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# Enclave of Ingenuity: The Plan and Promise of the Beijing Intellectual Property Court

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# Enclave of Ingenuity

The Plan and Promise of the Beijing Intellectual Property Court



SUBMITTED IN PARTIAL FULFILLMENT OF  
THE BACHELOR OF ARTS DEGREE IN ETHICS, POLITICS, AND ECONOMICS

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APRIL 10, 2017

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## Acknowledgements

Many people dedicated themselves to helping me complete this thesis. In particular, I thank Paul Gewirtz and Frances Rosenbluth. Their ingenuity, both scholarly and administrative, not only improved this paper, but made it possible for me to write it exactly as I pleased. I also am extremely grateful to have benefited from the advice of Robert Williams, Su Lin Han, and Jaime Horsley, who were constant sources of guidance and ideas throughout the process. As Yale Law School's China librarian, Evelyn Ma helped me locate material and resources that I otherwise would have missed. This paper is of course indebted to Taisu Zhang, who introduced me to the study of Chinese law. My high school Chinese teacher, Xiaorong Li, gave me the language skills allowed me to meaningfully research China; my Fields partners, JSD students Jiangfeng Li and Zeng Si, helped me maintain these skills throughout my time at Yale. Finally, I offer my most sincere thanks and apologies to my parents, who not only served as proofreaders and lay editors, but put up with many a nervous phone call very early in their California mornings.

## Introduction: A New Era for Intellectual Property in China?

When it comes to Intellectual Property (IP) protection, it is difficult to think of a country with a worse reputation than the People's Republic of China (henceforth, "the PRC" or "China"). Ask most American lawyers about China's IP law, and they'll likely respond with a wry smile and a rhetorical question: "Does it exist?" More experienced practitioners might recall colorful stories of Sonya Sotomayor in her days as a litigator, zipping through the narrow alleyways of New York's Chinatown on a motorcycle in hot pursuit of Fendi counterfeiters.<sup>i</sup>

These impressions are not without basis in fact. According to the United States Customs and Border Protection Office of Trade, China is by far the highest source of imported counterfeits, with the PRC and Hong Kong together comprising 83% of total seizures in 2015.<sup>ii</sup> United States Government Accountability Office statistics show that Chinese actors are by far the most heavily represented respondents in IP-related investigations, dwarfing the next most cited respondent (Japan) nearly fourfold.<sup>iii</sup> The Office of the United States Trade Representative repeatedly highlights "serious problems with intellectual property rights enforcement" in its annual reports about China.<sup>iv</sup>

Even US President Donald Trump cannot escape the ignominy of Chinese IP theft. A cursory search of China's State Administration for Industry and Commerce (SAIC) trademark database reveals 53 filings for the "Trump" brand, many of which are obviously not from the man himself.<sup>v</sup> The "Trump"-branded products range from leather goods to light beverages.<sup>vi</sup>

Naturally, President Trump has made China's lackluster protection of IP a central target of his public ire. During his campaign, Donald Trump's website specifically called for the US to go after China for stealing intellectual property.<sup>vii</sup> The administration already appears to be

making good on the president’s campaign promise. On February 9, 2017, President Trump issued an executive order singling out “IP Theft” as an enforcement priority, borrowing terminology from his notoriously anti-China trade advisor, Peter Navarro.<sup>viii, ix</sup> Five days later, Representative Steve King (R – IA) introduced a bill that would “require the imposition of duties on Chinese origin goods in an amount equal to the estimated losses from IPR violations suffered by US companies.”<sup>x</sup> The text of the bill, which has not yet passed, is tantamount to a declaration of trade war by the United States against China. Commentators are now predicting conflicts over IP as a “looming storm” for US-China bilateral relations.<sup>xi</sup>

Trump’s bluster misses a larger point. While it is true that China is a capital of IP infringement, it is also true that the PRC has done a great deal in recent years to improve its ability to protect IP and invest in innovation. Given this, does China really deserve its miserable reputation, or is at the dawn of a new era for IP, one in which China will become a center of innovation and a defender of IP rights?

By examining a new judicial institution, the Beijing Intellectual Property Court (BJIPC), this paper unearths the seeds of IP reform that China has planted in its capital, explaining how the Court has made enormous strides that have the potential to transform China’s IP environment. The BJIPC’s innovative and experimental procedures have produced the beginnings of a workable legal architecture for IP that responds to the growth imperative that China now faces: to avoid economic stagnation, China must make innovation account for up to half of GDP growth by 2025.<sup>xii</sup>

No study has yet determined the degree to which the experimental procedures of the BJIPC represent a departure from established practices or examined the degree to which the

changes proposed for the court are reflected in its actual decisions. To remedy this gap in the literature, this paper analyzes BJIPC case data to determine if and how reformers are innovating in the context of China's IP regime and legal system in general. It finds that while the BJIPC reforms represent a step forward for an already above-average area of Chinese law, their real significance remains to be seen due to a developing understanding of how the reforms will impact the economy and encounter political obstacles if implemented on a broader scale. Still, because the BJIPC provides a functional model for legal capacity-building within China's IP infrastructure, it holds tremendous promise for increasing consistency and openness in China's legal system.

The paper proceeds in three sections. Section 1 offers the legal background and history of the evolution of IP protection in China, explaining the development of the modern IP regime in three phases: legislation, enforcement, and utilization. It explains the paradox of statutory compliance without effective enforcement, arguing that while a transformation of China's IP industry combined with US pressure to improve IP protection, leading to improvements in China's statutory and judicial protections for IP, problems with bureaucratic organization and political demands prevented administrative enforcement from becoming maximally effective. Section 1's sketches of the IP system's development provide an expansive view of how the BJIPC fits into history, and set the stage for later discussions of current events.

Section 2 details the goals and accomplishments of the BJIPC as an experimental program in IP law, elucidating the need, the plan, and the reality of the BJIPC. This section shows how the BJIPC aims to offer increased consistency, standardization, transparency, and openness in the Court's decision-making with an eye towards using its work to revamp China's

guiding cases system (GCS), which has had little impact since its introduction in 2010. It goes on to explain the practical considerations of how, exactly, the BJIPC has planned and executed the reforms using a combination of statistical data and examples from cases to identify and explain court procedures. It concludes that innovations in the court have generally followed the official plan, going beyond its goals in some respects, and underwhelming in others. While the BJIPC has pursued the specific implementation mechanisms of the plan with varying degrees of success, it has produced at least six major new innovations in IP law during its first two years of operation, and provides adjudication services that are procedurally fairer than average. The BJIPC is “plaintiff-friendly,” and strongly protects the intellectual property rights of private owners against infringers and administrative agencies alike.

Section 3 examines the potential implications of the BJIPC reform within the context of China’s innovation economy and international trade issues, highlighting both domestic and international consequences. This section argues that IP is a relatively “safe” and beneficial area of law for reform because it stands out as a domain of commercial law that foreign and domestic firms both value highly, yet one in which political interests are relatively limited. This, along with the degree of control that the Chinese government can assert over the judicial impact of the IP court system as a whole, makes it a good candidate for rule of law reforms that “tie the autocrat’s hands” without disrupting the interests of Chinese Communist Party (CCP) leaders, who continue to control other domains of law. Finally, the BJIPC experiment has already provided a potential new direction for China’s case law system, and its procedural innovations may follow previous products of IP experiments into the next revisions of China’s intellectual property, administrative, and civil procedure laws.



The paper concludes with a reflection on how the BJIPC reforms fit in US-China trade relations, arguing that the US should see the BJIPC both as a credible signal of China's commitment to IP protection and the fruit of sustained US cooperation with China to strengthen IP protections. In this framework, the US will benefit from acknowledging the BJIPCs significance with respect to China's ongoing legal and economic development and understanding the court's more general role in promoting the rule of law in China.

## Section 1: Background and History of Intellectual Property in the PRC

In order to fully understand the significance of the BJIPC reforms, they must be situated within their legal and historical context. This section provides a brief overview of China's political-legal system as it applies to IP before exploring the history of the IP legal system, focusing on the development of the current system from 1979 onwards. It aims to contextualize the 2014 establishment of intellectual property courts (including the BJIPC) as logical extensions of historical and economic trends.

Before discussing China's IP protection regime, some basic background on China's legislative, executive, and judicial system is helpful. As a one-party state, China operates with a dual-power structure: politicians almost always hold positions in both the State (the PRC) and the Party (the CCP), and state power thus exists within a highly-centralized structure under the control of the CCP. The National People's Congress (NPC) is China's legislature. While all 2,987 members are entitled to vote on legislation, legislation is introduced by the NPC Standing Committee (NPCSC), whose approximately 150 members follow the party line in passing legislation. Executive power is wielded by State Council, whose bodies include each of the

administrative agencies involved in enforcing and protecting intellectual property: The State Administration for Industry and Commerce (SAIC), State Intellectual Property Office (SIPO), National Copyright Administration (NCA), General Administration of Quality Supervision, Inspection and Quarantine (GAQSIQ), and General Administration of Customs (GCA), The Public Security Bureau of the Ministry of Public Security (PSB under MPS, the national law enforcement body charged with investigating criminal IPR violations) and other, minor executive agencies. These administrative agencies are empowered by law to conduct *administrative enforcement* of IPRs, a shorthand for extrajudicial remedies (such as confiscation and destruction of infringing goods, fines [of a relatively small magnitude], and so on) for IPR infringement. Administrative enforcement is usually faster and less costly than *judicial enforcement*, which is handled by the courts. However, as this paper will discuss later, administrative enforcement is much less effective.

China has a system of civil law loosely based on the earlier civil code of Germany. Unlike the German system to which it is often compared, while China has a constitution, it does not serve as a source of law in practice. The priority of various laws is determined instead by China's Legislation Law. Courts lack the power of judicial review, though the Administrative Litigation Law (ALL, promulgated in 1994) provides limited powers of administrative review—courts may legally invalidate specific acts of government agencies (such as those under the State Council). This power was modestly expanded by the 2014 amendments to the ALL, which grants the courts administrative review power over agency-generated rules under certain circumstances. The overwhelming majority of administrative review cases are tried in Beijing, which serves as the headquarters of all State Council agencies.

China's court system has four tiers (from least to most authoritative): Basic, Intermediate, High, and the Supreme People's Court. Courts of special jurisdiction, including the Railway, Maritime, and Intellectual Property Courts, exist outside of this regime, and are usually equal in hierarchy to Basic or Intermediate courts. In Chinese legal terminology, the court that is first to hear a case is referred to as the "court of the first instance," with the second and third following suit. As a general rule, Basic People's Courts are the first instance courts for disputes, though, in the case of IP, intermediate people's courts may also serve as first-instance courts for certain cases. According to the Organic Law, which governs the operation of China's court system, most cases must be decided within two instances (i.e. they may only be appealed once to the next-highest level court), although certain civil and administrative cases may be heard a third time.<sup>xiii</sup>

The modern system of intellectual property law in China began in 1979, the year that marked the start of Deng Xiaoping's Reform and Opening Up (ROU) policy. Because the enlightenment ideals that underpin the foundations of Western intellectual property law have no real counterparts in Chinese history, the concept of intellectual property law was introduced to China mostly by the Western powers.<sup>xiv</sup> While Chinese dynastic civilization did at various times protect what would have seemed to Western observers like intellectual property, the Chinese state never developed a homegrown analogue to the concept of intellectual property as the West conceives of it.<sup>xv</sup>

The 29 years stretching from the founding of the PRC in 1949 to the end of the Cultural Revolution in 1976 roughly delineate a period of intense rejection of capitalism and the associated theories of private property and intellectual property in the PRC. According to Tian

Lipu, former commissioner of the State Intellectual Property Office (SIPO), prior to 1980, the year that the PRC joined the World Intellectual Property Office (WIPO), “the concept of IP was almost unknown in China.”<sup>xvi</sup> During the early days of the PRC, Chinese leaders tried to reconcile a Soviet-style socialist IP policy with the realities of the IP regime left behind by the vanquished republican Guomindang (GMD—Nationalist Party) government. The elimination of private ownership by the mid 1950s, however, rendered these compromises needless.<sup>xvii</sup> The Anti-Rightist Movement (1957) and Great Leap Forward (1958-60) emaciated the PRC’s incipient intellectual property laws to practically nothing. National People’s Congress (NPC) legislators lost confidence in the “anti-socialist” tendencies that the system of intellectual property seemed to encourage, replacing them with Marxist award schemes that existed in the functional absence of patent law.<sup>xviii</sup> The property elements of the patent laws had been eradicated entirely by 1963.<sup>xix</sup> Intellectual property retrenchment only increased during the Cultural Revolution (1966-76). The granting of trademarks in the fledgling registration system ground to a halt as proletarian rhetoric crowded out the capitalist notions of property rights, including IP. A popular slogan sums up the period’s prevailing socialist attitude towards intellectual property protections: “Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?”<sup>xx</sup>

Shortly after Mao’s death and the end of the Cultural Revolution in 1976, Deng Xiaoping began laying the groundwork for his ROU policy with the Four Modernizations: bringing China’s agriculture, industry, science and technology, and military affairs up to the cutting edge. As China’s leaders crafted a plan for reaching this goal, learning from the technological advances

of other countries became a central part of the ROU: purely socialist and isolationist policies were not enough to spur domestic innovation.

