, examining how recent legal reforms in China may, if at all, sustain a socialist course of development.

Accordingly, the thesis is devoted to exploring what is oft-referred to in the literature as the "transitory phase" of socialism.⁴ In doing so, it is argued that the modern People's Republic of China (PRC) has not abandoned its earlier, arguably once more

³ Compare FISCHER, supra note 2, at 177 and Osksenberg, supra note 2 ("[S]everal factors are propelling China toward a speedier democratic transition than most analysts think likely,") with David Pilla, China Part of Fastest-Growing Insurance Market in the World BEST'S INS. NEWS (New Jersey), Jan. 30, 2003 ("There is a lot of talk of the younger reformers coming to power, which I think will cause a further opening of government to business. In economics, they're jumping by leaps and bounds. Politically, there is not much progress.") Id.

pronounced, revolutionary trajectory. The origins for my suggestion of continued revolutionary continuity lie within China’s Deng-inspired legal reforms. Such a conclusion is of significant practical importance, in my view, because the spirit of such a hypothesis belies so much of what the average person—sophisticated, or otherwise—hears from popular accounts about the “new” China.

My resolve to demystify what I believe to be false impressions about China are motivated not by a desire for scholarly accolades, or even a driven commitment to further populate the already abundant landscape of legal commentaries on China. Rather, my interest is born from my own evaluation of China’s future course, which I posit is a socialist ideology in flux.

Of course, my credentials in offering such a premise may be suspect to sum, and regretfully, consists only of an eleven-year personal and academic commitment, which, when compared to the dedicated service of other Asian scholars I fully realize is minimal. Nevertheless, I offer my thoughts below without reservation, except to note that the value of my reflections lies not in the assumption of their correctness, but rather, in their ability to conceive of a socialism that does not presuppose a particular form of maturation. Others too, notably Arif Dirlik, have called for the relaxation of a rigid socialist model in the modern era. Dirlik argues that a redefinition of socialism “allows us to recognize the seriousness of Chinese socialism without falling into the teleological utopianism that is implicit in the world ‘socialism,’ which by itself refers not only to a present state of

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affairs but also to a future yet to come." I conclude by arguing that post-Maoist legal developments in China are but a few of a long line of regime practices that maintain an ongoing revolutionary course, and are not, as they are so often frustratingly misidentified as, a complete repudiation of China’s recent past.

II. METHODOLOGY

This examination has been rewarding. It has provided me with a rich intellectual exercise, and no doubt has tried the academic patience of all my colleagues that were kind enough to listen to my conclusions. Yet detailed legal scholarship, (particularly of new and emerging bodies of law) like all highly specialized areas of academic work, can leave both the researcher and reader anxious for more of the “big picture.” This paper reflects a conscious attempt to step back from much of the rhetoric that has emerged in recent years, and ask a more basic question that may help form future political and legal discussions on China: in what direction is China moving, and how, if at all, does this current course mark a divergence from its well celebrated communist past?

The term “direction” could refer to a variety of things—for example, it could refer to macro-level concerns, such as a change in China’s political direction, or micro-level issues, such as specific legislation that may or may not produce such a change. In this

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6 Id.
7 See supra notes 2 and 4.
8 I am stylistically indebted to Professor Salbu in framing the issues discussed herein. Professor Salbu’s eloquence and understanding of his inquiry has easily lent itself to adoption here, although all substantive questions presented herein remain my own. See Steven R. Salbu, Transnational Bribery: The Big Questions, 21 N.W. J. INT’L L. & BUS. 435-37 (2001).
9 See supra note 2.
thesis both are explored—questions of broad public policy, such as whether the Party\(^{10}\) can maintain an effective hold on power is a constant theme throughout. Yet, the following investigation is not limited to a discussion of macro-level questions. In turn, this paper addresses focused questions regarding recent legislation. It is argued that laws related to foreign investment in conjunction with the way in which they are administered—essentially arbitration, are contributing to a reality in China that has yet to have been addressed by devoted Asianists active in the study of China.

The questions and resulting analysis addressed are questions that I believe are absent from the current discourse and merit greater attention from scholars in the near future. Finally, the very nature of the subjective identification of this dissertation’s questions as integral to a complete understanding of China cannot help but reflect my own inherent interest in the subject as whole—in short, my analysis is that of questions and problems that I find undeniably perplexing and to date unanswered.

So what, in essence, are these questions? First, Section III examines how China’s recent history has shaped today’s Communist Party. In rejecting the mainline argument held by many academics and members of the popular press that China’s communist regime is damned,\(^{11}\) this section examines the ideological foundations of Chinese Marxism and the pervasiveness of the notion of struggle within Marxist-Leninist-Mao Zedong-Thought. My analysis argues that within these conceivably “old” ideological foundations lie the seeds for China’s future. In proving the point, analyses of the counter

\(^{10}\) China has a unitary political system. As such, the terms “Party,” “government” and “regime” are used interchangeably throughout this thesis. However, that is not to say that a separation of these terms is never necessary, as they may, and often do, contain varied meanings when applied to different areas of the world. But again here, for the purposes of this limited inquiry, no substantive parsing of their usage is necessary.

\(^{11}\) See supra note 2.
arguments are given great attention. This thesis looks at current majority perceptions and examines why they appear to be facile when compared to contemporary Chinese realities.

In establishing this position from the onset, my inquiry goes on in Section IV to offer theories in the understanding of "socialist transformation." Largely left to the study of social scientists, contemporary opinions by leading proponents of this movement are highlighted. While this thesis grounds many of the forthcoming foundations in the "soft" science of political science, the contemporary importance of these positions manifests in the every day expressions of the popular press. As such, this paper relies on these accounts to give an understandable expression to often difficult and abstract notions.

Next, I turn to recent legislation that in part exposes China’s intentions. In refuting the popular perception of an inevitable regime collapse, Section V reviews recent constitutional and contractual legislation and the future implications associated with these developments. In revealing that the establishment of liberalizing economic laws that are designed to promote foreign investment do not necessarily give rise to liberal democratic policies, mechanisms for the regime’s continued sustainability are explored.

Finally Section VI, and arguably the most important, queries whether recently promulgated laws in China are in-line with internationally acceptable norms. It is argued that the implementation of law in China may differ greatly from international expectations; in the process allowing the Chinese to actively promote a transitory phase of socialism. Partial evidence for this conclusion resides with China’s national arbitration body. The practice of arbitration provides that if parties to a dispute mutually agree to be

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12 See generally infra Part IV.
bound by the proceedings, the findings laid down by a tribunal hold the same force and
effect as any other legal proceeding. Increasingly throughout the world of international
business transactions, arbitration has become the favoured mechanism of resolving
disputes. With the discussion of Chinese arbitrations introduced into my overall
approach, and using my conclusions on Chinese ideology and socialist transitions
addressed in earlier sections as a backdrop, the reader is hopefully able to begin to see
that the Chinese Communist Party (CCP) is not weakening, but rather strengthening; the
result of the Party continuing along its historical path of conscious, if not overt
continuous struggle. My conclusions are buttressed by the reflections of contemporary
arbitrators and counsellors currently active in China, who, under the condition of
complete anonymity have agreed to offer their own insights into the interrelated nature of
law and politics in China.

This thesis concludes by suggesting that in the absence of unforeseen
circumstances, such as for example, the ravages of war or a large-scale natural disaster
that would prevent the government from conducting its day-to-day operations, the CCP
will continue to be the dominant political entity in China for some time to come. In
addition, my hypothesis goes further and proposes that China is currently engaged in a
deliberate and systematic attempt to provide the ripe conditions for a full-scale normative
shift, which after its completion may bear the more obvious hallmarks of a socialist state.

Regrettably, given that my facility with the Chinese language is inadequate for the
purposes of a rich intellectual engagement, I have had to rely exclusively on English
language commentaries and translations of Chinese laws and regulations. This being the
case, I have remained mindful that important subtleties of “true” legal meanings may
often be lost or misconstrued in subsequent translations. To combat this fear, I have
where possible attempted to cross-check existing legal translations, so as to ensure the
accuracy of my resulting analyses.

One final point before embarking on this voyage—the purpose of this thesis has
been to provide an alternative to the majority position on China. While the observations
made here are my own, they will invariably lead to certain judgements and conclusions
by others. The reader is encouraged to resist the temptation to make larger assumptions
until the argument has been fully presented. Easy answers rarely exist for difficult
questions, and the ensuing discussion is no exception. The objective of this inquiry has
been to merely identify inconsistencies in the language of law and its application that
extend beyond the semantic and, furthermore, hopefully add real value to the discourse
on China and its often complex relationship with the rest of the world.

III. HISTORY OF CHINESE COMMUNIST IDEOLOGY AND ITS
ORGANIZATIONAL IMPORTANCE

If it were necessary to articulate the essence of Chinese history over the past four
millennia it is conceivable that one statement would come to the lips of China watchers
and academics alike, the word being "warlordism." Periods of factionalism and frequent
upheaval (often involving bloodshed as the political landscape changed) dot the
chronological timeline of China's history. Beginning with the overthrow of China's

13 See supra note 2.
(1991); see also, CHANG, supra note 2, at 6.
15 See DERNBERGER ET AL., supra note 14, at 4-5, 83.
first dynasty, the Shang by the Zhou\textsuperscript{16} kingdom in 1122 B.C. and culminating in the last century, the relative truth of the Chinese idiom regarding the Mandate of Heaven remained constant.\textsuperscript{17} The concept of the Mandate of Heaven, grants no divine right to any one regime, but expects that each ruler will prove himself by his ability to serve the people.\textsuperscript{18} This concept makes rebellion justified when rulers fail to provide for their kingdom.\textsuperscript{19} The theory of divine intervention, and its relationship to Chinese politics, enjoyed an uninterrupted lineage until the last century.\textsuperscript{20}

Fast-forwarding to the twentieth century and admittedly dismissing a wealth of history that is of import to the truly invested China observer, the declaration of the PRC on October 1, 1949 by Mao Zedong\textsuperscript{21} was a seminal event not only in Chinese history, but within the broader context of understanding international geopolitical polarization.\textsuperscript{22} In analyzing what made the CCP’s victory such an exceptional event, attention must be given to strategies typical of any military based conquest.\textsuperscript{23} However, the real importance in appreciating the Chinese experience lies not in the realm of artillery analysis, but

\textsuperscript{16} A short remark regarding style may be useful to the reader. The system of romanized spelling (pin yin) for Chinese words used herein generally follows that which has been adopted in the PRC. This system acts as the basis for Chinese language instruction for non-native speakers and is now the accepted international standard. As such, it has largely replaced other systems previously in use. I have used this system almost entirely (Mao Zedong instead Mao Tse-tung, for example). However, in the footnotes, and when quoting I retain the spelling used in the original source.

\textsuperscript{17} See DERNBERGER ET AL., \textit{supra} note 14, at 123.

\textsuperscript{18} See \textit{id}.

\textsuperscript{19} See \textit{id}.

\textsuperscript{20} See CHANG, \textit{supra} note 2, at 77-79.

\textsuperscript{21} See RAYMOND L. WHITEHEAD, LOVE AND STRUGGLE IN MAO’S THOUGHT, xi (1977).

\textsuperscript{22} See CHANG, \textit{supra} note 2, at 6.

\textsuperscript{23} See DERNBERGER ET AL., \textit{supra} note 14, at 80-90.
rather in understanding the political organization of China, and the impact of ideology—
the architecture that gave birth to China’s current organizational structures.  
Understanding the uniqueness of China’s recent history is integral to any modern day
analysis.  The magnitude of this distinctiveness cannot be overstated, for in it lies both
the foundations and future of the PRC.

The modern era, which may be said to have begun unofficially with the death of
Mao Zedong in September 1976, would over the next two years result in a formal
departure from China’s then existing course of development. Following Mao’s death,
and the re-emergence of Deng Xiaoping as leader of the CCP, Deng, and his hand-
picked successor Jiang Zemin, would, over the next twenty years, engage China in an
aggressive modernizing campaign, affectionately known throughout China as the “Four
Modernizations theory—concentrating on advances in agriculture, industry, defence and
science and technology.” With the formal adoption of this “open door” expansionist
policy in December 1978, “focus was concentrated on economic reforms by utilizing
market mechanisms and foreign resources to speed up growth and modernization of the

24 See FRANZ SCHURMANN, IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA, 19 (1968) (“[t]he Party
Rules [essentially, the organization] can be said to contain the formal ideas basic to the ideology.”) Id.


26 See Great Theoretical progress for CPC in past decade, at

27 See Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of
China (adopted on December 22, 1978) 52 PEKING REV. 6 (Dec. 29, 1978); see also JONATHAN D. SPENCE,
THE SEARCH FOR MODERN CHINA 622, 650 (1990); CARL RISKIN, Market, Maoism, and Economic Reform
in China in THE TRANSITION TO SOCIALISM IN CHINA, 300 (Mark Selden et al. eds., 1982).

28 See SPENCE, supra note 27, at 606, 633-659 (discussing Deng Xiaoping’s political purging and eventual
reinstatement and resurrection as Chairman of the Party).

29 See CHANG, supra note 2, at 9.
This new era was characterized by the Chinese leadership as "socialism with Chinese characteristics." With this marked departure from isolation and state collectivization practices that characterized the Maoist era has come the observation by many (whose experiences cross-cut several disciplines) that China is embarked upon an irreversible path toward political liberalization, predicated upon the demise of the CCP. What is neglected in these observations, and to which this examination is largely devoted to exploring, is an in-depth investigation of contemporary Chinese Communist ideology and the current context of international trade in which it operates.

A. Definition of Terms

The term "socialism" has over the years acquired several different meanings. For the purposes of this inquiry, a generalized definition has been adopted, which is "socialism is understood to be a process of basic societal transformation, an historical period of planned transformation from capitalism to communism, undertaken in a society rule by a communist party." In using such a definition, it is taken as fact that the world's communist leaders throughout history have differed over the precise conception of socialism and what it means in practical terms. One needs only to review the record of Tito's Yugoslavia, Castro's Cuba, or Mao's China to illustrate the point. However,

30 Id. See also generally, Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China (adopted on December 22, 1978) 52 PEKING REV. 6 (Dec. 29, 1978).

31 See Friedman, supra note 2, at 477, 480 (quoting K. Matthew Wong, Securities Regulations in China and Their Corporate Finance Implications on State Enterprise Reform, 65 FORDHAM L. REV. 1221, at 1221 (1996)).

32 See supra note 2.

33 See VAN NESS & RAICHUR, supra note 4, at 78.
implicit in this assumption is that while the particularities of socialist development may differ, there is general agreement that communism is the end which they are trying to achieve. In adopting a definition of socialism as a process, it is hoped that the forthcoming legal analyses will guide the reader in understanding how China’s socialist objective may be reached in a contemporary world laden with law.

B. Ideological Underpinnings

No political party can possibly lead a great revolutionary movement to victory unless it possesses revolutionary theory and a knowledge of history and has a profound grasp of the practical movement. – Mao Tse-Tung

Chinese history bears heavily on contemporary Chinese politics. In China’s past lie the seeds for what the current ruling elite are attempting to bring to fruition. Consequently, this section explores these foundations in both their theoretical and practical application.

In understanding the multitude of factors that have contributed to the success of the CCP’s victory in China, none are more important than the political/philosophical system. Samuel Noumoff suggests that the importance of a philosophic system within society is both that of:


36 See Noumoff, supra note 25, at 284 (theorizing that in “pursuing [certain] goals, the Chinese [leadership] have extended the Marxist vision of society”). Id.

37 See id. at 3.
...integrator and independent component of the overall social system. Fulfilling a dual function, the political/philosophic system becomes particularly critical in times of systemic stress. There are, of course, attempts at stretching the philosophic overview to accommodate this stress, however, elasticity is not infinite, but rather proportionate to the limitations of the system’s assumptions.  

The existence of tensions between implementing ideology and overall practicality has a rich history in China. Franz Schurmann, has arrived at a similar conclusion, recognizing the difference between “pure” Marxist theory and the distinctions from Chinese practical application. Schurmann gives great discussion to advocating that the nucleus of Mao Zedong-Thought lies within Mao’s importance placed upon “contradiction,” a concept learned from Lenin, and integral to the “sinicization of Marxism.” For Schurmann, the practicality of the CCP’s doctrine manifested itself in the organization of institutions of the Party, which, according to Schurmann was a conscious attempt to apply Marxism—which was largely ethereal until Lenin operationalized the doctrine—to concrete and unique Chinese experiences. This attempt to unify theory with practice came with great

38 Id. at 8.

39 See id.

40 See SCHURMANN, supra note 24, at 54 (discussing a speech given by Liu Shaoqi in the early 1940s). He writes:

Liu’s speech was replete with discussions on contradictions, indicating that the notion of contradictions is inherent in Chinese Communist ideological thinking. However, Liu began his speech with the statement that the Party is a ‘contradictory structure.’ Such an idea would appear to be at variance with the commonly held notion that every Communist must have monolithic unity.

Id.

41 See Noumoff, supra note 25, at 9.

42 See generally SCHURMANN, supra note 24 (Schurmann’s premise is that the origins of Communist China’s success lies within the Party’s emphasis on organization).
difficulties and tensions for the Party.\textsuperscript{43} Mao alluded to the existence of these tensions in his aptly named work, \textit{On Contradiction}, where he opined:

\begin{quote}
Each of two aspects of a contradiction, in the process of development of things, regards its opposite aspect as the condition for its existence...The contraction aspects in every process exclude each other and are opposed to each other. Such contradictory aspects are contained \textit{without exception in the process of all things}.\textsuperscript{44}
\end{quote}

Because of Mao's belief in the ubiquity of contradiction, he felt it occupied a prominent place in politics.\textsuperscript{45} From this, we may infer that Mao included in his understanding of the "process of all things" the very nature of revolutionary struggle.\textsuperscript{46}

In his writings, entitled \textit{Dialectical Materialism}, Mao alludes to the inherent tensions of revolutionary theory.\textsuperscript{47} Mao notes, "[t]he whole history of philosophy is the history of the struggle and the development of two mutually opposed schools of philosophy – idealism [capitalism] and materialism [socialism/communism]."\textsuperscript{48} To truly understand the Chinese revolutionary experience, it is necessary to first appreciate the existence of the dialectic, essentially the concept of struggle, characterized by a constant ebb and flow of competing forces and practices.\textsuperscript{49} Samuel Noumoff has added that

\begin{itemize}
  \item \textsuperscript{43} See \textit{id.}; see also SPENCE, \textit{supra} note 27, at 569-73 (discussing, the "Hundred Flowers campaign." This is just one example of the party engaging in a rectification movement, which was ultimately designed to foster a more "socialized" Chinese society).
  \item \textsuperscript{44} See MAO TSE-TUNG, \textit{On Contradiction, in SELECTED WORKS}, Vol. II 36 (1967) (emphasis added).
  \item \textsuperscript{46} See MAO TSE-TUNG "BIEN-CHENG-FA WEI—WU-LUN (CHIANG-SHOU T'I-KANG)" ('DIALECTICAL MATERIALISM-IN K'ANG-CHAN TA-HSUEH, 4 nos. 6 to 8, (April to June 1938); see also MAO TSE-TUNG, \textit{QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG} 200 (Foreign Language Press Peking 1972).
  \item \textsuperscript{47} See \textit{id.} at 1.
  \item \textsuperscript{48} \textit{Id.}
  \item \textsuperscript{49} See \textit{id.}
\end{itemize}
"dialectics is worthy of consideration not only for its historic impact upon Chinese thought, but in addition its relevance in understanding Marxism as it took root in China."\textsuperscript{50}

The value of the dialectical approach historically is that this paper proposes that a consciousness associated with "struggle" continues to predominate China's present-day ideological landscape, notwithstanding the fact that China has embarked upon a different path of "socialization" since the concept's original formation during the Maoist era.\textsuperscript{51} For example, Mao, referring to the importance of destroying the Confucian mindset to pave the way for a new classless society, remarked in 1938:

Dialectical materialism...considers that rest or equilibrium are merely one element of movement, that they are merely one particular circumstance of movement. ...A sentence popular with the metaphysical thinkers of ancient China, 'Heaven does not change and the Way also does not change,' corresponds to... a theory of the immobility of the universe. ...In their view, the basic nature of the universe and of society was eternally unchanging. The reason why they adopted this attitude is to be found primarily in their class limitations. If the feudal landlord class had recognized that the basic nature of the universe and of society is subject to movement and development, then most certainly they would have been producing in theory a death sentence on their own class. The philosophies of all reactionary forces are theories of mobilism. Revolutionary classes and the popular masses have all perceived the principal of the development of the world, and consequently advocate transforming society and the world; their philosophy is dialectical materialism. ...If China is to grab hold of the revolutionary force and continue to develop, then China must struggle with all the old and rotten philosophical theories

\textsuperscript{50} See Noumoff, \textit{supra} note 25, at 19.

\textsuperscript{51} See \textit{AGENCE FR. PRESSE} Dec. 26, 2002 available at 2002 WL 11135545 ("Without Chairman Mao Zedong, the Chinese people would still be searching to find their way in the dark," said Jiang, quoting Deng [Xiaoping]. Then again, quoting Deng, he said: 'In the future we will continue to raise the flag of Comrade Mao Zedong.'" \textit{Id.} Though brief, this statement illustrates the reverence that China's recent leaders share for Mao; see also Arjun Subrahmanyan, \textit{Constitutionalism in China: Changing Dynamics in Legal and Political Debates}, \textit{CHINA LAW & PRACTICE}, May 2004 at 17, 20-21 (addressing the importance of political lineage in the context of Chinese elite politics).
throughout the whole country, raise the flag of criticism and in this way liquidate the philosophical heritage of ancient China.\textsuperscript{52}

The full weight of Mao's doctrine was expressed in \textit{Renmin ribao} dated April 5, 1956:

Some naïve ideas seem to suggest that contradictions no longer exist in a socialist society. To deny the existence of contradictions is to deny dialectics....Socialist society also develops through contradictions between the productive forces and the relations of production. In a socialist or communist society, technical innovations and improvement in the social system inevitably continue to take place; otherwise the development of society would come to a standstill and society could no longer advance....\textsuperscript{53}

As the above illustrates, Mao laid out a prescription for rooting out the last vestiges of a repressive society, calling for the destruction of feudalism in China.\textsuperscript{54} The importance of Mao's proscription cannot be understated. Beneath the rhetoric, he saw the importance of political substance and made it an immutable characteristic of Chinese Marxism.\textsuperscript{55} He developed a plan of action as to how to arrive at the Marxist ideal. After assuming control of the country, Mao was not content that the Chinese state was at peace, that taxes were being collected and that families were relatively stable.\textsuperscript{56} His ambitions led him on a variety of social campaigns that began with a tremendous push for development with the Great Leap Forward, but which ended with a heavy human toll,\textsuperscript{57} followed by the Great

\textsuperscript{52} See MAO, supra note 46, at 1.

\textsuperscript{53} See Noumoff, supra note 25, at 30 (quoting \textit{Renmin ribao}, Apr. 5, 1956).

\textsuperscript{54} See MAO, supra note 46, at 1.

\textsuperscript{55} See Noumoff, supra note 25, at 30.


\textsuperscript{57} See id.
The Proletarian Cultural Revolution, which attempted to revive the revolutionary spirit of Party cadres in the face of increased bureaucratization. The approach first adopted with "the Great Leap Forward, begins with a particular epistemology and emphasizes transforming individual citizens as both the means and ends of socialist construction."

For Mao, building socialism "was a dynamic, mass participant process, not simply the imposition of a centralized social system which gave directions to the populace." Implicit in this design was a process of discovery, through which, according to Mao, sufficient conditions for socialism to take root would be achieved. Alluding to the importance of Mao's mass-social engagement in building socialism, Peter Van Ness writes:

For Mao, 'Human knowledge and the capability to transform nature have no limit.' We are limited only by our capacity to understand. Therefore, those who aspire to achieve socialist construction must work in the unknown to discover those laws of transformation which apply in the particular conditions of any country. Socialist transformation is not achieved by anyone's [sic] imposing a system. Transformation, by definition, is anti-system. In Mao's view, the Chinese Communist would have to be as inventive and imaginative in designing strategies for socialist construction in a non-industrialized country as, for example, Marx was original in his analysis of capitalism of the 19th century. They would have to find ways of doing what had never been done before.

The contemporary relevance of Mao's contribution is that while today's CCP operates in a modern world, the ultimate political interests underlying the revolution remain the

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59 See Van Ness & Raichur, supra note 4, at 84.

60 Id.

61 See id.

62 Id. (quoting Mao Zedong, A Critique of Soviet Economics 72 (trans., Moss Roberts 1977)).
same. China's decision to join one of the world's foremost liberal economic institutions—the WTO—is, I would suggest, one of the more obvious cases in point. As a practical matter, this means that China's accession to the General Agreement on Tariffs and Trade (GATT) does not indicate a sharp departure from its revolutionary past as is so often characterized, but rather, is a progressive step forward in China's ongoing attempt to exact its ultimate revolutionary intent.

This thesis argues that the interest in maintaining at least a short-term, broad coalition of international support is of primary importance for China's ruling elite. While the face of Chinese society has changed immensely from the declaration of the Republic in 1949 (from a rural peasant base to an ever increasingly larger middle class), the necessity of maintaining domestic political support has not evaporated. In today's ever expanding global marketplace, China's leadership elites are able to facilitate wealth for the population for the first time. This in turn has had the effect of pacifying the nation into accepting the political status quo of a unitary system. Extrapolating from this logic and viewing it under the appropriate optic, China's long-term vision for reform becomes clearer; providing the means for accumulating capital, thereby guaranteeing the Party's continued vitality and, not as some have observed, its demise.


64 See VAN NESS & RAICHUR, supra note 4, at 84; see also Behind closed doors, THE ECONOMIST (London), Nov. 9, 2002, at 41-42 (discussing the then current power dynamic being played out by Chinese leaders).

65 See Behind closed doors, THE ECONOMIST (London), Nov. 9, 2002, at 41-42.

66 See generally SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES (1968).

67 See generally supra note 2; see also specifically Intimations of mortality, THE ECONOMIST (London), June 30, 2001, 21-23.
Naturally, the plausibility of such an outcome is not without limitation. That is, that while the regime may enjoy an upper-hand of sorts in possessing the ability to placate its population with promises of sustainable economic growth (among others), the looming threat of an emergence of a civil society is never totally without possibility. Currently, corruption, resentment of oppressive authoritarian tactics and the constant threat of foreign influences, are but a few of the steady flow of challenges currently facing the Party. Certainly, if left unchecked, these or other systemic stresses could threaten the regime’s ability to govern and consequently maintain power.

Nevertheless, notwithstanding these potentialities, over the last half-decade some scholars have commented on the unique limitations facing the emergence of a civil society in China. Addressing this very issue, Joseph Fewsmith writes:

[O]ne must be cautious about viewing...an emerging... ‘civil society’ [in China]. Going back to Habermas’s description of the emergence of the public sphere in the West, it should be apparent that there exists little basis in China—culturally, sociologically, intellectually, or economically—for the emergence of civil society in the Western sense, that is, for an independent ‘public opinion’ to establish the legitimate right to supervise the state. It seems more likely that a variety of intermediary entities (one cannot call them associations because they are neither voluntary nor, in most instances, nongovernmental) will emerge, but that they themselves will be of both state and society.69

Albeit for different reasons, the issue of “civil society” once again became topical with the death of Zhao Ziyang, the former Premier and General Secretary of the Chinese Communist Party, in January 2005. Purged in the summer of 1989 for his opposition to the use of force against student demonstrators in Tiananmen Square, in the months leading up to Tiananmen his power had been increasingly circumscribed by upper-

68 See supra note 2.
69 See JOSEPH FEWSMITH, ELITE POLITICS IN CONTEMPORARY CHINA 29 (2001).
echelon leaders Deng Xiaoping and Chen Yun in response to his calls for increased liberalizing reforms.

Commenting on how China has become gradually more insulated from social pluralism since the events of Tiananmen, Minxin Pei writes:

Instead of liberalising politics and expanding democracy, it [China] has deployed the resources of the state to strengthen its repressive capacity and expand its support among emerging social elites. It has done this in two ways. The first is through selective repression. ...Although the government has curtailed the scope of repression, it has deployed far more sophisticated tools. By driving most leading dissidents into exile, the government has decapitated the pro-democracy movement. In managing social unrest, it has trained a large, well-equipped riot police force, set up a network of informers and developed better procedures for breaking up demonstrations, arresting protest leaders and defusing public anger....The second component of the strategy is the co-option of new social elites. The party understands that its survival depends on preventing the emergence of a counter-elite. Even though it has resisted the expansion of democracy, which would have incorporated more ordinary people into the political process, it has set about enlisting professionals and private entrepreneurs. Professionals have been recruited into the party and appointed to powerful administrative positions in universities and research institutions. The government also parcels out professional recognition, along with material perks, to a select group of intellectuals and scientists....Political co-option appears to have played an important part in containing the challenge from China's professionals and intellectuals. This group constantly pushed the party to undertake political reforms in the 1980s, but has remained largely acquiescent since 1989.

While other nations in Asia have experienced relatively recent economic success, in large measure due to the adoption of liberal trade preferences which operate with the support of intergovernmental organizations such as the Association of South East Asian Nations (ASEAN), the contemporary experiences of countries like Vietnam and Indonesia are proving to be markedly different than China's. Foreign-trained lawyers active in East and South Asia are noticing an appreciable increase in the number of demands civilians are


71 See Minxin Pei, Time to reflect on how far China has to go, FIN. TIMES (London), Jan. 19, 2005, at 19.
making on their governments. It has been put forth that a reason for this increase may be that these societies were never so much as willing not to prioritize their collective interests, as they were to postpone them. That is to say, now, imbued with not only a material interest in their futures but with perhaps an increased feeling of entitlement that comes with economic empowerment, these groups are no longer willing to be passive participants in the administration of government, which, by extension, impacts their daily lives. Rather, demands for greater popular participation in decision-making are being

72 Conversation with Professor Ian Townsend-Gault, Director of the Centre for Asian Legal Research at the University of British Columbia, Vancouver, British Columbia (Feb. 2, 2005).

73 See id.

74 Regarding the existence of a relationship between a developing nation's openness to economic growth and an increase in the success for democratization, there appears to be a difference of opinion among scholars who have devoted their attention to this issue. There is certainly no lack of literature supporting such a claim with similar conclusions ultimately being drawn by several notable social scientists. For example, see generally SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991), SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 27-63 (2nd ed. 1981), RONALD DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 62-80 (1971).

However, it was suggested to me during the course of my research on this point that the empirical evidence for such a claim is comparatively weak. In my attempt to resolve this debate for my own edification, I have come to the conclusion that I must respectively disagree with the naysayers. From only a superficial overview of the literature on the subject there appears to exist ample empirical evidence to support the proposition, although much of it seems to have been conducted in the years immediately following World War II. See id. In the interest of fairness, I must confess that I have not been exhaustive in my research of the methodology of these studies, as to do so would be to stray too far from my present agenda. I wish only to point to the work of others in support of the above proposition and to add to it the more recent findings of Jonathan Carlson which appear to add further support to the conclusion. Carlson writes:

During the period of economic globalization, i.e. the post-WWII period, there has been a significant increase in civil and political freedom in the world. Freedom House, a non-profit, non-partisan organization founded by Eleanor Roosevelt, Wendell Wilkie, and others, has long led the fight for civil and political rights both in [the United States] and abroad. A number of years ago, it began measuring the level of democratic freedom and civil and political rights in countries around the world. In 1973, assessing 122 countries with populations over 1 million, Freedom House classified twenty nations as democratic and ninety-two as non-democratic. By 1990, the measure of 129 nations showed fifty-eight democratic and seventy-one non-democratic. Although there are still far too many non-democratic nations in the world, things appear to have improved during the GATT era. A clever conservative, Daniel Griswold, decided to compare the Freedom House ratings of countries as politically "free," "partly free," or "non-free" with the Fraser Institute's ratings of the economic openness of countries: i.e., their openness to trade and investment. The results are suggestive of some correlation between economic openness and political openness: 1) Nations classified as politically free rated a 7.9 for openness (a higher number
levied upon regional and national governments. One reason for these cries of political reform is the widespread belief by the local populace that their government’s have shown little competency is being the appropriate agents to steer the economy toward success.

The point to be stressed is that at present throughout much of Asia, the growing insistence on broader social participation is far richer than a simple, “we’ve worked hard, and therefore, we’ve earned it” philosophy. Rather, a lack of confidence in state institutions that were once publicly venerated—be they militaries or monarchies—has contributed to this phenomenon.

Yet, it would seem that China is all too familiar with the fate of its neighbours. Political elites have not forgotten that the world nearly witnessed the death of the revolution in the summer of 1989. This jolt to the regime’s once infallible authority continues to serve as a key reminder for China’s contemporary policy decisions.

2) Nations classified as only "partly free" in political terms also rated lower on the openness scale: 6.7;
3) Nations classified as politically "non-free" also were worst on economic openness: a 5.4 rating.

If one reverses the comparison, the results stay more or less the same:
1) Among the top one-third countries in terms of economic openness, 84% were rated as politically free.
2) Among the middle one-third on openness, only 57% were politically free.
3) The bottom one-third on openness (the least free economically) were also the least free politically. Only 22% ranked as politically free.

Correlation is not the same as causation, but neither should we ignore such evidence, especially when it corroborates what theory would predict—that economic openness promotes economic growth, which, in turn, creates the necessary conditions for open societies to flourish.

In short, we have theoretical reasons to believe that the goal of the globalization project—economic openness—promotes political freedom; there is also evidence that political freedom has, in fact, increased around the world during the post-war period of economic globalization; and, finally, there is evidence suggesting that nations that are more economically open are, in fact, more politically free.

Having established the foundation for dialectics as well as the Party's organization as a key supporting mechanism for the CCP historically, it becomes necessary to evaluate the "reforming policies" that began in the late 1970s following Mao's death.\(^{75}\) This is necessary to identify if, in fact, the policies implemented by Deng Xiaoping, and derivatively Jiang Zemin, and Hu Jintao ultimately suggest congruence or divergence from earlier Maoist Thought.\(^{76}\) Bearing in mind the previous discussion of dialectics and tensions,\(^{77}\) I propose that no substantive divergence has occurred. Rather, what has transpired in China since 1978 is instead a change in form.\(^{78}\) While it is true that since Mao's death China's emphasis on economic and material development has approached a fetish-like fixation, I am in agreement with Arif Dirlik and others who have argued that the overall goal of a viable, socialist state has remained a constant theme throughout China's more recent evolutionary course.\(^{79}\) It is within this context of a long-term strategic assessment that the above remarks are intended. Of course, in doing so the aim is not to minimize the tremendous gains China has made over roughly the last thirty years, however, there is currently no shortage in the volume of literature which lavishes

\(^{75}\) See CHANG, supra note 2, at 222-234.

\(^{76}\) See id.

\(^{77}\) See MAO, supra note 46, at 4; see also MAO TSE-TUNG, QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG 200 (Foreign Language Press Peking 1972).

\(^{78}\) In drawing this dichotomy, I am reminded of the parallelism to Duncan Kennedy's celebrated piece on contract law entitled, Form and Substance in Private Law Adjudication. 89 HARV. L. REV. 1685, 1740-53, 1762-66, 1776 (1976). Kennedy argues that within the apparent objectivity of private law adjudication lie conflicts over values—notably, economic ones—which further necessitate that choices must be made between them in "the pursuit of substantive objectives." Id.

\(^{79}\) See generally, MARXISM AND THE CHINESE EXPERIENCE: ISSUES IN CONTEMPORARY CHINESE SOCIALISM, supra note 4; see also infra Part IV & V.
such accolades upon China for this very reason, and so, I will not duplicate what has already been adequately addressed elsewhere.

In an attempt to give shape to the revolutionary continuity currently residing within contemporary China’s ideological policies, the forthcoming section is devoted to articulating the form, function and substance of a “transitory” or “primary stage of socialism.” Through harnessing the power of law, the current regime is able to better articulate and legitimate its intended path toward economic and socialist development.

IV. FISSION OR FISSURE?
CONTINUITY OF IDEOLOGY IN THE DENG & POST-DENG ERA

The 16th Chinese Communist Party Congress, held in November 2002 signaled not only a change in leadership, as Hu Jintao was confirmed as—among other titles—the new General Secretary of the Communist Party of China’s Central Committee, but it also indicated a further divorcing from the Party’s once rich collection of revolutionary forefathers. The ever increasing abandonment of social policies that aimed to curb class divides coupled with the then death of all but one of what the Party refers to as the eight


81 See CHINA’S POST-JIANG LEADERSHIP SUCCESSION: PROBLEMS AND PERSPECTIVES (John Wong et al. eds.) 49-51 (2002); BEHIND CLOSED DOORS, THE ECONOMIST (London), Nov. 9, 2002, at 41.
immortals\textsuperscript{82} (forefathers of the revolution) further created skepticism internationally over whether China’s current leadership was still committed to Marxist ideals.\textsuperscript{83}

Among the Western analysts who covered this leadership transition there exists a particular theory about China, which, when simplified, suggests that China’s existing communist hold on the country is waning.\textsuperscript{84} What all of these opinions share in common, in one fashion or another (the authors differ as to their emphasis), is the belief that China through aggressively reforming itself economically, must sooner rather than later necessarily commit itself politically to democratic change.

\textbf{A. Deconstructing the Reformist Argument}

Although the perspectives of the written popular press may differ from academics in arriving at similar conclusions, the idea of communism’s weakness as a “theory” is subsumed by the work of political scientists. As such, to the extent possible, this thesis attempts to give deductive expression to this idea by examining the conclusions of Minxin Pei in an effort to illustrate the point by way of example. Minxin’s scholarship is emphasized here because rather than simply stating general propositions of failure, he has

\textsuperscript{82} See Behind closed doors, \textsc{The Economist} (London), Nov. 9, 2002, at 42.


\textsuperscript{84} See id.; see also, \textsc{Kenneth Lieberthal}, Governing China: From Revolution through Reform 315-336(2004); \textsc{Kenneth Lieberthal & Michel Oskenberg}, Policy Making in China, Leaders, Structures and Processes 391-415 (1988).
gone further and has articulated processes by which he believes China’s regime will collapse.

It merits mentioning that Minxin Pei is not the only scholar active in the discussion of Chinese democratization; however, his analysis of the subject is particularly crisp and succinct, and so I rely heavily on his work to convey a broader set of beliefs held by a certain subset of academics.

Subscribers to this theory, hereinafter named “political reformists,” argue that the imposition of market forces can only result in the collapse of authoritarian regimes. The theory, to the extent that it is accurately predictive, holds that a “civil society develops simultaneously as economic resources, such as capital and significant market share, further develop.” As economic expectations grow, they can “be used to shift the balance of power in the direction of that interest” (typically democratic liberties). However, “unlike the means of social mobilization, the direct seizure of political power is a visible, relatively quick method of transition, often accompanied by immediate and widespread attention.” By contrast, the gradual expansion of market forces and their capacity to interrupt the activities of an authoritarian state are far more subtle in their ability to transform a state’s institutional structures.

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86 Id. at 70.
87 Id.
88 Id.
89 See id.
Other scholars, in addition to Minxin have emphasized the role of market forces as an indispensable precondition to democratic transition in China, arguing that the presence of a rule of law sustains economic growth. However, Minxin’s analysis on this point is more exacting; he concludes that the “creeping gradualism” associated with market forces is threefold in rendering political change.

