

# Washington University Global Studies Law Review

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Volume 2

Issue 1 *Festschrift in Honor of Professor William C. Jones*

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January 2003

## Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices

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### Recommended Citation

Pitman B. Potter, *Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices*, 2 WASH. U. GLOBAL STUD. L. REV. 119 (2003), [https://openscholarship.wustl.edu/law\\_globalstudies/vol2/iss1/5](https://openscholarship.wustl.edu/law_globalstudies/vol2/iss1/5)

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# GLOBALIZATION AND ECONOMIC REGULATION IN CHINA: SELECTIVE ADAPTATION OF GLOBALIZED NORMS AND PRACTICES<sup>1</sup>

PITMAN B. POTTER\*

Since the Third Plenum of the Eleventh Communist Party of China (CPC) Central Committee in late 1978, China has pursued a policy of expanded participation in the world political economy. This has been reaffirmed most recently with China's accession to the WTO. This process has resulted in increased interaction between regulatory norms and practices long-accepted as integral features of People's Republic of China (PRC) rule, and foreign norms often associated with globalization that embody significantly different assumptions and expectations. The recent record of China's "open door" policy has included ongoing tensions between local and international norms and practices of economic regulation. The extent to which globalized norms of economic regulation can influence practices in China will depend on the dynamic of selective adaptation. Selective adaptation describes a process by which foreign ideas are received and assimilated into local conditions.<sup>2</sup> This paper will examine changing norms and practices of economic regulation in China by reference to the dynamic of selective adaptation of norms of globalization.

## I. SELECTIVE ADAPTATION

In the context of a globalizing world in which proponents of liberal norms of institutional behavior are particularly powerful, Asia-Pacific states and

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1. This Article is based on a paper presented to the conference on *Globalization and China's Reforms*, held at Fudan University, Shanghai (May 21-24, 2002). Some portions are adapted from PITMAN B. POTTER, *THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE* (2001).

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2. See generally PITMAN B. POTTER, *THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE* (2001). Cf. David Kennedy, *Receiving the International*, 10 *CONN. J. INT'L L.* 1 (1994) (for discussion of various concerns about internationalization).

societies engage in selective adaptation as a coping strategy for balancing local regulatory imperatives with requirements of compliance with foreign norms largely derived from the regimes of liberal democratic capitalism. Whether in the realm of compliance with International Monetary Fund (IMF) funding requirements,<sup>3</sup> U.S. nuclear security mandates,<sup>4</sup> or U.N. human rights requirements,<sup>5</sup> local governments attempt to preserve their policy priorities even while acceding, where necessary, to foreign regulatory norms (generally expressed through rules, structures, processes, and practices).<sup>6</sup> This involves a complex process of selectively adapting foreign norms to local needs. In contrast to ideologies of convergence, suggesting development toward a unified system of institutional practices,<sup>7</sup> selective adaptation is a useful perspective for examining interplay of difference and conformity in the interaction between the global and the local.

Whereas the element of adaptation depends largely on power relations that dictate what of the foreign must be borrowed and what of the local may be retained, the element of selectivity includes elements of perception, complementarity, and legitimacy. Perception determines understanding (and misunderstanding) about foreign and local regulatory norms and their origins and implications.<sup>8</sup> Thus, perceptions about the purpose, content, and effect of foreign and local regulatory norms may determine the focus and parameters for selection and adaptation. Complementarity describes a circumstance by which apparently contradictory priorities are combined for new effect, while still preserving essential characteristics of each component.<sup>9</sup> In the context of economic regulation, the effectiveness of selective adaptation may depend on the capacity to combine local and foreign regulatory norms in ways that

3. See generally Timothy Lane & Steven Phillips, *Moral Hazard: Does IMF Financing Encourage Imprudence by Borrowers and Lenders*, 28 ECON. ISSUES (Mar. 2002), at <http://www.imf.org/external/pubs/ft/issues/issues28/index.htm>.

4. See generally Nicholas Eberstadt, *Korea*, in STRATEGIC ASIA: POWER AND PURPOSE 2001-2002 129-72 (Richard J. Ellings & Aaron L. Friedberg eds., 2002).

5. See generally ANNE KENT, CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE (1999).

6. For discussion of social norms, see generally, Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 LAW & SOC'Y REV. 157 (2000). As regulatory agencies and communities constitute types of societies, approaches to social norms would seem appropriate for examining regulatory norms.

7. See UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* (1997) (see especially ch. 5 and p. 126).

8. ROBERTO UNGER, *KNOWLEDGE AND POLITICS* (1975); see also Etzioni, *supra* note 6.

9. This approach to complementarity owes a significant debt to the work of nuclear physicist Niels Bohr. See NIELS H.D. BOHR, *ESSAYS, 1958-1962, ON ATOMIC PHYSICS AND HUMAN KNOWLEDGE* (1963); RICHARD RHODES, *THE MAKING OF THE ATOMIC BOMB* 13 (1986). In the context of cross-cultural and social sciences, see Ofira Seliktar, *Identifying a Society's Belief System*, in *POLITICAL PSYCHOLOGY* (Margaret Herman ed., 1986).

address globally derived challenges while remaining true to established local values. Legitimacy reflects the extent to which members of local communities support the purposes and consequences of selective adaptation.<sup>10</sup> While the forms and requirements of legitimacy may vary with time, space, and context, the effectiveness of selectively adapted regulatory norms depends to an important degree on legitimacy of the content and process of selection.

The dynamic of selective adaptation is particularly useful as a perspective from which to examine the Chinese government's efforts to reconcile global norms with local imperatives in the field of economic regulation. Selective adaptation offers insights to the process by which China has attempted to join on its own terms the international political economy, so as to balance international norms of economic regulation with local concerns over social welfare and balanced development. While unable for political and economic reasons to reject openly the norms, institutions, and processes of globalization, many Chinese government leaders and policy makers remain apprehensive about the socio-economic costs of close interconnection with the global market.<sup>11</sup> Yet China's relative size and importance allow it some capacity to limit the imposition of foreign regulatory norms. Selective adaptation allows compliance with international norms to remain contextualized to local conditions and the pursuit of closely-held domestic imperatives.

## II. GLOBALIZATION AND NORMS OF ECONOMIC REGULATION—THE CHALLENGE OF TRANSPARENCY AND TRADE ADMINISTRATION

Globalization has been used generally to describe a historical phenomenon of cultural and institutional change.<sup>12</sup> In the context of economic regulation, globalization is associated with the spread of regulatory norms of transparency and the rule of law.<sup>13</sup> Globalization of law-based

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10. MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich eds. 1978); STEPHEN P. TURNER & REGIS A. FACTOR, *MAX WEBER: THE LAWYER AS SOCIAL THINKER* (1994); RICHARD W. WILSON, *COMPLIANCE IDEOLOGIES: RETHINKING POLITICAL CULTURE* (1992); Nikolas Rose, *Governing Liberty*, in *GOVERNING MODERN SOCIETIES* 141 (Richard V. Ericson & Nico Stehr eds., 2000); F. Scharpf, *Legitimation and Democratic Legitimation*, in *DISAFFECTED DEMOCRACIES: WHAT'S TROUBLING THE TRILATERAL COUNTRIES*, (Susan J. Pharr & Robert D. Putman eds., 2000).

11. See POTTER, *supra* note 1, at 125.

12. See generally *THE CULTURES OF GLOBALIZATION* (Fedric Jameson & Masao Miyoshi eds., 1998); *THE GLOBALIZATION READER* (F.J. Lechner & J. Boli eds., 2000); FARHANG RAJAEI, *GLOBALIZATION ON TRIAL: THE HUMAN CONDITION AND THE INFORMATION CIVILIZATION* (2000); JOHN TOMLINSON, *GLOBALIZATION AND CULTURE* (1999).

13. See generally *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995* (Katharina Pistor & Philip A. Wellons eds., 1999); *LAW, CAPITALISM AND*

regulatory systems associated with the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) has been proposed as an antidote to “crony capitalism” and other perceived ills in the economies of East and Southeast Asia.<sup>14</sup>

As applied to economic regulation, norms of globalization give particular weight to issues of transparency and the rule of law. Article X(1) of the GATT requires publication of trade regulations, while Article X(2) requires publication of general measures affecting an advance in import duties, restrictions, or payments before enforcement.<sup>15</sup> In addition to imposing state obligations to disseminate the content of rules, these provisions may also permit the subjects of regulation opportunities to consult with government authorities to learn about laws and practices.<sup>16</sup> Article X(3) requires states to administer trade laws and regulations in a uniform, impartial, and reasonable manner, and to establish independent judicial, arbitral, or administrative tribunals or procedures for prompt review and correction of administrative action that fails to conform to these criteria. The transparency and enforcement provisions of the GATT Article X provide the framework for implementing the substantive norms of the WTO. For in the absence of transparency about the content and application of trade regulations, trading partners and their business constituencies cannot know whether or not the central the GATT principles of trade liberalization are being granted or denied. The substantive and operational norms complement each other and set the tone for the GATT’s regulatory culture.

The lengthy process of China’s accession to the WTO revealed the extent of concern among WTO members that regulatory norms and practices in China were inconsistent with the GATT/WTO requirements. The WTO Working Party’s Final Report on the Accession of China, tabled at the Fourth Session of the WTO Ministerial Conference in Doha November 2001 revealed the extent of this concern.<sup>17</sup> Building on a record of work running

POWER IN ASIA (Kanishka Jayasuriya ed., 1999); ANTHONY WOODIWISS, GLOBALIZATION, HUMAN RIGHTS AND LABOUR LAW IN PACIFIC ASIA (1998); DONALD BARRY & RONALD C. KEITH, REGIONALISM, MULTILATERALISM AND THE POLITICS OF GLOBAL TRADE (1999).

