

DISPUTE RESOLUTION IN CHINA: PATTERNS, CAUSES AND PROGNOSIS*

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Since the reform era began in China in 1978, there have been significant changes in the nature and incidence of disputes, conflicts and social disturbances, and the mechanisms for addressing them. We examine three types of disputes: commercial disputes, socio-economic claims and public law (administrative and constitutional law) disputes. Three general patterns stand out: first, the much better performance of institutions for handling disputes in urban areas compared to rural areas; second, the significantly greater progress in handling commercial law disputes compared to socio-economic claims; and third, the more advanced state of administrative law compared to constitutional law.

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I. INTRODUCTION

Since the Chinese reform era began in 1978, there have been significant changes in the nature and incidence of disputes, conflicts and social disturbances, and in the mechanisms for addressing them. As with economic and governance reforms, the government has adopted a pragmatic, problem-solving approach in its attempts to meet the broad and at times conflicting goals of justice and efficiency while maintaining socio-political stability and rapid economic growth. The result has been continuous experimentation leading to the creation of new mechanisms, the reform of existing mechanisms, and the return to older mechanisms in some cases when newer ones proved disappointing. This is generally true across areas: commercial disputes, constitutional and administrative law, socio-economic issues (pension, welfare and medical claims, labor disputes, land takings and environmental issues), criminal law, and civil and political rights. However, reforms have been more active, progress has been more noticeable, and the path of reforms has been more consistent and direct in some areas than others.

We begin with a brief overview of significant developments in the handling of commercial disputes, socio-economic claims and public law (administrative and constitutional law) disputes.¹ Three general patterns

¹ For developments in criminal law and administrative detention see generally JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 261-98 (2008) (reviewing Chinese criminal code and advocating for comprehensive reform); ZHU JINGWEN, ZHONGGUO FA LÜ FA ZHAN BAO GAO: SHU JU KU HE ZHI BIAO TI XI [REPORT ON CHINA DEVELOPMENT: DATABASE AND INDICATORS] (2007); Chen Ruihua, *Anjuan Bilu Zhongxin Zhuyi: Zhongguo Xingshi Shenpan Fangshi De Zai Kaocha* [On the Trial Mode Centered on Files and Notes: Reconsidering China's Criminal Adjudication Process], FAXUE YANJIU [CHINESE J. L.], April 2006, 63 (arguing for reform in criminal evidentiary rules);

stand out: first, the much better performance of institutions for handling disputes in urban areas compared to rural areas; second, the significantly greater progress in handling commercial law disputes compared to socio-economic claims; and third, the more advanced state of administrative law compared to constitutional law. We then summarize some of the key factors underlying these patterns and the dynamics of reform, providing an account of why the government has opted for a particular mix of mechanisms to handle a certain type of dispute at any given time, why that mix has changed over time, and why there has been more progress in some areas than other areas. We conclude with some thoughts on what can be expected in the future, and some policy recommendations to help overcome some of the existing problems.

II. COMMERCIAL LAW

Dispute resolution in the commercial area is characterized by: (i) demonstrable overall progress; (ii) considerable efforts to improve the regulatory framework and respond to investors' needs, thus reducing vertical disputes and tensions between businesses and the state; (iii) a rapid rise in litigation to resolve horizontal commercial disputes among business operators through the late 1990s followed by relative stability; (iv) improvements in enforcement, particularly in more developed urban areas; (v) notwithstanding the considerable progress, ongoing problems with litigation, including significant regional differences in the nature of the economy, the nature of disputes and institutional capacity, and (vi) a renewed emphasis on judicial mediation in response to ongoing problems.

Chen Ruihua, *Susong De Sili Hezuo Moshi: Xingshi Hejie Zai Zhongguo De Xingqi* [On the Private Cooperation Model in Criminal Proceedings], *ZHONGGUO FAXUE* [CHINA LEGAL SCI.], Oct. 9, 2006, at 15 (discussing criminal settlement practice); Hualing Fu, *Putting China's Judiciary into Perspective: Is It Independent, Competent, and Fair?*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* 193, 194-97 (Erik G. Jensen & Thomas C. Heller eds., 2003) (reviewing criminal law developments); Randall Peerenboom, *Out of the Pan and into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate Administrative Detention in China*, 98 *Nw. U. L. REV.* 991 (2004) (arguing for reform rather than elimination of administrative detention in China). For civil and political rights, see generally *CONG.-EXECUTIVE COMM'N ON CHINA, 108TH CONG., ANNUAL REPORT (2004)* [hereinafter *CECC 2004*]; *RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST?* 129-162 (2007) (assessing China's performance with respect to human rights).

A. *Improving the Business Environment: Market-Friendly Regulations and Improved Governance*

The importance of law and a functional legal system to economic development in Asia has often been overlooked because so much of the focus has been placed on the role of courts in enforcing contract rights.² However, equally if not more important is the creation of a business-friendly environment, including market-friendly regulations and institutions capable of enforcing the regulations effectively and efficiently.³ The primary complaint of foreign investors has not been weak courts unable to enforce contractual rights but a lack of transparency in the making of laws and regulations, inconsistent implementation of laws, excessive red tape, and predatory government behavior.⁴ This has been clearly shown in many areas related to foreign

² See, e.g., Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89, 94-96 (2003) (“legal systems of developed capitalist economies do two important things: they enforce contractual rights . . . and provide security for one’s property”); Donald Clarke et al., *The Role of Law in China’s Economic Development* 1-21 (Geo. Wash. U. L. Sch. Public L. & Legal Theory Working Paper No. 187, 2006), available at <http://ssrn.com/abstract=878672> (last visited May 10, 2009) (discussing the role of contract rights in China’s economic development and finding court’s role secondary); Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* 8 (Carnegie Endowment for Int’l Peace Working Paper No. 30, 2002), available at <http://www.carnegieendowment.org/files/wp30.pdf> (last visited May 10, 2009) (“the distaste for politics has led legal reformers to avoid it and to try to build legal systems outside of and in opposition to it, where property and contract rights are seamlessly enforced without reference to their political and social consequences”).

³ Courts in Japan, South Korea, Taiwan, Hong Kong and Singapore generally handled commercial cases in an independent, fair and reasonable way during their periods of rapid growth, even though the courts in the last four did not provide much protection for civil and political rights under non-democratic regimes, and commercial litigation in Japan was limited by a variety of institutional factors, including institutional restraints such as jurisdictional rules and the size of the legal profession. That courts were able to provide reasonable protection for commercial property rights if necessary enhanced the effectiveness of informal means of resolving disputes. See PEERENBOOM, *supra* note 1, at 33-39 (discussing mutual reinforcement of rule of law and economic growth).

⁴ Since 1999, foreign investors have cited as the four biggest challenges for doing business in China a lack of transparency (major challenge for 41% of respondents), inconsistent regulatory interpretation (37%), unclear regulations (34%), and excessive bureaucracy (31%), followed by human resource constraints (29%) and IP infringements (26%). AMERICAN CHAMBER OF COMMERCE IN THE PEOPLE’S REPUBLIC OF CHINA & AMERICAN CHAMBER OF COMMERCE IN SHANGHAI [hereinafter AMCHAM], 2007 WHITE

direct investment, such as which sectors are open to foreign investment and the levels of approvals needed for certain investment projects.⁵ In addition to these concerns, domestic businesses have complained about systematic biases against the private sector, including limitations on access to capital provided on soft loan terms to state-owned enterprises (SOEs).⁶

The business environment is now considerably more favorable to both foreign and domestic investors. Restrictions on foreign direct investment have been removed or relaxed in many areas.⁷ In addition to the Sino-foreign joint ventures, Sino-foreign cooperative enterprises, and wholly-owned foreign enterprises, there are new forms of investment.⁸ These new forms include various ways of participating in China's debt

PAPER: AMERICAN BUSINESS IN CHINA 13 fig.4 (2007), available at <http://www.amchamchina.org/article/3185> (last visited May 10, 2009). But almost 40% of investors believe there have been improvements in transparency between 2005 and 2007 (versus 55% unchanged); 27% saw improvements in regulatory consistency (versus 63% unchanged), 34% thought regulations were clearer (versus 54% unchanged) and 37% felt the bureaucracy had improved (versus 60% unchanged). *Id.* at 62 fig.21. Looking forward, 33% cited a slowdown of the Chinese economy as the biggest risk for coming years, while 26% cited increased Chinese protectionism, 21% cited deterioration of Sino-US relations, and 20% cited labor costs. *Id.* at 13 fig.5. However, 91% of respondents are either optimistic or cautiously optimistic in their five year outlooks for doing business in China, compared to only 5% who are pessimistic. *Id.* at 65 fig.29.

In predatory states, officials mainly utilize their position to extract unproductive rents from producers and entrepreneurs while not participating in business either directly or indirectly. For a discussion of the predatory state, see generally Marc Blecher & Vivienne Shue, *Into Leather: State-led Development and the Private Sector in Xinji*, 2001 CHINA Q. 368, 368 n.1.

⁵ See generally YASHENG HUANG, FDI IN CHINA: AN ASIAN PERSPECTIVE 31-41 (1998) (noting that China's organizational uncertainties and decentralized but layered discretionary authority lead to inefficiencies in attracting FDI).

⁶ See *id.* at 41 (noting excessive restrictions on domestic non-state-owned firms to compete for state-owned assets).

⁷ Guiding Catalogue of Foreign-Invested Industries (2007) (promulgated jointly by Nat'l Dev. & Reform Comm'n & Ministry of Com., Oct. 31, 2007, effective Dec. 1, 2007), translated in ISINOLAW (last visited May 10, 2009); see also *China's 2007 Foreign Investment Guide*, CHINA BUS. REV., Jan./Feb. 2008, at 16, 16-17 (discussing how as a result of 2007 guidelines, "some industry sectors will see more support and openness, while other sectors will find ownership or other restrictions on new investments").

⁸ See generally, Yadong Luo & Min Chen, *Financial Performance Comparison Between International Joint Ventures and Wholly Foreign-Owned Enterprises in China*, 37 INT'L EXECUTIVE 599 (1995) (examining relative performance of international joint ventures and wholly foreign-owned enterprises).

and equity markets, such as through Qualified Foreign Investment Institutions⁹ and RMB-denominated corporate debt issued in Hong Kong, and new types of business entities, including partnerships, franchises,¹⁰ and branch offices. The importance of the domestic private sector has been recognized and given a firm basis in the constitution.¹¹ Institutions have been created to facilitate market activities, including the China Securities Regulatory Commission (CSRC), which oversees China's stock markets, and the China Banking Regulatory Commission, which oversees the banking industry.¹² The approval and licensing system has been overhauled as a result of State Council initiated reforms and the passage of the Licensing Law,¹³ although most projects still require numerous licenses. The recently passed Property Law,¹⁴ Enterprise Bankruptcy Law,¹⁵ and Anti-Monopoly Law¹⁶ have filled gaps in the regulatory framework. The Legislation Law,¹⁷ China's WTO accession agreement,¹⁸ and other regulations have led to increased public participation in processes of making, interpreting and implementing laws and regulations. There has been an increase in the number of public hearings and opportunities for public comment prior to the passage of key laws and regulations, a trend that will be further strengthened with

⁹ See generally, Steven Yeo, *The PRC Qualified Foreign Institutional Investors Market*, 14 CHINA ECON. REV. 443 (2003) (speculating as to affects that qualified foreign institutional investors will have on Chinese securities markets).

¹⁰ See generally, Paul Jones, *The Regulation of Franchising in China and the Development of a Civil Law Legal System*, 2 CHINESE L. & POL'Y REV. 78 (2006) (discussing China franchising law).

¹¹ XIAN FA art. 13 (1982) (protecting rights to private property).

¹² See generally Duncan Alford, *The Influence of Hong Kong Banking Law on Banking Reform in the PRC*, 3 E. ASIA L. REV. 35 (2008) (elaborating on influence of Hong Kong's banking system on the development of Chinese banking law).

¹³ Administrative License Law (promulgated by the Nat'l People's Cong., Aug. 27, 2003, effective July 1, 2004), translated in ISINOLAW (last visited May 10, 2009).

¹⁴ Property Law (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), translated in ISINOLAW (last visited May 10, 2009).

¹⁵ Law on Enterprise Bankruptcy (Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007), translated in ISINOLAW (last visited May 10, 2009).

¹⁶ Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), translated in ISINOLAW (last visited May 10, 2009).

¹⁷ Law on Legislation (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000), translated in ISINOLAW (last visited May 10, 2009).

¹⁸ Decision of the Ministerial Conference, *Accession of the People's Republic of China*, WT/L/432 (Nov. 10, 2001).

the passage of the Administrative Procedure Law, currently being drafted.¹⁹

These changes are reflected in empirical surveys. China ranked seventeenth out of 134 countries in the 2008-2009 World Economic Forum's Global Competitiveness Index.²⁰ For 2009, the World Bank ranked China eighty-third out of 181 countries for doing business overall.²¹ China has been one of the most open developing economies in the world.²² Its average tariff rate of 10% is much lower than that of Argentina (32%), Brazil (31%), India (50%) and Indonesia (37%).²³ Its ratio of imports to GDP is almost 35%, compared to 9% for Japan.²⁴ China has also been more open, and relied more heavily on foreign direct investment, than South Korea, Japan or Taiwan. In 2003, the ratio of the stock of foreign investment to GDP was 35% in China, compared to 8%

¹⁹ China's first public hearing on the proposed income tax changes was held in 2005. See *China Opens Hearing On Income Tax Threshold*, CHINA DAILY, Sept. 27, 2005, available at http://www.chinadaily.com.cn/english/doc/2005-09/27/content_481213.htm (last visited May 10, 2009) ("More than 20 people from various walks of life and various regions across the country, selected from nearly 5,000 applicants, attended [*sic*] the hearing. Their opinions will provide an 'important basis' for the Standing Committee of the National People's Congress (NPC), the top legislature, to make amendments to the personal income tax law.").

China also sought public comment on its draft Labor Contract Law in 2007. See *Zhongguo zai du kai men li fa gong bu lao dong ge tong fa cao an zheng qiu yi xian* [Chinese Reopen Legislature's Published Draft Labor Contract Law To Solicit Opinions], XINHUANET, Mar. 21, 2006, available at http://news.xinhuanet.com/legal/2006-03/21/content_4325314.htm (last visited May 10, 2009). There were thousands of public comments and suggestions. See *Lao dong he tong fa cao an di er jie duan shou dao ge fang yi jian wan duo jian* [Draft Labor Contract Law Second Phase Receives More Than 30,000 Views], XINHUANET, Apr. 6, 2006, available at http://news.xinhuanet.com/newscenter/2006-04/06/content_4392485.htm (last visited May 10, 2009).

²⁰ WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2008-2009, 10 tbl.4, 134-35 (2008) [hereinafter WEF]. The comparability of prior years' results is mitigated by changes in methodology and by the number of countries surveyed. See *id.* at 43-59 (describing and justifying new methodology).

²¹ WORLD BANK & INTERNATIONAL FINANCE CORPORATION, DOING BUSINESS 2009: COMPARING REGULATION IN 181 COUNTRIES 6 tbl.1.3, 97 (2008).

²² Lee Branstetter & Nicholas Lardy, *China's Embrace of Globalization: The Move to Freer Trade Prior to WTO Accession*, ASIA PROGRAM SPECIAL REPORT, July 2005, at 6, 11-12.

²³ *Id.* at 12.

²⁴ *Id.* at 11 fig.6, 12.

in Korea, 5% in India and 2% in Japan.²⁵ Reflecting the considerable investment in institution-building, China now outperforms the average in its income class on World Bank's indexes for government effectiveness, regulatory quality and rule of law.²⁶

At the same time, many problems remain. Security markets are dominated by firms in which the state continues to hold a majority share, which has hampered the development of corporate governance and a legal regime to protect minority rights.²⁷ Starting a business is time-consuming and difficult, with numerous approvals and licenses required. Despite some improvements, including a recently passed freedom of information act,²⁸ transparency of government policymaking remains an issue.²⁹ Corruption also continues to be a problem, with China only slightly outperforming the average in its income class in 2006.³⁰

Investors have relied mainly on lobbying to address these issues, arguing generally that reforms are in China's own national interests (although administrative litigation and other mechanisms, discussed below, also provide disgruntled parties avenues for challenging government acts). Lobbying by the business community is frequently combined with bilateral and multilateral pressure, although the two processes are not always in lock-step, as when members of the U.S. Congress publicly reprimanded the American Chamber of Commerce for opposing labor-friendly provisions of the 2007 Labor Contract Law.³¹

²⁵ Martin Wolf, *Though Precedents are Ominous, China's Rise to Greatness Need Not Bring Conflict: Prospects for Peace and Prosperity Between China and the US*, FIN. TIMES (UK FIRST ED.), Sept. 15, 2005, at 17.