First, he argues that the expansion "of market forces takes place gradually and quietly without posing an overt" and direct political affront to hard-liners. He notes, "...the prosperity—hence temporary tranquility—created by the flourishing of market forces lulls the vigilance of the hard-liners and obscures the market’s threat to the long-term survival of the communist regime." In China’s case, during the mid to late 1980s, the growth of the market permeated Chinese culture as a “silent revolution,” the full implication of which was not felt by Party hard-liners until it was far too late to curtail its expansion. While the influence of market forces in contributing to the expansion of political liberties may lack a certain dynamism—notably speed, a focused intensity and the relative drama of a direct seizure of political power, such as in for example a coup d'état—the creeping gradualism of market forces according to theorists nevertheless produces an effect of “enlarging civil liberties that were previously restricted under

90 See id.; see also KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 302-303 (2004).

91 See MINXIN, supra note 85, at 71.

92 Id.

93 Id.

94 Id.
[traditional] orthodox communist control."  

Such a theory goes on to suggest that the 
"expansion of these civil liberties, in turn, frequently contribute to the growth of certain 
political liberties."  

Ultimately, the effect of an influx of market forces in leading a 
"transition from communism is that it has the effect of ushering in political 
liberalization[s] through the back door." 

Second, the sustaining of market forces promotes the growth of new state actors.  
The influx of capital from "the expansion of market forces can both enhance the 
autonomy of existing social groups [the peasantry and the intelligentsia] while creating 
new ones [private entrepreneurs and small property holders]."  
The effect of market forces may also lead to the development of "new social institutions, such as commercial 
associations," that may "compete with [formally recognized] state institutions in the 
acquisition and utilization of material resources."  
In the process, these associations build a network of support that may in the future translate into political support.  
The expansion of market forces are seen as the only way to slowly erode an authoritarian 
regime because market forces, as they expand, "offer both legitimacy in creating a

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95 Id.
96 Id.
98 See id.
99 Id.
100 Id.
101 See id.
modern democratic state as well as the foundation to build necessary pluralistic social institutions—the fundamental building blocks of a modern democratic society."  

Third, and perhaps most importantly, a key contributing feature addressed by Minxin and other proponents of this theory is that unlike organized political movements, which offer an "easily identifiable target" for regime supported repression, market forces are diffuse, lacking an identifiable origin and so are "repression-proof."  

When opposition parties mobilize they may be subject to government ordered brutality, which can force dissidents to disband. Conversely, market forces which affect millions of "profit-seeking private entrepreneurs" are impossible to "suppress absent a Stalinist mass terror campaign that would bring the entire country to economic ruin." This was evidenced by the events of 1989-1990, where the use of heavy-handed tactics by hardliners in Tiananmen Square saw that pro-democracy movements were either "physically crushed or driven underground and abroad." However, in spite of this crackdown the expansion of market forces and the growth of the private sector continued to grow as international outrage grew.  

Finally, Minxin concedes that although the advancement of "market forces may not, on their own, drive communist regimes from power," they nevertheless "weaken the

102 Id.


104 See id.

105 Id.

106 Id.

107 Id.

108 See id.
communist state’s control by shifting critical resources from the state to society.”  

109 It is this “shifting in the balance of power towards a broader segment of society,”  
China’s case, an emerging entrepreneurial class), which produces difficulties for the state in counteracting this result.  

With economic success come expectations of power that if left unsatisfied may produce political backlash.  

This reformist theory holds that by constraining conventional economic state organs, “favourable” conditions for political pluralism develop and a foundation is laid for a transition to democracy.

However, in my view, despite the apparent correctness of the above theory it contains critical omissions, which render it unfeasible. If fails to consider that even if the aforementioned conditions do arise—the theory, either in whole or in part, ignores the current importance of law and the pervasiveness of legal structures. In modern China, law is proving ever increasingly to be one of the primary social mechanisms by which the country is engaging itself both domestically as well as internationally.  

Although the role of law in China is relatively recent, the regime’s increasing reliance “on the socialist legal system as a source of legitimacy…also strengthens its ability to justify specific


110 See id.

111 Id.

112 See id.

actions by reference to law." As a result, I argue that the role of law in China is twofold in its mission. In addition to acting as a legitimating tool for the regime, law also serves the function of pacifier. This second role is evident by the regime’s attempt to ensure that its own power is not usurped by the very principles it espouses. To overcome this dilemma, the regime has actively attempted to constrain the development of a legal system into conforming with its own immediate political requirements, to the exclusion of alternative interpretations. While at first blush it may appear that any pacifying effect may lie exclusively with the regime and not law at all, in practice the two forces work hand-in-hand. By privileging legal access to particular groups, such as for example, Chinese entrepreneurs who wish to engage in foreign commerce but who must first hold a minimum amount of capital reserves depending on the nature of their enterprise, the regime is able to effectively trade political freedoms for legal access, which, in turn leads to increased economic prosperity. Reflecting this desire to utilize law as a vehicle for political control, Potter writes that the regime’s leadership “has tried to make certain that popular notions about law do not overreach its own view that law should merely be an instrument of rule rather than a set of generally applicable principles that regulate the state as well as the people it governs.” Potter concludes that the


115 See id. at 326.

116 See id.

117 Id.
regime's faith in their capacity to control this legal perspective in the post-Mao era stems from the Party's longstanding ability to "monopolize political discourse."\textsuperscript{118}

In sum, the principal oversight of political reformists is that their arguments presuppose that economic growth alone is enough to usher in mass democratic demands. Their arguments ignore that in contemporary China economic growth is largely confined to an urban elite, who, when presented with legal access for greater economic opportunity more often than not become politically complacent. Thus, access to law and its corresponding rights and privileges serves to anaesthetize rather than antagonize the very groups Minxin and others argue will eventually lead a democratic revolt.

In establishing the position of the Western-based majority's approach to China's future, such a critique provides an opportunity to address the shortcomings in the contemporary discussions on China. Perhaps artificially, although no doubt a result of the different disciplines that underscore the agendas of those who study China (i.e., law, history, political science, linguistics, etc.), there exists amongst Sinologists a kind of spectrum. At one end lie the "legalists," who are primarily concerned with legal culture, legal processes and Western conceptions of the "rule of law" in China. Equipped with a legal education, these scholars are concerned about human rights, as well as the legal implications for international trade and investment which is so obviously implicit in any discussion of modern China. Further along this continuum are their counterparts, who are largely comprised of political scientists and historians as well as others who use differing sociological perspectives as the foundations for their own inquiries. For my own generalized purposes here, I have labeled this group "structuralists." By employing the term "structuralist," emphasis is intended to focus on the institutions and policies which

\textsuperscript{118} Id.
are so often the focal point of this group's inquiries. While very few characterizations are absolute, the aforementioned is no exception, and certainly does not ignore the reality that contemporary scholars of China often venture into the corridors of their colleagues throughout the course of their research. Nonetheless, these rough compartmentalizations have merit in focusing in on the problem as I see it, which, when distilled, can be understood as the following: legalists too often appear to ignore the larger political reality in which jurisprudence in China develops. While the seasoned Chinese legal observer gives due consideration to the primacy of the Party, comparatively little attention is given to contemporary ideological debates, and more importantly, the existence of a perceptible ideological construction that may lie seemingly dormant beneath a host of other more overt developments. On the contrary, structuralists, while exploring all the potential machinations of policy and ideology, likewise ignore an important component part of the total inquiry—specifically, mechanics. I would venture to say that almost universally (and increasingly in China) law provides the mechanisms by which countries engage in economic development and modernize technologically.

Again, the attempt here is not to cast aspersions on the obvious wealth of work that has been accumulated over recent decades by erudite scholars who are so obviously far more accomplished than myself. Rather, my aim has been to inform the reader of my perspective in addressing the forthcoming analysis. It is the purpose of this dissertation to discuss the sources and limits of the CCP's power, but not by identifying every local or national initiative of the Party, which can be found elsewhere; but rather, by taking examples from sources of law as they are written and enforced. Essentially, the proceeding commentary makes a conscious effort to view law through the appropriate
optic of ideology, instead of treating it as distinct and separate conception. It is within this framework that my attention turns to the study of Deng Xiaoping, and the suggested Maoist continuity of his reforms.

B. Deng Xiaoping, more Maoist than most

It is not coincidental that the departure point for a discussion of revolutionary continuity in contemporary China begins with an examination of Deng Xiaoping's legacy. In suggesting that Deng is an integral part of an overall understanding of the agenda at play in present-day China two important considerations need to be highlighted. First, contrary to the multitude of critiques that exist on the matter, Deng was much more of a Maoist then he is traditionally given credit for.119 Second, the conscious paternal piety120 that persists between present and past Chinese leaders serves to further legitimize legacies of the past.121 In the process, this deference to prior political actors serves as a vehicle by which new leaders are able to mobilize and develop political support, by celebrating the accomplishments of their predecessors. In turn, this practice serves as a common political base from which new leaders are able to extend and promote their own policy initiatives.122 This phenomenon has been seen most recently under the leadership of Hu Jintao, who, despite his documented policy differences with Jiang Zemin,


120 See Subrahmanyan, supra note 51, at 17.

121 See id.

122 See id.; see also Chai, supra note 45, at 167-169.
continues to publicly praise his predecessor. In proving the argument that socialist ideology is alive and well in contemporary China, these issues merit greater exploration.

With the emergence of Deng Xiaoping in 1978 as the clear successor to the Party’s top post, it was widely reported that the rise of Deng would announce a new era of reform for China. In contrast to Mao, Deng’s open support and encouragement of science, technology and intellectualism coupled with his seemingly progressive idioms of “seeks truth from facts” and “practice is the sole criterion of truth” was, and still is, considered by many to be the hallmark of ideological reform. Yet, what is all too often ignored in these commentaries is a full historical appreciation of Deng’s contributions before and during the revolution.

Born to a well-to-do family, Deng was enthralled with the intellectual fervour of the May Fourth Movement of 1919. He befriended Zhou Enlai as a youth in France (a relationship that would increase in importance as Deng aged) and survived the inhospitable journey of the Long March of 1934-35. In addition, during the Yan’an era and waning years of the Civil War, Deng served as a political commissar for a variety of

123 See id.; see also, China’s New Military Leadership, 28 MIL. TECH. 11 Nov. 1, 2004 at 12, available at, 2004 WLNR 14690535 (“At a CMC meeting after the [4th] plenum, Hu heaped praise on Jiang’s ‘noble character, sterling integrity and broad-mindedness’, and extolled his ‘outstanding contributions’ to national defence during his 15-year tenure as Chairman. He also indicated that Jiang’s contribution to the Party’s ideological foundation ...would stand on equal footing with Mao Zedong’s and Deng Xiaoping’s ideas in guiding defence modernisation.”) Id.

124 See MEISNER, supra note 119, at 103.

125 See id. at 99-101.

126 See id. at 82-83.

127 See id. at 82.

128 See id.
Red Army units. Moreover, further supporting Deng's hard-line persona lie the historical accounts of the Anti-Rightist Campaign, where Deng served as one of Mao's closest allies in attacking bourgeois intellectuals. While it is common knowledge that Deng was twice purged during the Maoist era, Mao's supportive role in Deng's resurrection is not nearly as well documented. Upon examination, Deng's restoration reflects a man who did not abandon his ideological brethren, but instead was a savvy politico who effectively mobilized support for his eventual ascension within the Party ranks.

However, Deng's socialist legacy is far richer than the often used cliché “being in the right place at the right time,” which suggests that while Deng was perhaps not the intellectual powerhouse of his contemporaries such as Mao, Zhou Enlai and Zhu De,

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129 See id.

130 See TIEWES, supra note 58, at 217-222.

131 See MEISNER, supra note 119, at 81.

132 See RICHARD BAUM, BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPING 29 (1994). Baum writes:

After spending seven years in Cultural Revolution ignominy, Deng Xiaoping was rehabilitated and restored to favour at the Tenth Party Congress in 1973. On the joint recommendation of Ye Jianying and Zhou Enlai, and with the explicit approval of Chairman Mao, Deng was elevated to the concurrent posts of vice-chairman of the party's Military Affairs Commission and vice-premier of the State Council. In January 1975 he was also named PLA chief of staff and vice-chairman of the party Central Committee.

Deng's restoration was necessary to help bolster China's fragile political-military stability. In the highly charged aftermath of the 1971 'Lin Biao affair,' China's regional military commanders had displayed an alarming tendency to defy Beijing's political authority. Visibly concerned, Mao, Ye, and Zhou agreed that Deng Xiaoping's prestige and influence among senior army leaders could prove helpful in counteracting regional PLA defiance.

Id. (emphasis added).

133 See id. at 82-103.

134 See MEISNER, supra note 119, at 81-83.
he would nevertheless ascend to the pantheon of great Chinese ideologues. While much has been written on Deng Xiaoping and his life, this paper is concerned primarily with Deng’s ideological contributions, which continue to serve as the driving force behind both the Party’s policy initiatives as well as its legal developments.

\[\text{C. Marxism and the Chinese Socialist Market System}\]

Between 1978 and the present, China’s economy has matured from a centrally planned commercial system, comprised largely of collectivization policies, to a self-described socialist free market system. During this time, the economy has enjoyed between an average of a seven to nine per cent increase per year. However, the basic problem once again (although somewhat rephrased here), remains whether Marxism as it is popularly understood is compatible with a traditionally liberal free market economic system? In answering the question, the Chinese response appears to be: yes! The belief among Xue Muqiao and other leading Chinese economists who assisted in authoring *Studies on China’s Socialist Economy* in the winter and spring of 1978-79, and which served as the authoritative volume outlining Deng’s reformist policies, was

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135 See generally id.; see also BILL BRUGGER & DAVID KELLY, CHINESE MARXISM IN THE POST-MAO ERA (1990); DENG XIAOPING: PORTRAIT OF A CHINESE STATESMAN (David Shambaugh ed., 1995).

136 See generally Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China (adopted on December 22, 1978) 52 PEKING REV. 6 (Dec. 29, 1978); see also VAN NESS & RAICHUR, supra note 4, at 84.


138 See supra note 2.

139 See FEWSMITH, supra note 70 at 68-70; BAUM supra note 132 at 94-97 and supra note 136.

140 See FEWSMITH, supra note 70 at 68.
that China was only in the low, or “initial stage of socialism.” Through a powerful alliance that consisted of Deng Xiaoping, Chen Yun and Hu Yaobang among others, this faction engaged in a flurry of reform activity at the onset of Deng’s leadership that concentrated heavily on revamping China’s economy.

Of central concern to these leaders and their supporting cast of theorists was that the utopian idealism expressed in the Great Leap and the Cultural Revolution, which resulted in tremendous economic dislocations would need to be at least temporarily abandoned in favor of materialist considerations brought on by the realities of China’s circumstances. To combat rampant inefficiency and poor economic output, reforming policies therefore called for:

[T]he combination of a market mechanism with state plan; the competition of production units within a given industry; much greater autonomy to be permitted to individual enterprises; and appeals to Chinese workers to produce more and better quality products in return for individual material awards. The production unit is the focus of this strategy, and improving enterprise management is one of its principal tasks.

Again, the economic policies that germinated under market socialism beginning in the late 1970s is critical to understanding China’s current and future course of action. Although first given expression by the Deng-led coalition in the late 1970s and early 1980s, these same principles of practice were applied and expanded further under the tenure of Jiang Zemin. In February 2000, Jiang Zemin put forward a new Party

141 Id. at 69.
142 See BAUM supra note 132, at 66-69.
143 See VAN NESS & RAICHUR, supra note 4, at 85.
144 Id.
145 See BAUM, supra note 132 at 350-352; Frank Ching, Release of Kruschev film shows party’s shift in position, S.C. MORN. POST (Hong Kong), Aug. 26, 2001 at A11; Joseph Kahn, China’s Communist Party,
building theory known as the “three represents.”^146 In an effort to further elevate his own status to the pantheon of great Chinese ideologues Mao and Deng who came before him,^147 Jiang’s “blueprint” called upon the Party for (1) the “continued development of China’s advanced social productive forces;”^148 (2) “the continued promotion of a progressive course to achieve an advanced Chinese culture,”^149 and (3) a focus on the “fundamental interests of the majority of the Chinese people.”^150 The thrust of the policy suggests that the Party no longer identifies itself with only workers and peasants,^151 but also considers itself the “vanguard” of the most advanced productive forces in the country,^152 including those engaged with private enterprise.^153 As a consequence of being written into the CCP’s Charter^154 this new theory is seen as a further development of Deng Xiaoping’s Theory and has become the theoretical guideline for the Party over the

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^148 Id.

^149 Id.

^150 Id.


^152 See id.

^153 See id.

^154 See Fewsmith, supra note 151, at 13; Behind Closed Doors, THE ECONOMIST (London), Nov. 9, 2002, at 41.
course of the 21st century.\textsuperscript{155} Hu Jintao’s election as President of the PRC in March of 2003, and his subsequent succession to Jiang Zemin as Chairman of the CPC Central Military Commission at the Fourth Plenum of the 16th CPC Central Committee in September 2004, has to date given little indication that China is set to embark on a wholly different ideological course anytime soon.\textsuperscript{156} Consequently, this paper adopts the position that any indications of perceived political liberalizations are at best pretenses, purely designed to placate domestic and international opposition.\textsuperscript{157} Beneath this veneer of liberalization remains the Party’s primary objective of sustained economic growth, which is currently best effectuated by continuing to appeal to foreign investment.\textsuperscript{158}


\textsuperscript{156} At the time of this writing, relatively little has been written about Hu Jintao and his rather rapid ascent to political prominence in China. Nevertheless, his record does reflect that his emergence is at least in part attributable to the endorsements he received from such influential Party elites as Deng Xiaoping, former Premier Hu Yaobang, and former President Jiang Zemin. See Richard Daniel Ewing, \textit{Hu Jintao: The Making of a Chinese General Secretary}, 173 CHINA Q. 17-18 (Mar., 2003); Erik Eckholm, \textit{China’s new leader promises not to sever tether to Jiang}, N.Y. TIMES (Nov. 21, 2002) at A16; see also \textit{Behind Closed Doors}, THE ECONOMIST (London), Nov. 9, 2002, at 41. Despite that Hu’s rise appears linked to his success in developing a working association with Jiang over such important matters as corruption within the Party, the comparatively close relationship Jiang shared with his right-hand man Zeng Qinghong has fuelled speculation over the years that Jiang did not share Deng Xiaoping’s enthusiasm for Hu. See Ewing, at 18, 26-27; Fewsmith, supra note 151 at 15. Regardless of the personal rapport between the two men, it is clear that there is at least some variance in their policy preferences, in particular, as they relates to the poorer and underdeveloped areas of the country. See Solinger, supra note 1151, at 957-959. No doubt a result of their differing backgrounds, Hu has developed an acute awareness for the plight of the poor in China’s inland provinces, a product of his earlier political service spent in Gansu and Guizhou, two of China’s poorest regions. He has pledged a commitment to reducing poverty in these and other depressed areas. See id. Hu’s commitment is to be contrasted with his predecessor Jiang, who previously served as the mayor of Shanghai—one of China’s leading commercial centers—and often advocated “efficiency” over “fairness” in continued economic reform, as well as “encouraging part of the people to become rich first.” See Ewing, at 30; Solinger, supra note 151, at 953 (quoting “Full text of Jiang Zemin’s report at the 16th Party Congress”).

\textsuperscript{157} See Ewing, supra note 156 at 31; Fewsmith, supra 151 at 6; see also Subrahmanyan, supra note 51, at 17; Joseph Kahn, \textit{China’s Communist Party, ‘to Survive,’ Opens its doors to capitalists}, N.Y. TIMES Nov. 4, 2002, at A10 (arguing that although the Party re-wrote its Constitution to include capitalists, the act nonetheless appears self-serving).

\textsuperscript{158} See Ramona Taylor, \textit{Tearing Down the Great Wall: China’s Road to WTO Accession}, 41 IDEA 151, 152 (2001); see also Rolf H. Weber, \textit{Repositioning Hong Kong as a Regional and International Financial Center in View of China’s Imminent Accession to the WTO} 31 H.K.L.J. 122, 122 (2001).
In arguing that his "three represents" theory of embracing entrepreneurship is in line with Marxist-Leninist-Mao Zedong-Thought, Jiang refutes the allegation "that the Party has abandoned the poor." Rather, Jiang argues that China is still engaged in the "primary stage of socialism." He contends that in the future, "contradictions between the working and capitalist classes may become acute and the poor will vanquish the rich." However, this event may not occur within the primary stage of socialism, "which could last [in excess of] 100 years," as "[c]apitalism has to blossom before it can be uprooted." Putting aside for the moment the likelihood of such an occurrence, it is widely agreed that there is risk in this kind of thinking. It was forecasted as long ago as the early 1980s—when China's economic growth was just in its infancy—that "even if the anticipated contributions to China's development are realized, the economic relations into which China enters will inevitably have a shaping influence on China itself." On its surface, the logic behind the regime embracing the global community has been


161 Id.

162 Id.

163 Id.

164 Id.


166 See SELDEN & LIPPIT, supra note 165, at 24.
compelling.\footnote{167}{See generally \textit{Intimations of mortality}, \textsc{The Economist} (London), June 30, 2001, at 21-23.} As the world’s largest foreign investment center, which eclipsed a record $50 billion U.S. for 2002,\footnote{168}{See Matt Pottinger, \textit{Controversy in Hong Kong Leads to Increased Scrutiny of Beijing}, \textsc{Wall St. J.}, Dec. 19, 2002 at, A13.} the power of foreign investment may be seen in its ability to sustain high domestic accumulation rates even while consumer consumption continues to expand.\footnote{169}{See \textsc{Selden \& Lippit}, supra note 165, at 23.}

While it has been argued elsewhere that the potential benefits to be derived from participation in the world economy are substantial, it is yet unproven whether any nation in the modern world has the capacity to carve out and pursue its own policy objectives in opposition to established international expectations and standards.

Mark Selden has observed that China’s desire for a transitory society depends upon its ability to meet two independent goals.\footnote{170}{See \textit{id.}, at 23.} First, is the “extent to which Chinese policy-makers become conscious of and adopt successful counter measures to the shaping influences of the capitalist world system.”\footnote{171}{\textit{Id.}, at 24.} The second key component for China’s success will be marked by whether after almost three decades of socialist mercantilism, the country’s economic, political and social fabric will have sufficiently strengthened so as to allow the Party to be able to withstand the onset of international calls for increased and unfettered capitalist expansion.\footnote{172}{See \textit{id.}.} It is argued without hesitation in Parts V and VI of
this thesis that China has developed the necessary capacity to resist these and other potential destabilizing pressures.\textsuperscript{173}

\textbf{D. The PRC's Current Position}

Implicitly relying on the policy initiatives of former Party Premier Zhu Rongji and his successor Wen Jiabao, who, in recent years have promoted an aggressive foreign investment campaign on China's behalf,\textsuperscript{174} has led to the belief among Western analysts that China is no longer simply teetering on the precipice of political liberalization, but rather, has already begun its inevitable descent into it.\textsuperscript{175} Generally, this group of political reformists point to some significant dislocations in key areas, including: the bankruptcy of state-owned enterprises, rising unemployment, and the proliferation of corruption among Party and city officials, to name a few.\textsuperscript{176} As a result, current and incoming leaders face a multitude of potentially destabilizing social issues.\textsuperscript{177} Policy makers have

\textsuperscript{173} \textit{See infra} Part V & VI, respectively.

\textsuperscript{174} \textit{See Behind closed doors,} \textit{THE ECONOMIST} (London), Nov. 9, 2002 at 42. "Mr. Zhu—lionised by foreign businessmen." \textit{Id.;} \textit{Wen Jiabao To Visit United States in December,} \textit{AGENCE FR. PRESSE} (Hong Kong), Sept. 23, 2003, translated in F.B.I.S., document no. FBIS-CHI-2003-0923.

\textsuperscript{175} \textit{See supra} note 2 and notes 85-112 and accompanying text.

\textsuperscript{176} \textit{See generally} Ewing, \textit{supra} note 156; Soligner, \textit{supra} note 151; \textit{Intimations of mortality,} \textit{THE ECONOMIST} (London), June 30, 2001, at 21.

\textsuperscript{177} \textit{See id.; see also} Renmin Ribao Article on Development of Party's Advanced Nature Corrected version: \textit{Article by the Research Center for Deng Xiaoping Theory and the Important Thinking of the "Three Represents" of the CPC Central Party School, which was actually written by Lu Xianfu, Dai Yanjun, Song Fufan, Zhang Xiaoyan, Zhang Rongchen, and Cai Xiao; "The Development of the Party’s Advanced Nature Is an Major Innovation in the Marxist Theory of Party Building (Advanced Nature Forum); correcting “progressiveness” to “advanced nature” throughout,} RENMIN RIBAO (Beijing), July 11, 2005, translated in F.B.I.S., Newsedge document no. 200507111477.1_43840a528a933890; \textit{Wang Gang Speaks at Conference on Party Work of CPC Central Committee Organs "At the Conference on the Party Work of Organs Directly Under the CPC Central Committee in 2005, Wang Gang, Alternate Member of the Politburo of the CPC Central Committee, Member of the Secretariat of the CPC Central Committee, and Secretary of the Working Committee for Organs Directly Under the CPC Central Committee, Stresses the Need to Focus on Strengthening the Party’s Ability To Govern and Fully Push Forward Various Party}
identified the necessity to address the problem of growing crime rates and social unrest fueled largely by an increase in economic disparity and the resulting growth of a disenfranchised underclass.\textsuperscript{178} Exacerbating these social tensions for the regime is the increase in China's private sector, which roughly accounted for sixty per cent of China's overall Gross Domestic Product in 2003 and seventy per cent of new job growth.\textsuperscript{179}

As a result of the strengthened private sector, market forces and individual acumen—rather than Party influence—increasingly play a greater role in deciding who will be appointed preferred jobs, promotions and better housing.\textsuperscript{180} There is sufficient indication that the regime is aware of the social challenges currently gripping the country as a result of the introduction of an entrepreneurial spirit.\textsuperscript{181} In a report published in May 2001, the Party's Organization Department observed that new and potentially divisive "contradictions and problems" had emerged in Chinese society.\textsuperscript{182} The report allegedly concluded that "if there are no channels for letting off steam, the repressed discontent of individuals could well up into large scale social instability".\textsuperscript{183} In 2001, the concern over

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\textsuperscript{178} See id.


\textsuperscript{181} See supra note 177; Philip P. Pan, Civil disorder challenges China Party leadership / shift in society sets off protests, forcing officials to change tactics, PRESS ATLANTIC CITY, Nov. 5, 2004, at A4.


\textsuperscript{183} See id. "'New contradictions and problems' is a euphemism for corruption." Id. As an aside, the reader should note the continued use of the expression "contradiction" within China's political rhetoric. Although here the usage of the term may appear innocuous, it is my contention that the original Maoist importance placed on the word "contradiction" still pervades contemporary Chinese politics to this day. See supra notes 44-51 and accompanying text.
corraption vis-à-vis long-term political stability reached a high watermark, as intellectuals and some Party members called for the increased crackdown on opportunists.\textsuperscript{184} This calls to arms also had the effect of serving as a not so thinly veiled policy criticism of then Premier Zhu Rongji and others, who, in the estimation of many had not done enough to counteract the problem.\textsuperscript{185}

Another sign of instability that political reformists are quick to point to is the introduction of democratic practices—notably, the implementation of direct elections at county levels.\textsuperscript{186} Rural experiments with direct elections began in the late 1980s and gradually introduced a system whereby villagers by secret ballot were able to elect local leaders absent Party interference.\textsuperscript{187} It is apparent from Western governments and interested non-governmental organizations pouring money and personnel into helping further develop this nascent form of “democracy,” that the hope is that this small effort “might one day spread more widely into the body politic.”\textsuperscript{188} However, such optimism largely ignores the underlying conditions which gave rise to these “reforms” in the first place.\textsuperscript{189} Quite simply, the Party’s decision to concede to direct elections in the first place


\textsuperscript{185} I am grateful to Pitman Potter for pointing this out.

\textsuperscript{186} See POTTER, supra note 113, at 118-119; Ewing, supra note 156, at 31; Fewsmith, supra 151, at 6.


\textsuperscript{188} Id.

\textsuperscript{189} See POTTER, supra note 113, at 118-119.
was to strengthen its control over rural areas. By the late 1980s Central Party leaders were all too aware that appointed village Party officials lacked widespread support as well as the expertise to make important economic decisions. Moreover, appointed officials suffered from being perceived as Draconian agents, enforcing reviled centrally mandated policies such as China’s “one-child” program. Therefore, it may be said that the original rationale for the Party sanctioning direct local elections was directly tied to a singularly desirable policy agenda, which was, if villagers were able to retain a degree of relative control over local issues, the Party could simultaneously better ensure the implementation of centrally developed economic policies. However, notwithstanding the impetus for these “reforms” there is evidence that the direct election system itself has resulted in additional problems by creating rival centers of power at rural levels.

In conclusion, the Party’s own recognition of serious potential social harms, in particular, corruption and rising unemployment, coupled with the establishment of direct elections that many in the West have falsely interpreted as an inevitable blossoming of “democratic” practices has contributed to the popularly held notion of imminent political change.

190 See id.
192 See id.
193 See id.
194 See id.; CHANG, supra note 2, at 219-220; POTTER, supra note 113, at 118-119.
195 See Intimations of mortality, THE ECONOMIST (London), June 30, 2001, at 22. “Not surprisingly, elected village chiefs often felt that they had more authority to represent their communities than village party secretaries, who are chosen by party organs at a higher level.” Id. “The party, fearful of losing its grip entirely, decided to back its village representatives.” Id. Cheng Tongshun, a political scientist at Nankai University in Tianjin, said in a book published in 2000 that “most villages were still led by party secretaries who took on most, if not all, of the duties which the elected chiefs are supposed to carry out.” Id.
Whether one has confidence in the ability of Beijing’s leadership to effectively curtail the rising tide of dissent, as illustrated by the regime’s calculated control over local rural elections,\(^{196}\) is but a single, and by itself, insufficient example in gauging the regime’s overall capacity to maintain political control in the years to come. What is clearer however, is that “dialectical materialism” with its emphasis on “contradiction” has not abandoned contemporary Chinese politics.\(^{197}\)

Just as Mao was concerned with the existence of social and economic tensions and how they could be harnessed to promote the idea of a “continuous revolution,” China’s contemporary leaders similarly try to draw upon current social and economic cleavages, by creating particular policy preferences that at an ideological level attempt to resolve the country’s growing dislocations. This is evidenced by the leadership’s support of distinct income groups within China—historically an anathema to communist ideology—but which the Party now believes is a modern and necessary precursor to the goal of eventual economic parity for all classes of society.\(^{198}\)

Of course, whether these ideological commitments still capture the regime’s attention, rather than serving as hollow claims designed to placate a growing disenfranchised underclass, is the subject of great debate. However, notwithstanding the debate over the legitimacy of such a direction, there nevertheless exists limitations upon a political system in its attempt to deal with ideological contradictions. Consequently, it is an examination of these stresses that follows.\(^{199}\)

\(^{196}\) See supra notes 186-193 and accompanying text.

\(^{197}\) See supra note 183.

\(^{198}\) See generally Solinger, supra note 151.

\(^{199}\) See Noumoff, supra note 38 and accompanying text.
E. The Dynamics of Socialist Transition

Shortly after formally assuming power in 1949 the leadership had begun to envision a desirable transition to socialism in China’s countryside. The Party’s leaders were prompted by a study of the Soviet experience and inspired by Lenin’s all too brief, albeit, evocative writing on cooperation. Drawing from Lenin’s inspiration, the Chinese leadership developed an approach to the transitional period of socialism involving “controlled revolutionary change by stages, each resting on a broad base of popular support and active participation, and each involving testing at the grass-roots level to devise measures appropriate to Chinese conditions and popular consciousness.” As Mao noted in *Dialectical Materialism*, Marxist socialist development does not require the immediate elimination of all forms of private enterprise, but instead, promotes the “progressive restriction [of private enterprise] as cooperative and state systems and planning networks develop the capacity to expand their scope and effectively serve popular needs.” Yet, collectivization and central economic planning schemes are not by themselves sufficient conditions for the transition to socialism. Rather, the “sine qua non of the transition to socialism is the process by which the forms of state or cooperative ownership become invested with the substance of

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200 See SELDEN & LIPIT, supra note 165, at 7.

201 Id.

202 Id. at 8 (emphasis added).

203 See MAO, supra note 46, at 1. “In a socialist or communist society, technical innovations and improvement in the social system inevitably continue to take place; otherwise the development of society would come to a standstill and society could no longer advance.” Id.

204 See SELDEN & LIPIT, supra note 165, at 9-10.

205 See id. at 8-11.
mastery by the direct producers, that is by industrial workers, peasants, technicians, scientists, teachers, health workers, and other working people." Obviously, by itself, this prescription ignores the importance China has placed on its own economic development as a vehicle by which to achieve this transition. Stressing the interrelated nature of form (socialism) and process (economic development) in the transitional phase, two scholars write:

This poses the most complex, and in ways the most intractable, theoretical and practical issues of the transition. The transition requires the formulation and implementation of processes which assure the direct mastery of working people over the workplace, the state, and the society at every level. Yet it also involves the creation of a substantial state bureaucracy to pursue socialist goals and implement planning. …Examining the process of socialist transition as a whole brings to the fore a series of contradictions whose resolution is a necessary condition for realizing the mastery of the direct producers as the substance of socialist society. In addition to those contradictions concerning the state, a set of inter-related contradictions concerns the economy. For without economic development, even the most ambitious of social reforms in a poor and backward nation will be doomed to create a poor and backward socialism.

However, despite the enthusiasm China’s leaders have shown for market socialism, there are some scholars who are reticent in their support for China’s current course. Generally, the unease expressed to date rests with the belief that socialism—uniquely Chinese or otherwise—has been totally subsumed by the desire of underdeveloped nations to industrialize. Scholar Adam Ulam has offered a theory as to why Marxism found a footing in the underdeveloped nations of the non-Western world. While Marx “warned against the futility and social dangers of ‘premature’ attempts to carry out socialist

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206 Id. at 10 (emphasis in original).
207 Id. at 10-11.
208 See Meisner, supra note 165, at 347. See also generally, Adam B. Ulam, The Unfinished Revolution: An Essay on the Sources of Influence of Marxism and Communism (1960).
revolutions—in historical situations where, as he put it, 'the material conditions are not yet created which make necessary the abolition of the bourgeois mode of production,' the appeal of Marxism to these otherwise improbable nations remains one of the great ironies of history. Ulam’s thesis attempts to reconcile this anomaly. He argues that the magnetism of Marxist doctrine to both the intelligentsia and the masses in underdeveloped countries lies in its appeal to a specific social psychology that persists in the transformation of a preindustrial agrarian society into an industrial society. Ulam concludes that because Marxism was born from a similar historical set of circumstances in early and mid-nineteenth-century Europe, it is a natural and logical framework for contemporary societies to follow in their quest for industrialization. Thus, according to Ulam, today’s societies who bear the mantle of Marxist socialism are merely mimicking the economic transformation that swept across Europe nearly two hundred years ago. For Ulam, Marxism as a practical matter has no great ideological thrust of its own, but essentially serves as a pretext for modernization, harboring the same ultimate goals and ambitions as capitalism which it purports to reject. Ulam advocates caution in misrepresenting the socialist objective, he writes:

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209 See MEISNER, supra note 165, at 345 (internal citations omitted).

210 See id. at 347.

211 See id.

212 See id.

213 See id.
[One should not be distracted] by the revolutionary phraseology of Marxism into believing that from the economic point of view the stage of socialism represents a drastic break with capitalism. Quite the contrary: socialism, once it assumes power, has as its mission the fullest development of the productive resources of society...the [socialist] state will in no wise proceed differently from the capitalist: i.e., it will take the workers surplus labour in the form of surplus value and will sink it in further investment. ...What, then, is socialism? It is simply capitalism without the capitalists. ...Except for the abolition of private property in the means of production (its rationalization), socialism continues and intensifies all the main characteristics of capitalism.\textsuperscript{214}

As profound as Ulam’s insights may be with his emphasis on economic determinism, his grand theory is amiss in explaining the Chinese experience. While it may be true that Ulam’s hypothesis appears to have unfolded in the manner in which he proposes for the former Soviet Union, China’s path has been altogether different. Notably, Ulam’s theory fatally ignores that China abandoned its somewhat successful industrial modernization campaigns of the early 1950s in favor of greater ideological and social commitments, marked first by the Great Leap Forward, which attacked social stratification and occupational specialization\textsuperscript{215} and later by the Great Proletariat Cultural Revolution which embodied the ideological consciousness of continuous revolution. It is worth stressing that economic development alone was not enough for Mao.\textsuperscript{216} This attitude is evident in a variety of policy initiatives that Mao undertook throughout his tenure as

\textsuperscript{214} See id. (quoting ADAM B. ULAM, THE UNFINISHED REVOLUTION: AN ESSAY ON THE SOURCES OF INFLUENCE OF MARXISM AND COMMUNISM 45 (1960)).

\textsuperscript{215} See MAURICE MEISNER, Marx, Mao and Deng on the Division of Labour in History, in MARXISM AND THE CHINESE EXPERIENCE: ISSUES IN CONTEMPORARY CHINESE SOCIALISM 96 (Arif Dirlik et al. eds., 1989).

\textsuperscript{216} See Dali L. Yang, Surviving the Great Leap Famine: The Struggle over Rural Policy, 1958-1962 in NEW PERSPECTIVES ON STATE SOCIALISM IN CHINA 262, 283-289 (Timothy Cheek et al. eds., 1997).
China’s leader; however, there is perhaps no better illustration of these convictions than in the debates of 1961-62 surrounding the household contracting system. While different regions produced different characteristics of agricultural contracting, the practice typically involved every worker being assigned a particular responsibility for a plot of land with a set target quota for output. Each individual worker would then be rewarded for any output produced above the quota amount, with roughly 80 per cent of any excess going back to the individual’s household.

Devastated by the famines and the futility of the Great Leap policies of 1958-60, the practice of individual farming and household contracting had risen by the summer of 1962 to 30 per cent of all rural households, and was continuing to grow. Village accounts, particularly in those areas that were hardest hit by famine such as Guangxi, expressed great satisfaction with the contracting system, citing that “independent farming simplified management, saved operational costs, and spurred peasant enthusiasm.” Moreover, the productive yield of privately managed land was greater than collectivized plots.