14. See generally THE ASIAN FINANCIAL CRISIS AND THE ARCHITECTURE OF GLOBAL FINANCE (G.W. Noble & J. Ravenhill eds., 2000); TOWARDS RECOVERY IN PACIFIC ASIA (George Segal & David S.G. Goodman eds., 2000). For discussion of the applicability of liberal models of financial regulation to developing economies, see STEPHAN HAGGARD & CHUNG H. LEE, FINANCIAL SYSTEMS AND ECONOMIC POLICY IN DEVELOPING COUNTRIES (1995) and THE POLITICS OF FINANCE IN DEVELOPING COUNTRIES (Stephen Haggard et al. eds., 1993).

15. For text see THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE AGREEMENTS 424 (World Trade Organization ed., 1999).

16. See JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 463 (1969).

17. World Trade Organization Ministerial Conference, *Report of the Working Party on the Accession of China*, WT/MIN(01)/3, Nov. 10, 2001, available at <http://www.wto.org/english/the>

from March 4, 1987, when the Working Party was established, through the establishment of the WTO in 1995, and culminating in its 2001 Final Report, the Working Party attempted to identify, understand, and resolve numerous apparent conflicts and inconsistencies between Chinese trade policy and regulatory practice and the GATT/WTO standards.<sup>18</sup>

Building on a draft protocol completed in 1997, the final Protocol on the Accession of the People's Republic of China<sup>19</sup> confirmed the PRC's commitment to abide by the GATT/WTO standards on such matters as national treatment, non-discrimination, transparency, and uniform administration. In the area of transparency in particular, China committed itself to make available to WTO members, on request, all laws, regulations, and other measures pertaining to or affecting trade in goods, services, trade-related intellectual property, or the control of foreign exchange before such measures are implemented or enforced. The Protocol also provided that only those laws, regulations, and other measures that are published and readily available to other WTO members, individuals, and enterprises shall be enforced. A limited emergency exception was granted permitting China to make such measures available at the latest when they are enforced or implemented. The Protocol also required China to establish an official journal dedicated to the publication of all laws, regulations, and other measures pertaining to or affecting trade in goods, services, trade-related intellectual property or the control of foreign exchange. The WTO also required the government to provide a reasonable period for comment to the appropriate authorities before such measures are implemented. Limited exceptions were granted for national security, specific exchange rates and monetary policy, and situations when publication would impede enforcement.

The final Protocol also required China to apply and administer in a uniform, impartial, and reasonable manner its laws, regulations, and other measures of the central government; as well as local regulations, rules, and other measures issued or applied at the sub-national level pertaining to or affecting trade in goods, services, trade related aspects of intellectual property rights, and foreign exchange. China's local regulations, rules, and other measures must conform to China's obligations undertaken in the final Protocol of Accession. The Protocol required that China establish a

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wto\_e/acc\_e/completeacc\_e.htm.

18. See generally Richard Elgin, Challenges and Implications of China Joining the WTO (June 19, 2000) (unpublished manuscript on file with the author).

19. World Trade Organization, *Accession of the People's Republic of China*, WT/L/432, Nov. 23, 2001, available at [http://www.wto.org/english/thewto\\_e/acc\\_e/completeacc\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm).

mechanism under which individuals and enterprises can bring complaints of non-uniform application of the trade regime to the attention of the national authorities.

While China's accession to the WTO is often portrayed as a matter of economics and commerce, it is at root a fundamental challenge of politics and governance. The GATT/WTO principles of transparency derive broadly from liberal principles of government accountability. Proceeding from tenets about human equality and natural law, the liberal tradition of political ideology asserts that government is essentially an agency of popular will.<sup>20</sup> Such agency requires accountability from political leaders through democratic elections, and from administrative agencies through norms of transparency and the rule of law. Responsible agency is thus a typology by which regulators and their political superiors are accountable to the subjects of regulation, and as a result are expected to exercise regulatory authority broadly in accordance with norms of transparency and the rule of law. The accountability of political and administrative agents may be described in terms of their responsibility *to society*.

Norms of responsible agency associated with globalization constitute a belief system driven by changing historical conditions of socio-economic and political relations in Europe and North America. The capacity of the liberal industrial economies to promote their preferred regulatory norms as an essential element of globalization derives as much from political and economic power as from the inherent wisdom of the ideas themselves.<sup>21</sup> The essentially one-way direction by which these norms are disseminated around the world reflects imbalances in political and economic power between developed and developing economies, that characterize the current dynamic of globalization. In the case of China, however, the effects of globalized regulatory norms are confronted by powerful forces of local culture.

The norms that inform China's regulatory culture may be described in terms of patrimonial sovereignty. Drawing on traditional norms of Confucian patrimonialism combined with ideals of revolutionary leadership associated with Marxism-Leninism and Maoism, regulatory culture in China tends to emphasize a dynamic by which governance is pursued by a sovereign

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20. See generally ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY* 112 (1989); Agnes Heller, *On Formal Democracy, in CIVIL SOCIETY AND THE STATE: NEW EUROPEAN PERSPECTIVES* 129 (John Keane ed., 1988). For comparative context, see CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* 126 (1977).

21. R. Harrison Wagner, *Economic Interdependence, Bargaining Power and Political Influence*, 42 INT'L ORG. 461 (1988).

political authority that remains largely immune to challenge.<sup>22</sup> During the first thirty years of Communist rule, regulatory norms served nearly exclusively as instruments of the Party-state's policies of control. Notions of accountability were marginalized. By the turn of the century, even after twenty years of legal reform, the supremacy for the Party-state remains a salient feature in the regulatory process. Whether the policy aim is military re-strengthening, economic growth, or social welfare, accountability remains tied to results rather than process, and in the end is enforced primarily through government campaign rather than societal initiative. Patrimonial sovereignty is thus a typology by which regulators are accountable only to their bureaucratic and political superiors, and as a result have few obligations to heed the subjects of rule in the process or substance of regulation. Under the dynamic of patrimonial sovereignty, political leaders and administrative agencies have responsibility *for* society but are not responsible to it.

These competing visions of regulatory culture inform China's efforts to comply with the transparency and rule of law requirements of the GATT and the WTO. The government has begun a wide-ranging campaign to revise existing legislation and administrative regulations in most economic sectors, including customs, foreign exchange, taxation, intellectual property, enterprise law, bankruptcy, pricing, and other areas.<sup>23</sup> Whether these reforms will match the expectations of WTO members and their respective business communities remains to be seen. Nonetheless, in the context of tensions between regulatory cultures of patrimonial sovereignty and responsible agency, China's regulatory reform project may usefully be examined by reference to the dynamic of selective adaptation.

### III. CHANGING NORMS AND PRACTICES OF ECONOMIC REGULATION IN CHINA

The effects of globalization on norms and practices of economic regulation in China may be identified by reference to issues of property reform, administrative law reform, and corporate governance, where conditions of perception, complementarity, and legitimacy affect the

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22. See generally KENNETH LIEBERTHAL, GOVERNING CHINA (1995); KENNETH LIEBERTHAL & MICHEL OKSENBERG, POLICY-MAKING IN CHINA: LEADERS STRUCTURES AND PROCESSES (1988); INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, PROGRESS IN CHINA'S HUMAN RIGHTS CAUSE, at <http://www.chinaguide.org/e-white/index.htm> (Apr. 9, 2001); CONFUCIANISM AND HUMAN RIGHTS (W. Theodore de Bary & Tu Weiming eds., 1998). On regulatory and legal norms, see Pitman B. Potter, *The Chinese Legal System: Continuing Commitment to the Primacy of State Power*, 159 CHINA Q. 673 (1999).

23. See Potter, *supra* note 1.



dynamic of selective adaptation. In property law, the predominance of public property regimes reflects a legacy of Marxism-Leninism, and embodies perceptions about public interest and governmental responsibility. Reforms in China's property system reflect efforts to find complementarity between the legacy of public property and the private property ideals that dominate the international system. In light of the Chinese regime's claim to an ideological mantle of socialism, property reform also poses a significant question of legitimacy.

Administrative law reform reflects more directly the tensions between patrimonial sovereignty to responsible agency in norms of regulation. Notions of judicial review of administrative action, administrative supervision, and compensation for administrative errors, reflect increased attention to accountability, but also suggest efforts by the government to control lower level administrators. Despite possible conflicts of purpose, administrative law reform offers an important glimpse into the Chinese government's efforts to manage the process of reform.

Corporate governance reflects the influences of reforms in China's private property and administrative law regimes. In the context of state-owned enterprises particularly, reform embodies issues of perception regarding the relative social utility of public and private property interests in business entities, as well as issues of complementarity and legitimacy between public and private ownership. Regulation of corporate governance also reflects issues of perception regarding national interest, development, and dependence; issues of complementarity between pre-existing regulatory priorities of protectionism and local development and WTO-mandated norms of national treatment; and issues of legitimacy in the content and outcomes of WTO compliance.

