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Fundamentally Conflicting Views of the Rule of Law in China and the West & (and) Implications for Commercial Disputes

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Fundamentally Conflicting Views of the Rule of Law in China and the West & Implications for Commercial Disputes

*Benedict Sheehy**

Abstract: This paper is an examination of the notions of law, the Rule of Law, and commercial practice in the West and China. The paper outlines the basic philosophical principles and legal concomitants of the Rule of Law, and the corollary Chinese principles and concomitants. It examines the traditions, differences, and similarities in thinking about the issues in each tradition. It then examines the implications of these differences in commercial dispute resolution. After this discussion of traditions, similarities, and differences and their impact on commercial dispute resolution, the paper turns to address how the discrepancies could be dealt with in the China-Australia Free Trade Agreement.

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I. INTRODUCTION

The Rule of Law in the West is deeply entrenched in the legal system and is one of the fundamental assumptions about how relationships are to be conducted. In a sense, it is a part of Western culture, and in particular Western commercial culture. In its essence, the Western notion is that while power and influence certainly operate in all relationships, all of these relationships in turn are governed by or based upon the law. Law is seen to be independent of the power and influence of the members of society, including the government, and something that has the ability to control government action. By way of contrast, in China, although it has experimented with the notion at different times in its history, currently the Chinese Communist Party (“CCP”) is the basis of power and influence as well as the basis of all law. In essence, therefore, the law has been a tool of the CCP. While the CCP has been seeking to change this status, change is still at an inchoate stage, and as a result, for foreign commercial interests, access to predictable legal outcomes and enforcement has been very

limited.

The China-Australia Free Trade Agreement (“FTA”)¹ presumably, the first of many such bilateral trade agreements with Western nations, will require China to address this problem of legal certainty much more directly than it has to date under the World Trade Organization (“WTO”). The FTA requires such action because it will likely permit individual corporations and corporate interests to litigate on their own behalf, while the WTO dispute resolution mechanism is long, drawn out, and requires high-level government involvement.² Such being the case, both China and Australia will find their laws and assumptions tested relatively soon. This fact places an imperative on the Chinese government and its negotiators to consider the status of the Chinese legal system in their negotiations and to negotiate wisely with respect to jurisdiction and remedies to be provided in the FTA. Furthermore, it places certain imperatives on Australian and other Western negotiators who will need to review the same matters from their own perspective.

This paper examines the legal and commercial norms in their socio-political contexts with due regard to the relevant intellectual history. After a brief discussion of methodology, Part II turns to examine the different situations, connections and relationships between government and the governed in the West and China. Part III then examines the notion of law in both Western and Chinese traditions. Part IV turns to consider the two traditions’ approaches to the notion of Rule of Law, after which Part V offers a review of traditions of commerce and commercial dispute resolution. Finally, Part VI offers some suggestions for commercial dispute resolution provisions in trade agreements between China and Western nations.

II. THEORETICAL UNDERPINNINGS & CONTEXT

A. A Note on Theories and Method

Law, whether viewed as an instrument of government control or a responsibility of government in terms of its administration, imports its own set of assumptions and imperatives. It holds brilliant promise but carries with it a multiplicity of thorny problems. The promise and the problems sit equally on the laps of governments, scholars and citizens alike. Each of the

¹ See Australia, Gov’t Dep’t of Foreign Affairs and Trade, <http://www.dfat.gov.au/geo/china/fta/> (last visited Jan. 18, 2006).

² See WTO Legal Texts—A Summary of the Final Act of the Uruguay Round, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding (last visited Jan. 18, 2006). See also Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131 (2000).

Western and Chinese governments approach and deal with their responsibilities differently and these approaches form the basis from which each deals with law. These various views are also shared by scholars and cause great difficulty when conducting comparative work.³ Each scholar comes to a problem with her or his own mindset, point of view, assumptions, and understanding of the law. Not only is this plethora of views evident within legal traditions,⁴ but it greatly and perhaps excessively influences and thwarts comparative work—the present piece making no claim to exception.

The method I have adopted is to attempt to develop an understanding of and to situate each of the parties in their historical-legal contexts and then draw out the fault lines as to where they may meet. In doing so, every effort will be made to avoid the more common pitfalls of such comparative work⁵—recognizing that such interpretive work is, as comparative literature scholar Zhang Longxi observes, “a continuous intellectual endeavour [and] nothing but the rigorous critique of misunderstanding, misrepresentation, and all sorts of cultural myths and misconceptions.”⁶ Certainly, the concepts of “China” and the “West,” although having geographical referents, are also cultural myths and social constructs. These myths, when handled carefully, can assist in critiquing rather than supporting misunderstanding. It is with this in mind that the terms “China” (meaning primarily mainland China but also its traditions as carried elsewhere), the “West” (meaning Europe, North America, Australia and New Zealand) and “Anglo” (meaning the United Kingdom, United States and countries relying on the English common-law tradition) are used. It is to be understood that these are but constructs that hide as much as they reveal of the multi-faceted people, cultures and institutions that make up each grouping. They are not intended to be complete and correct descriptors of actual uni-dimensional monolithic societies and cultures. Undoubtedly, many Chinese will have views described herein as “Western” and vice-versa: the emphasis of this

³ H. Patrick Glenn’s work, *Legal Traditions of the World*, is a particularly refreshing approach to addressing this problem. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (2nd ed. 2004). Glenn’s view of law is that it forms the normative element in a society and so permits comparative work to be undertaken not as comparing rule with rule and code with code, but with systems of social ordering, institutions, and people’s response over time.

⁴ Consider, for example, M.D.A. Freeman’s masterful 7th edition of Lloyd’s *Introduction to Jurisprudence*. Some 1500 pages of text, excerpts, and commentary attempting to provide a rough sampling of most theories with the hope that the text will whet the appetite, for “whole libraries of jurisprudence are there to be sampled and enjoyed.” M.D.A. FREEMAN, *LLOYD’S INTRODUCTION TO JURISPRUDENCE*, at vi (7th ed. 2001).

⁵ Note the challenge to, and enlightening discussion of, such work in Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002).

⁶ ZHANG LONGXI, *MIGHTY OPPOSITES: FROM DICHOTOMIES TO DIFFERENCES IN THE COMPARATIVE STUDY OF CHINA* 2 (1998).

paper is on difference and how those differences may have a practical impact on certain disputes.

Accordingly, before moving to a direct discussion of law, it is necessary to put the law into its larger socio-political context, namely the role of law in society, prior to discussing the much more particularized, political and culturally informed notion of the Rule of Law. Both the West and China have organized social and political forces in different ways which have direct, complex, and broad influence determining the role of law in their respective societies. In the broadest of terms, the West is based on beliefs of individualism and separation whereas China has a tradition of unity and collectivity.⁷ We now turn to a further investigation and discussion of these differences.

B. Context

1. West: Separation of Powers—Legislative, Judicial & Executive Branch

Western governments tend to be organized around the idea of separation of powers⁸ for the purposes of accountability and control.⁹ One may consider the case of Australia as an example.¹⁰ The Australian governmental system is based on constitutional federalism.¹¹ That is, the Australian government's power rests on the basis of a constitution which was created by the states that banded together in order to form the federation. The Australian constitution follows the traditional Anglo attempt to limit the power of the political party in control of the government by separating the powers and making them independent of the party in control of government, to varying degrees.

This doctrine of separation of powers, the origins of which are lost in the centuries of history,¹² was articulated powerfully by the English legal

⁷ G. HOFSTEDE, *SOFTWARE OF THE MIND* (1991).

⁸ In the West, this notion was most forcefully advanced by Montesquie in his *The Spirit of the Laws*, in 1748. See generally BARON DE MONTESQUIE, *SPIRIT OF THE LAWS* (Hafner Publ'g Co. 1949) (1748).

⁹ M. J. C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 1 (1967).

¹⁰ The United States and the former U.K. colonies developed differently, with the colonies adopting a much softer form of separation of powers. In Australia and other former colonies it is argued the executive and legislative branches have not been separated sufficiently to claim a separation of powers doctrine. See generally Anthony Mason, *A New Perspective on Separation of Powers*, 82 *CANBERRA BULLETIN OF PUBLIC ADMIN.* 1, 5–6 (1996).

¹¹ C. SAUNDERS, *IT'S YOUR CONSTITUTION: GOVERNING AUSTRALIA TODAY* 13–18 (2d ed. 2003).

¹² See VILE, *supra* note 9, at 2–3.

theorist A.V. Dicey.¹³ Dicey argued that the organizers of the English legal system recognized that the concentration of power had a number of consequences, including the inability to make the government responsible to the people, and the tendency toward dictatorships, despots and tyrants.¹⁴ These outcomes were seen as undesirable from the perspective of the English social contract philosophers who held that governments had their legitimacy, at least in part, from the people.¹⁵ After the monarchies were overthrown in France and England, this legitimacy was granted to a government by the people via elections.

Accordingly, the legislative function was granted to the elected officials who were presumed to act on behalf of the citizens. They were expected to create legislation which advanced the interests of the people whom they represented. The legislators were not permitted simply to enact any legislation that seemed right to them or pleased the people: their legislative powers were limited by the constitution and supervised by the judiciary.

In the common law tradition, the judiciary has been an independent governmental body for centuries, although its independence is a curious type. Judges are selected in the common law tradition and appointed by parties in power; however, once appointed, these judges are independent, at least nominally, because they are free from interference or further influence with respect to their judgments by either the party appointing them or the government in power. Judges in these jurisdictions are usually appointed from the most senior and respected members of the legal profession. They often have decades of experience as lawyers prior to being appointed to their position as judges. In a sense, judges in these jurisdictions are the embodiment of the legal tradition. They have within them a sense of “justice”—of “fairness and law”—that to a large extent these societies have come to accept and expect, and that defines the legal system in their jurisdictions. The judges themselves are then constrained by a curious mix of constitutional limits on their powers, the socialization of many years in the legal profession leading them to prestigious positions within the profession, and the broad parameters of the common law tradition that they must follow.

The executive branch of the government, which administers legislation, is separated from the party in power by having no power to legislate and by having all of its actions potentially subjected to judicial

¹³ A. V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1959). See generally RICHARD A. COSGROVE, THE RULE OF LAW: ALBERT VENN DICEY VICTORIAN JURIST 77–87 (1980). Other twentieth century proponents are, of course, Frederick von Hayek and Lon Fuller.

¹⁴ Mason, *supra* note 10, at 2.

¹⁵ For a discussion of Locke’s view see J. GOUGH, THE SOCIAL CONTRACT 143 (1936).

review. In other words, no government agency is free to act as it chooses without potentially having to defend its actions. When it is challenged, it must be able to prove that it has acted within the law and has not exceeded its legally granted power. On this neat schema, the separation of powers works by permitting each branch of government to be controlled and limited in its actions by the powers granted and limited by law and the other branches of government.¹⁶ Of course, this theory, like all theories, has its short-comings and critiques, not the least of which is that it is a Western concept which has by no means been received by consensus nor fully realized in any country.¹⁷

2. Further Separation in Anglo Jurisdictions: Citizens and Government

The separation among powers and parties in Anglo jurisdictions is not limited to separation among the powers and bodies of the government. This separation extends broadly throughout society. At least in part because of the rebellion against the monarchy and aristocracy in England, known as the Glorious Revolution, those not in control of the government have had a suspicion of the government. As a result, they demanded a clear and sharp distinction between the citizens and the government. This distinction has served to limit the government's power and has forced the government to act with the concerns of citizens in mind. A failure to take judicious account of citizens' wishes has provided the basis for either a loss in the next democratic election, or worse, a violent overthrow of the government by another revolution. As a result of the power held by the citizens, Anglo governments have been forced to focus more on economic development which benefits not just the monarch and the aristocracy but a broader swath of society including merchants, traders, and politicians.¹⁸ While certainly providing a broader political base for decisions under the banner of democracy, citizen participation in the political arena has been slow to develop, and serious concentration of government attention to the well being of the masses has not been a hallmark for much of the time.¹⁹

Another source of power in Anglo society has been religion. The

¹⁶ Each branch limiting the other, however, makes it clear that each branch is doing more than its singular function. See VILE, *supra* note 9, at 18.

¹⁷ *Id.* at 1.