By the fall of 1961, these practices were increasingly being carried out in direct opposition to the desires of Mao and other top leaders, who, despite the apparent

217 See id.
218 See id. at 268.
220 See Yang, supra note 216, at 284. (citing Pang Xianzhi, Mao Zedong he ta de mishu Tian Jiaying “Mao Zedong and his secretary Tian Jiaying” in MAO ZEDONG HE TA DE MISHU TIAN JIAYING, 28, 68 (DONG BIAN et al. eds., 1989).
221 Id.
222 See Yang, supra note 216, at 284.
effectiveness of private agriculture, were nevertheless continuing to advocate the merits
of collective ownership.\textsuperscript{223} Fuelled by the reports of economic success and the
enthusiasm of cadres such as Qian Rangneng who advocated that the household
contracting system “was pioneered by peasants and suited the inexorable development
trend of rural productive forces,”\textsuperscript{224} central planners agreed to review the practice.\textsuperscript{225} In a
direct report written to Mao Zedong in May 1962, Deng Zihui, then vice premier and
director of the Central Committee’s Rural Work Department, noted that peasants “do not
trust the Party’s policies.”\textsuperscript{226} He concluded that if private land were to be limited to 20
per cent of all arable land it would ultimately pose no threat to collective ownership.\textsuperscript{227}
This shift in perspective was shared by several other high-ranking policy makers in the
spring and summer of 1962, which to varying degrees included: Liu Shaoqi, Zhou Enlai,
Chen Yun and Deng Xiaoping.\textsuperscript{228}

Despite the growing support by cadres and key leadership personnel, Mao would
become steadfast in his opposition to the practice in July of 1962, launching a direct
attack against all forms of individual farming, arguing that it “was the nemesis of the

\textsuperscript{\textit{223}} See id. at 283.
\textsuperscript{\textit{224}} Id. at 285. (citations omitted in original).
\textsuperscript{\textit{225}} See id. at 286.
\textsuperscript{\textit{226}} Id. at 284 (citations omitted in original).
\textsuperscript{\textit{227}} See id. at 286.
\textsuperscript{\textit{228}} See Dali L.Yang, \textit{Surviving the Great Leap Famine: The Struggle over Rural Policy, 1958-1962 in NEW
PERSPECTIVES ON STATE SOCIALISM IN CHINA} 262, 286 (Timothy Cheek et al. eds., 1997); see also
MACFARQUHAR, \textit{supra} note 219, at 232-233.
collective economy, and could only properly be combated with a renewed emphasis on class struggle.

Scholars appear to be in agreement that the motivations for Mao’s backlash against the practice were largely political, noting that had he sanctioned the reform, it would have at least in some small measure amounted to “an admission that the whole hectic process of collectivization and commune-ization from 1955 to 1960—Mao’s greatest post-1949 successes—had been disastrously bungled, and that the whole rationale of the key slogan defining the communes—large (of size) and public (in ownership)—was fatally flawed.”

Notwithstanding the personal motivations for his condemnation of private agriculture, Mao’s choice also signals a rejection of Ulam’s “economics first” approach. Using this illustration above, and, if need be, a collection of other examples contained within the historical record from the period, it may be stated with some degree of accuracy that Mao did not favour pure economic development over the important task of resocializing society. Rather, the two priorities were viewed as complimentary components to a single overall objective. As a practical example, consider the Great Proletarian Cultural Revolution, a mass movement that specifically targeted bureaucratic routinization and the predominance of class divisions within Chinese society. Not surprisingly, given the tremendous social upheaval that came with such an overt attempt

See Yang, supra note 216, at 287.

See id.

See id.; MACFARQUHAR, supra note 219, at 233.

See id.
to destroy the Confucian tradition of order and deference, the years of the Cultural Revolution resulted in large-scale economic stagnation.

While the events of China's history may discredit the applicability of Ulam's thesis to the Maoist era, the post-Maoist economic reforms begun in the late 1970s become more difficult to rationalize as "socialist" in nature. Long time China scholar Maurice Meisner, who appears from his writings to be particularly sympathetic to the Marxist tradition in China has expressed the apparent difficulty in reconciling a socialism cloaked in capitalists trappings. He writes:

But even if economic modernization is perforce a long-term process, and even if social change must proceed gradually and slowly in accordance with the development of the productive forces, as the present leaders of the People's Republic emphasize, one nevertheless would expect that their social and economic policies would be broadly consistent with the "primary stage" of socialism to "developed socialism," however slowly and gradually that process is conceived and proceeds. That, however, clearly has not been the case. The social tendencies that have resulted from the post-Mao deradicalization of Chinese economic, social and political life—otherwise known as 'reforms'—are simply incongruous with any conception of socialism, much less with a society that is officially described as proceeding from lower to higher stages of socialism, albeit in a gradual evolutionary fashion.¹²³

Of primary concern to Meisner is the rising level of socio-economic inequality that has come about from a greater reliance on market forces.²³⁴ Additionally, he finds little of the current approach to be transitory,²³⁵ and struggles to conceive of a way "[t]he social values conveyed by the new model are...in accord with socialist ideals...[let alone] conducive to any future process of socialist transition."²³⁶ Absent of any parameters,

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²³³ See MEISNER, supra note 165, at 353.
²³⁴ See id.
²³⁵ See id.
²³⁶ Id. at 354.
Meisner contends that the Party’s official rhetoric regarding the “primary stage” of socialism is so diffuse and utterly void of Marxist principles, that it enables the regime to effectively promote any policy that it deems to be “transitory,” regardless of its apparent risk to a later desirable and functioning socialist society.237

Although Meisner does not purport to speak on behalf of all sceptics, a review of Western popular press accounts appear to share Meisner’s conclusions. Meisner’s impressions about China’s future are invaluable because his critique offers a rare substantive analysis as to why failure under China’s current approach may be forthcoming; a feature absent, yet so obviously implied in non-scholarly writings on the subject.

With my somewhat artificial appointment of Meisner as the harbinger for China’s failure, naysayers are provided with an insightful ally who is also concerned with the disengagement between traditional Marxist practices and the reality of modern China. For as Meisner himself notes, therein lies the rub. By postponing the arrival of a just and socialist society to a distant point in the future, contemporary Chinese leaders have effectively severed any meaningful nexus between Chinese Marxist theory—which allegedly houses the goals of a socialist future—and contemporary practice.238 Meisner’s worry is that by further supporting this disconnect between theory and practice, the inevitable result will be a marginalization of socialist doctrine in favour of short-term, immediately beneficial economic policies.239 Whether Meisner and the rest of this group

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237 See id. at 355.


239 See id.
are ultimately correct in their suspicions—that the means and ends of socialism will
eventually become so misshapen in the hearts and minds of China’s ideological
stewards—remains to be determined. However, I must confess that I find at least some
measure of truth in their final assessments. At the current pace, I too agree that it is “most
unlikely that a populace schooled in the ‘four modernizations,’ as currently practiced,
will yield the human agents necessary for the building of socialism, however ripe the
economic situation eventually may become.” 240 Yet, I am simultaneously imbued with a
sense of hesitation in foreclosing the possibility of a socialist future for China. As
mentioned above, not all Sinologists share Meisner’s pessimism regarding China’s
current path.241 I for one believe that a redefinition of what constitutes “socialism in
practice” is already afoot in China. Naturally, determining once and for all which camp
may be correct in their assumptions lies outside the scope of this inquiry, except to
suggest, that I and others apparently hold strong to the belief that creativity is an
axiomatic necessity in discussing the modern Chinese state; and therefore, its presence
does not resign modern socialism to the historic impossibility that it is so often portrayed
as.

Only time will tell whether China’s leadership will be able act out an intention
that has been hinted at above. Adopting such a typology leads to the inevitable
conclusion that China’s decision to liberalize its economy was designed with the
unambiguous intent to bring about a transitional phase. In the process, the regime remains
mindful of its potential for collapse. For example, in the context of international trade

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240 Id. at 357.

241 See generally DIRLIK, supra note 5 and accompanying text.
China’s ruling elite mitigate these transitory stresses through legislation, which reduces the regime’s susceptibility to confrontation. This idea of the Party tempering the external influences of liberalism as a universal model of government, particularly given the theory’s indoctrination within the world’s governing international trade institutions, has been the focus of Pitman Potter’s work on “selective adaptation.” Appropriately, Pitman Potter’s work becomes the focal point of the next section as it relates to particular areas of Chinese commercial law.

F. Summary of Economic Development Since 1978

Since 1978, China has adopted economic policies designed to conform to a modern socialist model. At the same time, its leaders have reversed perceived shortfalls in development of the economy during the Maoist era. Although it is undisputed that these post-Mao policies marked a clear divergence from previous practices, there is recognition by some that more traditional communist counterweights will need to be identified and established by the current leadership to prevent a swing to capitalist extremes and a resulting collapse of the entire communist system. As a result, the “transitory problem” can be thought of as an ongoing contradiction. Hu Jintao and his colleagues essentially struggle with the same problems as their predecessors. The delicate balance needed to be struck by the regime’s contemporary leaders is that between modernizing the communist state, versus instigating its wholesale collapse. This fluid

\footnote{242 See infra Parts V & VI.}

\footnote{243 See Victor Lippit, Socialist Development in China, in The Transition to Socialism in China 144 (1982).}

\footnote{244 See id.}

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dynamic can be thought of as the ultimate give and take balance, as reformists attempt to appease hard-liners at every turn. As a single example, this kind of political balancing of interests comes to the fore in legislative debates, as hard-line Party members are often more willing to ensure the protection of state institutions, such as State Owned Enterprises for example, often in opposition to their more market-oriented opponents.

As has been demonstrated, current Chinese elites understand that an integral part of the contemporary political calculus involves China’s embracing of foreign investment. Their challenge however, will be to maintain order by recognizing the aforementioned goals. The above explanation has attempted to show that China historically has been acutely aware of its predicament. What follows is an evaluation focusing on China’s legal reforms related to foreign investment. Implications for the regime and the way these laws are ultimately expressed are thoroughly explored. In doing so, this offering is an alternative to the larger and more generally accepted worldview that China is confined to political liberalization. Rather, it is proffered that a temporary phenomenon of wealth accumulation—defined generally as an increase in the productive capacities of science, technology and related services—or “transition” is at hand, only to one day be resocialized at a distant, and yet to be defined point in the future.

Moving from historical underpinnings and abstract notions to the more practical contemporary framework of jurisprudence requires at least a general understanding of China’s laws, and so legislation related to foreign investment activity in China now becomes the subject of inquiry.

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246 See id.
V. **Legal Reforms**

Before discussing a few of the relevant Chinese laws on foreign investment and the regime’s policy expressions embodied within them, a brief overview of Pitman Potter’s ideas on selective adaptation are essential because his analysis provides both the inspiration and foundation for my own qualitative analysis.

**A. The Theory of Selective Adaptation**

Pitman Potter’s theory of selective adaptation lies at the core of his book entitled *The Chinese Legal System: Globalization and local legal culture.* In the book, Potter explores the ways in which Chinese actors, including both official policy makers and laypeople are actively engaged in the personalization or “sinofication” of international norms and standards. It is central to his thesis that China has become a repository for the influence of foreign laws. Potter suggests the idea of sinofication is evident in the expressions of local culture, which he adds act as “powerful restraints on the penetration of foreign legal norms associated with liberalism.” What comprises these local norms in China, is, according to Potter, a composite of “traditional values on social, economic, and political relations” as well as local conditions.

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248 See id.

249 See id. at 6.

250 See id.

251 Id. at 7.

252 Id.
indicia of culture are the ways in which foreign norms are compatible with Chinese conditions, and include: (a) the extent to which local infrastructures can accommodate foreign norms and practices and vice versa; and (b) the “acceptance of imported law norms may depend on a process by which traditional norms that are unresponsive to new realities are discarded (‘delegitimization’) and replaced by new norms as part of an evolving belief system (‘transvaluation’).” In addition, Potter notes that legal culture in China reflects the influences of government and society. “Governance provides the context for official legal culture, while society provides the context for popular legal culture,” yet both of these factions influence the process of absorption of foreign norms in the overall legal reform effort.

Naturally, the impact of foreign laws and the ways in which they are absorbed are inextricably linked to how law is conceived in China. Examining the relative understanding of law in China, Potter writes:

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254 See id. at 6.

255 Id. at 6-7.

256 See id. at 8.

257 Id.

258 See id.
The Chinese government’s approach to law is fundamentally instrumentalist. This means that laws and regulations are intended to be instruments of policy enforcement. Legislative and regulatory enactments are not intended as expressions of immutable general norms that apply consistently in a variety of human endeavours, and neither are they constrained by such norms. Rather, laws and regulations are enacted explicitly to achieve the immediate policy objectives of the regime. Law is not a limit on state power; rather, it is a mechanism by which state power is exercised, as the legal forms and institutions that comprise the Chinese legal system are established and operate to protect the Party/state’s political power. In part as a result but also a justification, Chinese constitutional and legal arrangements must conform to China’s special circumstances, which set the conditions for policy enforcement and the justification for Chinese law’s departure from international or Western norms.259

This view of the role of law in contemporary China enables the regime to confine jurisprudential developments to the promotion of policy preferences,260 meaning for example, that an individual’s right to autonomy under contract—a common presumption in international business transactions—in the Chinese context needs to be “couched in terms of constitutionally mandated imperatives to promote state and social interests.”261 Moreover, “where a policy is agreed upon and then expressed through law or regulation, the law or regulation serves as a conclusive indicator that the policy is being enforced.”262 While there is ample illustration by other nations, including those of the West, demonstrating a symbiotic relationship between law and politics, the full weight of this dynamic in China takes on specific and particularized attributes.

259 Id. at 10.
261 Id.
262 Id. at 12.
China is able to marry policy efforts with law in such a fluid manner because of “intentionally ambiguous[ly]”\textsuperscript{263} drafted legislation.\textsuperscript{264} Potter suggests that the motive for such ambiguity is to “give policy makers and implementing officials alike significant flexibility in interpretation and implementation.”\textsuperscript{265} In addition to being ambiguous on their face, these laws possess vague articulations that do little to “lend predictability [and] or transparency to [China’s] regulatory process[es].”\textsuperscript{266} Not surprisingly, as a direct consequence of this practice, ambiguities arise with respect to implementation. In light of the character of socialist law in China, it needs to be emphasized here that these are not simple surface ambiguities, but rather are ones of practice. While short-term gains may be reaped by allowing policy makers greater latitude to develop or restrain legislation so that it conforms to particular Party pronouncements, the obvious fallout from the use of intentionally ambiguous legislation is that uniform enforcement is rarely achieved.\textsuperscript{267}

Whether in the final analysis China’s course will mirror the chaos that ensued in Europe prior to the establishment of the Roman Civil Code is debatable, but the inconsistent application of law may nevertheless result in the undermining of certain pronouncements as “law,” and may ultimately lead to the erosion of its legal system as a whole.\textsuperscript{268}

One reason for the existing ambiguity may be the result of China’s relatively immature legal system. By providing a space for the formation and interpretation of law,

\begin{itemize}
\item \textsuperscript{263} \textit{Id.}
\item \textsuperscript{264} See id.
\item \textsuperscript{265} Id.
\item \textsuperscript{266} Id.
\item \textsuperscript{267} See generally \textsc{pitman b. potter}, \textsc{the chinese legal system: globalization and local legal culture} 12 (2001).
\item \textsuperscript{268} See \textsc{stanley b. lubman}, \textsc{bird in a cage: legal reform in china after mao} 32-39 (1999).
\end{itemize}
drafters may be intentionally creating leeway for the regime to carve out an appropriate course for itself at a later date. In essence, by acquiring time, those administering China’s legal system create the opportunity to develop more efficacious policy positions in the event that there is not a clear and coherent path from the beginning. However, this “infancy argument” is rejected here at least in part. While the attractiveness of such a strategy is self-evident, China has historically demonstrated the capacity for long-term organizational initiatives. Under the Maoist era, the Long March, the variety of industrialization campaigns that immediately followed the regime’s official seizure of power, and particularly the Cultural Revolution, demonstrated at a minimum the leadership’s commitment to the praxis and theory of the communist struggle. In the post-Mao era, an overt steadfast commitment to ideological importance has remained. Deng’s “Four modernizations” and “actualization through truth” campaigns, and by extension, Jiang’s “Three Represents Theory” has enjoyed an almost uninterrupted thirty year legacy of support, but for a brief period that followed the events of Tiananmen. Given the historical strength of these and other strategic agendas by the regime, it is naïve, I believe, to presume that China does not similarly possess a long-range strategy for its own legal system. Rather, China in recent years has learned to wed its economic ambitions with the supporting operational capacity of its legal system, much like its counterparts in the developed world.

B. A Review of the Actors Influencing China’s Legal Development
Further effecting the aforementioned amalgam of law and economics in China is the role that local culture plays in forming the overall legal discourse.\textsuperscript{269} Even as the hopes of many in the West hinge on the establishment of formal legal institutions, the legacy of China's informal relationships—namely guanxi,\textsuperscript{270} continue to inhabit China's cultural landscape in concert with its developing formal legal institutions.\textsuperscript{271} Potter argues that nascent formal legal institutions and informal cultural inter-personal relations can be seen working together, in harmony, in the post-Maoist era.\textsuperscript{272} He adds that given the pervasiveness of the state in Chinese society and the corresponding lack of formal institutional limits on state intervention, informal relationships expand\textsuperscript{273} in an effort to create personal autonomy and benefits for individuals.\textsuperscript{274} Finally, regarding the future of informal cultural relations as a greater number of formalistic institutions take root in China, Potter believes that guanxi will become an increasingly important tool in the future.\textsuperscript{275} The incompleteness of China's legal system, i.e., the lack of a well established

\textsuperscript{269}See generally POTTER, supra note 247, at 12.

\textsuperscript{270} The term “guanxi” (pronounced “gwan-shee”), is loosely translated into English as “connections.” See THOMAS GOLD ET AL., An Introduction to the Study of Guanxi, in SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE, AND THE CHANGING NATURE OF GUANXI 3 (Thomas Gold et al. eds., 2002). While a precise definition of the term is elusive, scholars are in general agreement that the practice is a kind of “social capital” garnered with the intent to transform it into economic, political, or symbolic ends. See id. at 7. What is particularly unique about the practice is that once guanxi is recognized between two people, it entails mutual obligations, as both parties bear correlative responsibilities of obligation and performance to be satisfied at some point in the future. See id. Through the ubiquity of the practice, guanxi has become the basis for China’s gift economy, and with it harbors specific rituals and rules for its practice. See id.

\textsuperscript{271} See POTTER, supra note 247, at 12.

\textsuperscript{272} See generally PITMAN B. POTTER, Guanxi and the PRC Legal System: From Contradiction to Complementarity in SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE, AND THE CHANGING NATURE OF GUANXI 180 (Thomas Gold et al. eds., 2002).

\textsuperscript{273} See POTTER, supra note 247, at 14.

\textsuperscript{274} See id.

\textsuperscript{275} See POTTER, supra note 272, at 194-195.
body of law that serves to provide meaning and restrain recently promulgated principles will promote the growth of informal ties between parties, as each will be motivated by the desire to achieve a favourable outcome, and therefore, will be inclined to lubricate the process through guanxi relations.276

Comparatively, the process of foreign legal exposure and absorption operates with a heavier emphasis on institutional regulation. Individuals responsible for this function are drawn from China's legal elite and serve as the principal contact point for newly discovered international laws and foreign standards.277 This group, comprised largely of judges, lawyers and legal scholars, is supported by the regime and thus largely only reflects state interests.278 Despite its obvious allegiances to the Party, this group is nevertheless important because it acts as a contextual bridge between local Chinese norms and foreign legal pronouncements.279 Consequently, this group is both the first and arguably the most important in determining the transferability of foreign laws to a domestic Chinese setting.

However, the quality of China's legal literati is suspect.280 Many senior level officials are not recruited for their legal proficiency. In many cases legal advisors lack formal training in the law, but were recruited for their skill in foreign languages, in particular English.281 Moreover, scholars that have been trained in China's legal system

276 See id.
277 See POTTER, supra note 247, at 13.
278 See id.
279 See id.
280 See id. at 14.
281 See id.
suffer from an education that is pedagogically weak, which is characteristic of much of the legal training throughout Asia. 282 In many parts of Asia, legal training fails to place primary importance on critical analysis and instead encourages rote memorization. 283

Given their obvious deficiencies, I stand in agreement with Professor Potter when he concludes that this group of legal analysts are ill equipped to properly evaluate the volume and subtleties of the Western-liberal laws which they are mandated to review. China’s legal intelligentsia effectively become agents of the regime in its attempt to achieve instrumentalist goals, but do so lacking a full appreciation of what it is they are interpreting. 284 This gap in analytic capacity is particularly troublesome in a legal context because the usage of a particular term may be unique to a specific law, or alternatively, may possess a different legal meaning altogether than that which it possesses colloquially.

Finally, the last in a series of institutional actors who currently influence China’s legal discourse are bureaucrats. 285 Often lacking formal legal education, bureaucrats are motivated by political self-interest. 286 While the manipulative capabilities of a bureaucrat are often greater then that of the institutional legal scholar, 287 their influence over law is


284 See POTTER, supra note 247, at 14.

285 See id.

286 See id.
tempered by their immediate and obvious relationship to politics. Thus, bureaucrats instinctively "reinforce the subordination of law to state power."\textsuperscript{288}

In their totality, the aforementioned forces continue to shape and modify the influence of foreign norms in China. Potter's "basket of culture" contains a varied and diverse group of influences derived from religion, custom and individual actors. In formulating his theory on selective adaptation, Potter does not focus upon Chinese domestic culture as a vehicle by which to allow the regime to carry out improprieties in upholding international norms and agreements; in other words, Potter is not an apologist for China's intentional malfeasance regarding its contractual obligations.\textsuperscript{289} Potter recognizes that the guise of cultural difference is used by China's leadership as a pretext for subverting international norms; however, he quite correctly recognizes a distinction between complimentarity and outright corruption. In separating out the serious averments from the spurious, it is important to keep in mind that there exists within international law particularized regulatory procedures that allow parties to obtain redress when confronted with wrongdoing.\textsuperscript{290} However, this is not the concern of Potter's inquiry. Instead, at its core, his examination is an attempt to understand the contributing dynamics to China's legal processes. Potter is all too acutely aware that China is constantly bombarded with an American-inspired liberalist agenda that is in tension with China's own policy

\textsuperscript{287} See id.

\textsuperscript{288} Id.

\textsuperscript{289} Conversation with Dr. Pitman B. Potter, Director of the Chinese Legal Studies Programme at the University of British Columbia, Vancouver, British Columbia (Nov. 21, 2004). This position is not intuitively obvious from Dr. Potter's writings on selective adaptation, but becomes readily apparent when his overall research methodology is reviewed.

\textsuperscript{290} See id.
Therefore, it is within the realm of “culture” that Potter believes lie the foundations for China’s individualism in formulating its own legal norms and standards. As a result, it is the unconscious cultural activity, as opposed to any premeditated offensiveness, that Potter is truly interested in exploring.

In my view, the unconscious acts Potter investigates further supports Will Kymlica’s conclusions regarding liberalism, that is, the presence of a particular group’s individualism—in this case Chinese cultural distinctiveness—is a counterbalance to liberalism’s overarching weight. This uniqueness by itself necessitates space for individual accommodation within the overall theory of liberalism.

Amidst the current international celebration of liberalism and its various offshoots, a few common denominators are identifiable. Regardless of whether the ideology is couched in the phraseology of communitarianism or civil libertarianism the goal is essentially the same, which is to create a space for the rights of minorities, or non-traditional rights holders. In doing so, modern liberalism adopts a certain scepticism and recognizes that the imposition of a monolithic ideology is flawed. To accommodate the interests of all international stakeholders, individual enclaves are not only carved from the whole, but are given equal, or at least proportional representation. Herein then

291 See Potter, supra note 247, at 14.

292 See supra note 289.


294 See id.

295 See id.

lies China's challenge: to circumvent international liberalism with a legitimate objection to the status quo. In so doing, China may opt to utilize an escape route that liberalism itself was required to create.297 Liberalism as a universal doctrine must acknowledge individual accommodation or risk inherent self-contradiction and subsequent criticism.298 In the instant case of China, wherein lies this legitimacy for potential deviation? According to Potter, the answer lies with its culture.

Even an unperceptive reader would realize that to this point that I have been perhaps overly reverential of Pitman Potter's work. However, this thesis is much more than a celebration and regurgitation of Potter's own research. As a result, any perceived unctuousness must regretably end here. I respect immensely Pitman Potter's work and his related observations of China, and if somehow quantifiable would agree with perhaps four-fifths of his conclusions. Nevertheless, it is in the remaining one-fifth that I argue lies the key to China's future.

Simply put, I respectfully reject the notion that culture, and, in particular, its relative passivity is the foremost leading agent in determining China's future. Rather, my inquiry is an intentional re-orientation of the aperture that focuses much more exclusively on Chinese ideology, including both its historical and present day manoeuvrings. While an obvious criticism of such a singular focus may be that it suffers from a myopic perception; particularly, when contrasted against the realities of present day China, I nevertheless stand by my convictions for at least three reasons.

297 See id.

298 See id.
First, as Roberto Mangabeira Unger has written, "[e]very general way of thinking that dominates the ideas of an age has to be understood as a phenomenon of consciousness rather than just a theory."

That is to say that while a political message undoubtedly resonates with local culture based upon the intimate relationship between the two, the consciousness associated with ideology is a priori deserving of more attention. Unlike its cultural counterpart, ideology is intentionally distilled from a society’s underlying social fabric rather than simply passively acquired. Devoted Sinologists have made similar observations, albeit in a much narrower sense. Joseph Fewsmith has noted the inter-relationship between ideology and political “lines” in China. He argues that these lines link policy to leadership and in the process serve to legitimize and distinguish Chinese politics from purely personal power relations.

Second, given the role of consciousness I believe that China’s ideological pronouncements are both real and one of the more dominant stimuli currently driving the regime’s policies. Although evidence for such a claim is not readily measurable, it is nonetheless significant as indicated by the wealth of literature that addresses the subject.

Finally, I submit that by adopting such a limited perspective, many of Potter’s observations are increasingly pulled into clearer focus. By drawing conclusions which recognize a modern socialist ideology as driving policy—rather than vice versa—I


300 See FEWSMITH, supra note 70, at 8-9.

301 See id.

302 See supra Part III and infra Parts V & VII.

303 See id.
suggest that such an approach goes farther, and therefore, may be richer in its overall attempt to better predict China’s future course.

The collection of Potter’s work cited here (although profound) is limited to observing and commenting on selective adaptation. Essentially, he has been answering questions regarding what is taking place and how these events are occurring. Juxtaposed to this inquiry, and using Potter’s observations (as well as others) as a departure point for my own discussions, my investigation is instead concerned with the future, namely, what will happen? My focus on the future of China is derived largely from my own experiences in that country and the region as a whole. Excluding my own preoccupations, China’s future is of manifest importance to many, ranging from both the well-educated and proactive foreign investor to the largely indifferent lay consumer.

My dissent from Potter’s typology is not a sign of disrespect, but rather of disagreement. Regrettably, in the end, I may be incorrect in arguing that China is engaged in an active effort to accumulate the fruits of a capitalist economy, only to one day socialize those holdings and redistribute both goods and productive forces in a more egalitarian manner. I hold however, that my resulting analysis has been appropriately careful and detailed in its scrutiny of China’s laws. Again, in my estimation it is law which is currently providing the essential mechanism for this change to occur.

In suggesting that the Chinese are engaged in a pro-active effort to acquire capital which will later result in an overt transformation into a socialist state is a task of Promethean proportions. The support for this transformation will undoubtedly rely on the various parts of the Chinese political, legislative and dispute resolving channels for its support. As I noted earlier, one of the failings in the discussions to date is the lack of a.
workable theory that harmonizes modern socialist ideology with the reality of Chinese legal reforms and the institutions that uphold them.\textsuperscript{304} As a result, a conscientious effort has been made to cure this deficiency in the analysis that follows.

The aim in focusing on Chinese legal reforms in the private sector is twofold. First, a theory is offered which suggests that economic reforms are being created with political mandates (i.e., regime control) in mind. Second, political control is but one component part of the overall objective. Rather, in addition to the Party's continued political dominance, it is through the conscious exercise of control that the regime is engaged in the transitory processes discussed in the previous section.\textsuperscript{305}

My focus on private law reforms has been deliberate. Unlike public laws, which are designed with the express purpose of serving the interests of states, private law is intended to stand outside of the state's reach (at least inasmuch as the primary beneficiary of those laws is not the state). It is within this context that I review China's Unified Contract Law (UCL), promulgated in 1999. Laws will be examined which expressly reserve for the government an opportunity to intervene in private commercial transactions, which, as previously indicated, is antithetical to conventional notions of private law, absent a few narrow exceptions involving matters of public policy. It is argued below that the language of reservation used within these laws is far more than simply perfunctory. Rather, the use of particularized language has real implications for the regime, which deliberately utilizes certain legal terms and conditions to shield Chinese society from the full thrust of Western inspired liberal values. Finally, contract

\textsuperscript{304} See supra Part IV at 32-34.

\textsuperscript{305} See supra Part IV.
law serves as an appropriate subject of review because of its relative historical neutrality towards communist appeal. In essence, the laws of property or labour have to a greater extent than contract law been used as a political tool to aid bureaucratic rhetoric in communist nations. My focus on private contractual law demonstrates the complexity and advancement with which “socialism with Chinese characteristics” now operates.

However, private law alone is not where this theory of socialist transition lies. To a much lesser extent China’s Constitution, particularly with its recent revisions in March of 2004\(^\text{306}\) (although by all accounts not a substantive basis of law in China\(^\text{307}\)), also serves a deliberate purpose in the goal of socialist transformation and sustainability. Accordingly, the Chinese Constitution becomes the subject of focus, as relatively recent amendments provide broad policy advancements which further serve to undergird the resulting legal analyses.

\textit{C. Constitutional Constructs and the Role of External Expressions}

China’s most recent constitutional amendment in March 2004 is the latest in a string of amendments that embody a transitory objective.\(^\text{308}\) The National People’s Congress in perhaps one of its most progressive announcements to date “enshrined the protection of private property as citizens’ rights guaranteed under law.”\(^\text{309}\) This pronouncement signals an ongoing shift as the Party attempts to re-orient itself in the

\(^{306}\) See Subrahmanyan, \textit{supra} note 51, at 20-23.

\(^{307}\) See \textit{id.}

\(^{308}\) See \textit{id.}

\(^{309}\) \textit{Id.}
wake of increased pluralism and a sea change in the economic composition of Chinese society. China has moved from official disapproval of a private sector, to embracing it, celebrating this newly formed entrepreneurial class as the modern vanguard. According to some estimates, private business now accounts for as much as two-thirds of all economic activity in China.310

In the face of these changes, it is worth considering why the Party has elected to move ahead with these protections now? Moreover, and perhaps more importantly, what do these progressive amendments collectively indicate, if anything, about the future direction of the regime and its relationship to its ideological past?

In answering these questions, a general appreciation for the socialist theory of law is necessary as is a basic familiarity with China’s constitutional history.

1. The Socialist Conception of Law

Material conditions have forever been the ne plus ultra of socialist ideology.311 For socialists, history has repeatedly demonstrated that relationships are contingent upon power imbalances. These imbalances, it is argued, manifest themselves within the overall superstructure of societies, evidenced by legal systems, constitutions and religions,312 which seeks to suppress “producing classes and restrain them from forming rival ideological systems that could strengthen their assertion of power.”313

310 See id. at 17.
312 See id. at 18.
313 Id.
However, standing in sharp contrast to the Western notion of immutable values embodied in individual rights-based theories lies the socialist conception of law, that is, as material conditions change, so too should law to reflect those changes. Unlike the politically inspired liberalism of the West, with its emphasis on universal principles, China's apparent neo-liberalism is dependent on the evolution of social orders and the correlative fluctuations in power relations.  

2. A Brief Overview of China’s Constitutional History

China’s constitutional revisions made in 1982 were of tremendous significance. While the country had engaged in at least three formal constitutional conventions before then, the 1982 Constitution remains the core document embodying “socialism with Chinese characteristics.” Prior to 1982, China’s Constitutions were limited to providing for the organization of institutional structures as well as broad principles of socialist practice. These were only general prescriptions and included vague language in support of egalitarianism as well as the independence of the adjudicative and prosecutorial branches of government. The structural delegation of rights and power within China was no clearer, as evidenced by the country’s first Constitution in 1954. Scholars have documented that “[b]y 1957, all means of production in China had been nationalized, despite the fact that two articles of the 1954 Constitution gave legal protection to private

314 See id.


316 See id. at 221.

317 See id.
ownership of the means of production, where it had already existed.” In the years that followed and with the increasingly centralization of power around Mao Zedong, the Constitution fell into de facto abeyance. Legislative institutions, such as the National Peoples’ Congress (NPC) which were mandated with particular powers and obliged to convene with a certain degree of frequency under the 1954 Constitution, became largely hollow institutions during the years of the Cultural Revolution.

China’s second Constitution—promulgated in January of 1975—was emblematic of the paranoia and autocracy that characterized the Cultural Revolution. Hortatory language filled much of the document, and it eviscerated many of the protections that been guaranteed under the 1954 document. “[T]he document enshrined two provisions that led directly to the control of state power by the CPC: the nomination of the premier

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Thus, commune industries are clearly seen to have relied in their formative stages upon the annexation of assets of local industry and handicrafts. Many press descriptions of commune enterprises mentioned their origins in previously existing activities. Redistribution, or “primitive socialist accumulation” in the Preobrazhenskian phase, was the principle resource base of the industrial “walking on two legs” movement in the Great Leap Forward.

Id.

319 See Cai, supra note 279, at 218-19.

320 See id. For a detailed account of events which have led to a resurrection of the National People’s Congress in the post-Mao era, see also Michael W. Dowdle, The Constitutional Development and Operations of the National People’s Congress, 11 COLUM. J. ASIAN L. 1 (1997).

321 See id.

322 See id.
of the PRC by the CPC Central Committee and the military commander-in-chief by the
CPC Central Committee Chairman.”

In 1978 China unveiled its third constitution in just over thirty-years. This
document was a largely a return to the principles embodied in the 1954 Constitution.
Its reference to class struggle, unlike that of its predecessor, was significantly muted and
largely reflected the political success of Deng Xiaoping’s victory over Maoist
holdovers. However, the 1978 Constitution would also be more progressive in other
ways. It contained an express provision which established the NPC’s Standing
Committee’s authority to oversee constitutional interpretation.

It would not be until 1982, however, with the promulgation of China’s fourth
Constitution that the legal principles and guarantees that Mao Zedong spoke of on the
steps of the Forbidden City in October 1949 would finally be entrenched. This document
unlike its forerunners is by far the most expansive. Worthy of particular mention is
Article 13, which expressly provides for the state’s protection of citizen’s rights to inherit
private property as well as a citizens’ right “to own lawfully earned income, savings,
houses and other lawful property.” Of course, the significance of private property

323 See Subrahmanyan, supra note 51, at 19.
324 See Cai, supra note 279, at 220-222.
325 See id.
326 See Subrahmanyan, supra note 51, at 19.
327 See Cai, supra note 279, at 221.
328 See Subrahmanyan, supra note 51, at 19.
329 Id. at 19 (quoting Constitution of the People’s Republic of China [hereinafter Constitution], adopted
December 4, 1982. All English references to the Constitution are taken from the official English translation
published by the Chinese government which is available at
guarantees—aside from formally departing from collectivist practices that dominated China for much of the 1960s and 1970s—indicates that China has undertaken a significant divergence from conventional communist principles. However, this is not to say that the 1982 Constitution wholly embraced capitalism either. For example, Article 6 provides: “[t]he basis of the socialist economic system of the People’s Republic of China is socialist public ownership of the means of production.”\textsuperscript{330} Moreover, Article 6 goes on to denounce capitalism and explains how socialist ownership over the means of production has triumphed over the inherent exploitative socio-economic relations inherent within capitalist societies.\textsuperscript{331} Finally, Article 12 states, “[s]ocialist public property is sacred and inviolable.”\textsuperscript{332} In light of these ostensibly conflicting declarations, what conclusions may be drawn?

First, the 1982 Constitution reflects a positivist and formalistic approach to law that was yet unseen in China. Rather than being concerned with broad individual legal concepts, the regime’s focus clearly centred upon institutional rule making and organizational structures. It becomes clear from the document’s design that the laws entrenched by the enactment of the 1982 Constitution were intended to promote specific policies initiatives of the Dengist regime, most obviously, economic reform.\textsuperscript{333} Thus, China’s 1982 Constitution demonstrates a complexity that is far richer than the legally progressive charters of other developing nations; but also, serves as demonstrative

\textsuperscript{330} Id. at art. 6.

\textsuperscript{331} See id.

\textsuperscript{332} Id. at art. 12.

\textsuperscript{333} I am grateful to Professor Pitman Potter for pointing this out.
evidence of a political and ideological victory that had been successfully fought in the preceding years.

Second, the presence of inconsistent language in the 1982 Constitution I submit is not accidental. Rather, it reflects the continued existence of contradiction as a prevalent component and motivating feature within the contemporary Chinese discourse. Perhaps in its most unconcealed fashion, the existence of this contradictory language in China’s Constitution demonstrates a synthesis of ideology and law that harks back to its historical importance discussed above. I contend that the presence of this language is the Marxian dialectic at work, to wit, the process of change through the conflict of opposing forces, whereby a primary and a secondary aspect characterize a given contradiction. The secondary aspect succumbs to the primary, which is then transformed into an aspect of a new contradiction. Put more practically, this tension in the earlier constitutional language of China serves as additional evidence of a period of socialist transition. The existence of these contradictions has in no way subsided with the 1982 Constitution. Instead, the regime’s continued constitutional revisions and subsequent amendments since 1982 have only served to amplify these conclusions and are examined below.

3. Revisions since 1982

In 1988, two important amendments were made to the 1982 Constitution. The first expressly spoke of an individual economy. For the first time the Party embraced

334 See generally supra Parts III & IV.


336 See Subrahmanyam, supra note 51, at 19.
language that not only recognized, but promoted, the existence of a private sector.\textsuperscript{337} Demonstrating this new support, Article 11 states “[t]he private sector of the economy is a compliment to the socialist public economy[, t]he state protects the lawful rights and interests of the private sector of the economy...”\textsuperscript{338}

The second revision of importance, which in my view, was so obviously designed to coalesce with the Party’s 1986 promulgation of the \textit{PRC Wholly Foreign-owned Enterprise Law} (WOFEs), sought for the first time to protect the interests of foreign investors by constitutionally obligating the state to safeguard their assets and property.\textsuperscript{339} State endorsed property protections are reassuring in the context of an investment setting that \textit{inter alia} obligates a foreign party to bear the entire risk of loss in a venture with a Chinese entity.

Subsequent modifications made in 1993 were unabashed in promoting the overall objective of capital accumulation. Somewhat conspicuously, language was added to the Preamble which expressly provides that the Chinese state is currently engaged in a “primary stage of socialism.”\textsuperscript{340} The use of such language categorically assumes that a secondary stage is to come, and gives credence to the suggestion already put forth that China is actively embarking on a quest for capital accumulation in an effort to prepare for a later socialist transformation.

However, while the impact of the 2004 amendments are discussed below, the language of the 1999 revisions, standing alone, is arguably the most powerful with

\textsuperscript{337} \textit{See id.}

\textsuperscript{338} \textit{See Constitution, supra} note 329, at art. 11.

\textsuperscript{339} \textit{See id.}

\textsuperscript{340} \textit{See Constitution, supra} note 329, preamble.
respect to their relevance to the international community. Among others, Article 11 was reworked from the original language of: ""[t]he individual economy of urban and rural working people...is a complement to the socialist public economy’ to ‘individual, private and other non-public economies...are major components of the socialist market economy.’"" Noticeably absent from this description is a reference to the rural peasantry, which historically and continues to this day to account for a large percentage of China’s population. Some present day commentators argue that China’s Constitution reflects demographic changes that have swept over the country in recent years, including both the rise of a sizeable entrepreneurial middle-class as well as unprecedented migrations of the rural peasantry into major urban centres. In accounting for these changes, the arguments suggest that the regime has had to alter its political base or fear losing its legitimacy in the wake of China’s dramatic transformation. As a result, no longer are the rural masses the indispensable source of political support they once were, officially holding the distinction until the late 1990s. Rather, today’s political legitimacy now rests with a growing urban educated middle-class.