### *A. Property*

Property rights in China are influenced by a legal culture that, broadly speaking, emphasizes collective and state interests over individual identity. In traditional China, economic activity was built generally on collective relationships of patronage and clan, rather than individual ownership.<sup>24</sup> More recently, the socialist ideology of Maoism repudiated explicitly the notion of private property rights and installed the Party-state as the guardian of public

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24. See, e.g., Tu Weiming, *A Confucian Perspective on the Rise of Industrial East Asia*, in *CONFUCIANISM AND THE MODERNIZATION OF CHINA* (Silke Kreigher & Rolf Trausettel eds., 1991). See also HILL GATES, *CHINA'S MOTOR: A THOUSAND YEARS OF PETTY CAPITALISM* (1996) (see chapter 2 for a discussion of "the Tributary and Petty-Capitalist Mode of Production.").

welfare.<sup>25</sup> The early post-Mao period saw a gradual introduction of imported notions of private autonomy in the acquisition and management of property, but subject always to the overarching political imperative of collective and public interests.<sup>26</sup>

The recent development of property rights discourse bears the imprint of the Western liberal tradition.<sup>27</sup> Indeed, under the rubric of property rights internationalization, Chinese jurists have called for greater reference to foreign law from Japan and Europe, and Anglo-North American tradition as precedents for property rights reforms in China.<sup>28</sup> Chinese civil law notions of property behavior (*wuquan xingwei*) have been influenced in particular by German law (either directly or in the forms adopted in Japan and Taiwan).<sup>29</sup> Taiwanese law scholars such as Wang Zejian, have been particularly influential in the transmission of German civil law concepts to China.<sup>30</sup> However, in the absence of relatively autonomous norms and effective institutions to restrain state action, China's adoption of the liberal private property rights regime remains incomplete.

25. See, e.g., R. BIN WONG, CHINA TRANSFORMED: HISTORICAL CHANGE AND THE LIMITS OF EUROPEAN EXPERIENCE (1997) (see chapter 8 for a discussion of the changes in Chinese states after 1949).

26. See generally Qian Mingxing, *Woguo Minshi Fazhi Sishi Nian de Bianqian* [Changes in Forty Years of Our Civil Law System], ZHONGWAI FAXUE [CHINESE AND FOREIGN LAW], no. 5, 1 (1989).

27. See generally PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA (Jean C. Oi & Andrew G. Walder eds., 1999).

28. See, e.g., Qian Mingxing, *Lun Woguo Wuquanfa de Jiben Yuanze* [On the Basic Principles of Our Civil Law], BEIJING DAXUE XUEBAO [PEKING U. J.], no. 1, 29 (1998); Zheng Chengsi, *Minfadian Zhong de Jige Gainian Xianyi* [Various Basic Ideas in the Civil Code], MINSHANG FAXUE [CIVIL AND COMMERCIAL LAW], no. 7, 14 (1998); Yu Nengwu & Wang Shenyi, *Lun Wuquan Fa de Xiandaihua Fazhan Qushi* [The Development of Modern Property Law], ZHONGGUO FAXUE [CHINESE JURISPRUDENCE], no. 1, 72 (1998); Zheng Ruikun, *Lun Woguo de Wuquan Lifu* [Legislation of Our Country's Property Rights], FAXUE [JURISPRUDENCE], no. 3, 16, 18-19 (1998); Guo Mingrui, *Guanyu Woguo Wuquan Lifu de San Dian Sikao* [Three Perspectives on Our Country's Property Legislation], ZHONGGUO FAXUE [CHINESE JURISPRUDENCE], no. 2, 21 (1998).

29. See, e.g., LIANG HUIXING, ZHONGGUO WUQUANFA CAOAN JIANYI GAO [OUTLINE OF OPINION ON A DRAFT CHINESE PROPERTY LAW] (2000); Sun Xianzhi, *Wuquan Xingwei Lilun Tan Yuan Yiqi Yiyi* [Exploring the Origins and Significance of Theories of Property Behavior], FAXUE YANJIU [STUDIES IN LAW], no. 3, 80 (1996); Wang Liming, *Wuquan Xingwei Ruogan Wenti Tantaoyan* [Inquiry on Several Issues of Property Rights Behavior], ZHONGGUO FAXUE [CHINESE JURISPRUDENCE], no. 1, 58 (1997). See also Edward J. Epstein, *The Theoretical System of Property Rights in China's General Principles of Civil Law: Theoretical Controversy In the Drafting Process and Beyond*, 52 LAW & CONTEMP. PROBS. 179 (Spring 1989).

30. See, e.g., Qian Mingxing, WUQUANFA DE YUANZE [PRINCIPLES OF PROPERTY LAW] (1994); Ji Yibao, *Lun Wuquan Gongshi de Xingzhi he Zhidu Jiazhi* [On the Character and Systemic Value of Property Public Notice] ZHONG WAI FAXUE [CHINESE AND FOREIGN JURISPRUDENCE], no. 3, 47 (1997). See also Wang Liming, *supra* note 29.

### 1. *Property Relations and Economic Reform*

The economic reform policies begun in 1978 raised the prospect of greater managerial autonomy in state-owned enterprises and increased diversity of economic actors and transactions.<sup>31</sup> However, during the post-Mao period of economic reform, the state remained a key player in property relations—state property rights remained dominant albeit purportedly in the service of social interests.<sup>32</sup> The 1982 Constitution extended protection to property, but only to the extent that it is “lawful property,” the definition of which remains the exclusive province of the state.<sup>33</sup> Constitutional requirements that the exercise of citizens’ rights, including the right to own property, must not conflict with state or social interest effectively grant the state a monopoly on interpreting that interest and on determining the extent to which private property rights that might possibly conflict with it will be recognized and enforced.<sup>34</sup>

The General Principles of Civil Law (GPCL) (1986) codified broad principles of property rights, albeit subject to provisions that these not conflict with state policies and public and social interests.<sup>35</sup> The GPCL reflected CPC policies that, while attempting to limit the intrusion of the state into social and economic relationships, still assert basic principles of state control. Thus, the GPCL emphasized notions of party equality; voluntariness; and the protection of citizens’ lawful rights and interests (thus diminishing the arbitrary authority of state organs and officials to intrude upon civil law relations in property), but also recognized the fundamental principle of socialist legal order and the still-central role of state planning.<sup>36</sup>

Despite the changes brought on by economic reform, and despite the formal equality among legal actors provided by civil law,<sup>37</sup> the State’s

31. See generally He Guanghui, *Continue to Deepen Reform by Centering on Economic Improvement and Rectification*, ZHONGGUO JINGJI TIZHI GAIGE [REFORM OF THE CHINESE ECONOMIC STRUCTURE], 1990, no. 2, in FBIS DAILY REP.: CHINA, Mar. 23, 1990, at 21.

32. See Wang Liming, *Guojia Suoyouquan de Falu Tezheng Yanjiu* [Research on the Legal Features of State Property Rights], FALU KEXUE [LEGAL SCIENCE], no. 6, 29 (1990); Jiang Shan, *Shilun Wuguang He Woguo de Wuquan Zhidu Tixi* [Tentative Theory on Property Rights and Our Country’s Property Rights System], FAXUE YANJIU [STUDIES IN LAW], no. 5, 70 (1988).

33. Zhonghua Renmin Gongheguo Xianfa, [Constitution of the People’s Republic of China], art. 13 (1982) [hereinafter XIANFA].

34. XIANFA, art. 51 (1982).

35. Zhonghua Renmin Gongheguo Minfa Tongze [General Principles of Civil Law of the People’s Republic of China], art. 6 (1986) [hereinafter General Principles of Civil Law of the PRC].

36. See, e.g., Liang Huixing, *Wo Guo Min Fa de Jiben Yuanze* [Basic Principles of Our Civil Law], ZHONGGUO FAXUE [CHINESE JURISPRUDENCE], no. 3, 3 (1987).

37. See, e.g., Meng Qinguo, *Jingji Tizhi Gaige Shiqi de Minshi Lifa* [Civil Legislation in the Time of Economic Structural Reform], ZHONGGUO SHEHUI KEXUE [CHINESE SOCIAL SCIENCES], no. 6,

responsibility to harmonize different economic and social interests remained. Judicial decisions in property cases during the mid-1980s, relied heavily on interpretations of the GPCL (1986) that enshrined the centrality of state interests.<sup>38</sup> Decisions on such matters as unjust enrichment (*budang deli*) cited with favor GPCL provisions emphasizing the importance of state and collective property.<sup>39</sup> The policy implications about the diminution of class struggle, stemming from the Thirteenth CPC Congress (October 1987) consensus on China in the early stage of socialism, supported broader social and economic autonomy and stronger protection for civil-law based property rights.<sup>40</sup> As the exploitative possibilities of property relations received less concern, limited efforts were made to recognize subsequently rights of privately operated enterprises<sup>41</sup> and individuals.<sup>42</sup>

Throughout the 1980s and early 1990s, law and regulation on property matters focused mainly on state-owned property and the extent of autonomy granted to managers of (generally state-owned) enterprises. The GPCL recognized the rights of enterprise managers to administer enterprise property.<sup>43</sup> These provisions were expanded in the Law on Industrial Enterprises Owned by the Whole People (1988), otherwise referred to as the "State-Owned Enterprise Law."<sup>44</sup> The rights of enterprise managers were grounded in the policies of the socialist commodity economy and the rights

77 (1988).

38. See Yang Lixin, RENMIN FAYUAN ANLI LEIBIAN PINGXI: MINSHI SHENPAN ZHUAN [CRITICAL ANALYSIS OF TYPES OF PEOPLE'S COURT CASES: VOLUME ON CIVIL JUDGMENTS] 19, 168 (1998).

39. See CHUI XIUMING ET AL., RENMIN FAYUAN YINAN PANLI PINGXI: MINSHI ZHUAN [CRITICAL ANALYSIS OF DIFFICULT DECISIONS BY THE PEOPLE'S COURTS; CIVIL VOLUME] 45 (1999).

40. See Zhao Ziyang, *Advance Along the Road to Socialism With Chinese Characteristics*, in DOCUMENTS OF THE THIRTEENTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA 39 (1987). For discussion of the implications for civil law, see Yang Chenshan, SHEHUI ZHUYI CHU JIEDUAN LILUN YU WO GUO DE MINFA XUE [THE THEORY OF THE PRIMARY STAGE OF SOCIALISM AND THE STUDY OF OUR CIVIL LAW], ZHONGGUO FAXUE [CHINESE JURISPRUDENCE], no. 5, 3 (1988).