China began a project to revive the little that remained of the old systems of intellectual property in 1977, although China's leaders were fully cognizant of the fact that this was only to be an intermediate step in the development of a modernized system of intellectual property.<sup>xxi</sup> China's first significant step towards the current regime was a trade agreement with the United States, forged in 1979. Article VI provided that the PRC recognize American intellectual property rights.<sup>xxii</sup> This agreement marked the first time that the PRC entered into an international agreement to protect IP. Over the next four decades IPR development proceeded through three phases of focus: legislation (1980—Early-1990s), enforcement (Mid-1990s—Early 2000s), and utilization (Mid-2000s—Now).<sup>xxiii</sup>

## Legislation

The first phase, legislation, began in 1979 with the US-PRC Trade Agreement. The agreement marked the first time that the PRC meaningfully agreed to protect intellectual property. In 1980, China joined the WIPO and thereby certified its intention to follow the international intellectual property regime. After joining the WIPO, NPC legislators crafted a statutory framework for intellectual property, passing patent, trademark, copyright, and unfair competition laws. The earliest of these preceded even the basic civil and administrative litigation laws, laying the foundations for a trend: China's intellectual property system would paradoxically develop without a robust system of administrative, civil, or property law.<sup>xxiv</sup> Following its joining of the WIPO, the PRC immediately began passing legislation to bring itself in line with global standards.

A trademark law was passed in 1982, and, after a fierce debate, China passed its Patent law in 1984, which granted inventors the rights to their innovations while not ignoring their broader responsibilities to the state.<sup>xxv</sup> Administrative Litigation, Civil Litigation, and Property laws did not arrive until 1989, 1990, and 2007, respectively. Each of these laws contributed to the IP protection regime, as shown in Table 1 (Infra). The compromise between socialist ideas of state centrism and capitalist notions of independent ownership became a mainstay of Chinese IP legislation during the first period of IP reform.

Table 1. IP-related Legislation and Amendments

<b>Title</b>	<b>Date</b>	<b>Description</b>	<b>Administration</b>	<b>Key Aspects of Amendments</b>
Trademark Law	1982	Sets rules for the issuance, revocation, and protection of trademarks.	SAIC, CTMO, TRAB	1993: Advances additional protections and definition of Infringement. 2001: Introduces of new judicial procedures (preliminary injunctions, evidence rules), 2013: Increases damages, shortens timelines for CTMO and TRAB review, and adds internet-specific regulations alongside connections with international and WTO practice.
Patent Law	1984	Sets rules for the issuance, revocation, and protection of patents.	SIPO, PRB	1992: Expands scope and period of protection, adds domestic right of priority. 2000: Allows judicial review of PRB; provides for TRIPS compliance; adds basis for damage calculation, right of sale, and preliminary injunctions. 2008: Adds requirement of absolute inventiveness, streamlines approval of overseas patents, increases safeguards against malicious filing and litigation, eliminates statutory barriers for foreign filers.
Copyright Law	1990	Sets rules for the issuance, revocation, and protection of copyright.	NCA	2001: Adds in protection for digital and internet materials. 2010: Relatively minor changes for WTO compliance.
Unfair Competition Law	1993	Sets rules to prevent commercial entities from competing unfairly.	SAIC, UCEB	2017 (draft): Expands protections for unfair use of 'business identifiers' (such as trademarks).
Administrative Litigation Law	1989	Authorizes private suits against administrative organs and personnel for rights infringement.	Courts	2014: Greatly expands the scope of actionable cases, augments enforceability of judgments against agencies.
Civil Litigation Law	1991	Sets rules and procedures for suits between private parties.	Courts	2008: Facilitates retrial and appeal applications, increases the effectiveness of execution of judgments. 2012: Improves efficiency and transparency, increases autonomy of parties, introduces new rules for third party rights, preliminary injunctions, etc.
Property Law	2007	Governs creation, transfer, and ownership of all property.	Courts	None yet.

Of the three phases, legislation is the one perhaps most fraught with contradiction for IP: as the NPC crafted the first iteration of China's first IP laws, the PRC was acquiring its reputation as the IP theft capital of the world. The period immediately following Deng's opening up brought unprecedented prosperity to China. A Copyright law finally entered into force in 1990, and the unfair competition law came next in 1993 along with a trademark law amendment that further solidified brand protections. But without any effective IP enforcement infrastructure in place, infringement flourished. For instance, even while the 1992 revisions to China's patent law brought the PRC's statutory law into full compliance with the requirements of the General Agreement on Tariffs and Trade's (GATT) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), in 1995, the ratio of pirated to licensed software in China was 50:1.<sup>xxvi xxvii</sup> While China focused on improving enforcement in the next stage of the development of its IP protection system, problems with enforcement dog China to this day.

From the mid-1980s to the end of the legislation phase in the early-1990s, China acceded to nearly all of the WIPO-administered treaties on intellectual property, and sent delegations of legislators and judges abroad in order to learn other countries' judicial practices on IP cases.<sup>xxviii</sup> While China's statutory IP protection regime generally coincided with international norms by the end of the legislation phase, enforcement was almost nonexistent. The beginning of the second phase, enforcement, is marked by China's aspiration to World Trade Organization (WTO) accession. In this period, the PRC invested heavily in harmonizing its statutory legal system with international norms and developing a professionalized IP administrative and judiciary apparatus to deal with increasingly complex cases and a proliferation of new laws, regulations, and amendments concerning IP law.



## Enforcement

As China struggled to enforce its laws, domestic favoritism and weak administrative enforcement made foreign IP firms loath to do business in China. During the late eighties and early nineties, rampant IP theft in China caused an average annual loss of over \$2 Billion to US firms alone.<sup>xxix</sup> These losses, among other trade issues, prompted both the H.W. Bush and Clinton administrations to adopt a coercive approach to negotiation, repeatedly threatening China with sanctions, trade wars, nonrenewal of most favored nation (MFN) status, and opposition to China's WTO accession.<sup>xxx</sup>

Because of continued pressure from the US and China's aspirations to join the WTO, the beginning of China's focus on enforcement began in the mid-1990s as China gradually abandoned the earlier compromise between socialist, statist ideals and the need for private intellectual property to spur investment and innovation. Instead, China moved more or less unidirectionally towards a western-style IP regime. The enforcement era began in the early nineties, with the first trademark law amendment in 1993. The amendment, along with the other amendments to IP laws that would follow both before and after China's WTO accession, acknowledged a need to respond to US pressure for better IP enforcement.<sup>xxxi</sup> In the 1995 US-China agreement on IPR enforcement, further clarifying this relationship.<sup>xxxii</sup> From 1995, China added several new protections for intellectual property, including the establishment of the SIPO in 1998, which provided an analogue to the US Patent and Trademark Office, adopting comparable patent review and approval procedures.<sup>xxxiii</sup> In 1999, the value of wholly-foreign-

owned companies overtook that of enterprise joint ventures (EJVs) between Chinese and foreign enterprises, a culminating mark of a two-decade long push towards opening up.<sup>xxxiv</sup>

Paradoxically, the same pressure that encouraged China to improve its statutory IP regime and court system contributed to the continuing failure of administrative enforcement to be effective. Leading up to and following World Trade accession, China launched several high-profile crackdowns on infringing goods, which continue to this day. While this administrative enforcement is highly politicized, inconsistent, largely campaign-based, and does little to actually change infringers' behavior, it serves an important propagandistic purpose to supplement the slow progress of legal reform during this period. Unlike courts, campaign-style administrative enforcement (most commonly by Customs as well as the State Intellectual Property Office [SIPO], the National Copyright Administration [NCA], and the State Administration on Industry and Commerce [SAIC]) can respond quickly to foreign pressure; despite the inferiority of this type of enforcement, its political and diplomatic role in responding to the demands of other nations has proven indispensable.<sup>xxxv</sup>

Figure 1. Timeline of China's Intellectual Property Law



During the enforcement period, amendments to IP legislation brought China's statutory regime into nearly full compliance with WTO rules. At the same time, China dedicated a great deal of resources towards improving enforcement of IPRs. As a result, agencies' capacity to issue and inspect IPRs increased tremendously (Figure 3, *Infra*). But, despite these efforts, administrative agencies emerged from the period still unable to provide *rationalized* enforcement (enforcement that is consistent, transparent, and procedurally fair) of IPRs.<sup>xxxvi</sup>

While the *volume* of enforcement of administrative agencies (as measured by the number of enforcement actions) increased during the enforcement period, its effectiveness did not. The reasons for this perplexing failure, first explained in a landmark, 327-page study of IP enforcement in China by Martin Dimitrov, were threefold.<sup>xxxvii</sup> First, while mechanisms for bureaucratic accountability exist, they are ineffective and therefore there is no strong mechanism to hold agencies to task for failures to enforce effectively. Second, decentralization and overlapping mandates of enforcement agencies exacerbate these problems of accountability. Third, agencies have repeatedly been co-opted by the government in order to respond to external pressures for IP-enforcement, resulting in ineffective, campaign-style enforcement that is of high *quantity* and low *quality*. As a result of these three factors, while certain exceptions exist, the non-judicial enforcement remedies offered by administrative agencies in China are generally not rationalized, and therefore ineffective.

In the legal realm, reform efforts were much more successful, as increased specialization of IP courts formed the backbone of the new IP protection regime. As an area of law, intellectual property requires an extremely high degree of both judicial professionalism and specialized knowledge. China's first significant step towards this professionalism was the

establishment of the specialized IP tribunals within existing people's courts. During the previous legislation period, poorly-trained, nonspecialized judges frequently handed down arbitrary opinions of IP matters that were not released publically and, as a general rule, could not be appealed.<sup>xxxviii</sup> As Beijing aspired to WTO accession and stepped up enforcement, the first such tribunals were established in 1993, in the Beijing Intermediate and High People's Courts, and the SPC's tribunal was established soon thereafter.<sup>xxxix</sup> These tribunals had unprecedented levels of transparency, with open courts and high appeals rates, a marker of at least a modicum of procedural fairness.<sup>xl</sup> Delegations from the tribunals made frequent visits to courtrooms in the United States and Europe, gleaning knowledge that they would bring back to China.

Compared to administrative enforcement agencies, IP tribunals were able to handle enforcement in the more even-handed and less politicized fashion. Their ability to do so resulted from the lack of pressure upon them to enforce IPRs and that their jurisdictional and enforcement mandates were more clearly delineated than most of the agencies'.<sup>xli</sup> By 2013, there were nearly over 400 such tribunals across China; the number grew to over 560 in the very next year.<sup>xlii</sup> The tribunals not only provided judicial resources for exponentially expanding IP Caseloads (Figures 2 and 3, *Infra*) but supplied the legal system with several new innovations. Preliminary injunctions, burden of proof reversals, and punitive damages all emerged in the judgments of IP tribunals long before NPC legislators included these judicial tools in the 2007 and 2012 revisions to the Civil Procedure Law. The five types of enforcement available to IP rights holders, including judicial enforcement by the courts, are summarized in Table 2 (*Infra*).