¹⁸ A view of the broader involvement in economic concerns is evidenced by a review of the types and classes of people who lost money in the South Sea Bubble of 1721. The Earl of Dartmouth, for example, noted "the loss would fall chiefly on the persons of quality," indicating a range of investors beyond the monarchy and aristocracy who were involved in the venture. See Julian Hoppit, *The Myths of the South Sea Bubble*, 12 *TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY* 141, 151 (2002).

¹⁹ The exception may be when Keynesian economics dominated governmental policy, from approximately 1940–1970 in the United States and the United Kingdom.

Church of England has had considerable power for several centuries in most Anglo jurisdictions except the United States.²⁰ The deposing of the monarchy as the sole source of political power did not translate into a deposing of the English monarch as the head of the church. Therefore Anglo governments have traditionally been keen to indicate their separation from religion and the church. Anglo society has then had a tradition of fragmenting political and religious power as well.

A stable democratic government not under threat of rebellion tends to support economic growth and institutions that develop to protect and to foster growth.²¹ The result is stable institutionalized economic systems in Anglo jurisdictions.²² In societies based on economic power and rights, as opposed to those societies developed on politico-social relations, those with economic power reinforce those economic institutions which expand their control and favor development that advances their power and rights.

As a result, Anglo governments have surrendered considerable control to these particular actors which, among other things, has achieved a stabilizing effect for their economic and political purposes. In the last century in particular, this economic and political power has become concentrated in business corporations,²³ giving these corporations the power to act in ways that limit democratic activity and governmental response.²⁴ Interestingly, this shift from citizen power to corporate power has followed the rhetoric of “citizen versus government.”

Private corporate interests have come to dominate the economy, culture and media of Anglo societies. Citizen protest around the world against corporate power began in the 1920’s and has continued to grow into the present, as manifested in the growing opposition to economic globalization, which often focuses on multinational corporations.²⁵

²⁰ PETER N. CARROLL & DAVID W. NOBLE, *THE FREE AND THE UNFREE* 62–63 (3d ed. 2001) (discusses and offers one explanation of the failure of the Church of England to establish itself as a dominant part of society in the United States).

²¹ See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

²² See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

²³ This was first put forward with an empirical analysis by Adolf A. Berle and Gardiner C. Means. See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

²⁴ See CARROLL, *supra* note 20. See also Benedict Sheehy, *Corporations And Social Costs: The Wal-Mart Case Study*, 24(1) J.L. & COM. 1, 1–55 (2004).

²⁵ See DAVID C. KORTEN, *WHEN CORPORATIONS RULE THE WORLD* (1995). On the most recent event, the G8 Summit in Gleneagle, Scotland in July 2005, see Indymedia, *G8 2005*, <http://www.indymedia.org.uk/en/actions/2005/g8/> (last visited Jan. 18, 2006); Sean Maguire, *Amid protests G8 meets, split on Africa and climate*, <http://www.tiscali.co.uk/news/newswire.php/news/reuters/2005/07/06/topnews/amidprotestsg8meetssplitonafriandclimat.html> (last visited Jan. 18, 2006).

Corporations continue to advance their economic and political interests, dominating governmental agendas in Anglo societies and international forums such as the International Monetary Fund and the World Bank.²⁶ The dramatic rise in open and manifest pro-corporate power arose from the failure of Keynesian economics to address stagflation of the early 1970's in the West and a shift to neo-classical economics and monetarism.²⁷ This shift in economic theory buttressed a political shift toward neo-liberal reforms which, starting with the Thatcher-Reagan era, have come to dominate politics in the West. Generally, these reforms have permitted governments to ignore the average citizen's concerns.²⁸

Relevant to this discussion is the fact that these corporations have done this often by presenting themselves as opposing government on behalf of the citizens and claiming to protect individual rights and freedom of choice.²⁹ Corporations have been the main beneficiaries of freedom of speech laws in the United States.³⁰ This corporate take-over has been effective by maintaining on the one hand the illusion of a separation of corporate and government interests,³¹ while on the other hand simultaneously appearing to support a citizenry quite distinct and separate from the government and in a position to criticize governmental policy and action.

Thus, though there is a purported separation between citizen and government, the reality is somewhat different. Based on voter turnout figures for elections, the average Anglo citizen is not particularly involved or interested in participating in the political system. Corporations, on the other hand, are exceedingly involved in political activities as is evidenced by such things as campaign contributions, lobbying groups, and Non-Governmental Organizations ("NGOs") set up by corporations to advocate

²⁶ See generally J. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 3–89, 195–213 (2001). See also MICHAEL HUDSON, *SUPER IMPERIALISM: THE ORIGINS AND FUNDAMENTALS OF U.S. WORLD DOMINANCE* (2d ed. 2003).

²⁷ STIGLITZ, *supra* note 26, at 13.

²⁸ J. HACKER & P. STRAUSS, *OFF CENTER: THE REPUBLICAN REVOLUTION & THE EROSION OF AMERICAN DEMOCRACY* (2005). For some opposing views, see *UNITING AMERICA: RESTORING THE VITAL CENTRE IN AMERICAN POLITICS* (N. Garfinkle & D. Yankelovich eds., 2005).

²⁹ For a very recent example, consider the "Center for Consumer Freedom"—a "consumer" organization sponsored by Coca-Cola, Wendy's and Tyson Foods dedicated to undermining government efforts to encourage healthy eating in the United States. See generally Paul Krugman, *Girth of a Nation*, N.Y. TIMES, July 4, 2005, at A13.

³⁰ See Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990).

³¹ See generally Michael Scherer, *The Making of the Corporate Judiciary: How Big Business is Quietly Funding a Legal Revolution*, MOTHER JONES, Nov.–Dec. 2003, at 72, 74–5, 100.

and sell to citizens the benefits of corporate profits and activities. Nevertheless, there remains a strong dissociation between government, citizen and religion.

3. *China: Unity of Powers—CCP, Government and Democratic Dictatorship*

The CCP's structuring of the Chinese government appears to be the exact opposite of the Anglo structure. Whereas the Anglo model has advocated the separation of powers, the CCP has designed a government based on unity of powers.³² In China, the CCP, the government, and the people's will are one—at least according to the official view. Therefore, they exist simply as a unified whole and not merely as a collection of three independent parties or interests forced together.³³ The CCP, as part of its effort to hold the hegemony of power, has actively promoted this unity and opposed calls for the separation of powers.

Unlike the Soviet-styled Dictatorship of the People,³⁴ the Chinese model of government was a dictatorship of the workers, peasants, petty bourgeois, and national bourgeois.³⁵ The Chinese government, as established under the "Organic Law," has, as the supreme governmental body, the Central People's Government Council. This Council has executive, legislative, and judicial powers.³⁶ This unity of powers facilitated the central organization of the economy, land re-distribution,³⁷ the numerous and marked shifts in policy,³⁸ and the development of state owned enterprises that has marked China's progress in the period since 1949. China's economic, environmental, and development problems stem largely from Mao Tse Tung who, in his twenty-seven year reign of terror between 1949 and 1976, implemented a series of disastrous policies concerning collectivization, the creation of famines to support his superpower ambitions, the Cultural Revolution, and various purges. All told, it is estimated that Mao and his CCP collaborators killed 70 million

³² RONALD C. KEITH, *CHINA'S STRUGGLE FOR THE RULE OF LAW* 83 (1994).

³³ KUI HUA WANG, *CHINESE COMMERCIAL LAW* 16–17 (2000).

³⁴ This is not to say that China did not follow Soviet-styled law. Indeed, it did. *See id.* at 10–11.

³⁵ IMMANUEL C. Y. HSU, *THE RISE OF MODERN CHINA* 645–47 (6th ed. 2000). Of course, the whole story of the development of the CCP is hotly contested. Most recently, authors Jung Chang and Jon Halliday, in a meticulously researched biography of Mao Tse-Tung, have set out a strong case for the CCP to have been little more than a tool for Mao's successful exploitation and manipulation of people and power to satisfy his megalomania. J. CHANG & J. HALLIDAY, *MAO: THE UNKNOWN STORY* (2005).

³⁶ *See* HSU, *supra* note 35, at 648.

³⁷ *Id.* at 652–57.

³⁸ *See* WANG, *supra* note 33, at 11.

Chinese.³⁹ Upon taking control of the CCP, Deng Xiaoping initiated, with increasing speed in the 1980's-90's,⁴⁰ reforms in the structure of the economic sector permitting increased private property and liberalization in terms of markets.⁴¹ This liberalization has had beneficial economic effects. Indeed, Deng Xiaoping argued in 1992 that this reform and liberalization was the driving force behind China's remarkable economic growth, critical to China's continued ascendancy.⁴²

The ascendancy of economic power in China, however, has had significant implications for the CCP's approach to both its own power and its ability to control political and social development. More specifically, with increased economic power, the CCP has had to change its view on capitalism and the role of the economy in the development potential of society.⁴³ Indeed, the 2002 revision of the CCP constitution of the 16th Party Congress, acknowledged the existence of the following classes: workers, peasants, members of the armed forces, intellectuals and "advanced elements"⁴⁴ of other social strata. Each of these classes is eligible for membership in the Party.⁴⁵ Still, to date, the CCP has managed to maneuver through a treacherous path in order to develop a "socialist market economy with Chinese characteristics"⁴⁶ that marks its reform and opening while maintaining its power. The change has been described as "from 'politics in command' to 'economics in command.'"⁴⁷ In this way, through its economic leadership, political control, and desire to reform, the governing CCP continues its tradition of consolidating the functions of government.

4. Further Integration: Unity of the CCP and of the People

By way of contrast, China's dictatorship has viewed itself as a representative of the people and a democratic dictatorship born out of the

³⁹ See CHANG, *supra* note 35, at 651.

⁴⁰ See HSU, *supra* note 35, at 776-77.

⁴¹ DAVID S. G. GOODMAN & GERALD SEGAL, CHINA IN THE NINETIES: CRISIS MANAGEMENT AND BEYOND 10 (1991).

⁴² Wang Wei-hsin, "Teng Hsiao-p'ing lu-hsien ti kuan-ch'a" T'an So, (May 1992) 41, in HSU, *supra* note 35, at 946-7, n. 9.

⁴³ Leong H. Liew, *China's Engagement with Neo-liberalism: Path Dependency, Geography and Party Self-Reinvention*, 41 J. DEV. STUDIES 331, 340-344 (2005).

⁴⁴ XIAN FA chap. 1, art. 1 (1982) (P.R.C.) [Constitution of the Communist Party of China].

⁴⁵ Art. 1(1) Compilation of Documents from the 16th National Party Congress of the Chinese Communist Party, *noted in* Liew, *supra* note 43, at 344.

⁴⁶ Created in 1993 to replace a prior CCP commitment to government dictated production and distribution and to a state owned enterprise model.

⁴⁷ See Liew, *supra* note 43, at 341.

coalition of four classes of people mentioned above. This view comes not only from the founding principles of the CCP, which have been subjected to various revisions and reforms, but also from the complex structure of China's government. With 23 provinces, 5 autonomous regions, 2 special administrative regions and 4 municipalities, all with different amounts of power, China's government is necessarily complex. To complicate matters further, China also has 56 ethnic minorities and a multitude of CCP organs and civil associations.

The CCP explains and proclaims:

The Chinese Communist Party was established on 1st July 1921. In 1949, The People's Republic of China came into being and then as the Organizer and Leader of the Chinese Revolution, the CCP became the ruling and controlling Party in China. Under the Constitution of the CCP, the CCP represents the proletariat in China which is the majority through out the country and represents the interest of most of the Chinese people.⁴⁸

The CCP's handling of power, its view of itself, its role in governing, and its role in continuing reforms have, in a certain sense, mandated both its democratic and dictatorial facets. Having to coordinate so many people of diverse ethnicities, interests, and political arrangements, it can be argued that the Chinese government needed to have an element of democracy, which arguably it accomplishes through elections of local party officials.⁴⁹ Furthermore, the CCP viewed itself as having responsibility for advancing the communist vision. Therefore, the CCP may claim it has necessarily taken a dictatorial role to avoid subversion by capitalists and other less visionary, narrowly interested parties.⁵⁰ It is not surprising, therefore, that the CCP has opposed a separation of powers.⁵¹

The CCP's representative structures, based on combinations of class, party membership, and civil organizations, have, in the eyes of many,

⁴⁸ Translated from Chinese by Yuru Li., available at http://news3.xinhuanet.com/ziliao/2004-11/24/content_2255749.htm.