41. See Shi Zhuhua, *Siying Qiye Lifa de Lilun Yiju he Jiben Yuanze* [Theoretical Basis and Basic Principles of Private Enterprise Law], ZHENGZHI YU FALU [POLITICS AND LAW], no. 4, 35 (1998); Li Peizhuan, *Tan Woguo Siying Qiye Lifa Wenti* [On Issues of Our Private Enterprise Legislation], ZHONGGUO FAXUE [CHINESE JURISPRUDENCE], no. 4, 11 (1988); Xie Shisong, *Lun Geti Jingji de Falu Wenti* [On Legal Issues of the Individual Economy], ZHENGZHI YU FALU [POLITICS AND LAW], no. 2, 28 (1988).

42. See Zhong Wenbin, *Woguo Gongmin Geren Suoyouquan de Xingzhi* [Characteristics of Our Citizens' Individual Property Rights], XIANDAI FAXUE [MODERN LAW], no. 5, 46 (1989).

43. General Principles of Civil Law of the PRC, *supra* note 35, art. 82.

44. See ZHONGHUA RENMIN GONGHEGUO QUANMIN SUOYOUZHI GONGYE QIYE FA ZHISHI SHOUCHE [HANDBOOK OF KNOWLEDGE ON THE LAW OF THE PRC ON INDUSTRIAL ENTERPRISES OWNED BY THE WHOLE PEOPLE] (Mu Xichuan & Zhang Lingyuan eds., 1988). For text and commentary, see ZEN YANG ZHENGQUE SHISHI QIYE FA [HOW TO PRECISELY IMPLEMENT THE ENTERPRISE LAW] (China Economic Law Research Association, Beijing Branch and Beijing Municipal Government Electronic Industries Office ed., 1988).

of persons in possession of property (*zhanyouquan*).<sup>45</sup> By distinguishing ownership from rights to managerial autonomy, reform policies attempted to stimulate enterprise performance without compromising orthodox views on public ownership.<sup>46</sup> Regulations issued in 1988 covered private enterprises including individually operated businesses.<sup>47</sup> However, the “provisional” nature of the regulations, and explicit provisions subordinating the private economy to the socialist publicly owned economy underscored that private enterprises were still viewed as policy concessions to the needs of economic growth and subject to the will and the dispensation of the state. Despite continued challenges to conventional limits on private property rights, further constitutional protection was not forthcoming.<sup>48</sup>

During the period of accelerated reform following Deng Xiaoping’s 1992 Southern Tour, property policy and legislation emerged as an important agenda item for both academics and government officials. While conventional norms of public ownership and protection of public interest remained well represented,<sup>49</sup> increased attention was paid to reforming the system of state ownership. Existing discourses on management rights expanded to address not only issues of managerial autonomy, but also

45. See Wang Liming, *Lun Shangpin Suoyouquan [On Commodity Ownership Rights]*, FAXUE YANJIU [STUDIES IN LAW], no. 2, 37 (1986); Wang Liming, *Suoyouquan Minfa Baohu de Ruogan Wenti [Various Issues of Civil Law Protection of Property Rights]*, FAXUE XUEXI YU YANJIU [STUDY AND RESEARCH IN JURISPRUDENCE], no. 4, 57 (1988).

46. See Zhang Ling, *Jingyingquan Chansheng Genju Xin Tan [New Inquiry on the Progeny of Managerial Rights]*, FAXUE YANJIU [STUDIES IN LAW], no. 6, 47 (1998); Ding Jimin, *Jingyingquan yu Suoyouquan [Managerial Rights and Ownership Rights]*, FAXUE YANJIU [STUDIES IN LAW], no. 1, 12 (1987); Li Yongfu, *Suoyouquan yu Jingyingquan Fenli Wenti de Bijiaofa Sikao [Comparative Law Perspectives on the Issue of Separating Ownership from Management Rights]*, BEIJING SHEHUI KEXUE [BEIJING SOCIAL SCIENCES], no. 1, 153 (1989); Guo Shaodong, *Guanyu Shehui Zhuyi Quanmin Suoyouquan de Xingzhi, Tezheng he Shixian Wenti [On the Issues of Character, Features and Implementation of Socialist Public Ownership Rights]* FAXUE LUNCONG [COLLECTED THEORIES ON LEGAL STUDIES], no. 2, 46 (1989); Wang Chong & Jiang Deyuan, *Lun Guojia Suoyouquan, Xingzhengquan yu Qiye Jingyingquan de Fenli [On the Separation of State Ownership and Administrative Rights From Enterprise Management Rights]*, FAXUE YANJIU [STUDIES IN LAW], no. 2, 47 (1988).

47. See *Zhonghua Renmin Gongheguo Siying Qiye Zanzing Guiding [Provisional Regulations of the PRC on Privately Managed Enterprises]*, in SIYING QIYE CHANGYONG FALU SHOUCHE [HANDBOOK OF COMMONLY USED LAWS ON PRIVATE ENTERPRISES] 1 (Law and Regulation Editorial Office of Law Publishing House ed., 1988).

48. The Chinese Communist Party’s authoritative journal *Qiushi [Seeking Truth]*, specifically repudiated suggestions that the Constitution be revised yet again to accommodate expanded private property rights ideals. See Xiao Weiyun, *Woguo Xianfa Ji Qi Guiding de Guojia Genben Zhidu Bu Rong Fouding [The Basic System of the State as Set Forth in the Constitution and its Provisions is not Easy to Deny]*, QIUSHI [SEEKING TRUTH], no. 22, 25 (1990).

49. See, e.g., Li Yunhe, *Dui Gongyouzhi We Zhuti de Yi Dian Kanfa [A View on the Centrality of Public Ownership]*, ZHONGGUO FAXUE [CHINESE JURISPRUDENCE], no. 5, 37 (1993); Wang Shenyi, *Lun Wuquan de Shehuihua [On the Socialization of Property Rights]*, FAXUE PINGLUN [LEGAL STUDIES COMMENTARY], no. 1, 56 (1999).

managerial responsibility to conserve state property.<sup>50</sup> Problems of corruption and mismanagement of state property (particularly in state-owned enterprises) gave rise to calls for tighter regulation.<sup>51</sup> However, policy changes supporting the transition to a market economy meant that state ownership rights must also evolve and in some instances give way to diverse alternatives.<sup>52</sup>

The PRC Constitution was amended in 1993 to affirm the socialist market economy as the foundation for economic policy.<sup>53</sup> The transition from the socialist commodity economy meant that increased market autonomy for economic actors (including individuals as well as enterprises) could extend beyond the realm of commodities, supported by a property rights regime that could extend beyond personal property and immovable property, such as land and movables, to include intangibles such as intellectual property.<sup>54</sup> In 1995, a semi-official proposal on property legislation was published, which suggested that conventional boundaries for property rights as set forth in the GPCL should be re-examined.<sup>55</sup>

A key issue has been whether property rights are abstract (*wuyinxing*) or the result of causation (i.e. transactional—*youyinxing*). Influenced by principles of German law (drawn from the Roman law tradition), proponents of inherency argue that rights in property transcend the transactions by which they are transferred.<sup>56</sup> The implications of inherency suggest a diminution of the State's authority to control the content and scope of property rights, as the

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50. See, e.g., Xie Zichang & Wang Xiuqing, *Guanyu Chanquan de Ruogan Lilun Wenti* [Several Theoretical Questions about Property Rights], FAXUE YANJIU [STUDIES IN LAW], no. 1, 42 (1994).

51. See, e.g., Forum Comments in *Jiaqiang Guoyou Zichan Guanli Duse Guoyou Zichan Liushi Luodong* [Strengthen Management of State Property and Block the Runoff and Leakage of State Property], ZHENGZHI YU FALU [LAW AND POLITICS], no. 1, 22, 22-24, 45 (1996); Wang Jueyu, *Ezhi Guoyou Zichan Liushi de Falu Duixiang*, [Legal Objectives of Halting the Losses of State Owned Property], FAXUE [JURISPRUDENCE], no. 6, 35 (1995).

52. See, e.g., Zou Xi & Shu Sheng, *Shichang Jingji Shehui Zhong de Guojia Caichan Suoyouquan* [State Property Ownership Rights in the Market Economy Society], ZHONGGUO FAXUE [CHINESE JURISPRUDENCE], no. 4, 56 (1996).

53. See *Draft Amendments to Constitution Discussed*, XINHUA ENG. SERV., Mar. 22, 1993, in FBIS DAILY REP.: CHINA (FBIS-CHI-93-054), Mar. 23, 1993, at 13.

54. See Gong Xiangrui & Jiang Mingan, *Zai Lun Gongmin Caichanquan de Xianfa Baohu* [Again, on Constitutional Protection for Citizens' Property Rights], ZHONGGUO FAXUE, [CHINESE JURISPRUDENCE], no. 2, 70 (1992).

55. See Property Law Research Program of CASS Law Institute, *Zhiding Zhongguo Wuquanfa de Jiben Sikao* [Basic Perspectives on Enacting Chinese Property Law], FAXUE YANJIU [STUDIES IN LAW], no. 3, 3 (1995).

56. See LIANG HUIXING, ZHONGGUO WUQUANFA CAOAN JIANYI GAO [OUTLINE OF OPINION ON A DRAFT CHINESE PROPERTY LAW] 93 (2000). See also Qian, *supra* 28, at 29-38. As applied to Bills of Lading for example, the property rights in the underlying goods remain independent of the documentation. See Guo Yu, *Lun Tidan de Wuquanxing* [On the Property Rights Character of Bills of Lading], ZHONGGUO FAXUE [CHINESE JURISPRUDENCE], no. 4, 69 (1997).