However, in my view the apparent innocuous pronouncement of Article 11 suggests something more than mere domestic political posturing. In addition to indicating an obvious shift in whom the regime is attempting to appeal to by

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341 See Subrahmanyan, supra note 51, at 20.
342 See id.; see also Fewsmith, supra note 151, at 13-14; Potter, Riding the Tiger, supra note 113, at 325; Solinger, supra note 151, at 176.
343 See id.
344 See Fewsmith, supra note 151, at 13-14; Subrahmanyan, supra note 51, at 20.
345 See Subrahmanyan, supra note 51, at 17-18.
incorporating entrepreneurial classes into the Party, the force of Article 11 also assuages the chronic concerns of foreign investors, whom, despite their rampant investment activity prior to the 1999 amendment, lacked any entrenched legal protection for their operations in the country. 346 As with other recently enacted constitutional guarantees, such as for example, the entitlement to ownership of private property (discussed below), the addition of these constitutional protections although largely symbolic, 347 nevertheless provide claimants with an articulable source of law in the event of dispute.

Moreover, the removal of rural references from the Constitution serves as a clear indicator to foreign audiences that China is changing. 348 By abandoning its rural roots, the Party is attempting to demonstrate to the world that large collectivist farms that once proliferated the countryside are now only entities of the past. The implicit message contained in China’s constitutional reforms is that contemporary China bears little resemblance politically or economically to the nation that hosted Richard Nixon on his historic visit in 1972. Rather, today’s China wishes to promote a much more modern appeal for foreign investors, as Shanghai and Shenzhen serve as the economic inspiration for the rest of the country and the primary loci for foreign investment. The downgrading of the importance of rural classes in the Constitution further promotes a perception of modernity, thereby making China an ever more attractive site for foreign investment.


347 See id.

Given its reliance on attracting foreign investment, China has been forced to deliberately overplay the importance of its urban centres. This is to say that what should happen under a classic Marxist appeal is very different from what is occurring. While under the current circumstances a redistribution of wealth would appear to be in order in the face of a re-emergence of urban and rural class divides since the early 1980s, the likelihood of such a scenario seems extremely unlikely. Contemporary factors that are preventing such a development include: current leadership elites that are almost exclusively educated in metropolitan centres, the growing formal and informal relationships between the Party and private urban entrepreneurs, and the critical inability of a disenfranchised peasantry to effectively mobilize and threaten urban based elites in the modern era.

The correctness of the regime’s decision to consistently ignore the plight of rural areas is certainly debatable and is revisited (albeit briefly) below in my conclusions. However, the necessity over whether the Party should align itself with an urban populace cannot similarly be attacked. Increased economic and industrial development—which at present is most attractive in China’s growing urban centres—operates as one of the few uncontested policy arenas where relatively little internal opposition is heard. Thus, the decision to promote an urban middle-class elite has the effect of allaying domestic and foreign concerns simultaneously.

See Fewsmith, supra note 69, at 19-22.

See id.

Certainly, the absence of rural rhetoric alone has not been the solution to a continued interest in foreign investment. The average sophisticated foreign investor cares little about a rise in class inequality, but is instead naturally preoccupied with the protections and legal guarantees associated with his or her investment. Additional protections came with the revisions in the 1999 Constitution which saw the explicit incorporation of the term “rule of law.” The provision, nestled within Article 5, now reads: “The People’s Republic of China is implementing the administration of the country in accordance with the rule of law, adhering to the Socialist rule of law.”352 While the 1982 Constitution contained language that considered the Constitution the paramount source of law in China and that no entity was above its application, the explicit reference made in 1999 has lead to an abundance of literature in an effort to decipher what the term “rule of law” means in a Chinese setting.353 A survey of the literature demonstrates that Western scholars subscribe to a mixed appreciation for the term.354 Many applaud the addition of the phrase and propose that its inclusion is a further development in China’s ongoing legal maturation. However, at the same time, these same supporters display misgivings over the “completeness” of the theory and whether such a concept, as it is generally understood in the West will ever similarly take root in China under a Leninist political structure.355 The impetus for formally including the term is also the subject of debate amongst scholars. Some have stressed that the incorporation of the familiar

352 See Constitution, supra note 329, at art. 5 (emphasis added); see also Chang, supra note 346, at 33.

353 See generally Lubman, supra note 268; Randall Peerenboom, China’s Long March Toward the Rule of Law (2002); Chang, supra note 346, at 33-35.

354 See id.

355 See id. In particular, for a helpful review of the criticisms on the “rule of law” in China see generally Randall Peerenboom, China’s Long March Toward the Rule of Law 126-174 (2002).
Western-based phrase was a deliberate attempt to pre-empt the recurrence of the “cult of personality” power imbalances that characterized the later years of the Maoist era. Others have argued that the inclusion of the term is principally intended to thwart impropriety, effectively signalling to Party members that the regime is serious in its efforts to prosecute officials for corruption.

The above demonstrates that the inclusion of the common law-based expression “rule of law” has a legitimate practical application in China. Furthermore, the use of the expression reveals how the doctrine is simultaneously utilized as a sword—to combat corruption—and a shield—to protect the sanctity of Western-based constitutionalism. However, as valid as these uses of the doctrine may be, they each fail in my estimation to appreciate fully the importance of external impressions in an era of internationalism. Hong Kong-based lawyer and scholar Gordan Chang has implicitly suggested that the incorporation of the phrase has been motivated largely by a desire to reassure foreign investors; rather than an attempt to demonstrate a concern for the development of domestic legal principles. In other words, Chang has recognized that the inclusion of such a foreign concept to Chinese traditions has less to do with domestic considerations and was instead designed to promote confidence amongst an on looking foreign clientele—effectively, assuring investors that arbitrary and non-transparent policies are

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356 See Chang, supra note 346, at 33; Subrahmanyan, supra note 51, at 20.
357 See id.
358 See Chang, supra note 346, at 33.
359 See id.
360 See id.
confined to China’s past. Viewed through this optic, China’s more recent constitutional amendments appear obvious in their objective. The Party’s formal inclusion of Jiang Zemin’s “three represents” theory, and its inherent support of private business is a logical extension of the earlier constitutional revisions of 1999. Moreover, the amendments made at the 16th National Congress in November of 2002, can be considered the initial precursor to China’s most recent constitutional guarantees regarding the ownership of private property which was adopted in March of 2004.

As Randall Pereenboom has noted, the inclusion of private business in the Party’s official ideological dogma—adopted in the fall of 2002—has given China’s new entrepreneurial class access to credit which had traditionally been extremely difficult for this group to obtain given their apparent revisionist persuasions. In turn, this access to credit and the regime’s overall support for the growth of a mercantilist class has only further ignited the interest of investors, who, now armed with the knowledge that private Chinese operations have the financial support of large state-owned institutional lenders, perhaps more than ever, may make investors more eager to conduct business with Chinese entities.

In recent years, with the ever-increasing solidification of individual rights in the Constitution, the document has begun to develop a series of characteristics which are endemic to Western liberal societies. At the same time, it is important to question why these changes are occurring. The formal incorporation of a rights-based jurisprudence is

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361 See id.

362 See Fewsmith, supra note 151, at 13-14.


364 See Subrahmanyan, supra note 51, at 21.
not the product of a proactive monumental paradigm shift within Chinese legal
philosophy, but rather may be said to be reactive, as the country attempts to grapple with
unprecedented change to its social and economic character. Alluding to the forces
effecting this change, Stanley Lubman has remarked:

[China’s] Constitution defines the direction that the communist party is
marching in at the particular moment, rather than endowing citizens with
rights that are fundamental. Now they’ve decided they have to go further
[by cementing the right to private property] because they have a rising
middle-class that wants protection of their property rights.366

However from its face, Lubman’s critique ignores the importance of externality and
rationalizes China’s constitutional changes from an exclusively domestic perspective;
suggesting that internal political legitimacy is the sole criterion for these adjustments.367

Moreover, Lubman goes further. He believes that constitutional developments that have
evolved in China since the early 1980s are essentially reactionary and vacuous, rather
than exemplifying a development in ideology that is currently being realized.368 He
comments:

It comes down to the fact that Chinese ideology, especially in the last 20
years, must be constantly changed to conform to the realities of social and
economic transformation while at the same time maintaining that the
ideology has been consistent. [China’s leadership] seem to think that the
more consistent they can be, the more legitimate they are. This has made
the ideology increasingly hollow, and (each new ideological line) is just a
formula that sanctifies whatever changes have been made by the
leadership, but none are real substantive developments.369

365 See id.

366 Id. (quoting Stanley Lubman).

367 See id.

368 See id.

369 See Arjun Subrahmanyan, Constitutionalism in China: Changing Dynamics in Legal and Political
Debates, CHINA LAW & PRACTICE, May 2004 at 21.
Lubman's conclusions—that is, "that ideology must remain static over time"370 is debatable. Such a rigid requirement has been rejected by at least a few commentators,371 and has even been described as an "absurd" necessity in the modern world as material conditions change.372 From the little that I have been able to discern in this ongoing debate, it would seem that Lubman and other contemporary Sinologists appear to have resigned China's ideological pronouncements to schizophrenic irrationality. Rather than subscribing to these conclusions myself, I instead posit that these interpretative problems lie with an "inability of analysis in the West to interpret China's evolving Communist ideology and the world view behind the[se] changes."373 Undeniably, all Western observers—try as they may—are inherently limited by some degree in their capacity to perceive and appreciate indigenous contexts.

With the aid of the above proviso, the regime's recent formal receptiveness to private property in March of 2004 is not altogether illogical. One commentator has noted that reference to an entitlement to lawful or legally obtained property, not only renews the Party's commitment to the ridding of corruptive practices, but also may subtly signal that illegally obtained property will be confiscated and presumably repatriated to the rightful owner.374 Once more, this serves as an encouraging reinforcement for the potentially sceptical foreign investor, in essence, providing that not only will property be protected from the onset of an investment, but should an investor become a victim of a

370 See Chai, supra note 45, at 164.

371 See generally id.; see also DIRLIK, supra note 5, at 362; SELDEN & LIPPIT, supra note 165.

372 See Chai, supra note 45, at 164.

373 Id.

374 See Subrahmanyan, supra note 51, at 21.
criminal act, the state supports the process by which an investor may attempt to regain legal title to the asset. The kind of nuanced interpretation of Chinese law being employed here (and for that matter, throughout the entirety of this thesis) is hardly novel.\textsuperscript{375} In a country such as China that still carries with it an impression of lawlessness in the minds of much of the world, the impact of these guarantees should not be under-appreciated. Naturally, in contradistinction to this argument, critics argue that constitutional rights may be hollow and effectively useless to a foreign investor if they prove to be unenforceable, a claim which is buttressed by the Constitution’s silence on the issue of enforcement. Furthermore, China’s Constitution fails to speak to the issue of court access in the event that a formal dispute arises. Nevertheless, as chimeric as these protections appear to be, they are nonetheless tangible and at a minimum provide a foreign investor with a source of law that is able to be referenced in the event of a dispute. Thus, at some level the particular laws that undergird China’s foreign investment strategy, such as contract law become justiciable. As a consequence, if China were to fail in honouring these protections outright, the overall net effect would be counterproductive to the state’s primary economic motivations. In turn, the international community frustrated by the overt lack of security for their investments would become less enthusiastic to invest, despite the intoxicating attractiveness of China’s markets.\textsuperscript{376}

\textsuperscript{375} See Chang, supra note 245, at 364-65. Chang argues that words used in the titles of laws or hortatory language of a preamble “which are usually inconsequential in the construction of Western laws...can often reveal important insights [in the Chinese context].” \textit{Id}. Chang notes that the use of this language “has tended to have greater legal content and literal meaning than in Western legal systems.” \textit{Id}.

\textsuperscript{376} In making this statement, I am reminded of a book by Jonathan Spence that seeks to explore this idea of China as the great marketplace of the world. \textit{See generally} JONATHAN D. SPENCE, THE CHAM’S GREAT CONTINENT: CHINA IN WESTERN MINDS (1998). In a rather unassuming fashion, the book surveys the misperceptions that the West has long held since the arrival of Marco Polo regarding China’s penetrability.
Further still, some commentators have argued China’s constitutional revisions, in particular, the recent enactments regarding private property have placed pressure on some of the countries other political outlets. Donald Clarke joined the debate on the issue, observing:

[The private property] amendment puts a kind of pressure of the NPC [National Peoples Congress] to come up with new legislation. The changes are in part the declaration of a legislative programme. A particular group of people who want to put the law on the books about compensation for taking private property now have a much stronger rhetorical weapon to say that this should be on the NPC’s near-term agenda and that the law should have this approximate content.377

Clarke also notes how these reforms may also have the effect of mobilizing private businesses into securing greater protections for themselves.378

Yet, arguably, Clarke too fails to appreciate the importance of externality in light of China’s WTO accession. Like his other contemporaries, Clarke’s emphasis centres on finding a nexus between the expansion of individual constitutional guarantees and a direct correlation to domestic political legitimacy. Rather, as already noted and now reiterated here, the thrust of China’s constitutional guarantees in the area of individual rights lies to a greater extent with the international community then it does with its own domestic agenda.379 Pressure to guarantee property protections for foreigners, as well as the growth of a heightened political and moral consciousness within the international trading community, has inspired China to ostensibly liberalize its constitution or risk disruption to its economic development scheme.

377 See Subrahmanyan, supra note 51, at 22.
378 See id.
379 See Chang, supra note 346, at 33.
Summary

The presence of contradiction that was once so central to Chinese ideology continues to manifest itself in contemporary Chinese law.\textsuperscript{380} China’s Constitution, the country’s highest expression of positive law emotes these ongoing contradictions. Much has been written about the relationship between constitutionality and political legitimacy as being a key issue in China as it undergoes wrenching domestic change. However, the role of external foreign impressions as they relate to China’s Constitution has not to date, in my view, received deserved attention amongst Sinologists devoted to the study of law. In making the argument, the position adopted herein is that the regime’s political legitimacy (both present and future) has come almost exclusively from promoting foreign investment. To ensure the short-term success of that goal China has sought to protect the interests of foreign-based investors and an emerging domestic middleclass to the exclusion of a large per cent of the populace—the rural peasantry. In doing so, China has transformed its Constitution—traditionally a wholly domestic document—into an unabashed international brochure designed to promote continued foreign investment.

D. Contract Law

Pitman Potter has commented, that “[p]erhaps no single area of Chinese law encapsulates so thoroughly as does contract law the interplay of legal and economic reform.”\textsuperscript{381} However in doing so, contract law also holds enormous evidence for the existence of contradiction within Chinese law and serves as further corroboration of the

\textsuperscript{380} See \textit{supra} Part III & IV.

\textsuperscript{381} See \textit{POTTER, supra} note 247, at 38.
transitory process in action. The enactment of the Unified Contract Law (UCL) in 1999 reflects not only a culmination of legal reform that borrowed heavily from the international community, but also an ideological direction that required further refinement in light of legal inadequacies brought on by changing material conditions. The ensuing singular focus on contract law has been purposeful in an effort to illuminate two important principles. The first is that standing alone, no other single Chinese law expresses the kinds of tensions between both liberal economic development and a desire for continued authoritarian rule. Second, the subject of commercial contracts in general provides the basis for international commercial arbitration of which China is currently such an active participant. Therefore, the focus on contracts here is in many ways directly linked to the forthcoming section (Part VI), which provides the evidentiary foundation for China’s current preoccupation with a transitional or “primary stage” of socialism.

1. The Development of Contract Law in Historical Context

In the West law embodies ethical norms that are either inviolable, such as constitutions, or at the very least, encompass broad public policy statements which are necessary for the governance of an orderly society, such as torts or criminal law. In China, however, law has taken on a strict instrumentalist form. In being instrumentalist, law becomes merely a tool to give effect to state policies. As a result,

382 See id.
383 See POTTER, supra note 247, at 10-12; see also LUBMAN, supra note 268, at 130-137.
384 See id.
all rights of autonomy are dependent upon positive law for their parameters, in opposition to Western traditions that view law as restrained by natural rights.\(^3^8\)

The dichotomy between Western conceptions of the “rule of law” and common law contract principles, which seek to develop but simultaneously regulate the bargaining capacities of individuals, has not been lost on contract scholars. One observer has remarked:

In the West, it is believed that the objective and predictable enforcement of contracts is desirable because it maximizes the welfare of the parties involved, thus promoting the welfare of society as a whole. Individuals enter into contracts because they believe that an exchange will make them better off. Where contracts are enforced in an objective and predictable manner, individuals are better able to determine which transactions will be wealth-maximizing and are able to shift the risk of uncertain events in economically efficient ways. On the other hand, where contractual enforcement is subject to changing state policy, wealth-maximizing transfers may be voided by the state or never attempted due to the risk of contractual non-enforcement. Further, the resolution of contractual disputes by a legal system that is an impartial mediator of interests is beneficial for society because it establishes rules to resolve future disputes and ‘encourage[s] socially desirable behaviour by future bargainers.’\(^3^6\)

Although the above rationale is not an indigenous development of the Chinese legal system, it has nonetheless taken root as one of the more predominate legal values in recent years throughout the era of economic reform. During this time, China has turned to foreign investment as the primary vehicle for the acquisition of capital. As a result, Western norms regarding contractual arrangements have

\(^{3^8}\) "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights." The United States Declaration of Independence para. 1 (U.S. 1776) (emphasis added).

become increasingly important,\textsuperscript{387} as the West’s demands for consistent enforcement to ensure the maximization of wealth with a correlative reduction in associated risk has been the impetus for China adopting these self-imposed restraints.\textsuperscript{388} However, Western businesses engaged in international commercial transactions “bec[a]me increasingly concerned about the perceived risk of contractual non-enforcement in the PRC,”\textsuperscript{389} despite the PRC’s reform efforts to model Sino-foreign contracts upon Western based common law.\textsuperscript{390}

It is worth noting that the notion of commercial contracting was not a new phenomenon for China during the reform efforts of the late 1970s and early 1980s. Rather, it has been argued elsewhere that the idea of contracting existed as early as the Han dynasty (although the effects of those contracts appear to have had more to do with the sustainability of an orderly society then they did with a development of mercantilism).\textsuperscript{391} Moreover, other commentators argue that there existed an identifiable relationship between the socialist planning of the Maoist era, and the necessity for contractual relations.\textsuperscript{392} Of course, such a relationship, real or imagined is fraught with


\textsuperscript{388} See Lewis, supra note 386, at 502.

\textsuperscript{389} Id. at 502 (referencing Erik Guypt, S&P Warns China That Confidence May Be Hurt by Contract Disputes, Wall St. J. Eur., Dec. 15, 1994, at 13, available at 1994 WL-WSJE 3171393. In the article, James Penrose, then assistant General Counsel for Standard & Poor’s Ratings Group warned that China’s continued ability to raise foreign capital faced increased risk because of a “pattern of repeated behaviour” in which state-owned, Chinese businesses allegedly breached contracts with Western companies.”) See id. at n.44.

\textsuperscript{390} Id.

\textsuperscript{391} See Hugh T. Scogin, Jr. Between Heaven and Man: Contract and the State in Han Dynasty China, 63 S. CAL. L. REV. 1325, 1329-30 (1990). Scogin argues, that “in spite of the absences of references to contracts in law codes [of Imperial China], the issue of private contract enforcement was a matter of concern for the Chinese legal system from its inception.” Id. at 1329.

\textsuperscript{392} See Cheng & Rossett, supra note 387, at 163-164.
irony, as Mao repeatedly throughout the 1950s demonstrated little patience for law and viewed it as a bourgeois trapping. Nevertheless, noting this interplay between the Maoist era and a reliance on contract law, Cheng and Rossett write:

China during the first generation after 1949, used the forms of contract to embody written planning orders. The contracts were largely unnegotiated and in no substantial sense reflected choices on the part of the enterprises that were bound to deal together by the contract order. In this sense, “contract” can be adopted to serve a socialist system of central planning almost as readily as it can be used to support a capitalist system of free enterprise. At the very least, contract techniques make it easier to decentralize the planning process by allowing the parties at the operating ends of the system to create a binding form of obligation, the contract order. Although the central planner may remain in control of the operation, everything does not have to stand still and wait for the issuance of detailed commands from the center before the plan is translated into specific transactions.

Regardless of the existence of a relationship between the necessity of contracting and the era before reform in China, it is well settled that the role of contracts took on a much different dimension under the tenure of Deng Xiaoping. In an effort to address the “inadequacies of socialist planning and traditional institutions of economic exchange in industry and commerce,” at least three key objectives directly related to the utilization of contract theory were employed:

394 See Cheng & Rossett, supra note 387, at 163-164.
395 See id. at 181-82.
396 Id. at 181.
(a) through contract exchanges, markets would be created and incentives expanded to improve and increase the volume of goods;
(b) through contract exchanges, Chinese economic activity would bring it into closer linkage with the world system, increasing foreign trade and Chinese access to capital and technology; and
(c) through contract exchanges and the creation of markets to supplement central state planning, the efficiency of economic activities would be enhanced and allocative decisions would be rationalized.397

In an effort to meet these objectives, at least three distinct set of contract rules were established in the aftermath of 1979.398 The first was a set of agricultural responsibility contract rules that were used to reorganize the redistribution of rural land to households.399 These arrangements were put into contractual form and were reminiscent of traditional feudal land agreements between landlords and tenant farmers.400 The second type of contract rules that developed were contracts predicated on civil agreements between individuals.401 At their inception, these rules were thought to operate on the periphery and were of limited application because of the original narrow usage of private property in individually owned enterprises.402 However, the growth of these areas, exemplified by the March 2004 constitutional amendment regarding private property (referred to above) would suggest that these kinds of contractual relations are growing in terms of their utilization and importance. Finally, the third set of contractual relations that will be the focus of the remaining discussion concern economic contracts. It is within this realm of contracts that the ever-present tensions of contradiction continue to permeate the

397 Id. at 182.
398 See id. at 204.
399 See Cheng & Rossett, supra note 387, at 204.
400 See id.
401 See id.
402 See id.
discourse, both in the policy discussions and in the resulting implementation of law that surrounds contemporary contract theory in China.

2. Modern Chinese Economic Contract Law

The enactment of the Economic Contract Law (ECL) in 1982, represented the PRC’s first attempt to codify a single and coherent national law on contracts. The ECL applied only to domestic contract relations between Chinese parties. Out of necessity, the ECL was augmented with the enactment of the Foreign Economic Contract Law (FECL) in March, 1985. As implied by its title, this law was applied to contracts between foreign parties and domestic Chinese entities. Coupled with an additional law, dealing with contracts involving technologies, these three laws comprised the corpus of contract law in China.

The UCL took effect in October 1999. This law marked the first time that a single law of contracts was to apply to both Chinese-Chinese relations, as well as Chinese-foreign relations. In addition, it also subsumed all substantive contract topics under a single law. The UCL was more than twenty years in the making, and reflects the insights of some of China’s best legal literati, in contrast to the poorly drafted

\[403 \text{See Potter, supra note 247, at 38.}\]
bureaucratic works which characterized China's earlier contract laws.\textsuperscript{404} By comparison, the UCL is an enormous document, containing four hundred and twenty-eight articles.\textsuperscript{405}

As a result of the document's immense size and breadth, no single, digestible commentary could possibly explore all of the law's permutations. Given these inherent limitations, the emphasis here is confined to a few areas of the UCL that I argue allow the regime to retain significant control over areas of international trade; thereby, allowing China to mitigate the constant thrust of Western liberal values. Where these "veto points"\textsuperscript{406} exist within the UCL, a short explanation as to how these interpretations may sustain the Party's domestic political control are explored.

3. The Presence of Policy tensions within the UCL

Throughout the drafting of the UCL it has been observed by a number of scholars that a debate emerged within the National People's Congress' Legislative Affairs Work Committee. The subject of the debate was how the Party was going to adequately balance the requirement for autonomy—an imbedded tenet of international contracting—with the


\textsuperscript{406} The term "veto point" is used throughout this section to denote those areas within the UCL that I consider possible avenues of entry for the Party's legitimate involvement in a contract in an otherwise unauthorized context. The origins of the term however, are quite different. See Daniel Rubenstein, \textit{Legal and Institutional Uncertainties in the Domestic Contract Law of the People's Republic of China}, 42 \textit{McGill L.J.} 495, 515 (1997). The original author's usage refers to ways in which the state regulates an individual's "right" to contract. \textit{Id.} As a result, I merely borrow the term, but not its original meaning as it appears.
regime's ongoing need to be mindful of “public welfare.” The regime’s overarching interest in maintaining public order is perhaps no better reflected than in Article 7 of UCL, which provides that contracting parties are obliged to respect social ethics, social and economic order and are to refrain from undermining the public interests of society.

In his analysis of the UCL, Pitman Potter has noted that the drafting process of the law reflects the existence of tensions between principles of autonomy that embody this ostensibly progressive law and the Party’s ongoing desire for regulation. The latter being a bureaucratic concern over governance issues, which in China have historically been predicated on increased uniformity. The presence of these contradictory values owe their existence to the complexity of China’s material conditions. Alluding to the difficulty imposed by China’s state of development, one of the country’s leading jurists and original drafters of the UCL, and former President of the China University of Politics and Law, Ping Jiang, remarked in a speech while visiting the U.S. in 1996:

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407 See Contract Law, at ¶1-6.2.6; see also Ping Jiang, Drafting the Uniform Contract Law in China, COLUM. J. ASIAN L. 245, 248, 257-258 (1996).

408 See Contract Law, supra note 404 at ¶1-6.2.9; see also UCL, supra note 405, at art. 7.

409 See Contract Law, supra note 404 at ¶1-6.2.8.

410 See id.
Contract law represents the economic relationships within a country. The nature of China's economic relationships reflects the fact that China is presently at a transition period. It is moving from a planned economy toward a market economy. The number and proportion of products produced under the planning system have decreased considerably, but they still make up an important part of the economy. A market economy remains a goal to be achieved. Therefore, the Uniform Contract Law cannot cover merely the contractual relationships under the market mechanism; it has to cover those relationships under the central planning mechanism in place. This is a very difficult problem for legislation because the standards for contracts under planning and market mechanisms are very different, and it is unrealistic to have two contract laws, one for contractual relationships under a market economy and one for those under central planning. The general provision of the Uniform Contract Law provides that 'if contracts are required by state planning, parties shall do so in accordance with state instructions.' The difference in specific rights and obligations, such as that between planned and unplanned transportation projects, will be set out within the specific types of contracts. This is also due to China's actual situation.\textsuperscript{411}

While from the above it can be understood that the encouragement of autonomy under the UCL will further hasten a transition to the "secondary stage" of socialism by aiding in the provision of the resources necessary to effect such a transformation, such freedom of interference at present is not completely unfettered. "...[C]ontractual parties must also adhere to laws and administrative regulations which may, and often do, privilege domestic parties and generally permit state agencies to intervene in contract formation and performance."\textsuperscript{412} Regime imposed limitations on autonomy provides China's leadership elites with a veto point by which they are able to restrain those contractual relations they determine to be contrary to the state's interest. This capacity to review, and, if need be, prevent particular contractual relations from forming is an important and powerful mechanism in allowing the Party to remain a dominant force in contemporary

\textsuperscript{411} See Jiang, supra note 407, at 256.

\textsuperscript{412} See Contract Law supra note 404, at ¶ 1-6.2.9.
China. Such discretion provides leaders with the opportunity to keep entrepreneurial practices in check, and ensures that the state remains at a minimum an indirect beneficiary of commercial relations.

Contractual controls over the forces of production are only the most obvious of benefits which may be derived under the current system; however, such tactics are far too susceptible to a claim of outright repression to derive any long-term legitimacy from critics. An additional consequence of existing contractual relations that to date appears uncultivated by scholars and pundits alike is that the regulation over contracts also provides the means to achieve a transitional end. Namely, that while the capacity to regulate contracts may contain the added benefit of limiting political opposition forces from acquiring resources—monetary or otherwise—such superiority also enables China’s leaders to focus on processes that may advance a long-term ideological direction. It needs to be stressed that the motive for such control must be viewed in broader terms than those that are too easily politicized, such as for example, outright repression. By focusing on the reasons for such contractual control, and thereby gaining a greater appreciation for the origins of such policies, the full weight of China’s future trajectory is given definable parameters. Additionally, by realizing the future goals of Chinese society a greater moral and political legitimacy might be afforded to China’s leaders from members of the international community. This may result from the leadership’s deliberate and steadfast commitment to long-term egalitarianism, which, for example, stands in stark contrast to China’s North Korean neighbours, who despite overtly subscribing to a communist ethos, fashion few if any objectively legitimating policy goals.

413 See Peerenboom, supra note 355, at 242.
Regarding the CCP's control over rights and freedoms, a similar debate has raged for sometime in the context of human rights. Some native Asianists have argued that the concepts of universal human rights, as a body of separate inviolable principles are a uniquely Western creation. This group contends that when these values are imposed by external sources, they fail to resonate in the underdeveloped economies of much of Asia, and furthermore, might be viewed as an affront to local Confucian-based cultures. Yet, other scholars such as Jack Donnelly have argued that individual rights are not a uniquely Western concept that is incompatible with Asian societies. He proposes that to claim that individual-based rights cannot live along side local Asian cultures is typically a pretext for continued long-term repression, and therefore we need to be wary of categorical sacrifices of human rights. He effectively asks: if the rhetoric emanating from Beijing regarding human rights is in essence "not yet," after slightly more than fifty years of power, then when will conditions be appropriate for the recognition of universal rights? He answers his own rhetorical question with a presumptive "never."

I offer the above illustration of human rights in an effort to demonstrate by analogy the tensions that are inherent in the developmental discourse in much of contemporary China. While I am inclined to side with liberal academics in arguing that the issue of human rights has universal application, the same is not true of contract rights.


415 See id. at 67-68.

416 See id. at 67-68, and 72.

417 See id. at 72.

418 See id at 79.

419 See id.
Any contentiousness over these issues is entirely distinct. In comparing the two, the moral implications surrounding the subject of contracting is easily overshadowed by the obvious importance of basic human dignities. Because the relative consequences of contracting cannot justly be squared with human rights, additional latitude should be afforded to the Chinese regime in allowing it to pursue a path of controlled development. Justification for this restrained approach admittedly lies in a yet undetermined point in the future, but is permissible in my view, if economic egalitarianism should ultimately result once such a transitional phase has occurred. It is from this position which may appear at first blush to be overly apologetic that I offer the following observations, yet it is maintained that what lies beneath China's current legal constructions is something far more salutary then the rather banal suggestion of blanket repression.

4. **Who may contract, and limitations of contracting parties**

Under the FECL, a domestic Chinese individual did not have the power to contract.\(^{420}\) Instead, the contracting rights of domestic Chinese were governed by the General Principles of the Civil Code.\(^{421}\) While all foreign juridical entities were governed by the FECL, only domestic “enterprises” or “other economic organizations” fell under the FECL’s breadth.\(^{422}\) By contrast, the UCL does away with all the previous contractual

\(^{420}\) See Rubenstein, *supra* note 406, at 512.

\(^{421}\) See *id*.

\(^{422}\) See Cheng & Rossett, *supra* note 387, at 207-215. Cheng and Rossett offer insight into the historical reasons why the Party sought to restrain the capacity of individuals to contract. Among the reasons include:

From the beginning of the reform era there has been widespread fear by conservative elements that contract responsibility would be a major step in the unwinding of socialism and the state ownership of the means of production. To mollify these fears the contract law adopted was an economic contract law. The only lawful contracts are those between
fragmentation. Article 2 of the UCL grants contracting capacity to "equal-player natural persons, legal persons, and other organizations..."423 Under the same provision, the UCL’s application is limited to economic contracts, as relationships of a non-economic nature are expressly provided for by other legal provisions.424

Related to the capacity to contract, the absence of third-party beneficiaries under the UCL is notable. Under American jurisprudence, in an effort to soften the common law privity requirement of contract law, a third-party may in certain instances possess enforceable rights under the contract even though such a party was not a signatory to the agreement. The theory relies on a third-party being an intended beneficiary425 (as opposed to an incidental beneficiary) to the contract, and grants relief to a third-party

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legal persons, that is, economic units organized or recognized by the state. By the laws 
terms, individuals generally cannot make economic contracts; their agreements are 
governed by civil law, if they are legally enforceable at all (which, in practical terms they 
usually have not been).

Id. at 209-210 (emphasis added). This restriction in contracting under the FECL gave rise to the practice whereby eligible contracting entities, such as for example universities, would effectively sell their right to contract to entrepreneurs, who in turn would set up operations in the name of the permissible organization. See id. at 211. The effect was to insulate the entrepreneur against a bad deal, so that with proper registration (in the name of a permissible party) a viable right of redress existed. See id. See also Rubenstein, supra note 406, at 513.

423 See UCL, supra 405, at art. 2.

424 See id.

425 See RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981), providing:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Id.
based on principles of equity.\textsuperscript{426} Comparatively, under the UCL there exists no law that provides for the enforcement of rights for parties that are not in privity of the contract.\textsuperscript{427}

Although not readily obvious from the drafting of the UCL, the intentional omission of third-party beneficiaries was not without design. By purposely excluding a potential beneficiary's rights, PRC lawmakers have been able to limit the number of parties subject to any given contract. The resultant effect is that the applicability of Chinese law may be more likely in the event of a dispute because the numbers of parties formally recognized under the contract are fewer. Thus, under governing international choice of law principles,\textsuperscript{428} an inquiry into which country's national laws may apply to a multi-national dispute is made simpler by the smaller number of recognized claimants. Of course, that is not to say that a Chinese party will always be a beneficiary\textsuperscript{429} under a contract; rather, this construction merely improves the probability of the application of Chinese law even where a Chinese party may be a debtor.\textsuperscript{430}

\textsuperscript{426} See National Cash Register Co. v. UNARCO Industries, Inc. 490 F. 2d. 285 (1974). The district court had dismissed the complaint on the ground that there was no privity of contract between the owner and the subcontractor, so that the owner lacked standing to sue. The court held that under the circumstances, since the owner was instrumental in bringing the contract into existence, and the subcontractor's failure to perform had caused him additional expense, the building owner was a subrogee of the contractor's cause of action, with standing to sue. The court concluded that equity required the subcontractor to bear the burden of the increased price which the owner was compelled to pay.

\textsuperscript{427} See Wang Limang, An Inquiry into Several Difficult Problems in Enacting China's Uniform Contract Law, 8 PAC. RIM. L. & POL'Y J. 351, 361 (1999); see also UCL, supra note 405, at arts. 64-65. Article 64 provides: "When the parties agree that the debtor [obligor] will fulfill the debt to a third party, and the debtor [obligor] does not fulfill the debt to the third party or the fulfill the debt as agreed, the debtor [obligor] assumes the liability for the violation to the creditor [obligee]." Id. Article 65 notes: "When the parties agree that a third person will fulfill a debt to the creditor [obligee], and the third person does not fulfill the debt or fulfill it as agreed, the debtor [obligor] assumes the liability for the violation to the creditor [obligee]. Id. Therefore, a third party can neither assert a right, nor have a right asserted against them, if not a formal party to the contract. See id.

\textsuperscript{428} See infra note 433 and accompanying text.

\textsuperscript{429} See UCL, supra note 405, at art. 65 (outlining obligations where the third party is a debtor).

\textsuperscript{430} See id.
It is this favoured application of domestic law—a reality not unique to the PRC—that is increasingly beginning to change the shape of Chinese-foreign relations. This kind of manoeuvring relating to choice of law principles has been much more overt in other areas. Notably, the PRC ratified the United Nations Conventions on Contracts for the International Sale of Goods (CISG), but in doing so conditioned its signature upon the application of domestic Chinese law in those instances where a Chinese entity contracts with a non-contracting state. In addition, the major vehicles of foreign investment—Sino-foreign Equity Joint Venture and Sino-foreign Cooperative Joint Venture operations—are considered Chinese juridical entities, under the exclusive jurisdiction of Chinese law. Finally, “Sino-foreign prospecting and development of natural resources contracts [are] subject to PRC law,” provided these events take place within the territory of China.

431 See generally infra, Part VI.


433 China declared that it would not be bound by Article 1(1)(b) of the CISG, which provides that the Convention applies where rules of private international law lead to the application of the law of a Contracting State. By reserving the applicability of Article 1(1)(b) to China, Chinese domestic-laws, rather than the provisions under the Convention govern international sales contracts between a Chinese party and a party of a non-Contracting state when the rules of private international law lead to the application of Chinese law; see also CISG, arts. 1(1)(b), 95. The U.S. too has opted out of Article 1(1)(b).

434 See UCL, supra note 405, at arts. 2 & 126; in particular, Article 2 of the Law of the People’s Republic of China on Sino-foreign Co-operative Enterprises and Article 2 of Law of the People’s Republic of China on Sino-foreign Equity Joint Ventures. Of importance is that since the Chinese-foreign Joint Venture is considered a Chinese legal entity, where a foreign party contracts with a wholly domestic Chinese entity, the resulting basis of the contractual relationship is not governed by CISG principles.

435 See UCL, supra note 405, at art. 7.

436 See id; see also POTTER, supra note 247, at 44.
Given the Party's recent desire to solidify the application of Chinese law in its national and international legislative agenda, the above discussion supports the argument that the capacity to contract in China is directly related to desirable choice of law principles, which are shaped by the UCL as well as other international agreements. However, as tenuous as this relationship may appear to the truly erudite contract scholar, more readily obvious provisions of the UCL provide China with mechanisms by which it may opt out of internationally accepted norms and practices.

5. **Limitations - Contract Invalidity and “Forced” Contracting**

Under the UCL, contracts that have been arrived at through fraud or coercion, the result of malicious collusion or that are violative of public policy are rendered "invalid." However, invaliding contracts because of public policy considerations is not unique to China. While not all nations, such as for example, the U.S. under the *Restatement (Second) of Contracts* use the term "invalid," the concepts are nevertheless

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437 See UCL, *supra* note 405, at art. 52-53.

438 See *Restatement (Second) of Contracts* (1981). The Restatement deals with enforceability in the following definitional sections:

§ 1. Contract Defined. A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

§ 7. Voidable Contracts. A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.

§ 7 cmt. a. "Void contracts." A promise for breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promisor is often called a void contract. Under §1, however, such a promise is not a contract at all; it is the "promise" or "agreement" that is void of legal effect. If the term "contract" were defined to refer to the acts of the parties without regard to their legal effect, a contract could without inconsistency be referred to as "void."

§ 8. Unenforceable Contracts. An unenforceable contract is one for the breach of which neither the remedy of damages nor the remedy of specific performance is available, but which is recognized in some other way as creating a duty of performance, though there has been no ratification.
similar.\textsuperscript{439} Still, the breadth of the PRC's interpretation of "public policy" is peculiar to China and reflects at times an undifferentiated relationship between governmental power and enforceability.\textsuperscript{440}

Pitman Potter has observed that while Article 6 of the UCL embodies a good faith principle,\textsuperscript{441} an element that is akin to the American notion embodied in the Uniform Commercial Code (UCC),\textsuperscript{442} it is the concept of "social public morality"\textsuperscript{443} provided for in Article 7, which "permit[s] government officials [enormous] discretion in [deciding]...

\textsuperscript{439} See id.