Table 2. The Five Types of IPR Enforcement in China<sup>xliii</sup>

<i>TYPE OF ENFORCEMENT</i>	<i>DESCRIPTION</i>	<i>PROVIDED BY</i>	<i>IS IT RATIONALIZED?</i>
<b>JUDICIAL</b>	Administrative, civil, and criminal proceedings conducted in accordance with applicable laws. (Available for all types of IP)	Courts, especially IPTs and IPCs.	<b>Yes</b> , or at least more so than other forms, and especially in the case of the BJIPC.
<b>QUASI-JUDICIAL</b>	A hearing reminiscent of a court procedure conducted by an administrative agency. It may result in a written punishment decision. Caseloads are generally comparable to those of the courts and tribunals combined. (Patent and Copyright only)	SIPO, NCAC	<b>Generally not.</b> Proceedings are run by agencies themselves, with little direct oversight from central government, and decisions are not published. While decisions may be appealed in principle, they are difficult to contest in practice. SIPO procedures, in recent years, have emerged as a notable example to this general rule
<b>RAIDS</b>	IPR holders may complain to an agency of a Trademark infringement, which may then conduct a raid. (Trademark only).	SAIC, GAC, PSB	<b>No.</b> Enforcement agencies regularly refuse to organize a raid, often taking advantage of jurisdictional overlap to do so. Even when raids are conducted, infringing goods may not be seized. Bribery often goes along with raids.
<b>PROACTIVE ADMINISTRATIVE ENFORCEMENT</b>	Agencies conduct routine inspections on businesses for suspected IPR violations. (Dominant enforcement mode for trademarks, but exists for all types of IP)	All administrative IP enforcers. (Not courts)	<b>No.</b> Enforcement is incidental to other duties, e.g. only 1% of routine SAIC inspections encounter violations. <sup>xliv</sup> Even when case is processed, it is handled in a completely opaque and unaccountable fashion.
<b>“CAMPAIGN-STYLE” ENFORCEMENT</b>	Sweeps of intense enforcement lasting no more than a few weeks, often coordinated by the central government, and often involving collaboration between multiple agencies. (Common for all types of IP.)	All administrative IP enforcers. (Not courts)	<b>No.</b> These types of enforcement are responses to “crisis situations.” Because the multiple agencies involved have overlapping enforcement mandates, campaigns are farcically uncoordinated and duplicative, often with agencies reporting the same case several times and imposing multiple fines for the same alleged offense.

While foreign pressure played an important role, both the statutory changes and the introduction of the rationalized enforcement mechanisms of the IP tribunals during the enforcement stage were prompted primarily by economic development. In the mid-nineties, China's IP-intensive industries reached an inflection point in their growth. China's leaders began to see IP not merely as a means of increasing foreign direct investment (FDI), but as a means for protecting and encouraging the development of homegrown R&D.<sup>xlv</sup> Economic evidence indicates two key factors at play: a trade-supporting market expansion effect and a trade-inhibiting market concentration effect.<sup>xlvi</sup> First, Chinese patent grants to foreign firms are positively correlated with export volume of those firms to China; second, increased domestic patent-holder concentration in an industry has a negative relationship with export volume of foreign firms to China.<sup>xlvii</sup> In the periods before WTO accession, China's domestic IP-intensive industries had experienced unprecedented growth. For instance, the value of China's software industry in the late nineties doubled every year, with software patents nearly quintupling during the period (Figure 2, *Infra*).<sup>xlviii</sup> The integrated circuit industry enjoyed a similar explosion, with output growing by 30% annually, alongside a roughly corresponding increase in domestic patent grants.<sup>xlix</sup> The increased concentration and market expansion effects in IP-intensive industries combined to increase the volume of trade while simultaneously increasing the benefits and decreasing the drawback of IP protection for Chinese firms. As local firms and owners increasingly had reasons to support better protection of intellectual property, the Chinese government had a strong incentive to support the expansion of IPR and to create a fairer and less protectionist system for IP protection.<sup>1</sup>

Figure 2. Patent Applications in the PRC, 1985-2010<sup>li</sup>

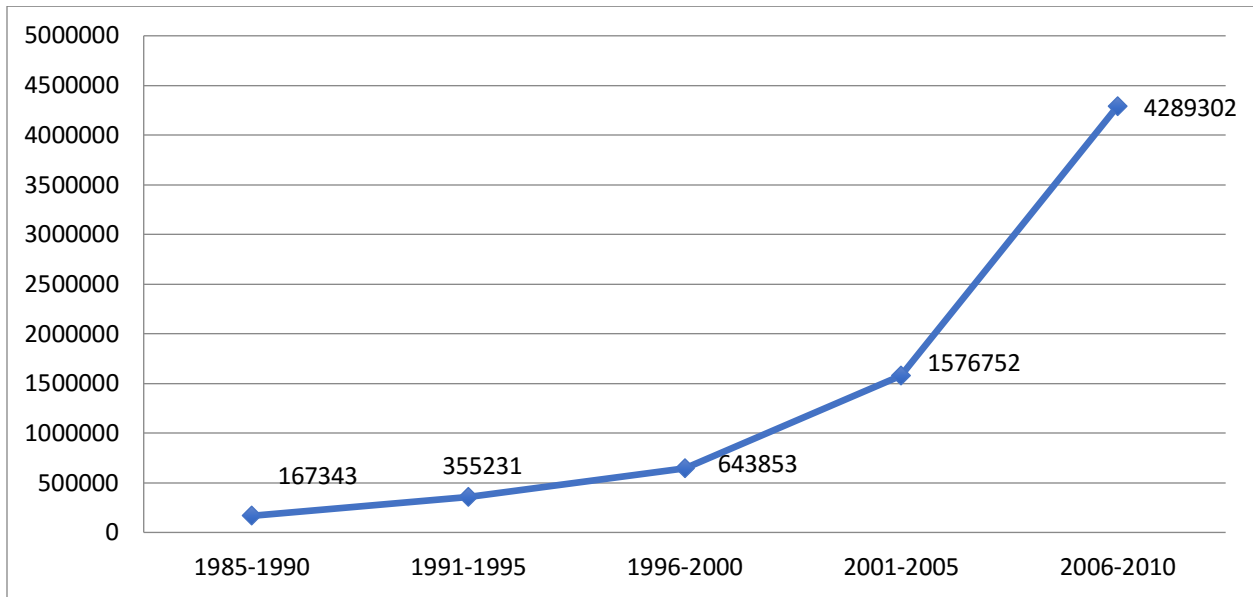
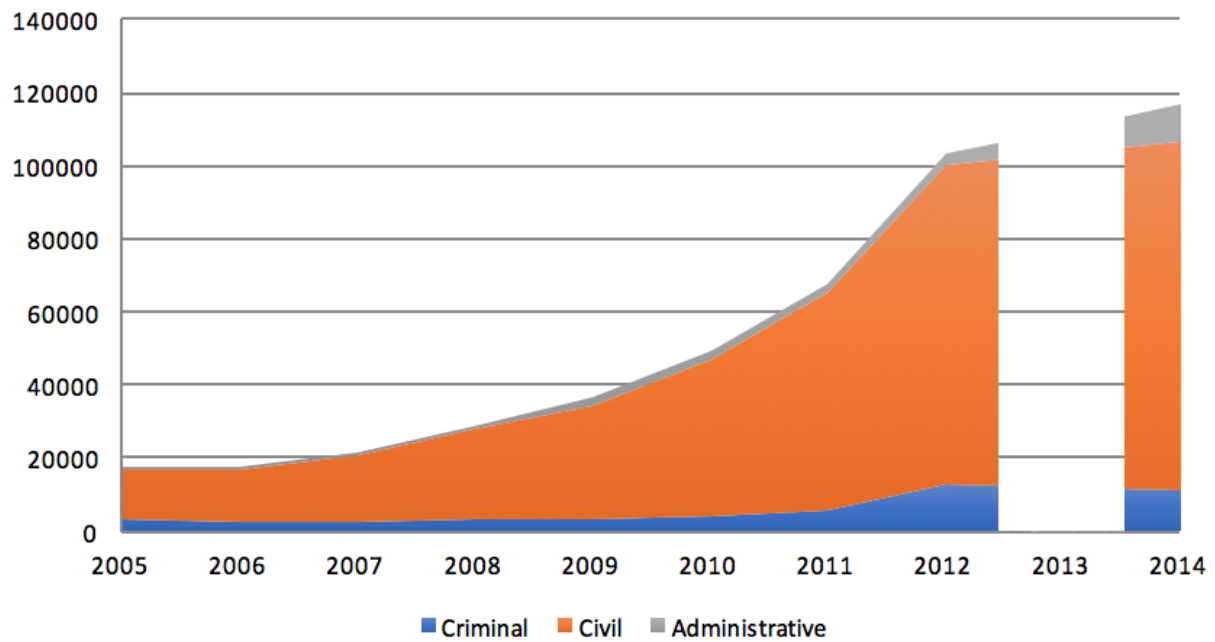


Figure 3. First-Instance IP Cases in PRC Courts by Type, 2005-2014<sup>lii</sup>





## Utilization

In the 22 years between the beginning of Deng's Reforms (1987) and China's eventual accession to the WTO (2000), China built a comprehensive, if imperfect, IP framework that has continued to evolve. While initially rooted in socialist ideals, by the time of its WTO accession, China had placed itself squarely on the trajectory towards the western private-property style model of IP. During the utilization phase, the nation began to shift its focus from persistently problematic enforcement system that concentrated on compliance with WTO norms with an eye towards protecting foreign IP owners towards a system that promoted homegrown intellectual production even in the absence of maximally effective enforcement.

Since China's WTO accession, the path of Chinese IP legal regime has continued to parallel the development of China's IP-intensive industry, subject to the constraints of developing legal systems. Each revision of the Patent and Trademark laws have brought them closer into harmony with their US and EU counterparts, though significant differences still exist.<sup>liii</sup> As it stands today, Chinese IP legislation shares many similarities with western systems, and is fully statutorily compliant with the TRIPS agreement. In 2009, China passed a property law, which, in a certain sense, marked the end of the era of quasi-socialist-capitalist compromise.

China's current reforms in intellectual property are guided by the 2008 National Intellectual Property Strategy (NIPS), a State Council directive which aims to increase the share of IP-intensive industries as a percentage of GDP by crafting IP policy that incentivizes both homegrown innovation and international exchange of IP.<sup>liv</sup> In order to accomplish this, NIPS emphasizes that China must develop IP enforcement mechanisms that are economically

efficient, adaptive, and judicially consistent. As the guiding document for the utilization phase, NIPS puts forward the strategic goal that “by 2020, China will be a country with high levels of intellectual property rights creation, application, protection and management.”<sup>lv</sup> It goes on to immediately highlight the “legal environment,” “market entities” and “public awareness” (in that order) as three pillars towards achieving this goal.<sup>lvi</sup> Three of the five “Strategic Focuses” of the NIPS (“1. Improving the Intellectual Property Regime,” “3. Strengthening the Protection of IPRs,” and “4. Preventing Abuses of IPRs”) are dedicated to guiding judicial reform in IP, setting forward nonspecific, goal-based directives for national progress in IP by 2020.<sup>lvii</sup> Current legal reform in IP, including the BJIPC experiment, utilizes NIPS as a touchstone for generating and evaluating plans for reforms. In short, the NIPS makes emphatically clear that China’s leaders see the courts as the central part of their national IP strategy.