State's regulatory authority over transactions would not extend to the underlying property rights themselves. A contrary approach suggests that property rights are transactional, such that the character and scope of property rights depend on the terms and conditions of underlying transactions.<sup>57</sup> Thus, land use rights or ownership rights to buildings and improvements may depend on the validity of the agreements through which these rights are transferred.<sup>58</sup> Under the transactional approach to property rights, the State's power to determine the effectiveness of transactions extends as well to the character of the underlying property rights that are the subject of those transactions.<sup>59</sup> The issue whether civil law rights (including property rights) derive from, and thus are dependant upon, transactional conditions remained a major issue in the drafting of a civil code in the late 1990s, reflecting, along with continued debates about the public and private character of civil law, the continued difficulty of bringing full autonomy to civil law relations under China's socialist system.<sup>60</sup>

## 2. *Limits to Adaptation of Private Property Rights Norms*

Efforts to draft a Code of Property Law in 1998, under the aegis of a Civil Code drafting team headed by former CASS Law Institute Director Professor Wang Jiafu, suggested continued limits to the discourse of private property rights. The property law drafting group led by CASS's Liang Huixing posited the principle that property rights could not be interfered with by third parties (including government organs).<sup>61</sup> Yet the draft retains the basic principles of protecting lawful rights and interests, safeguarding social and economic order and socialist modernization, and prohibition against property rights that harm the public interest.<sup>62</sup> Explanations of this section make

57. See Wang, *supra* note 29.

58. See Wang Yongxia, *Lun Budongchan Wuquan Biandong Zhong Zhaiquan he Wuquan de Baohu* [Safeguarding Creditor and Property Rights in the Transfer of Immovable Property Rights], FAXUE PINGLUN [LEGAL STUDIES COMMENTARY], no. 2, 121 (1998).

59. For examples of the debate, see Liang Huixing, *Wo Guo Minfa Shi Fou Chengren Wuquan Xingwei?* [Does our Civil Law Recognize Actions in Property?], FAXUE YANJIU [STUDIES IN LAW], no. 6, 59 (1989) (arguing that the transactional requirements bring property rights within the purview of obligations, thus diminishing their autonomy); Zhang Yumin & Tian Shaomei, *Wo Guo Minfa Yingdang Chengren Wuquan Xingwei* [Our Civil Law Ought to Recognize Actions in Property], XIANDAI FAXUE [MODERN LAW], no. 6, 27 (1997) (arguing that property rights are distinct from obligations, and should be autonomous and protected).

60. See, e.g., Jiang Ping, *Zhiding Minfadian de Jidian Xiongguan Sikao* [Several Macroscopic Perspectives on Drafting a Civil Code], ZHENGFA LUNTAN [POLITICS AND LAW FORUM], no. 3, 26 (1997).

61. See Liang, *supra* note 29, art. 2, at 5.

62. *Id.* arts. 1 & 5.

specific reference to the constitutional provisions on the market economy and, by extension the limits on marketization imposed by the Party's policy imperatives on socio-economic order.<sup>63</sup> Thus, even as renewed efforts are made to enshrine property rights into legal codes, the rights that result will unavoidably remain subject to the general tenor of the Constitution, which currently favors socialist public ownership over private property rights.

Confronting those who argued for more expansive private property rights protections in the Constitution, opponents of expanded constitutional protection suggested that this would contribute to problems of corruption and misuse of state property.<sup>64</sup> This reflected, more fundamentally, the extent to which the system of public ownership remains deeply ingrained in the normative and institutional framework for China's property law regime.<sup>65</sup> Indeed, the importance of conforming to China's particular conditions (*tedian*) remains a powerful orthodoxy governing the scope and terms of property rights reform.<sup>66</sup> Doctrinal norms continue to emphasize the importance of state interests in the enforcement of private law relations.<sup>67</sup> The centrality of public ownership is part of this orthodoxy, and inhibits the emergence of private property rights.<sup>68</sup>

The 1999 revisions to the Constitution did not ultimately include a provision on the sanctity of private property rights. Instead, the language provided that the self-employed, private, and other non-public sectors constituted an important component of the socialist market economy, whose lawful rights and interests would be protected by the state.<sup>69</sup> While this was

63. *Id.* at 95-97.

64. See Huang Rutong, *Shi Fou Yiding Yao Ba "Siying Caichan Shensheng Bu Ke Qinfan" Xiejin Woguo Xianfa?* [Do We Definitely Want to Write "the Sanctity of Private Property is Inviolable" into our Constitution?], DANGDAI FAXUE [MODERN LAW], no. 4, 5 (1998).

65. See Qian Mingxing, *Woguo Wuquanfa de Tiaozheng Fanwei, Neirong Tedian Ji Wuquan Tixi* [The Scope of Adjustment, Special Contents and Property System in Our Property Law], ZHONG WAI FAXUE [CHINESE AND FOREIGN JURISPRUDENCE], no. 2, 88 (1997).

66. See Guo, *supra* note 28, at 23-24.

67. See, e.g., Yu & Wang, *supra* note 28, at 73.

68. See generally Wen Zhiyang, *Zhanlun Zhongguo Minfa Wuquan Tixi* [Sketching China's Civil Law Property System] FAXUE [JURISPRUDENCE], no. 6, 37 (1997). For a poignant example of a reformist scholar towing the line in times of conservatism, see Wang Liming, *Lun Guojia Suoyouquan Zhuti de Quanminxing Wenti* [On the Issue of the Mass Character of the Bulk of State Ownership Rights], ZHONGNAN ZHENGFA XUEYUAN XUEBAO [JOURNAL OF THE CENTRAL SOUTH POLITICAL LEGAL INSTITUTE], no. 4, 17 (1990).

69. See *Text of PRC Constitutional Amendment*, BEIJING XINHUA DOMESTIC SERV., Mar. 16, 1999, in FBIS DAILY REP.: CHINA (FBIS-CHI-1999-0316) (Mar. 17, 1999), at [http://wnc.fedworld.gov/cgi-bin/retrieve.cgi?IOI=FBIS\\_clear&docname=0f8r9qd0340m6g&CID=C677307128906250236624568](http://wnc.fedworld.gov/cgi-bin/retrieve.cgi?IOI=FBIS_clear&docname=0f8r9qd0340m6g&CID=C677307128906250236624568); Tian Jiyun on *Constitutional Amendments*, BEIJING XINHUA DOMESTIC SERV., Mar. 13, 1999, in FBIS DAILY REP.: CHINA (FBIS-CHI-1999-0316) (Mar. 19, 1999), at Li Peng *Presides Over Closing of 9th NPC*, BEIJING XINHUA DOMESTIC SERV., Mar. 15, 1999, in FBIS DAILY REP.: CHINA (FBIS-CHI-1999-0326) (Mar. 29, 1999), at



touted as a major step forward in China's reform process, the reference to state protection of lawful rights and interests signals that the private sector will remain subject to significant state control.<sup>70</sup> Parallel provisions can be found in the unified Contract Law of the PRC, which confines contracts to notions of "lawful rights and interests of the parties" and to the imperative to protect "state and social interests."<sup>71</sup> The limits of the constitutional revision suggest that China's socialist system continues to privilege public property, and while it might tolerate or even encourage private property, this remains dependent on the policy direction and dispensation of the Party-state.<sup>72</sup> Indeed, complaints about the phenomenon of "unit crimes" (*danwei zui*) such as bribery and tax evasion committed by enterprises suggest further limits to official tolerance of private businesses.<sup>73</sup> The constitutional amendment originated with the CPC Central Committee,<sup>74</sup> and confirmed that while the policy of the socialist market economy would permit individual enterprises and private firms to play an important role, ultimately property rights would remain subject to the policy priorities of the Party-state and would not receive absolute constitutional sanction.

In the legal and policy discourse of property law, property relations remain a creation of the state and are subject to the limitations of positive public law enacted by the state.<sup>75</sup> Chinese jurists point to foreign precedents, such as Japan's Civil Code, as support for this approach: "The civil laws of most modern countries adopt legal positivism (*fading zhuyi*) over laissez faire (*fangren zhuyi*)" to address property rights.<sup>76</sup> Thus, procedural requirements that formation of private law relations depend on establishing the requisite

[http://wnc.fedworld.gov/cgi-bin/retrieve.cgi?IOI=FBIS\\_clear&docname=0f8ucq0030tmdy&CID=C518371582031250236625998](http://wnc.fedworld.gov/cgi-bin/retrieve.cgi?IOI=FBIS_clear&docname=0f8ucq0030tmdy&CID=C518371582031250236625998).

70. See *Constitution Amendment Gives Solid Legal Support to Private Business*, CHINA ECON. NEWS: SPECIAL SUPPLEMENT FOR THE 2D PLENARY SESSION OF THE 9TH NAT'L PEOPLE'S CONGRESS, Apr. 19, 1999, at 2; *Constitutional Amendments Propel China's Reform and Opening-up*, BEIJING XINHUA ENGLISH SERV., Mar. 15, 1999, in FBIS DAILY REP.: CHINA (FBIS-CHI-1999-0315) (Mar. 15, 1999), at [http://wnc.fedworld.gov/cgi-bin/retrieve.cgi?IOI=FBIS\\_clear&docname=0f9dnzn03ewizs&CID=C518371582031250236625998](http://wnc.fedworld.gov/cgi-bin/retrieve.cgi?IOI=FBIS_clear&docname=0f9dnzn03ewizs&CID=C518371582031250236625998).