\textsuperscript{440} See Rubenstein, supra note 406, at 515-516. Rubenstein writes:

The state has taken great care to ensure that it does not lose control over the decision to permit or deny someone the right to engage in legally protected economic exchange. Behind a veneer of civil-law language lie carefully constructed "veto points". These make it impossible for would-be businesspersons who are denied juristic personhood to assert against the state a "right" to contract; i.e., they cannot accuse the state of violating the law or their rights. The formal institutional barriers to engaging in productive economic activity are very real and potentially high; how high depends largely on how local officials use their considerable discretionary power.

\textit{Id.} He adds:

Broadening the types of entities that fall under the Contract Law's scope certainly did not dilute the principle of state control over who enters contracts. In addition, "administrative regulations" may be issued by planning authorities and may be just as intrusive and oriented to the plan as policy or the plan itself. Moreover, the prohibition against contracts that violate state or public interests remains. This in itself grants Chinese courts much broader grounds for nullifying contracts than are available to U.S. courts, for example.

\textit{Id.} at 516-17.

\textsuperscript{441} See POTTER, supra note 247, at 47; see also UCL, supra note 405, at art. 6.

\textsuperscript{442} The Uniform Commercial Code (UCC) is prepared by the National Conference of Commissioners on Uniform State Laws, in collaboration with the American Law Institute. Regarding good faith under the UCC, see generally E.A. Farnsworth, \textit{Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code}. 30 U. Chi. L. REV. 666 (1963). UCC § 1- 201(19) defines "good faith" to mean "honesty in fact in the conduct or transaction concerned", while UCC § 1-203 defines good faith for a merchant in the context of transactions in goods as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." \textit{Id.}

\textsuperscript{443} See See. POTTER, supra note 247, at 47; see also UCL, supra note 405, at art. 7.
which contracts are [deemed] lawful and which are not." Practically speaking, trouble with this particular provision may come to the fore in issues involving disclosure, in for example that mutually agreeable exculpatory clauses may even be enough to invalidate an agreement. The raises real concerns as to what kind of interpretation will be given to the “principles of honesty and trust” which are contained in Article 42.

Summarizing this potential conflict, Potter writes:

These limits on contract autonomy suggest a recognition that China’s transition to a market autonomy has not yet progressed to the stage where contracting parties can be imputed with relatively equal access to information and negotiating power. For foreign businesses whose pursuit of commercial advantage is often based on building superior knowledge and access to information, this raises particularly sensitive issues of disclosure. It is unclear, for example, to what extent foreign businesses will be required to disclose market information, potential profit margins, or other information that steers their price negotiations in concluding production and export contracts. Similarly, it is unclear whether foreign investors engaged in joint venture negotiations will be required to disclose any information concerning their costs for capital, equipment and staff in order to avoid liability for lost profits that the Chinese counterpart might have garnered by negotiating a better deal.

While regretfully few English language sources exist that offer comment on how the above interpretations materialize within the Chinese legal system, these and other potential horribles that relate to adverse interpretations are examined in the next section. However, before inviting a discussion of the all-important evidence for this

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444 See POTTER, supra note 247, at 47.
445 See id.
446 See Contract Law, supra note 404, at ¶ 1-6.2.19.
447 Id. (emphasis added).
448 See infra, Part VI.
thesis—namely, how laws are being interpreted in contemporary China—still even more unusually Sino-centric provisions may be distilled from analyzing the UCL.

One such clause, Article 38 of the UCL addresses the flipside of invalidity, and instead authorizes adhesion contracts when they are the product of "state directives or mandated procurement transactions issued to legal persons or other organizations." Pitman Potter suggests that the presence of this provision only gives the appearance of voluntariness. Absent a legal prohibition against the inherent disparity of bargaining power between the state and an individual entity, such an edict would in all likelihood result in a requirement of specific performance. From the perspective of a foreign party, the difficulty would appear to be self-evident. The PRC could in theory attempt to bind a foreign party to deliver under a contract, in the process, potentially igniting issues of extraterritoriality. With an increase of foreign procurement contracts in particular

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449 See POTTER, supra note 247, at 47; see also UCL, supra 405, at art. 38. Article 38 provides:

When the state assigns a directive or goods order task by need, the concerned legal person and other organization should conclude to make a contract in line with the rights and commitments provided in the pertinent laws and administrative legislation.

Id.

450 Id.

451 See POTTER, supra note 247, at 47.

452 See UCL, supra note 405, at art. 38. Again, Article 38 states:

When the state assigns a directive or goods order task by need, the concerned legal person and other organization should conclude or make a contract in line with the rights and commitments provided in the pertinent laws and administrative legislation.

Id. (emphasis added). The above analysis is predicated upon the use of the term "other organization". While it's clear that a joint venture, by definition is a legal person subject to jurisdiction under Chinese law, the same is not true of a foreign based operation, or government which elects to engage in a one-off agreement (or for that matter, multiple procurement contracts) with the Chinese government. Somewhat curiously, I was unable to find any authority that had at least commented on the somewhat ambiguous term "other organization," and its precise definition.
the possibility of such an interpretation (particularly where the commodity is deemed to be a vital necessity by the regime) appears credible.454

Broadening the somewhat narrow scope of government procurement transactions, the potential for a domestic Chinese party acquiring an unduly advantageous position is reinforced by the UCL, which “provides that the invalidity of part of a contract will not invalidate the whole....”455 While by itself this may not warrant alarm, at present “no clear provision is offered for circumstances where partial invalidation would frustrate the purpose of the contract and thus warrant invalidity of the contract in its entirety.”456 As Pitman Potter has observed this could create the untenable result where a foreign party could succeed on a declaration that part of the contract was invalid, but nevertheless be obligated to perform the underlying agreement.457 However, Article 54 of the UCL, which in essence provides cancellation or invalidation of a contract that is grossly unconscionable at the time of its conclusion, might provide at least some relief to a beleaguered foreign party.458

453 See Bruce Stanley, China Aviation Oil: The Fallout: Carriers Explore Fuel Options, ASIAN WALL ST. J. (Hong Kong), Dec. 6, 2004 at A5; Microsoft loses another China govt software deal, but no cause for panic, XINHUA FIN. NETWORK (Beijing), Aug. 12, 2005 available at 2004 WL 99274465 (discussing, the rise of foreign procurement requirements in the areas of jet fuel and software, respectively).

454 See id.

455 See Contract Law, supra note 404, at ¶ 1-6.2.21.

456 Id.

457 See id.

458 See id. On the availability of this remedy to a foreign party, I respectfully wish to clarify the explanation offered by Professor Pitman Potter. Regarding this point, Potter writes:

While application to a court for modification or revocation on grounds of unfairness might be possible under Article 54 of the UCL, this offers only slight comfort. The dispute resolution provisions of the contract remain despite invalidation of the contract. Accordingly, negotiators should avoid linking negotiations over the dispute resolution
6. Dispute Settlement

Under the FECL, litigation was viewed as a last resort, and was to be utilized only after conciliation and mediation had failed to resolve an issue. In fact, it may even be fair to suggest that while arbitration needed to be recognized as a formal mechanism for the resolution of disputes in light of the fact that it was common to many Western cultures, it is at least plausible that PRC lawmakers originally viewed it with some reluctance under the FECL. Perhaps continuing to reflect traditional cultural

clause to concessions given or obtained in other parts of the contract, since such clause [sic] is treated essentially as a stand-alone provision.

Id. (emphasis added). As written, it appears that Potter is making the all important observation that with respect to international commercial arbitration, subsequent court intervention is kept to a minimum. This exclusion of court intervention is one of the hallmarks of international arbitration, absent some sort of unconscionable conduct by the arbitrator or an arbitrator’s findings exceeding the scope of the agreement. In fact, the removal of disputes from a formal court system is often one of the main reason why parties elect to submit their disputes to arbitration in the first place. However, Potter’s words from their face appear to ignore that under the UCL an arbitration panel in addition to a court, may be petitioned for relief. This fact is reflected in at least two translations of the UCL. See UCL, supra note 405, at art. 54; see also The Uniform Contract Law of the People’s Republic of China, (English version) available on-line at Chinese Commercial Law Forum available at http://www.cclaw.net (last visited Aug. 10, 2005). My interpretation of Professor Potter’s remarks appears supported by his singular reference to “a court” absent any mention of an arbitration panel. This issue is raised here only to clarify for the reader that should they interpret Professor Potter’s analysis as I did—that is, that an arbitration panel may not hear a petition for relief—is not the current status of the law. See id. Thus, a determination regarding the underlying unconscionability or material mistake of a contract upon its conclusion may be lawfully submitted to an arbitration panel under Article 54 of the UCL. See id. However, as a practical matter, much like a court, an arbitration panel hearing such a claim will in all likelihood reject the applicant’s claim. Finally, it bears mentioning that I am in complete agreement with Professor Potter’s practical advice recommending clear drafting and the severance of the contract’s terms and conditions from the dispute resolution clause (because of the latter’s treatment as an entirely separate provision).

459 See Contract Law, supra note 404, at ¶ 1-6.2.13.

460 See Foreign Economic Contract Law (FECL) (Adopted on March 21, 1985 at the 10th Session of the Standing Committee of the 6th National People’s Congress) available at http://www.qis.net/chinalaw/lawtran1.htm (last visited Dec. 12, 2004). Article 37 provides as follows:

Any disputes arising from a contract ought to be settled by the parties, if possible, through consultations or mediations of a third party. In case the parties are unwilling to solve a dispute through consultation or mediation, or fail to do so, the dispute may, in accordance with the arbitration clause provided in the contract or the written arbitration
values,\textsuperscript{461} and with it, a tendency to shy away from more Western-based adversarial approaches,\textsuperscript{462} mediation was given a premium in the hierarchy of favoured dispute resolution methods. Under Article 128 of the UCL, arbitration is no longer met with the same reservations as it once was, as parties may elect to submit themselves to arbitration at the immediate onset of a dispute.\textsuperscript{463} The use of litigation under the UCL is also permissible, but only where parties have failed to agree to arbitrate, or the arbitration clause is rendered invalid.\textsuperscript{464} The provision for litigation is slightly broader than under the previous FECL, which barred litigation where there was evidence of an arbitration agreement, regardless of the validity of the clause.\textsuperscript{465} Apparently, the rationale for this practice was that since the parties agreed to arbitration in the first place, they should subsequently be barred from filing suit in court.\textsuperscript{466}

Article 128 also contains language that reflects support for China’s ratification of the New York Convention for Recognition and Enforcement of Foreign Arbitral Awards.\textsuperscript{467} The provision allows a party’s application to the People’s Court for the enforcement of arbitral decisions.\textsuperscript{468}

\begin{flushright}
agreement reached by the parties afterwards, be submitted to a Chinese arbitration body or other arbitration body.
\end{flushright}

\textit{Id.} (emphasis added). The emphasis on traditional non-adversarial resolution methods appears self-evident from the text, and so, my comments made above stem from the prolific use of qualifiers in the law’s support for arbitration.

\textsuperscript{461} See LUBMAN, supra note 268, at 30-32, 217.

\textsuperscript{462} See id.

\textsuperscript{463} See Contract Law, supra note 404, at ¶ 1-6.2.13.

\textsuperscript{464} See id.

\textsuperscript{465} See id.

\textsuperscript{466} See id.
Although unfortunately no single study has yet been conducted on the relationship between judicial and arbitration decisions in China and the effect such decisions have on sustaining the Party’s political power, the above focus on the UCL has been intended to elucidate a single proposition. Namely, that the regime is actively aware of the power of law, and has embraced it as a mechanism by which it is able to exert control over its domestic domain, but also exercise influence over foreign practices by utilizing the power of international regulations. In concrete terms, it is suggested that the amendment over the use of arbitration under the UCL may have as much to do with an aspiring market economy—and with it an appreciation for the growth of international commercial transactions—as it does with the regime’s understanding that control over the interpretations of law may maximize the PRC’s legitimacy at home and internationally. This understanding also simultaneously enables a foundation to be laid

467 See UCL, supra note 405, at art.128.

468 See id.

469 See generally POTTER, supra note 113. I use this book as an analogy in referencing the aforementioned proposition. While this book is largely a biographical account of a single individual, it is the only source this author could find that appropriately elevates the importance of law within the PRC’s overall mandate. The book goes on to suggest that with Peng Zhen acting as a principal architect, the Party’s use and appreciation for law hit an unparalleled high point. However, I suggest regardless of who receives recognition for the re-introduction of law as something more than merely a “bourgeois pursuit,” the Party continues well after Peng Zhen’s death to utilize legal doctrine as a primary vehicle to effect its agenda. See supra Part V and infra Part VI.

470 See Cheng & Rossett, supra note 387, at 190. The authors write:

To join the world and gain foreign exchange for development, China needed to make its legal system consistent with world standards. To trade with foreigners and to attract their investments, China has had to reassure potential partners that it will provide the familiar security of a legal regime. To communicate with foreigners, it has had to talk the special language that is universally used in world trade, a language closely connected with the legal requirements of the world system.

Id.
for China's own legal development. Accordingly, the power inherent in the arbitral process becomes the subject of focus in the following section.

E. Summary

The UCL demonstrates the ongoing ways ideological contradictions continue to pervade Chinese substantive law. The existence of these contradictions should not be underemphasized; particularly, since formal ideological commitments to class struggle under which the doctrine of contradictions grew, are increasingly becoming marginalized in the Party's modern policy pronouncements. While black-letter law in the West has come to be synonymous with at least some relative indication of how law is administered, the same truism does not necessarily lend itself so easily to China. Chinese cases are replete with differing examples between laws as they are written versus the way in which they are interpreted.  

This thesis argues that the resolution of these contradictions have in some measure been provided for in the drafting of the UCL and operate as "veto points," thus, allowing the regime to intervene and offer guidance in the establishment of a preordained objective. I submit that the said "objective" is a transitional stage, which will later mature into a "secondary stage of socialism" concentrating more visibly on classic Marxist-

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Maoist objectives, even though such as a focus has been largely de-emphasized over upwards of the last twenty-five years.\footnote{472}{See supra note 2.}

The UCL serves as the source for China’s international commercial arrangements and so is undeniably one of the most important arrows the regime holds in its quiver. As already discussed, the Party’s ongoing legitimacy is entirely linked to sustained economic growth, of which foreign investment is such an important component. Realizing this importance, the regime and its supporting cast of scholars have intentionally authored the UCL to provide avenues by which China’s courts and arbitration tribunals may employ alternatives to international standards, but which are nevertheless legitimate interpretations of Chinese law.

To date, this inquiry has been largely confined to a discussion of substantive law and its theoretical applications. However, in an effort to complete a contemporary portrait of China, this thesis’ attention must deservedly turn to issues of practice. While I am confident that standing alone my observations thus far are accurate, any socialist critique lacking a practical investigation ignores the Maoist-Leninist call to arms. \textit{“Practice is higher than (theoretical) knowledge}, for it has not only the dignity of universality, but also of immediate actuality.”\footnote{473}{See MAO TSE-TUNG, On the Relation Between Knowledge and Practice, Between Knowing and Doing - July 1937 in SELECTED WORKS (1977)(quoting Vladimir Lenin, internal citations omitted)(emphasis added).}

Appropriately, to substantiate the claims made throughout this piece the forthcoming section turns to the enforcement of international commercial contracts and their resulting interpretations.
VI. ARBITRAL POWER AS DE FACTO LEGISLATIVE FIAT

"There is little use in going to law with the devil while the court is held in hell." 474

A. Introduction

For well over a decade, commentators and investors have raised concerns over the degree to which foreign parties are treated fairly in their attempts to enforce arbitral awards in China. 475 However as one scholar has noted, much of the criticism surrounding enforcement in China is based on a handful of anecdotal accounts, which have lacked a firm empirical foundation. 476

While much of the literature dealing with arbitrations in China has to date centred on the enforcement of awards, comparatively little has been written about the social and political dynamics that occur in China’s arbitrations, often before the case is formally heard. As a result, this section is specifically devoted to examining the issue of impartiality in the Chinese International Economic and Trade Arbitration Commission (CIETAC), and hopes to offer a glimpse into what foreigners might expect from the institution. Given the limited nature of this inquiry, the problems presented and the


475 See e.g., Mathew Bersani, Enforcement of Arbitral Awards in China: Foreigners Find the System Sorely Lacking, 19 CHINA BUS. REV. 1, 5 (1992) (arguing that enforcement problems are so severe that CIETAC has become a paper tiger); Charles Kenworthy Harer, Arbitration Fails to Reduce Foreign Investors’ Risk in China, 8 PAC. RIM L. & POL’Y J. 393 (1999); Greg Rushford, Chinese Arbitration: Can it be trusted? ASIAN WALL ST. J. (Hong Kong) Nov. 29, 1999 (quoting one lawyer as saying China “might as well have not bothered signing” the New York Convention).

resulting analysis cannot be considered exhaustive, but rather, only a sampling of the kinds of conduct that a foreign party may expect to encounter when submitting a dispute before CIETAC.

Part I of this section discusses briefly the merits of arbitration generally. Through articulating a foundation in Part I, Part II offers an examination of CIETAC’s impartiality in particular. Largely drawing on commentaries—where they exist—contemporary opinions by recent scholars and practitioners are highlighted.

Part III turns to a handful of cases to support the proposition, namely, that a foreign party sitting before CIETAC may not be afforded the fundamental principle of impartiality that is common to all other mainstream commercial arbitration forums.477 By way of example, I suggest how bureaucratic and financial interests of the CCP may co-opt private arbitrations.

Finally, Part IV of this section concludes by offering a brief comparative analysis of CIETAC’s immediate reform interests vis-à-vis those concerns held by contemporary advocates and arbitrators who often appear before the Commission. Perhaps not surprisingly, there exists some disagreement in the areas identified.

**B. An Overview of Arbitration**

Regrettably, the souring of relations between parties under contract is not a uniquely domestic or Western phenomenon.478 While the act of contracting by


international parties may employ more sophisticated techniques in arriving at an agreement, such as for example, language translations and a greater complexity of involvement, the immutable res of contracting remains the same. However international disputes, unlike their local domestic cousins, present uniquely troublesome issues.\textsuperscript{479} In a formal court system, unfavourable circumstances for a foreign party often include a distinct advantage for the local disputant, as “unfamiliar procedures, perhaps a foreign language, and in some countries a xenophobic or even corrupt judge”\textsuperscript{480} can thwart even the most prepared litigator. As a result, the reluctance of a foreigner to submit themselves to local judicial idiosyncrasies is not without merit.\textsuperscript{481} Given the regional and cultural disparity in the administration of “home town” justice, it should come as no surprise that as globalization reduces the world’s relative size, international entities are increasingly looking beyond the courts for the administration of justice. In an effort to reduce the threat of bias by acquiescing to litigation in a foreign forum, international contracts include a forum selection mechanism\textsuperscript{482}—that is to say, an arbitration agreement that derives its legitimacy from contract theory and allows the parties to settle disputes “under the rules of a relatively neutral arbitral institution.”\textsuperscript{483}

Because of arbitration’s inherent flexibility, its relative costs in comparison to litigation and the ability to have sophisticated arbitrators adjudicate often-complex disputes, parties prize arbitration as a method of dispute resolution in comparison to the

\textsuperscript{479} See Park, supra note 474, at 74.

\textsuperscript{480} Id.

\textsuperscript{481} See id.

\textsuperscript{482} See id.

\textsuperscript{483} Id.
formal court system. The parameters of the arbitration, i.e., which disputes may and may not be arbitrated, who will serve as arbitrators as well as the venue which will hear the arbitration are but a few of the provisions which may be contracted for under arbitration agreements. Moreover, the exclusive re-assignment of these disputes away from court systems has international support, and is even upheld in jurisdictions that lack a litigious tradition and therefore may be less inclined to promote alternative dispute methods.

Naturally, in the absence of adjudicating a case under the formal strictures of a court system many of the indicia of traditional litigation are removed. A few of the procedural and substantive devices that are notably absent in the arbitral process include:

484 See Kimberly Song, Arbitrate, don't litigate, 166 FAR EAST ECON. REV. 41(Hong Kong) Oct. 16, 2003 at 70.

485 See Park, supra note 474, at 80. He writes: "...the New York Arbitration Convention, backed by a network of national arbitration statutes, binds most of the world to enforce an arbitration clause and the resulting award." Id.

486 For a sample of different legal jurisdictions supporting the arbitration process see Rio Algom Inc. v. Sammi Steel Co., Ltd., 562 N.Y.S.2d 486 (1990)(supporting arbitration, New York holds: "The policy of this State is to favor and encourage arbitration as a means of expediting the resolution of disputes and conserving judicial resources (quoting, Matter of Nationwide Gen. Ins. Co. v. Investors Ins. Co. of Am., 37 N.Y.2d 91, 95, 371 N.Y.S.2d 463, 332 N.E.2d 333). Where the parties have chosen arbitration as their forum, they are precluded "from using the courts as a vehicle to protract litigation" (quoting, Matter of Weinrott [Carp], 32 N.Y.2d 190, 199, 344 N.Y.S.2d 848, 298 N.E.2d 42). "The parties have designated an arbitrator to determine their dispute, and the courts will avoid interference with their selection of forum" (quoting, Matter of Siegel [Lewis], 40 N.Y.2d 687, 689); (supporting arbitration, Washington holds: "We begin our analysis by noting the strong public policy in this state favouring arbitration of disputes."


...[t]he trend in international commercial arbitrations is clearly towards giving greater emphasis to party autonomy and contracting judicial control over the legal content of the reference and the award. Examples of recent legislation are the English Arbitration Act 1979, the new Commercial Arbitration Acts in Australia and the International Commercial Arbitration Act 1986 of British Columbia and similar legislation in other provinces of Canada adopting the UNCITRAL Model Law.

personal jurisdiction requirements, a lack of full appeal on the merits and formal rules of evidence\textsuperscript{487} (although, in the latter example, international conventions as well as local practices provide regulations on the admissibility of evidence\textsuperscript{488}). Not surprisingly, while arbitration is favoured in some contexts, it may be loathed in certain circles for precisely the same reasons.\textsuperscript{489} Chief among the complaints heard are the occasional undisciplined acts of rogue arbitrators, as well as the odd anecdotal tale of tribunal partisanship.\textsuperscript{490}

\textbf{C. Impartiality in China’s Arbitrations}

In the West, it has been observed that the importance of a consistent standard requires all members of international arbitral tribunals to maintain a uniform standard of independence and impartiality unless the parties to the dispute prospectively elect

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\textsuperscript{487} See Park, \textit{supra} note 474, at 79 and 82.


\textsuperscript{489} See Park, \textit{supra} note 474, at 82.

\textsuperscript{490} \textit{Id.}; see also generally L. Yves Fortier, \textit{The Occasionally Unwarranted Assumption of Confidentiality} 15 \textit{ARB. INT’L} 131 (1999); \textit{Redfern & Hunter} \textit{supra} note 477, at 212. With something less than a humorous tone, the authors write:

\begin{quote}
It has been reported that in an arbitration in the United States in which a U.S. $92 million award had been rendered but not yet confirmed by the court, a challenge was launched on grounds of evident partiality in circumstances where, after the award was rendered, the presiding arbitrator was discovered to have spent two nights in the hotel room of a female lawyer representing the successful party in the arbitration.
\end{quote}

otherwise. Consequently, it has been argued that there is no room for debate that a party-appointed arbitrator may be partisan in an international arbitration absent party authorization. However, impartiality has a somewhat different meaning colloquially than it does within the language of international arbitration. Referring to the need to properly define the term in the context of international arbitration, one practitioner has remarked:

[U]nder a narrow and superficial interpretation the terms independence, impartiality and neutrality are used synonymously [in international arbitration] but that neutrality in its proper meaning refers to national neutrality where parties from different countries will require that the third arbitrator not have the same nationality as one of the parties. This is not however the meaning given to neutrality in the American rules where the term is clearly used to distinguish between a party-appointed arbitrator who is predisposed to a party and the neutral third arbitrator who must remain completely impartial. ...Impartiality and neutrality will be used synonymously to refer to the obligation not to favour one of the parties or prejudge an issue. All of these terms connote a duty of freedom of thought to decide against the nominating party if the evidence so warrants. However, it is necessary to make some distinction between independence and impartiality because in practice it is common for parties to waive the independence rule where there has been disclosure of some connection with one of the parties. This does not mean that the party waives the impartiality rule.

Like the above, the ensuing discussion is concerned with the pollution of this latter principle—impartiality—in the context of the Chinese experience. Increasingly, the viability of this principle is being called into question.

492 See id.
493 Id. at 323.
Admittedly, making statements of this sort invariably gives rise to concerns on a number of fronts. First, being critical of any foreign legal institution immediately calls into question one’s comparative approach. That is to say, the very nature of comparative law, and the comparative scholars that comprise the discipline invariably suffer from subscribing to some over-arching grand narrative. Even to suggest that one does not subscribe to some dominating value system, is itself a grand narrative, worthy of at least identification in comparative law if not further probing. While one’s own experiences with Western-based formalism may lead to an imposition of “epistemological imperialism” on a foreign legal system, the alternatives seem wholly inadequate—namely, to abandon the study of foreign legal systems altogether. Saddled with this intrinsic disability there is little a comparative scholar can do, save perhaps to recognize and attempt to work around this inherent flaw.

Second, an inference which may be drawn and one that I believe is of greater concern, is that the forthcoming commentary will be viewed as alarmist. While I believe that I have done my best to avoid these and other interpretative pitfalls, the reader


496 See id.

497 This is a direct reference to RICHARD BERNSTEIN & ROSS H. MUNRO, THE COMING CONFLICT WITH CHINA, (1998). While the book is somewhat out of date now, I remember the firestorm of controversy that ensued shortly after its publication. At the risk of editorializing, one of its many hysterical statements, included:

China even now effectively uses its newly built economic power, threatening to withhold contracts or to turn to other markets as a tool of greater power diplomacy ... China seems [to be] moving toward some of the characteristics that were important in early-twentieth-century fascism. There is a cult of the state as the highest form of human organization, the entity for whose benefit the individual is expected to sacrifice his own interests and welfare. There is ... the alliance between financial interests and interests of the state, vast interlocking directorate by which the sons and daughters of the senior political leaders control the state corporations....

Id. at 61-62.
is encouraged to use the same care in developing a more generalized interpretation of
China and its adherence to the “rule of law.”

I have argued above that ideological contradictions continue to pervade China’s legal environment, even where such messages are far more discreet than they once were under the Maoist regime. Yet the proposition here, however tenuous, also goes further and suggests that these contradictions do not remain static indefinitely; but rather, are being resolved at times in a state of “punctuated equilibria” triggered by the greater atmospheric conditions in which they operate. It has been discussed that some contemporary legal scholars support the idea that legal evolutions in China are the product of cultural input, itself a composite of a variety of features that are constantly shaping and re-designing the extent to which foreign normative standards are adopted in China. Nevertheless, this inquiry at least re-orients that observation, if not rejects it altogether. Rather, the proposition made here suggests that what is occurring in China first and foremost are the influences of political operatives who are able to permeate all levels of China’s private business and bureaucratic structures. This increasingly potent clandestine group are key actors giving context to law and shaping its interpretation. Moreover, the fora of choice for these operatives are increasingly arbitration tribunals, an

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498 See Stephen Jay Gould & Niles Eldridge, *Punctuated Equilibria: An Alternative to Phyletic Gradualism*, in Thomas J. M. Shopf, ed., *MODELS IN PALEOBIOLOGY.* (1972) at 82-115. This paper was a landmark in palaeontology when it debuted. The thesis, (overly simplified here for explanatory purposes) argues that unlike earlier suggestions put forth by Charles Darwin and others, life on Earth did not evolve in a constant and often predictable gradual fashion. Rather, Gould and Eldridge pointed to evidence within the Earth’s evolutionary development that showed rapid and drastic development over a comparatively short period. It is these unusually active periods, arising periodically across a continuum of development that comprises the “punctuated” idea embodied in their thesis.

499 See generally, *POTTER,* supra note 247.
outgrowth of the medium's international popularity for the resolution of disputes involving foreign contracting parties.

At this point, an astute reader with only a marginal understanding of international commercial arbitration may ask a key question: if commercial arbitrations are private, essentially, standing outside of the sphere of political pressures, how are governmental influences (an expression of public interest) able to penetrate this private dispute resolution system?

The answer lies in two parts. First, as already noted, the autonomy inherent in international contract law, which underscores the basis of any arbitration agreement, is at odds with China's regulatory philosophy. Arguably, this fact alone has been enough to prompt the CCP to watch the developments of private arbitration closely, despite the fact that arbitral awards have little if any value as precedent. Naturally, the thrust of the Party's concern has been to ensure that Chinese commercial parties, themselves integral to the development of a socialist market-economy, are not held hostage to a politically neutral, and potentially unfavourable arbitral decision.

The second feature in answering this question lies in the substantive uniqueness of China's arbitration systems. While in other areas of the world the implicit suggestion of governmental collusion with a country's arbitral system could be viewed as libellous, in

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500 See id. at 37-55; see also supra note 409-410 and accompanying text.

China at least, arbitration operates under a very different context. For years CIETAC—a private institution—enjoyed a virtual monopoly on all of China’s arbitrations.\textsuperscript{502} However, this condition changed abruptly in July 1996 to little fanfare, when China’s State Council granted other local arbitration commissions jurisdiction over disputes involving foreigners.\textsuperscript{503} Today, CIETAC is one of 185 arbitration institutions that operate inside China.\textsuperscript{504} This amendment by the State Council is important for its impact in ameliorating tensions in the regime’s ongoing effort to arrive at a market-oriented economy, while simultaneously retaining a socialist value system. By removing CIETAC’s monopoly in favour of local tribunals, the principle of impartiality within an arbitral setting is more easily compromised. These comparatively smaller and immature arbitration institutions may not always be able to maintain the same level of professionalism and independence as CIETAC.\textsuperscript{505}


\textsuperscript{503} See Stanley Lubman, Setback for China-Wide Rule of Law, Far. E. Econ. Rev. (Hong Kong) Nov. 7, 1996, at 38. Lubman remarks:

Foreigners now face the risks of home-town justice all over China, thanks to the June decision which ends the long-established arbitration commission’s exclusive jurisdiction over the hundreds of international commercial disputes that arise annually. Under the rules, if the foreigner’s local partner doesn’t agree to go to the veteran commission, the dispute must go to a local arbitration commission, newly established in over 90 cities. Worse, the dispute can go to a local Chinese court. Both bodies will likely operate under the sway of the type of political meddling that the Chinese call “local protectionism.”


tribunal systems lack the sophistication and institutional capacity to prevent an abuse of process. Alluding to this problem Chinese arbitration scholar Donald Clarke, writes:

In addition to CIETAC, there are over 140 local arbitration commissions that have been established and are operating under the [Chinese] Arbitration Law. Originally set up to hear purely domestic disputes, they exist in most major cities, including Beijing, Shanghai, Guangzhou, and Shenzhen, and can now hear all kinds of disputes as agreed by the parties. The most active of these in foreign-related arbitration is the Beijing Arbitration Commission (the "BAC"). While the local arbitration commissions are in principle civil institutions and not government units, they remain closely tied to government in a number of ways, including financing and personnel appointments. Thus, they remain susceptible to local government pressures in the same way as the courts. Their quasi-governmental status is further shown in their internal arbitration rules - those of the BAC, for example, purport to give jurisdiction to Intermediate Level People's Courts to resolve certain issues arising in the course of arbitration.

While Clarke at the time of this writing was enthusiastic about the prospect of local arbitration panels becoming financially self-sufficient and therefore no longer beholden to local governmental interests, subsequent studies on the matter reflect little change. Moreover, the overall institutional dynamic of how law is shaped, and which parties are involved in the process, suggests that the extent to which local arbitration

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505 See Sally Harpole, State Council Circular Creates a New Forum for Disputes, CHINA LAW & PRACTICE, June 1997, at 46-50 (arguing that by comparison local arbitral tribunal rules may even be less favourable to foreign investors than CIETAC rules).


507 Id.

commissions will ever be truly emancipated from local government is not fixed but a matter of degree.\textsuperscript{509}

While a case can be made that I am overly reverential in allowing China's leaders to achieve their aforementioned goals, I am unequivocally harsh in criticizing the current regime for the manner by which they are attempting to achieve that end. It would be easy I feel to dismiss the forthcoming analyses as purely economic or legal "collateral damage" in the regime's continued attempt to fulfill its revolutionary agenda and bring about a socialist transition. However, to do so in my opinion would be disingenuous and unfulfilling. China has made a commitment to use law as a primary tool of engagement in its ongoing effort to assert itself into global relations; however, unlike the ingenuity its leaders displayed in spawning economic reform beginning in the late 1970s, law does not similarly lend itself to such creativity. Rather law, specifically, international law, provides a much more unforgiving framework for neophyte nations to explore various theories of development. "For the operation of law is subject to evaluation and challenge by reference to external standards: once a principal of law is enunciated it becomes part of the public domain and open to uses that the regime may not be able to control."\textsuperscript{510} The strictures of law complete with its panoply of rules and standards necessarily require at times a measure of compliance. The appropriate level of compliance is fluid, operating as a matter of degree that rises and falls dependent upon a host of considerations which include, but are not limited to: international pressures, local expectations, feasibility, etc.


\textsuperscript{510} See Pitman B. Potter, Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China, 138 CHINA Q. 325-326 (June, 1994).
As illustrated below, it is argued that China has intentionally failed to meet the minimum level of compliance regarding impartiality in its private state-sponsored commercial arbitrations. I argue that such a failing is intentional, systemic and violative of the expressed and implicit expectations of the international commercial community.

Again, China's motivation for non-compliance appears to be self-evident. Like the "veto points" contained within its Uniform Contract Law (UCL), the contamination of the impartiality principle in China's arbitrations can perhaps best be understood as the second part of a two pronged attack. The goal operates with the UCL addressing key policy considerations as they relate to substantive law, and arbitration tribunals—currently China's primary forum for international disputes—dedicated to the all-important function of practice or procedure, which serves to reinforce the policy preferences embedded within the substantive law of the UCL.

While clearly a means to an end, this overt violation of the presumption of impartiality is an untenable position over the long-term. China's developmental strategies thus far (the First Five Year Plan, 1953-1957; the Great Leap Forward, 1958-1960; and emphasis on the Four Modernizations, 1978-present) have for a myriad of reasons failed to achieve socialist construction. While it is plausible that this new avowed commitment to law may one day achieve that end, I contend that such a strategy if left unaltered is fundamentally flawed. Ultimately, the foremost problem regarding this approach to socialist construction is that no matter how economically successful such a posture may turn out to be in the short-term, it necessarily involves the unconcealed defiance of international established rules and norms. This in turn undermines the development of an attitude of acceptance for China's communist regime, which many foreigners will

511 See discussion supra Part V.D.3-5.
continue to believe it is a pariah state merely masquerading as a nation that upholds the "rule of law." This resulting growth in contempt by the West, will, over time in my view, serve to isolate China from the international community, and will further lead to increased scrutiny and the delegitimization of the current regime within international circles.

Consequently, the remainder of this inquiry examines the administration of law at CIETAC, and demonstrates the degree to which such damaging awards delivered by the Commission may create irreparable harms in the near future. With the study of three cases convened before CIETAC over the course of the last fifteen years, precisely how the Party's aforementioned interest in protecting domestic Chinese entities is occurring at the expense of foreign claimants is explored.

D. Exposing Interference and its Effects on Impartiality

1. Sida Corporation

In the fall of 1995, CIETAC embarked on hearing an arbitration officially known as M94209 Laser Cutting Machine Contract Dispute Arbitration.512 While the title would betray the significance of the case, so too would the disputants and the issues raised during the course of the arbitration.513 Rather, under the pseudonym "the Sida arbitration"514 the importance of this case lies in the administrative wrangling that consumed the proceedings. To begin with, this occasion marked the first instance in

512 See generally Hughes, supra note 494 for an in depth summary and analysis of the case.

513 See id.

514 Id. Hereinafter I refer to the case as "the Sida arbitration" to be consistent with the original author's work.
which CIETAC permitted a majority of non-Chinese nationals to sit on a CIETAC panel.\textsuperscript{515} W. Laurence Craig of the United States, Yuqing Zhang of the PRC and Ulf Franke of Sweden (with Franke serving as Chair), comprised the tribunal.

\textbf{a. Underlying Facts of the Sida Arbitration}

On December 29, 1992 the American Sida Corporation (\textit{Sida}) and China National Technical Import and Export Corporation (\textit{China National}) entered into an agreement where \textit{China National} would purchase a laser-cutting device for its factory in Chuzhou, China.\textsuperscript{516} The contract contained specifications for the laser’s performance.\textsuperscript{517}

The parties agreed to an “operational display of the laser machine at an industrial equipment exhibition in Beijing prior to its shipment to Chuzhou.”\textsuperscript{518} Employees from \textit{China National} came to Beijing and accompanied the machine back to Chuzhou.\textsuperscript{519} Once installed in the spring of 1993, the laser system failed to perform to \textit{China National’s} expectations, falling short of the specifications for performance laid out in the contract.\textsuperscript{520} \textit{Sida} attributed these problems to \textit{China National}, arguing that an impure gas intake, voltage fluctuations of the power supply and mishandling of the equipment by \textit{China National}.

\textsuperscript{515} See id. at 63-64. There were additional issues in this case. Chief among them was the preclusive effect of an earlier arbitration held in Sweden, and the CIETAC tribunal’s subsequent recognition of \textit{res judicata} as a result. This issue, however, as germane as it was to this tribunal’s decision, is beyond the scope of this inquiry.

\textsuperscript{516} See id. at 64.

\textsuperscript{517} See id.

\textsuperscript{518} See Justin Hughes, \textit{Foreign lis alibi pendens, Non-Chinese Majority Tribunals and Other Problems of Neutrality in CIETAC Arbitration}, 13 ARB. INT’L 63, 64 (1997).

\textsuperscript{519} See id.

\textsuperscript{520} See id.
National personnel was to blame for the trouble.\textsuperscript{521} China National demanded that Sida make repairs to the system until it complied with the contract specifications.\textsuperscript{522} Over the course of a year,\textsuperscript{523} Sida complied with China National's demands.\textsuperscript{524} In February 1994, buttressed with an opinion rendered by a local inspection bureau that had found fault with Sida's performance, China National in a letter demanded that Sida take back the laser system, return the contract price and pay consequential damages to China National for its resulting losses.\textsuperscript{525} Negotiations ensued, but the two parties remained at odds. Through a joint resolution, they agreed to submit to arbitration under the terms outlined in the arbitration clause contained within the contract.\textsuperscript{526}

\textbf{b. Terms of the Arbitration Clause}

The arbitration clause provided that the seller (Sida) when deemed the plaintiff (or applicant) could elect any forum for arbitration. However, under the form used for this contract, (somewhat antiquated, even by then existing standards\textsuperscript{527}) the buyer (China National) was required to submit their application to CIETAC and have its rules govern the dispute.\textsuperscript{528} Sida designated Stockholm, Sweden as its favoured site for arbitration.\textsuperscript{529}

\textsuperscript{521} See id.

\textsuperscript{522} See id.

\textsuperscript{523} See id. There is no record of precisely how many times Sida attempted to resolve the problem by providing repairs.

\textsuperscript{524} See Justin Hughes, \textit{Foreign lis alibi pendens, Non-Chinese Majority Tribunals and Other Problems of Neutrality in CIETAC Arbitration}, 13 ARB. INT'L 63, 64 (1997).

\textsuperscript{525} See id.

\textsuperscript{526} See id.