²⁶ See Daniel Kaufmann et al., *Governance Matters VI: Aggregate and Individual Governance Indicators 1996-2006* 13-14, 82-90 tbls. C3-C5 (World Bank Pol'y Res. Working Paper No. 4280, 2007), available at <http://ssrn.com/abstract=999979> (last visited May 10, 2009) (giving tables of performance indicators in given categories).

²⁷ See WEF, *supra* note 20, at 26-28 and box 3 (discussing China's growth and its relative weakness in the financial sector).

²⁸ Regulation on the Disclosure of Government Information (promulgated by the St. Council Apr. 5, 2007, effective May 1, 2008), translated in LAWINFOCHINA (last visited May 10, 2009). See also Zhao Huaxin, *Statute to Make Gov't Open, Clean*, CHINA DAILY, Apr. 25, 2007, available at http://www.chinadaily.com.cn/cndy/2007-04/25/content_858970.htm (last visited May 10, 2009) (discussing regulation).

²⁹ See WEF, *supra* note 20, at 135 (ranking China 46th out of 134 countries on transparency of government policymaking).

³⁰ Kaufman et al., *supra* note 26, at 13-14, 91-93 tbl. C6.

³¹ Labour Contract Law (promulgated by the Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), translated in ISINOLAW (last visited May 10, 2009); Tim Costello

The Chinese government, for its part, has remained committed to market reforms, albeit with periods of indecision, most notably in 1989 in the wake of the Tiananmen demonstrations and more recently when conservative factions argued that China's open-door economic policies have led to rising income inequality, environmental degradation and a host of social ills from increased crime to rampant prostitution. There are also signs that China's leaders, now more acutely aware of the many ways in which rich countries erect trade barriers to protect their own national economies, are beginning to rethink China's open door policies.³² At present, however, the general trend seems to be toward continued openness, albeit with limited retrenchment in some areas.³³

Given the Chinese Communist Party's dependence on economic growth as the mainstay of its claim to legitimacy, government leaders have had little choice but to press on with reforms. In so doing, they have relied mainly on an incentive structure for promotion that places great weight on economic growth to ensure that local officials create a business-friendly environment. At times, the incentive structure has worked too well, as lower-level officials ignore central policies or engage in protectionist measures to achieve local development.³⁴

B. *General Trend Toward More Litigation*

The transition to a market economy not only increases transactions but creates new property rights: use rights in land and ownership rights in buildings; security interests in land, buildings and other property;

et. al, *Labor Rights in China*, FPIF COMMENTARY, Dec. 21, 2006, available at <http://www.fpif.org/fpifxt/3824> (last visited May 10, 2009). See also AMCHAM, *supra* note 4, at 36 (expressing concerns with some provisions of then draft Labor Contract Law).

³² See MARK WILLIAMS, *COMPETITION POLICY AND LAW IN CHINA, HONG KONG, AND TAIWAN* 141 (2005) (comparing China's protectionist policies to those of the United States during the Great Depression). See generally *id.* at 93-220 (describing Chinese competition law policies through historical and political lens).

³³ See LESTER ROSS, *THE ROLE OF FOREIGN INVESTMENT IN CHINA'S TRANSITION* (n.d.), available at http://www.fljs.org/uploads/documents/Ross_pb9%231%23.pdf (last visited May 10, 2009) (discussing China's technical compliance to WTO accession agreements, but continued use of protectionist measures). See also AMCHAM, *supra* note 4, at 24-30 (discussing improvements and new barriers to foreign investment).

³⁴ See HUANG, *supra* note 5, at 31 (noting ability of firms to bargain with local authorities over the enforcement of central policies).

rights of homeowner associations vis-à-vis developers and management companies; property interests in stocks and other securities; intellectual property rights; and rights to business licenses and to be free from government predation. In some cases, the new rules alter or replace existing norms and rules, in the process transferring assets from less productive users to higher productive users. One of the most conspicuous examples is through privatization, in which land use rights in rural areas have been allocated to individual households.³⁵ In urban areas, many residents have been relocated in the process of transferring land to higher value users, leading to considerable conflict. Many state-owned enterprises have also been restructured and reformed.³⁶ These new rights must be protected, often but by no means exclusively through litigation in the courts.

The general trend in the commercial area has been for an increase in litigation with an expansion of the range of justiciable disputes, while mediation has decreased and arbitration has remained relatively stable and limited.³⁷ The number of first-instance economic cases increased from 44,080 in 1983 to 1,519,793 in 1996, while the number of first instance civil cases increased from 300,787 in 1978 to 3,519,244 in 1999.³⁸

Between 1983 and 2001, economic disputes increased an average of 18.8% a year, an increase twice the rate of civil disputes, and four times the rate of criminal cases.³⁹ Contract disputes are the major cause of litigation.⁴⁰ First-instance purchase and sale contract cases increased from 23,482 in 1983 to 422,655 in 1996, and money-lending cases increased from 1,264 in 1983 to 558,499 in 1996.⁴¹

A number of procedural reforms have increased the efficiency and fairness of the process, including reforms of the case management

³⁵ Xin He, *The Recent Decline in Economic Caseloads in Chinese Courts: Exploration of a Surprising Puzzle*, 2007 CHINA Q. 352, 365.

³⁶ *Id.* at 366-67.

³⁷ ZHU, *supra* note 1, at 21-26.

³⁸ He, *supra* note 35, at 353 tbl.1.

³⁹ Clarke et al., *supra* note 2, at 40, 69 tbl.2.

⁴⁰ *Id.* at 40, 70 tbl.3.

⁴¹ QUAN GUO REN MIN FA YUAN SI FA TONG JI LI SHI ZI LIAO HUI BIAN: 1949 - 1998 (MIN SHI BU FEN) [COLLECTION OF HISTORICAL INFORMATION ON NATION-WIDE PEOPLE'S COURTS' JUDICIAL STATISTICS: 1949-1998 (CIVIL SECTION)] 52, 264 (Zui gao ren min fa yuan yan jiu shi bian [Sup. People's Ct. Research Office] ed., 2000).

system, rules regarding evidence, time limits for the completing cases and various stages of the litigation process.⁴² In 2006, 95% of all first instances cases were completed within the time limits.⁴³

Nevertheless, the utility of litigation to protect commercial actors is affected by many factors, including limitations on the right to sue, the use of other means to achieve similar ends, conflicting policy goals, and the strength and independence of the courts. These factors affect certain areas of law and types of cases more than others.

For instance, shareholder rights were (until recently) mainly protected through criminal sanctions and fines.⁴⁴ The 1993 Company Law appeared to limit private shareholders to injunctive relief rather than damages.⁴⁵ In 2001, the Supreme People's Court (SPC) issued an interpretation preventing shareholders from bringing suits; then four months later it issued another interpretation allowing shareholders the narrow right to sue for misrepresentation where the CSRC had issued a report finding misrepresentation.⁴⁶ The restrictions were justified on a variety of policy grounds: the judges lacked experience handling such cases, jurisdictional rules had yet to be worked out to prevent different courts from issuing different awards for suits arising out of the same cause of action, and large damage awards against SOEs would result in significant losses of state assets.⁴⁷

In 2003, the SPC issued a third, much more detailed, interpretation.⁴⁸ Although the interpretation did not expand the subject matter for

⁴² For example, cases handled through the normal procedure shall be completed within six months, while cases handled through summary procedure shall be completed within three months. Civil Procedure Law (promulgated by the Standing Comm. Nat'l People's Cong. Oct. 28, 2007, effective Apr. 1, 2008), arts. 135, 146, *translated in* ISINOLAW (last visited May 10, 2009).

⁴³ *Xiao Yang zuo zui gao ren min fa yuan gong zuo bao gao* [*Xiao Yang Delivers Supreme People's Court Work Report*], SINA, Mar. 13, 2007, available at <http://news.sina.com.cn/c/2007-03-13/155812506927.shtml> (last visited May 10, 2009) [hereinafter *SPC Work Report*].

⁴⁴ JIANGYU WANG, RULE OF LAW AND RULE OF OFFICIALS: SHAREHOLDER LITIGATION AND ANTI-DUMPING INVESTIGATION IN CHINA 2-4 (n.d.), available at <http://www.fljs.org/uploads/documents/Jiangyu%231%23.pdf> (last visited May 10, 2009).

⁴⁵ *Id.* at 3.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.*

⁴⁸ *Id.*

litigation, it did clarify a number of procedural and evidentiary issues.⁴⁹ After courts gained experience from further study of the issues and the handling of several cases, the Company Law⁵⁰ was amended in 2005 to strengthen the rights of minority shareholders to bring suit.⁵¹ Courts have now begun accepting suits for reasons other than misrepresentation, and the SPC appears to be set to issue another interpretation based on the experience gained from these cases.

Bankruptcy provides another example of interplay between litigation and government policy. The Enterprise Bankruptcy Law passed in 1986 was limited to SOEs, and was not very effective in practice.⁵² There were on average only 277 bankruptcies a year from 1989 to 1993.⁵³ Banks objected to provisions that gave priority to workers, while local government officials were worried about social unrest from laid-off workers, judges lacked independence and the specialized training in bankruptcy proceedings, and the support network of trained accountants, lawyers and bankruptcy specialists was lacking.⁵⁴

Rather than relying on creditor-initiated bankruptcy proceedings to resolve the problem of insolvent SOEs, the government opted for an administrative approach, with the State Council encouraging the merger of weaker SOEs with stronger ones and carefully allowing selected SOEs to go bankrupt based on a regional quota that allowed government officials to factor in the likelihood of social unrest in deciding which companies could enter bankruptcy proceedings.⁵⁵ The government also reversed the preference for workers by reassigning the priority for the proceeds from the sale of secured land use rights to the secured parties, in most cases PRC banks.⁵⁶ Over time, the vast majority of SOEs were sold off, with many of the remaining ones—having been exposed to increasing competition—becoming less of a burden on the state.⁵⁷ More

⁴⁹ *Id.*

⁵⁰ Company Law (promulgated by the Standing Comm. Nat'l People's Cong. Oct. 25, 2007, effective Jan. 1, 2006), translated in ISINOLAW (last visited May 10, 2009).

⁵¹ WANG, *supra* note 44, at 3.

⁵² See TERENCE C. HALLIDAY, THE MAKING OF CHINA'S BANKRUPTCY LAW 3 (n.d.), available at <http://www.fljs.org/uploads/documents/Halliday.pdf> (last visited May 10, 2009) (noting six elements applicable to bankrupt SOEs).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Joel R. Samuels, Comment, "Tain't What You Do": Effect of China's

generally, the private sector (including collective enterprises) began to play an increasingly dominant role in the economy.

These changes were reflected in the 2006 Enterprise Bankruptcy Law, which applies to both state-owned and non-stated-owned companies, except for small unincorporated private businesses and some 2000 SOEs that are either at particular financial risk or in sensitive industries.⁵⁸ The courts now oversee bankruptcies, aided by the private professions of lawyers, accountants and other bankruptcy specialists.⁵⁹ While the government's role has been diminished, there are still various opportunities for the government to intervene to pursue non-economic policy goals such as social stability. These include special approvals for certain SOEs and financial companies to commence bankruptcy proceedings,⁶⁰ possible pressure on courts from local governments to decide that companies are not technically insolvent or to simply refuse to accept the case, and government pressure on banks to issue policy loans to prop up ailing SOEs. Nevertheless, the 2006 Enterprise Bankruptcy Law provides creditors the means to initiate bankruptcy proceedings,⁶¹ and, on the whole, represents a large step forward in clarifying and strengthening their rights.

Whereas the general trend in securities litigation and bankruptcy proceedings has been to provide a more rule-based system that strengthens the hand of private actors, antidumping remains an area that is much more politicized and dependent on administrative discretion.⁶²

Proposed Anti-Monopoly Law on State Owned Enterprises, 26 PENN. ST. INT'L L. REV. 169, 178 (2008) (noting SOE privatization since 1978 has caused SOE contribution to GDP to decline from roughly eighty percent to between seventeen to fifty percent).

⁵⁸ Law on Enterprise Bankruptcy (Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007), arts. 2, 7, 133-34, *translated in* ISINOLAW (last visited May 10, 2009); HALLIDAY, *supra* note 52, at 5.

⁵⁹ Law on Enterprise Bankruptcy (Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007), arts. 3, 24, *translated in* ISINOLAW (last visited May 10, 2009).

⁶⁰ *Id.* art. 134; *see also* 30 *Chinese Securities Firms Enter Bankruptcy Proceedings*, XINHUA, Nov. 13, 2006, available at <http://english.cri.cn/2946/2006/11/13/53@162350.htm> (last visited May 10, 2009) (noting CSRC is on a "mission to overhaul the [securities] sector").

⁶¹ Law on Enterprise Bankruptcy (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007), art. 7, *translated in* ISINOLAW (last visited May 10, 2009).

⁶² WANG, *supra* note 44, at 7.

China is one of the most frequent targets of antidumping claims, and appears to pay a rising-power premium.⁶³ On the other hand, China has increasingly turned to antidumping actions against others doing business in China.⁶⁴ The Ministry of Commerce (MOFCOM) is charged with both investigating the existence of dumping and recommending whether duties should be imposed.⁶⁵ Antidumping proceedings remain shrouded in mystery. Parties are not allowed access to confidential information subject to protective order, to staff reports in particular cases, or even to MOFCOM's standards for calculating the dumping margin and industry damage. As in other countries, decisions appear to be driven by domestic political concerns to protect certain vulnerable industries rather than by principles of free trade or legal considerations.

C. *Enforcement Improving in Urban Areas*

While enforcement is often portrayed as difficult in China, recent studies have found significant improvements in urban areas, where “more than half of the creditors/plaintiffs . . . receive 100 per cent of the amount owed, and three-quarters are able to receive partial enforcement.”⁶⁶ Moreover, the main reason for non-enforcement is that

⁶³ Noting the parallel to the demonization of Japan in the 1980's, two authors describe “unprecedented” discriminatory policies against China by the United States that protect domestic industries and favor China's competitors. For example, Chinese companies face the most antidumping actions by the United States, are the most likely to have duties imposed, and suffer the highest duties—a “China premium” of an additional 80%—making China “public enemy number one.” Chad P. Bown & Rachel McCulloch, *U.S. Trade Policy Toward China: Discrimination and its Implications*, in CHALLENGES TO THE GLOBAL TRADING SYSTEM: ADJUSTMENT TO GLOBALIZATION IN THE ASIA-PACIFIC REGION 58, 58, 61-63 (Peter A. Petri & Sumner J. La Croix eds., 2007).

⁶⁴ China first passed anti-dumping regulations in 1997. By the end of 2003, the country had dealt with 27 such cases against foreign countries and regained an accumulated loss of more than 20 billion yuan (US\$2.4 billion). The petrochemical sector accounted for 20 of these 27 cases. Wang Ying, *Dumping Hits Nation's Petrochemical Sector*, CHINA DAILY, Mar. 24, 2005, at 11, available at http://www.chinadaily.com.cn/english/doc/2005-03/24/content_427593.htm (last visited May 10, 2009).

⁶⁵ Regulations on Anti-dumping and Anti-subsidy (promulgated by the St. Council Mar. 25, 1997, effective Mar. 25, 1997), arts. 11-35, translated in ISINOLAW (last visited May 10, 2009).

⁶⁶ XIN HE, THE ENFORCEMENT OF COMMERCIAL JUDGMENTS IN CHINA 2 (n.d.), available at <http://www.fljs.org/uploads/documents/Xin%20He%231%23.pdf> (last visited

defendants are judgment proof; they are insolvent or their assets are encumbered.⁶⁷ No legal system is able to enforce judgments in such circumstances.

Although cross-country comparisons can be misleading, it would appear that enforcement in China may be less problematic than in many jurisdictions, including in rich countries such as the United States, the United Kingdom, or Russia.⁶⁸ In the World Bank's Doing Business 2009 survey, China ranked eighteenth out of 181 economies in contract enforcement.⁶⁹ The survey measures the time, cost and number of procedures involved from the moment a suit is filed until payment is made.⁷⁰

The main reasons for the improvement in enforcement are changes in the nature of the economy, general judicial reforms aiming at institution building and increasing the professionalism of the judiciary, and specific measures to strengthen enforcement.⁷¹ The economy in many urban areas is now more diversified, with the private sector playing a dominant role.⁷² The fate of a single company is less important to the local government, which has a broader interest in protecting its reputation as an attractive investment environment. As a result, the incentive for governments to engage in local protectionism has diminished.⁷³ In contrast, enforcement is predictably more difficult in rural areas, where the economy is less developed and diversified, and judicial corruption and competence are more serious issues.⁷⁴

May 10, 2009).

⁶⁷ Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of the Enforcement of Arbitral Awards in the People's Republic of China*, 49 AM. J. COMP. L. 249, 273-74 (2001).

⁶⁸ HE, *supra* note 66, at 3.