⁴⁹ Jack Gray discusses this limited democracy but notes that local people have a choice of candidates for election although the nominees are still determined by the party. JACK GRAY, *REBELLIONS AND REVOLUTIONS: CHINA FROM THE 1800S TO 2000* 434 (2d ed. 2002).

⁵⁰ In Mao's various "cleansings" of the CCP, the charge of "anti-Bolshevik" as well as "capitalist roader" could well be a condemnation to death. See CHANG, *supra* note 35, at 95, 558.

⁵¹ See Stanley Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy*, 39 AM. J. COMP. LAW 316, 317 (1991); RONALD C. KEITH, *CHINA'S STRUGGLE FOR THE RULE OF LAW* 83 (1994). Noted also in the constitutional discussion in M. Ulric Killion, *China and Neo-liberal Constitutionalism*, 3 GLOBAL JURIST FRONTIERS 1, 11 (2003).

blurred the lines between party, government, and nation.⁵² Indeed, it may hearken back to what has been described as a monolithic socio-political tradition in which the individual's identity is subordinate and individual interests are subsumed in the family-clan-state unity that was part of the traditional form of governance in China⁵³—something that appears enshrined in article 51 of the Constitution.⁵⁴ Since the reforms of the 1990's, however, the role of ideological communism has declined significantly as other values have moved toward center stage. Perhaps the most notable has been individual economic values. This is not to say that Chinese communism is dead and its agent, the CCP, is finished. Rather, it is a reflection of a disentangling of economic and political spheres referred to as the “self-reinvention”⁵⁵ of the CCP and the “crumbling” of the “social and economic foundations of communism” that leaves the political facet intact.⁵⁶

This unity is further demonstrated by the CCP's ambiguous status at law. The CCP is identified in the Preamble of the Constitution. It reads in part: “The system of multi-party cooperation and political consultation led by the Communist Party of China will exist and develop in China for a long time to come.”⁵⁷ It would appear that the phrase “a long time to come” refers to the system, not the Party which one assumes would be indefinite in its term. The term, “the system” seems to mean the CCP in the lead with other parties straggling along. In his discussion of legal reforms in China, Professor Albert Chen observes:

[T]he extent to which the organization, structure, functions, powers, responsibilities and operations of the Party should come under the purview of the law, given that it is financed by the state budget, its personnel are paid by the state, and . . . the constitutional mandate to exercise “leadership” (the manner and procedure of which are not yet legally defined).⁵⁸

⁵² This change may have started with the striking of the character for “loyalty” from the ancestral plaques of many Chinese after Sun Yatsen. See GRAY, *supra* note 49, at 443.

⁵³ Albert Chen, *Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN, L.J. 125, 130 nn. 26–27 (2000).

⁵⁴ “The exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society, and of the collective, or upon the lawful freedoms and rights of other citizens.” Constitution of the Communist Party of China, art. 51.

⁵⁵ Liew, *supra* note 43, at 340–348.

⁵⁶ HSU, *supra* note 35, at 950.

⁵⁷ XIAN FA pmbl.

⁵⁸ Chen, *supra* note 53, at 160. See also Hao Tiechuan, *Ten Suggestions Regarding Ruling the Country According to Law*, 5 FAXUE [JURISPRUDENCE] 2 (1996).

His comment offers an insight into a connection between party and state that is nearly incomprehensible to citizens of multi-party Anglo democracies. Such a unity between party and state is an important difference between nation states, particularly when it comes to matters of adjudication.

Interestingly, China's traditions of power had been focused on the Emperor, who seized power on the basis of force, and had held power on the basis of Heaven's Mandate.⁵⁹ Religion had been a matter of family devotion to one's ancestors and was not controlled by the state. In the Western sense of religion, Chinese traditional religion is a syncretism of Buddhism, Taoism, animism, and ancestor worship, none of which makes exclusive absolutist truth claims.⁶⁰ Perhaps this is one reason why wars in China (with the exception of conflicts with Muslim Chinese) are not attributed to religious conviction.

III. HISTORICAL PERSPECTIVES ON LAW

The idea of "Law" is a highly contested notion with diverse meanings due to individual preferences, political power structures, and eternal ontological entities. Western and Chinese perspectives of "Law" are radically different. Yan Fu, a leading Chinese intellectual at the beginning of the last century, warned of this diversity in views and its importance when he observed:

In the Chinese language, objects exist or do not exist, and this is called *li* [order in nature, things as they are, or the law of nature.] The prohibitions and decrees that a country has are called *fa* [human-made laws]. However, Western people call both of these 'law.' Westerners accordingly see order in nature and human made laws as if they were the same The word 'law' in Western languages has four different interpretations in Chinese as in *li* [order], *li* [rites, rules of propriety], *fa* [human made laws] and *zhi* [control].⁶¹

Clearly, "law" has had markedly different meanings in Chinese and Western society even in a most basic, linguistic sense.⁶² This conflation of ideas in Western language is indicative of Western ideology, just as its discrete meanings in China reflect a different perspective. We will turn

⁵⁹ See discussion of Mencius thought and critique by Xun Zi in HE ZHAOWU ET AL., AN INTELLECTUAL HISTORY OF CHINA 57–58, 64 (He Zhaowu rev. & trans., 2d ed. 1998).

⁶⁰ ZHANG QIZHI, TRADITIONAL CHINESE CULTURE 102–132 (2004).

⁶¹ Yan Fu's translation of Montesquieu, *De l'esprit de loi*, quoted in DEBORAH CAO, CHINESE LAW: A LANGUAGE PERSPECTIVE 20 (2004).

⁶² See Liang Zhiping, *Explicating 'Law': A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 55 (1989).

briefly to consider these differences as they continue to inform, at least to some degree, the on-going debate and understanding of the issues surrounding the Rule of Law and its role in commercial disputes.

A. The West: A Metaphysical First Principle

Traditionally, law in Western society is part of the eternal nature of the universe as organized by the divine. This view is succinctly expressed by Roman statesman, Cicero, circa 50 B.C.:

[Law] is of universal application, unchanging and everlasting . . . it is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely . . . There will not be different law as at Rome and at Athens, or different laws now and in the future, but one eternal and unchanging law will be valid for all nations and all times.⁶³

This exalted view of law was carried forward from the early Roman Empire of Cicero's day via the Roman Catholic Church. It was revived and systematized through the thinking of St. Thomas Aquinas. This view of law as part of the natural order, for Western thinkers at least, caused it to be viewed as falling into the domain of religion.⁶⁴ God, who for the West is an anthropomorphic being, caused the heavens and earth to exist, as well as all laws and order. The Christian religion, therefore, was intrinsically linked to the law. This connection between law and institutional religion caused them to fuse, mixing both the charitable dimensions and the hierarchical tendencies of religion to inform law.

Although this natural law view is a traditional view and has fallen out of favor in the West, for many modern Western theorists,⁶⁵ including H.L.A. Hart⁶⁶ and Lon Fuller,⁶⁷ it still carries at least a kernel of truth. It has a special appeal to Westerners because it offers some relief to the indeterminacies of social existence; because of law's universal, timeless nature, law has been viewed with reverence in the West and its practitioners given a high level of respect. Law is viewed as a dispassionate meting out of justice, a fair means to resolving disputes in an honorable and just way.

⁶³ CICERO DE RE PUBLICA, III at 22.

⁶⁴ Wang claims that there is also a tradition of connecting religion and law in the "Five Penalties" of the Shang Dynasty of ancient China. See WANG, *supra* note 33, at 5.

⁶⁵ Larry Arnhary, Thomistic Natural Law as Darwinian Natural Right, in NATURAL LAW AND MODERN MORAL PHILOSOPHY 1 (E. Frankel Paul, et. al, eds., 2001); Joseph Boyle, Fairness in Holdings: A Natural Law Account of Property and Welfare Rights, in NATURAL LAW AND MODERN MORAL PHILOSOPHY 206 (E. Frankel Paul, et. al, eds., 2001).

⁶⁶ See, e.g., H.L.A. Hart, *Are there Any Natural Rights?*, 64 THE PHILOSOPHICAL REV. 175 (1955)

⁶⁷ LON FULLER, THE MORALITY OF LAW 186 (rev. ed. 1969).

Through its multitude of changes, law has at some level always (at least generally) resonated in the West as a form of relief, social ordering, and a manifestation of justice and certainty in a world that seems otherwise to be crowded with intractable injustices and indeterminate solutions.⁶⁸

B. The East: An Instrument of Control and a Last Resort When Shame and Respect Fail

By way of contrast, law has generally not had the same prestige in China. Indeed, since the brief Ch'in Dynasty of 221-207 B.C. and the Legalist School,⁶⁹ in which a strict, harsh legal regime⁷⁰ was introduced and enforced, law (*fa*) has had a rather poor reputation.⁷¹ Although there is a natural law theme in the Mandate of Heaven, or Will of Heaven discussions of that same period,⁷² law has been viewed as merely an instrument used by the rulers to impose their will on the people leading to the general acceptance of an instrumentalist view of law referred to as "rule by law."⁷³ Law, when seen as a list of rules for meting out punishments and guiding government action, has contributed to its being seen as a last resort.⁷⁴ This negative view of law in the Chinese tradition existed from the period of the Ch'in Dynasty until 1911,⁷⁵ and the subsequent instrumentalist view of law, currently referred to as "pragmatic," continues into the present.⁷⁶ Law has no high position, existentially and to itself in China. Indeed, it is said that "the CCP can rewrite the law whenever it deems it to be appropriate and convenient, with or without the consent of the people."⁷⁷

Chinese folk sayings about law, which in some ways reflect the collected wisdom of a people, are illustrative of this negative, skeptical view of law. Consider the following: "Better to be vexed to death than

⁶⁸ Of course, in considering the legal subject as a creation of social discourse, one arrives at the rather different views of the role of law in Western discourse. Robert Gordon, for example, argues that law is "omnipresent in the very marrow of society," and provides some of "the primary sources of pictures of order and disorder, virtue and vice, reasonableness and craziness." Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984).

⁶⁹ ZHAOWU, *supra* note 59, at 72-85.

⁷⁰ *Id.* at 80.

⁷¹ GLENN, *supra* note 3, at 305-306.

⁷² QIZHI, *supra* note 60, at 40-42.

⁷³ D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH'IN DYNASTY CASES* 11 (1967).

⁷⁴ GLENN, *supra* note 3, at 333.

⁷⁵ *Id.* at 306.

⁷⁶ See Yu Xingzhong, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE LAW 24 (1989); P. POTTER, *THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE* 10 (2001).

⁷⁷ WANG, *supra* note 33, at 17.

bring a lawsuit,”⁷⁸ and “litigation ultimately ends in disaster.”⁷⁹ Confucius said “In hearing lawsuits, I am no better than anyone else. What we need is to have no lawsuits.”⁸⁰ In essence, resolution of disputes was to be brought about by any means other than law (*fa*).

The Chinese tradition, however, has not been limited to viewing law as a list of rules for punishment.⁸¹ Indeed, pluralism seems to be a constant of Chinese tradition.⁸² Law (one translation of “li”) has generally had a different, more intuitive sense or meaning. Consider, for example, the contrast between law (*fa*) and law (*li*) in the view of Confucius:

The Master said, ‘If the people be led by laws [*fa*], and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue [*li*], and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good.’⁸³

The Confucian tradition sets up a more amorphous, fluid notion of law. It is not one thing but an attitude or disposition, a question of propriety. As the quote indicates, law (*fa*) cannot create an acceptable social order.⁸⁴ For that order to occur something else is required and in China that something else is the Confucian *li*. *Li* has been variously defined as “moral law,”⁸⁵ “customary uncodified law, internalized by individuals,”⁸⁶ “the concrete institutions and the accepted modes of behavior in a civilized state,”⁸⁷ “moral and social rules of conduct,”⁸⁸ and “courtesy, customs and traditions

⁷⁸ GLENN, *supra* note 3, at 308. It is interesting to note a remarkably similar statement by former U.S. Supreme Court Justice Learned Hand: “As a litigant, I should dread a lawsuit beyond almost anything short of sickness and death.” See Learned Hand, *Deficiencies of Trial to Reach the Truth of the Matter*, in LECTURES ON LEGAL TOPICS 89, 105 (1921–22) (James N. Rosenburg et al. eds., 1926) cited in Ruskola, *supra* note 5, at 211.