71. Zhonghua Renmin Gongheguo Hetong Fa [People's Republic of China Unified Contract Law] arts. 1 & 52 (Mar. 15, 1999), FAGUI HUIBAN (1999, no. 1) at 5, 12 [hereinafter Contract Law of the PRC].

72. See Zhang Guangbo, *Lun Caichan de Shensheng Bu Ke Ginfan* [On the Sanctity of Property is Inviolable] FAXUE ZAZHI [LEGAL STUDIES MAGAZINE], no. 4, 10 (1999).

73. See, e.g., Dai Jiabing, *For Public Interest: Breaking the Law and Not Being Punished*, FAZHI RIBAO [LEGAL SYSTEM DAILY], Feb. 23, 1998, at 7.

74. See *More on NPC Third Plenary Meeting*, BEIJING XINHUA ENG. SERV., Mar. 9, 1999, in FBIS DAILY REP.: CHINA (FBIS-CHI-1999-0308), Mar. 9, 1999.

75. See Yu & Wang, *supra* note 28, at 74; Jonas Alsen, *An Introduction to Chinese Property Law*, 20 MD. J. INT'L L. & TRADE 1 (1996).

76. See Qian, *supra* note 28, at 29-38.

capacity and authority of the parties, permit state licensing and approval agencies to play a central role in determining what kinds of legal rights will be recognized.<sup>77</sup>

The development of property law in China reflects a dynamic of selective adaptation of norms associated with globalization. The fundamental tension between public and private property interests embodies a tension between collectivist norms of Chinese tradition and PRC socialism, on the one hand, and norms espousing the virtues of private property rights tied to liberal regulatory regimes supported by globalization. The element of perception is evident in the views of official and academic observers, both in their reaction to and differing levels of support for private property ideals, and in assumptions and assertions about the virtues of public goods in the global context. Efforts to reconcile these differing approaches express elements of complementarity, as limited private property norms are combined with proscriptions against injury to public interest or the interests of the state. How effective this effort at complementarity will be remains to be seen. Elements of legitimacy are also evident, as official policy efforts to accelerate economic growth reflect conclusions that regime legitimacy depends significantly on economic success. Factors of legitimacy also are evident in efforts to retrain traditional fealty to norms of public interest. The process of selective adaptation that has informed China's property law reforms remains dynamic, with its contours subject to changing conditions that affect elements of perception, complementarity, and legitimacy.

### *B. Administrative Law*

Whereas property law provides substantive norms for regulation of economic rights and interests, administrative law provides process norms for

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77. See *Shourangfang Jieshou Jishu Fuzhu Shishi, Bu Dei Chaoyue Ziji Jing Gong Shang Xingzheng Guanli Bumen Hezhun Dengji de Shengchan Jingying Fanwei* [The Transferee Receives Technical Input, and Should Not Overstep Its Own Registered Scope of Production Management Received Through Examination and Ratification By the Industrial and Commercial Administration Departments], in JINGJI FA ANLI XUAN XI [COMPILATION AND ANALYSIS OF ECONOMIC LAW CASES] 236 (Dan You ed., 1990), (holding invalid a contract which was deemed to be outside the registered scope of business of one of the parties). Formalistic approaches to enforcement that focus on capacity also reinforce doctrinal requirements that obligations not conflict with state policies. See Economic Contract Law of the PRC, arts. 4 & 7; General Principles of Civil Law of the PRC, *supra* note 35, arts. 55 & 58. Public notice requirements on property transfers, for example, are intended primarily to meet the needs of economic stability and security and remain subject to the controls imposed by state registries. See Sun Xianzhong, *Lun Bu Dongchan Wuquan Dengji* [On the Registration of Property Rights in Immovables], ZHONGGUO FAXUE [CHINESE JURISPRUDENCE], no. 5, 51 (1996); Wang Shiwei & Wang Penglin, *Dui Woguo Caichan Shenbao Fa de Gouxiang* [Thoughts on our Property Registration Law], FALU KEXUE [LEGAL SCIENCE], no. 91 (1998).

economic regulation. Administrative bureaucracies in the PRC have long dominated the regulatory process, remaining generally impervious to external restraint. The most recent decade of legal reform saw efforts to curtail the power of bureaucratic agencies through administrative law. Foreign practices in administrative law have informed discussion in China on such matters as resolution of administrative disputes, enforcement of administrative orders, and judicial review.<sup>78</sup> The Administrative Litigation Law (ALL) was heavily influenced by the U.S. Federal Administrative Procedure Act (APA), a somewhat ironic situation in light of the contradictions between China's civil law governance system and the separation of powers principles that inform the APA. As well, American academics lectured at Chinese law schools on administrative law, imparting broad norms that could be adapted to China's conditions.<sup>79</sup> Administrative law systems in Germany and Japan were also referenced in the course of drafting the ALL.<sup>80</sup>

### 1. *Administrative Law and Expanding Norms of Accountability*

The ALL formalized the authority of the People's Courts to review administrative agency decisions.<sup>81</sup> Article 5 of the ALL authorizes the People's Courts to determine whether a challenged administrative decision is lawful and in accord with relevant laws and regulations. Under Article 54 of the ALL, the People's Courts have power to quash illegal administrative orders; to compel administrative action, and to revise unfair administrative sanctions. Administrative cases are heard before specialized Administrative Adjudication Chambers (*Xingzheng Shenpan Ting*) established within the

78. See Hu Jianlin, *Guo Wai Xingzheng Sifa Tizhi* [Foreign Systems for Administrative Adjudication], FAXUE YANJIU [STUDIES IN LAW], no. 2, 88 (1989); Jiang Bixin, *Guo Wai Xingzheng Susong Zhong de Sifa Biangengquan* [The Juridical Authority of Revision in Foreign Administrative Litigation], FAXUE RIBAO [LEGAL SYSTEM DAILY], June 24, 1989, at 4.

79. See, e.g., Bernard Schwartz, *Fashioning an Administrative Law System*, 40 ADMIN. L. REV. 415 (1988).

80. See, e.g., Liu Zhaoxing, *Lianbang Deguo de Xingzheng Susong Fa Ji Xingzheng Susong Zhidu* [The Administrative Litigation Law and Administrative Litigation System of the Federal Republic of Germany], FAXUE YANJIU [STUDIES IN LAW], no. 1, 87 (1988); Liu Hai, *Riben Guojia Xingzheng Jiguan de Jiben Tedian* [The Basic Features of National Administrative Organs in Japan], FAZHI RIBAO [LEGAL SYSTEM DAILY], June 24, 1989, at 4; Zhang Ling, *Riben Xingzheng Susong Fa Zhong de Kanggao Susong* [Litigation over Refusal of Complaint in Japan's Administrative Litigation Law], FAZHI RIBAO [LEGAL SYSTEM DAILY], June 24, 1989, at 4.

81. See Pitman B. Potter, *The Administrative Litigation Law of the PRC*, 24 L. & GOV'T 22 (1991) (English translation of Administrative Litigation Law) [hereinafter Administration Litigation Law]; Pitman B. Potter, *Judicial Review and Bureaucratic Reform: The Administrative Litigation Law of the PRC, in DOMESTIC LAW REFORMS IN POST-MAO CHINA* 270 (Pitman B. Potter ed., 1994). See also J. Fa & S. Leng, *Judicial Review of Administration in the People's Republic of China*, 1 OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES (1992).

People's Courts.<sup>82</sup> By the date the law went into effect, some 2,600 tribunals under the provincial and local courts, staffed by 8,000 judges, had been established to handle ALL cases.<sup>83</sup>

The basic tenet of the ALL supports judicial supervision over administrative action, as the courts are empowered to quash illegal administrative decisions and to revise administrative penalties which are obviously unfair. The ALL supports expanded judicial review through provisions on the scope of cases accepted, the types of parties that may bring suit or that may be compelled to appear as defendants, trial procedures and enforcement provisions, and provisions for tort damage remedies. Under Article 11 of the ALL, the People's Courts have authority to hear suits brought by citizens and juridical persons<sup>84</sup> (including foreign businesses)<sup>85</sup> regarding challenges to administrative decisions imposing punishments and fines, restricting or infringing on property rights, intervening in business operations, denying licenses, and a number of other matters. The broad scope of administrative conduct subject to review under the ALL is intended to curb bureaucratism and prevent abuses of power by administrative officials who impose their will without reference to or support from regulatory rules.<sup>86</sup> This has significance not only to encourage administrative regularity, but also as an anti-corruption measure, discouraging officials from enforcing regulations, based on favoritism and patronage.

## 2. *Limits to Adaptation of Norms of Accountability*

Despite its provisions supporting judicial review of administrative conduct, the ALL also suggests the limits to norms of accountability of bureaucratic agencies. For example, under Article 5 of the ALL, courts hearing ALL cases are authorized to review only the legality and not the propriety of administrative decisions.<sup>87</sup> The ALL also places significant

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82. *Zui Gao Renmin Fayuan Xingzheng Shenpan Ting Zhengshi Jianli Bing Kaizhan Gongzuo* [Administrative Adjudication Chamber of the Supreme People's Court is Formally Established and Begins Work], 4 ZHONGHUA RENMIN GONGHEGUO ZUI GAO RENMIN FAYUAN GONGBAO [PRC SUPREME COURT BULLETIN] 10 (1988).

83. Chang Hong, *1 Oct Law Will Permit Citizens to Sue Officials*, CHINA DAILY, Sept. 28, 1990, at 1, reprinted in FBIS DAILY REP.: CHINA, Sept. 28, 1990, at 11.

84. Juridical persons may include economic enterprises and business units, state organs, social groups or other legal organizations. See General Principles of Civil Law of the PRC, *supra* note 35, ch. 3.