⁶⁹ WORLD BANK & INTERNATIONAL FINANCE CORPORATION, *supra* note 21, at 97.

⁷⁰ *Id.* at 49.

⁷¹ HE, *supra* note 66, at 2-4, 7.

⁷² *Id.* at 4.

⁷³ See Mei Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 COLUM. J. ASIAN L. 97, 113 (2005) (arguing that "[t]he magnitude of local protectionism is inversely proportional to the prosperity of a locality.").

⁷⁴ HE, *supra* note 66, at 6.

D. *Limitations and Ongoing Problems in Litigation: Judicial Competence*

Despite the progress, a variety of problems limit the effectiveness of litigation in some circumstances. First, the quality of the judiciary remains a concern, particularly in basic level courts in poorer regions. Critics often note that only slightly more than half of all PRC judges have college degrees, not all of which are in law. While true, the education level of judges in higher level courts in urban areas is often quite high. For instance, over one-third of High Court judges and nearly one-third of Intermediate Court judges in Shanghai have masters or doctorate degrees in law. Education levels also vary by division within the same courts. Among the thirteen judges in Shanghai Intermediate Court No. 1 Civil Division No. 5, one has a Ph.D., another is completing a Ph.D., eight have masters degrees in law, and the others are studying for their masters degrees.⁷⁵

Moreover, eighty percent of Chinese courts are basic level courts, most of which are in rural areas. Much of their caseload consists of the types of small claims and minor property disputes that in other countries would be handled by magistrates and other laypersons without any, or any significant, formal legal training. Further, in many cases, parties in rural basic courts are seeking a decision that comports with local norms rather than a technically correct decision based on formal state law. As discussed in Part H, the vast majority of disputes that make their way to court are settled through judicial mediation. Some studies have found that young college graduates who formalistically rely on the law to settle disputes are perceived as less effective than older judges with less legal training who are more familiar with local norms and customs.⁷⁶

In any event, the long term trend is toward better educated judges. The Judges Law requires judges to have college degrees.⁷⁷ In most cases,

⁷⁵ Yong xing dong shu xie “Shanghai fa yuan jing shen” [Use Action to Show the “Spirit of Shanghai Courts”], Aug. 6, 2004, available at http://www.a-court.gov.cn/platformData/infoplat/pub/no1court_2802/docs/200408/d_22511.html (last visited May 10, 2009).

⁷⁶ See ZHU SULI, SONG FA XIA XIANG: ZHONGGUO JI CENG SI FA ZHI DU YAN JIU [BRING THE LAW TO THE COUNTRYSIDE: RESEARCH CONCERNING THE BASIC LEVEL OF THE JUDICIAL SYSTEM IN CHINA] 322-86 (2000).

⁷⁷ The Judges Law was amended to provide that new judges must have a bachelor’s degree in law or a bachelor’s degree in some other subject combined with knowledge of

new judges now have law degrees.⁷⁸ Judges are now also expected to pass the national unified exam, although certain exceptions can be made in remote areas where courts may find it difficult to attract judges with the necessary qualifications.⁷⁹ One of the problems has been that once judges in rural areas pass the national exam, they often leave the court for more lucrative private practice as lawyers.⁸⁰

E. *Judicial Corruption*

A second concern is judicial corruption. Judicial corruption is hard to define and even harder to measure empirically. The nature and incidence of corruption also varies by type of case,⁸¹ region and level of court.

A narrow definition would limit judicial corruption to bribery of judges that affects the legal outcome in particular cases. A broad definition of corruption would include any extralegal pressure on judges, including social pressure from relatives and friends and internal pressure from senior judges in the court, whether or not the pressure affected the legal outcome in the case, and regardless of whether the influence was for the sole purpose of speeding up the process and obtaining a just

law, plus two years of experience in legal work to become a judge in lower courts, or three years of work experience to be appointed to a High People's Court or the Supreme People's Court. If one has a masters or Ph.D. in law or in another subject combined with equivalent legal knowledge, then only one year of experience is needed to become a judge in a lower court or two years of experience to be appointed to a High People's Court or the Supreme People's Court. Judges Law (promulgated by the Standing. Comm. Nat'l People's Cong. June 30, 2001, effective Jan. 1, 2002), art. 9(6) para. 1, *translated in* ISINOLAW (last visited May 10, 2009).

⁷⁸ Interview with director of international donor agency providing judicial training to PRC judges (on file with authors).

⁷⁹ Judges Law (promulgated by the Standing. Comm. Nat'l People's Cong. June 30, 2001, effective Jan. 1, 2002), art. 9(6) para. 3, *translated in* ISINOLAW (last visited May 10, 2009).

⁸⁰ ZHU SULI, DAO LU TONG XIANG CHENG SHI: *ZHUAN XING ZHONGGUO DE FA ZHI* [LEGAL DEVELOPMENT IN CHINA'S TRANSFORMATION] 249 (2004). A similar pattern has emerged in Korea. See Patricia Goedde, *From Dissidents to Institution-Builders: The Transformation of Public Interest Lawyers in South Korea*, 4 E. ASIA L. REV. 63, 69-74 (2009) (noting that the judicial examination in South Korea has been extremely difficult, in part to keep compensation levels high by limiting the number of lawyers).

⁸¹ Fu, *supra* note 1, at 212 (noting differences in corrupt practices between criminal and administrative cases).

outcome.

Transparency International, for instance, defines judicial corruption as “any inappropriate influence on the impartiality of the judicial process by any actor within the court system.”⁸² This definition includes actions by the police, prosecutors, court staff and bailiffs as well as judges.⁸³ It includes acts done for financial gain, to enhance future career prospects or to comport with social norms. It includes media influence and popular pressure on the courts.⁸⁴ And it includes a politicized appointment process dominated by a single party or where the appointment of individual judges is subject to a political litmus test or based on political ideology.⁸⁵

Given such a broad definition, many legal systems would apparently be openly endorsing corruption given that the appointment process is explicitly political, such as in state elections of judges in the United States (where the candidates’ abilities to raise campaign funds increasingly plays a determinate role in the outcomes) or in countries where a certain number of high court appointments are reserved for each party. Such a definition also makes it difficult to compare judicial corruption across countries, as the nature of problems could be very different in different countries with similar scores.

As a general empirical matter, judicial corruption is highly correlated with wealth, as is corruption more generally.⁸⁶ Accordingly, comparison of judicial corruption in a lower-middle-income country such as China to judicial corruption in a high-income country such as the United States leads to the conclusion that China’s judicial system is more corrupt (and that the nature of its corruption is different), while comparison of China’s judicial system to that of other lower-middle income countries shows that China has been about as successful as others in controlling corruption, as

⁸² Transparency International, *Executive Summary: Key Judicial Corruption Problems*, in GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS, xxi, xxi (Diana Rodriguez & Linda Ehrichs eds., 2007).

⁸³ Mary Noel Pepys, *Corruption Within the Judiciary: Causes and Remedies*, in GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS, *supra* note 82, at 3, 7.

⁸⁴ *Id.* at 5.

⁸⁵ *Id.* at 4.

⁸⁶ See generally Brian W. Husted, *Wealth, Culture, and Corruption*, 30 J. INT’L BUS. STUD. 339, 350-54 (1999) (studying empirical data and concluding that corruption is generally correlated with GNP).

it has been in controlling corruption generally.⁸⁷ This is consistent with general corruption data from Transparency International and other surveys.⁸⁸

The high correlation of wealth and corruption is also generally true within China, where the level of wealth differs significantly across regions. In rural areas where the courts lack adequate funding, there tends to be more systematic institutional corruption generated by the need to raise funds. In some cases, judges attempt to persuade or cajole potential litigants to file lawsuits or disregard jurisdictional rules to obtain litigation fees. Courts may also aggressively enforce cases filed by some institutional plaintiffs, such as local banks, for the sake of litigation and enforcement fees, while pursuing other cases less aggressively.

Although judicial corruption in China appears to be slightly less frequent than in other lower-middle income countries, the public continues to perceive judicial corruption as a significant problem. To be sure, public perceptions of corruption are generally worse than the reality, in part because of sensationalist coverage of particular egregious cases that are not representative of the system as a whole, and because of distortion or inaccurate reporting in other cases.⁸⁹ In all African countries except South Africa and all Latin American countries except Colombia, the majority of citizens perceive the legal system to be corrupt, with more than 80% of the people describing the judicial system as corrupt in Bolivia, Cameroon, Mexico, Paraguay and Peru.⁹⁰ At least 45% of citizens view the judicial system as corrupt in all former soviet countries.⁹¹ Within Asia, 77% perceive the judicial system as corrupt in India, compared to 65% in Taiwan, 52% in Indonesia, 45% in the

⁸⁷ See Clarke et al., *supra* note 2, at 22 (“China has less legal corruption than countries at similar levels of per capita income.”).

⁸⁸ See, e.g., Johann Graf Lambsdorff, *Corruption Perceptions Index 2006*, in GLOBAL CORRUPTION REPORT: CORRUPTION IN JUDICIAL SYSTEMS, *supra* note 82, at 324, 325-32 tbl.1 (ranking China seventieth out of 163 countries in the Corruption Perception Index); see also DALI L. YANG, REMAKING THE CHINESE LEVIATHAN: MARKET TRANSITION AND THE POLITICS OF GOVERNANCE IN CHINA 254-57 (2004) (noting that while corruption is still perceived to be prevalent, China’s scores in several global corruption surveys have improved).

⁸⁹ Pepys, *supra* note 83, at 10.

⁹⁰ *Id.* at 12, 13 tbl.2.

⁹¹ *Id.*

Philippines, 26% in Japan, and 9% in Singapore.⁹² Even in the United States, the majority describes the judicial system as corrupt, while one of three Canadians holds similar views.⁹³

Given the broad definition of corruption, it is possible, indeed likely, that citizens in different countries have very different problems in mind when they complain about judicial corruption. Moreover, asking respondents whether the judicial system is corrupt does not tell us how severe the respondents think the problem is or whether they are satisfied overall with the courts despite concerns about corruption in some cases.

F. *Popular Attitudes Toward the Court*

Looking at public perceptions of the judicial system more broadly, Chinese citizens have surprisingly positive attitudes toward the courts, although the results vary widely by region, type of case, amount of actual experience with the courts, and the nature of the plaintiff.

One large survey using GPS readings to generate a representative sample found a “widespread belief that courts are more effective and fair than preexisting alternatives, such as mediation.”⁹⁴ In a survey of business people in Shanghai and Nanjing between 2002 and 2004, almost three out four gave the court system a very high to average rating, compared to 25% who rated the system low or very low.⁹⁵

In still another survey, Ethan Michelson found that Beijing respondents are more trusting of the courts than their Chicago counterparts, and evaluate the performance of the courts more positively.⁹⁶ Respondents in Beijing were twice as likely as Chicago residents to agree with the claim that courts are “doing a good job.”⁹⁷ Moreover, whereas roughly 40% of Chicago residents disagreed or

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Pierre F. Landry et al., *Introduction: Markets, Courts, and Leninism*, 9 CHINA REV. 1, 12 (forthcoming 2009).

⁹⁵ Clarke et al., *supra* note 2, at 43.

⁹⁶ TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2d. ed. 2006) (giving Chicago statistics); Email from Ethan Michelson, Associate Professor of Sociology and East Asian Languages and Cultures, Adjunct Professor of Law, Indiana University-Bloomington, to author (Apr. 24, 2007) (on file with authors) (basing results on a 2001 survey of 1,300 Beijing residents that he conducted with sociologists from Renmin University).

⁹⁷ TYLER, *supra* note 96, at 50-53 tbls.4.7, 4.8; Michelson, *supra* note 96.

strongly disagreed that the courts generally guarantee everyone a fair trial,⁹⁸ only 10% of Beijing residents and 28% of rural residents held similar negative views.⁹⁹ And whereas 43% of Chicago residents disagreed or strongly disagreed with the statement that judges are basically honest,¹⁰⁰ only 9% of Beijing residents and 29% of rural residents held similar views.¹⁰¹

To put these numbers in a broader comparative context, barely half of Belgians believe court decisions are just, while 60% lack confidence in the judiciary.¹⁰² Over 40% of British citizens have little or no confidence in judges and the courts.¹⁰³ In France, only 38% of the public has confidence in the judiciary, with only 21% believing judges are independent from economic circles and only 17% believing they are independent from political powers.¹⁰⁴

To be sure, there is still room for improvement. Chinese citizens with actual experience with the courts tend to be less satisfied, although that is also true elsewhere.¹⁰⁵ There are also significant differences between rural and urban residents.¹⁰⁶ Urban residents are much more likely to litigate, and more likely to be satisfied with their experience, than rural residents.¹⁰⁷

⁹⁸ TYLER, *supra* note 96, at 49 tbl.4.6.

⁹⁹ Michelson, *supra* note 96.

¹⁰⁰ TYLER, *supra* note 96, at 47.

¹⁰¹ Michelson, *supra* note 96.

¹⁰² Mike Hough & Julian V. Roberts, *Confidence in Justice: An International Review*, 243 FINDINGS 1, 3 (2004), available at <http://www.homeoffice.gov.uk/rds/pdfs04/r243.pdf> (last visited May 10, 2009).

¹⁰³ *Id.* at 2 tbl.1.

¹⁰⁴ Pierre Grelley, *Les Français et la Justice*, 2, 5 (1997), available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/984001248/0000.pdf> (last visited May 10, 2009). A more recent study shows that, in France, 37% believe the administration of justice to be independent of political power. *Les Français et l'indépendance de la justice*, Feb. 18, 2004, available at <http://www.csa-fr.com/dataset/data2004/opi20040211b.htm> (last visited May 10, 2009).

¹⁰⁵ See ETHAN MICHELSON, *POPULAR ATTITUDES TOWARDS DISPUTE PROCESSING IN URBAN AND RURAL CHINA* 7 (2008) (giving account of variations in use and perceptions of rural and urban Chinese courts). *But see* Herbert M. Kritzer & John Voelker, *Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts*, 82 JUDICATURE 58 (1998) (reporting that, in contrast to other studies, Wisconsin residents who had been to court recently had more favorable opinions about courts).

¹⁰⁶ See MICHELSON, *supra* note 105, at 3-7 (giving account of variations in use and perceptions of rural and urban Chinese courts).

¹⁰⁷ *Id.* at 4-6.

The background of the parties also matter. Gallagher and Wang found that while parties' feelings of dissatisfaction are mitigated by gains in internal efficacy, "[o]lder urban disputants employed in the state sector are more prone to feelings of disillusionment, powerlessness, and inefficacy. Younger, rural disputants employed in the non-state sectors are more likely to have positive evaluations of their legal experience and to embrace the legal system as a potential space for rights protection."¹⁰⁸ This reflects different perceptions of substantive justice.¹⁰⁹ Older SOE employees feel that they have been cast aside in the process of SOE downsizing, in breach of the implicit social contract where they worked for low wages in exchange for lifetime security.¹¹⁰ Thus, they are not happy with the court's decision against them in their various disputes between the employees and their enterprise even when it is legally correct.¹¹¹

In any event, the majority of people who are dissatisfied are still likely to sue.¹¹² Interestingly, cadres, Party members and other political elites are less likely to have disputes in the first place, more likely to turn to the courts if they have disputes, but no more likely to be satisfied with the courts than other parties.¹¹³

G. Judicial Independence

Judicial independence is a complicated topic, as there are many different ways influence can be exerted on the judiciary, and courts may enjoy more independence in some areas, such as commercial cases, than in other politically sensitive areas.¹¹⁴ Moreover, the experiences of many

¹⁰⁸ Mary Gallagher & Yuhua Wang, *Users and Non-Users: Legal Experience and its Effect on Legal Consciousness*, in *CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA* (Margaret Woo et. al. eds., forthcoming 2009) (manuscript at 3-4, on file with authors).

¹⁰⁹ *Id.* (manuscript at 24-25).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Cf.* Mary E. Gallagher, *Mobilizing the Law in China: "Informed Disenchantment" and the Development of Legal Consciousness*, 40 *L. & SOC'Y REV.* 783, (2006) (noting Chinese government campaign to increase use of courts has produced more litigation).

¹¹³ MICHELSON, *supra* note 106, at 4-5.

¹¹⁴ *See generally* JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Randall Peerenboom ed., forthcoming 2009).

developing countries demonstrate that judicial independence must be **balanced against the need for judicial accountability**: enhancing the authority and independence of incompetent or corrupt judges does not lead to more justice.¹¹⁵

Apart from bribery or other inappropriate influence by the other party, the biggest concern of most commercial litigants has been local protectionism. As noted, while local protectionism is still an issue in less developed rural areas, particularly in lower level courts, local protectionism in urban areas is now less of a concern. Party organs and government entities in more developed areas have little incentive to intervene in most commercial cases.