⁷⁹ GLENN, *supra* note 3, at 308.

⁸⁰ Confucius, Analects 12:13. Charles Muller trans., Tōyō Gakuen University, available at <http://www.hm.tyg.jp/~acmuller/contao/analects.html>.

⁸¹ This view of Chinese law is advanced by some Western commentators. See the critique offered in T. Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in Chinese Perspective*, 52 STAN. L. REV. 1599, 1618 (2000).

⁸² GLENN, *supra* note 3, at 325.

⁸³ Confucius, *supra* note 80, at 1:1.

⁸⁴ GLENN, *supra* note 3, at 326.

⁸⁵ D. Tan, *Judicial Independence in the People’s Republic of China: Myth or Reality*, 68 AUST. L.J. 660, 663 (1994).

⁸⁶ J. Ching, *Human Rights: A Valid Chinese Concept?* in W. DE BARY AND TU WEIMING, *CONFUCIANISM AND HUMAN RIGHTS* 67, 74 (1998).

⁸⁷ BODDE, *supra* note 73, at 19.

⁸⁸ A. CHEN, *INTRODUCTION TO LEGAL SYSTEM OF PEOPLE’S REPUBLIC OF CHINA* 8 (1992).

we come to share.”⁸⁹

Li is fundamentally a relational concept, flexible, consensual, harmony focused and viewed as a “mutual reinforcement of norms rather than a dispute over content.”⁹⁰ This voluntary, as opposed to coercive, social ordering was seen as highly preferable, civilized, acceptable, and refined. The harsh intrusion of the blunt instrument of law into a refined social order was therefore seen as reprehensible. Keeping in mind that the following extract is to teach Confucian social ordering, the contradistinction between law and correct social relations and the preference for li is illustrated by this sharp story:

The Duke of She informed Confucius, saying ‘Among us here there are those who may be styled upright in their conduct. If their father has stolen a sheep, they will bear witness to the fact.’ Confucius said, ‘Among us, in our part of the country. . . . The father conceals the misconduct of the son, and the son conceals the misconduct of the father. Uprightness is to be found in this.’⁹¹

This connection of rightness with relationships rather than compliance with imposed rules, of harmony of social relations over conformity to abstractions and codes, sits at the heart of the Chinese tradition’s approach to law. Glenn writes: “We have to think of law as li, a learned, . . . informal tradition of normativity, whose persuasiveness was so great that it could effectively control all those areas of life which were not given over to the formal world of fa-edicted sanction.”⁹² Professor Cao explains this by her observation that “[i]n any conflict between li and fa, traditional Chinese society preferred li.”⁹³ Li denies the normative value of formal law and formal sanction over informal, relationally-based ordering,⁹⁴ and may in part form some of the basis for one of the common Western views in which China is seen as “lawless.”⁹⁵

One can see the notion of guidance and control in society, which the West ascribes to law, from a rather different perspective in China in the following story from *The Analects*:

The Master said, ‘T’ai-po may be said to have reached the highest point

⁸⁹ H. Rosemont, Jr., *Why Take Human Rights Seriously? A Confucian Critique*, in *HUMAN RIGHTS AND WORLD’S RELIGIONS* 167 (L. Rouser ed., 1988).

⁹⁰ GLENN, *supra* note 3, at 311.

⁹¹ *Confucian Analects* (James Legge trans. 1893) in *THE CHINESE CLASSICS*, VOL. 1: *CONFUCIAN ANALECTS, THE GREAT LEARNING AND THE DOCTRINE OF THE MEAN* 270 (1970).

⁹² GLENN, *supra* note 3, at 310.

⁹³ CAO, *supra* note 61, at 63.

⁹⁴ GLENN, *supra* note 3, at 304–305.

⁹⁵ Noted, explained and critiqued in Ruskola, *supra* note 5, at 183.

of virtuous action. Thrice he declined the kingdom, and the people in ignorance of his motives could not express their approbation of his conduct.' The Master said, 'Respectfulness, without the rules of propriety, becomes laborious bustle; carefulness, without the rules of propriety, becomes timidity; boldness, without the rules of propriety, becomes insubordination; straightforwardness, without the rules of propriety, becomes rudeness.' 'When those who are in high stations perform well all their duties to their relations, the people are aroused to virtue. When old friends are not neglected by them, the people are preserved from meanness.'⁹⁶

This story indicates the value of wisdom and propriety over some perceived control by law. The rejection of the kingdom is an indication of the value of wisdom above material wealth and the value of disengagement from the entanglements of politics. The Confucian adage of virtue above all as the guiding force is abundantly clear in the story of the rejection of the kingdom and the explication which follows it.

Ultimately, the Chinese view of what Westerners call law is pragmatic.⁹⁷ Law is valued as a means to accomplish some one or other particular end not as a value in itself contributing to the social order. It has no exalted existential status and is merely one among many cultural artifacts, and one of lesser importance at that.⁹⁸ It is a source of discord in a society that values harmony. As such, traditional China discouraged self-interested litigation and promoted compromise and concession.⁹⁹

Certainly, there have been dramatic changes in China and Chinese traditional views toward law in the last century. At one point in his reign, Mao advanced that people who wish to appeal to the law courts were asking for more punishment.¹⁰⁰ Changes introduced by the CCP were enormous to say the least, and indeed have left China's laws and legal system with very little in common with pre-1911 law.¹⁰¹ This dramatic reorientation with respect to law can be illustrated by comparing the ancient Taoist saying "the more laws are promulgated, the greater the number of thieves," with Deng Xiaopong's comment that "law is better than no law, faster [law making] is

⁹⁶ Confucius, *supra* note 80, at 2:8.

⁹⁷ See WANG, *supra* note 36, at 39; KEITH, *supra* note 32, at 1; and Preston Torbert, *China's Struggle for the Rule of Law*, by Ronald C. Keith, 28 J. MARSHALL L. REV. 639, 642 (1995).

⁹⁸ This lesser regard for law may be a result of the Xia, Shang, and Zhou Dynasties of the Slave Period. See WANG, *supra* note 33, at 2. It is a central theme in Western critiques of Chinese law. See Ruskola, *supra* note 5.

⁹⁹ Chen, *supra* note 53, at 129-130.

¹⁰⁰ CHANG, *supra* note 35.

¹⁰¹ WANG, *supra* note 33, at 1.

better than slower [law making]."¹⁰² Still, these changes notwithstanding, certain elements of the traditions survived intact—including a low regard for law¹⁰³—and with considerable strength.

Neither Western ideologies, whether Marxism¹⁰⁴ or neo-liberalism,¹⁰⁵ nor China's own ideologies, such as Mao's own ideology and the Cultural Revolution aimed at the destruction of Chinese traditional culture,¹⁰⁶ has yet to destroy the bases forming the foundations of Chinese culture. Modern discourse about law in China includes a discussion of a revival of Confucian thinking.¹⁰⁷ Despite on-going skepticism about the efficacy of law in China, there has been a concerted effort by the CCP to encourage reliance on it, illustrated by its promotion of litigation.¹⁰⁸

C. Summary: The Traditional Role of Law in Societies of the East and West

These historical allusions are important to contemporary discussion because the issues faced by the Ancients are the same issues we face today¹⁰⁹ and their answers, perhaps not surprisingly, are remarkably similar to those of leading modern theorists. Furthermore, kernels of their ancient answers survive in the often unspoken ethos of a society known as culture.¹¹⁰ Culture, as a form of thinking about the world, is not something merely manufactured and imposed on a people. As leading cultural theorist Edward Hall observed, "The purpose of the model [i.e., culture] is to enable the user to do a better job in handling the enormous complexity of life. By using models, we see and test how things work and can even predict how things will go in the future."¹¹¹ Culture is something developed over centuries and millennia.

¹⁰² Quoted in KEITH, *supra* note 32, at 20, and noted as an example of the CCP's pragmatic view of law in WANG, *supra* note 33, at 39.

¹⁰³ WANG, *supra* note 33, at 37.

¹⁰⁴ GLENN, *supra* note 3, at 332.

¹⁰⁵ Killion, *supra* note 51.

¹⁰⁶ As early as 1917, a Mao friend and contemporary wrote of Mao's desire for a "burning all the collections of prose and poetry after the Tang and Sung dynasties in one go." Quoted in CHANG & HALLIDAY, *supra* note 35, at 12.

¹⁰⁷ See W. DE BARY, *THE TROUBLE WITH CONFUCIANISM* 45 (1991); CHEN, *supra* note 88, at 48; Benjamin Gregg, *Law in China: The Tug of Tradition, the Push of Capitalism*, 21 *REV. OF CENT. AND E. EUR. L.* 65, 76 (1995); GLENN, *supra* note 3, at 333.

¹⁰⁸ WANG, *supra* note 33, at 38 (citing Jeffrey W. Berkman, *Intellectual Property Rights in the PRC: Impediments to Protection and the Need for Rule of Laws*, 15 *UCLA PACIFIC BASIN L.J.* 1, 40 (1996)).

¹⁰⁹ GRAY, *supra* note 49, at 458.

¹¹⁰ Yu Xingzhong, *Legal Pragmatism in the People's Republic of China*, 3 *J. CHINESE L.* 29, 32 (1989) ("Traditional notions at the heart of ancient Chinese law . . . remain influential today.")

¹¹¹ EDWARD T. HALL, *BEYOND CULTURE* 13 (1976).

To the extent that one may generalize about the different views, Professor Cao's observation is insightful. She observes:

Westerners may be more willing to accept a narrowly circumscribed rule of law that sacrifices equity and particularised justice for the virtues of generality, equality, impartiality and certainty that result from limiting the discretion of the decision-maker. In contrast, Chinese ethical traditions whether Confucian, Daoist or Maoist, have rejected rule ethics and universal principles in favour of a context-specific, pragmatic and situational ethics.¹¹²

Regardless of the dramatic changes in technology in recent centuries, human nature, human culture and human law retain strong elements of continuity that persist in informing humans about how to live, what is right and what is wrong. In summary, the West has come to see the law as the divinely granted method of ordering society, part of the natural order of the universe, integral to the universal order. In China, there is no such role for law:¹¹³ it is merely a smaller part of society and a last resort in resolving disputes that threaten the harmonious fabric of society.¹¹⁴ Westerners have accepted a model of humanity based on economic and legal rights and a societal ordering based on persons with economic power enforcing those rights. The Chinese have determined their society based on their relationships and networks, reflecting family loyalties and political influence.

With this background setting out the distinct versions and views of social control and the role of law in Chinese and Western societies, it is appropriate to turn to considering specific legal notions in both contexts.

IV. THE RULE OF LAW

The notion of the Rule of Law is central to the function of Western liberal states.¹¹⁵ It guides governments in their strategy, legislation, and

¹¹² Deborah Cao, *Fazhi vs/and/or Rule of Law?: A Semiotic Venture into Chinese Law*, INT'L J. SEMIOTICS L. 223, 240 (2001) (citing Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711 (1994)); see Randall P. Peerenboom, *Ruling the Country in Accordance with Law: Reflections in the Rule and Role of Law in Contemporary China*, 11 CULTURAL DYNAMICS 315 (1999).

¹¹³ This smaller role accorded to law in China may be in part due to some Western commentators' failure to accept Chinese law as law. See, e.g., JOHN KING FAIRBANK, CHINA: A NEW HISTORY 185–86 (1992); Ruskola, *supra* note 5, at 179.

¹¹⁴ GLENN, *supra* note 3, at 309.