\textsuperscript{527} See id. at 65.
Because a resolution to this dispute could not be arrived at amicably, Sida initiated arbitration by serving China National with a Request for Arbitration, where Sida averred that it had performed its obligations under the contract and was entitled to full performance on behalf of China National.\textsuperscript{530}

However, the contractual form, which embodied the arbitration agreement did not contain a provision as to which arbitral rules would govern the proceedings, or which arbitral governing body’s jurisdiction would apply.\textsuperscript{531} This would become a key issue as China National would in a later arbitration before CIETAC, argue that a lack of specificity on these issues made the resulting geographic designation by Sida void \textit{ab initio}, and violative of CIETAC’s bar of ad hoc arbitrations.\textsuperscript{532}

Pursuant to the petition, a hearing was granted over the objection of China National, which appeared to reject the validity of the Swedish tribunal over the express absence of the governing procedural rules in the arbitration clause.\textsuperscript{533} Not surprisingly, given their apparent indifference from their lack of correspondence, China National failed under the terms of the arbitration to appoint an arbitrator in a timely manner.\textsuperscript{534} As a result, under the Swedish Arbitration Act an arbitrator was chosen for China

\textsuperscript{528} See id.

\textsuperscript{529} See id. at 66.

\textsuperscript{530} See Justin Hughes, \textit{Foreign lis alibi pendens, Non-Chinese Majority Tribunals and Other Problems of Neutrality in CIETAC Arbitration}, 13 \textit{ARB. INT’L} 63, 66 (1997).

\textsuperscript{531} See id. at 70.

\textsuperscript{532} See id.

\textsuperscript{533} See id. at 67.

\textsuperscript{534} See id.
A hearing was convened for mid-December 1994, at which time Sida presented extensive testimony and documentary evidence. China National failed to take part, but was given adequate notice. An award followed a month later, where Sida was found to have performed under the terms of the contract and was awarded full payment under the contract for China National's material breach.

At the time the article containing these facts was written, China National had made no attempt to contest the award and, given the then difficult climate of enforcing arbitral awards in China, Sida had made no attempt to enforce the award.

No doubt, a contributing factor to China National's neglect of the Swedish proceeding was that it had initiated its own arbitration before CIETAC at almost the same time, but one day later. However, the due process measures which China National employed, and which the CIETAC Secretariat ratified, were suspect to say the least. As to who was first in time, and therefore had "home-court" advantage in the proceedings was never in dispute. CIETAC's recognition of the latter petition resulted in a mystery as to why the Secretariat ever elected to accept China National's request, as the initiation

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536 See id.

537 See id.

538 See id.

539 See id. at 68.

540 See id.


542 See id. at 68 n.8.
of an earlier proceeding before another arbitral commission under the then operative CIETAC rules should have resulted in a refusal to hear the matter.\textsuperscript{543}

Notwithstanding this procedural aberration, CIETAC refused to stay its own arbitration at Sida’s request, finding that the issue before the two tribunals, though only narrowly dissimilar, was sufficiently distinct to warrant the tribunal’s hearing of the matter.\textsuperscript{544} While CIETAC’s decision to hear the petition resulted from its emphasis on the difference in the monetary relief requested by each party,\textsuperscript{545} I firmly believe had the composition of the CIETAC tribunal not been dominated by Westerners, the award eventually rendered in this case would have been completely different. This conclusion is based wholly on the relationship of the Chinese arbitrator Yuqing Zhang, and his then connection to Communist Party bureaucracies in Beijing.\textsuperscript{546} While CIETAC too would in the end confirm Sida’s earlier award, the arbitrators appeared to strain in arriving at a majority decision, where the sole dissenter was China National’s appointed arbitrator, Yuqing Zhang.\textsuperscript{547}


\textsuperscript{544}See Hughes, supra note 474, at 71 n.11 and accompanying text.

\textsuperscript{545}See id. at 71.

\textsuperscript{546}Email correspondence with Justin Hughes, Counsel for Sida (Dec. 3, 2004). Although Mr. Hughes’ memory had been somewhat tarnished by time, (the hearings occurred more than nine years ago) he remembered “...from the moment it was clear what had happened, I knew we were in trouble...” with the Chinese arbitrator Zhang, given his connections to the PRC government. Id; see also Hughes, supra note 474 at 74-75. Hughes, notes: “At the time of the arbitration Mr. Zhang was Deputy Department Head of the Department of Treaties and Laws of the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) [—a Chinese Communist Party bureaucratic agency].” Id. at n.21. (emphasis added).

\textsuperscript{547}See Hughes, supra note 474, at 73.
The reservations surrounding the involvement of Mr. Zhang in this matter do not end with him serving on the Commission. Rather, the way he came to become a China National designee was shrouded in secrecy. Unbeknownst to Sida until the hearing and never offering justification for the replacement, Mr. Zhang replaced China National’s original designee Ms. Wan-Ru. Commenting on the perplexities of the situation, counsel for Sida writes:

At the hearing, Sida raised the issue – pointing out that it had never been informed of the change in China National’s arbitrator, let alone the reason for such a change. The CIETAC representative attending the hearing advised the tribunal and the parties that Sida had not been told of the change because, essentially, CIETAC did not consider the matter to be of any concern to Sida....It should be disturbing to anyone potentially appearing in a CIETAC arbitration that the CIETAC Secretariat would take such a cavalier attitude toward the arbitral process. CIETAC Rules provide for an arbitrator’s withdrawal if he has ‘a personal interest in the case’ (...1994 Article 28) and for appointment of substitute arbitrator when ‘an arbitrator cannot perform his duty owing to withdrawal or other reasons’ (...1994 Article 31)....But the lack of transparency in this process – even to the point of mystery as to [when] Ms. Ran-Wu was replaced – shows a serious problem with the CIETAC Secretariat. The faith private parties put in a dispute-resolution system depends on a belief that the system’s actions are governed and motivated to produce fair, enforceable results. All of this was called into doubt by the Wan-Ru/Zhang switch. Mr. Zhang’s background raised the possibility in the minds of Sida counsel that the Commission, not China National had sought Mr. Zhang’s participation because this case marked the first time a non-Chinese majority would sit on a CIETAC panel. But still the question is, to what end?

What cannot be lost sight of in the instant case is that Mr. Zhang was the lone dissenting voice, and would ultimately refuse to sign the award in Sida’s favour. His

548 See id. at 74.
549 See id.
550 Id. at 75. (emphasis added).
551 See id. at 69.
disengagement with clearly established legal principles (namely, the complete absence of a legal argument that would have justified Zhang's position without simultaneously calling into question *China National's* good faith,\(^{552}\)) could only lead to the existence of an ulterior motive.

While the above summary is of a single case, its value does not lie in its ability to paint in broad strokes and offer gross generalizations about the apparent governmental contamination of China's leading private arbitral institution. Rather, its worth must be measured in offering glimpses into the discreet manner in which this influence is exerted. This case illustrates a relationship between a governmental bureaucratic office and a private arbitral institution which has continually promoted itself as autonomous.\(^{553}\) In doing so, the veil of ignorance that has for so long obscured many Western foreign investors' understanding of China's political and legal processes are finally seen in their true state, that is, inextricably linked.

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\(^{552}\) *See id.* at 70. Hughes opines:

> [I]f CIETAC had accepted China National's argument that seller-initiated arbitration ... was defective [because of its omission of procedural and governance rules], this might have raised a serious issue about China National's good faith in preparing a standardized arbitration clause which so readily invited a seller to fail to designate an arbitral institution.

*Id.*

\(^{553}\) *See CIETAC Rules, available at* [http://www.cietac.org/](http://www.cietac.org/) *last visited Dec. 15, 2005*. Article 2 provides:

> China International Economic and Trade Arbitration Commission (originally named the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade, later renamed the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade, and currently called the China International Economic and Trade Arbitration Commission, hereinafter referred to as the "Arbitration Commission") *independently and impartially resolves, by means of arbitration*, disputes arising from economic and trade transactions of a contractual or non-contractual nature.

*Id.* (emphasis added).
Admittedly, a potential criticism of the above analysis could point to the date of this dispute. Again, the award in the instant matter is now more than eight years old. Critics of my assessment could argue that over the course of the last decade advancements in China’s enforcement methods have been made which render the above criticism obsolete. Notably, these improved measures include the mandatory intervention and approval by an appellate court, should a lower court decline to enforce a foreign award. However, as much as these improvements are to be applauded, most indications suggest that CIETAC is still an institution engaging in disturbing practices. Regarding current CIETAC practices (as of April 2003), one apparently naïve practitioner has written:

While it is true that CIETAC typically appoints a Chinese arbitrator to act as a presiding arbitrator in an arbitration involving a Chinese and foreign party, there is no evidence to suggest that a Chinese presiding arbitrator would be biased against the foreign party and there is nothing inherently wrong with this practice.

554 See Hughes, supra note 474, at 82.

555 See Temogen Heild, Arbitration body a reliable way to resolve disputes, CHINA DAILY (Beijing) May 21, 2003 available at http://www.chinadaily.com.cn/en/doc/2003-05/21/content_165804.htm (last visited Apr. 15, 2005)(arguing “experience has shown CIETAC is not only free from party influence but also free of any pro-mainland bias.”) Id.; Enforcement of Arbitral Awards, supra note 466 at ¶ 4.02.20-23, 38-32; Tang, supra note 458, at 1; Arbitration sector to play greater role, CHINA DAILY (Beijing) May 18, 2004 Available at http://www.chinadaily.com.cn/english/doc/2005-02/28/content_420363.htm (last visited Apr. 15, 2005)(arguing that “CIETAC’s arbitration work has never been interfered in by outside sources and local protectionism, which ensures the fairness of its arbitration awards and enforcement.”) Id.

556 See Enforcement of Arbitral Awards, supra note 502 at ¶ 4.02.35.

557 See infra note 559 and accompanying text.

558 See Tang, supra 494, at 1. (emphasis added). Obviously, I reject this practitioner’s conclusions based on the above referenced evidence and other recent commentaries. For example, see infra note 559 and accompanying text.
Further rejecting the suggestion that time and experience have corrected CIETAC's wayward course, Stanley Lubman has recently commented on CIETAC's suspect practices, writing:

The most critical appraisal of CIETAC is also the most recent, and resonates very strongly with what some veteran foreign practitioners well-acquainted with the commission have long said privately. Jerome Cohen, testifying before the U.S.-China Commission in 2001, drew attention to what he signalled as CIETAC's major defects: 'At a minimum, I would surely no longer advise clients to accept CIETAC jurisdiction unless the contract's arbitration clause requires the appointment of a third country national as presiding arbitrator. And CIETAC needs to improve the ethical and professional standards of its staff, prevent breaches of confidentiality and conflicts of interest and insulate its arbitration panels from the hazards of politics, corruption, guanxi and ex parte communications that plague the courts.'

Unjustifiably influencing CIETAC and local arbitration tribunals in China is only one method by which the regime is able to exert pressures on private legal matters. A second indication of a politically inspired dispute resolution system is related to the decisions themselves. To a great extent, spurious findings by tribunals are a predictable consequence of breaches of impartiality, which in China appear to be more common than elsewhere. While no dispute resolution system, despite how developed and insulated it may appear to be will ever render just decisions all the time, it is nonetheless worth exploring a handful of awards that were determined by governmental policy interests in an effort to understand the extent of the problem within China.


560 See generally Smith, supra note 491.
E. Public Policy & Arbitral Decisions: Confucian Confusions in Context

As noted in the previous section, Article 7 of the UCL contains a broad “veto point” by which contracts may be rendered invalid should they be deemed contrary to “public interests of society.” The exact parameters of the term “public interest” is elusive not only in China, but has engendered questions regarding its definition and resulting application throughout the commercial world. However, public policy violations are increasingly utilized in Chinese arbitration decisions in a way that suggests the doctrine (at least as it is generally understood in the West) is being manipulated for other purposes. To illustrate, an account of the Dongfeng Garments case follows.

It deserves mentioning that while the impact of the following case extended beyond CIETAC, and involved the Chinese court system, its discussion here is nevertheless relevant because it so adequately addresses a key motive for the absence of impartiality—namely, a strict commitment to economic development. The Dongfeng Garments case also has some historical importance as well, by demonstrating an earlier, stronger disinclination by Chinese officials to enforce arbitral awards against local entities.

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561 See UCL, supra note 405, at art. 7. Article 7, reads:

In concluding or performing a contract, the parties shall abide by the relevant laws and administrative regulations, as well as observe social ethics, and may not disrupt social and economic order or harm the public interests.

Id.

562 See Hu, supra note 478, at 176-177.
1. **The Case of Dongfeng Garments**\(^{563}\)

The *Dongfeng Garments* case involved a dispute between a plaintiff and defendant who were involved in a joint venture operation for the manufacture and exportation of "fashion garments."\(^{564}\) The plaintiffs alleged breach of the joint venture contract and in April 1991, petitioned for arbitration before CIETAC as provided for in the arbitration contract.\(^{565}\) The Commission accepted the petition, a tribunal convened and an award was rendered in April 1992 that granted the plaintiffs substantial damages.\(^{566}\) In an effort to collect their award, the plaintiffs sought the assistance of the local Municipal Intermediate People's Court in May 1992.\(^{567}\)

The defendant contested the enforcement proceedings before the court, and the court rendered a verdict in the defendant's favour rejecting the plaintiff's application for enforcement.\(^{568}\) Sources have related that the sole justification for the court's decision was that "according to current State policies and regulations, enforcement ... would seriously harm the economic influence of the State and public interest of the society, and

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563 For a brief summary of the case, see *Dongfeng Garments Factory of Kai Feng City and Tai Chun International Trade (HK) Co. Ltd. v. Henan Garments Import & Export (Group) Co.* in CHENG DEJUN ET AL., INTERNATIONAL ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARY, CASES AND MATERIALS 131 (2nd ed. 2000) [hereinafter *Dongfeng*]. While the UCL was not enacted until after this dispute arose, the same principles of "public policy" were embodied at the time in Article 260 of the 1991 Civil Procedure Law, which gave local courts the power to refuse arbitral enforcements where to do so would be contrary to "social and public interests of China." *Id.*; see also, *Enforcement of Arbitral Awards*, supra note 502, at ¶ 4.02.2 at n.110.

564 See *Dongfeng* supra note 563, at 131.

565 See *id.*

566 See *id.*

567 See *id.*

568 See *id.*
adversely affect the foreign trade order of the State.” Noticeably lacking in the court’s analysis was a contrary finding that the defendant did not in fact breach their contract. Rather, the court offered its rationale exclusively on public policy grounds, arguing “that to compel the defendant to pay substantial damages would be detrimental to ‘social and public interests.’” In an earlier edition of the book in which this case appears, the authors offer some editorial comments regarding the relationship between local economic interests and the Chinese courts’ enforcement of arbitration awards. They write: “In so ruling, there can be little doubt that the court was influenced by the fact that the defendant was the major economic force in the municipality where the court sat.” This kind of sentiment is not uncommon, as another commentator has written more generally that protectionism can often translate into local governments helping companies “in which they have an economic interest hide assets or dodge debts.”

In the end, this case would eventually be overturned by the Supreme People’s Court in Beijing, which has jurisdiction over all judicial proceedings. In upsetting the judgement the courted stated: “…that it was incorrect for the Zhengzhou Municipal Intermediate People’s Court to refuse to enforce the arbitral award on the grounds that enforcement would seriously harm the economic interests of the State…”

569 Id. Unreported case provided by CIETAC.


572 See Enforcement of Arbitral Awards, supra note 502, at ¶ 4.38.

573 See CHENG DEJUN ET AL., supra note 563, at 131.

574 See id.
While in this case justice was subsequently rendered on appeal, here the claimant’s vindication by arbitration deals with a different issue—notably—enforcement. Much has been written on the issue of enforcement;\textsuperscript{575} at times promoting the idea that CIETAC is a reputable institution that suffers from undeserving criticisms.\textsuperscript{576} Yet, the apparent enthusiasm for CIETAC enforcement is somewhat undeserved, as these determinations only come well after the rendering of an original decision. While it is true that the measure of an institution’s capacity to render justice must be viewed by its ability to enforce compliance where losing parties fail to voluntarily execute orders, the necessity of filing even a \textit{single} formal appeal or enforcement proceeding does little to promote arbitration as a flexible, inexpensive alternative to litigation. After all, one of the desirable characteristics of arbitration is its comparatively low cost to litigation and efficiency in rendering decisions. If parties are continually forced to expend time and resources in solidifying those original judgements with additional legal assistance through enforcement proceedings, arbitration as an alternative to litigation is impaired and becomes simply an old offering reconstituted in new packaging.

Consistent with the discussion above, more recent cases brought before CIETAC suggest that the problem of illegitimate motives continue to shape the outcome of CIETAC awards, despite the recent increase in normative legal standards in China.

\textsuperscript{575} See generally Hu, supra note 478, Pereenboom, supra note 502 and accompanying text; \textit{see also} Tang, supra note 494.

\textsuperscript{576} See id.
2.  *Google’s Experience in China*[^577]

According to Randall Peerenboom, in the competitive business of dispute resolution "CIETAC officials have long marketed themselves by pointing out how much better they are than the courts, which are plagued by corruption, local protectionism and incompetent judges."[^578] However, after exploring the surrounding facts of the *Google* decision, CIETAC has done little to endear itself to international onlookers.

*Google*, the well-known internet search engine was incorporated in California in 1998.[^579] *Google* operates its search engine under the address “www.google.com.”[^580] The word “google” has no other known meaning, and is exclusively used as a trade name.[^581] *Google* registered its trademark in the PRC on September 28, 2000. The defendant/respondent in the action, *Beijing Guo Wang Information*, was incorporated in Beijing in 1996.[^582] The respondent became the rightful owner of “google.com.cn” on December 3, 1999.[^583] Given the similarities in the domain name registrations, *Google* petitioned the Domain Name Resolution Centre[^584] (DNRC) of CIETAC requesting that the respondent’s domain name be transferred to it.[^585]


[^580]: Id.

[^581]: See id.

[^582]: See id.

[^583]: See id.
In rendering its decision, the appointed panel "confirmed that Beijing Guo Wang Information had no rights or legitimate interests in respect of the domain name in dispute." The panel also concluded that the respondent’s registration of the domain name "google.com.cn" was done in bad faith. Yet, paradoxically, the panel awarded a decision in the respondent’s favour. While the panel would ultimately conclude that Google failed to have rights and interests in the word "google" as a trade name that was protected by Chinese laws, upon further investigation it becomes obvious that the tribunal’s findings were a pretext for the larger policy concerns of the central government.

In making its finding, the panel viewed the case as a simple "first in time, first in right" issue according to the Measures of the China Internet Network Information Centre for the Resolution of Disputes Relating to Domain Names (Measures) and refused the complaint. Under Article 8 of the Measures, for a complaint to be successful all three of the following criteria must be met: (a) the domain name in dispute is identical or confusingly similar to a name or mark in which the complainant has civil rights and interests; (b) the holder of the domain name in dispute has no civil rights and interests in

584 See id. CIETAC established the DNRC mandatory administrative proceeding to hasten the administration of domain name disputes. The goal was that this special tribunal would provide fast and efficient relief to parties where the subject matter of the dispute was domain name registrations. See id.


586 Id.

587 See id.

588 See id.

589 See id.

590 See id.
such domain name or distinctive part thereof; and (c) the holder of the domain name in
dispute registers and uses such domain name in bad faith.  

Again, in the Commission’s view, Google failed the first prong of the test by
failing to register its trademark before the defendant. However, the tribunal’s decision
neglected to recognize that “legitimate civil rights and interests” have been conferred
upon Google by other international agreements, which China has ratified. Chief among
them is the Paris Convention for the Protection of Industrial Property (Paris
Convention). Article 8 of the Paris Convention provides: “A trade name shall be
protected in all of the countries of the Union without the obligation of filing or
registration, whether or not it forms part of a trade mark.” Because both the US and the
PRC are parties to this agreement, “google, as a trade name, should be protected by the
laws of both countries,” regardless of the venue (courts, tribunals, etc.) where the
dispute is resolved. While it bears mentioning that China at one time utilized a trade
name registration system for foreign trade names, whereby protection could only be
afforded to those who registered, the requirement was abandoned precisely because
China became a party to the Paris Convention in November of 1984.

591 See Jerry Y. Zhang & Xu Xhang Rong, Google loses its domain name in China in MANAGING
592 See id.
593 See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 1647-
594 Id. at art. 8.
595 See Zhang & Rong, supra note 494, at 1.
596 See id.
597 See Paris Convention, supra note 593, at art. 8.
Moreover, besides the Paris Convention other domestic regulations exist for the protection of foreign trade names. In an advisory opinion by China’s Supreme People’s Court concerning domain name dispute cases and the commission of tortious acts, the court wrote that if:

[The domain name of the respondent or distinctive part thereof constitutes the copy, imitation, translation or transliteration of the well-known trade mark of the complainant; or the respondent’s domain name is identical or similar to the trade mark, domain name of the complainant, causing confusingly [sic] recognition by the relevant public; the respondent has no rights and interests in the domain name or its kernel part thereof, and has no legitimate reason for the registration and use of such domain name]...

Here, applied to the facts in the instant case, Beijing Guo Wang’s registration and use of the domain name “google.com.cn” constitutes the commission of the tort of unfair competition against Google. Under the Supreme People’s Court’s directive, the “distinctive” part of the respondent’s registration (the “google” in “google.com.cn”) is not only similar, but is an identical “copy” of Google’s domain name. In addition, the two—that is, “google.com” and “google.com.cn” are so sufficiently “confusing” that it is easy to see how a typical internet user could err.

However, notwithstanding that the panel found that Beijing Guo Wang had no legitimate rights or interests in the “google” domain name, and was liable for bad faith in registering the name, there exists an additional oddity in this case. Just over a year earlier, in a case that also involved Beijing Guo Wang and which almost factually mirrors Google’s action here, the Second Intermediate People’s Court in Beijing ruled Beijing Guo Wang had infringed the trademark rights of Ikea (the Swedish furniture

598 See Zhang & Rong, supra note 494, at 1.
599 See id.
600 See id.
manufacturer) and had engaged in unfair competition. In that case, the court issued a
decision restraining *Beijing Guo Wang* from using the domain name, "ikea.com.cn," and
ordered that the registration be cancelled. In its ruling, the court noted that *Beijing Guo
Wang* had registered several well-known trademarks as domain names, but had never
used them, confirming *Beijing Guo Wang*’s bad faith. Furthermore, this case was
upheld by Beijing’s highest municipal court, which dismissed the appeal and once again
ordered the cancellation of the registration within 10 days of its appeal order.

The intent in highlighting the above is that although China’s legal system rejects
case law as binding precedent, this decision nevertheless signalled an important step
forward in the protection of domain name cases involving foreigners. While the facts
in the *Google* case were slightly different, and so obviously hinged on the time of
*Google*’s registration, the DNRC panel’s decision to award in favour of the respondent
despite its past offences in similar matters is a strong indication of collusion with the
government. This fact becomes particularly evident when the relationship between
*Google* and the PRC government is further unearthed.

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601 For a brief summation of the case see *Inter Ikea Systems B.V. (Inter Ikea) v. Beijing Guo Wang
Information Co., Ltd. (Beijing Guo Wang)*, (Feb. 2002) available at
http://www.ladas.com/BULLETINS/2002/0202Bulletin/ChinaTMUsedAsDomainName.html (last visited
Nov. 6, 2005).

602 See id.

603 See id.

604 For a short comment on the denial of the appeal, see *China (PRC) - Decision Issued on Appeal in
Domain Name Dispute* available at

605 See id.
Finally, the single most telling feature suggesting government involvement in the Google arbitration matter relates to the CCP’s ongoing attempt to filter internet content that it believes is not in the public’s interest (or for that matter, its own).\textsuperscript{606}

In late August 2002, Mainland Chinese awakened to find that they could no longer access\textsuperscript{607} the world’s most popular search engine.\textsuperscript{608} Although at the time internet users inside China were not unaccustomed to the arbitrary loss of access to media websites, the outright blocking of Google, which was already a key tool in China for online research, meant China’s leadership was committed to embarking on new ways to restrain access to information.\textsuperscript{609} Until then, China had confined its regulation of the internet to websites only. This act by the government marked the first time that entire search engines, which do not contain any content themselves, but only links to other sites, were disabled.\textsuperscript{610}

The impact of the government’s new found power was obvious, as the regime armed with this technology now had the means to suppress content en masse. It was


\textsuperscript{608} See Allan Hoffman, \textit{More than a Search Engine, Google is a Phenomenon}, STAR-LEDGER (Newark N.J.) Nov. 4, 2002 at 37.

\textsuperscript{609} See supra note 607 and accompanying references.

widely reported that the government’s crackdown although not provoked by any single act by Google, was in response to a number of factors that included an upcoming Party Congress in November 2002 (and a corresponding desire to sanitize the media’s portrayal of Jiang Zemin and others beforehand); as well as reports of unauthorized access to sites related to the banned spiritual group Falun Gong.\textsuperscript{611}

In sum, the totality of these events, including: (a) the obvious misapplication of the law under the Paris Convention; (b) the failure of CIETAC to defer to the Supreme Court on

\textsuperscript{611} See supra note 607 and accompanying references. It the days immediately prior to the submission of this thesis, Google Inc. was widely criticized in the media over the California-based company’s decision to censor some of its Web content as it continues to vie for the lucrative Chinese internet market. See Google agrees to China censorship, available at http://www.cnn.com/2006/BUSINESS/01/24/google.china.ap/index.html (last visited Jan. 26, 2006).

Google’s announcement coincided with their launch of a new Chinese language version of its search engine which was released under the more desirable country-code top-level domain (ccTLD) suffix “.cn.” See id. Previously, a Chinese language equipped version had been available only through the company’s “.com” address in the United States. See id. Google agreed to censor its content in order to receive the appropriate license from the Chinese Academy of Science, the ministry which administers ccTLDs on behalf of the CCP. See Root-Zone Whois Information, available at http://www.iana.org/root-whois/cn.htm (last visited Feb. 18, 2006). Although Google contends that its presence in China over the long-term will only foster the growth of human rights in the country, Google’s recent acquiescence to Chinese authorities has come under harsh criticism in light of the company’s decision to adopt “don’t be evil” as its business motto. See supra, Google agrees to China censorship. To its credit, Google has agreed not to provide blogging and e-mail messaging services with the launch of its new Chinese search engine, for fear that the CCP’s increasingly pervasive internet monitoring could result in the company being forced to hand over information under local Chinese law, which could then lead to the continued imprisonment of dissidents. See David Barboza, Version of Google in China Won’t Offer E-Mail or Blogs, N.Y. TIMES, Jan. 25, 2006, at C3. However, not everyone believes Google’s actions have gone far enough in preventing human rights abuses. On February 15, 2006 executives from Google, Microsoft, Yahoo! and Cisco Systems were called before a congressional hearing in the United States “to consider whether the internet was ‘a tool for suppression’ in China.” See China-bashing: Portman’s complaint, THE ECONOMIST (London), Feb. 18, 2006, at 72. One member of Congress, Republican Chris Smith of New Jersey is currently drafting a bill that would ban U.S. firms from using servers in countries, namely China, that engage in human rights abuses. See id.

This most recent imbroglio involving Google is indicative of a handful of emerging trends. First, and perhaps most obviously, it aptly demonstrates the regime’s continued conviction in regulating the internet in its ongoing effort to control all media sources within China. However, additionally, and more discreetly, is the degree to which foreign operations are forced to follow local Chinese law to achieve their own growth within China’s markets. This is illustrative of both a rise in the relative power of the regime’s ability to command foreign compliance, but is also evidence of their capacity to shape established norms and standards. In other words, if continued foreign entry into China requires at least some erosion of the “universalism” which is so often associated with human rights, to what extent will such a requirement reduce the supremacy of such laws not only in China, but elsewhere in the world, including those nations where the doctrine of human rights enjoys comparatively greater strength? This effect, will, overtime, increasingly become a source of conflict, and one would suspect the subject of continued hostility.
Court Interpretation in Domain Name Civil Disputes; (c) the failure to admonish the respondent in this action in light of its prior bad faith registrations; and (d) the proximity in time between the government’s unscrupulous actions against Google in the summer of 2002, and Google’s subsequent filing of its own complaint (under four months—by conservative calculation) points to this tribunal’s bias, and confirms the impact that the CCP’s interests have on contemporary CIETAC arbitral awards.

F. Current Perceptions of Impartiality Among CIETAC Practitioners

The discussion of China’s leading arbitration forum has focused on an overview of the impartiality problem and its manifestations through a series of cases that span roughly a fifteen-year period. However, in addressing the pollution of the impartiality principle within CIETAC it is helpful to consider the opinions of contemporary arbitrators active within CIETAC before giving final expression to a potentially damaging hypothesis. Accordingly, this section is devoted to an analysis of survey respondents, who are currently active CIETAC arbitrators and counsellors. Before jumping into the analysis of the data that have been collected, a brief word on the methodology of the underlying survey is necessary.

612 See Appendix I for a copy of the questions that were asked in preparation of this paper [hereinafter CIETAC Arbitrator Questionnaire 2005]. Given the sensitive nature of the subject matter, the relatively small size of the CIETAC community, and because respondents may exclusively rely on CIETAC related business to sustain their own legal practices, participation was conditioned upon complete and total anonymity. In an effort to honour that promise, the responses of survey participants have been intentionally omitted from this paper but remain on file with me.
I. Methodology

Like Randal Peerenboom in his 2001 study of the enforcement of arbitration awards in China, I too believe that the only way to obtain the “real story” on CIETAC is to supplement information acquired from printed sources with information obtained directly from arbitrators, lawyers and parties. An obvious drawback of my methodological approach is that it does not use a random sample. Rather, survey respondents were introduced to me and my research because of their previous work with other foreign lawyers on international commercial issues. Given the arbitrators’ focus on international arbitrations, no information was collected about domestic cases, and so no information pertaining to these arbitrations is included in these results.

A second shortcoming of my examination is that the sample size is far too small (three) to qualify as a statistically sound empirical study; however, the responses by participants nevertheless have merit in two respects. First, when considering the operation of any foreign legal institution an insider’s perspective can be invaluable. Since at the time of this study then current CIETAC rules required that foreign arbitrators must be appointed from an approved panel established by CIETAC—a requirement not found in any other of the world’s arbitration institutions—the importance of arbitrators who are intimately familiar within CIETAC’s practices is particularly true here. Second,

613 See Peerenboom, supra note 471, at 259-260.

614 See id.

although the responses generated are few in number, there exists nonetheless important qualitative issues that can be distilled from the remarks of survey participants.

2. Results

Based on the survey responses, the following CIETAC behaviours produce a consensus from those foreign arbitrators who were interviewed for the purposes of this thesis.

First, intervention by any Chinese bureaucratic official serving as an arbitrator and who is also involved in regulating an industry sector that may be relevant to one or more of the disputants is strongly discouraged. As a practical matter, this means that the events described in the aforementioned Sida case, which involved a government official simultaneously serving as an arbitrator is unanimously disfavoured by the respondents. Where such occurrences exist, the concerns of arbitrators are twofold. The first area of concern is where a bureaucratic office establishes contact with one or both of the disputants. This is more often the case in China with matters involving foreign direct investment, as China’s heavy regulatory practices require that all foreign parties liaise with local and central bureaucratic agencies to varying degrees before business operations may be legitimately commenced. The second point of concern is a direct result of the first. Interviewees expressed worry that the presence of a local

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616 See Responses to CIETAC Arbitrator Questionnaire 2005 [hereinafter Responses] (on file with author).
617 See supra Part VI.D.
618 See Responses, supra note 616.
619 See id.
bureaucrat in an arbitration may affect the position of one or both of the disputants, by improperly favouring one party over the other and leading to the existence of actual or apparent bias.\textsuperscript{620}

An additional area of concern agreed upon by the interviewees is where one party to the arbitration may have a major economic presence in the location of the administering CIETAC institution.\textsuperscript{621} Even where the application of foreign law is expressly provided for in the arbitration clause and upheld by the tribunal, the possibility of manipulation of that law to the case may exist because of the participation of a dominant local party.\textsuperscript{622} An example of such an occurrence would be the following: relying on the arbitration clause in the contract, the claimant initiated arbitration that provided for CIETAC arbitration in Shanghai, China. Although the defendant was a major economic force in the municipality where the tribunal convened, the contract provided that Japanese law was applicable to the dispute.

However, as one respondent aptly noted, whether actual manipulation of the foreign law in favour of the local party would actually occur or not would depend on the particular institutional actors involved in handling the case, as well whether they were serving as administrators or arbitrators.\textsuperscript{623}

Finally, respondents agreed that the geographic location of an arbitral institution appears to be a practical factor in assessing the extent to which influence may exist.\textsuperscript{624}

\textsuperscript{620} See id.
\textsuperscript{621} See id.
\textsuperscript{622} See id.
\textsuperscript{623} See Reponses to CIETAC Arbitrator Questionnaire 2005 (on file with author).
\textsuperscript{624} See id.
For example, in locations far from major Chinese commercial centres such as Beijing and Shanghai, local industry interests may be more prominent, and therefore, it may be more difficult for regional arbitration institutions to resist local influence.625 This concern corroborates the findings of Donald Clarke and Sally Harpole referenced above, who have long argued that smaller, more regional institutions may provide foreign investors with fewer guarantees of impartiality.626 However, one respondent concluded that a “public policy” exception would probably not be applied by the tribunal as a reason to find in favour of a local entity, even where public policy concerns are a tacit motive for such refusal. The respondent’s opinion no doubt reflects contemporary China’s acute awareness of the international limitations of public policy that were not yet fully realized until the appeal of the aforementioned Dongfeng Garments case.627 While the relationship between economic and political interests may be more pronounced in the secondary commercial areas of China, a threat to a key local entity—whether it be state or privately owned—would in the estimation of one foreign arbitrator fail as a legitimate public policy bar.628 The importance of these remarks lies in that they reflect the perceived consciousness of the arbitral institution and not just the opinion of the survey respondent.

One area where there exists noticeable disagreement among survey respondents is the extent to which the regime is able to influence the outcome, or manner of a CIETAC case in which a majority-Chinese tribunal presides.629 Responses varied on the question

625 See id.
626 See Clarke supra note 505 and Harpole supra note 506 and accompanying text.
627 See Dongfeng, supra note 563.
628 See Reponses, supra note 616.
629 See id.
of Party influence from it being a "predictable outcome" (presumably in all cases), to highly unlikely, occurring only in the most isolated of instances with select individuals, and even then, only when CIETAC was responsible for selecting the arbitrators. Without more information it is difficult to determine why the impressions of respondents differed so greatly on this issue. Certainly, varied individual experiences may have contributed to incongruent answers. However, I also believe that an important interpretative understanding may also exist in this question, which by itself is worthy of comment. In answering the question, one participant elected to mention the recourse that would be available to a disputant, should an arbitrator be in communication with or under the influence of a Party official. Observing that such involvement would be a breach of independence and impartiality, the respondent argued that such an abridgment of rights would give rise to a challenge of the arbitrator's capacity to hear the case. This perspective is to be contrasted with the opinion of another survey respondent, who instead elected to comment on the furtive nature of the regime’s involvement. The participant discussed how the CCP’s interference would prevent a successful challenge to the arbitrator’s impartiality, as well as preclude an opposing disputant of ever discovering a breach of impartiality given the covert nature of the Party’s involvement. (Of course,

630 Id.

631 See id.


633 See Reponses, supra note 616.

634 See id.

635 See id.
this result would only occur in the absence of some overtly transparent act, such as a disputant telling the other side, or the discovery of damaging documentation, etc.\textsuperscript{636}

The differences in the range of responses reflect a conflicting view of the CCP's capacity to influence CIETAC. It would seem that some foreign arbitrators tend to believe that the Party is like any other entity involved in the process, certainly having its own interests but most of which are filtered by the internal controls of the Commission.\textsuperscript{637} By contrast, other foreign arbitrators recognize a disproportionate power imbalance that results from Party interference.\textsuperscript{638} In fact, one participant argues that the greatest danger that comes from the Party's involvement is not the contamination of arbitrators—Chinese or foreign, but rather CIETAC administrators.\textsuperscript{639} CIETAC's administrating staff—all of whom are Chinese—may become highly involved in internal meetings with arbitrators when a case decision is being deliberated.\textsuperscript{640} They may also serve as arbitrators in any CIETAC case, including when parties default in their own arbitration appointments.\textsuperscript{641} Unlike arbitrators, this group is far less educated on international commercial and quasi-judicial practices.\textsuperscript{642} In addition, they are comparatively poorly paid, often holding multiple positions both inside and outside of

\textsuperscript{636} See id.
\textsuperscript{637} See id.
\textsuperscript{638} See id.
\textsuperscript{639} See Responses to CIETAC Arbitrator Questionnaire 2005 (on file with author).
\textsuperscript{640} See id.
\textsuperscript{641} See id.
\textsuperscript{642} See id.
CIETAC, with several serving as Communist Party members.\textsuperscript{643} As a result, the data suggests that administrators become an obvious conduit by which to channel Communist Party interests into CIETAC's deliberative processes.

3. Reform Efforts

Although the universal expectation of impartiality at present is not strictly adhered to at CIETAC, the near future may hold promise for some of the problems described above. A new set of rules, some of which are aimed at curtailing the problem of impartiality and inappropriate influence took effect on May 1, 2005.\textsuperscript{644} Highlights of these new rules include: (a) the abolition of the requirement that parties must select an arbitrator from a pre-established CIETAC panel; thus, aligning CIETAC arbitrator selection procedures with the rest of the world's other major commercial arbitration centres; and (b) stricter disclosure requirements of arbitrators who may have a conflict of interest with the disputants or the subject matter of the dispute.\textsuperscript{645} Some insiders see these advancements as major steps forward in further legitimizing CIETAC's operations.\textsuperscript{646} However, there are a handful of other amendments absent from this current crop of reforms that CIETAC commentators and survey respondents alike feel are necessary.

\textsuperscript{643} See id.

\textsuperscript{644} Prior to May, 1, 2005 a complete copy of the new CIETAC Rules were not then available in the public domain, including the Commission's own website. I suspect that only active arbitrators, administrators and counsellors within CIETAC may have received an advance copy. Given that these new rules were not available I had to rely on secondary accounts of their contents by those individuals active within CIETAC. For a synopsis of these new rules, see Michael Mosher, \textit{New Rules for an Old Game}, FIN. TIMES (London) Jan. 12, 2005 at 9; Jingzhou Tao, \textit{Uncertainty about Chinese Courts Fuels Alternative Resolutions}, LEGAL INTELLIGENCER (Washington) Feb. 22, 2005 at 5.

\textsuperscript{645} See id.

\textsuperscript{646} See Mosher, \textit{supra} note 644.
before CIETAC may be said to properly occupy premier status as one of the world’s elite arbitral institutions.

Chief among the concerns heard are the fees attached to cases involving foreign arbitrators.\textsuperscript{647} At present, CIETAC’s fee schedule for international cases calls for an increase in costs for those disputants who wish to have non-Chinese arbitrators serve in the resolution of their dispute.\textsuperscript{648} Predictably, this increase in cost for non-Chinese arbitrators at times prevents foreigners from participating in the resolution of conflicts.\textsuperscript{649}

In turn, this serves as but one more example of an institutional mechanism by which CIETAC favours not only Chinese arbitrators, but domestic Chinese interests generally, by fostering an environment that favours local participation for the purposes of local disputants.

\textbf{4. \quad \textit{Summary}}

The above reflections demonstrate that the CCP’s influence on CIETAC is unpredictable. In general, the absence of a Western understanding regarding the “rule of

\textsuperscript{647} See Responses, supra note 616.