Nevertheless, some investors and commentators continue to worry about Party or government interference in particular cases involving key SOEs or key industrial sectors, where the amount at stake is high or the legal issue is particularly significant to national or local interests; or where the outcome of the case might affect particular government officials who, for example, may have been involved in corrupt behavior or responsible for decisions that would lead to losses for the defendant company.

Fueling such concerns are government policies that seek to protect domestic industries. In 2006, the State Council announced that seven industries were to remain under “absolute” state control: armaments, electricity, oil, telecommunications, coal, civil aviation and shipping.¹¹⁶ In addition, several others would remain under “relatively strong” state control, including manufacturing, automobiles, electronics, architecture, steel, metallurgy, chemicals, surveillance, science and technology.¹¹⁷ The goal is to produce thirty to fifty globally competitive enterprise groups. The government is also developing a system similar to that in the U.S. to investigate the impact of economic transactions on national security, and to investigate and retaliate against trade barriers in other

¹¹⁵ Susan Rose-Ackerman, *Judicial Independence and Corruption*, in GLOBAL CORRUPTION REPORT: CORRUPTION IN JUDICIAL SYSTEMS, *supra* note 82, at 15, 24. For China, see Dingjian Cai, *The Development of Constitutionalism in the Transition of Chinese Society*, 19 COL. J. ASIAN L. 1, 19-24 (2005) (noting that increasing authority, has created a breeding ground of corruption among many Chinese officials).

¹¹⁶ Zhao Huanxin, *China Names Key Industries for Absolute State Control*, CHINA DAILY, Dec. 19, 2006, at 1, available at http://www.chinadaily.com.cn/china/2006-12/19/content_762056.htm (last visited May 10, 2009).

¹¹⁷ *Id.*

countries.¹¹⁸ The Anti-Monopoly Law provides for national security assessments according to relevant laws and regulations in certain mergers involving foreign interests, thus subjecting such mergers to both competition law and national security clearance.¹¹⁹ Further, the Anti-Monopoly Law does not adequately address administrative monopolies and sectors dominated by large SOEs.¹²⁰ And, as noted, the bankruptcy law contains a carve-out for certain SOEs, while antidumping cases appear to be heavily influenced by political factors, with the MOFCOM rather than the courts playing the dominant role.

H. Mediation

While the general trajectory for commercial litigation has been relatively consistent and progressive, the nature, incidence and government sponsorship of mediation has been more varied. Mediation has always been a major form of dispute resolution in China, with ongoing debates about whether its popularity during the imperial era was due more to cultural factors, such as the Confucian emphasis on harmony, or institutional constraints, such as the limited budgets provided magistrates for resolving civil disputes. During the Mao era, mediation continued to be the most popular means for resolving civil disputes.¹²¹ However, in contrast to the traditional era, there was less emphasis on social harmony and more emphasis on political ideology and mediation as tool for educating, reforming and advancing society.¹²²

Today, there are various types of mediation: mediation by People's Mediation Committees,¹²³ specialized mediation such as labor mediation, informal and formal commercial mediation (the latter by professional

¹¹⁸ Foreign Trade Law (Amended in 2004) (promulgated by the Standing Comm. Nat'l People's Cong. Apr. 6, 2004, effective July 1, 2004), arts. 37-39, translated in ISINOLAW (last visited May 10, 2009).

¹¹⁹ Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 31, translated in ISINOLAW (last visited May 10, 2009).

¹²⁰ See *id.*, art.7 (directing sector-dominating SOEs to act in good faith).

¹²¹ Philip C. C. Huang, *Divorce Law Practices and the Origins, Myths, and Realities of Judicial "Mediation" in China*, 31 MODERN CHINA 151, 154 (2005).

¹²² See *id.* at 171-72 (discussing emphases in mediation in divorce context).

¹²³ See generally Aaron Halegua, *Reforming the People's Mediation System in Urban China*, 35 H.K. L. J. 715 (2005) (describing the history and structure of People's Mediation Committees).

third-party mediation organizations,) judicial mediation, and mediation during arbitration. The popularity of all types of mediation had been decreasing until recently, except for formal third-party commercial mediation, which has never been popular.¹²⁴ For instance, the percentage of civil and economic cases resolved through judicial mediation decreased from 69% and 76% in 1989 to 36.7% and 30.4% in 2001.¹²⁵

There were many reasons for the decline.¹²⁶ Most fundamentally, mediation came to be seen as inconsistent with rule of law. People's mediators often lacked legal training. Even in judicial mediation, many cases were decided based on factors other than law, with judges sometimes pressuring parties to accept settlements, thus depriving them of their legal rights.

In addition, as noted, the increased professionalization of judges and lawyers, and the streamlining of the litigation process, made litigation more attractive. With heavier caseloads and stricter time deadlines for completing cases, judges discovered that mediating cases took more of their time on an hourly basis than simply trying the case.

There were also more one-off, high-value contractual disputes between arms-length parties who simply wanted to have their legal rights enforced. The total value of contract disputes rose 40.9% on average from 1983 to 1998, while the average value of the disputes increased 11.9% per year on average.¹²⁷

Moreover, several studies found that mediated settlements were not necessarily any easier to enforce than final judgments, with non-compliance rates ranging from 50 to 80 percent.¹²⁸ Parties were in effect

¹²⁴ See generally Randall Peerenboom & Kathleen Scanlon, *An Untapped Dispute Resolution Option: Mediation Offers Companies Distinct Advantages in Certain Cases*, CHINA BUS. REV., July/Aug. 2005, at 36, 38-40 (2005) (discussing mediation options in China).

¹²⁵ Fan Yu, Positive Research on Judicial Mediation (unpublished manuscript, on file with authors).

¹²⁶ See *id.* (elaborating on reasons for decline in mediation). See also Fu Hualing & Richard Cullen, *From Mediator to Adjudicator: The Limits of Civil Justice Reform in China 3* (Oct. 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=1306800> (last visited May 10, 2009) (explaining how a decline in court-mediation arose as a consequence of the rise of judicial autonomy, the rule of law, and judicial professionalism).

¹²⁷ Clarke et al., *supra* note 2, at 40.

¹²⁸ *Id.* at 42.

using the mediation process as a delay tactic.¹²⁹

Despite the overall decline, mediation has varied by region and level of court.¹³⁰ Mediation in urban courts dropped dramatically: the mediation rate in Guangdong courts fell from 67.7% in 1989 to 23.6% in 2001, while Shenzhen courts mediated less than 12% of cases in 2001.¹³¹ In contrast, although mediation rates also decreased somewhat in most basic level rural courts, many such courts continued to mediate 50 to 70% of cases.

Mediation rates in intermediate courts are much lower than in basic level courts. For instance, while mediation rates in Fujian basic level courts ranged from 30 to 50 percent, rates in intermediate courts ranged from 10 to 20 percent.¹³² This is not surprising given the higher level of professionalism, the higher stakes, and the fact that upper level courts are often serving as second instance courts hearing cases on appeal that obviously were not settled through mediation.

In 2002, the Supreme Court and Ministry of Justice began to re-emphasize mediation.¹³³ The SPC and the Ministry worried that more cases were being appealed, adding to the costs of the judicial system. Judges for their part did not want to be reversed on appeal, as a high number of reversals would diminish their chance for promotion or in some cases affect their salary and bonus. More fundamentally, the

¹²⁹ *Id.* at 33-34.

¹³⁰ Measures to hold judges responsible for wrongfully decided cases and performance evaluation criteria created some incentive for judges to mediate cases. Some courts used the number of appeals or party complaints to measure performance. As a result, some judges sought to mediate disputes or persuade the plaintiffs to withdraw their suit, particularly when the law was not clear, rather than risking reversal on appeal or complaints from parties unsatisfied with the result. Fu & Cullen, *supra* note 126, at 49.

¹³¹ *Id.* at 53.

¹³² Fan, *supra* note 125.

¹³³ *Id.* See also Several Rules for the Works of People's Mediation (promulgated by the Ministry of Justice Sept. 26, 2002, effective Nov. 1, 2002), arts. 20-24, translated in ISINOLAW (last visited May 10, 2009) (regulating procedures by which disputes may be accepted for mediation); Several Provisions of the Supreme People's Court on the Application of Summary Procedures in the Trial of Civil Cases (promulgated by the Sup. People's Ct. Sept. 10, 2003, effective Dec. 1, 2003), art. 14, translated in LAWINFOCHINA (last visited May 10, 2009) (listing types of cases that must be mediated before court may hear them); Provisions of the Supreme People's Court on Certain Issues Concerning Civil Mediation of the People's Courts (promulgated by the Sup. People's Ct. Sept. 16, 2004, effective Nov. 1, 2004), art. 2, translated in ISINOLAW (last visited May 10, 2009) (mandating mediation where available).

policy change can be traced to shortcomings in the litigation system mentioned earlier. Many parties were not satisfied with the results of litigation because of a perceived lack of judicial competence, actual or suspected corruption, the feeling that laws are at odds with local norms, difficulties in enforcing judgments, or simply the plaintiff's lack of understanding or unrealistically high expectations of what a legal system can do.

Another major reason behind the shift toward mediation was the inability of courts to provide an adequate legal remedy in the kind of "growing pains" cases that arise in developing countries, such as land-taking cases, labor and environmental disputes, and cases involving socio-economic rights or entitlements including pensions, medical and welfare claims. The courts' inability to provide an adequate remedy in such cases led to a huge increase in petitions to the courts and other government entities by disgruntled parties seeking relief, and a sharp spike in protests and social disturbances.¹³⁴ The mediation of such disputes was thus part of the broader strategy to create a harmonious society.¹³⁵

The change in policy toward mediation appears to have had only a minor impact. The percentage of civil (including economic) cases settled through mediation rose only slight from 31% in 2004 to 32.1% in 2005.¹³⁶ As before, the rate tends to be much higher in rural areas, and in lower courts.¹³⁷

This emphasis however has led to some unintended consequences. Judges in some courts may be caught between solving cases in an efficient manner and the political requirement of a higher mediation rate. To maintain efficiency, some judges have transformed mediation in ways that consume less time and energy and yet satisfy the new push to increase mediation. They will, for example, hear the case to the end and then ask the parties if they are willing to settle the dispute. To achieve a higher mediation rate, some judges persuade, plead, and even force the litigation parties to accept a mediation result. Consequently, many

¹³⁴ See Carl F. Minzner, Xinfang: *An Alternative to the Formal Legal Institutions*, 42 STAN. J. INT'L L. 103, 158-65 (2006) (discussing staggering increase in informal petitioning).

¹³⁵ Fu & Cullen, *supra* note 126, at 4.

¹³⁶ Fan, *supra* note 125.

¹³⁷ *Id.*

litigants change their mind after they reluctantly sign the mediation letter, which may be leading to higher rates of compulsory enforcement. And in some default on bank loans cases, the banks and the borrower will sign a mediation agreement even though it is clear to all that borrowers have no ability to repay. However, the banks can use the settlement agreement to seek compulsory enforcement. Once that fails, they can then write off the loans as bad debt.¹³⁸

I. Arbitration

The PRC arbitration system consists primarily of the China International Economic and Trade Arbitration Commission (CIETAC), the China Maritime Arbitration Commission, and almost 200 local arbitration commissions set up in large- and medium-sized cities throughout China. CIETAC has been by far the most important in terms of foreign investors.¹³⁹

CIETAC is one of the busiest arbitration centers in the world. While overall arbitration is insignificant relative to the number of disputes resolved through mediation or litigation, CIETAC's caseload has risen dramatically in just 20 years from a mere 37 cases in 1985 to 1,118 cases in 2007, of which 429 involved at least one foreign party.¹⁴⁰ By way of comparison, in 2007 there were 621 International Centre for Dispute Resolution (ICDR) arbitrations and 599 International Chamber of Commerce (ICC) arbitrations.¹⁴¹

¹³⁸ Tang Ying-Mao & Sheng Liu-Gang, *Min shang shi zhi xing cheng xu zhong de "shuang gao' xian xiang"* [The 'Double High' Phenomenon in Civil and Commercial Execution Process], 1 *FALU YU SHEHUI KEXUE* [L. & SOC. SCI.] 1 (2006).

¹³⁹ Will W. Shen & Iris H. Y. Chiu, *Arbitration in China: History and Structure*, in 1 *ARBITRATION IN CHINA: A PRACTICAL GUIDE* 3, 14-23 (Jerome A. Cohen et al. eds., 2004).

¹⁴⁰ YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 278 (1996) (1985 statistic); Ashby Jones & Andrew Batson, *Concerns About China Arbitration Rise*, WALL ST. J., May 9, 2009, available at <http://online.wsj.com/article/SB121029284891279427.html> (last visited May 10, 2009) (2007 statistics).

¹⁴¹ *AAA's 2008 Caseload up 8 Percent*, <http://www.adr.org/sp.asp?id=35937> (Apr. 20 2009) (last visited May 10, 2009) (ICDR statistics); Jesse Greenspan, *Cost, Convenience Drive Rise in Asia Arbitrations*, LAW360, May 6, 2008 (ICC statistics). The ICDR is the international division of the American Arbitration Association. In 2008, the number of arbitrations in both of these forums increased further. *AAA's 2008 Caseload*, *supra*; Greenspan, *supra*.

CIETAC has continually responded to criticisms and market demands by amending its rules—six times since 1988—most recently in 2005.¹⁴² The revisions reflect two general trends: first, convergence with international best practices; second, more autonomy and flexibility for the parties.¹⁴³

CIETAC arbitrations are generally considered to be substantively fair.¹⁴⁴ A survey by the American Chamber of Commerce found that 75% of respondents who had actual experience with CIETAC arbitration believed CIETAC measured up favorably to arbitration at other major international centers, whereas only 45% of those who lacked experience thought so.¹⁴⁵ There does not seem to be a systematic bias against foreign parties. In 2000, foreign party claimants prevailed in 101 out of 185 cases against Chinese respondents, and lost in 28 cases.¹⁴⁶ From 2004 to 2006, U.S. parties prevailed in twenty-seven cases and lost in twenty-five cases, with the others ended up settled or still pending, even though the U.S. party was the respondent in 46 of the 81 cases.¹⁴⁷

Despite the recent rule changes, investors still find fault with CIETAC on several fronts. The Ministry of Justice has imposed limitations on the role of foreign lawyers, who are not allowed to interpret PRC law but must rather rely on PRC co-counsel.¹⁴⁸ In addition, the pay for arbitrators is low by international standards,¹⁴⁹ thus limiting the number of foreigners willing to serve in the crucial post of chief arbitrator. And ad hoc arbitration is not allowed.¹⁵⁰

There has also been criticism of CIETAC scrutiny of awards,

¹⁴² LIJUN CAO, CHINESE LAW AND BUSINESS: CIETAC AS A FORUM FOR RESOLVING BUSINESS DISPUTES 3 (n.d.), available at <http://www.fljs.org/uploads/documents/Cao%231%23.pdf> (last visited May 10, 2009).

¹⁴³ *Id.*

¹⁴⁴ While CIETAC has enjoyed a solid reputation thus far, some commentators have recently expressed concerns that CIETAC arbitration is becoming subject to political pressure and corruption. See generally Jerome A. Cohen, *Time to Fix China's Arbitration*, FAR EASTERN ECON. REV., Jan/Feb. 2005, at 31 (expressing increased pessimism regarding CIETAC's ability and desire to conduct fair hearings).

¹⁴⁵ Johnson Tan, *A Look at CIETAC: Is it Fair and Efficient?*, CHINA L. & PRACTICE, April 2003, at 24, 26.

¹⁴⁶ *Id.*

¹⁴⁷ CAO, *supra* note 142, at 2.

¹⁴⁸ *Id.* at 5-6.

¹⁴⁹ *Id.* at 4.

¹⁵⁰ *Id.* at 6.

although other arbitral bodies, including the ICC and Hong Kong Arbitration Commission, also scrutinize awards.¹⁵¹ Moreover, ICC scrutiny appears to be much more frequent and invasive than CIETAC scrutiny. In 2005, the ICC laid down modifications as to form and/or drew attention to points of substance when scrutinizing 256 of 325 awards, and requested the arbitral tribunal resubmit its award for approval in 31 cases.¹⁵² CIETAC has not published information about the number of awards scrutinized or the results. However, there apparently has been no confirmed case reported of CIETAC scrutiny resulting in substantive changes to awards.

III. SOCIO-ECONOMIC DISPUTES

Socio-economic cases involving pension and other welfare claims, labor disputes, land takings and environmental issues present problems for developing countries because institutions are weak and the state lacks the financial resources to address what are in essence economic concerns.¹⁵³ Characteristics of dispute resolution of socio-economic cases include: (i) notably less effective resolutions than in commercial cases; (ii) a trend toward de-judicialization, in contrast to the judicialization of commercial disputes; (iii) a sharp rise in mass-plaintiff suits; (iv) a dramatic rise in letters, petitions, and social protests in response to the inability of the courts and other mechanisms to adequately address citizen demands and expectations; (v) a reallocation of resources toward the least well-off members of society as part of government efforts to contain social instability and create a harmonious society, with a simultaneous increase in targeted repression of sources of potential instability, including political dissidents, NGOs and activist lawyers.