¹¹⁵ Cheryl Saunders & Katherine Le Roy, *Perspectives on the Rule of Law*, in THE RULE OF LAW 1 (Cheryl Saunders & Katherine Le Roy eds., 2003). Professor Tomasic observed that the Rule of Law serves to legitimize the legal system in the West. Roman Tomasic, *Company Law and the Limits of the Rule of Law in China*, 4 AUSTL. J. CORP. L. 471, 476

operation, and guides people in the evaluation of government action. When governments fail to follow the Rule of Law, they can expect either removal from power by accepted political processes or removal by revolt.¹¹⁶ China, however, has a very different view of the Rule of Law.¹¹⁷ The only reference to the Rule of Law is in article 5 of the Constitution, which reads:

Article 5 [Socialist Legal System, Rule of Law]

1. The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law.
2. The state upholds the uniformity and dignity of the socialist legal system.
3. No law or administrative or local rules and regulations shall contravene the Constitution.
4. All state organs, the armed forces, all political parties and public organizations, and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be looked into.
5. No organization or individual may enjoy the privilege of being above the Constitution and the law.¹¹⁸

This article, as it stands, is the result of a constitutional amendment introduced at the second plenary session of the Ninth National People's Congress in March 1999.¹¹⁹ Is China, because of this one change in the Constitution, a Rule of Law state?¹²⁰ There are two main challenges to defining China as a Rule of Law state. First, some Western commentators deny that China, as a socialist state, can qualify as a Rule of Law state which, by definition, is limited to liberal democracies.¹²¹ Their definition of the Rule of Law is a thick, or formal, definition. In this definition of the

(1995).

¹¹⁶ The notion of government legitimacy depending upon the people's wishes is the notion of the Social Contract. See generally THE SOCIAL CONTRACT THEORISTS: CRITICAL ESSAYS ON HOBBS, LOCKE AND ROUSSEAU (Christopher W. Morris ed., 1999).

¹¹⁷ See Karen Turner, *Rule of Law Ideals in Early China*, 6 J. CHINESE L. 44 (1992) (offers an excellent historical review).

¹¹⁸ XIAN FA, art. 5, §§ 1-5 (1982) (P.R.C.), available at http://www.oefre.unibe.ch/law/icl/ch00000_.html.

¹¹⁹ Chen, *supra* note 53, at 128.

¹²⁰ The obvious assumption is that Australia itself is a Rule of Law state. Both historic and recent events, including Australia's policy toward Aboriginal peoples, support of the United States' illegal invasion of Iraq (the May 22, 2003 U.N. resolution did not deal with the attack's legality), and refusal to investigate U.S. abuse of Australian citizen Habib in Guantanamo and U.S. incarceration of detainees without recourse to the courts, offer reasonable grounds for suggesting Australia is not a Rule of Law state.

¹²¹ Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 RATIO JURIS 127, 135 (1993); see also WANG, *supra* note 33, at 16-18.

Rule of Law, basic legal principles do not suffice. The Rule of Law has substantive elements that include economic arrangements (such as free market capitalist or socialist), governmental arrangements (such as dictatorships or democracies), and notions of human rights (such as liberal or communitarian).¹²² Since the modern rise of the Rule of Law occurred in liberal democracies, there is a tendency to equate the Rule of Law with that form of social organization.¹²³

The second set of challenges to China as a Rule of Law state is based on the following lack of separation of powers: because the Supreme People's Court is answerable to the National People's Congress and its Standing Committee, just as the local courts are answerable to the local committees, the court is not independent of political influence. Further, as the Standing Committee is the final arbiter of legal interpretation, the judicial, political and legislative arms of the government are not separate. Challengers argue that without these separations, there can be no Rule of Law.¹²⁴

Professor Peerenboom, a scholar who has written considerably on the Rule of Law, offers that, “[a]t its most basic [level], rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite . . . [through] a government of laws, the supremacy of the law and equality of all before the law.”¹²⁵ Peerenboom, following Raz,¹²⁶ has described two views of the Rule of Law,¹²⁷ “thick” and “thin,” which parallel Raz’s “informal” and “formal” categories. A “thin” view permits further discussion because it has but minimal content. Peerenboom offers the following as constitutive of a thin conception of the Rule of Law:¹²⁸

- Meaningful restraints on state actors and ruling elites
- Rules for empowering certain authorities to make law
- Laws are made only according to those rules
- Laws are publicized and accessible

¹²² RANDALL P. PEERENBOOM, ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF THE RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 4 (Randall P. Peerenboom ed., 2004); see generally David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307 (2003), available at <http://ssrn.com/abstract=724341> (accessible and critical introduction to the topic).

¹²³ *Id.*

¹²⁴ WANG, *supra* note 33, at 16.

¹²⁵ PEERENBOOM, *supra* note 122, at 2.

¹²⁶ JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210–29 (1979).

¹²⁷ PEERENBOOM, *supra* note 122, at 2–10.

¹²⁸ *Id.* at 2–3.

- Laws be generally applicable and not focused on individuals
- Laws must be clear, consistent, stable, prospective
- Laws must be enforced
- Laws must be reasonably acceptable and accepted by the majority¹²⁹

It is immediately evident that this list is completely lacking in normative content.¹³⁰ In other words, it only informs about how law is organized, managed and conducted in a particular state. It says nothing about what social objectives the law aims to achieve or political agenda the law aims to advance. China's purported adoption of the Rule of Law is a distinct change in policy, leaving behind a more instrumentalist, pragmatic, or socialist view of law.¹³¹ Still, China's version of the Rule of Law is markedly different from Anglo versions. The difference becomes apparent when examining the thick version of the Rule of Law in Western and Chinese systems, to which we now turn.

A. Western Liberal Societies

As previously noted, law holds a particularly privileged place in Western society and thinking. This change was particularly significant when the Roman Catholic Church lost its power over increasingly significant parts of the population. Western society, stripped of its guiding religion by the scientific discoveries flowing from the Enlightenment and the Protestant Reformation, looked to other forms of social organization and authority. Western society soon rejected the traditional authority of monarchies and sought out new forms of social order. Law, particularly well situated at the time, filled the void and provided a means of social organization.¹³² Having rejected other forms of rule, including authoritarian, monarchical, and terror, the notion of rule by impartial law was a pleasing ideal.

The Rule of Law is comprised of four main principles in common law jurisdictions. As stated by Saunders and Le Roy:

[T]he polity must be governed by general rules that are laid down in advance . . . [, and] these rules (and no other rules) must be applied and enforced [D]isputes about rules must be resolved effectively and

¹²⁹ *Id.*

¹³⁰ Fuller, *supra* note 67, at 39.

¹³¹ Whether China is moving toward the Rule of Law in fact is controversial. With respect to the trial of the three leaders of the China Democracy Party, historian Gray notes, "[N]ew laws and procedures remained subject to the Party's self-proclaimed right to intervene and overrule the law in the last resort." GRAY, *supra* note 49, at 437.

¹³² This functionalist view is only but one of many competing and at least partially satisfying answers to the problem of law in society.

fairly [G]overnment itself is bound by the same rules as citizens[,] and . . . disputes involving governments are resolved in the same way as those involving private parties.¹³³

Troper observes that, “[i]n the language of modern politics the expression ‘rule of law’, together with ‘democracy’ and possibly ‘market economy’, has become the symbol of what is good and just.”¹³⁴ Although Troper goes on to question this equation of views, his statement of the popular view is nevertheless helpful. In the West, it is undoubtedly the case that these notions converge, purportedly justifying and explaining one another.

As democratic states, the West has had Rule of Law institutionalized for decades, if not centuries. Democracy has three dimensions: an electoral dimension where universal suffrage is exercised to select policy, a participatory process, which includes free speech permitting candidates to freely express views and citizens to participate in policy development, and finally, institutions to ensure that these processes are carried out fairly—the Rule of Law dimension. Thus, although democracy needs the Rule of Law, the Rule of Law is not dependent on democracy.¹³⁵

Still, perhaps in part because of this conflation and perceived superiority, the Western perspective on the Rule of Law often carries a missionary element.¹³⁶ In the context of the West’s interaction with China, it is an attempt to bring China to an “enlightened”¹³⁷ (i.e. “they” have come to see it “our” way) state at best, or to transform China into yet another state that has committed itself to a neo-liberal ideology where the rich over-run everyone else without restrictions.¹³⁸ Indeed, Asian countries such as China and Vietnam view this less than covert attempt to convert as a repugnant form of imperialism, which is a source of conflict between those countries and such U.S.-dominated bodies as the World Bank, International Monetary Fund (“IMF”), and WTO.¹³⁹

In summary, although some often conflate Rule of Law with liberal democracies and market economies, the West accepts that the Rule of Law

¹³³ Saunders, *supra* note 115, at 5; Kanishka Jayasuriya, *The Rule of Law and Governance in the East Asian State*, 1 *ASIAN L.* 107 (1999) (claiming that Hong Kong is governed by the Rule of Law).

¹³⁴ Michel Troper, *The Limits of the Rule of Law*, in *THE RULE OF LAW* 81 (Cheryl Saunders & Katherine Le Roy eds., 2003).

¹³⁵ PEERENBOOM, *supra* note 122, at xix.

¹³⁶ Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored ‘Rule of Law’ Reform Projects in the People’s Republic of China*, 18 *UCLA PAC. BASIN L.J.* 64 (2000); PEERENBOOM, *supra* note 122, at xvi.

¹³⁷ Chen, *supra* note 53, at 165 (the Rule of Law debate in China is “an attempt to foster a new Chinese political culture that is liberal, constitutional and democratic.”)

¹³⁸ Ruskola, *supra* note 5, at 228.

¹³⁹ PEERENBOOM, *supra* note 122, at 38.

is a control on government action, placing limits on both government-citizen actions and citizen-citizen activities.

B. *Fazhi*—A Similar Concept in China?

'Rule of Law' is a contested term in China. It has been conflated with other terms, such as the Rule by Law of the Legalist period of the Qing Dynasty 221-207 B.C.¹⁴⁰ (known as *yifa zhiguo* or *fazhi*),¹⁴¹ Rule by Men (known as *renzhi*), and more recently with the Legal System (known as *fazhi*, though it is different in meaning than *fazhi* described above).¹⁴² In modern times, it carried with it a derogatory connotation as part of the Marxist critique of capitalism.¹⁴³ Although the 1950's Anti-Rightist movement rejected Rule of Law as "bourgeois,"¹⁴⁴ the CCP itself resurrected it with a positive meaning in 1978.¹⁴⁵

As evident in the earlier section dealing with the tradition of law in China, a narrowly prescribed regime of punitive rules and punishments cannot produce a core suitable for social organization. Accordingly, Rule of Law as understood in the West has no history in China.¹⁴⁶ To say this is not to say that China has not had its own experiences with rulers using law in some aspect of their rule. Rather, it is to say that given law's traditionally narrow scope and China's traditional hierarchical social ordering, there has been little need for the development of the concept as understood in the West. As Professor Chen's state of the art review of the discussion of Rule of Law in China shows, the debate has been exceedingly diverse and grown at an explosive rate.¹⁴⁷ Some Chinese scholars in this active and diverse group have taken up, discussed, critiqued, advocated, or rejected every conceivable facet of the Rule of Law, both thick and thin.

Although the mere inclusion of the Rule of Law in the constitution does not make China a Rule of Law state, its inclusion is evidence of the legitimacy of the notion in contemporary China.¹⁴⁸ Indeed, scholars see a movement towards the Rule of Law, which, barring some intermediate event turning the whole project around, may well be the future of China's legal system.¹⁴⁹ What the Rule of Law means in the Constitution is not

¹⁴⁰ Chen, *supra* note 53, at 129.

¹⁴¹ WANG, *supra* note 33, at 40.

¹⁴² Cao, *supra* note 112, at 234-36 (masterful discussion of the concepts and language).

¹⁴³ *Id.* at 235.

¹⁴⁴ Chen, *supra* note 53, at 125-26.

¹⁴⁵ Torbert, *supra* note 97, at 641.

¹⁴⁶ Some scholars, as discussed in Chen's review, contest this view. Chen, *supra* note 53.

¹⁴⁷ *Id.* at 125.

¹⁴⁸ Cao, *supra* note 112, at 244.