By the time that China’s growth slowdown became clear in the first decade of the 2000s, its leaders had already recognized that the China’s economy must move towards innovation to avoid economic torpor. The two major economic drivers of China’s economic growth over the preceding three decades—heavy-duty capital investment and labor force expansion—were grinding and screeching to a halt. To avoid further economic stagnation in the near future, innovation must make up half of China’s GDP growth by 2025—an annual value of \$3 trillion to \$5 trillion per year.<sup>lviii</sup> Already, China’s R&D spending has been growing by an astonishing 18.3% annually, almost precisely the same rate as its IP case docket over the same time period. At over \$200 billion per year, it is now second in amount only to the United States.<sup>lix</sup> Today, China leads the world in patent applications and produces nearly 30,000 PhDs in science and engineering each year.<sup>lx</sup> While China lags behind in some measures of innovation, such as

biotechnology and commercial aviation, it has made enormous leaps ahead of the United States in other IP-intensive areas, such as railroad technology and solar panels, where the government has actively spurred innovation through market creation, pro-cluster policy, and other pro-innovation measures. In order to further develop its innovation economy, however, China must not only continue to boost utilization of IPRs through spending policy, but also by creating an effective enforcement mechanism for IPRs centered around a fair, consistent, and efficient legal system.

Taking a view of China's IP enforcement system as a whole, the reason that the NIPS focuses so much on legal enforcement as opposed to administrative enforcement is relatively obvious: the latter has not worked. Historically, China's administrative enforcement bodies (with the partial exception of the newer SIPO) have operated under pressure from the government and foreign entities to enforce IPRs without establishing workable mechanisms for accountability, clearly delineated areas of responsibility, or even bureaucratic channels to ensure that enforcement adheres to applicable laws and regulations.<sup>lxii</sup> Companies, especially those based overseas, rarely if ever seek administrative enforcement of IPRs because of these issues with administrative enforcement and the fact that, unlike courts, agencies can only stop infringement, and cannot award monetary damages.<sup>lxiii</sup> Because these problems are deeply embedded in the centralized structure of the Chinese state, it is far easier to address the problems of IP enforcement by focusing on the court system, which is relatively free from the political pressure to enforce (compared to administrative agencies, at least), has clearly defined areas of jurisdiction, and can serve as a costly but effective check on government agencies through administrative litigation.<sup>lxiii</sup>

As it exists today, China's IP regime is a mixed story. On the one hand, revolutionary statutory changes have propelled the PRC into full compliance with TRIPS and WTO norms, at least on paper. But, as always, the devil is in the details: deeply problematic administrative enforcement alongside a generally inefficient and expensive court system that lacks judgmental consistency, professionalism, and expertise continue to present problems for China's legal system in IP and beyond. For some of these problems, the BJIPC experiment could provide solutions. The next section describes how the BJIPC reforms fit into both the NIPS and the current epoch of development in intellectual property law in the PRC.

## Section 2: Innovation in the BJIPC

This section details the emergence of the BJIPC and scrutinizes its practices in order to elucidate its role within the reform of both the IP regime and legal system in three parts. First, it explains how the BJIPC and other intellectual property courts came to be, and what needs its creation was intended to address. Second, it lays out and examines reformers' goals and intentions for the BJIPC, showing how the court was designed to respond to needs both in IP specifically and in the legal system more generally. Finally, it analyzes the realities of the BJIPC during its first 2.5 years of operation (December 2014 – April 2017) using a hybrid approach that combines aggregate numerical data with specific case studies, highlighting several ways that the BJIPC has innovated in the practice of IP law, meeting some of its goals while falling short on others. The BJIPC has developed at least six innovative procedures, and has positioned itself as a staunch defender of IPRs. While it is too early to tell how durable or significant the reforms may turn

out to be, the court's work so far provides very encouraging signs for the prospects of China's IP regime and further integration in the global economy.

## The Need

From its beginnings, the establishment of the BJIPC experiment served needs in two general areas: (1) IPR enforcement and dispute adjudication, which has involved each of the three new courts (in Beijing, Shanghai, and Guangzhou, respectively), and (2) developing innovative procedures to guide legal reform, which is specific to the BJIPC. While these two categories of needs are not necessarily discrete in practice, discussing them separately is useful because it shows how the BJIPC procedures were crafted to respond to them.

The first category of needs was the primarily the product of historical trends. As the utilization phase progressed, China as a whole saw exponential increases in both IP production (Figure 1, *Supra*) and IP litigation (Figure 2, *Supra*). IP tribunals around China had been struggling under dockets that grew larger ever year. From 1986-2003, caseloads grew quickly but manageably, with an average annual growth rate of 16%. But from 2004-2013, the average growth rate rose to 30% per year.<sup>lxiv</sup> The strain was especially great in the regions of Beijing, Shanghai and Guangdong (Figure 4, *infra*), whose IP caseloads comprised 55% of the national total.<sup>lxv</sup> While the rapid increase in tribunals (an incredible 40% increase to 410 between 2013 and 2014 alone) had likewise increased professionalization across geographical areas and had somewhat alleviated the flood of first instance IP cases in appellate courts (which were generally the first to have IP tribunals and therefore served as courts of the first instance of IP cases), additional resources were needed in the high-volume Civil IP jurisdictions, including

Guangdong (#1), Beijing (#3, after Zhejiang Province), and Shanghai (#7, after Jiangsu, Shandong, and Hebei provinces).<sup>lxvi</sup>

A second portion of the IP-specific need came from the requirement for increased accountability for administrative agencies and more consistent judgment. This was greatest in Beijing, which, as the center of government, hosts the lion's share of China's administrative docket. As mentioned in the previous section, China's administrative enforcement of IPRs has been extremely ineffective, with inefficient corruption-prone campaign-style and routine enforcement dominating a mess of overlapping mandates that prevent bureaucratic accountability (Table 2, *supra*). Against this backdrop, the IP tribunals were an important step in that they allowed China to carve out an area of more effective "model enforcement" within the court system instead of taking on the much more difficult task of creating an effective administrative enforcement bureaucracy. However, the fact that IP tribunals were parts of larger courts made it more difficult for these courts to focus specifically on IP, since the justices on the tribunals had to contend with the other demands implied by participating in an established institution.<sup>lxvii</sup> IP Tribunals simply did not have the flexibility demanded by NIPS to quickly create and implement innovative adjudication procedures.<sup>lxviii</sup>

In addition to goals related to IP specifically, the BJIPC experiment was also intended as a response to the lackluster results of the Guiding Cases System (GCS), which was first introduced in 2010. Eight times since, the SPC has promulgated sets of around ten cases each that it deems as models, appropriate for judges to cite as compelling authority in their reasoning when making decisions.<sup>lxix</sup> When the SPC issued the first batch of Guiding Cases in 2011, they were initially met with great fanfare from international observers. China's system of

civil law, unlike the common-law system that originated in Britain and spread throughout its colonies, does not respect *stare decisis*, the common-law principle that precedent may be binding on subsequent cases. This differentiates it tremendously from not only the British and American systems, but also from the German, French, and Japanese systems of civil law, all of which have well-documented mechanism that carve out a role for case law in legal decision-making. While case law has long been cited by litigants in the courtroom, before the guiding case reform in 2010, Chinese judges were not allowed to use any cases as compelling authority, although more informal mechanisms that resemble case law operated in the courtroom long before the debut of the GCS.<sup>lxx</sup> As it promulgated the first guiding cases, the SPC announced the system's necessity to "handle similar cases similarly" and fill the gaps in statutory law. Many observers and commentators hoped that the GCS would usher in an era of greater consistency and, therefore, fairness in China's judicial process.

As of 2017, the SPC has released 87 guiding cases, 23% (20) of which concern intellectual property law.<sup>lxxi</sup> But the on-the-ground impact of the system in actual subsequent cases has been very limited. In all of China, judges cited guiding cases only 181\* times from Q1 2014 to Q4 2015, and nearly half of these references were to a single case (#24), which established the "eggshell skull rule" in tort law.<sup>lxxii</sup> Half of all cases, and nearly two thirds of those related to intellectual property law, were not cited at all.<sup>lxxiii</sup> Despite their great promise, the percentage of Chinese cases that have cited guiding cases can be measured as thousandths of a percentage point.<sup>lxxiv</sup>

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\* Other studies have found up to 241 cases; either way, this figure is a drop in the bucket when compared to the enormous national docket. See: Jeremy Daum, "The Curious Case of China's Guiding Cases System," *China Law Translate*, February 21, 2017, <http://www.chinalawtranslate.com/the-curious-case-of-chinas-guiding-cases-system/?lang=en>.

There are several reasons why guiding cases have been cited at such an abysmally low rate, and they have likely worked in concert to produce the effect. First, China's judiciary, itself relatively new, is trained almost entirely within a civil law tradition that does not easily accommodate the citing of any precedent. In 2014, 4 years after the GCS was started, over 40% of 500 basic and intermediate court judges surveyed in a city in Southern China that received an SPC commendation for fairness and efficiency in judgment admitted that they had still not read the SPC's 2010 provisions on the guiding case system.<sup>lxxv</sup> The legal system has gone through a flurry of changes in the last few decades, and it has evidently proven difficult for courts to keep up with rapidly developing judicial tools, especially considering that the majority of judges in China hold only a bachelor's degree, or, in less prosperous areas, no degree at all.<sup>lxxvi</sup>

Second, the narrow scope of the GCS and the lack of comprehensiveness across the body of guiding cases means that it is rare for judges to have the opportunity cite them. Even when this opportunity exists, the one-off nature of guiding cases, which are the sole representative of what would be an entire body of case law in a common-law tradition, means that subsequent cases are very easy to distinguish from any given guiding case. Judges themselves provide the paucity of cases as the most common reason why they did not cite guiding cases, with 65% of judges who did not consider guiding cases in adjudication saying that they did so because none of the guiding cases published concerned the areas of law that they adjudicated.<sup>lxxvii</sup>

Third, even in cases where this opportunity does present itself, lawyers unfamiliar with the cases may not cite them. Most of the time, advocates stick to the statutory and substantive issues at hand. Fourth, aggregate court data shows that lawyers are nearly three times more



likely to refer to guiding cases than judges, suggesting that judges may feel that they don't need to include precedent-based decisions in written judgments, even if the arguments help to support their decision.<sup>lxxviii</sup>

Finally, when judges do reference guiding cases, they almost never quote or reference them explicitly. Because the cases don't have any true legal authority, but only "guiding" significance, there's not much of a reason to do so. In 2014, none of the 500 judges surveyed who had referenced guiding cases had referenced the cases with attribution to the source, with all of them referring to a case either obliquely or by quoting from the guiding case decision without a citation. In the year before, only 2% of judges said that they had explicitly referenced a guiding case.