A. *Pension and Other Welfare Claims*

¹⁵¹ *Id.* at 7.

¹⁵² 2005 Statistical Report, 17 ICC INT'L CT. ARB. BULL. 1 (2006).

¹⁵³ For an excellent study of various efforts to address environmental issues, ongoing problems and policy recommendations, see generally BENJAMIN VAN ROOIJ, REGULATING LAND AND POLLUTION IN CHINA: LAWMAKING, COMPLIANCE AND ENFORCEMENT; THEORY AND CASES (2006).

In the past, the employer paid for worker pensions. But this practice could not be sustained in the face of more severe market competition. Many reforms have sought to revamp the pension system, the most significant of which is the establishment of social security funds to which both the employers and the employees have to contribute a part.¹⁵⁴ Nevertheless, SOE reform and the transition to a market economy have led to many disputes over pension payments and other welfare benefits, including unemployment insurance, job relocation and training expenses, worker's compensation benefits and medical care.¹⁵⁵

Many SOEs have gone bankrupt and ceased to exist or are insolvent. Others have been sold off or restructured. The new buyer or restructured company is unwilling or unable to assume the welfare obligations. Some enterprises are unwilling or unable to contribute their share to the social security funds for employees, or to provide retraining, unemployment or social security payments for laid-off employees. In some cases, local government officials unilaterally decrease the amount of benefits. Meanwhile, some social security fund managers have refused to distribute the pensions or misappropriated funds.¹⁵⁶

Yet, the courts handle few of these disputes. Both government and party officials and the courts have preferred to solve these problems through political or administrative channels. These disputes usually involve a large number of pensioners who share a common history and grievance, increasing the likelihood that they will lead to mass protests.¹⁵⁷ Thus, local party and government officials have a strong incentive to resolve these problems directly given the importance of maintaining social stability in their performance evaluations. If necessary, governments will often pay off the workers. Some governments particularly in more affluent areas have continually

¹⁵⁴ See William Hurst & Kevin J. O'Brien, *China's Contentious Pensioners*, 2002 CHINA Q. 345, 348 ("Various reforms have been proposed in the last few years, with the most widely talked about involving provincially-managed funds, derived from firm and employee contributions, which are invested in a range of financial instruments and are supposed to become the primary source of funding for an employee's pension.").

¹⁵⁵ See generally Robert Guthrie & Miriam Zulfa, *Occupational Accident Insurance for All Workers: The New Challenges for China*, 3 E. ASIA L. REV. 1 (2008) (elaborating worker's compensation law and labor dispute resolution in China).

¹⁵⁶ As widely reported, one billion yuan of the social security funds in Guangzhou has been misappropriated. See, e.g., *SPC Work Report*, *supra* note 43.

¹⁵⁷ See Hurst & O'Brien, *supra* note 154, at 345-46 (describing how similarities between pension protestors lead to common complaints).

increased the pension standard to keep pace with inflation, thus preventing disputes from arising in the first place.

Another reason for the limited role of the courts in these cases is that the regulatory framework in this area is incomplete and sometimes inconsistent. For example, there has been an ongoing debate as to whether these pension claims should be considered a labor dispute or an administrative dispute.¹⁵⁸ A 2006 SPC interpretation provides that pension and social security disputes between the employer and the employee are considered labor litigation, while disputes between the employee and the agent charged with managing the funds will not be considered labor disputes.¹⁵⁹ However, the interpretation does not expressly state that such disputes will be accepted as administrative suits.

Even when courts do accept these disputes, they have to work with various governmental institutions to find a solution acceptable to all of the relevant parties. Many SOEs were owned by government entities higher up in the administrative hierarchy than the courts handling the dispute, making it difficult for the court to hold against them. Accordingly, courts often emphasize mediation in solving these disputes.

Sometimes there is little that the courts can do. For example, a Guangzhou intermediate court accepted an administrative litigation initiated by 4583 miners, who claimed that the Social Security Administrative Bureau had unlawfully modified the pension standard.¹⁶⁰ The court, after consulting numerous provincial and central authorities, rejected the claim on procedural grounds.¹⁶¹ Judges involved in the case acknowledged that the dispute was unresolvable through legal channels.¹⁶²

¹⁵⁸ Shao Guorong, *Shilun shehui baoxianfei jiufen anjian de shouli he chuli* [On the Handling and of Social Security Litigation], ZHONGGUO FAYUAN WANG [CHINA COURT NET], May 10, 2007, available at <http://www.chinacourt.org/html/article/200705/10/245704.shtml> (last visited May 10, 2009).

¹⁵⁹ Interpretation on Several Issues Concerning Application of Laws in Hearing Labour Dispute Cases (II) (promulgated by the Sup. People's Ct. Aug. 14, 2006, effective Oct. 1, 2006), arts. 4, 6-7, translated in ISINOLAW (last visited May 10, 2009).

¹⁶⁰ Long Sicai deng yu Guangdong Sheng She Hui Bao Xian Ji Jin Guan Li Ju fa fang she hui yang lao bao xian xing zheng jiu fen shang su an [Long Sicai et al. v. Guangdong Province Social Security Fund Administrative Bureau], No. 42-4624 (Guangdong High People's Ct. July 30, 2002), at CHINALAWINFO (last visited May 10, 2009).

¹⁶¹ *Id.*

¹⁶² *Id.*

Many of these disputes then end up being pursued through the petition system or other channels that seek to get high ranking officials involved. For instance, the pensions of more than 10,000 female workers from the Shengli Oil Field were terminated in 1997. The case took almost ten years to be partially resolved, and was only resolved after the women's representatives successfully passed the grievance to high ranking central government officials.¹⁶³ The happy ending is due to the large number of the affected workers. In contrast, politically less salient pensioners and welfare claimants are less likely to find relief by petitioning government officials.

B. *Land Takings*

Economic development and urbanization inevitably involve the reallocation of land, usually from lower to higher productive users. In the process, some parties are made better off, often developers and corrupt government officials, though also the broader public, while other individuals lose out. Land takings have been common, and controversial, in China. They are one of the most common sources of large-scale protests.¹⁶⁴

Land taking cases are complicated in part because of disagreements over how the windfall from rising real estate prices is to be allocated.¹⁶⁵ Urban residents, especially those that worked for the government or SOEs, are often living in housing originally allocated to them by the state for free, and then sold to them at heavily subsidized rates. When the land is requisitioned, the court must decide how much the homeowners should be compensated. Should the current residents be entitled to fair market value for their housing and the land use rights, even though the land use rights may be unclear and they obtained the housing at subsidized prices? Those affected may argue that they worked hard for the state for years for low wages, and deserve the windfall. But they have already benefited relative to others who did not have the opportunity to purchase their

¹⁶³ Qi Guimin & Ji Yuying, *Shengli Youtian 10191 Nugong Yanglaojing Zhengyi Yi'an Youla Jiegou* [The Pension Disputes Involving 10,191 Female Workers of the Shengli Oil Field Were Solved], *ZHONGGUO MIN YING KE JI YU JING JI* [CHINA NON-GOVERNMENTAL SCI., TECH. & ECON.] May 2006, at 32, 32-33 (2006).

¹⁶⁴ Susan Whiting, *Public Finance and Land Disputes in Rural China*, in *CHINESE JUSTICE*, *supra* note 108.

¹⁶⁵ *Id.*

housing at below-the-market prices. Similar issues arise in the countryside, although farmers may have a greater normative claim to the sales from land use rights given the discriminatory policies that transferred wealth from rural to urban areas through artificially low prices for agricultural products and the large wealth differential between rural and urban areas today.

A more serious problem in rural areas is that the local governments depend heavily on the proceeds from the sale of land to fund development and cover government expenses, both directly and indirectly by transferring the land to higher productive users, often industrial and commercial users, which then pay taxes.¹⁶⁶ The new businesses are also a source of jobs. The generation of wealth and jobs, at least in theory, should contribute to social stability, one of the key criteria for promotion for local government officials.¹⁶⁷

Yet what upsets rural and urban citizens the most is the lack of transparency and corruption in land takings. Local governments often ignore the requirement to auction land.¹⁶⁸ Instead, they requisition the land on behalf of a particular party, and then transfer the land at a pre-arranged price, only a portion of which goes to the original land users.¹⁶⁹ Moreover, many government officials benefit personally from the transfer.¹⁷⁰

Generally, the courts have been ineffective in handling land-taking disputes. Most cases involve a transfer to a more productive user, and thus legal challenges on the ground that the taking is not in the public interest fail in China as they do elsewhere.¹⁷¹ Given the dependence of courts on the local government for funding, judges are not in a position to pursue aggressively allegations of corruption on the part of local officials. Moreover, applying central legal standards to land disputes often fails to address local needs. Rather than enhancing social stability, some court decisions exacerbate social conflicts.¹⁷² In light of these

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *See, e.g.,* *Kelo v. City of New London*, 545 U.S. 469, 480, 483 (2005) (finding eminent domain powers are not limited to transfers of land for “use by the public” so long as condemnation effectuates a “public purpose,” which includes economic development).

¹⁷² *See* Whiting, *supra* note 164.

challenges, some local courts have refused to accept land-taking cases, with judges advising parties to file suit in a higher court or take up the issue directly with government officials.¹⁷³

The government's response has been to enact a series of measures to prevent land taking disputes from arising in the first place, including shifting the approval authority upward to provincial governments; re-emphasizing the need for local officials to hold hearings on taking decisions and compensation amounts; requiring that land sales be through a public bidding process¹⁷⁴; attempting to cool the red hot real estate sector; and amending the Land Administration Law¹⁷⁵ and passing the Property Law¹⁷⁶ to clarify and better protect people's rights.¹⁷⁷

In addition, the government has sought to relieve the pressure on courts by limiting the ability of citizens to challenge taking and compensations decisions. In 2001, the State Council issued the Urban Housing Demolition Administrative Regulation, which requires developers negotiate a demolition agreement with residents and provides details for calculating compensation.¹⁷⁸ However, the Demolition Regulation also provides that the developer can apply for a "forced demolition" if the residents do not accept a developer's compensation proposal that has been approved by municipal authorities.¹⁷⁹ The Demolition Regulation both allows the residents to challenge a municipally-approved compensation proposal in court and stipulates that the courts cannot stop or suspend a forced demolition that has been approved by the municipality.¹⁸⁰

¹⁷³ *Id.*

¹⁷⁴ *E.g.*, Rural Land Contract Law (promulgated by the Standing Comm. Nat'l People's Cong. Aug. 29, 2001, effective Mar. 1, 2003), art. 3, *translated in* ISINOLAW (last visited May 10, 2009)

¹⁷⁵ Land Administration Law (promulgated by the Standing Comm. Nat'l People's Cong. June 25, 1986, effective Jan. 1, 1986), *as amended* (Aug. 28, 2004), *translated in* ISINOLAW (last visited May 10, 2009).

¹⁷⁶ Property Law (promulgated by the Nat'l People's Cong. Mar. 16, 2007, effective Oct. 1, 2007), *translated in* ISINOLAW (last visited May 10, 2009).

¹⁷⁷ *See* CECC 2004, *supra* note 1, at 91-95 (2004) (discussing problems faced by current landowners and calling for more reform).

¹⁷⁸ Administrative Regulations on Urban House Demolition and Relocation (promulgated by St. Council June 13, 2001, effective Nov. 1, 2001), art. 4, *translated in* ISINOLAW (last visited May 10, 2009).

¹⁷⁹ *Id.* art. 16.

¹⁸⁰ *Id.*

These measures to reduce land-taking disputes may have some impact, but more fundamental changes are likely to be needed. In particular, it may be necessary to address the incentive for rural governments to rely on land sales to provide the funds for development. One way to do this would be to increase central funding to local governments. As this is unlikely, however, another more feasible approach would be to require that all funds from the sale of land use rights be transferred to the central government and then redistributed. This would also allow the government to reallocate funds from wealthier to poorer areas.

C. Labor

The transition to a market economy, the jarring process of SOE reform, and the pressures of economic globalization have resulted in a rapid rise in labor disputes. Labor disputes grew from under 20,000 in 1994 to over 300,000 in 1996.¹⁸¹ Once again, there are significant regional variations: the more economically advanced areas such as Guangdong, Shanghai, Beijing, Jiangsu, Zhejiang and Shandong have more disputes, as do the areas with significant heavy industry and a large number of SOEs, such as Liaoning, Hubei, Fujian and Chongqing.¹⁸² Labor disputes cover areas such as “wages, termination, insurance and work injury.”¹⁸³

The resolution of labor disputes involves voluntary mediation, mandatory labor arbitration, and litigation if the parties are unsatisfied with the results of arbitration.¹⁸⁴ While still common, mediation has declined in importance.¹⁸⁵ Workers do not trust mediators, who are usually dominated by the union, which is closely allied with the employer.¹⁸⁶

Workers win the vast majority of arbitration cases: they prevail in “nearly four cases for every one by the employer, and partially win a

¹⁸¹ RON BROWN, CHINA LABOUR DISPUTE RESOLUTION 2 (n.d.), available at <http://www.fljs.org/uploads/documents/Brown%231%23.pdf> (last visited May 10, 2009).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 3.

¹⁸⁵ *Id.*

¹⁸⁶ *See id.* at 4-5 (stating that union mediators are overly responsive to enterprise’s interests).

majority of the other cases.”¹⁸⁷ Nevertheless, a significant percentage of arbitration appeals come from employees, either because they were not satisfied with the results or the awards were not enforceable.¹⁸⁸

Litigation of labor disputes plays a role somewhere between the role of litigation in commercial disputes and in other socio-economic disputes. On the one hand, litigation has become increasingly prevalent and effective, as in commercial law. Labor disputes appealed from arbitration to the courts increased to 122,405 in 2005 from under 30,000 in 1995.¹⁸⁹ Whereas in the past, plaintiffs in labor suits often lost, today courts frequently uphold the decisions of labor arbitration committees, and plaintiffs enjoy a greater than fifty percent success rate in the courts.¹⁹⁰

On the other hand, the courts are often unable to provide effective relief for many of the same reasons that apply to other socio-economic disputes. Cases involving back pay and insurance claims are particularly difficult to enforce in large part because many companies are operating on very thin margins or even insolvent. Not surprisingly, many disputes are resolved through mediation at various stages of the process. In addition to the disputes resolved through enterprise mediation, about one-third of the disputes brought to arbitration are resolved through mediation, while about one-quarter of the cases brought in litigation are mediated settlements.¹⁹¹

The inability of the courts to provide effective relief may also explain the reluctance to do away with the requirement that workers first go through arbitration before going to court. Although labor advocates have long called for the abolition of mandatory arbitration, a 2006 SPC interpretation provides only limited relief, allowing workers to go directly to court in wage arrears cases where they have written proof of unpaid wages from the employer and no other claims are raised.¹⁹² In

¹⁸⁷ *Id.* at 3.

¹⁸⁸ *Id.* at 5-7.

¹⁸⁹ *Id.* at 4.

¹⁹⁰ *Id.* See generally Ethan Michelson, *The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work*, 40 L. & SOC'Y REV. 1, 16-17, 28 (2006) (noting that although Chinese lawyers are loathe to take labor cases because of high risks in dealing with the clients and low payouts, these cases still make up about ten percent of casework).

¹⁹¹ BROWN, *supra* note 181, at 3-4. If the cases rejected by courts or withdrawn are excluded, about one-third of litigated cases are resolved through mediation. *Id.* at 4.

¹⁹² Interpretation on Several Issues Concerning Application of Laws in Hearing

contrast, the 2007 Labor Dispute Mediation and Arbitration Law went the other way, providing for binding arbitration in certain cases, including failure to pay wages or worker's compensation.¹⁹³ The law also emphasizes mediation and appears to create an additional administrative channel for workers to bring suit.¹⁹⁴

D. *The Petition System*

Another response to the failure of courts to provide adequate resolution of disputes was to encourage citizens to make use of the letters and visits system (*xinfang*, hereafter the petition system). The petition system serves a variety of purposes.¹⁹⁵ In a very small percentage of cases, petitioners are able to obtain relief.¹⁹⁶ Perhaps more importantly, the system allows citizens to blow off steam, and government officials, particularly at the central level, to obtain feedback about tensions in society and problems with lower level government officials.¹⁹⁷

The number of petitions rose dramatically until 1999, and then started to decline (similar to the rise in litigation).¹⁹⁸ In 2005, the various

Labour Dispute Cases (II) (promulgated by the Sup. People's Ct. Aug. 14, 2006, effective Oct. 1, 2006), arts. 4, 6-7, *translated in* ISINOLAW (last visited May 10, 2009). Granted, one should not expect the SPC to forge new rights given the tenuous legal basis it has for issuing interpretations. Even the limited change in the SPC's interpretation would appear to be at odds with the Labor Law and thus technically invalid.