\textsuperscript{648} See id.; see also CIETAC “Arbitration Fee Schedule” \textit{available at} www.cietac.org (last visited Apr. 17, 2005). While no express stipulation could be found providing for an increase in cost for cases involving foreign arbitrators, it would seem that the following language may provide at least in part a basis for this assessment:

Where the amount of the claim is not ascertained at the time when application for arbitration is handed in, or there exists \textit{special circumstances}, the amount of arbitration fee shall be determined by the secretariat of the Arbitration Commission or the secretariats of the Sub-Commissions of the Arbitration Commission.

\textit{Id.} In offering this explanation, I am admittedly making a large unfounded assumption that a request for a foreign arbitrator rises to the level of “special circumstances”. However, I make such a leap only because no other publicly available CIETAC provision (as of the time of this writing) addresses this issue.

\textsuperscript{649} See Responses, supra note 616.
law,” coupled with the capricious acts of the Party does very little to provide the kinds of guarantees that sophisticated international parties have obviously sought by subjecting themselves to commercial arbitration in the first place. Instead, the potential “parade of horribles,” which are commonly understood to exist within China’s judicial system, have simply migrated into the private realm, which many naively believe is free of political influence.

In this section, I have been decidedly unforgiving in criticizing CIETAC and the CCP’s involvement in its decisions. My reasons for doing so stem from the promises CIETAC makes as it holds itself out to the international commercial community. While many of China’s current practices may be justifiable for one reason or another, it is quite something else altogether to sanction institutional behaviours which so clearly contravene internationally held expectations of impartiality. Since conducting my research, I have come to learn that the majority of foreign practitioners active within CIETAC concede some degree of regime involvement in one way or another. Yet, the reviews currently published on the subject belie such an obvious conclusion. This division in the literature, argued by both academics and practitioners, served as the motivation for conducting my own inquiry in my ongoing effort to determine who was right. Naturally, the comments made above are a reflection of my own conclusions.

Arbitral tribunals in China have become the new battleground for the Party’s resolution of systemic tensions between its own value system and that of Western liberal nations. Cognizant of this fact, the Party has marshalled its economic legion toward local and centrally administered arbitration tribunals in an effort to militate against the unencumbered presence of Western-inspired liberal economic values.

650 See CIETAC Rules, supra note 553, at art 2.
While the inherent flaw of case studies is that they are so often limited by the facts that give rise to them, at some point ideally conclusions that are more general in nature may be distilled from their analysis. Throughout the above, I have attempted to corroborate the findings of CIETAC tribunals with the opinions of participants active in CIETAC cases. The absence of a greater number of published CIETAC awards prohibits a richer collection of examples being presented here; however, support for the premise that arbitration in China is not free from the yoke of governmental influence, as some observers and practitioners have suggested elsewhere has hopefully been achieved.

VII. CONCLUSIONS: TEMPORARY DISLOCATIONS OR TERMINAL HEMORRHAGING?

As arguably the world’s only emerging superpower, China appears to many as standing on the precipice of inevitable change. Its growing military power, technological and economic accomplishments in recent years serve both as a model for other developing nations and as a means of forcing other states to finally recognize China’s rightful place on the world’s stage.

However, this picture of the Chinese colossus necessarily relies on two suppositions. First, a presumption exists that every powerful nation state harbours a

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651 See Peerenboom, supra notes 471 and 502 and accompanying text.

652 Credit for this title is owed to Samuel Noumoff, who, given his flair for dramatic language, adequately captures the current debate on China in a working paper entitled, The Significance of China’s Technology Acquisition Policy Revision (on file with author).

653 See supra note 2.

654 Compare with supra note 2.
hegemonic desire. In suggesting that China is no different in its ultimate desires, “extremist” observers give no deference to China’s Marxist legacy, and the possibility of a rapid philosophical contribution at a crossroads.

Second, such a position ignores the role that international organizations play in today’s global community. Increasingly, international regulatory bodies are called upon to resolve conflicts with so-called rogue nations, whether those issues pertain to matters related to trade or acts of military aggression. With that said, this thesis does not back down from the consistent suggestion throughout that China is currently in a position of possible, if not probable transformation into a socialist society. Such an event will have a radiating impact globally and will occur without the effective intervention of international regulatory regimes, as their relative parochialism and individual mandates will restrict any meaningful foreign intercession.

This dissertation began by asking the reader to be aware of drawing conclusions. Predictably, my use of terms like “unconcealed defiance” and “the contamination of internationally accepted principles” produces certain normative value judgments about China’s current conduct. However, I reject the subtle suggestion perhaps implied from the above that the value of international standards lie in their capacity to constrain China’s emerging dominance. China must be afforded an opportunity for a self-defined path. Thus, this paper’s conclusions do not cry for more Western-inspired reforms in

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655 See generally Bernstein & Munro, supra note 497 at 210-211.

656 See generally id.

657 See Noumoff, supra note 25, at 268.
China; but rather, stem from a personal interest in how Western legal principles, such as constitutionalism and contracts are applied in a non-native setting.

Earlier, I cautioned against lumping legitimate policy efforts together with general claims of repression. My justifications for doing so, I contend, are not a fiction, but the result of a real premeditated policy aim that was first given expression in the late 1970s. The idea, that Deng-inspired economic initiatives are part of a temporary capitalist phenomenon has seemingly fallen out of fashion over the last decade. One can only assume that the reasons for the intellectual migration away from such a hypothesis stems from a growing recognition that was first heard in the late 1980s, which is, that “socialism with Chinese characteristics” has become the very thing it was once so vehemently opposed to by confusing the ends and means of the objective. However, by shifting the focus here to law rather than economics, the latter of which has been so adequately addressed elsewhere, my hope is to recast the debate in a contemporary setting where law as a system by which to effect socialist transformation is given equal billing with economics. This increase in the importance placed on law in China is proper and is reflected in the regime’s growing comfort with legal principles, evidenced by a multitude of promulgations since the early 1980s.

China’s unprecedented economic reform efforts since 1979 have created a presumption of inevitable political change. While money matters a great deal in its ability to exert political pressures, as it does in many other fields, it by itself is not enough to bring this about. Economic reform has been a double-edged sword in China; while

658 See discussion supra pp.103-104.
659 See Communiqué, supra note 4 and VAN NESS & RAICHUR, supra note 4, at 77-87.
660 See MEISNER, supra note 165, at 341-358.
bringing prosperity, it has brought with it a tremendous decentralization of political power both in attitudes and practice. The creation of these provincial attitudes has proven to be an obstacle to establishing a unified rule of law.

In suggesting that the Chinese have applied Marxist-Maoist revolutionary theory to the idea of continued socialist transformation, four components have been examined: the first being the historic and philosophic; the second—theories of transition; the third—expressions of law as a vehicle for change; and fourth, legal interpretations, which essentially serve to operationalize and unify the former three concepts. It has been noted that central to the importance of a political system’s transformation is:

'[A] common assumption basic to all revolutions: the centrality of time and history and the real grip on the human being.' Mao Zedong reportedly once remarked, 'that without a China there would not have been a Chinese Communist Party.' This rather self-evident comment was a direct response to the periodic attempt by other early Communist Party members to overlay the Chinese social fabric with abstract Marxist principles.\(^{661}\)

Here, in the attempt to articulate a relationship between Maoist-Marxist tradition and contemporary transmutations, this thesis began by examining the communist concept of contradiction, which was best given expression in the form of the dialectic.\(^ {662}\) That is, "[phenomena] were conceptualized in a reciprocal relationship to its antithesis."\(^ {663}\)

Inherent in this idea is that the conditions which give rise to socialism are never static, but rather remain in a state of flux or constant motion. This fluid dynamic provides the basis for the transitory theory that I have articulated above.

\(^ {661}\) See Noumoff, supra note 25, at 271-272.

\(^ {662}\) See id.

\(^ {663}\) Id.
Having established contradiction as a contemporary element of Chinese policy decisions, insights were offered into one area of continued revolutionary transformation—namely, commercial arbitrations. “The history of all revolutionary societies has provided the lesson that at some stage, prior to the transition of power, a fundamental contradiction emerges between values and the institutionalization of those values.” Under Mao’s direction, the CCP developed mechanisms that “served to purge and cleanse ... [what were deemed to be abhorrent] values through various rectification campaigns,” while maintaining central political control in the midst of this chaos.

While these continuous purgings, such as the Cultural Revolution, may have been viewed by officials at the time as a “mechanism of necessity,” a problem remains in the present as to whether the international community will be accepting of China’s ever evolving goals. Throughout the ongoing Chinese revolution “institutional legitimacy has been defined strictly in terms of the current political objective.” “That is to say, when institutional forms began to display significantly counter productive consequences, these institutions were either modified, extended or if need be, totally altered.”

664 Id.
665 Id.
666 See id.
668 See supra notes 2-3 and accompanying text.
669 See Noumoff, supra note 25, at 282; see also SCHURMANN, supra note 24, at 19.
670 See Noumoff, supra note 25, at 282.
Whether China will be afforded the opportunity to further develop its laws and legal institutions in an attempt to bring about a particular socialist ideal remains to be seen.

In suggesting that an ultimate transition in China’s society lies at the heart of its lawmakers interests in: (a) liberalizing its Constitution; (b) promulgating the UCL; and (c) infiltrating conventionally autonomous tribunals, this monograph cannot provide precise forecasts as to when this formal transition will occur. Nevertheless, identifiable in the present are legal release valves that exist to prevent a democratic political transformation from occurring, and which simultaneously provides the required controlled conditions for a socialist transition to occur.

If we start from the assumption that the ultimate fulfillment in all societies, be they capitalist or communist, is economic freedom, then in consistently pursuing this goal, the Chinese have extended the Marxist vision to incorporate law as a necessity to that end. In addition, the existence of overwhelmingly different international expectations in the area of commercial transactions, despite the existence of universal norms and expectations in trade—lex mercatoria\(^{671}\)—produces no real strain on the current regime.

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\(^{671}\) *Lex Mercatoria*, or Law of the Merchant was originally a body of rules and principles laid down by merchants themselves to regulate their dealings. It consisted of usages and customs common to merchants and traders in Europe, with slightly local differences. It originated from the problem that civil law was not responsive enough to the growing demands of commerce, and so there developed a need for quick and effective jurisdiction, administered by specialised courts.

The guiding spirit of the merchant law was that it ought to evolve from commercial practice, respond to the needs of the merchants, and be comprehensible and acceptable to the merchants who submitted to it. International commercial law today owes some of its fundamental principles to the Law [of the] Merchant as it was developed in the medieval ages. This includes choice of arbitration institutions, procedures, applicable law and arbitrators, and the goal to reflect customs, usage and good practice among the parties.

For a general overview of the history of *lex mercatoria*, see [www.wikipedia.com](http://www.wikipedia.com) [search term “lex mercatoria”] (last visited Dec. 11, 2005).
as the Party is able mitigate international challenges by crafting alternative legitimate norms and standards.

Many narratives on the subject of China conclude with some form of the cliché: "...only time will tell." As in, for example: whether or not the world will idly stand by and allow China to pursue its own course...only time will tell. As for my own contribution, only time will tell whether the regime’s continued influence in the shaping of foreign investment interests becomes a standard – or whether it is only a passing trend. However, it is evident that arbitration tribunals, in all their several manifestations throughout China are serving as the front lines where communist ideology and liberal legal notions are being wrestled into a usable shape by the current regime.

Yet, when considering all the above, one obvious question remains: if all of China’s recent successes are not tantamount to a wholesale adoption of capitalist practices, what else, if anything, lies at the core of these achievements? Before examining in detail the answer to this question, prudence dictates that I pause for a moment and reflect generally on my methodology and the modern history that has guided my inquiry to date.

A. Reviewing the Approach

When I began developing the broad contours of this thesis more than four years ago, I was mindful that the shelf life of writings related to contemporary Chinese social issues were often very short, in some cases with their relevance lasting less than a year. With the proliferation of modern commentaries on China over the last twenty-five years, including those works which address legal issues, individual policies frequently serve as
the authors’ focus. Yet, it remains largely undeniable that institutions and structures far
outlive particular policies; however, writings on these subjects often lack the dynamism
of their policy counterparts, and therefore, often have a tendency to be dry in their
content, particularly if there has been little or no development within these said
institutions or structures. Herein then laid my dilemma: how could I contribute to the
overall legal discourse on China by relying almost exclusively on policy interpretations
without running the risk of being a simple footnote in the years to come, or worse, be
consigned to the dustbin of history altogether? My answer, I quickly discovered, was not
reconcilable. Albeit with reservations, I concluded that any reference I made to particular
policies—regardless of how profound the analysis—inexorably ran the risk of being
rendered obsolete. Nevertheless, there remains no alternative methodology that allows for
a detailed investigation of law without at some point requiring a discussion of the laws
themselves. As self-evident as this truism may appear, I discovered that discussing law
and legal culture in China was multifaceted, addressing not only questions of policy, but
more long-term institutional and structural concerns. Having now arrived at the
conclusion of my discussion, I wish to turn to issues of the latter rather than deliberating
my findings on the former. In doing so, I have no intention of abandoning the offerings I
have presented on China’s legal policies and related reform initiatives; but rather, as I
have alluded to throughout the aforementioned chapters, I am confident that recent legal
reforms in China provide a vital means to a more important end. In other words, the
overriding purpose of law in China is that of a powerful instrumentalist tool, in what can
only be understood as a principally instrumentalist society.\footnote{See Potter, supra note 259 and accompanying text.}

\textit{See} POTTER, \textit{supra} note 259 and accompanying text.
Shifting the focus of the discussion to the long-term sustainability of the CCP makes the subject as a whole more accessible because of its breadth and relative ease in understanding. However, it also in my estimation provides for a more useful commentary, since the prolonged existence of certain institutions is integral to the development of individual policies, including the promulgation of laws.

In the years following Mao Zedong’s death, the tenure of Deng Xiaoping did much to reassure an anxious international community. Aside from the U.S.’s impassioned but brief infatuation with the Maoist regime during the time of President Nixon’s historic visit in 1972, for nearly three decades the country presented little hope to those who wished for the demise of “Red China.”

Unlike his predecessor, Deng elected to abandon the Maoist regime’s radical social policies, which, until then, had been one of the more defining features of China’s communist rule. Despite how one wishes to characterize the events and policies of the Maoist era—a subject that nearly thirty years later still manages to elicit great debate from both intellectuals and laypeople alike—it remains irrefutable that the manner in which China attempted to engage in a socialist transformation is of unparalleled significance, and adds to the country’s already rich historical legacy which is unlike that of any other nation on earth.

By employing capitalist approaches to its long-term development and economic sustainability, China under the direction of Deng pursued a path of modernization that is far more analogous to the First World. In fact, since 1979 both the domestic and foreign policies of China have dovetailed in pursuit of this common objective; however, the
descriptive characteristics of this quasi-capitalist approach remain markedly different in
the way that they are referenced locally within China vis-à-vis the rest of the world.

In China, the official proclamations by the Party insist that its current economic
course is not inconsistent with an overall communist objective. That is to say, much is
made of the fact that for the practice of socialism to officially take hold, a capitalist
infrastructure must already be in place, and it is to this end that current efforts are
directed. In essence, the approach is attempting to stand classic Marxism on its head.
Classical Marxism provides that concomitant with the existence of a capitalist system lie
repressed social cleavages, that when held under capitalism’s oppressive thumb for too
long, spill over into social unrest and leads to an upheaval of the whole social-economic
order. As noted earlier, it remains one of the great perplexities of the twentieth century
that no communist nation ever came to power under the appropriate order of events, an
act of history for which all communist world leaders at one time or another have later
rationalized only after assuming political power.

In the years following political seizure of the country in 1949, China’s leaders
spent considerable time and effort developing social policies commensurate with a
communist ethos. In addition, leadership was concerned with creating the institutional
mechanisms for their implementation, i.e., a series of large political organs rich in
organizational bureaucracy. Identified by this approach, it may be said that the regime
was attempting to build a socialism from the inside out, rather than completely
deconstructing the overriding superstructure, as was predicted by Marx.

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673 See supra 209 and accompanying text.

674 The term “superstructure” within Marxist social theory is a term of art within the discourse. As a
practical matter, it may be understood as the particular relationship through which human subjectivity
Today, China’s current regime announces that they have not abandoned their attempts to rewrite history in their pursuit of socialist development. Having learned from the over indulgences of the Maoist years, the regime continues to profess that its ideological efforts have merely shifted, rather than withered entirely since the end of Mao’s rule. Cleverly entitled “market-socialism,” so as to avoid any perception of aligning itself with the West, China’s current neoliberal policies reflect little that can be termed “socialist” in nature, nor have they since their inception. Policies are buttressed engages with the material substance of society. There is both subjective and objective components to this formulation. The relationship between superstructure (social relations) and base (the economy) is understood to be fluid or dialectical and not a distinction between actual entities “in the world.”

The concept is first introduced by Marx in the 1859 Preface to A Contribution to the Critique of Political Economy. The relevant passage is reproduced here:

In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness. At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production or — this merely expresses the same thing in legal terms — with the property relations within the framework of which they have operated hitherto. From forms of development of the productive forces these relations turn into their fetters. Then begins an era of social revolution. The changes in the economic foundation lead sooner or later to the transformation of the whole immense superstructure. In studying such transformations it is always necessary to distinguish between the material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, artistic or philosophic — in short, ideological forms in which men become conscious of this conflict and fight it out. Just as one does not judge an individual by what he thinks about himself, so one cannot judge such a period of transformation by its consciousness, but, on the contrary, this consciousness must be explained from the contradictions of material life, from the conflict existing between the social forces of production and the relations of production.

See id.

675 See Kahn, supra note 160 and accompanying text.

676 See MEISNER, supra note 165, at 353.
by powerful and doctrinaire ideological slogans, such as Deng’s now infamous aphorism: “it doesn’t matter if a cat is black or white, so long as it catches mice.” The statement, which was actually first uttered in 1962—several years prior to Deng’s ascension as Party leader—so obviously suggests that the regime’s overt character is far less important to the overall task of development and modernization. This adage came to symbolize Deng’s preoccupation with matters concerning material development.

Early in the 1980s, shortly after Deng assumed political control and a “shift” in the political tone of the Party became clear, concerns were being raised about the country’s newfound direction. Events had prompted “questions not only about the future of socialism in China but also about the legitimacy of the revolution that brought the Chinese Communists to power in the first place, a revolution which the present regime continues to claim as its legacy.” The paradoxes inherent in these questions are self-evident and have, to my dismay, largely led to a dismissal in the West of any lingering notion of communism in China. The West’s failure to engage China’s ideologues on their own terms, is, in my estimation the product of at least three features implicit in any contemporary discussion of China. Admittedly, there may be more to this explanation,

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677 The origins of this remark are widely misreported. The statement first appears to have been made on July 7, 1962 in a speech in which Deng supported the experimental policy of contracting farmland to individual peasant households, since as he saw it, actual conditions dictated that China “not stick to a fixed mode of relations of production but adopt whatever mode that can help mobilize the masses’ initiative.” See Deng Xiaoping, “Restore Agricultural Production,” Selected Works (1938-1965), at 293. Deng’s support of the household contract system, was not only condemned by Mao as a rightist undertaking, and therefore at odds with the Party’s official line, but David Shambaugh has noted that “during the Cultural Revolution an entire public relations offensive against Deng was drummed up on the basis of this one quotation.” See Shambaugh, supra 135 at 88. Curiously, the original translation referred to a yellow cat rather than a white cat. See Deng, supra 677, at 293. While I can only speculate as to the reason for the continued misquote, my guess is that use of the colour white was introduced into the references at a later time, so as to create a sharper distinction from black, and therefore, make the analogy slightly more powerful.

but the following influencing features I have experienced firsthand, and so therefore, I am convinced of their pervasiveness within the current discourse.

The first point in assessing the dynamics that contribute to the current myopic perspective on China is perhaps not novel to the seasoned scholar or researcher, and I suspect radiates beyond the confines of those disciplines that were reviewed in preparation of this thesis. Nevertheless, the realization that every opinion on China, comes with at times a not-so-subtle presentation of each discussant’s agenda was a feature I found difficult at times to navigate as a young neophyte scholar. Certainly there were exceptions, but my research, like that of others, often revealed that developments in China had more to do with the implications for the messenger than it did about any meaningful message about China.679 Lawyers, government officials and entrepreneurs who wish to continue to reap the successes of China’s opening markets, as well as scholars who recreated their romanticized impressions of Chinese history and culture delivered to me their personal exposes and interpretations, but simultaneously imbued their impressions with their own limited ideological perspectives. The attempt to appropriate and convey to me an individualized portrait of China was not done in the spirit of mal intent, rather each subject’s descriptions were carefully constructed using native Chinese testimonials to corroborate the findings they put forth. Certainly finding Chinese subjects to testify to particular prejudices, however accurate, is no longer difficult in a country that long ago abandoned any notion of a monolithic response.680 As it has been observed, given that “there is no shortage of Chinese witnesses to testify in

679 See id. at 5-8.

680 See id.
support of th[ese] evaluations, [] adds an aura of authenticity to [] claims and sentimental power to [the] allegations. The concerns of how China is presented in the post-Maoist era has been captured by several scholars across an assortment of disciplines, however, one scholar in particular—Arif Dirlik—has examined the implications for these observations as they relate to understanding contemporary socialism in China. He writes:

While access to China has created fresh opportunities for understanding Chinese society in ways possible only through direct involvement in its everyday life, face-to-face contact is not as unproblematic as it may seem where broader issues of Chinese socialism are concerned. To the extent that the immediate experience of China is informed by a grasp of the historical and social context of which contemporary China is a product, as well as critical self-reflection on the ideological roots and implications of interpretation, its consequences are salutary for it enables us to reformulate the issues of Chinese socialism with a concreteness that was not possible earlier.

It is another matter, however, when the immediate experience of Chinese society becomes the basis for interpreting long-term issues that are beyond its compass; so that rather than add to historical perspective, the problematic of personal encounters is substituted for a historical problematic. The result is to subject our understanding of Chinese socialism as a historical problem to spatially and temporarily (not to say ideologically) limited interpretive tropisms—which nevertheless carry immense emotive power because of the immediacy of the experiences that invoke them. Rather than broaden understanding, these tropisms reduce the historical to the personal, and dissemble in a nonproblematic simplicity issues in which are embedded complex problems of a century of revolution. In a cultural environment that privileges immediate experience over reflective memory, this is a problem in any case. Where China is concerned, it may be the very sense of the remoteness of Chinese society, mystifying in its alienness, that ironically bestows upon the direct experience of things Chinese an epistemological status that such experience does not command in more familiar contexts, where we have a keener sense of what we know and do not know, and a framework within which to judge the general relevance of personal experience. To be fair, revolution and mutual isolation have reinforced this tendency to privilege immediate experience, which has already begun to subside with the ever broader opening of Chinese doors and the decline in China’s exotic appeal. Nevertheless, the mystifying alienness of Chinese society continues to invite ideological mystification with more than ordinary ease. Rather than provoke challenge, ideological mystification merely confirms

681 *Id.* at 7.
the mysteriousness and adds to the “orientalist” lore of China in which truths and half-truths blend with ideology and fantasy.682

Second, and far more particularized then the general concerns of how China is conveyed in Western academic circles, and in the U.S. in particular, is to understand that all modern discussions of China are politically supercharged. The growing air of animosity between Beijing and Washington reduces even the most benign discussions of twenty-first century world orders into a singular political concern: that the promotion of neoliberal values remains the only way to ensure the sustainability of global capitalism.

During the 1970s and 1980s, Beijing and Washington shared common strategic objectives in their attempt to contain the Soviet Union. However, the demise of the Soviets has increasingly narrowed any shared consensus which appears to have ended during the 1990s. The Sino-American relationship now involves elements of limited cooperation and growing competition. While there is an important convergence of interests with respect to North Korea and the proliferation of nuclear weapons, the two governments increasingly diverge on a long list of strategic issues, including: Taiwan, Japan’s regional security role, Iran and Iraq, the expansion of NATO, the strengthening of other US alliances, missile exports, and the overall U.S. security role within the Asia-Pacific region. This growing “strategic competition” has already coloured Sino-American relations over the last fifteen years and there is little indication that tensions will be quelled with a change in U.S. administrations in the forthcoming years. Fuelled by the above antagonisms, noticeably absent in the current debate is an attitude of acceptance, where viable alternatives to old hegemonic approaches may be explored. Contrary to the positions struck by the U.S. Department of State and other U.S. government organs, there

682 Id. at 5-6.
is surprisingly little that is new, unique or indigenous about the promotion of neoliberal values in China. The nature of the current interactions between Beijing and Washington would seem to not only preclude the discussion of China’s transitory socialist model, but also other indigenous Developing World strategies as well.

Third, while the rise in political tensions between China and the U.S. may go a long way in explaining the lack of Western support for a sustained communism in China, it does not answer lingering questions as to why the Western academic community has adopted what can only be described as an uniformly uncritical view of socialism. The term “uncritical” is used here not to suggest that scholars have not adequately addressed the various social deficiencies apparent in China today; but rather, that their analyses of contemporary ideology are little more than a blanket celebration of China’s capitalist practices.

My observations will no doubt submit me to criticisms in the unlikely event that this thesis is ever removed from its home in the Faculty of Law’s library tomb, but I nonetheless unapologetically put forth my impressions in their entirety. It is my firm contention that one of the more dominant misconceptions about modern China, and which importantly serves to influence the perceptions of scholars who have taken up the task of writing on China’s political future, rests with a fundamental bias. The nature of this prejudice is simple in its formulation and appears to stem from some unspoken Anglo-American bias against the Chinese, as if they somehow cannot be taken seriously about their Marxist orientations because they are Chinese, and therefore, either lack the capacity to indulge in what was once a foreign political concept—Marxism, or are in some other way intellectually or materially incapable of effectuating the necessary
conditions for a required transition to socialism. It goes without saying that I find such a conviction to be intellectually crippling to these same scholars, not to mention offensive in its underlying suggestion.

To lay blame on Sinologists and other devoted China specialists for misrepresenting China to the world has not been arrived at as an afterthought, nor is it an inaccurate condemnation, for it is this same group who “have taken the lead in the wholesale “reevaluation” of Maoist China, often repeating in substance if not in terminology the pronouncements of the [post 1979] leadership in Beijing.” Perhaps excited that the subject of China is increasingly topical, and therefore that their own individual expertise is increasingly relied upon by industry and governments, those professing to be “in the know” on China, have at the very least engaged in a calculated “ignorance,” if not an outright “dismissal” of China’s revolutionary struggle, which is a historical legacy that has nevertheless produced today’s modern China. The impact of these scholarly assessments has not occurred without consequences. As Arif Dirlik has argued:

The dominant ideological orientation of the day is all the more powerful because its assessments of socialism in China (or, more precisely of the Chinese striving for socialism) are not offered in explicit arguments or by systematic analyses that bring up concrete issues for discussion and debate, but rather find expression in a general orientation that is “structure of sentiment” …than one of ideas. This “structure of sentiment” consists of an allegation here and a suggestion there and takes hold of our consciousness all the more easily because it is imperceptible in its diffuseness. From television screens to academic conferences, Chinese socialism past and present is condemned through “world politics,” through the use of rhetorical devises that suggest that the history of socialism in China has been little more than a story of impractical, utopian dreams born

683 Id. at 7.
from conditions of backwardness, in turn giving birth to a morally degenerate of "feudal-fascism."  

The work of Arif Dirlik is recognized by many as an important contribution to the leftist intellectual discourse in China. While others, notably Maurice Meisner, have devoted a large part of their academic careers to seriously pursuing the study and application of Marxism in China, Dirlik’s work in particular, unlike his counterparts, has retained an enthusiastic optimism for the future of socialism in China. Undoubtedly, good scholarship will most often draw upon a variety of sources in substantiating a particular perspective; however, here, such a luxury does not exist as few authors have elected to take up the task of reflecting seriously on the prognosis of Chinese socialism. Therefore, my remaining conclusions rely heavily on the impressions of Arif Dirlik set forth in what I believe to be a seminal work on contemporary socialism in China entitled, *Postsocialism? Reflections on “Socialism with Chinese Characteristics.”* My opinions were further supplemented by our personal conversations in early November, 2005. However, in addition to providing an occasion to revisit Dirlik’s conclusions, my own assessments, which at times vary greatly from his own, arguably offer a more modern update on his original reflections which he made nearly twenty years ago. Despite my philosophical disagreements with him and my insistence that his level of abstraction is at times a barrier to understanding what I think can be far more easily accessible issues, I applaud his efforts to engage with Chinese intellectualism on its own terms, which,  

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684 Id.

685 See DIRLIK, supra note 5.

686 See id.
independent of his radical socialist agenda, is an important but rarely invoked perspective.

Dirlik's writings on China evidence the radical socialist perspective that imbues many of his observations. However, for myself, formally trained in law, with its emphasis on rules and standards and now as a practicing attorney, I lack Dirlik's conviction in believing that revolutionary radicalism, with its violence, economic disarray and institutional upheaval will ever revisit the nations of the world with the same enthusiasm it possessed throughout the twentieth century. This is largely the result of the growth of an international "middle-class" which, once established, becomes risk adverse to the destabilizing forces of revolution. While the demographics as to what constitutes a middle-class may differ internationally, even nationally or regionally from country to country, those at least marginally reliant on the social order of the state for their survival develop too great an interest in the operation of the existing order to effectively mobilize and destroy it. Middle-classes are only one such order of economic classes with a vested interest in the continued operation of the existing social order; however, their recent growth in societies around the world has transformed them into an increasingly potent political force internationally. Whatever their influence, certainly the power of middle-classes does not extend to the outright suppression of all governmental criticisms or even at times violent outbursts, as was seen most recently across the many regions of France in the autumn of 2005; however, there remains an identifiable difference between, essentially, what can be classified as flashes of outrage (as destabilizing as they may be) and overt revolution.
B. The Evidence Revisited

"If it is a Miracle, any sort of evidence will answer, but if it is a Fact, proof is necessary" – Mark Twain

Perhaps one of the greatest obstacles to overcome in suggesting that China’s current path is not out of step with a socialist vision is providing the evidence for such a claim. Indeed, this has remained the most intractable challenge throughout, particularly since my hypothesis is neither intuitively logical nor linear in its assumptions. Trained as a lawyer, these evidentiary foundations take on an unprecedented importance for me—both in their objective and subjective applications—as bestowed by the discipline’s inherent standards of “proof” (objective) but also because my aim throughout this project has been to convince skeptical naysayers of my conclusions (subjective). Chapters V and VI have already dealt with this evidentiary burden in detail at the policy level, but I wish to conclude by offering more general explanations, which in the final analysis may prove to be more salient. Of course, in suggesting that China is still committed to socialism, in no way is intended to imply that the CCP, either under the tenure of Mao Zedong or its successive leaders has been entirely successful in achieving its professed socialist mandate. Rather, the forthcoming evidence suggests a continued commitment to the long-term process of socialist transformation.

The first and single most overriding factor which has allowed me to devote myself to this discussion without fear that my arguments would not be taken seriously rests with China’s burden of history. China’s historical repertoire is both unique and utilized by the regime in a manner that is unlike any other. My choice of the term “repertoire” is deliberate, and reflects the current “use” of history by governmental elites...
that other words such as "legacy" simply do not convey in their singular reference to the past. For example, current Chinese leaders attempt to address contemporary social problems by invoking socialist policies and strategies that were designed to address similar problems decades earlier. 687 Certainly the introduction of modernity into China has greatly improved the material conditions of the country, but it is widely believed that the underlying problems of class inequality, for example, which has reached unparalleled proportions in recent years, can only be remedied by revisiting polices originally formulated during the Maoist era. 688 The reason for this approach appears clear, which is, that despite the almost universal recognition that China is a far better place for its inhabitants today then it was at any time under Mao's tenure, there is an equal appreciation that the country's social consciousness has not kept stride with its developmental ambitions. Policies conceived during the Maoist era—the height of China's own social consciousness—are increasingly looked upon favourably by some to combat modern social problems. 689 These policy invocations are not hollow, and extend beyond a simple reverence for Chairman Mao personally. Rather, these policies are revisited in legislative debates and official speeches where they are often fully articulated, complete with their origins, and often reworked to reflect current circumstances. 690 An additional feature in summoning up old Maoist policies is that these invocations serve as a reminder that China must maintain vigilance in addressing the

687 Conversation with Professor Arif Dirlik at the Peter Wall Institute at the University of British Columbia, Vancouver, British Columbia (Nov. 1, 2005).

688 See id.

689 See id.

690 See id.
social stresses that so often accompany the development of capitalism. In turn, this results in the consciousness of China’s history being brought forward continuously into modern daily political reflections. It is this reaching back and grabbing hold of Maoist policies to address contemporary problems that is so irrefutably profound, and which serves to supply the historical consciousness that lies at the core of China’s new socialist path.

Few, if any, other nations attempt to so deliberately incorporate their political history into developing new social policies, and, unlike Russia, for example, China continues to draw on its communist repertoire as an ideological resource, rather than using it as a subject of condemnation.

The interplay of history, policy and modernity—or as Arif Dirlik described it to me as “functionality versus materialism”—consists of a balance of competing interests. “Functionalism” is socialism in the abstract sense and includes Marxist doctrine and the Sinonization of Marxist principles. In contrast, exists “materialism.” Materialism refers to real world conditions, which must be infused with functional aspects in order to arrive at an eventual socialist model. Although in the abstract the two notions may exist independently as counterpoles, the goal in Chinese socialism has been to integrate the two competing concepts. The attempt to harmonize these two forces is reflected in Mao’s April 1956 essay entitled, “On the Ten Great Relationships.” The essay, which acknowledges the contradictory nature in arriving at socialism—which is also incidentally a subsidiary theme running throughout this paper—provided instruction on how China was to proceed with the operationalization of socialism under a new found commitment to real world material conditions. Mao’s reflections in the essay were among

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691 See id.
the first calls for material intégration, and the tensions he identified in the essay endure to this day.

While the duality of functionalism versus materialism continues to persist in modern China and provides a backdrop by which old policies are able to be resuscitated, a viable socialist future for China is additionally fortified by the convictions of key personnel. It goes without saying that measuring the individual sincerity of Chinese academics and officials can often be difficult in a society where political repression is common and Western-based freedoms of thought and speech are antithetical to the goal of state control. Even where an opportunity does exist to elicit the opinions of top-level elites, it can be difficult to assess where precisely Party indoctrination ends and an individual’s own convictions begin. Nevertheless, notwithstanding the suspicions that may surround some Chinese intellectuals and political figures, there are at least two recent developments regarding socialist advancement in China that cannot be ignored. First, in August of 2003, Hu Jintao was instrumental in the establishment of the Chinese Government Innovative Research Center at Beijing University. The Center’s goals “concentrate [on] efforts in building communication and cooperation between academics and government officials, discovering, assessing, studying, encouraging and disseminating reform experience at all levels of government, in order to make contributions toward the promotion of political structural reform in China.” The well-regarded Marxist scholar Yu Keping, who also retains the title of Director of the Institute of Comparative Politics and Economics of the Central Bureau of Compilation and

692 My thanks to Arif Dirlik for pointing this out.

Translation, leads the Center.\textsuperscript{694} A scholar close to government sources says Yu Keping is a "literary resource" for Hu Jintao and compares Yu's role to that of Wang Huning who served under Jiang Zemin; however, the two men's Marxist orientations are quite different, and further illustrates the ideological differences between Jiang and Hu.\textsuperscript{695}

Second, and related to the above point is that Hu Jintao has recommitted the Party to Marxist education.\textsuperscript{696} In addition to establishing the Chinese Government Innovative Research think tank, he was recently responsible for an increase in funding for the Institute of Comparative Politics and Economics of the Central Bureau of Compilation and Translation, a move which has served to endorse the scholarship of Yu Keping.\textsuperscript{697}

The relative strength and youth of this group interested in the development of Marxist education in China (many are in their forties and fifties), comprised of Hu, Yu and others, in part demonstrates that a progressive socialism in China in opposition to the global thrust of capitalism is a genuine conviction—albeit reinforced by various Party propaganda outlets—and is not simply a convenient political tool supported by aging elites in an effort to maintain individual and institutional legitimacy. Moreover, these developments taken together further demonstrate that socialism both as an ideology and practice is still relevant within Chinese politics.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{694} See id.
\item \textsuperscript{695} See id; see also supra note 123 and note 156 and accompanying text.
\item \textsuperscript{697} Conversation with Professor Arif Dirlik at the Peter Wall Institute at the University of British Columbia, Vancouver, British Columbia (Nov. 1, 2005).
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The reference to legitimacy made above provides an appropriate occasion to discuss this issue in further detail. Simply put, the whole reporting of political legitimacy in China is too often misidentified or unrefined in its analysis. Rarely, if ever, do such commentaries discuss what legitimacy is at stake. Is it the Party itself, including individual elites and their policies? Or is it instead institutional legitimacy, referring to the organs of governance, such as the National Peoples Congress? Or, finally, is it a combination of things, which includes, but is not limited to the Party’s ideology and its associated political structures? These questions are not purely pedantic, as each reveals a different target with respect to legitimation, and therefore a different problem. However, even if we assume that those critics who support an argument of “legitimacy” (whatever is meant by the term’s use) lies behind the regime’s continued public support for a Marxist tradition, practically, such an argument holds little water once contrasted with the reality of present-day conditions. An argument centered upon legitimacy in China is often implicitly accompanied by the suggestion that failure to legitimize will result in the regime’s collapse. However, such a result presupposes important suppositions, the absence of which in China preclude the arrival of such perceived inevitabilities. First, such a theory ignores the growing influence of a rising middle-class elite. Well-educated younger people, who, for the first time in the country’s history possess a disposable income, are increasingly turning away from the Party for guidance in their individual lives. The Party during the Maoist era, which was then an institution of social and economic support and in many ways an extension of the nuclear family, is no longer the pervasive force it once was. This is directly attributable to the abandonment of collectivization, as individuals once again have become atomized under a modern
development scheme. As a growing number of middle-class Chinese continue to go abroad to study or for employment, their day-to-day reliance on the Party for economic support or social programs has dwindled. This is in addition to a burgeoning entrepreneurial class, who, because of their success have become the envy of Chinese society. Consequently, the Party has lost some of its mass support in the era of reform. This is despite the regime’s recent overtures to include a more modernizing appeal into its official ideology, such as the official adoption of entrepreneurs into the country’s constitution. The end result is that the regime is attempting to effectuate a shift in its basis of political power from what was once a peasant base during the pre-1949 and Maoist eras, to a growing middle-class in the contemporary era of reform. However, middle-class Chinese, the focus of the regime’s newfound direction, appear increasingly apathetic to the Party’s current overtures despite indications that the regime remains committed to this group. Thus, an argument based upon legitimacy seems largely fatuous in my view. If legitimacy is intimately tied to a notion of mass domestic political support (as I understand the term to mean), then the regime could have reoriented its Marxist principles or abandoned them altogether if it had wished to seek greater support from its growing middle-class constituency. Arguably, conditions for such a shift would have been ripest during the 16th National Congress in November of 2002, when it was widely published in the preceding months that profound changes to the Party were imminent. This of course did not happen, and there appears to have been little inquiry by the regime into whether a socialist objective should still be pursued. Nevertheless, the point is that the Party did not sacrifice short-term political gains in favour of long-term ideological

698 See supra 159 and accompanying text.
699 See supra notes 159-164 and accompanying text.
commitments, and this by itself is noteworthy, considering the waning domestic support for the regime in recent years.