China's leaders have not let the weaknesses in the GCS go unnoticed. At the Fourth Plenum of the Eighteenth Party Congress, held just before the announcement of the Intellectual Property Courts' establishment in 2014, officials highlighted the need "to strengthen and standardize judicial interpretation and case guidance and harmonize the applicable legal standards,"<sup>lxxix</sup> building on the slightly more concrete proposal of the Third Plenum to "explore the establishment of a special court for intellectual property rights."<sup>lxxx</sup>

Experiments in intellectual property were nothing new—they had long served as a means for Chinese jurists and legislators to test out and gauge the impact of new legal policy. As one of the most complex areas of law, IP has demanded both specialized legal background and technical expertise. The concentration of expert jurists in the IP Tribunals (IPTs) that have historically handled these cases alongside the high degree of specialization within this field of law have made intellectual property a natural venue for judicial experimentation in China. IP

litigation has paved the way for the introduction of myriad judicial tools that were later incorporated into other aspects of the Chinese judicial system, including preliminary injunctions, punitive damages, and burden of proof reversals.<sup>lxxxix</sup>

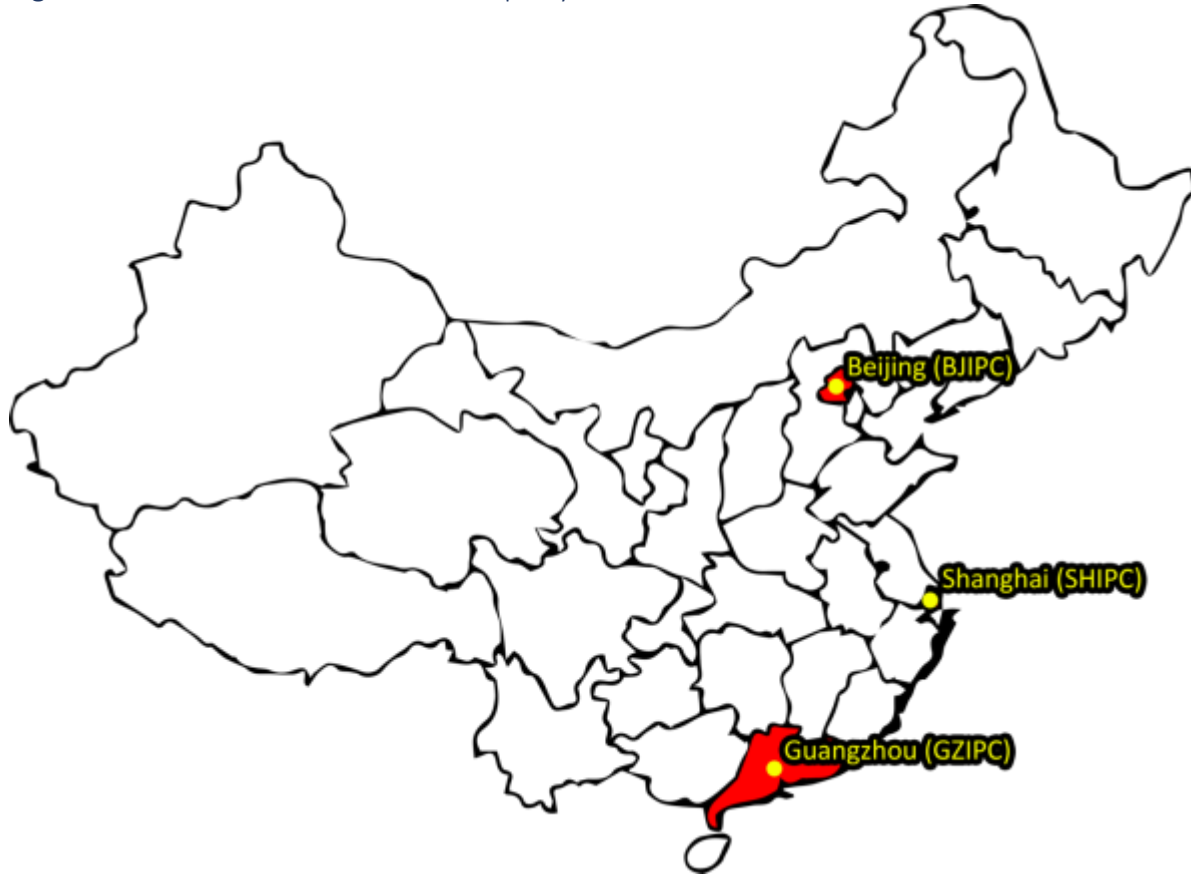
A major task for China's next legal innovation would be to establish the BJIPC as an institutional mechanism for exploring how to improve upon the GCS, providing a new mode of "case law with Chinese Characteristics." What the plenums' proclamations lacked in specific guidance, they made up for by giving reformers in the NPC and the SPC a broad mandate for tweaking this system of case law until it served its intended purpose of making China's judicial process less arbitrary and creating a more consistent procedure for the application of laws.

## The Plan

Following the directives of the Third and Fourth Plenums, the NPC and SPC set to work on crafting a court experiment that would address both the strain of the IP tribunals and the woes of the GCS. Expanding the tribunals made little sense, given that most of them were located in areas with low volumes of IP litigation; in China, IP has one of the most uneven distributions of civil and administrative caseloads, with over half of all cases in just three jurisdictions.<sup>lxxxix</sup> As mentioned, the tribunals, as parts of larger courts, lacked the institutional agility and flexibility to experiment with new procedures. Instead, the NPC established three pilot intellectual property courts (IPCs), in Beijing (BJIPC), Shanghai (SHIPC), and Guangzhou (GZIPC), respectively (Figure 4, *Infra*). Each court would have jurisdiction over the municipality in which it was located, while the GZIPC would have additional jurisdiction over the entire province of

Guangdong, which edges out Beijing as the province-level administrative division with China's largest IP docket.

Figure 4. China's Three Intellectual Property Courts



Together, the three jurisdictions encompass over half of China's entire IP docket.

Since the IP courts were intended to alleviate the glut of civil (and administrative in the case of the BJIPC) cases, the new IP courts did not have criminal jurisdiction, reversing the “three-in-one” approach of the tribunals.<sup>lxxxiii</sup> Their independence from the rest of the court system allows them to act as courts of both first- and second- instance. Specifically, Article 1 of the SPC Provisions on the Jurisdiction of the Beijing, Shanghai, and Guangzhou Intellectual Property Courts granted the new courts original jurisdiction over all IP cases in their

jurisdictions that presented special legal challenges, including (a) civil IP cases involving patents, trade secrets and other technical cases; (b) all IP-related administrative cases involving the State Council department or the local people's government at or above the county level; and (c) civil cases involving well-known trademarks.<sup>lxxxiv</sup> Therefore, the provisions imply that local court tribunals continue to handle copyright, trademark, and other uncomplicated IP cases. Each of the three IP courts has original jurisdiction over IP-related administrative review cases and more technical civil IP cases in its district. Article 6 gives the courts second-instance jurisdiction over all IP cases in their districts.<sup>lxxxv</sup> Figure 5 (Infra) shows how the introduction of the IP courts has changed the civil and administrative IP litigation environment in China.

Compared to the other courts, the BJIPC has far more political significance due primarily to its location in Beijing and its greatly expanded powers of administrative case review. Article 5 granted the BJIPC additional first-instance jurisdiction over all IP administrative decisions of central State Council bodies, such as the SAIC and SIPO. This means that the BJIPC is the first court to hear any complaints against China's national IP regulators (SIPO, SAIC, etc.), and is therefore the most important court for administrative accountability for IP in the country. Interestingly, in this role, the BJIPC replaces the Beijing Intermediate People's Court, the site of China's first ever dedicated IP tribunal, established in 1993. The court's jurisdiction over Beijing means that the BJIPC is an indispensable part of any analysis of the international significance of China's IP law, since it currently tries approximately 80% of the cases in China's combined civil and administrative docket that involve a foreign party.<sup>lxxxvi</sup>

Its administrative jurisdiction and location alone make the BJIPC worthy of heightened attention, but the SPC revolutionized the BJIPC even further by making it the site of an

experiment in case law. Nearly three years after the BJIPC's establishment, the document that outlines the parameters of this experiment, "Beijing IP Court Case Guidance Work Trial Measures (Draft)," ("BCGM") has yet to be approved for public release, and remains confidential, along with several other guiding documents relating to the court's procedures.<sup>lxxxvii</sup>

However, two researchers from the China Institute of Applied Jurisprudence (an academic division of the SPC) who are directly guiding the BJIPC experiment, Jiang Huiling and Yang Yi, have outlined its goals in publically available documents. Although the authors mix the contents of the BCGM with their own opinions and ideas to a certain degree, their article is generally clear in delineating the two, with only a few points of ambiguity. According to them "the reform attempts to explore and test the intellectual property case guidance system with Chinese characteristics, gradually standardize the adjudication of IPRs, deepen judicial public disclosure rights of IPRs, gather the judicial wisdom of IPRs, promote the unified application of intellectual property law, enhance the judicial credibility of intellectual property rights, and promote the judicial communication and research on intellectual property law."<sup>lxxxviii</sup> Several of these goals, particularly "gather the judicial wisdom of IPRs," strongly suggest the reformers' hope that the case guidance system that eventually emerges from the BJIPC experiment may eventually produce nationally-reproducible judicial standards, thereby following the historical precedent of how experiments in IP planted the seeds of several innovations in broader areas Chinese law.

Jiang and Yang outline four primary goals of the BJIPC reforms. First, the court should become a center for building the "theoretical construction and basis" of intellectual property case guidance. The practical significance of this goal to IP litigation is probably limited, with the

exception that a commitment to “theory” in such a practical setting may indicate that reforms aim to set national standards.

Second, the BJIPC reform seeks to increase “informatization” and “openness” in the system of IP law.<sup>lxxxix</sup> Specifically, the BJIPC plan for these goals spans five years. 2015, the first year, is set aside for the “establishment of the research base,” including the logistics of hiring, forming various committees, and laying down a bureaucracy to support the court’s activities and reforms. In 2016 and 2017, the court was to and will work to establish a public IP law database at the BJIPC that connects the SHIPC and the GZIPC to their Beijing counterpart, which will be uploaded before the end of the two-year period and enhanced with various search and screening tools. In 2018 and 2019, the database will be extended across Chinese courts and then linked with international databases. These goals, if realized, could meaningfully increase ease of access to court information and data manipulation, though all judgments (except those that are sealed or otherwise exempted from the public record) are theoretically available through existing SPC databases. In turn, increased access to information could lead to more consistent rulings and fairer trials, as litigants and judges alike could enter the courtroom with more information on prior litigation and a deeper understanding of the issues at stake in a given case.

Finally, and probably most importantly, the court aims to increase standardization across cases. This has been an enormous issue that the GCS attempted and so far failed to address, and is critical to the broader impact of the BJIPC. Jiang and Yang indicate several mechanisms through which the court will achieve its aims of standardization. Most significantly, Article 7 of The BCGM establishes a nine-tiered ranking of influence of decisions.<sup>xc</sup> While SPC-

designated guiding cases are the most persuasive source of legal precedent, the hierarchy includes every level of the Chinese court system. Surprisingly, it reserves the bottom rung for “extraterritorial precedent,” raising the tantalizing possibility that a BJIPC judge could, in theory, legitimately cite a US or EU court ruling in a legal decision.

Accompanying these primary goals, Jiang and Yang also explain the nature of “The Innovative Application of ‘Precedent Judgments’” that the BJIPC aims to achieve. They emphasize that BJIPC judges will establish the status of precedent without invoking the usual notions of “binding-ness” that could “shake the legal system.” In the BJIPC, they assert, precedent will not begin as part of the content of the law *per se*, but rather a system of “supplementation” that serves three purposes: explaining the law where it is unclear or contains loopholes; supplementing the law where the law creates conflict; and harmonizing the law by creating regulations in areas in which the law does not explicitly provide for them. Precedent gains a “*de facto* binding” effect as a matter of practice because, if two judgments conflict, this could serve as the grounds for an appeal or a retrial. Therefore, judges have a strong reason to defer to prior judgment. This is where the nine-tier hierarchy of precedent comes in, since it provides a framework for organizing the persuasiveness of precedent from differing sources.