¹⁹³ Law on Labour Dispute Mediation and Arbitration (promulgated by the Standing Comm. Nat'l People's Cong. Dec 29, 2007, effective May 1, 2008), art. 47, *translated in* ISINOLAW (last visited May 10, 2009).

¹⁹⁴ *See id.* arts. 10-16, 42 (providing for mediation, even for cases subject to arbitration). Whether the law will provide relief for the courts remains to be seen. The ranges of cases subject to "final" arbitration are limited. Rather oddly, the law still allows workers and even employers to challenge the limited range of cases subject to "final" arbitration in the courts. *Id.* art. 48.

¹⁹⁵ *See* Minzner, *supra* note 134, at 117-120 (elaborating on the various purposes of *xinfang*).

¹⁹⁶ *See* China Labour Bulletin, *A New Force for Social Justice in China*, Oct. 11, 2007, <http://www.china-labour.org.hk/en/node/50409> (last visited May 10, 2009) ("a recent survey showed that only three in ten thousand petitions result in some form of resolution"); CONG.-EXECUTIVE COMM'N ON CHINA, 109TH CONG., ANNUAL REPORT 96 (2005) ("government bureaus address only 0.2 percent of petitions filed") [hereinafter CECC 2005].

¹⁹⁷ Minzner, *supra* note 134, at 117-119.

¹⁹⁸ *Id.* at 161 tbl.1.

letters and visits offices received 12.7 million complaints,¹⁹⁹ with the number of petitions declining in 2006 by 15.5% to just over ten million.²⁰⁰ Petitioners may seek relief from a wide variety of sources, including Party organs, government agencies, the procuracy and the courts.²⁰¹ Provincial courts at all levels handled a total of approximately 3.9 million letters and visits in 2006, or slightly fewer petitions than the 5.2 million first instance civil cases.²⁰² The 2006 figures were a decrease of 4.71% from 2005, and more than 50% from 1999, when the total number of complaints handled by the courts peaked at 10.7 million.²⁰³ In contrast, in 1999 China's courts handled 5.7 million first instance cases.²⁰⁴

According to one survey, 63.4% of those who eventually brought their complaints to the central authorities in Beijing had first sought resolution in the courts.²⁰⁵ The courts declined to accept 43% of the cases,²⁰⁶ courts decided against the petitioners in 55% of the cases, and were unable to enforce judgments in favor the petitioners in 2% of the cases.²⁰⁷ Most complaints arise from the way cases were handled in rural courts.

In many cases, however, the parties do not understand the law or are unsatisfied with legally correct decisions.²⁰⁸ In other cases, there is nothing the courts can do. These cases include enforcement cases where the company is insolvent and judgment proof; corruption cases involving local government officials; bankruptcy cases and land taking cases; and

¹⁹⁹ Posting of Carl Minzner to Chinese Law and Politics Blog, What Has Happened to Petitioning in China Since the 2005 Xinfang Regulations?, http://sinolaw.typepad.com/chinese_law_and_politics_/2007/04/what_has_happen.html (Apr. 18, 2007 17:09 CDT) (last visited May 10, 2009).

²⁰⁰ *Id.* Note that in 2005, the *xinfang* system was substantially reformed. *Id.*

²⁰¹ Minzner, *supra* note 134, at 116.

²⁰² HONGBO LI, FAZHI XIANDAIHUA JINCHENG ZHONG DE RENMIN XINFANG [PEOPLE'S PETITION IN THE PROCESS OF LEGAL MODERNIZATION] (2007).

²⁰³ *Id.*

²⁰⁴ Fu & Cullen, *supra* note 126, at 6 chart 1. The cited figure includes all civil, economic, administrative, and criminal cases.

²⁰⁵ Minzner, *supra* note 134, at 119.

²⁰⁶ *Id.*

²⁰⁷ Taisu Zhang, *The Xinfang Phenomenon: Why the Chinese Prefer Administrative Petitioning over Litigation* 13 (Yale L. Sch. Student Scholarship Series., No. 68., 2008), available at <http://lsr.nellco.org/yale/student/papers/68> (last visited May 10, 2009).

²⁰⁸ CECC 2005, *supra* note 196, at 177 n.12.

socio-economic issues such as claims for retirement benefits when the company is insolvent or the government lacks the funds to provide adequate medical care.²⁰⁹ Unable to obtain effective relief, many petitioners persist in their efforts, repeatedly petitioning the same entities for relief, broadening their appeals to a wider range of entities, and escalating the disputes by taking their cases to Beijing, where they besiege government offices in the hope that central authorities will look more kindly on their claims than local officials.

In the face of this upsurge in petitions and the increasing escalation of disputes to central authorities, the State Council amended the Regulations on Letters and Visits in 2005.²¹⁰ The amendments strengthened the rights of citizens in some respects. For instance, the Regulations call for greater procedural fairness, increased powers for the letters and visits offices to respond to citizen complaints, and enhanced supervision of government officials involved in the process, including through the imposition of legal liability for those who do not carry out their duties.²¹¹

However, the authorities appear to be increasingly worried that too many people are blocking government offices, interfering with officials trying to do their work and upsetting social stability. The Regulations limit the petitioners to three appeals to successively higher-level administrative agencies,²¹² limit the number of representatives for each mass complaint to five,²¹³ and emphasize the need to obey the law and not disturb social order.²¹⁴

The Public Security Administration Punishments Law of 2005 suggested that the government will start to crack down on those who repeatedly petition government offices.²¹⁵ In recent years, there were

²⁰⁹ Benjamin Liebman, *A Populist Threat to China's Courts?*, in CHINESE JUSTICE, *supra* note 108.

²¹⁰ Regulation on Complaint Letters and Visits (promulgated by the St. Council Jan. 10, 2005, effective May 1, 2005), , *translated in* LAWINFOCHINA (last visited May 10, 2009).

²¹¹ *Id.* arts. 40-46 (imposing legal liability on administrative organs and personnel for nonfeasance and misfeasance related to xinfang).

²¹² *Id.* arts. 34-35.

²¹³ *Id.* art. 18.

²¹⁴ *Id.* art. 20.

²¹⁵ *See* Law on Public Security Administration Punishments (promulgated by the Standing Comm. Nat'l People's Cong. Aug. 28, 200, effective Mar. 1, 2006), arts. 1-2, *translated in* LAWINFOCHINA (last visited May 10, 2009) (criminalizing disruptions of

numerous media reports of people detained for petitioning activities. In a 2007 survey of 560 petitioners who had come to Beijing, 70% felt that local government retaliation had become more severe.²¹⁶ Nearly, two-thirds of petitioners faced detention, with 18.8% sentenced to prison or “re-educated” through labor (a form of administrative detention).²¹⁷

E. *Mass-Plaintiff Suits*

Many socio-economic cases involve multiple plaintiffs. There were 538,941 multi-party suits in 2004, up 9.5% from 2003.²¹⁸ Land takings, labor disputes and welfare claims are three of the major types of multi-party suits. In 2004 alone, Shanghai Intermediate Court No. 1 handled 21 multi-plaintiff cases, of which 17 involved land takings, relocations and real estate disputes.²¹⁹ In 2006, there were 14,000 collective labor disputes (in 2005, 19,387) involving 350,000 workers (in 2005, 409,819), or just over half of the total number of workers involved labor disputes²²⁰

Many of these disputes result in mass protests. The number of mass protests rose rapidly, from 58,000 in 2003 to over 74,000 in 2004.²²¹ In 2001, 28.1% of mass protests involved back pay, pension benefits and other welfare claims; an additional 9.5% involved decreased payments due to SOE restructurings and bankruptcies; and 13.5% involved compensations in land takings and relocation cases.²²² Such protests,

public order in some cases).

²¹⁶ Yu Jianrong, *Who Bears the Costs of Intercepting Petitioners?*, July 28, 2008, (Michael Huang trans.), available at <http://en.chinaelections.org/newsinfo.asp?newsid=18648> (last visited May 10, 2009).

²¹⁷ *Id.*

²¹⁸ Michael Palmer & Chao Xi, *China*, 622 ANNALS AMER. ACAD. POL. & SOC. SCI. 270, 271-72 (2009).

²¹⁹ Shen Li, *Renmin Fayuan shen li qun tixing su song ancjian de kun jing yu dui ce—jian lun si fa bao zhang she hui he xie neng li di guo cheng* [*The Issues and Countermeasures in People's Courts Handling of Multi-party Suits—And the Ability of Law to Ensure Social Harmony*], available at http://www.a-court.gov.cn/platformData/infoplat/pub/no1court_2802/docs/200601/d_435514.html (last visited May 10, 2009). The *China Daily* reported that over one million cases of illegal seizure of land had been uncovered between 1998 and 2005. Opinion, *Fight Illegal Land Seizure*, CHINA DAILY, April 18, 2006, p. 4, available at http://www.chinadaily.com.cn/cndy/2006-04/18/content_569896.htm (last visited May 10, 2009).

²²⁰ BROWN, *supra* note 181, at 2.

²²¹ SUSAN L. SHIRK, CHINA: FRAGILE SUPERPOWER 56 (2007).

²²² Liu Xiaomei, *Mass Incidents in the Process of Establishing Socialist Harmonious*

many of them violent, are a threat to social stability, and thus to sustained economic growth. According to the security ministry, over 1800 police were injured and 23 killed during protests in just the first six months of 2005.²²³

The courts have developed a number of techniques to reduce public pressure, including breaking the plaintiffs up into smaller groups, emphasizing conciliation, and providing a spokesperson to meet with, and explain the legal aspects of the case to, the plaintiffs and the media in the hopes of encouraging settlement or even withdrawal of the suit. Some courts also try to pacify the protesters through legal means, for example by providing accelerated procedures to access government sponsored funds.²²⁴ Basic-level courts also often work closely with higher-level courts and other government entities through the Social Stability Maintenance Offices.²²⁵

In a related move, in 2006, the All China Lawyers Association issued guidelines that seek to reach a balance between social order and the protection of citizens and their lawyers in exercising their rights.²²⁶ The guidelines remind lawyers to act in accordance with their professional responsibilities.²²⁷ Lawyers should encourage parties and witnesses to tell the whole truth and not conceal or distort facts; they should avoid falsifying evidence; they should refuse manifestly unreasonable demands from parties; they should not encourage parties to interfere with the work

Society, ZHONGGUO RENMIN GONGAN DAXUE XUEBAO [J. CHINESE PEOPLE'S PUBLIC SECURITY UNIV.], 2005 no.3, at 75, 78.

²²³ *Attacks on Chinese Police Rising*, BBC NEWS, Sep. 28, 2005, available at <http://news.bbc.co.uk/2/hi/asia-pacific/4289654.stm> (last visited May 10, 2009).

²²⁴ Yang Su & Xin He, *Street as Courtroom: State Accommodation of Labor Protest in South China* (unpublished manuscript, on file with authors). *But see* Ching Kwan Lee, *From the Specter of Mao to the Spirit of Law: Labor Insurgency in China*, 31 THEORY AND SOC'Y 189 (2002) (arguing that rule of law in China is more of an ideal than a reality).

²²⁵ *See generally* Gu Peidong, *Shi lun wo guo she hui zhong fe chang gui xing jiu fen di jie jue ji zhi* [On the Resolution Mechanism of Irregular Disputes], ZHONGGUO FA XUE [CHINA LEGAL SCI.], June 2007, at 3 (giving recommendations to improve dispute resolution mechanisms).

²²⁶ *See* All China Lawyers Association, *Guiding Opinion of the All China Lawyers Association Regarding Lawyers Handling Cases of a Mass Nature*, Mar. 20, 2006 (Congressional-Executive Commission On China trans., May 30, 2006), available at <http://www.cecc.gov/pages/virtualAcad/index.php?showsingle=53258> (last visited May 10, 2009) (issuing guidelines for lawyers representing clients in mass actions).

²²⁷ *Id.* art. I.

of government organ agencies; they should accurately represent the facts in discussions with the media and refrain from paying journalists to cover their side of the story.²²⁸ And they should report to and accept the supervision of the bar association.²²⁹ On the other hand, bar associations shall promptly report instances of interference with lawyers lawfully carrying out their duties to the authorities, and press the authorities to take appropriate measures to uphold the rights of lawyers.²³⁰ Where necessary, local bar associations may enlist support from the national bar association.²³¹

More generally, the government has closed down or put pressure on some NGOs and law firms that have become too active in pressing for change. Some individual lawyers have been arrested, experienced intimidation or had their licenses revoked in the process of representing criminal defendants or citizens challenging government decisions to requisition their land for development purposes and the amount of compensation provided.²³² Meanwhile citizens seeking to protect their property rights, uphold environmental regulations or challenge government actions have been beaten by thugs and gangs, which sometimes have been linked to the local government, or even detained for their efforts.²³³

IV. PUBLIC LAW: ADMINISTRATIVE AND CONSTITUTIONAL LAW

Developments in public law are characterized by: (i) a manifest shift toward legalized, rule-based governance, though with limited judicialization, and with “courts continu[ing] to play a complementary role to political-administrative mechanisms in dispute resolution and an even more limited role in the making of key policies”;²³⁴ (ii) the

²²⁸ *Id.* art. II.

²²⁹ *Id.* art. III.1.

²³⁰ *Id.* art. IV.

²³¹ *Id.* art. IV.5.

²³² See Fu Hualing, *When Lawyers are Prosecuted . . . The Struggle of a Profession in Transition*, 2 J. COMP. L. 95 (2008) (documenting the revocation of several lawyers' licenses in response to having taken cases of a politically sensitive nature).

²³³ CECC 2004, *supra* note 1, at 93 & 158 n.890.

²³⁴ Randall Peerenboom, *More Law, Less Courts: Legalized Governance, Judicialization and Dejudicialization in China*, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES 175, 175-76 (Tom Ginsburg & Albert H.Y. Chen eds., 2009).

development of a wide range of political-administrative mechanisms and channels for handling disputes, including administrative litigation, administrative reconsideration, administrative supervision, party discipline committees, and the petition system;²³⁵ (iii) despite the progress in creating new mechanisms, the limited effectiveness of those mechanisms in addressing citizen concerns due less to technical or doctrinal issues than to case-dependent systemic socio-political factors; (iv) more limited progress in constitutional law, with the constitution playing a limited role in dispute resolution.²³⁶

A. *Administrative Litigation and the Development of Mediation and Administrative Reconsideration*

Administrative litigation has been an important symbol of the government's commitment to law-based governance and rule of law. The Administrative Litigation Law (ALL) was passed in 1989.²³⁷ Since then the SPC has issued two interpretations to clarify various issues.²³⁸

²³⁵ *Id.* at 181 & 198 nn. 20-26.

²³⁶ ZHENMIN WANG, CONSTITUTIONAL CONFLICT AND THE ROLE OF THE NATIONAL PEOPLE'S CONGRESS 2 (n.d.), available at <http://www.fljs.org/uploads/documents/Zhenmin%231%23.pdf> (last visited May 10, 2009); see Keith Hand, *Can Citizens Vitalize China's Constitution?*, FAR E. ECON. REV., May 2007, at 15, 18-19 (noting that China has yet to develop significant constitutional review, but that it is most likely to occur in economic rather than political rights cases). *But see* Cai, *supra* note 115, at 13-16 (noting potential for courts to increasingly undertake constitutional review); Michael William Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 N.Y.U. J. INT'L L. & POL. 1, 1-10 (2002) (arguing that China, with an authoritarian regime, has the capability to evolve a true constitutional system); Thomas E. Kellogg, *Constitutionalism With Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT'L J. CONST. L. 215, 216-18 (2009) (arguing that Chinese courts will be increasingly likely to undertake constitutional review).

²³⁷ While officially translated "Administrative Procedure Law," we prefer the translation "Administrative Litigation Law" unless an English-language source provides otherwise, as it more closely matches the original Chinese; both translations are used in English-language literature. Administrative Procedure Law (promulgated by the Nat'l People's Cong. Apr. 4, 1989, effective Oct. 1, 1990), translated in ISINOLAW (last visited May 10, 2009).

²³⁸ Interpretation on the Execution of the Administrative Procedure Law (promulgated by the Sup. People's Ct. Mar. 8, 2000, effective Mar. 10, 2000), translated in ISINOLAW (last visited May 10, 2009) (noting, for example, that only acts authorized by the Criminal Procedure Law are excluded from the ALL's scope). *Zui gao ren min fa*

Amendments to the law are currently being drafted.