¹⁴⁹ *Id.*; Chen, *supra* note 53, at 165.

clear. Indeed, there is an argument that it is merely another way of stating rule by law—i.e., rule by the whim of the CCP through its law-making powers.¹⁵⁰

Perhaps the best concise explanation of the Rule of Law [*fazhi*] in China is Professor Cao's, who writes:

Fazhi consists of two Chinese characters, *fa* (law or laws) and *zhi* (to rule or govern, or rule or governing). Without going into a discussion of *fa*, essentially, *fa* denotes a meaning of 'fair', 'straight' and 'just,' derived from its water radical in the Chinese character. It also carries the sense of 'standard, measurement, and model.'¹⁵¹

Some view the Rule of Law as particularly important in China's transition to a Socialist Market Economy. Former Chinese President Jiang Zemin stated that, "ruling the country according to law is an important mark of social progress and the civilization of a society; it is a necessary requirement of our construction of a modern socialist state."¹⁵² The necessity of strong private property rights and contract law is uncontroversial in any market economy and hence they form an important part of the discussion and reform in Chinese law as it pertains to its socialist market economy.¹⁵³

For China to make the shift to a thin Rule of Law state, not only does there need to be considerable theorizing about what the Rule of Law will mean in a socialist state,¹⁵⁴ but also there will have to be significant innovations in thinking, language,¹⁵⁵ law, and legal institutions.¹⁵⁶ Some of these innovations have begun. For example, changes resulting from the 1996 Lawyers Law permitted lawyers to act in the interests of their clients rather than the interests of the state.¹⁵⁷ Judicial independence has increased as well in that political influence in individual decisions has decreased—

¹⁵⁰ WANG, *supra* note 33, at 17.

¹⁵¹ Cao, *supra* note 112, at 234 (citing Liang Zhiping, *Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 55 (1989) (for a "discussion of the Chinese character *fa* in comparison to the English 'law'")).

¹⁵² Chen, *supra* note 53, at 127.

¹⁵³ WANG, *supra* note 33, at 41–42; Albert Hung-ye Chen, *The Developing Theory of Law and Market Economy in Contemporary China*, in LEGAL DEVELOPMENTS IN CHINA: MARKET ECONOMY AND LAW 3 (Wang Guiguo & Wei Zhenying eds., 1996).

¹⁵⁴ See Randall P. Peerenboom, *Competing Conception of Rule of Law in China*, in ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF THE RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 113–145 (Randall P. Peerenboom ed., 2004).

¹⁵⁵ For example, the term "liberal" implies "irresponsible" in Chinese. GRAY, *supra* note 49, at 458.

¹⁵⁶ WANG, *supra* note 33, at 40.

¹⁵⁷ *Id.* at 18.

although general judicial policy is still controlled by the CCP.¹⁵⁸ Many challenges to China's legal system were presented by its accession to the WTO and in particular were identified as Rule of Law-type problems by Cao Jainming, the Vice-President of the Supreme People's Court of the PRC.¹⁵⁹ In his extensive review of the changes that need to be implemented pursuant to the Rule of Law required by the accession, it is interesting to note that at no point did he suggest that the CCP be checked in the exercise of its power. It may well be that as others have said,¹⁶⁰ the biggest challenge to the Rule of Law will be the matter of the relationship of the CCP to the law and its officials. Will it and its officials be subject to the law?¹⁶¹ To make this transition, the CCP will be forced to give up some of its power and authority.

Of course, there will be problems with many aspects of this shift and it is important to note that this discussion is not the first discussion of the Rule of Law in the CCP. Indeed, Mao had considered writing a Constitution and apparently produced some drafts; however, in an apparent rejection of any limitations on his power, decided against the effort.¹⁶² In 1956, Mao permitted his number two, Liu Shao-chi, to discuss setting up a legal system in which the CCP was to "convince everyone . . . that as long as he does not violate the law, citizen's rights are guaranteed and he will not be violated."¹⁶³ In addition, there were calls for an independent judiciary and an amendment of duty so that one who "follows the law, not the orders of the Party" is not persecuted.¹⁶⁴ These ideas flourished under the One Hundred Flowers movement, which Mao subsequently violently suppressed, purging members of the CCP and others, leading to about 550,000 being labelled "rightists" with its bitter consequences.¹⁶⁵

Whatever else one may say about the Rule of Law in China, there is currently a growing push for it, and it appears that there is a consensus developing in which China's development toward the Rule of Law will be a Rule of Law within the thin or formal model discussed above.¹⁶⁶

¹⁵⁸ *Id.*

¹⁵⁹ Cao Jainming, *WTO and the Rule of Law in China*, 16 TEMP. INT'L & COMP. L.J. 379 (2002).

¹⁶⁰ Chen, *supra* note 53, at 160 (notes this to be a forbidden topic).

¹⁶¹ WANG, *supra* note 33, at 40.

¹⁶² CHANG, *supra* note 35, at 407.

¹⁶³ *Id.* at 420 (citing Jianguo yilai zhongyao wenxian xuabian (Important Documents of P.R.C.), 9 CCP Archive Study Office, 92-94, 268-69).

¹⁶⁴ CHANG, *supra* note 35, at 436.

¹⁶⁵ *Id.* at 437.

¹⁶⁶ Drawn generally from the broad discussion in Chen's article and his comment of a consensus of the desirability of the Rule of Law among Chinese legal scholars. Chen, *supra* note 53, at 138. See also Cao, *supra* note 112, at 246-47.

C. Summary of the Rule of Law in Societies of the East and West

The Rule of Law is a difficult concept which imports for many a considerable number of additional political ideas. In its most stripped-down form, the Rule of Law is a thin, or formal, standard for measuring government behaviour. Both China and the West have traditions of the Rule of Law, although they are markedly different. In the West, the tradition is viewed as a harmonious, linear progress leading to a form of control on government action and a means of protecting citizens from unwarranted intrusion and, in fact, determining what is warranted and unwarranted.

The Eastern tradition is more complex. In China, the notion of the Rule of Law has moved unpredictably depending on the particular views of the ruling classes. Even in the last century, the Chinese view has veered wildly from one extreme to the other, from Mao's repudiation of essentially all law to the recent revival and active engagement in discussion of all facets of the dialogue concerning Rule of Law.

Perhaps the most significant difference is the depth of penetration of the view of Rule of Law. As Professor Martin Krygier observes:

For the rule of law to *count*, rather than simply to be announced or decreed, people must *care* about what the law says—the rules themselves must be taken seriously, and the institutions must come to matter. They must enter into the psychological economy of everyday life—to bear both on calculations of the likely official responses *and* on those many circumstances in which one's actions are very unlikely to come to any officials' attention at all. They must mesh with, rather than contradict or be irrelevant to the 'intuitive law' [sic] . . . in terms of which people think about and organize their everyday lives.¹⁶⁷

Krygier sees this integration of the rule of law into people's everyday thinking as a fortunate phenomenon in Anglo-American societies. It allows such societies to function despite not having unities of culture, ethnicity or language. In this sense, rule of law has become an important organizing principle in Anglo-American societies; however, in China it has not.

V. RESOLUTION OF COMMERCIAL DISPUTES

Social interaction leads to dispute. Whether as a result of poor understanding, changing circumstances, strategic behaviour or outright maliciousness, conflicts are a normal and possibly necessary part of human

¹⁶⁷ M. Krygier, *The Grammar of Colonial Legality: Subjects, Objects and the Australian Rule of Law*, in *AUSTRALIA RESHAPED: 200 YEARS OF INSTITUTIONAL TRANSFORMATION* 220 (Geoffrey Brennan & Francis Castles eds., 2002), *reprinted in* M. KRYGIER, *Subjects, Objects, and the Colonial Rule of Law*, in *CIVIL PASSIONS: SELECTED ESSAYS* 80 (2005).

society. Business is no exception.

A. The Western Approach to Commercial Dispute Resolution

The Western model of business has been competitive at least since the sixteenth century and subsequently increased with the privatization of the Commons in the eighteenth century and the industrial revolution thereafter. Prior to that, production and distribution were coordinated as in any feudal society based on matters of religion, location in the hierarchy, and where markets were used and goods traded, pricing was based on a notion of fairness rather than the maximum profit obtainable.¹⁶⁸ The clan system and the limited movement of members of Western society restricted the ability of one member to take advantage of another member of society.

Once the traditional forms of social control broke down, resulting from the revolutions in England and France and the European invasions of new continents where the social order from homelands rapidly faded,¹⁶⁹ it was necessary for Westerners to develop new and different forms of enforcing agreements. The method that came to be accepted in Western countries was law and rights talk.¹⁷⁰

B. The Chinese Approach to Commercial Dispute Resolution

By way of contrast, the model of business in China is significantly different from the model in Western countries. This difference is reflected in contract drafting¹⁷¹ and business negotiations in general.¹⁷² Indeed, significant contracts are entered into with terms which would make a Western commercial lawyer shudder. Consider the following example:

Where one party to a contract fails to perform the contract obligations or its performance fails to satisfy the terms of the contract, the party shall bear such liabilities for breach of contract as to continue to perform its obligations, to take remedial measures, or to compensate for losses, etc.¹⁷³

Such ambiguity would not only be *prima facie* evidence of professional

¹⁶⁸ See LINDA MCQUAIG, *ALL YOU CAN EAT: GREED, LUST AND THE NEW CAPITALISM* (2002).

¹⁶⁹ See CARROLL, *supra* note 20, at 72–75 (a discussion of this phenomenon in the United States).

¹⁷⁰ See Ruskola, *supra* note 5, at 200–02.

¹⁷¹ See, e.g., DEBORAH CAO, *Chinese Law and Imprecise Language*, in CAO, *supra* note 61, at 103. See also, YU, *supra* note 2, at 40–43.

¹⁷² See ROBERT MORAN & WILLIAM STRIPP, *DYNAMICS OF SUCCESSFUL INTERNATIONAL BUSINESS NEGOTIATIONS* (1991).

¹⁷³ CAO, *supra* note 61, at 103.

negligence, it is even hard to imagine what a lawyer would have in mind drafting, let alone accepting, such loose terms! Yet it is language from an actual contract. Noted Chinese law scholar Professor Albert Chen claims that there is an absence of commercial law in China.¹⁷⁴

This difficulty is in one sense not surprising; rather it is consistent with Chinese social values and customs. Chinese traditionally limit trust to well-known groups of family and friends, with none at all to strangers. There is no sense of loyalty to society—only to filial relations (*hsiao*) and to the emperor (*chung*), leading to what has been referred to as “negative expectations about cooperation in Chinese society.”¹⁷⁵ In other words, the family receives complete trust, the friend considers trust based on mutual dependence and face, and the stranger has no assumption of trust, described as indifference on the verge of callousness.¹⁷⁶ In this context survival, in terms of both the personal and business, is aptly described as dependent on networks.¹⁷⁷ Without such networks it would be impossible to conduct business. Consider the following explanation from a study of a Chinese business community:

In a community almost totally oriented toward business transactions, *sun yung* was the most important aspect of a person’s character and not merely a quality to be considered in economic affairs. *Sun yung* referred not only to credit, in the sense of goods or services lent without immediate return against the promise of future payment . . . it further carried the connotation of a person’s total reputation for trustworthiness and in this sense was a statement of a person’s social and psychological characteristics as well as strictly economic reliability.¹⁷⁸

Again, it is such relationships and deep evaluations of business partners that set Asian business practices apart from Western practice. This investigation and careful evaluation of business partners is something different from concerns identified by law and economics scholars as stigma: it is not a mere economic calculation of the costs of scandal or due diligence done in contemplation of a transaction but a weighing of the trustworthiness and loyalty of a potential business partner through thick and thin regardless of fault or cost.

Overlaying the difficulties of ambiguity of language, general disdain for law, a distrust of law, and a lack of a commercial law tradition is a tradition of strategic thinking and wily behavior. As Glenn puts it: “think

¹⁷⁴ Chen, *supra* note 53, at 20–21; see also GLENN, *supra* note 3, at 310 n.37.

¹⁷⁵ S. GORDON REDDING, *THE SPIRIT OF CHINESE CAPITALISM* 66 (1993).

¹⁷⁶ *Id.* at 66–68.

¹⁷⁷ *Id.* at 54–57.

¹⁷⁸ *Id.* at 67–68.

of all the Chinese stratagems, all the wiles for getting where you need to be, for circumventing the bureaucracy, for achieving personal goals against all odds.”¹⁷⁹ He adds for illustrative purposes the old Chinese adage: “Always kill with a borrowed knife.”¹⁸⁰

C. Experience & Expectations in the West: Commitment to Courts

Those of Western colonial tradition have come to rely extensively on law. The laws of England were considered the laws of most colonies from their inception. For example, the laws of England were part of Australian law until recently, when the right to appeal to the English Privy Council was terminated. Anglo countries are deemed to be Rule of Law states because of their separation of powers (thin version) and liberal democracy (thick version). For that reason, certain expectations or norms will be expected with respect to how the law will both assist and limit the ways in which business will be conducted.