Finally, Jiang and Yang outline four ideas about how BJIPC judges will support the Court’s system of precedent-based judgments. First, BJIPC judgments will include an expanded discussion of the substantive facts of the case as the court and each of the parties has determined them, the legal rules and application of law, and identification and discussion of any applicable precedents. Second, BJIPC judges’ thinking on precedent will be cultivated such

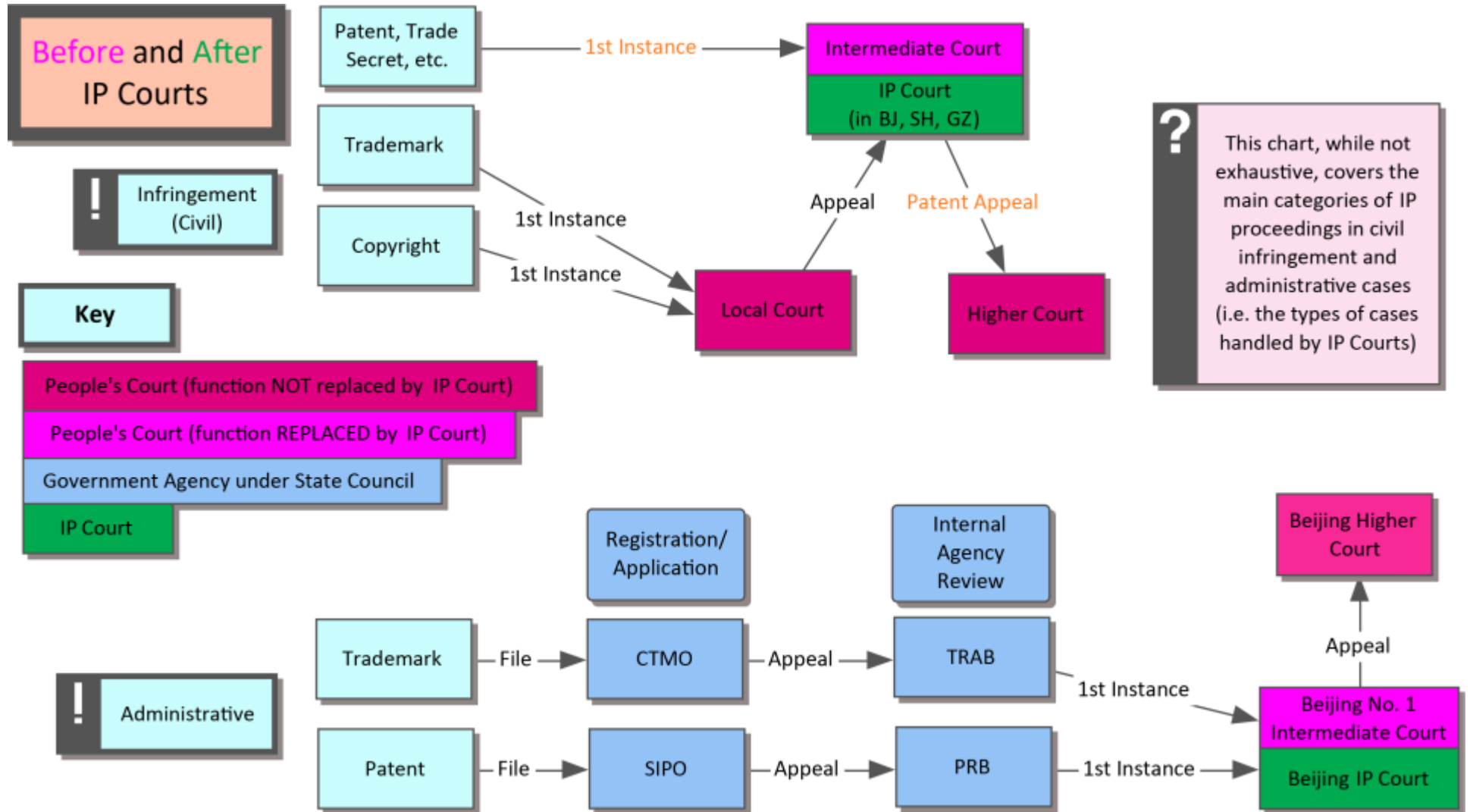
that precedential authority is seen not as a “given,” but rather as the “long-term accumulation” of authority, the product of the gradual formation of a sort of jurisprudential “inertia.” Third, litigation in the BJIPC will take advantage of the database and the other informatization initiatives. Fourth, the BJIPC will establish a system for the overruling of precedent by establishing standards that exercise “a considerable degree of caution” when deciding to overturn precedent. Overturning precedent must be based on a transformation of values over time, and must involve a “special regulatory mechanism.” Jiang and Yang suggest the submission of the precedent overturning decision to a higher court as one such mechanism, though it is not clear if this is their own commentary or part of the actual plan as outlined in the BCGM. The table below summarizes the goals of the BJIPC.

Table 3. Stated Goals of the BJIPC

Developing IP Theory
Informatization and Openness <ul style="list-style-type: none"><li>• Public Database</li><li>• Disclosure of Rulings</li><li>• Advanced Data and Search Tools</li></ul>
Standardization and Consistency <ul style="list-style-type: none"><li>• Expanded opinions</li><li>• Precedent-based reasoning drawing from all court levels</li><li>• Utilizing informatization and data tools</li><li>• System for determining when precedent should be upheld or overruled.</li></ul>



Figure 5: IP Litigation Before and After IP Courts



## The Reality

As of April 2017, the BJIPC has been in operation for nearly 2.5 years, and has tried thousands of cases, handling about 10% of China's IP total docket each year, including nearly all administrative IP cases.<sup>xcii</sup> The court currently has 44 judges with an average age of 40. All but 4 hold masters' degrees or higher. As has long been the tradition in the IP tribunals, the judges on the BJIPC represent the most qualified in the nation, and have a reputation among lawyers for being "tech savvy and plaintiff-friendly."<sup>xcii</sup>

Presumably, the court has been following the goals set forth by the SPC, NPC, and the 3<sup>rd</sup> and 4<sup>th</sup> Plenums of CCP, both in terms of improving China's protection of intellectual property and in providing a way forward for the ailing GCS. Of course, the ultimate question beyond whether or not the BJIPC is fulfilling its goals is whether the court's procedures are conducive to a greater level of fairness and economic efficiency than before. In order to arrive at this question, we must examine how exactly BJIPC judges are innovating with IP law and then scrutinize whether these changes are a positive development for both innovators (in relation to the protection of IP) and the rule of law in general (in relation to the GCS and the broader question of how to incorporate case law into China's legal decision-making process).

But, since any evaluation of the BJIPC's performance depends on the court's transparency and the quality of the data it releases, it is useful to begin by evaluating the BJIPC's commitment to informatization and openness, a central goal of the reforms. In general, the court's operation has been unusually transparent. Fulfilling its mission as a quasi-academic enterprise, it has hosted several seminars for academics and practitioners.<sup>xciii, xciv</sup> As promised, the court has publically released its rulings through a variety of databases—but it has yet to

establish its own. This makes accessing court data rather difficult. The SPC's China Court Monitor, which theoretically should include all court decisions in China, only had 2,801 BJIPC cases in its database from the year 2015, barely half of the total number of closed cases listed in the BJIPC's gazette, 5,432. Peking University's PKULaw, a "gold-standard" of databases for legal research in China, only has 1,159 records, a rate of one in five. While a new site dedicated to IP-specific rulings from the SPC's IPR division, China IPR judgments and Decisions, might at first appear to hold more promise, the site is technologically unreliable. While the website was reportedly functional at least through October 2016, from at least March of 2017, any searches on the site return HTTP code 404 errors (page not available). While the phenomenon of sensitive cases' omission from government databases in China is well documented, lapses of this size are much more likely the result of a lack of attention and resources than deliberate censorship.<sup>xcv</sup>

While official government databases are incomplete, the BJIPC and other intellectual property courts have partnered with the private company IPHouse to release opinions in a reasonably-complete fashion.<sup>xcvi</sup> IPHouse is, for the time being, willing to give academic researchers essentially indefinite "trial" subscriptions that allow full access to the site. IPHouse's database contains 5,022 judgments from the year 2015, a much-more reliable reporting rate of 94.25%. While there is no definitive way of knowing the content of the remaining 5.25% of cases, they have likely been removed from the record for their sensitivity. IPHouse's search functions are incredibly sophisticated, with 41 easy-to-use search filters spanning 6 tabs compared to China Court Monitor's 15 (Figure 6, *Infra*). While the data download and analysis tools pale in comparison with IPHouse's (free) US and EU counterparts,

court data from the three IP Courts and hundreds of tribunals are far easier to access than they are on any other commonly-used platform. Setting the curious step of privatization aside, the BJIPC seems to have mostly delivered on its informatization and openness goals, even if a small quantity of cases have most likely been censored.

Figure 6. Comparison of China Court Monitor and IPHouse Search Functions



The high level of completeness in the IPHouse database provides an accurate picture of how the BJIPC has actually innovated in judgment. In particular, while many of the court’s innovative procedures are specific to individual cases or bodies of IP law, at least six broad trends in innovative judgment emerge from the data, presented below roughly in order of least to most significant.

First, the drafting style of BJIPC opinions, especially in complex and highly technical cases, differs significantly from that of other courts. On average, BJIPC opinions are 40-50% shorter than the decisions of more traditional IP tribunals, despite the fact that the BJIPC jurisdiction specifically includes the most technical cases. Especially in the judgments of extremely technical patent cases, which tend to be the longest, BJIPC judges utilize a highly

specialized segmented drafting style that relies extensively on outline numbering for organization. In practice, this form of segmentation is similar to the US Judges' practices of organizing decisions by legal issue. For instance, in 2015 Case No. 3269, an administrative suit brought by AUO Optronics against the SIPO for the Patent Reexamination Board's (PRB's) denial of a patent application for a pixel array on creativity grounds, the BJIPC judge uses outline numbering to organize one of the court's most technical opinions. A similar style is used in one of the BJIPC's shortest decisions, 2015 Case No. 903, an administrative trademark case brought by Foshan Nanhai Yalan Royal Furniture against the SAIC for the Trademark Review and Adjudication Board's (TRAB) refusal to approve a trademark for the reason that it was too similar to an existing trademark. In this case, the BJIPC judge uses a numerical organization scheme to present an argument that moves seamlessly from facts to law to application, as well as to exhibit the cited trademarks within the text of the opinion. While these drafting changes may seem trivial, especially to western observers who may be used to similar styles, it means that BJIPC opinions are significantly easier to skim, read, and understand when compared to the more prolix and less consistently organized decisions of other courts. These changes decrease litigation costs and increase accessibility of court documents to businesses and the general public. While effective drafting is important, the claim that this is truly an innovation must be qualified by the fact that there is no indication that these changes are the result of court policy. Better drafting may simply be the result of a more experienced and professionalized panel of judges. Still, at the very least the changes and the relative brevity of opinions are a sign of the court's professionalism.

Second, BJIPC decisions explicitly reference the testimony and participation of independent technical investigators in technical cases. These investigators write technical examination opinions that inform the judges, who may not be proficient in technical matters. Previously, the experts on IP tribunals were internal court employees, were notorious for their lack of reliability, and were rarely referenced directly in opinions.<sup>xcvii</sup> As of November 2016, the BJIPC had hired over 39 technical investigators, all of whom are either academics or researchers, appointed by the court in cases of high technical complexity.<sup>xcviii, xcix</sup> The vast majority of technical investigators are part time, making their job reminiscent of the expert witness in the US system, with the important caveat that the technical investigator's remuneration is covered by court fees, rather than by the litigants directly. In addition, the technical investigators participate more broadly in the activities of the court, cross-pollinating the academic and judicial thinking of BJIPC jurists with their more technical and scientific perspectives.

Cases that include the participation of technical investigators explicitly mention their participation in the "trial process" section of the case. Judges then write technical opinions in direct consultation with the technical investigator and his or her report. For instance, in 2015 Case No. 73-2627, an administrative suit brought by inventor Shao Pengfei against the SIPO for the PRB's denial of a patent application for a noncorrosive water sterilization procedure on creativity grounds, the technical investigator Sun Bin, a researcher at BOE Technology Group, provided an independent evaluation of the organochemical procedure involved that ultimately vindicated the PRB's decision. In addition to the benefits of having expert technical consultation ready for a case, the court's utilization of the same technical investigators across multiple cases serves to increase judicial consistency. While the inclusion of expert testimony in cases isn't

completely new, the heightened independence of the BJIPC's technical investigators is a novel phenomenon in China's IP litigation.