The number of annual ALL cases has ranged from 80,000 to 100,000 over the last decade.²³⁹ Determining how often the plaintiff “wins” is difficult because about one-third of the cases are settled in other ways, such as rejection of the suit or mediation.²⁴⁰ However, even counting all such results, as well as all cases where the plaintiff withdrew the suit as its own loss, and setting aside all plaintiff victories on appeal or through retrial supervision, the plaintiff would have prevailed in 17 to 22% of cases between 2001 and 2004. These success rates stand in sharp contrast to success rates in the United States, Taiwan (both 12%), and Japan (between 4 and 8%).²⁴¹

Nevertheless, there remain serious problems with administrative litigation. Courts have only limited judicial review power. They do not have the power to review abstract acts (generally applicable administrative rules).²⁴² Rather, they may only review specific acts, and then only for their legality rather than for their appropriateness.²⁴³

Moreover, parties may only challenge specific acts that infringe their “lawful rights and interests,”²⁴⁴ which has been interpreted to mean personal or property rights.²⁴⁵ Other important rights are thus excluded,

yuan guan yu guan che zhi hang “zhong hua renmin gong he guo xing zheng su song fa” ruo gan wen ti de yi jian (shi xing) [On the implementation of the “Administrative Litigation Law,” a number of issues (for trial implementation)] (promulgated by the Judicial Comm. Sup. People’s Ct. May 19, 1991, effective May 29, 1991), available at <http://www.gy.yn.gov.cn/Article/flfg/sfjs/xzssf/200605/7957.html> (last visited May 10, 2009).

²³⁹ Pierre F. Landry, *Administrative Conflicts in China: Initiation, Escalation and Resolution* 4 fig.1 (H.K. Baptist Univ. GIS Working Paper No. 7, 2005).

²⁴⁰ From 1989 to 1997, the rate at which the court upheld agency decisions dropped rapidly from over 50% to around 13%. Since then, the rate has increased slightly to 15 to 18%. The rate at which the court quashes agency decisions in recent years has ranged from 12 to 16%. Since 2000, just over 30% of cases are resolved when either the plaintiff withdraws the suit or the suit is withdrawn after the agency changes its decision. Plaintiff withdrawal rates have remained relatively constant for the last 15 years at about 25 to 30% of all cases. However, defendant agency withdrawal rates have dropped sharply from over 20% between 1995 and 1997 to 5 to 10% between 2001 and 2004. ZHU, *supra* note 1, at 229-31.

²⁴¹ PEERENBOOM, *supra* note 67, at 400.

²⁴² Administrative Procedure Law (promulgated by the Nat’l People’s Cong. Apr. 4, 1989, effective Oct. 1, 1990), art. 12, translated in ISINOLAW (last visited May 10, 2009).

²⁴³ *Id.* art. 5.

²⁴⁴ *Id.* art. 1.

²⁴⁵ *Id.* art. 11; Qianfan Zhang, From Administrative Rule of Law to

most notably political rights such as the rights to march and to demonstrate, freedom of association and assembly, and rights of free speech and free publication.

The requirement that one's legitimate rights and interests be infringed has also been construed narrowly to prevent those with only indirect or tangential interests in an act from bringing suit. The narrow interpretation prevents interest groups or individuals acting as "private attorneys general" to use the law to challenge the administration.

The main limitations, however, are systemic. The system for funding courts and appointing and promoting judges is undergoing reform, and varies by region. However, many courts still rely on local government for funding, and judges are still technically appointed by the local people's congresses after vetting by local party organs. This arrangement has led to difficulties in filing suits, external interference in the litigation process, and problems in enforcing judgments against administrative defendants.²⁴⁶ In general, administrative litigation is more effective in economically developed urban areas than in poorer rural areas. It is more difficult to file cases and prevail in basic level courts in less developed areas where the local governments exercise more control over the courts.

Higher level courts are also less likely to be influenced by pressure from local governments. Not surprisingly, the number of administrative litigation cases appealed has risen steadily to almost 30,000 per year, or about 30% of all such cases.²⁴⁷ Plaintiffs prevail, as measured by decisions quashed or cases remanded to the lower court, in approximately 17% of appellate cases.²⁴⁸ Even after appeal, parties may petition for retrial pursuant to a discretionary supervision procedure. Success rates, as measured by reversal of the appellate decision or remand for retrial, ranged from 27 to 36% between 2002 and 2004.²⁴⁹

Constitutionalism? The Changing Perspectives of the Chinese Public Law, Dec. 13, 2006, available at <http://www.tecn.cn/data/detail.php?id=12196> (last visited May 10, 2009).

²⁴⁶ Wang Qinghua, *Zhongguo xingzheng susong: duo zhongxin zhuyi de sifa* [Chinese Administrative Litigation: Polycentric Adjudication], 19 *ZHONGWAI FAXUE* [PEKING UNIV. L. J.] 513 (2007).

²⁴⁷ See ZHU, *supra* note 3, at 236.

²⁴⁸ Interestingly, this number has declined over the last ten years, as has the success rate for appeals in criminal and civil cases, suggesting perhaps that judges in first instance cases are becoming more qualified. *Id.*

²⁴⁹ *Id.* at 242.

All else being equal, cases that involve commercial issues such as the denial of a license or imposition of excessive fees are easier for the courts to handle than socio-economic cases. Plaintiffs in the former type of case may still run into problems with local protectionism, government interference or retaliation. Such problems might also affect administrative litigation cases involving socio-economic issues. However, plaintiffs in the latter are also likely to confront all of the additional obstacles that arise when courts handle socio-economic cases, including conflicting policy goals, central-local tensions, an insufficiently developed regulatory framework, and most fundamentally lack of resources to provide an adequate remedy.

Socio-economic cases affect many parties. Because the courts are unlikely to be able to provide adequate relief, they also have a great potential to lead to social disturbances. Local officials, worried about social instability and its affect on their future career prospects, often pressure courts not to accept such cases. Once accepted, judges are often pressured to resolve the case through mediation. Mediation of administrative litigation cases has not been allowed under the ALL for fear that government officials would intimidate plaintiffs into settlement.²⁵⁰ However, in recent years, mediation of administrative litigation cases grew despite the prohibition, and an amendment of the ALL is being considered that would permit mediation.

Another response to problems in administrative litigation suits has been to emphasize administrative reconsideration and other political or administrative channels as an alternative. Unlike in some countries, China allows parties to initiate an administrative litigation suit without first exhausting administrative remedies, except in a narrow range of circumstances. As noted, recent regulations now require parties to first seek administrative reconsideration of the amount of compensation in land taking cases before turning to the court. More generally, the government has sought to encourage administrative reconsideration by making it more appealing.

Administrative reconsideration offers a number of additional advantages over litigation under the ALL. First, it is free. Second, administrative reconsideration bodies, which consist of government

²⁵⁰ Although “the A.L.L. states that administrative cases should not—in principle—be mediated, in reality they often are, resulting in an abnormal rate of case withdrawals once the parties have reached a compromise.” Landry, *supra* note 239, at 7.

officials of a higher government organ, may consider both the legality and appropriateness of administrative decisions. Third, parties may challenge not only the specific act but in some cases the abstract act on which it is based. If the reconsideration body finds the regulation inconsistent with higher legislation, it may annul the inconsistent regulation or, if it does not have the authority, it may refer the problem to the body that has such authority.

Administrative reconsideration was permitted by regulations issued in 1991.²⁵¹ However, reconsideration was not popular. There were only 240,000 applications for administrative reconsideration from 1991 to 1998.²⁵² The government then revised the regulations to encourage greater use of the procedure, and upgraded the regulations to a law.²⁵³ As a result, the number of applications for reconsideration has increased. In 2004, there were 81,833 applications, of which 72,620 were accepted and heard.²⁵⁴ Of those, 64,953 cases were concluded, among which 37,726 resulted in upholding the administrative agency decision or act (58%), compared to 1,741 alterations, 9,527 revocations, 407 confirmations of illegality, and 557 orders to the agency to discharge their legal duties (most likely in cases where agencies had failed to take an action).²⁵⁵ Thus, the plaintiff obtained some form of relief in about 19% of the cases accepted for reconsideration.

The low success rate would suggest that administrative reconsideration would not be an effective way of reducing pressure on the courts by screening out potential administrative litigation cases.

²⁵¹ Regulations on Administrative Reconsideration (promulgated by the St. Council Jan. 1, 1991, effective Jan. 1, 1991), *translated in* ISINOLAW (last visited May 10, 2009), *repealed by* Law on Administrative Consideration (promulgated by the Standing Comm. Nat'l People's Cong. Apr. 29, 1999, effective Oct. 1, 1999), *translated in* ISINOLAW (last visited May 10, 2009).

²⁵² Office of Legislative Affairs [OLA], *Undertaking Administration According to Law: Review and Prognosis*, 111th Cong. Rep. on the Asian Development Bank (2008) (on file with authors).

²⁵³ Law on Administrative Consideration (promulgated by the Standing Comm. Nat'l People's Cong. Apr. 29, 1999, effective Oct. 1, 1999), *translated in* ISINOLAW (last visited May 10, 2009).

²⁵⁴ Fang Jun, *Wo guo hang zheng fu yi zhi du de shi shi xian zhuang, wen ti he zhan wang (er)* [China's Administrative Review System, Problems and Prospects (2)], May 4, 2007, *available at* <http://www.5izy.cn/articles/h000/h02/1178334701d2793.html> (last visited May 10, 2009).

²⁵⁵ *Id.*

However, it appears that many parties give up after losing in reconsideration. In 2002, Shanxi province had 912 administrative reconsideration cases, compared to 169 administrative litigation cases, of which only 39 (23%) had gone through administrative reconsideration.²⁵⁶ In 2006, Shandong province had 6,288 administrative reconsideration cases, compared to 9,647 administrative litigation cases, of which 1043 (11%) had gone through administrative reconsideration.²⁵⁷ Thus, in both places, the vast majority of parties seeking administrative reconsideration did not end up taking their claim to court: 96% in Shanxi, 84% in Shandong. Conversely, in both places, the vast majority of administrative litigation plaintiffs proceeded directly to court: 77% in Shanxi and 89% in Shandong. According to some national statistics, of the reconsideration cases that do go on to litigation, the court upholds the reconsideration decision in three out of four cases.²⁵⁸

B. *Constitutional Developments*

Constitutional law has developed at a slower pace than administrative law. Constitutional law, and constitutional litigation in particular, serves three broad purposes: addressing division of power issues among state organs; resolving conflicts between the central and local government, including inconsistencies between lower level regulations and the constitutions; and protecting individual rights.

The main role of the constitution to date has been to provide an

²⁵⁶ Legislative Affairs Office of Shanxi Province People's Government, Shanxi sheng zheng fu fa zhi ban gong shi guan yu 2002 nian quan sheng xing zheng fu yi xing zheng ying su an jian tong ji qing kuang tong bao [2002 Statistical Report on Shanxi Administrative Reconsideration and Administrative Litigation Cases], Apr. 17, 2003, available at http://www.34law.com/lawfg/law/1797/2397/print_890916242509.shtml (last visited May 10, 2009).

²⁵⁷ Legislative Affairs Office of the State Council, 2006 nian Shandong sheng xing zheng fu yi xing zheng ying su an jian tong ji fen xi bao gao [2006 Statistical Report on Shandong Administrative Reconsideration and Administrative Litigation Cases], Aug. 27, 2007, available at <http://www.chinalaw.gov.cn/article/dfxx/dfzxx/sd/200708/20070800026354.shtml> (last visited May 10, 2009).

²⁵⁸ *Cun min gao ying sheng zheng fu: xing zheng fu yi jian cheng qun zhong wei quan gan dao* [Villagers Beat Provincial Governments: Administrative Reconsideration Has Become the Main Route of Mass's Rights Protection], BANYUETAN, Mar. 28, 2007, available at http://news.xinhuanet.com/politics/2007-03/28/content_5906335.htm (last visited May 10, 2009).

initial distribution of power among state organs. Against this background legal reforms are negotiated, which frequently affect the balance of power among key state actors. For example, the constitution now gives the procuracy the power to supervise the courts. In recent years, the procuracy has interpreted this power to mean that it has the authority to supervise final judicial decisions. As expected, the judiciary has argued that the procuracy's power of supervision should be eliminated, or at least limited to general oversight of the court or investigation of particular instances of judicial corruption. According to most judges, the procuracy should have no power to supervise individual cases. The courts have also come into conflict with the legislative branch over similar powers of individual case supervision and with administrative agencies over the power of judicial review of agency decisions.

In the absence of a constitutional court, however, most issues involving the balance of power between state organs, such as whether the procuracy and People's Congress should be able to review court decisions, have been left to the political process, with the Party being the ultimate arbitrator when the conflicts become too intense or there appears to be a deadlock.

Constitutional law also provides the basis for addressing conflicts between the central government and lower level governments, which is a form of principal-agent conflict. The rapid pace of legislation and an incentive structure that rewards local officials for achieving high growth rates have led to numerous inconsistencies between lower level regulations and higher level laws and the constitution. Rather than relying on the courts to strike down lower level laws that are inconsistent with the constitution, the main way for addressing inconsistent regulations is through a filing and review system, with the review performed by the administrative superior agency.²⁵⁹

The 2000 Legislation Law granted citizens and other entities the right to propose to the National People's Congress Standing Committee (NPCSC) that lower regulations were inconsistent with the constitution or laws.²⁶⁰ The government has now established a National People's

²⁵⁹ OLA, *supra* note 252.

²⁶⁰ Law on Legislation (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000), art 90(2), *translated in* ISINOLAW (last visited May 10, 2009); Wang, *supra* note 236, at 4.

Congress (NPC) committee to perform this task, and is in the process of working out the details of how this mechanism will work in practice.²⁶¹ This has provided an opportunity to push for changes to protect citizens' constitutional rights and advance constitutional claims.

For example, after Sun Zhigang, a university student from Hubei, was beaten to death while detained in a form of administrative detention known as Custody and Repatriation, several young scholars filed a proposal challenging the legality and constitutionality of the Custody and Repatriation Measures.²⁶² One of the key arguments was that the Measures were passed by the State Council. However, the Legislation Law required all restrictions of personal liberty to be based on a law passed by the National People's Congress or its Standing Committee. The case was widely reported in the media, and resulted in the State Council repealing the Measures, thus avoiding the need for the NPCSC to strike down the regulation.

In another well-known case, Peking University law professor Gong Xiantian published two open letters arguing that the draft Property Law violated basic principles of socialism and a constitutional provision declaring that state property is inviolable.²⁶³ NPC spokespersons, including NPCSC Chairman Wu Bangguo, issued public statements defending the constitutionality of the draft law, and noted that the draft had been amended to provide greater protection to state property and avoid the fraudulent sale of state assets.²⁶⁴ Although delayed for a year, the Property Law was passed in 2007.²⁶⁵

It remains to be seen to what extent this new review mechanism will empower citizens. Citizens have submitted at least 37 requests for review.²⁶⁶ However the NPCSC has yet to respond formally to a citizen proposal for review. Moreover, although the NPCSC issued two circulars setting out detailed procedures for handling proposals for

²⁶¹ See Wang, *supra* note 236, at 2 (calling for such a committee).

²⁶² See generally Keith J. Hand, *Using the Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China*, 116 COLUM. J. TRANSNAT'L L. 114, 119-131 (2006) (narrating background of Sun Zhigang case).

²⁶³ Hand, *supra* note 236, at 17.

²⁶⁴ *Id.*

²⁶⁵ Property Law (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), *translated in* ISINOLAW (last visited May 10, 2009).

²⁶⁶ *Id.* at 16.

NPCSC review of administrative regulations and judicial interpretations, these circulars do not provide much transparency into how the decisions are actually made.

More generally, while the NPCSC review creates a constitutional mechanism for dealing with one type of principal-agent problem, principal-agent issues—including the problem of inconsistent regulations—are for the most part handled through other administrative and political mechanisms. The role of the courts is limited given their inability to strike down abstract acts.

Constitutional litigation to protect individual rights is only just beginning, and future progress is likely to be slow. In addition to the lack of a constitutional review body, the constitution is generally not considered to be directly justiciable. The SPC did rely on the constitution in reaching its decision in a civil case involving the right to education.²⁶⁷ However, that case did not involve enforcing the constitution against the government.²⁶⁸ The case was also extremely controversial, with proponents of expanded constitutional litigation drawing hyperbolic comparisons to *Marbury v. Madison*.²⁶⁹ Critics argued that the decision was at odds with the constitutional structure or unnecessary to provide relief in the particular circumstances.²⁷⁰ Since then, there have been no cases where a court has cited a constitutional right as the sole basis for its holding (although courts do sometimes cite specific constitutional provisions along with other laws and regulations to support their decisions).