85. See generally PETER H. CORNE, FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM (1997).

86. E.g., Wang Yuming, *Xingzheng Susong Fa Shixing de Jiji Zhengzhi Xiaoyong* [The Positive Political Utility of Implementing the Administrative Litigation Act], FA ZHI JIANSHE [BUILDING THE LEGAL SYSTEM], no. 4, 2 (1990).

87. The courts are to defer review of the propriety of administrative decisions pending future

limits on the range of decisions that the People's Courts are authorized to review. Judicial review does not extend, for example, to the inherent validity of administrative laws and regulations.<sup>88</sup> This provision suggests that the political system retains ultimate authority to determine the validity of laws and regulations. The reluctance to permit the courts to substitute themselves for the legislative organs of government was at the root of this restriction.<sup>89</sup> At issue was the matter of legislative authority, and the view that the power to determine the essential validity of laws should remain solely with the NPC legislature or the delegated administrative departments of the State Council.<sup>90</sup> The contradiction was recognized that the courts could not adjudicate administrative cases effectively without ruling on the validity of underlying administrative regulations.<sup>91</sup> Nonetheless, the courts were barred from making such judgments. As a result, a decision by an administrative agency can be overturned by a court only if the decision is in violation of the agency's own rules, while the legality and interpretation of these rules remain the province of the agency, not the court. In response, the point has been forcefully made that the State Council should enact special rules permitting judicial interpretation of administrative laws and regulations.<sup>92</sup>

The ALL also limits the authority of the courts to substitute their own judgment for that of the administrative agency.<sup>93</sup> Although arguments were raised in favor of limited powers of the courts to amend administrative decisions,<sup>94</sup> resistance by administrative organs was sufficiently strong to

refinements of China's administrative law system. See e.g., Wang Hanbin, *Zhonghua Renmin Gongheguo Xingzheng Susong Fa (Caoan) de Shuoming [Explanation of the Draft Administrative Litigation Law of the PRC]*, RENMIN RIBAO [PEOPLE'S DAILY], Apr. 10, 1989, at 2.

88. Administrative Litigation Law, *supra* note 81, art. 2(ii).

89. WANG MINCAN, XINGZHENG FA GAIYAO [INTRODUCTORY OUTLINE TO ADMINISTRATIVE LAW] 221 (1983).

90. Zhang Shuyi, *Xingzheng Susong Fa (Caoan) Ruogan Zhenglun Wenti Sikao [Inquiry Into Various Controversial Issues of the (Draft) Administrative Litigation Law]*, FAXUE [JURISPRUDENCE], no. 3, 8 (1989).

91. Zhang Shuyi, *Xingzheng Fagui Jieshou Si Fa Shencha Xi [Analysis of Administrative Laws and Regulations Accepting Judicial Scrutiny]*, FAZHI RIBAO [LEGAL SYSTEM DAILY], Mar. 24, 1989, at 3. See also *Guanyu Difang Renmin Zhengfu Guiding Ke Xiang Renmin Fayuan Qisu de Xingzheng Anjian Fayuan Ying Fou Shouli Wenti de Pi Fu [Response to a Question as to Whether Courts Should Accept Administrative Cases of Local Government Regulations Submitted to the People's Courts for Litigation]* (1987).

92. See Wang Xuezheng, *Zai Xingzheng Susong Zhong de Keneng Yudao de Wenti [Questions That May Be Encountered in Administrative Litigation]*, FAXUE ZAZHI [LEGAL STUDIES MAGAZINE], no. 3, 24 (1990).

93. See, e.g., *Xingzheng Susong Fa Caoan Zuotan Hui Jieshu [Conference on the Administrative Litigation Law Closes]*, RENMIN RIBAO [PEOPLE'S DAILY] Dec. 20, 1988, at 4; *Dui Xingzheng Susong Fa Caoan Ji Ge Wenti de Jianjie [Opinions on Several Questions of the Draft Administrative Litigation Law]*, FAZHI RIBAO [LEGAL SYSTEM DAILY], Feb. 3, 1989, at 2.

94. See, e.g., Jiang Bixin, *Lun Xingzheng Susong Zhong de Sifa Bian Geng Quan [Discussion of the*

prevent inclusion of such powers in the ALL. The final text permitted judicial amendment of administrative decisions only in cases of administrative penalties that are deemed manifestly unfair.<sup>95</sup> Generally, however, courts were not to be substitutes for the administrative organs themselves, and thus were limited in their authority to revise administrative decisions.<sup>96</sup>

Notwithstanding suggestions that the courts will be granted broader review authority as the system is perfected,<sup>97</sup> the limits on the scope of the judicial review continued to undermine the capacity of courts to exercise external supervision over administrative action. Ten years of practice under the ALL suggest that protection against administrative abuses through effective judicial review remains an elusive goal.<sup>98</sup> In part this is due to the intent and limited reach of the statute.<sup>99</sup> As well, popular confidence in the law's effectiveness is limited. A study published in 1998 suggested that less than twenty percent of potential claimants would be willing to file actions under the ALL.<sup>100</sup>

The judicial review provisions of the ALL were augmented by those of the State Compensation Law (SCL), which permitted awards of compensation to individuals and organizations harmed physically or financially by unlawful bureaucratic action.<sup>101</sup> However, like the ALL, the SCL remains relatively weak as a basis for challenging misdeeds by high

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*Authority of Judicial Revision in the Course of Administrative Litigation*], FAXUE YANJIU [LEGAL STUDIES], no. 6, 31 (1988). Jiang's position with the Supreme People's Court at the time this article was published suggests the article was an effort to win support for the authority of the courts to amend generally administrative decisions.

95. Administrative Litigation Law, *supra* note 81, art. 54(iv).

96. *See, e.g.*, Wang Hanbin, *supra* note 87.

97. *Id.*

98. For compendia of case decisions involving the Administrative Litigation Law, *See, e.g.*, RENMIN FAYUAN YINAN PANLI PINGXI: XINGZHENG JUAN [ANALYSIS OF DIFFICULT JUDGMENTS OF THE PEOPLE'S COURTS: ADMINISTRATIVE VOLUME] (Wang Guichen et al. eds., 1999); XINGZHENG SUSONG YU TUDI GUANLI FA [ADMINISTRATIVE LITIGATION AND THE LAND ADMINISTRATION LAW] (Administrative Adjudication Chamber of the Supreme People's Court ed., 1999); CHANGJIAN ANJIAN GUIFANHUA SHENLI ZHINAN [GUIDE TO THE STANDARDIZATION OF COMMONLY SEEN CASES] (Liang Huaren & Zhang Jiyang eds., 1992). Administrative law cases also appear in quarterly published the series, RENMIN FAYUAN ANLI XUAN [COMPILATION OF CASES FROM THE PEOPLE'S COURTS] (Supreme People's Court ed.).

99. *See* Ranier Heufers et al., *The Impact of the Administrative Procedure [sic] Law on Legal Security in the People's Republic of China*, in OCCASIONAL PAPER POLICY ANALYSIS, (Friedrich Naumann Foundation eds., 1996). *See also generally* Pitman B. Potter, *Administrative Litigation and Political Rights in China*, 3 HUM. RTS. TRIB., no. 2, 4 (1992).

100. *See* JIANG MINGAN, ZHONGGUO XINGZHENG FAZHI FAZHAN JINGCHENG DIAOCHA BAOGAO [REPORT ON INVESTIGATION OF THE DEVELOPMENT AND PROGRESS OF CHINA'S ADMINISTRATIVE RULE OF LAW] 324 (1998).

101. *See* Zhonghua Renmin Gongheguo Guojia Peichangfa [State Compensation Law of the People's Republic of China] (1994).

officials. The statute excludes the possibility of compensation for harm by officials acting outside the scope of their duties, where the complainant has caused harm through its own acts, or “under other circumstances prescribed by law.” The law also requires that aggrieved parties first file their claims directly with the administrative agency charged with wrongdoing, an exhaustion of remedies requirement that may deter potential claimants. The empirical record suggests considerable weakness in implementation of administrative rules on compensation. A study published in 1998 indicated that of the 1646 cases filed with the Beijing People’s Courts at all levels during 1990-96, only seven resulted in compensation to the complainant.<sup>102</sup> In 1999, the People’s Courts throughout the country handled only 6,788 cases involving claims for state and administrative compensation.<sup>103</sup>

Efforts to restrain bureaucratic power have extended as well to administrative rulemaking, although the impetus once again turns on compliance with higher level directives rather than accountability to the subjects of rule. Measures to rein in the rulemaking powers of the bureaucracy were attempted during the first decade of legal reform, exemplified by the *Provisional Regulations on the Procedure for Enacting Administrative Laws and Regulations*,<sup>104</sup> which purported to establish limits on the rulemaking authority of administrative offices and departments based on their relative rank in the bureaucratic hierarchy. Supervision of the rulemaking practices of bureaucratic agencies was confined to the authority of superior level departments, however. This process was formalized in the Administrative Supervision Law (ASL) of 1997, which authorized superior level agencies to require subordinate units to amend or annul their regulations where inconsistent with superior laws and regulations.<sup>105</sup> However, due to its limits on the rights of affected parties to bring legal action against errant officials, the statute offers little support for the subjects of administrative action to challenge bureaucratic rulemaking. The statute does permit higher level administrative organs to monitor activities by lower level officials, to ensure compliance with valid laws and regulations, and to

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102. See Jiang, *supra* note 100.

103. See *Report on Just Implementation of Law by PRC’s People’s Courts in 1999*, BEIJING XINHUA DOMESTIC SERV., Mar. 11, 2000, in FBIS DAILY REP.: CHINA (FBIS-CHI-2000-0311) (Mar. 30, 2000), at [http://wnc.fedworld.gov/cgi-bin/retrieve.cgi?IOI=FBIS\\_clear&docname=0fs811a01hq8dh&CID=C518371582031250236625998](http://wnc.fedworld.gov/cgi-bin/retrieve.cgi?IOI=FBIS_clear&docname=0fs811a01hq8dh&CID=C518371582031250236625998).