Third, the BJIPC appears to be regularly soliciting opinions on cases from disinterested third parties, usually academic and research institutions, to assist the court in deciding cases that could have significant legal implications. On October 12, 2015, the BJIPC posted a public notice on its website and Weibo microblog announcing "Collection and Publication of Opinions Regarding Law Application on Issues Related to Article 19.4 of the Trademark Law."<sup>c</sup> At the time, the court was conducting hearings on 2015 Cases No.s 91, 97, and 98, all of which concerned the Shanghai Trademark and Patent Agency, a limited liability corporation, which filed administrative lawsuits against the Trademark Office of the SAIC for its denial of their trademark application. Article 19.4 of the PRC Trademark law states, "A trademark agency," a firm handling trademark applications on behalf of a client, "shall not apply for registration of trademarks other than the ones entrusted to it."<sup>ci</sup>

The issue at hand in the case is text versus intent. In its judgment, the BJIPC acknowledges that logically, legislators would have intended Article 19.4 to prevent agencies from "maliciously registering trademarks" on behalf of their clients "to seek profit," not to preclude them from registering trademarks for their own use. The text of the law, however, rather unambiguously prohibits trademark agencies from registering trademarks for their own use. Ultimately, the court determined that to establish the intent claim, the plaintiff must prove not simply that the legislators probably intended a given interpretation, but that that interpretation can be plausibly "read from the literal meaning of the interpretation." Because it could not, the court affirmed the SAIC's denial. Because the issue at hand was one of serious

legal importance, the court solicited and then directly cited and included (as appendices) the submitted legal opinions that it had received from five university IP law research centers from across China. This system of public opinion solicitation and incorporation, along the lines of amicus briefs in common law jurisdictions, is a revolutionary development in China's IP litigation environment.

Fourth, second-instance (appellate) judgments in the BJIPC acknowledge disagreements among the three-judge collegial panel that hears the cases. While article 43 of the Civil Litigation Law, provides that "differing opinions must be recorded accurately," the law also enshrines the principle of the minority's "subordination to the majority".<sup>cii</sup> In practice, dissenting opinions are not publicized, but recorded in a "secret file."<sup>ciii</sup> The inclusion of dissenting opinions within a published judgment at the BJIPC is a new development in China's court system. For example, in 2015 Case No. 1750, the three judges agreed that the lower court had erred on the first issue of determining whether the law of copyright applied in the case (the first issue presented), but disagreed 1-2 on whether the works in question, easily reproducible employee management rules, met the originality test required for copyright protection (the second issue presented). The final judgment presents both the majority and dissenting opinions, providing a richer examination of the issue that the customary unanimous opinion would. This move towards acknowledgement of judges' differences of legal opinion within written judgments has no antecedents in the modern Chinese legal system.

Fifth, the BJIPC is the only court in all of China whose adjudication committee has held open court in order to rule on important aspects of cases. The first such case, 2015 Case No. 177, was hailed as a "watershed moment" for both adjudication committee procedure and



administrative IP review review in China. Courts at all levels in China have adjudication committees, which are officially tasked with discussing difficult cases collecting judicial experience, and reviewing court affairs. In practice, committees are typically composed entirely of CCP members and handle “politically sensitive cases” in advance, handing down decisions that seem to “come from above.”<sup>civ</sup> The committees are infamous for their lack of transparency, and their minutes are generally classified as state secrets.

In Case No. 177, the adjudication committee of the BJIPC upended this reputation by holding an open court session to hear a particularly complex trademark adjudication case, issuing a landmark ruling that the 2014 Amendments to Article 1, Section 2 of the Administrative Litigation Law’s right to “review” gives citizens the legal authority to sue contesting the legality of government agencies’ normative documents (a type of non-legally binding document), and for courts’ authority to rule against government agencies in such cases and overturn illegal normative document.<sup>cv</sup> Such a breakthrough in administrative litigation would likely not have been possible without the adjudication committee’s special authority behind the decision.

After the court heard and decided case No. 177, the adjudication committee held a press conference to discuss the ruling with the media. BJIPC vice president Song Yushui announced the criteria adjudication committee involvement as twofold: (1) major and complex cases involving diplomacy, national security and social stability and (2) cases involving difficult and complicated questions of legal doctrine.<sup>cvi</sup> At the same press conference, BJIPC President Su Chi explained the purpose of the open hearing as a broader effort of increasing China’s “national competitiveness” by means of IPR protection, echoing the words of premier Li

Keqiang at Davos a few months earlier and reaffirming the connection of the BJIPC to broader push for economic liberalization and institutionalization.

Sixth and finally, the judgments of the BJIPC have made ample use of precedent in their legal decision-making. From the very beginning, BJIPC courts regularly cited precedent from other courts. 2014 Case No. 50 is one of the earliest examples; in this case, the BJIPC cited a prior Beijing High People's Court case that concerned the same issue: whether the potential "negative impact" of a trademark based around the Buddhist word "Zen" was a legitimate reason for the SAIC's TRAB's rejection of a proposed trademark containing it.

In 2016, the court's own "precedent base" was established, allowing direct citation tracking between decisions. From then until October 2016, the court cited 279 case precedents in 168 cases.<sup>cvii</sup> The 279 case precedents included 31 (11%) from the SPC, 132 from High Courts (47%), and the remaining 116 (42%) from various local courts (foreign cases have not yet been cited in BJIPC decisions). Litigants' arguments (as outlined in written decisions) cited cases 121 times while judges took their own initiative to cite cases on 47 occasions, while the decisions in 117 cases relied directly on precedent to reach their conclusions.<sup>cviii</sup> So far, no precedents have been overturned, but it remains to be seen whether or not the court has instituted a policy of binding precedent.

While the lack of a precise start date for the precedent database makes it impossible to calculate an exact citation rate for the BJIPC, a lower bound of 2.1% (168 cases citing precedent divided by 8,111, the total number of cases tried by the BJIPC in 2018) be established with the unrealistically conservative assumption that the only cases that cited precedent in 2016 were those that occurred between the establishment of the precedent database and October.<sup>cix</sup>

While the true rate is likely much higher (probably around 10%), even this small rate is orders of magnitude higher than that of the GCS. This is a strong indication that the BJIPC's open-ended system of precedent may have hit upon a workable and more organic alternative to the GCS.

While the BJIPC's judicial innovations not only provide a veritable menu of reform options for China's IP judicial system, but begin to answer the question of how fair the BJIPC's judgments are. The large-scale participation of technical investigators, for instance, suggests a more impartial process in technical cases than in other courts who lack this independent authority. The increased citation of precedent in decisions should theoretically increase consistency and decrease litigants' uncertainty, lowering costs for businesses and promoting economic growth. Of course, directly observing these effects from a "system in miniature" such as the BJIPC (which only handles 10% of China's total IP docket) is implausible, especially at such an early stage.

Where evaluating judgments is concerned, there are several metrics that can provide important indications of whether the BJIPC is doing enough to ensure the fair use and enforcement of IP rights. The first measure to look at in the BJIPC is the success rate of plaintiffs, especially foreign plaintiffs. The BJIPC in particular has critical importance to foreign holders of IP due to the fact that it has jurisdiction over 80% of the combined civil and administrative docket for cases involving foreigners.<sup>cx</sup> Furthermore, if the independence of the BJIPC leads to local protectionism for infringers (a concern that Chinese scholars raised before BJIPC data became available), we would expect to see this reflected in a low success rate of both domestic and especially foreign plaintiffs, with the rate of foreign plaintiff success relatively lower.<sup>cx</sup> Instead, the opposite was true. In 2015 (the most recent year that complete data is available)

plaintiffs in Civil IP infringement cases won 72.34% of their cases, while the success rate of foreign plaintiffs was 100% across a total of 63 civil cases, prompting foreign firms to reevaluate their prospects in China's civil IP litigation environment.<sup>cxii</sup> Admittedly, while the high success rate of foreign plaintiffs is an encouraging sign, such reevaluations were likely premature, since the volume of civil cases involving foreigners at the BJIPC was too low to draw any definitive conclusions about adjudication.

The BJIPC is most notable not for its impact on Civil IP litigation, but for its enormous authority over administrative cases. While results such as the willingness of the adjudication committee to expand administrative review of IP agencies are heartening in isolation, it is also important to look at data over the entire system. The key variables for fairness in administrative litigation at the BJIPC are (1) the rate that cases are withdrawn by the plaintiff ("withdrawal rate") and (2) the rate that cases are decided in favor of the plaintiff, resulting in a court-ordered revocation of a government agency's action ("revocation rate"). In an unfair system in which the government discourages administrative litigation, the withdrawal rate should be relatively high; indeed, a recent paper highlighted the withdrawal rate of administrative litigation cases across China (which varied from 30% to 57% from 1994, the year of the Administrative Litigation Law's passage, to 2010) as an indicator of the broader failure of administrative litigation in China (at least prior to the ALL revision).<sup>cxiii</sup> While the revocation rate will always be low (since IP administrative agencies are at least reasonably competent at following their statutory mandates of issuing and certifying IPRs), an extremely low revocation rate would suggest that courts are not giving fair play to administrative plaintiffs' claims. The

2015 data show a low withdrawal rate of 7% (240 cases), and a healthy revocation rate of 17% (539 cases).<sup>cxiv</sup>

These statistics, while encouraging, only tell a partial story of a court that has existed for just over two years. While the BJIPC has already introduced several judicial innovations, including a model for case law that appears to have broad applicability even outside of IP, the substantive impact of the court on China's IP litigation environment and innovation space remains to be seen. The next section describes the implications of the BJIPC and other intellectual property court reforms, discussing critical perspectives and ways forward for what is essentially still a pilot project.

### Section 3: Implications of the BJIPC Reforms

The BJIPC's innovations are significant primarily for two main reasons: (1) they have the potential to influence the development of IP law in China, and (2) they may impact rule of law development more broadly. While the BJIPC is admittedly a small-scale endeavor in terms of scope, lifespan, and real world impact, the project has serious implications for the future of China's rule of law, its status as a global innovation leader, and relations with other nations, especially the US and Europe. This section discusses the economic, legal, political, and international implications of the BJIPC reform, highlighting potential barriers to widespread adoption of the BJIPCs innovations alongside the benefits that incentivize taking advantage of them.

In economic terms, BJIPC efforts to increase standardization and consistency decrease commercial uncertainty and are therefore good for both foreign and domestic IPR holders—in

other words, the BJIPC reforms promote the rule of law. In 2013, the year before the establishment of the IP courts, only 47% of the respondents in the China Business Climate Survey (conducted by the American Chamber of Commerce in China [ACCC]) believed that China's IP protection had improved in the past five years.<sup>cxv</sup> In 2015, one year after the courts' establishment, the same number had risen 39 points to 86%. In particular, the BJIPC's willingness to award large compensation to IP plaintiffs and its clear and detailed legal opinions have begun to address the two primary substantive concerns of foreign IPR holders during the pre-2014 period.<sup>cxvi</sup>

While it is too soon to say definitively what effects the BJIPC's heightened protection of IP will have on China's innovation space, applying existing data and logic suggests that increased protection of IPRs combined with market liberalization will allow trade-promoting market expansion effects to dominate concentration effects of IPRs that tend to limit trade.<sup>cxvii</sup> This, in turn, may help innovation become a driver of GDP growth and bilateral trade, especially with the US and Europe, which have high concentrations of IPR holders in areas in which China's innovation lags behind.<sup>cxviii</sup>

The legal implications of the BJIPC reform become relatively clear after following the general trends of litigation in the court. Most prominently, the BJIPC as an institution seems to support the rule of law, at least in terms of its willingness to hold "the government and its officials and agents as well as individuals and private entities [...] accountable under the law."<sup>cxix</sup>

On the other hand, the nature of the BJIPC and other IP courts as a non-uniform system of justice raises the question whether the parallel nature of both specialized IP courts and traditional courts working simultaneously on IP, not to mention the continued failure of

administrative enforcement, constitutes an unfair legal system in IP *per se*.<sup>cx</sup> From another perspective, this objection claims that even if the IP court's work is excellent by any measure, China's IP system as a whole cannot be considered "fair" because of the discrepancies that exist between the IP courts and the other system. Furthermore, the specialization of IP courts can have serious negative consequences if it results in IP becoming a completely separate category of jurisprudence, making an already arcane area of law even more impenetrable.