Other communist nations, namely, the former Soviet Union prior to its eventual collapse, followed a course of persistent political liberalizations. The hope was that with the conferring of political freedoms the regime could maintain the support of the masses as well as resist challenges from within the Party. However, such overt political pandering in a socialist country can be suspicious as “[a]rbitrary interpretations of socialism designed to suit changing political needs have long contributed to undermining it as a viable political theory.” By contrast, in China there have been no similar acts to glasnost. The difference in China’s approach from that of the former Soviet Union is in my opinion less of a reflection of the regime wanting to maintain a hard-line approach at all costs, but rather, indicative of a long-term commitment to socialist construction. The Party, and the key central figures that comprise it, for better or for worse take great responsibility in their roles as China’s architects for the 21st century. Elites pledge that with controlled central leadership, essentially, remaining steadfast to a socialist commitment can only properly ensure China’s future development both socially and economically. With this self-imposed entrustment comes the understanding by Party elites that systemic tensions will at all stages of this advancement persist within local and international discourses. Therefore, the current apathy or even overt disenchantment of China’s middle-class is seen not as a debilitating rupture to the overall sustainability of socialist construction, but rather, merely a temporary dislocation, which in time can be healed through modern socialist education. By relying on the scholarship of Yu Keping and others to effectively communicate the benefits of the regime’s current direction, as

700 See DIRLIK & MEISNER, supra note 678, at 8.
well continuing to concentrate on improving China's material conditions, the Party remains committed to the revolutionary expressions originally formed by Mao and his contemporaries.

Of course, in reiterating that the Party remains committed to a socialist future—and by extension, will in all likelihood continue to dominate the country's political landscape for sometime to come—is in no way intended to suggest that the regime has completed its task. On the contrary, one need only glance through any number of the dozens of English language publications devoted to China, such as *The China Quarterly* to discover the myriad of social and economic ills that currently grip the country. Growing rural discontent, the absence of a national social security program, the constant impending threats of bankruptcy to state owned enterprises and the country's banks, as well as the benzene contamination of the Songhua river in November of 2005 are all issues that seriously challenge the current administration's capacity to govern effectively. Yet, these latest negative portrayals of the current state of Chinese socialism are the most recent in a long line of negative attitudes largely led by the West that seek to condemn China. In fact, few favorable commentaries exist among Western evaluations of Chinese socialism, and where they do, they are largely confined to economic development, celebrating China's "second revolution' [a revolution] derived not from the standards of socialism but from those of capitalism."\(^{701}\) Arif Dirlik has devoted considerable attention to how China is portrayed in the post-Mao era. He writes:

\(^{701}\) *Id.* at 13.
What is regarded as praiseworthy about the post-Mao regime is clearly not progress in social welfare and justice, not greater popular participation in decision making, not greater equality in the distribution of goods and power, and certainly not any renewed commitment to a socialist vision of the future. Rather, what is celebrated is ‘progress’ in privatizing a collectivized economy, the recognition of the assumed ‘imperatives’ of hierarchical decision making and economic inequality, the subordination of all social (and certainly all socialist) considerations to rapid economic development by whatever means promise the greatest efficiency, the discovery of the “the magic of the market,” the supposed abandonment of “ideological thinking” in favor of “pragmatism,” and a new Chinese receptivity to Western capitalist culture and commodities. All the economic success of post-Mao China, perhaps prematurely celebrated, are attributed to the adoption of capitalist methods and techniques, while the economic accomplishments of the Mao period, without which the current successes might have been impossible, are ignored or denigrated.\(^{702}\)

As a radical leftist intellectual Dirlik appears incensed by use of the term “second revolution.” He believes that implicit in the term’s use is a devaluing of the Maoist agenda, which reduces it to a trivial event within the continuum of twentieth century history. He states:

Those that describe the post-Mao course as a ‘second revolution’ debase the meaning of the term revolution, since they can only logically mean it to be a ‘revolution’ of capitalism against either socialism that has restored China on its proper historical course, a course from which socialist endeavors deviated. It is hardly surprising that against this conception of history, which assumes capitalism to be history’s final destination, the Cultural Revolution should appear as an aberration—not for what it did but for the very presumptuousness of its challenge to history.\(^{703}\)

Again, my perspective differs from Professor Dirlik’s in that I am neither the revolutionary radical nor an accomplished Chinese historian—perspectives which predominate his many observations. Yet the questions he raises and the surrounding framework of his approach is unique to the study of modern China, and like Dirlik I feel greater attention is owed to socialism both as a historical legacy and as a contemporary

\(^{702}\) *Id.*

\(^{703}\) *Id.* at 13-14.
offering. Given that the historical importance of socialism in China is not an appropriate topic for a legal dissertation, the forthcoming discussion will attempt to convey how the regime may maintain its political dominance by relying on modern socialist principles in a contemporary capitalist context.

C. "Protosocialism?" Transiting in a Modern Context

In the preceding chapters, I considered various substantive and procedural laws in reflecting upon the long-term viability of Chinese communism. My motivation has been to articulate a space for the contemporary Chinese experience that lies somewhere in between outright capitalism and more conventional socialist policies, such as communes, that predominated the Maoist era. These days, commentaries on China that appear in the Western media are as much prescriptive as they are descriptive; in other words, tinged by a bias which the superiority of capitalism presupposes. These largely inaccurate portrayals have grown in such numbers that they now constitute the balance of the politico-legal literature written on China. As such, they have managed to influence an entire generation’s (mis)understanding of the country. However, these mischaracterizations are far from benign in nature. While the majority of these journalistic and academic accounts lionize China’s economic progress, often citing increases in GDP and GNP figures, as well as other internationally recognized economic standards, they also disturbingly perpetuate a kind of fear-mongering in the process. Most often included in the message of economic celebration is a contemporaneous warning of China’s impending global strength, and the implicit assumption that this newfound power

704 See Dirlk, supra note 5, at 362.
will be used to the detriment of other nations. Growing trade disparities and China's scientific, technological and military advancements are all cited as threats, particularly when buttressed by facts detailing assorted human rights violations.\\footnote{See e.g., George Cahlink, China Caucus Chairman Warns About Emerging China, DEF. DAILY (Rockville), Sept. 6, 2005 (Pg. Unavail. Online); Herb Keinon & Hilary Leila Krieger, Ally in the making, JERUSALEM POST, Feb. 4, 2005 at 10; David Lague, Coming to terms with the ascent of China Trade links cannot hide the political anxieties of neighbors, INTL. HERALD TRIB. (Paris), Nov. 7, 2005 at 14; see also supra note 2.} Admittedly, referencing these criticisms only generally dilutes the strength and substance of my argument; however, the proliferation of these commentaries makes it far too difficult to provide a detailed account of all such instances that impart such a message.

The conceptualization I have offered above of a modern Chinese socialism, and therefore a viable communism, is in my opinion necessitated by a need to break free from the absolutist ideas on the subject which presently comprise the bulk of the discourse.\\footnote{See id.} Today, the greatest struggle for China's model of socialism is its relevancy. Disconnected by time and personal lineage from the historical circumstances which originally brought the ideology and its impassioned leaders to the fore, China's present material conditions no longer serve as the "...inspiration from a conviction in the immanent relevance of the socialist vision, but instead resigns itself to the continued hegemony of contemporary circumstances that are at odds with its vision..."\\footnote{See DIRLIK, supra note 5, at 363.} Thus, the next logical query becomes "can socialism remain socialism for long, or must it be recaptured inevitably by the forces emanating from its irreducible global context, which is dominated by capitalism?"\\footnote{Id.}
The seriousness of this struggle, that is, China's deliberate attempt to create an independent ideological and political landscape for itself in an increasingly homogeneous capitalist world, and with it the opportunity for increased polarization between Washington and Beijing, necessitates an inquiry into both the West's claims which seek to undermine China's socialism, as well as China's often over-exaggerated statements regarding its stability. In earlier chapters and the accompanying footnotes, I have attempted to engage this debate from both perspectives.

The presence of current ideological contradictions in China have been referred to as a state of "postsocialism" by Arif Dirlik. His model is multifarious, and has been crafted from the recognition that "socialism has lost its coherence as a metatheory of politics" not only as a result of its global erosion as a viable political system, but also because its survival in China, somewhat unconventionally, so closely resembles its theoretical antithesis—capitalism. However, the current state of socialism in China is enriched in Dirlik's view because its juxtaposition to the global dominance of capitalism has provided it with a particular self-awareness. He writes:

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709 Id. at 364.
710 See id.
Postsocialism is of necessity also postcapitalist, not in the classical Marxist sense of socialism as a phase in historical development that is anterior to capitalism, but in the sense of a socialism that represents a response to the experience of capitalism and an attempt to overcome the deficiencies of capitalist development. Its own deficiencies and efforts to correct them by resorting to capitalist methods of development are conditioned by this awareness of the deficiencies of capitalism in history. Hence postsocialism seeks to avoid a return to capitalism, no matter how much it may draw upon the latter to improve the performance of “actually existing socialism.” For this reason, and also to legitimize the structure of “actually existing socialism,” it strives to keep alive a vague vision of future socialism as the common goal of humankind while denying it any immanent role in the determination of present social policy.\(^{711}\)

Of course, by adopting capitalist modes of development the regime has found itself confronted with obvious contradictions. These tensions are most often cited in the aforementioned journalistic and scholarly accounts and have seemingly led to the apparent crisis of legitimation for socialism in China.\(^{712}\) However, implicit in Dirlik’s conception of a modern socialism is the recognition that its survival in China must bear a certain relationship to capitalism,\(^{713}\) rather than attempt to disavow the theory in its entirety. Students of Chinese history will recognize that such an idea bears an uncanny pseudo “genetic” lineage to Sun Tzu’s famous maxim: “keep your friends close, but your enemies even closer.” By incorporating tools of the capitalist world order—law notably among them—China’s ongoing efforts to gain acceptance as one of the world’s economic elites has attempted to appropriate capitalism for socialist goals “…on [the] condition that capitalism serve, rather than subvert, national autonomy and a national self-image grounded in the history of a socialist revolution.”\(^{714}\) An additional anxiety related to

\(^{711}\) Id.

\(^{712}\) See supra Part VII(B) pp. 186-191.

\(^{713}\) See DIRLIK, supra note 5, at 366.

\(^{714}\) Id. at 367.
China’s limited appropriation of capitalism is the extent to which it can withstand full-scale absorption into the capitalist model. Evaluating current Chinese history as an extension of other post-Berlin Wall historiographies is an error that I have spent considerable time and effort above explaining. However, why these interpretations continue to proliferate has been summarized by Arif Dirlik. He notes:

The tendency to read into the attenuation of Chinese socialism the inevitability of a capitalist restoration is based on a non sequitur: that any compromise of a strict socialism must point to a necessary assimilation of Chinese socialism to capitalism. Such an assumption may be justified only by an ideology of capitalism which, in its projection of its own hypostatized self-image indefinitely upon a history that is yet to be lived out (and is, therefore, unknowable), forecloses the possibility of any significant alternatives to its vision of the future.715

While Professor Dirlik is to this day still comfortable using the term “postsocialism”716 to describe the state of current ideological stresses and their potential resolution within a overall historical context, for my own purposes I prefer the term “protosocialism.” I argue that the term’s use more aptly describes both the features which contribute to a modern “socialism with Chinese characteristics,” as well as more precisely characterizes the stage of socialism China is currently engaged with. Unlike terms such as “market socialism,” which is only descriptive and bears no relationship to the evolution of socialism along a historical continuum,717 use of the term protosocialism places the phenomenon in historical context. Implicit in its meaning is the idea of a nascent socialism, which is at present relatively primitive in its formulation but which has the capacity in the future to develop and evolve into an effective and recognizable alternative

715 Id.

716 Conversation with Professor Arif Dirlik at the Peter Wall Institute at the University of British Columbia, Vancouver, British Columbia (Nov. 1, 2005).

717 See DIRLIK, supra note 5, at 377.
political system. Additionally, my rejection of postsocialism as an appropriate application for China reflects my personal distain for the term “postmodernism,” which has gained far too much cultural relevancy in recent years by barring the value of objective criticism; thereby, negating the importance of grand narratives. I contest that such metatheories serve an important function for comparative scholars and often provide the only means of an understandable relativism to a variety of inquiries. There is perhaps a certain semantic quality in making these distinctions, but it is one which nevertheless deserves mentioning, especially considering that the process in arriving at Chinese socialism is far from complete.

Regardless of which topology more accurately reflects modern China, the seriousness with which Marxism may afford the country a viable path for the future is of interest to only a limited number of scholars, namely, Arif Dirlik and Maurice Meisner. Yet even these two stalwart supporters of leftist intellectualism in China concede that the recent division of class relationships, notably, the firm establishment of a middle-class, combined with the emergence of powerful intellectual and political elites within the Party may prove too great for a revival of leftist policies. The pervasiveness of these forces within the CCP often goes without mention in official state releases. Condemnation of Marxist policies, even if only in principle, is not confined to the opinions of senior elites. Rather, such criticisms are seemingly shared by a cross-section of mid- and lower-level Party functionaries who ostensibly appear to have no reservations whatsoever in rejecting the regime’s official position. A personal anecdote is illustrative of this point. In the

718 See generally MEISNER, supra 165; see also supra note 685.

719 See supra note 685.
spring of 2005 the University of British Columbia’s Faculty of Law hosted several Asian judges, who, depending on their schedule spent as little as a few weeks to as much as a full semester in Vancouver as a Visiting Scholar in Residence. The opportunity afforded these individuals a chance to witness first-hand Western legal training while providing them with extensive resources (both in English and in a variety of Asian languages) for their own comparative research. During one of the many receptions that were held to honour our distinguished guests at the Faculty of Law I had a conversation with a member of China’s Second Intermediate People’s Court in Beijing. This is the second highest court in the country and subordinate only to the Supreme People’s Court—the premier appellate forum in China, which supervises the administration of justice of all lower “local” and “special” people's courts. It is well established that “[c]ourt officials typically are outranked by public security and other law enforcement officials in the Party hierarchy, limiting their influence over Communist Party policy related to legal work.”

My discussion with the judge quickly turned toward the topic of my thesis and what it is I felt was occurring in China with respect to legal reform. I mentioned that I felt legal reform was far less a deviation from Marxist principles than was often suggested, but rather, more in line with a long-term premeditated socialist goal. I summarized my observations by arguing that the current regime’s resiliency in the face of sweeping economic change would bode well for China over the long-term, and that I looked forward to watching protosocialism develop and address the various social problems that the country currently faced. By now, our discussion had caught the interest of a few others who had decided to migrate over from across the room, perhaps enticed by the

assorted cheese and fruit trays which were situated strategically between us. Among our audience was a Ph.D. law student from China, whom I had previously had several conversations with. As we were talking I was interested in the judge’s own experiences with legal reform, and in fact eager to capture all that I could from her in the same way that a portraitist fusses over their subject. The judge was quick to caution me against my enthusiasm and suggested that I “had it all wrong,” and that I fundamentally misunderstood China’s new course. She said that Marxism was dead in China, and that but for a few politically impotent voices no Chinese felt it had a viable future. While respectful of her opinions (in fact I was amazed with the frankness in which she took issue with my claims), I remained resolute in my convictions. When I asked how the Party’s official pronouncements could be reconciled with her perspective, she responded: “she was the Party,” which, in the ensuing moments became clear that she meant she was the new face of the regime and shared with it its capitalist aspirations. By now, the Chinese Ph.D. student who had originally been receptive to my position in earlier conversations was now championing her every word, attempting to offer his own independent observations to corroborate the judge’s views. At the end of our conversation I was visibly distressed. I could not help but wonder if I had been wrong in my conclusions, in essence, to what extent had I perhaps willed, rather than observed my findings? After all, if the Chinese themselves are not going to be receptive to a socialist future, external forces can hardly impose such a destiny. It was only in the resulting weeks that I learned that perhaps given the nature of her position as a judge, she lacked the authority that I had falsely ascribed to her. Unlike in North America, where a judicial appointment is conclusive proof of accomplishment in the field of law, and by extension,
recognition of an individual's high intellectual and ethical values, the same does not hold true in China. Chinese culture lacks the West's oracular-like reverence for judges, and no level of the Chinese judiciary is positioned at or even near the apex of the Party's hierarchy. Judges in China are viewed strictly as functionaries, equipped only with the most rudimentary of legal educations. Therefore, those who comprise the judiciary are not as a rule the Party's most valued or capable individuals. This lack of aptitude is the subject of a current judicial reform initiative, although it is my understanding that a tremendous amount of work still remains in educating and developing attitudes that are respectful of the judicial function in China.

The point, is that while this particular judge's opinion should be respected as one Party member's account, her comparatively marginal role within the Party may preclude her from entirely appreciating the full thrust of the regime's policies. To the extent that such a conclusion appears to be an *ex post facto* rationale for an unfavorable result, others have arrived at similar conclusions.

The whole episode is revealing, I feel, not in demonstrating ideological tensions between East and West, which are far from novel, but in exemplifying the ideological hostility that persists within the Party among its own members. Implicit in the judge's discussion with me was that Marxism is inconsistent with progress, and therefore its staying power within Chinese society is attributable to nothing more than backwardness. However, such an understanding betrays the Party's repeated calls for

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721 See id.

722 Conversation with Dr. Pitman B. Potter, Director of the Chinese Legal Studies Programme at the University of British Columbia, Vancouver, British Columbia (Nov. 21, 2004).

723 See supra note 720; see also POTTER, supra note 247, at 10-14.

724 See DIRLIK, supra note 5, at 368.
development (both material and social), and reduces the regime’s political motivations to nothing more than the maintenance of a despotic legacy. Indeed, it is unrealistic and has been suggested “un-Marxist” to presume that socialist consciousness is immune to the changing realities of socialist existence and “that the changing relationship between socialism and capitalism may have no significant implication for either socialist consciousness or the Chinese conception of socialism.”

By way of concluding, I wish to reiterate the similarities rather than the differences between Mao Zedong and Deng Xiaoping and his successors, for both groups have addressed the necessity to nationalize Chinese socialism and legitimized it through offering a distinctly Chinese brand of the theory forged from the uniqueness of China’s particular conditions. Just as the internal emphasis on socialism in China has oscillated between a concentration on material development in the 1950s to a preoccupation with social rectification in the form of the Cultural Revolution in the late 1960s, the current debate regarding the legitimacy of Chinese socialism is similar, with the distinguishing feature that the present debate is being fought externally; that is, being waged internationally (publicly) in a much more media accessible era than the 1950s and 1960s. Today, “socialism with Chinese characteristics” with its emphasis on the stages of development is not an abandonment of earlier communist ideals, but merely a return to the recognition that economic development must come before the associated problems of socialization—or re-socialization as was attempted in the Cultural Revolution—can be successfully achieved. However, the disparity between China in the early 1950s and

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725 Id. at 370.

726 See id. at 376.
China now, is a difference in the motivating features that underlie these similar policy aims. In the early 1950s, when contradictions in the few years following the revolution forced Mao and other leaders to re-evaluate their tactics in the face of unexpected challenges, they were able to tap into the immense reservoir of hope that been instilled by the excitement of the revolution. Thus, leaders were able to perpetuate a notion of utopia as revolutionary fervor eventually gave way to actual conditions. However, the current strategy is contrary to that of the early 1950s. Today, the role socialism plays “is not that of immanent vision, pushing society further along the road to socialism, but of ideological guardian, to check the possibility of a slide into capitalism.” Naturally, the opposition inherent in these two orientations runs the risk of reducing the latter to an act of desperation, as it inherits a policing function that it may be ill equipped to perform. However socialism, with an emphasis on material development is a role that must be taken very seriously as it remains the only viable counterbalance to a capitalist system, and more generally, the last remaining thread that prevents much of China’s national identity—at least for the older generation—from unraveling into the capitalist world order.

One of the more obvious commonalities between nations which have adopted Marxism, is that the ideology’s appropriation has been coloured not only by the historical heritage of individual nations but also by the formation of particular relationships to

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727 See id. at 374.
728 Id.
729 See id.
capitalism. The advancement of socialism in China was no different, as it attempted to respond to economic forces that had been introduced externally from the West with a message that was bundled with nationalist appeal. With China perhaps serving as one of the better examples, the specificity with which nations have employed their own brand of socialism has served to undermine the appropriateness of socialism as a grand metatheory. In practice, now resigned to a local nation-by-nation effort, socialism must be cautious of succumbing to the capitalist enterprise, if, for no other reason, that in a genuinely socialist system efforts geared toward the advancement of social equality and justice must predominate over interests of economic efficiency. China’s Cultural Revolution is one of the finest historical examples in demonstrating the tensions between social and economic directives. The failure of this era to adequately address economic development, while simultaneously attempting to re-socialize society, has more than ever demonstrated the importance for socialism’s necessary interaction with capitalism without abandoning its underlying values.

The existence of this duality I feel is ample justification for use of the phrase protosocialism, over say Arif Dirlik’s use of the term postsocialism. While the latter may evidence “some accommodation with the capitalist world order without abandoning its basic institutional structure [which] seems to be a permanent condition of actually

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731 See id., 732 See id. at 379. 733 See id. 734 See id. 735 See id.
existing socialism unless some drastic change occurs within the world system,” the
former more aptly describes socialism as an evolutionary process, which, as one of its
many goals, will seek its continued survival through its own development. In the same
way that evolution has equipped terrestrial prey such as antelopes, cattle and zebras with
eyes at the sides of their heads to facilitate a greater field of vision and therefore detect
the presence of predators sooner, the development of legal principles in China has
provided an analogous advantage. Law, and the attention to legal developments, is the
mechanism by which socialism will survive in China.

I am in agreement with Professor Dirlik in that it is unlikely that socialism’s
viability will ever again challenge the dominance of the global capitalist effort; however,
to attribute permanence to the now existing relationship between the two forces in China
as an historical fait accompli is not only premature, but also in my view consigns
socialism to an eventual defeat since its entire long-term existence is reduced to a
defensive posture in contradistinction to capitalism, and under Dirlik’s model, lacks any
competitive advantage whatsoever.

Regardless of how one attempts to describe modern socialism in China, it strikes
me as undeniable that a limited embracing of capitalism may result in the development of
uniquely economic alternatives (“which may be greater even than that of capitalism,
which, for all its flexibility, forecloses one important option—socialism”\(^{37}\)), as well as

\(^{36}\) Id.

the opportunity for the advancement of greater social and political equality born from the recognition that the “coercive utopianism”\textsuperscript{738} of the Maoist era was misguided.\textsuperscript{739}

Thus, while modern China’s intimate ties to capitalism serve as the justification for its demise for those who long for its abandonment, a theory of protosocialism offers longevity and creativity for the regime, and by extension, a sense of optimism for it and others who hold out hope for its advancement. The urgency in providing such optimism is necessitated by the crisis socialism currently faces in China.

When I began formulating this thesis, my original intent—however latent—was to seriously engage with Chinese socialist ideology in a modern context. In conducting my research, I had hoped to clarify some of the legal and social issues that have arisen in China since the beginning of the post-Mao era, but to do so in a way that was not apologetic or unforgiving of China’s problems. With so many Sinologists exclusively focused on China’s transformations: political, legal and economic, it struck me that it would perhaps be more rewarding to pause and evaluate the implications of these changes, rather than simply adding to what has already become in the field an endless list of observations. For the foreign investor who increasingly relies on commercial transactions with China as an important source of revenue, or is looking in the near future to expand into the Asian marketplace, it has become ever more crucial to properly evaluate China’s post-Maoist transformations in the broader context of a progressive socialism. The basis for making this assessment transcends my own preoccupation with the subject and is not intended to reflect an overly dramatic, Chicken Little-like claim that “the sky is falling!” Rather, it is suggested that these discussions are warranted

\textsuperscript{738} Id.

\textsuperscript{739} See id.
because the very essence of socialism, however conceived, seeks to restrict the free flow of capital and is therefore antithetical to current internationally accepted principles of free enterprise. Thus, the potential impact on an unsuspecting foreign operation becomes obvious if everything from initial operating licenses to the remittance of profits stand to be effected from the “re-socialization” of Chinese society. With so much hanging in the balance, I have consciously sought to pause and reflect on recent developments within the broader context of the theory and practice of socialism in China.
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Scenario #1:

An American buyer entered into two similar contracts for the purchase of rice from a Chinese seller to be delivered in June and July, respectively. The contracts provided that payment was to be made by the opening of an irrevocable letter of credit, which was to be payable on demand upon presentation of the necessary documents. Any demurrage was to be subtracted from the costs of the charter, and it was provided in the contracts that the Chinese seller would pay any demurrage. Both contracts provided that the appropriate forum for the resolution of any disputes arising under the contracts would be the China International Economic and Trade Arbitration Commission (CIETAC).

The June contract was performed with a delay of several days as the vessel chartered to transport the rice incurred demurrage. The American buyer requested seller to reimburse the demurrage, as provided for under the contract, but the Chinese seller was unresponsive.

With respect to the July contract, buyer opened the letter of credit and seller confirmed that it would deliver on the agreed upon date. Shortly before the delivery date, seller informed the buyer that it could only deliver about one-third of the amount stipulated in the contract. Buyer subsequently asked the seller not to send the vessel to collect the cargo and asked buyer to void the agreement. Relying on instructions from the Ministry of Foreign Trade and Economic Cooperation (MOFTEC), the seller proposed an increase in the purchase price and then subsequently informed the buyer that it could only deliver when authorized by MOFTEC, and in the instant case, it would be necessary to renegotiate the contract.

With the recommendation of MOFTEC, seller proposed a draft agreement which allowed for delivery several months later and with an offer to increase the price. Buyer failed to respond favourably to the new terms. Through negotiation, an amicable resolution could not be achieved.

Buyer initiated arbitration claiming losses for demurrage regarding the June contract and losses incurred as a result of having to purchase the rice elsewhere regarding the July contract.

The arbitral tribunal comprised of an American, and two Chinese nationals, one of which was Deputy Department Head of the Department of Treatises and Laws of MOFTEC concluded that the parties intended that the customs of international trade were intended to be applicable to the contract. Accordingly, the tribunal held that the seller as provided for under the contract was to reimburse the buyer for demurrage. However, the tribunal found that the buyer was not entitled to damages for non-performance of the sales contract equal to the difference in the market cost for buying substitute goods and the contractual price, because the contract neglected to expressly provide for the buyer's ability to obtain substitute goods.
Questions:

1) In the above scenario, where in your estimation does there exist an opportunity for CIETAC awards to be influenced by entities not part of the formal CIETAC process, and what would those interests be?

2) In the above scenario, who are all the entities in your estimation who may improperly influence a CIETAC award? Please include a short explanation as to why you have identified particular entities.

3) In the above scenario, who are all the entities in your estimation who may benefit from a politically inspired CIETAC award? Please include a short explanation as to why you have identified particular entities.

Scenario #2:

Defendant a Chinese buyer contracted to buy a quantity of electronic goods from claimant, a Japanese seller. The goods were to shipped to defendant within a specified time limit. The contract specified a latest date of shipping and a maximum age of 20 years for the shipping vessel. Japanese claimant agreed to open a bank performance bond to be payable in the event that the shipping would be delayed more than 10 days after the specified time limit. The contract and performance bond indicated that the claimant was to submit a clean bill of lading upon delivery.

Claimant’s agents faxed defendant several documents requesting an extension for the latest date of shipping and a final expiration term. Defendant’s bank issued an amendment fixing a new expiration date without setting an extension of the latest shipping date. By the time the defendant’s bank provided claimant with a second amendment extending the latest date of shipping, the extension date has passed.

Actual shipment took place seven days following the latest date of shipping. Although claimant asserted that the defendant was informed beforehand of the shipping date, no documentary evidence was provided in support of this claim. Several days after leaving port, the vessel collided with another vessel. Attempts to save the vessel proved futile. After the salvaged cargo was liquidated at a forced sale, no profit resulted.

Defendant sent claimant a letter stating that it was unable to accept the ship because the cargo was loaded after the latest date of shipping, the documents were not presented within the expiration date contained in the contract or performance bond and the bill of lading was undated. Furthermore, claimant had concealed the age of the vessel and the true shipping date giving the defendant the right to avoid the contract. Claimant protested against the defendant’s avoidance of the contract and insisted on the full value of the contract price.

Relying on the arbitration clause in the contract, claimant initiated arbitration which provided for CIETAC arbitration in Shanghai, China. Although, the defendant was a major economic force in the municipality where the tribunal sat, the contract provided that Japanese law was applicable to the dispute. Although disagreeing initially, parties later accepted the application of the United-Nations Convention on Contracts for International Sale of Goods (CISG).
Applying INCOTERMS 1990 as well as the CISG, the CIETAC tribunal established that late shipment had caused independent breaches of contractual obligations: no goods in conformity were placed on board the ship and no effective bill of lading existed. The tribunal held that the claimant was under an obligation to deliver documents within the prescribed time limits to defendant and to give sufficient notice that the goods had been delivered on board the vessel. Defendant was also entitled to receive clearly dated documents. As the requirements had not been complied with, the tribunal found that the defendant had validly avoided the contract, and therefore claimant had no valid averment for payment of the purchase price. Claimant was ordered to pay 96% of the costs of the arbitral proceedings and indemnity for defendant’s costs.

Questions:

1) In the above scenario, where in your estimation does there exist an opportunity for CIETAC awards to be influenced by entities not part of the formal CIETAC process, and what would those interests be?

2) In the above scenario, who are all the entities in your estimation who may improperly influence a CIETAC award? Please include a short explanation as to why you have identified particular entities.

3) In the above scenario, who are all the entities in your estimation who may benefit from a politically inspired CIETAC award? Please include a short explanation as to why you have identified particular entities.

Scenario #3:

The complainant, an internationally recognized domain name holder. The company “Americosearch” is well-known in the internet search engine industry, and provides one of the more sophisticated algorithms currently used within the industry under the name www.americosearch.com. The word “americosearch” as Americosearch’s trade name has no other known meaning. The company has registered “Americosearch” as a trademark in several countries, including the PRC, though did not legally registered the name as a trade mark in the PRC until 2000.

“Chinaco,” the respondent, a company incorporated in Beijing in March 1996, became the holder of the domain name “americosearch.com.cn” as of December 1, 1999. Americosearch submitted its complaint to the Domain Name Resolution Centre (DNRC) of CIETAC (which was specifically created to deal with disputes involving domain name registrations) on January 2, 2003.

Relevant events surrounding Americosearch’s claims, include:

Article 8 of the Paris Convention provides: “A trade name shall be protected in all the countries of the Union without the obligation of filling or registration, whether or not it forms part of a trade mark.” The US and PRC are both signatories to the agreement. The application of the Paris Convention would be consistent with Chinese arbitration.
practice, because where Chinese law is silent or contains other conflicting rules on a specific matter, international conventions shall apply.

In addition, many laws or regulations, for example the Implementation Measures for Enterprise’s Name Registration (issued by the State Administration for Industry and Commerce on December 8, 1999) affirm that the name of foreign country (region) enterprises shall be protected without the necessity of registration in the PRC pursuant to the relevant provisions of the Paris Convention.

Finally, in late August 2002—four months before Americosearch would file its compliant with CIETAC—mainland Chinese awakened to find that they could no longer access one the world’s most popular search engines. Until then, China had largely confined its regulation of the internet to web-sites only. This act by the government marked the first time that entire search engines, which do not contain any content themselves, but only links to other sites, were disabled. It was widely reported outside of China that the government’s crackdown although not provoked by any single act by Americosearch, was in response to a number of factors that included an upcoming Party Congress; as well as reports of unauthorized access to sites related to the banned spiritual group Falun Gong.

The panel’s determination...

The panel the DNRC appointed in the case confirmed that Chinaco had no rights or legitimate interests in respect of the domain name in dispute. The panel also confirmed that Chinaco registered and used the domain name “americosearch.com.cn” in bad faith. However, the panel concluded that Americosearch did not have prior civil rights and interests in the word “Americosearch” that were protected by Chinese laws. The panel reviewed Americosearch’s trade mark registration history in respect of the trade mark Americosearch in China and found that the trade mark was not registered until September 2000, although an application for registration had first been filed in March 1999. Based on this, the panel determined that the complaint did not satisfy all the requirements of the applicable rules, that is, the Measure of the China Internet Network Information Centre for the Resolution of the Disputes Relating to Domain Names (Measures) and accordingly refused the complaint.

Questions:

1) Is it conceivable in your estimation that the interests of the most elite members of the Chinese Communist Party (CCP) could effect the outcome of this private arbitral decision?

2) Assume that the upper echelons of the CCP leadership have the ability to impose a political directive upon CIETAC which would be taken seriously by the tribunal. Could that Party directive specifically call for CIETAC to expressly reject international legal agreements? Or, put another way, would it instead be entirely incumbent upon CIETAC arbitrators to rationalize their determinations in conformity with the general desires of the Party?
Scenario #4:

"Furnaco," a manufacturer of industrial heat treatment furnaces having its principle place of business in the U.K., and Chi Eng, a corporation having its principle place of business in Shandong, China executed a license cooperation agreement in 2000 under which Chi Eng was given the right to manufacture certain products in Shandong and Furnaco provide technical assistance. The agreement provided that all disputes were to be settled by CIETAC.

Alleging in 2002 that Chi Eng had failed to pay royalties, Furnaco initiated arbitration proceedings in which Chi Eng participated and lost. An award was rendered in Furnaco’s favour and Furnaco sought enforcement in China. Chi Eng resisted enforcement on two grounds. First, that there had been a fundamental breach of the licensing agreement which put the dispute outside the jurisdiction of the arbitrator, and, secondly, that to recognize the foreign arbitral award would be contrary to public policy in China in that a foreign corporation without assets in China would be entitled to enforce the English award in China, leaving the Chinese corporation without recourse with respect to its substantial damages occasioned by Furnaco’s fundamental breach. In addition, Chi Eng argued further that Furnaco had not filed a duly certified copy of the award with the Court, as required by law.

Upon review, the defendant’s arguments were rejected. The Court held that Chi Eng’s arguments that there had been a fundamental breach should have been raised in a timely fashion before the arbitral tribunal, as it fell directly within the arbitrator’s jurisdiction. The Court reviewed the meaning of “duly certified” under the law, and concluded that while the initial documents submitted by the applicant did not meet the standard, subsequently filed documents did comply with the requirements of law. Accordingly, the award was enforced.

Questions:

1) Limited to the above facts, is this kind of outcome likely? That is to say, where a Chinese party may loose in an arbitral decision, what is the likelihood that a local Municipal Intermediate People’s Court will defer to the tribunal’s findings in upholding enforcement?

2) In enforcement proceedings in China, to what extent will a People’s Court overlook procedural deficiencies (whether they are slight or otherwise), when to do so would be at the expense of a Chinese entity?
Scenario #5:

An American aftermarket automotive parts manufacturer "Americo" and a unit of a Chinese city government "Chicity" formed an equity joint-venture operation (EJV). The local Commission on Foreign Trade and Economic Cooperation (COFTEC) approved the creation of the EJV. Americo holds a 60 percent equity interest in the project, which is to make parts for a Chinese automotive manufacturer for the domestic Chinese market.

Americo supplied the technology for the parts, their design, as well as prototypes in the prescribed period outlined in the EJV contract. In return, Chicity which was to secure financing, prepare a site for a manufacturing facility, build, lease back the facility to the EJV, and obtain a supply agreement with the potential customer. Chicity failed to satisfy these commitments.

The site lease agreement between the parties called for CIETAC to be the appropriate forum to settle disputes. Later, ignoring certain preliminary requirements in the site lease, Chicity submitted a claim against the EJV to CIETAC based upon the EJV's termination of the site lease. The individual who submitted the claim on behalf of Chicity was not only a Chicity director but also a Chicity appointed chair of the EJV. Chicity then successfully influenced its local branch of the Bank of China to prevent the EJV from using its own funds to defend itself before CIETAC and attempted to prevent the general manager of the EJV from retaining legal counsel to defend the EJV. As a result, Americo was forced to finance the EJV's defense.

Based upon its earlier termination of its technology transfer agreement with the EJV, Americo terminated its name license agreement with the EJV, and its trademark license agreement with the EJV shortly thereafter. At the time of terminating its trademark license, Americo again requested the return of its technology. Chicity removed the technology covered under the terminated technology transfer from both the EJV and the potential customer's site and refused to release the technology to the EJV general manager so that it could be returned to Americo. At roughly the same time, Chicity withdrew all of its technical personnel from the EJV to work on Chicity's own competing project for the EJV's potential customer.

In compliance with CIETAC's requirements, the EJV submitted to CIETAC its statement of defense and its counterclaims against Chicity regarding the site lease. Upon receipt of the EJV's complaint, and because the EJV's counterclaims were so compelling from their face, Chicity immediately petitioned CIETAC to withdraw its claim against the EJV and averred that CIETAC did not have the legal jurisdiction to hear the matter. CIETAC requested briefs from both parties on the issue.

The EJV later learned, from minutes obtained from a meeting between Chicity and the local city government, that the city was willing to finance legal actions to appropriate the EJVs assets. As recorded in the minutes of that meeting, Chicity gave the city assurance that it would prevail.

Six weeks later, the EJV general manager was on company leave to the US and CIETAC was still considering the site lease arbitration. During this time, according to a court docket number, Chicity sued the EJV in local court based on EJV's alleged breach of the site lease. The EJV's chair, who had previously submitted a claim on Chicity's behalf against the EJV with CIETAC, had apparently now appeared on the EJV's behalf in local court on the same matter, despite the fact that the EJV contract did not permit...
him to do so. Another Chicity-appointed EJV board member had represented Chicity against the EJV. Perhaps not surprisingly, Chicity won the case. Aside from the obvious conflicts of interest of individuals appearing on both sides of the case, a number of Chinese procedural rules were violated during the trial. Chicity both sued and represented the EJV and sealed all of the trial records, keeping them from Americo and EJV general manager.

One month later, the general manager and Americo first learned of the findings against the EJV when his office received a fax from its Chicity appointed chair informing it of the suit in local court. In the fax, the chair stated that he had represented the EJV against Chicity and lost. The chair’s fax went on to add that the parties needed to contribute additional funds to cover the shortfall between the court’s award to Chicity and the funds that had already been seized from the EJV’s accounts. By the time the EJV had received the fax, the court’s statute of limitations for appeal had elapsed.

A few days later, the EJV received another fax, this one from the local COFTEC administration. The fax rejected the application for termination because both parties’ EJV board members had not approved it. In short, COFTEC disallowed the unilateral termination provisions of the EJV contract that it had originally approved. A day or two later, the EJV then received notice that CIETAC was in agreement with Chicity on the issue of jurisdiction, ruling that because both parties to the arbitration were Chinese legal persons CIETAC did not have legal jurisdiction despite the arbitration provisions to the contrary in the site lease.

Questions:

1) In the above scenario, which contains a litany of actors and their potential interests, is it possible in your opinion that CIETAC arbitrators could have been the last in a series of actors to exercise their own political interests, or the interests of others? Please state yes or no in your response, and how logistically CIETAC would have come to know of these other interests.

2) NOTE: This question does not relate to any of the aforementioned hypotheticals. Please answer this question independently of the any of the responses you have provided.

Finally, in considering the totality of your professional experiences with CIETAC, either as counsel, arbitrator or some other type of observer, what three (3) areas within CIETAC do you believe require the greatest need for reform? Note: Ranking these reforms in order of importance is not necessary. However, if you have assigned any numeric importance to your suggestions, please include that information and why.