As evident in the traditional saying “possession is nine-tenths of the law,” the English common law in addition to criminal law, has traditionally focused on matters of contract and private property. Likewise, former British colonies have well-developed contract and private property laws. Where matters of property and contract are in dispute, there is no social inhibition among Anglo businesses to retain lawyers and commence legal proceedings. It is expected that courts will function relatively efficiently and transparently. Indeed, the last decade’s reforms of corporate law in Australia, for example, have been focused on just such matters, and accordingly have been appropriately entitled the Corporate Law Economic Reform Program. In thinking about how businesses will operate their corporate and commercial activities in Australia, legal considerations will be among the top concerns.¹⁸¹

¹⁷⁹ GLENN, *supra* note 3, at 321.

¹⁸⁰ *Id.*

¹⁸¹ Professor Roman Tomasic claims that Australian corporate law can hardly be called “Rule of Law.” In support of his claim he cites empirical studies for applications for permission to avoid compliance with law, which are at such a high level as to “undermine claims that the Rule of Law is a characteristic of legal-making in relation to business in market-based societies.” Roman Tomasic, *Company Law and the Rule of Law in China*, 4 AUST. J. CORP. L. 21 (1995). The issue of the Rule of Law in this context may be framed differently in that the very effort required and decision to comply with law by seeking permission and the transparency in the exercise of governmental discretion permit this activity to fall well within the Rule of Law. The professor himself realizes this in his comment that these activities serve toward “legitimization and system maintenance.” *Id.* at 21. Rule of Law does not require that every letter be followed; rather, it requires that the law be complied with, in this case, by the appropriate filings and dispensations. See an interesting discussion on the topic and a critique of Professor Tomasic’s article in Bahrin Kamarul, *Western Economic Law and Asian Resistances*, 5 AUST. J. CORP. L. 84 (1995).

Furthermore, Australia is considered to have a relatively low level of corruption in its legal system and there appears to be little suspicion of or actual corruption in the judiciary.¹⁸² It ranked eighth out of 133 countries on the Corruptions Perception Index in 2003.¹⁸³ Accordingly, it is not unreasonable to assume that a party in a dispute would appeal for governmental intervention in the form of a court proceeding as it would be a reasonable anticipation that such intervention will bring about a predictable legal result instead of an arbitrary result on the basis of corruption of the government's legal process.

This view of the situation is also reflected in the Western view of a contract. American lawyer, business consultant and Chinese resident, L. Brahm writes:

The Western legal mindset understands a contract as a document which is legally binding and to which a company has legal recourse should anything go wrong. In other words if the other party 'breaks' their side of the bargain, you can sue them and drag them through the courts.¹⁸⁴

These experiences would lead Australians in a business dispute to expect a transparent legal system, with a reasonable amount of speed (cases lasting perhaps a few years), with a firm recognition of private property rights and a formal, binding, and inflexible view of contracts. Furthermore, Australian business people would not plan to corrupt a judge in the deciding of a case. For the Westerner wishing to do business in China, Brahm states that the problem lies: "with the Western party who insists on adopting a Western legalistic approach to the practical reality of doing business in China."¹⁸⁵

D. Experience & Expectations in China: Guanxi, Corruption, and Cash

Unlike Australia, Chinese law, as previously mentioned, has tended to focus on criminal law. Accordingly, its private law had not been well developed prior to 1949 and, indeed, has been outlawed at times since 1949. In addition, there was a near complete abandonment of law-making during the Cultural Revolution, leaving large gaps in the legal fabric of the Chinese socialist experiment.¹⁸⁶ Unsurprisingly, since embarking on its Open Door Policy the development of private law has been a high priority for the CCP

¹⁸² Peter Roberts, Transparency International Country Study Report Australia 2004, <http://www.transparency.org.au/documents/CNISA.pdf>.

¹⁸³ Transparency International, Global Corruption Report 2004, http://www.globalcorruptionreport.org/download/gcr2004/10_Country_reports_A_K.pdf.

¹⁸⁴ LAURENCE BRAHM, WHEN YES MEANS NO: THE ART OF NEGOTIATING IN CHINA 45 (2003).

¹⁸⁵ *Id.*

¹⁸⁶ WANG, *supra* note 33, at 11.

and even more so since its larger socio-politico-economic reforms of the 1990's, during which time it has passed hundreds of laws dealing with economic and commercial matters.¹⁸⁷

Despite these legal reforms and efforts to raise the esteem of law, Chinese law has not kept up either in quantity, quality, interpretation by the courts, or in terms of enforcement. Chinese society has not come to view law as a highly respected or credible institution. Indeed, the lack of respect for law is notable in such events as attacks on judges and an on-going feeling of, if not contempt, at least low esteem of the law among CCP officials.¹⁸⁸

As Kui Wang observes, there remains a general mistrust of the law among the Chinese.¹⁸⁹ Thus, although the law has been elevated in society and promoted by the CCP, this change does not make the law the primary organ for dispute resolution or even guidance in society. Rather, business in China continues with "party policies, governmental powers, the network of all kinds of social relations and the rampant protectionism"¹⁹⁰ such that law becomes a weaker alternative to social and hence commercial orderings.

Conventional wisdom notes that the Chinese view commercial relationships and their contracts in a way that is different from Western business professionals. This difference has been characterized as follows: "[Chinese] conceptualize contractual promises in a less formal fashion than do foreigners. The Chinese tend to view a contract as an expression of a long-term cooperative and friendly relationship [rather than as a legal document with legal ramifications]."¹⁹¹ Again Brahm offers the following insight:

The contract should be viewed as a tool by which both [parties] can be assured that the other party understands what they understand, and everybody knows what they have to put into the deal to make it work, and what everyone will get out at the end of the day if it does work . . . [and every]one rests assured that everyone understands everyone else so that no disputes will arise at all and the deal can work and everyone will work together to achieve that goal.¹⁹²

¹⁸⁷ *Id.* at 12–13.

¹⁸⁸ *Id.* at 37.

¹⁸⁹ *Id.* at 38.

¹⁹⁰ *Id.* (WANG contains a subheading entitled "Corruption and bribery in the judicial system").

¹⁹¹ DAVID FLINT ET AL., CONSTITUTIONAL SAFEGUARDS FOR FDI: A COMPARATIVE REVIEW UTILIZING AUSTRALIA AND CHINA IN ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND THE LAW 110 (1996) (bracketed material found in WANG, *supra* note 33, at 37).

¹⁹² BRAHM, *supra* note 184, at 46.

This description is sure to send shivers down the spine of any Western-trained lawyer. The Chinese view is quite pragmatic—the issue is not my rights and obligations versus your rights and obligations. Rather, the issue is can we agree to commit to each other to see this project through? If so, we will all do whatever is necessary to get the project finished and we can all gain.

Chinese relationships with family and friends develop into strong bonds and these special relationships, or “guanxi,” appear to be an integral part of commercial relations in China.¹⁹³ As Glenn observes:

[A] society of social relations, of guanxi, may easily slide towards cronyism, the ongoing cultivation of reciprocal, unjustified advantage, to the exclusion of considerations of the outside world. . . . It becomes difficult to distinguish the loyalties which are rooted and justifiable, even though the less responsive to outside need, from those which are transient or parasitic, designed simply to leach away the resources.¹⁹⁴

The notion of relationships, loyalty and duty remains much higher in China than in the West.¹⁹⁵ The importance of relationships is evident in business,¹⁹⁶ and the role of family in the corporation¹⁹⁷ is prevalent throughout the new economy despite the changes to law. In fact, a parish priest’s relationship with the Church in Rome is said to be “guanxi” at least as it pertained to Rome providing economic support for the church.¹⁹⁸ Gray observes: “those below look for patrons, those above for clients. . . . The Chinese instinct is not to expose and condemn privilege, but to seek to share its advantages by becoming the client of a privileged individual.”¹⁹⁹

Guanxi is part of the larger social order. Gray describes it thus:

Most Chinese continue to feel (rather than to think) that conflict is deplorable; that any sectional interest is likely to be inimical to the public welfare; . . . that personal obligations between superior and

¹⁹³ REDDING, *supra* note 175, at 40–78; *see also* Shaomin Li, *Why Is Property Right Protection Lacking In China? An Institutional Explanation*, CAL. MGMT. REV., Spring 2004, at 109.

¹⁹⁴ GLENN, *supra* note 3, at 324.

¹⁹⁵ It is not that these relationships do not exist in the West or that they may not be more important than even the law. Indeed, empirical evidence indicates that at times they may well be. *See* CHRISTOPHER D. STONE, *WHERE THE LAW ENDS* (1975); ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* (1988); ROMAN TOMASIC, *CASINO CAPITALISM? INSIDER TRADING IN AUSTRALIA* (1991).

¹⁹⁶ *See* REDDING, *supra* note 175, at 40–78.

¹⁹⁷ Philip Lawton, *Berle and Means, Corporate Governance and the Chinese Family Firm*, 6 AUST. J. CORP. L. 348, 370 (2006).

¹⁹⁸ PETER HESSLER, *RIVER TOWN: TWO YEARS ON THE YANTGZE* 224 (2002).

¹⁹⁹ GRAY, *supra* note 49, at 460.

inferior, rather than impersonal and impartial relationships, provide the better ethical basis for the conduct of public affairs. . . .²⁰⁰

Certainly, *guanxi* is unlikely to stop on the steps of the courthouse. A judge is expected to provide a judgment in favor of a friend or relative. Although changes to the law have prevented judges from sitting on cases involving family, associates, or friends, it is deemed normal for a judge to mention to a fellow judge that in a case she or he is deciding one of the parties is of particular importance to the fellow judge, and naturally, the favor can be expected to be returned.

Corruption of the judiciary is apparently a long standing problem tolerated by the Confucians²⁰¹ (one can consider the above example of the father and son shielding one another as correct) and appears to continue as a common complaint among legal practitioners, scholars and the populace alike.²⁰² Further corruption is not limited to government officials taking bribes.²⁰³ Government officials' law-breaking undermines claims for a Rule of Law state — simply put, it is unfair to force the populace to obey the law if the officials do not. The issue of corruption has certainly been exacerbated in recent times as scholars have observed that “money is the new religion” in China.²⁰⁴ Indeed, one commentator has written that “Communist ideology is largely ignored as irrelevant. The entrepreneurial spirit fills the air.”²⁰⁵ As to its corruption, China ranked 71 of out of 146 countries in a 2004 report by Transparency International,²⁰⁶ by no means an enviable spot. Corruption may well be part of the reason for many of the calls for the Rule of Law.²⁰⁷ Perhaps in part responding to this complaint, the CCP interference in judicial decision-making appears to have waned in the last decade.²⁰⁸ Despite China's efforts, however, it is unlikely that corruption will be wiped out quickly or completely.

In addition to the matter of non-Western understandings of contract rights, property law remains exceedingly fragile. Indeed, a 2004 study of property rights in China seeks to explain “why property right [not just

²⁰⁰ *Id.*

²⁰¹ GLENN, *supra* note 3, at 324.

²⁰² *See, e.g.,* WANG, *supra* note 33, at 30; Li, *supra* note 193, at 100–14; Chen, *supra* note 53, at 160.

²⁰³ Gray makes the observation that corruption “is perhaps China's most serious problem.” GRAY, *supra* note 49, at 436.

²⁰⁴ HSU, *supra* note 35, at 950.

²⁰⁵ *Id.*

²⁰⁶ Transparency International, Corruption Perceptions Index 2004 score, http://www.globalcorruptionreport.org/gcr2005/download/english/country_reports_a_j.pdf.

²⁰⁷ Chen, *supra* note 53, at 155; Lubman, *supra* note 51, at 317; Li, *supra* note 193, at 109.

²⁰⁸ Cao, *supra* note 112, at 241.

intellectual property] violation is still rampant in China.”²⁰⁹ The author discusses three cases that can only be described as demonstrating a shocking disregard of property rights (with government connivance), at least from a Western point of view.²¹⁰ Also problematic are government appropriations that under-compensate owners, allegedly by as much as 80%.²¹¹ Among the recommendations is that China establish strong personal private property rights and work toward the increase of informal respect for private property.²¹²

Combined, these factors have likely affected Chinese business interests to expect a prompt resolution to business disputes. Where a court is involved, judges are paid the necessary amount, the preferred outcome is obtained, and business carries on as before. Chinese business people are likely to see the law as flexible, contracts as guidelines rather than rules and less than directly enforceable legal instruments. Further, Chinese expectations would not include a bar to access to what Western business officials would see as inviolable property rights. Finally, the matter of corruption of government officials and their connivance with private parties in the expropriation of private property would be an expected, predictable norm.