While these criticisms certainly carry some weight, and are true in their most limited sense (that China's IP enforcement system as a whole is not particularly fair), they seem to ignore the fact that the BJIPC, SHIPC, and GZIPC are pilot projects. There is no indication that the project of IP courts aims to wall off IP jurisprudence from other areas of law. As they operate today, the IP courts are profoundly connected to the broader legal system, as the vast majority of the precedent that the BJIPC cites comes from ordinary, nonspecialized people's courts. The allegations of judicial isolationism in IP also seem ignorant of history: IP law has long served as a breeding ground for new legal procedures in China that can eventually be introduced to the legal system as a whole. Even if the IP courts were separate from the rest of the court system, this would be no reason to exempt them from consideration as rule of law institutions. If the BJIPC's structure allows it to hold both state and non-state actors accountable under the law, it may rightly be classified as a rule of law institution *regardless* of whether the entire system in which it is situated embodies the rule of law.

On the practical level, the BJIPC in its current form is likely not replicable across China, and expanding the system could face political barriers in the future. While its accomplishments have been lauded all over the country, with regional leaders calling for IP courts of their own,

the present work of the BJIPC depends heavily on its location in one of the largest and wealthiest cities in China, the atypically high level of education that its judges have received, and a great deal of judicial exchanges and foreign interaction, particularly with American and European lawyers who undoubtedly influenced the development of many of the BJIPCs innovations.<sup>cxxi</sup> Still, a great deal of the BJIPC's innovations, such as amicus brief solicitation and open hearings of the adjudication committee, are easily transferrable to other courts. Other innovations, such as case law, could be transferred to the national IP bench after more judicial education on the role and scope of case law within China's civil system.

While difficult, doing so could be extremely beneficial. The BJIPC's innovative and organic version of case law adds a layer of resilience to the court's potential to promote the rule of law in China. As BJIPC cases themselves become precedent, and perhaps are chosen as guiding cases,<sup>\*</sup> the resulting case law could bolster the court's powers of administrative review. If even some elements of the BJIPC's precedential authority mechanism follow the example of previous IP law innovations and are later incorporated into national law, this could lead to greater respect for the courts in the Chinese system as a whole.

The BJIPC's plaintiff-friendly environment raises another, political question: Why has the BJIPC been allowed to directly question and even repudiate the judgment of the CCP-led authoritarian government (vis-à-vis revoking the decisions of administrative agencies) in the first place? Because IP is an area of law that protects one of the most important and mobile types of business assets that is critically important to China's continued economic growth (and, by extension, the legitimacy of CCP rule), IPR rights holders are in a uniquely powerful

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<sup>\*</sup> Although the last batch of guiding cases focused on intellectual property, it contained no judgments from the BJIPC or any of the other IPCs.



bargaining position. In order to sustain growth, China *must* take advantage of its potential for innovation. But in order for IPRs to enrich the Chinese economy, rights holders must remain confident that their assets are secure; otherwise, intellectual production will falter as innovators and valuable IP flows out beyond China's borders. The economics of the PRC's innovation imperative likewise suggest an IP protection imperative. Insofar as China's leaders believe that the BJIPC's innovations represent an incremental step towards a more effective system of IP production, learning from its lessons and utilizing its innovations on a broader scale may not only be useful, but also necessary.

Because the BJIPC's revocations of administrative decisions serve to correct government agencies' failures in IPR protection, such rulings generally do not run contrary to the interests of China's authoritarian government. In fact, the revocations actually serve the CCP's more encompassing interest of boosting economic growth. Since rule of law in the IP sector does little to harm political interests, IP is an area in which the rewards for the authoritarian "tying his own hands"—economic prosperity, decreased uncertainty costs, and better international perceptions—are worse than the small loss in absolute power.<sup>cxxii</sup> The CCP has clearly signaled its intent to expand intellectual property courts in the SPC's most recent five-year plan, which unambiguously calls for "promoting the establishment of intellectual property courts."<sup>cxxiii</sup>

The BJIPC reforms also have several more immediate political benefits. Most obviously, the Court provides a model of Chinese law that has appeared to work well, or at least one that can be tinkered with experimentally until it produces a system that can be expanded nationally. As such, the BJIPC is a powerful propaganda tool against the "wild east" image, showing how China is both adopting western judicial tools (open and transparent hearings, amicus briefs,

outline-style drafting) into its own IP protection arsenal in addition to devising its own effective idiosyncrasies (sophisticated technical review, a new system of precedential authority). An example of robust judicial protection in IP also distracts somewhat from the persistently high levels of infringement in China, a problem that is far larger and more complex than the administration of IP law in the courts.

As the court with by far the largest share of foreign IP cases, the largest proportion of which (36%) are from America, followed by Germany (13%) and France (11%), the BJIPC also plays an important role in improving China's trade relations with the rest of the world. At the same time that China had to bend backwards to create an exception for the SAIC's (a frequent defendant at the BJIPC) politically-motivated approval of Trump's trademark, the BJIPC was showing the world how defending foreign IPR's in China can look like business as usual. As the 39-percentage point jump in China's IP reform among businesses surveyed by the ACCC between 2013 and 2015 shows, IP courts have been perceived as a major positive development not only in China, but overseas as well.

## Conclusion: Trump, Trade, and the BJIPC

The ascent of the PRC from a backward nation of communist peasants to a global superpower is arguably the single phenomenon that has most altered the world order that emerged from the aftermath of World War II. In recent years, China's transformation into an economic and military powerhouse has worried Americans who see China's rise as a signal of their own country's perceived decline as a unipolar power, as resulting from an illegitimate use and abuse of power, and posing a challenge to American ideals of global democracy and geopolitical fair play.

No event has underscored these beliefs more than the election of Donald Trump, who opened his campaign by saying, “We don't have victories anymore. We used to have victories, but we don't have them. When was the last time anybody saw us beating, let's say, China in a trade deal? I beat China all the time. All the time.”<sup>cxxiv</sup> President Xi responded resolutely to Trump’s sabre rattling with the simple assertion that cooperation with China is the new president’s “only choice.”<sup>cxxv</sup> Xi is right. As the two most powerful nations on the planet by far, the US and China exist in a state of competitive interdependence.

No issue presents this interdependence more starkly than international commerce. The US and China are each other’s largest trading partners, exchanging an estimated 659.4 Billion USD in goods and services in 2015.<sup>cxxvi</sup> The number grows each year. Exports to China alone support over 951,000 US jobs.<sup>cxxvii</sup> Yet trade also brings out US-China competitiveness. While US leaders initially hoped that China’s 2001 WTO accession fifteen years ago would help reign in some of these conflicts, problems clearly persist. Enormous barriers to market and investment access exist on both sides of the Pacific, anticompetitive subsidy and tariff patterns generate bilateral tensions, and threats of trade retaliation produce chilling effects on international trade flows.<sup>cxxviii</sup>

Trump’s ascent to power has underscored not only the conflict between US and China on IP law, but also points of cooperation. US media outlets widely reported China’s expedition of the long-delayed approval of Trump’s trademark applications as a means to “curry favor” with the new president, but neglected to mention how Trump’s claims were only made possible by revisions to the trademark laws.<sup>cxxix</sup> While the 24-hour news cycle lays bare the ability of the Communist Party of China (CCP) leaders to manipulate the law of the land to serve diplomatic

and political realities, it also misses a less-noticed but critically important fact. China's leaders have long been devising and enacting reforms, slowly and cautiously building a procedurally and substantively fair system of intellectual property law in China.

While the BJIPC is a particularly recent example of this phenomenon, China has made great strides forward in protecting IPRs, especially considering that just 37 years ago, China had essentially no system of IP protection. Today, China's legal architecture is fully compliant with international agreements on trade, even if consistent, effective enforcement remains elusive.

When it comes to dealing with a Trump administration intent on a trade showdown, the BJIPC will be a major asset to China for its role in assuring businesses that courts will be willing to respect and uphold their legitimate IP claims. The more American businesses believe that China's IP protection environment is improving, the more likely they will to oppose hostile trade policy that may put these positive developments in jeopardy. At the extreme, positive perception of the BJIPC's work may help China to avoid a repeat of the H.W. Bush- Clinton-era trade threats by convincing US IPR-controlling firms that China not only wants their business, but is willing to stand up and protect it.

However, the BJIPC also presents an opportunity for the US. The vast majority of its new policies, while "innovative" in the context of Chinese law, appear familiar to Americans as storied elements of the US's own legal system. Indeed, the BJIPC reforms are part of a long history of US influence in China's legal development. The BJIPC has reaffirmed that China is not only willing, but eager to learn from the example of American legal institutions, and serves as a powerful reminder that the US's legal reform work with China at the Strategic & Economic

Dialogue and other summits have had profound impacts on China's legal institutions, and that these impacts benefit US firms and citizens. While the Trump administration should continue to take China's IP infringement seriously, it must do so with an understanding that without transpacific cooperation, China's legal institutions and IP protection regime would certainly look worse than they do today. As much as the BJIPC reminds US foreign policy makers of the benefits of cooperating with China to build institutions of law, it must also show how much we have to lose from the breakdown of this cooperation.

The BJIPC is one piece in the puzzle of law, politics, economics, and international relations that surround China's intellectual property environment. While its model is not yet ready to be applied throughout China, the zeal of Chinese leaders in adapting and spreading the IP court model throughout their country means that anyone concerned with China's IP protection or rule of law development overlooks ongoing and future developments in the BJIPC at their own peril.

China's legal environment may be filled with contradictions, but the BJIPC shows that it is better for it. By carving out this enclave of effective, rationalized enforcement within a deeply troubled system of IPR protection, China has demonstrated its ability to move forward in IP protection. The BJIPC experiments have arrived at an opportune moment in history—within the greater context of economic liberalization, shifts away from labor force and capital investment as sources of growth, a rapidly growing innovation culture, and the looming specter of trade wars with the United States, the time for a better IPR regime is now.

While the BJIPC's footprint on the world is still very small, its willingness both to adapt judicial practices from abroad and create new ones to suit the purpose of more consistent and

fair decision-making makes it a vanguard of legal development in China to be closely scrutinized. As the BJIPC continues to develop, innovations from this enclave of enforcement may find their way into courtrooms across the country, and perhaps inspire new laws. China's fledgling intellectual property courts will grow and multiply, profoundly impacting not only China's mechanisms and institutions of IP protection, but potentially the legal architecture of the state itself. In this way, the BJIPC represents a step towards an era of more sustainable growth, efficient governance, and the rule of law for China.

## Table of Abbreviations

ACCC	American Chamber of Commerce in China
ALL	Administrative Litigation Law
BCGM	Beijing IP Court Case Guidance Work Trial Measures (Draft)
BJIPC	Beijing Intellectual Property Court
CCP	Communist Party of China
CLL	Civil Litigation Law
CTMO	China Trademark Office, SAIC
EU	European Union
FDI	Foreign Direct Investment
GAQSIQ	General Administration of Quality Supervision, Inspection and Quarantine
GATT	General Agreement on Tariffs and Trade
GAC	General Administration of Customs
GCS	Guiding Cases System
GDP	Gross Domestic Product
GZIPC	Guangzhou Intellectual Property Court
IP	Intellectual Property
IPC	Intellectual Property Court
IPR	Intellectual Property Right
IPT	Intellectual Property Tribunal
MFN	Most Favored Nation

MPS	Ministry of Public Security
NCA	National Copyright Administration of China
NIPS	National Intellectual Property Strategy
NPC	National People's Congress
NPCSC	National People's Congress Standing Committee
PRB	Patent Reexamination Board, SIPO
PRC	People's Republic of China
PSB	Public Security Bureau, MPS
R&D	Research and Development
ROU	Reform and Opening Up
SAIC	State Administration for Industry and Commerce
SHIPC	Shanghai Intellectual Property Court
SIPO	State Intellectual Property Office
SPC	Supreme People's Court
TRAB	Trademark Review and Adjudication Board, SAIC
TRIPS	WTO Agreement on Trade-Related Aspects of Intellectual Property
UCEB	Anti-Unfair Competition Enforcement Bureau, SAIC
US	United States of America
WTO	World Trade Organization



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