The constitution has, however, been invoked in a series of discrimination cases. In one case that combined the right to education with a discrimination claim, three students from Qingdao sued the Ministry of Education for its admissions policy that allowed Beijing residents to enter universities in Beijing with lower scores than applicants from outside Beijing.²⁷¹ In another case, a person infected

²⁶⁷ See Shen Kui, *Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case,"* 12 PAC. RIM L. & POL'Y J. 199, 201-03 (Yuping Liu trans., 2003) (giving facts of the case).

²⁶⁸ See *id.* (articulating that the dispute was between private parties).

²⁶⁹ *Id.* at 199; *Marbury v. Madison*, 5 U.S. (Cranch 1) 137, 177-79 (1803), asserted that the U.S. Supreme Court has the power to exercise judicial review.

²⁷⁰ Kui, *supra* note 267, at 212.

²⁷¹ Yu Meisun, *Cong jiao yubu dang bei gao de liang'an kan zhaosheng zidu chuang xing de po jie xing* [On the Exigency of Renovating the College Recruiting System,

with hepatitis B recently won an administrative litigation suit when he was denied a post as a civil servant because of his disease.²⁷² The court did not reach the constitutional issues raised in the case, but held that the application of the standard on the plaintiff was wrong.²⁷³ Other employment discrimination cases have challenged height, gender and age restrictions.

Rural residents have also appealed to the constitution to protest discriminatory treatment. In one well-known case, three students died in a traffic accident.²⁷⁴ In China, compensation hinges on average income, which differs significantly between rural and urban areas.²⁷⁵ Thus, the families of two of the victims who were urban residents received more than twice the compensation of the family of the victim who was a rural resident.²⁷⁶ The family of the rural victim brought a lawsuit to challenge the discriminatory compensation, arguing the standard violated the principle in Article 33 of the constitution that all citizens are equal before the law.²⁷⁷ However, the court held that the compensation was in accordance with existing law.

Citizens have also drawn on constitutional principles to uphold privacy claims. “In a much publicized case, a Shanxi [*sic* - Shaanxi] couple was awarded damages after police stormed into their bedroom while they were watching an adult movie, and a scuffle broke out

Judging From the Two Cases Where the Ministry of Education is the Defendant], DA JI YUAN SHI BAO [EPOCH TIMES], Apr. 23, 2004, available at <http://www.epochtimes.com/gb/4/4/23/n519496.htm> (last visited May 10, 2009). Another case where a student who did not meet the requirements to take the graduate student exam, but was nevertheless permitted to do so, was rejected by the Chinese Academy of Social Sciences even though others who did not meet the minimal score were admitted. After losing in administrative reconsideration and in both the Beijing Intermediate and High People’s Courts, the student took his case to the Supreme People’s Court. *Id.*

²⁷² Kellogg, *supra* note 236, at 234-42.

²⁷³ *Id.*

²⁷⁴ Zhao Huanxin, *Make Payments 'Fairer': Legislator*, CHINA DAILY, Mar. 14, 2007, at 5, available at http://www.chinadaily.com.cn/cndy/2007-03/14/content_826874.htm (last visited May 10, 2009). See also Jim Yardley, *3 Deaths in China Reveal Disparity in Price of Lives*, N.Y. Times, Apr. 14, 2006, available at <http://www.nytimes.com/2006/04/14/world/asia/14china.html> (last visited May 10, 2009) (providing background story of the case).

²⁷⁵ Zhao, *supra* note 274.

²⁷⁶ Yardley, *supra* note 274.

²⁷⁷ *Does All Life Have the Same Value?*, BEIJING REV., May 11, 2006, available at <http://www.bjreview.cn/EN/06-19-e/zm-1.htm> (last visited May 10, 2009).

between the husband and police, resulting in injuries to the husband.”²⁷⁸ To be sure, most of these cases have been dismissed on technical grounds, including lack of jurisdiction, failure to apply to the proper court, or the lack of authority to overturn an abstract administrative act.

Moreover, in most cases, relief came in the form of a change in the laws, not a favorable court judgment, and was the result of a fortuitous conflux of circumstances including media attention. For instance, the civil servant hepatitis B case arose after a man in Zhejiang, after being denied a civil service position because he was a hepatitis B carrier, killed a local official and seriously injured another.²⁷⁹ Although the man was eventually sentenced to death, his case has attracted much sympathetic media attention.²⁸⁰ At the time, a proposal had also been submitted by a group of hepatitis carriers to the NPCSC on the discrimination issue. In the wake of these events, several provinces announced that they would not exclude non-infectious hepatitis carriers from public employment.²⁸¹ And in 2004, the NPC revised the Law on Prevention and Control of Infectious Diseases, banning discrimination against the disease carriers.²⁸²

Similarly, the rural resident compensation case arose at a time when the Hu-Wen administration was announcing a new policy to create a harmonious society and address social injustice, including rising rural-urban inequality. After the case, which was again widely reported in the press, several provinces adopted a uniform compensation standard for urban and rural residents. SPC president Xiao Yang has also announced that the SPC would soon issue an interpretation changing its earlier interpretation to provide for a uniform compensation standard.

These quasi-constitutional cases generally have involved economic issues. They do not involve political dissidents or the right to free speech.

²⁷⁸ PEERENBOOM, *supra* note 1 at 118; accord Gang Bian, *Porn at Home Leads to Red-Hot Privacy Debate*, CHINA DAILY, Aug. 27, 2002, available at http://www.chinadaily.com.cn/english/doc/2002-08/27/content_350757.htm (last visited May 10, 2009).

²⁷⁹ Alice Yan, *Hunan Lifts Ban on Hiring Hepatitis B Carriers*, S. CHINA MORNING POST, Mar. 5, 2004, at 6.

²⁸⁰ See, e.g., *id.* (giving attention to the case).

²⁸¹ See *id.* (noting that Hunan was the fifth province to lift ban on employing non-infectious hepatitis B carriers).

²⁸² Law on Prevention and Treatment of Infectious Diseases (promulgated by the Standing Comm. Nat’l People’s Cong. Aug. 28, 2004, effective Dec. 1, 2004), art. 16, translated in LAWINFOCHINA (last visited May 10, 2009).

Parties who invoke the constitution to criticize the government or call for greater democratization have been notably unsuccessful.²⁸³ Further, most of the successful cases raised discrimination claims. Discrimination is less politically sensitive, and equality claims are easily understood and generally supported by the public.

Notwithstanding these qualifications, these cases signal an increasing willingness on the part of plaintiffs, lawyers and courts to look to the constitution as the basis for norms and principles that may be applied in particular cases to expand protection of the rights of individuals, subject to current doctrinal, jurisdictional and political limitations.

V. EXPLAINING DISPUTE RESOLUTION PATTERNS

The three most striking patterns from this survey are: first, the much better performance of institutions for handling disputes in urban areas compared to rural areas; second, the significantly greater progress in handling commercial law disputes compared to socio-economic claims; and third, the more advanced state of development of administrative law compared to constitutional law.

Economic growth largely explains the first pattern. As is generally true everywhere, there is a high correlation between wealth and the strength of legal institutions.²⁸⁴ In richer urban areas, there are more and better judges, lawyers and law schools.²⁸⁵ Overall, people in urban areas have fewer complaints than their counterparts in rural areas. But when they have a dispute, they are more likely to resort to litigation to resolve them, and significantly more likely to be satisfied with the result. In the event of mass protests, urban governments are capable of allocating funds to pacify some of the disputants.

²⁸³ For instance,

Wang Zechen was sentenced to six years for subversion for attempting to establish a Liaoning branch of the banned China Democratic Party, attacking the Party as a dictatorship, and advocating the end of the single party system and the establishment of a multiparty system with separation of powers. In court, Wang did not contest the facts but argued the acts were legal.

PEERENBOOM, *supra* note 1, at 111 (citations omitted).

²⁸⁴ PEERENBOOM, *supra* note 1, at 198-99. *See also* Kaufmann et al., *supra* note 26, at 76-93 (listing numerical data).

²⁸⁵ Zhu, *supra* note 1, at 47-58.

Given the greater importance of commerce in urban areas, there are also more commercial disputes. This leads to a demand for better legal institutions and more just and efficient ways of resolving disputes. The government has invested heavily in improving the investment environment, including strengthening the various mechanisms for commercial dispute resolution, particularly the courts. The government has done so because it relies heavily on economic growth for legitimacy, and because continued economic growth is essential if the government is going to continue to reduce poverty, improve human development, and create a harmonious society. At the same time, the government has ensured that the development of certain areas of commercial law that have broad-ranging significance for the national economy and socio-political stability, such as bankruptcy and competition law, remain subject to various political-administrative controls, with a limited role for private actors and the courts.

The second pattern is also largely explained by levels of wealth, and in particular the related problems that lower-income countries such as China lack the resources to resolve what are fundamentally economic issues, and that existing institutions, particularly courts, lack the means, competence and/or independence to provide effective relief.

On the other hand, the government cannot simply ignore the problems. The transition to a market economy has led to greater income inequality, environmental degradation and social injustice. People nowadays are much more conscience of their rights, and have much higher expectations of the government. When their needs are not addressed, they are increasingly likely to take to the streets to protest, or to travel to Beijing to beseech central leaders for assistance.

The government has responded by adopting policies that attempt to reallocate resources to those who have lost out, or not benefited as much, from economic reforms; by emphasizing sustainable growth; by re-emphasizing traditional, non-judicial mechanisms for resolving disputes such as mediation, petitions and administrative reconsideration; and by developing new mechanisms, such as greater public participation in the law-making, interpretation and implementation processes.

Yet none of these mechanisms are likely to be adequate in the short term. Accordingly, the government has also increased targeted repression to ensure social stability. This approach generates criticism both from liberals, who feel that what is needed is not repression but

more rapid liberalization and political reforms, and from conservatives, who feel that what is needed is tighter control to maintain law and order, and that greater liberalization would plunge China into the kind of chaos found in many other developing countries in Asia and elsewhere.²⁸⁶

The third pattern of more rapid development of administrative law in comparison to constitutional law is explainable primarily by the different benefits and risks to the central authorities. Administrative law is a useful means for central authorities to obtain information about, and to rein in, local officials. Regional diversity makes it difficult to design and implement national laws in a uniform way. Many laws are drafted in general terms, and allow local officials considerable discretion to pass implementing regulations that adapt the national law to local circumstances. In addition, the incentive structure puts pressure on local officials to achieve growth and social stability without significant support from the central government. As a result, local governments often disregard national laws and policies, creating significant principal-agent problems. The various administrative law mechanisms allow the government to use citizen complaints to monitor local officials. Of course, the developments in administrative law are also a response to citizen and investor demands for more effective governance. However, administrative law mechanisms are most effective when they are used against lower level entities on issues that the central government supports, rather than when used against the central authorities directly or indirectly by raising issues the central authorities deem politically sensitive.

Constitutional law developments are more problematic because they have the potential to alter the balance of power among state organs and challenge the basic principles of the political system. Nevertheless, the constitution has served those inside and outside government as a source of empowerment for legal institutions and the development of constitutional norms. In particular, the constitution has played a role in establishing broad grounds of legality, accountability and justice, which activists and reformers have then drawn on to push for reforms.

However, there is currently no constitutional review body. Even if a constitutional review body were to be established with jurisdiction over individual rights claims, progress would likely be slow, as it was in South Korea and Taiwan prior to democratization. While the courts

²⁸⁶ See generally Peerenboom, *supra* note 1, at 1045-47 (describing deep division on how to approach administrative detention).

might be able to address adequately certain discrimination claims, they are likely to be less effective handling civil and political rights, which are threatening to the ruling party, or socio-economic cases, for the reasons discussed.

VI. CONCLUSION AND POLICY RECOMMENDATIONS

Given that many disputes are economic in nature and the problems with institutions and mechanisms for resolving disputes are wealth-related, the government must continue to promote economic growth. At the same time, more resources should be allocated to rural areas to strengthen institutions and address underlying problems, thus preventing disputes from arising in the first place.

Access to justice is a pressing issue. In April 2007, the State Council issued new standards for litigation fees in an effort to provide socially vulnerable groups better access to the court system. Litigation fees in some categories will be totally waived while others will be cut in half. There are also sporadic reports about courts enforcing judgments in favor of socially weak groups. These developments are largely in response to the central government's call to create a harmonious society and "courts for the people."

Although some low income litigants might benefit from the new fee standards, the impact on the courts and ultimately on access of justice remains unclear. Many courts, especially rural courts in poor areas, cannot afford a decrease in litigation fees, which have been their main source of funding. Some rural courts have thus resisted implementation of the new policy, while others have decided to implement the standard for one year to see what the affect on court finances will be, and then to reevaluate accordingly.

The centralization of funding for the judiciary, along with an increase of funding especially for poorer rural areas, would go a long way toward addressing many of the current problems. But an increase in funding alone will not be sufficient. The efforts to build institutional capacity must continue. The competence of judges needs to be raised through training programs and strict adherence to the higher educational standards for recruiting judges. The quality of the legal profession must also be improved, particularly in rural areas where there are few lawyers

or legal service providers, and even fewer well-trained ones.²⁸⁷

Further reductions in judicial corruption are obtainable by: (i) ensuring that the recruitment and promotion of judges is based on merit, and that judges are provided continuous on-the-job training; (ii) ensuring that the courts are adequately funded, and that judges are paid a reasonable salary; (iii) reducing the discretion of judges and court staff by reducing barriers to the acceptance of cases, by adopting a case management system that assigns cases within a division randomly, and by reducing the complexity of pretrial and trial procedures; (iv) strengthening the mechanisms for accountability, including more prosecutions and heavier punishments of corrupt judges, while at the same time ensuring that judges enjoy due process rights and cannot be removed from their jobs or denied promotion for whistle-blowing on other corrupt judges; (v) making full use of the rules for withdrawal in cases of real or perceived conflicts of interest; (vi) enhancing scrutiny of judges by civil society, including the establishment of consultative committees that include citizen representatives to investigate allegations of corruption and conflicts of interest; (vii) increasing transparency through publication of judgments; wider and easier access to court documents for the public and media; publishing the process for nominating, appointing and promoting judges, including selection criteria and reasons for appointing or rejecting candidates; and (viii) fully enforcing a requirement that judges report their and their immediate family members' income, with the information available to the public and media.

There is an inherent tension between judicial corruption and judicial independence. Accordingly, increased independence and authority of judges should be tied to levels of competence and integrity, beginning with judges in higher level courts in urban areas. There are a number of ways in which independence could be strengthened. Some of them are the same as for dealing with judicial corruption: (i) ensuring that the recruitment and promotion of judges is based on merit, and that judges are provided continuous on-the-job training; (ii) allowing a greater role

²⁸⁷ See generally Fu Yulin, *Status Quo and Development of China's Rural Grass-Roots Legal Services: Viewed From Rural Grass-Roots Legal Services Offices 50* (Oct 10, 2007) (unpublished manuscript, on file with authors) (stating that rural areas have lower proportion of qualified legal workers and lawyers due in part to lack of financial resources).

for higher level courts, the bar association and other legal professionals in nomination and appointment process; (iii) ensuring that the courts are adequately funded, and that judges are paid an adequate salary; and (iv) publishing more judgments with reasoned opinions. Other ways include: (v) ensuring that judges are not fired or removed for deciding cases in ways that are politically controversial but in compliance with the law; (vi) eliminating or greatly restricting the role of the adjudicative committee, a committee of senior judges in each court responsible for deciding important or complex cases; (vii) defining more specifically, and making more transparent, the role of Party organs with respect to ideological guidance for the court, appointments and involvement in particular cases, and ensuring that Party policies are transformed into laws and regulations; (viii) eliminating or restricting supervision of the courts by the procuracy and people's congresses, and increasing supervision by the media and civil society; and (ix) changing the incentive structure for judges so that they are not penalized in terms of bonuses or promotions for reversals on appeal provided that their decisions were based on a plausible interpretation of law rather than ignorance of the law, negligence or corruption.

Given the wide diversity in China, a varied approach is needed that takes into consideration local circumstances, including the nature of disputes, people's expectations and the level of development of the economy and institutions. A highly technical, legalistic solution centered on the courts is not always the best approach. Mediation of some disputes may be more appropriate in the countryside, although there should be safeguards to ensure that people are not coerced into settlement, and that vulnerable parties are not discriminated against in the process. Rural areas in particular might benefit from the development of small claims courts.

More generally, dispute resolution should be rationalized by allocating disputes to effective channels. Courts should not be required to accept socio-economic disputes that they are ill-equipped to handle. However, if these disputes are to be channeled to political or administrative channels instead, then these mechanisms must be improved.

One lesson learned from the experiences of global law and development projects over the last forty years is that there is no single blueprint for reforms. Countries begin with different traditions and

institutional endowments. Different stages of the development process present different challenges, as do different areas of law. There is therefore a need to adopt a pragmatic approach to reforms, to try out new methods, and to abandon current practices if they no longer serve their purposes. Much of China's success to date, whether in the area of economics, rule of law, or good governance, is attributable to its pragmatic approach.