VI. A SPECIAL PROBLEM OF BILATERAL TRADE AND THE PROMISE OF A RULE OF LAW SOLUTION

These contradictory views of the role of law in business are likely to cause substantial difficulty for both private parties and governments alike as trade increases under a Free Trade Agreement as predicted by the governments of both China and Australia. Unlike the WTO, which China recently joined, bilateral trade agreements usually grant rights to private parties. Accordingly, rather than dealing with acrimony between states on an international stage, bilateral trade agreements (and multi-lateral trade agreements) grant rights to private parties vis-à-vis other states. Such being the case, it puts states in the peculiar position of having to answer to private citizens of foreign nations for their policies and decisions. In China in particular, where the state on the one hand has not been forced to answer to its own citizens (both through the CCP’s refusal to subject itself to the law and by its control of the press) and on the other hand has been free of scrutiny in its dealings with matters pertaining to the economy, it will be a

²⁰⁹ Li, *supra* note 193, at 100.

²¹⁰ See *id.* Li analyzes the cases of *Beijing McDonald's vs. Li Ka-shing, Nantung Unistar Electro-Mechanical Industries Co.*, and *Weipang Composites Resources Co.*

²¹¹ Matthew Forney, *Crude Fight: Wildcat drillers in China are battling Beijing after their oil wells were seized*, TIME ASIA, July 25, 2005, at 33.

²¹² Li, *supra* note 193, at 111. Numerous authors cited in this paper have also noted this and offered the same recommendation.

struggle to address such matters.

The second problem for China with a trade agreement with a non-Asian partner is the inability to rely on certain Asian norms²¹³ for problem resolution. Where different cultures come into contact there is a need to find a means to communicate a common system of signs accessible to both in order to address both differences and commonalities, and the needs and wants of the parties. Australia, a country whose culture is predominantly Western, lacks the traditions that facilitate dispute resolution in the more closely related cultures of East Asia. Accordingly, Australia looks to law to resolve a dispute. The dispute is resolved by appealing to someone outside the relationship to resolve the differences in a way that is impartial to the parties.

The obvious corollary holds true as well: China lacks the traditions of the West. The Chinese way involves drawing in more people involved with the dispute to resolve the difference. It does not appeal to parties, “outsiders,” or non-Chinese to resolve what is essentially seen as a relationship problem. The difference between the approaches and the lack of a shared tradition creates a dilemma—is one to follow the other, or is there a solution independent of each yet accessible to both? Certainly, given the previously outlined problems associated with the legal system in China, it would seem that neither party is likely to be confident or satisfied as to the impartiality of any decision handed down in that context. By default, holding the resolution of disputes in Australia hardly seems likely either to garner much support or to provide an aura of justice.

As the Chinese traditions appear to be more culture-bound and hence implicit and informal, they are not particularly accessible to an outsider. In order to access these Chinese traditions one must be Chinese (or at least perceived to be Chinese). Australians, too, are culture-bound and their solution is also equally appealing to people of their culture. Australia, with its own customs and context, although perhaps more explicit than Chinese culture, is still a foreign culture to the Chinese.

²¹³ The term “Asian norms” here is loosely used to refer to a preference for extra-legal methods of conflict resolution (or at least extra-legal from the Western point of view), including relying on business networks, political alliances and other social relationships, which exist in part because of the problems of the legal system in China discussed above and elsewhere in Asia, and in part because of the traditions also referred to above. It is not meant to imply that there is a harmonious “Asian value” system spreading from Arabia to Japan. See Randall Peerenboom, *Social Networks, Civil Society, Democracy and Rule of Law: A New Conceptual Framework*, in *THE POLITICS OF RELATIONALITY: CIVIL SOCIETY, ECONOMICS, AND LAW IN EAST ASIA* (Chaibong Hahm & Daniel Bell eds., 2003); Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates about “Values in Asia”* (UCLA, School of Law Research Paper No. 02-23, 2002); see also, Benedict Sheehy, *Singapore, “Shared Values” And Law: Non East Versus West Constitutional Hermeneutic*, 34 HONG KONG L.J. 67 (2004).

It is perhaps here, in this gap between cultures created by a bilateral trade agreement, that the ideal and the promise of the Rule of Law, with its explicit, formal methods, may be admirably well-suited. As a concept understood by and accessible to both parties, it may well be the best alternative. Law is understood by both cultures to be a restraint on behavior. The applicability and role of law is different, however, both clearly see law as limiting the worst behavior, among other things. Further, both understand the potential for law to be a limit on the actions of all parties, including governments, and to serve as a guide to acceptable action for all parties including law making, promulgation, enforcement and acceptance, again including governments. In sum, both parties have a sense of the formal, or thin, Rule of Law and are not inimical to it, at least from a cultural perspective. Therefore, if the Rule of Law can be held out as a mutually acceptable model for commercial dispute resolution, it may hold some promise for both governmental and private participants with respect to Free Trade Agreements.

To achieve the Rule of Law, however, will take some strategic thinking. Simply waiting for progress to result from China's commitments to global agreements and its planned internal developments is unlikely to satisfy foreign enterprises wishing to participate in the Chinese market. The issue of the Rule of Law in the context of international trade has been raised before. There was comment on the importance of the Rule of Law for China when it acceded to the WTO.²¹⁴ Analysis of China's progress in that regard, however, has not been overly promising, in part simply because of the complexity involved and the number of changes that need to be made.²¹⁵ China's system of central governance and local control is poorly coordinated, and local laws can be made which contradict centrally developed legislation. Furthermore, there is no overall legislation or means of determining the resolution of such conflicts either in favor of the local or central government. This lack of direction and practice, particularly when combined with the above noted issue of corruption, creates more than a mild threat to those whose affairs may come under the jurisdiction of any one of the many levels of government.

Furthermore, it seems unwise to rely on reforms promised under the conditions of accession to the WTO given that the WTO is a matter of national government and policy. Such being the case, these WTO

²¹⁴ Jainming, *supra* note 159, at 379. See also, Peter K. Yu et al., *China and The WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1 (2003) (particularly the comments of Yu on page 3 and Hom on page 23); Stanley Lubman, *The Study of Chinese Law in the United States*, 2 WASH. U. GLOBAL STUD. L. REV. 28, 31 (2003).

²¹⁵ Gregory Fennell, *The People's Republic of China's Ability to Comply with the Standards Mandated by the World Trade Organization*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 613 (2002). See also WANG, *supra* note 33, at 146-47, 173-74.

commitments are not as likely to have a bearing on individual private enterprise or to address matters of credibility necessary in specific litigation or disputed matters. Accordingly, awaiting the broad-based promised changes necessary to comply with WTO commitments seems to be a poor strategy without particularly promising results.

As the Rule of Law, at least in its formal or thin version, implies no specific set of institutions, the situation facing both countries permits a fresh look at what an institution which would embody the Rule of Law in this particular instance would look like and how it should be designed.

VII. RECOMMENDATIONS FOR A TRADE DISPUTE PANEL

As in most Free Trade Agreements, it will be necessary to establish some institutions, usually including a trade dispute panel. This panel will not only deal with matters of the interpretation of the obligations of the governments to the agreement, but also often provides judgments to particular parties in litigation. Given the radically different legal systems and traditions, it will be difficult for either party to accept wholeheartedly the other's approach and hence, there may well be a high level of dissatisfaction with outcomes.

There are a number of common solutions which include, of course, panels of experts composed of members from both jurisdictions. The obvious problem in this situation is that in panels of uneven numbers, it ought to be anticipated that members of different traditions would be most inclined to see things the same way and hence most likely to issue judgments along lines of traditional affiliation than on points of law. Were this to occur, the credibility of the panels and ultimately the agreement would be seriously eroded. Accordingly, it may well be that a different approach needs to be taken in the peculiar case of Australia and China.

As previously discussed, members of each tradition have different expected processes and outcomes when they appeal to institutional dispute resolution. Given this fact, it may well be wise to have such expectations identified, distinguished, and addressed within the agreement. Expectations that need to be addressed would include a time frame for hearings and decision making, in addition to basic procedural issues such as means of initiating procedures, notice periods and notifications of pending action.

It may be that looking to other methods and jurisdictions is the best alternative. In this context, Singapore offers an interesting alternative. It is a multi-cultural center with strong roots in both common law and Chinese culture. Furthermore, Singapore, in looking at its economic development, recognized its strength in the common law tradition and its importance as an international center for commerce in Asia. Accordingly it embarked on a program of establishing itself as a center for the arbitration of international commercial disputes. It has established a highly regarded,

independent, non-profit arbitration practice, the Singapore International Arbitration Centre,²¹⁶ which lists distinguished lawyers from around the world including both Australia and the PRC.²¹⁷ Given its combination of straddling cultures, independence from both, and strong Western Rule of Law tradition, it may be particularly well suited to dealing with problems arising from the proposed Australia-China Free Trade Agreement. Even if the jurisdiction is not moved, it may be both possible and desirable to have a contribution to dispute resolution tribunals from Singapore.

The other element that may be preferable to an aggressive Western litigious approach would be drawing substantially more arbitration into the dispute resolution model. That being so, it may be desirable to impose arbitration, giving it a central place in the dispute resolution process. This approach is well accepted by businesses in China as a way of avoiding the potentially corrupt courts, in addition to offering some further control of the outcome of the decision. Furthermore, even in various Western jurisdictions there is a trend toward further exploration of the arbitration model in litigation, and in particular in commercial disputes, and a move away from the Western tradition of purely adversarial dispute resolution.²¹⁸ Of course arbitrators will come with their own biases, and again, given Singapore's successful bridging of the two cultures and well developed arbitration institutions it could well contribute arbitrators, the arbitration model offers an important step away from the exclusive adversarial model. This arbitration approach combined with the other proposed alternative—varying the jurisdiction—may hold the best promise for commercial dispute resolution where two dramatically different traditions come into contact.

VIII. CONCLUSION

The traditions of China and Australia are strikingly different and will come to pose a challenge for parties in both countries and for the nations themselves in developing the extended relationships contemplated by the FTA. Given these differences, it will be important to remain cognizant of how they affect views, practices and approaches to law, business, and dispute resolution. Each party can and must recognize the different development and tradition represented by the other and accord it respect. These traditions have developed each in its own way, each solving the problems in a way understood and accepted within its own frame of reference. Shifts in tradition may well be the only constant; however, the current trend of globalization is increasing the extent and speed of such shifts, and by so doing, increasing the pressure not only on the traditions,

²¹⁶ Information available at <http://www.siac.org.sg/spore.htm>.

²¹⁷ See the list of international panel members at <http://www.siac.org.sg/intnal-panel.htm>.

²¹⁸ This is embodied in the ADR movement popular in many Anglo jurisdictions.

but on the individual members of the traditions. In the case of such changes, the number of people in these pressure situations and the sizable stakes often involved, not only in terms of money and time, but also such other things as jobs, environment, and lives, a broader understanding and deeper sympathy is imperative.

No one party has a monopoly on the correct way to resolve disputes, nor on the correct version of the Rule of Law. Learning the other party's approach to dispute resolution is a worthwhile endeavour teaching about the mundane matters of commerce as well as the loftier matters of the coordination of society and solutions to collective problems. Working through such disputes in different contexts will develop a greater appreciation for the collective wisdom of human-kind and the ingenuity of societies, other than our own, for resolving differences.

Finally, it is also humbling to recognize that the Rule of Law, whatever its specific embodiment, remains an ideal for all. Its interpretation, development and application are not determined. It, like all ideals, will never be more than an effort at a continual process of improvement. The Rule of Law ideal will continue to have profound effects on both countries and their peoples as the governments alternatively approach and withdraw from it. Still, it is an ideal worth pursuing because it will provide a remarkably hardy bridge in assisting parties to communicate across cultures for the greater good of humans everywhere and in the day to day concerns of commerce.