104. See Xingzheng Fagui Zhiding Chengxu Zanxing Tiaoli [Provisional Regulations on the Procedures for Enacting Administrative Laws and Regulations] (1987).

105. See Zhonghua Renmin Gonghe Guo Xingzheng Jianchu Fa [Administrative Supervision Law of the People’s Republic of China] (May 9, 1997).

curb corruption.<sup>106</sup> Ongoing efforts to draft a law on administrative procedure may help strengthen this process, although it remains uncertain whether these will extend to judicial review of decisions and behavior by Party organs.<sup>107</sup>

While foreign influences have been evident in China's administrative law reforms, they remain limited. The administrative law system in China is intended primarily to ensure that subordinate institutions comply with directives from their superiors. This extends to the issue of corruption, where administrative law measures have been particularly evident.<sup>108</sup> However, foreign influences have had little effect on the basic normative premise underlying China's administrative law system, namely that administrative law remains an instrument in service of Party-led governance. The unhappy experiences of dissidents such as Guo Luoji to utilize administrative law to challenge party domination, underscore the limitations of foreign liberal principles on government accountability.<sup>109</sup> While the SCL promises remedies for harm caused by venal officials acting outside their mandate, even this measure does not permit challenges to Party dominance per se. On the other hand, administrative law has provided remedies against improper behavior of regulators in areas such as land regulation, where there is less direct political challenge to the Party's dominance.<sup>110</sup>

Administrative law reform in China reflects a dynamic of selective adaptation with associated elements of perception, complementarity, and legitimacy. Elements of perception are reflected in policy imperatives aimed at bureaucratic reform and at the use of administrative rules to control the behavior of lower level officials and possibly to reduce corruption. This may in fact be a misperception, for the effectiveness of formal law in controlling bureaucratic behavior remains uncertain. As well, misperception is evident in

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106. See Ma Huaide, *Xingzheng Jiandu Yu Jiuji Zhidu de Xin Tupo* [A New Breakthrough in the Administrative Supervision and Remedy System], ZHENGFA LUNTAN [POLITICS AND LAW FORUM], no. 4, 66 (1990). See also LIN ZHE, QUANLI FABAI YU QUANLI ZHIYUE [CORRUPTION OF AUTHORITY AND LIMITATIONS ON AUTHORITY] (1997).

107. See YANG HAIKUN & HUANG XUOXIAN, ZHONGGUO XINGZHENG CHENGXU FADIANHUA: CONG BUJIAO JIAODU YANJIU [CODIFICATION OF CHINESE ADMINISTRATIVE PROCEDURE: STUDIED FROM A COMPARATIVE PERSPECTIVE] (1999).

108. See, e.g., Guojia Xingzheng Jiguan Gongzuo Renyuan Tanwu Huilu Xingzheng Chufen Zanxing Guiding [Provisional Regulations on Handling Corruption by State Administrative Institution Officials]; Guojia Xingzheng Jiguan Gongzuo Renyuan Tanwu Huilu Xingzheng Chufen Zanxing Guiding Shishi Xize [Implementing Regulations for the Provisional Regulations on Handling Corruption by State Administrative Institution Officials] (1989).

109. See Guo Luoji Kangsu Li Tiesing [Guo Luoji Rebutts Li Tienying], ZHONGGUO ZHI CHUN [CHINA SPRING], Mar. 1992, at 9; Guo Luoji de Shangsu Zhuang [Guo Luoji's Appeal], ZHONGGUO ZHI CHUN [CHINA SPRING], May 1992, at 44.

110. See, e.g., XINGZHENG SUSONG YU TUDI GUANLIFA: XIN JIE [ADMINISTRATIVE LITIGATION OF LAND ADMINISTRATION LAW: NEW INTERPRETATIONS] (Supreme People's Court Administrative Tribunal ed., 1999).



assumptions about the utility of foreign law models, particularly the use models based on common law principles in China's civil law-based administrative system. This raises the prospect of a hybridized system of administrative law as judicial review principles associated with the U.S. system of separation of powers are inserted to China's continental legal arrangement with its quite different operational principles.

These issues of perception affect the element of complementarity. Efforts at achieving complementarity are clearly evident in policies aimed at restraining bureaucratic behavior through the vehicle of judicial review and external supervision. However, ongoing barriers to completion of an administrative procedure code, as well as varying degrees of effectiveness in promoting use of judicial review under the ALL, suggest that imported norms of judicial review are not yet seen as fully effective in controlling bureaucratic excess.

Selective adaptation of foreign principles on judicial review also reflects elements of legitimacy. Regime legitimacy is clearly at issue in the effort to control lower level officials and reduce corruption. Whether the legitimacy of the effort to borrow foreign norms will spill over to lend legitimacy to the resulting regulatory regime is less certain. Officials within the bureaucratic system, whose support is critical, have yet to evidence strong support for the new system, raising the prospect of a conflicted legitimacy whereby popular support is contradicted by official ambivalence. China's administrative law reform project, while reflecting the dynamic of selective adaptation also reveals potential problems faced when important elements of perception, complementarity, and legitimacy are conflicted.

### *C. Corporate Governance*

Corporate governance entails norms and procedures for management and accountability of economic actors. These operate against a backdrop of property norms that determine the nature of the rights and interests held by corporations and their shareholders, and administrative norms that affect the process of government regulation. Thus, property and administrative law reforms set the parameters of possibility for corporate governance reforms.

Corporate governance in China proceeds primarily from the principles set forth in China's Company Law, in combination with provisions of related laws and regulations such as the Securities Law of the PRC.<sup>111</sup> Reflecting the

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111. See Company Law of the People's Republic of China, *reprinted in* CHINA ECON. NEWS (Supp. no. 2), Mar. 2, 1994, at 1. The statute was revised in 1999 to impose stricter information disclosure requirements and to clarify issues on management rights in state-owned enterprises. The revised statute

intersection of global and local norms, the Company Law formalizes the rules and procedures for company operations.<sup>112</sup> China's corporate governance regimes have been influenced by a variety of foreign jurisdictions. In company law, the English and German models were particularly influential and in securities regulation, the U.S. system served as a core influence.<sup>113</sup> China's Company Law provisions on joint stock companies and limited liability companies reflect the distinction found in Anglo-American law between limited companies and public limited companies.<sup>114</sup> Echoes of German law models on private limited companies (GmbH) and public limited companies (AG) are also evident.<sup>115</sup>

The Company Law's provisions on securities issues (complementing those in the Security Law of the PRC) also reflect foreign influences. Chinese experts leading the securities regulatory system received much of their legal education in the United States and continue to look to the New York Stock Exchange (NYSE) and the Securities and Exchange Commission (SEC) system as models for market regulatory regimes.<sup>116</sup> The State Council also consulted Japanese securities regulatory models in the course of its rulemaking and legislation on securities regulation.<sup>117</sup> Taiwan company laws

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appears in CHINA LAWS FOR FOREIGN BUSINESS (CCH) § 13-518 (Australia Ltd. ed., 1999). Citations herein are to the revised statute. References to the Securities Law of the PRC (1998) are to CHINA ECON. NEWS (Supp. no. 3), Mar. 15, 1999, at 1.

112. A number of preliminary analyses have emerged addressing this legislation, including Preston Torbert, *Broadening the Scope of Investment*, CHINA BUS. REV., May-June 1994, at 48 and David Ho, *China's New Company Law: Something Concrete to Go By*, in E. ASIAN EXEC. REP., Feb. 1994, at 9.

113. See, e.g., Mark Gillen & Pitman Potter, *The Convergence of Securities Laws in Asia: Case Studies of Malaysia, Singapore, Japan and China*, in ASIA-PACIFIC COMPARATIVE LAW (Gerald Ferguson ed., 1998); Mei Shengshi, *Wo Guo Zhengzhan Li Fa de Que He Luan Ji Qi Zhili [The Deficiencies and Disorder in Our Securities Legislation and Their Resolution]*, ZHONGGUO ZHENGQUAN BAO [CHINESE SECURITIES REPORT], Jan. 25, 1994, at 7; Peng Zhenming, *Touze Jijin Lifu Ruogan Wenti Sikao [Consideration of Several Questions on Investment Funds Legislation]*, ZHENGZHI YU FALU [POLITICS AND LAW] no. 1, 8 (1996).

114. See, e.g., Robert Art & Minkang Gu, *China Incorporated: The First Corporation Law of the People's Republic of China*, YALE J. INT'L L. 273 (1995).

115. For discussion of German Company Law, see NORBERT HORN ET AL., GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 251 (Tony Weir tr. 1982); NIGEL FOSTER, GERMAN LAW AND LEGAL SYSTEM 289 (1993); HOWARD FISHER, GERMAN LEGAL SYSTEM AND LEGAL LANGUAGE 81 (1996).

116. Gao Xiqing, former general counsel for the Chinese Administration for Securities Exchanges attended Duke University and Gao Peiji, former general counsel for the Shenzhen Securities Exchange was trained at Berkeley. Other influential Chinese officials received U.S. training under the auspices of the Committee on Legal Education Exchanges With China, and U.S. and Canadian law schools continue to benefit from the contributions of law students and scholars from China writing on securities law. See, e.g., J.Z. Zhang, *Comment, Securities Markets and Securities Regulation in China*, 22 N.C. J. INT'L L. & COM. REG. 558 (1997).

117. See, e.g., ZHONG WAI GUFEN ZHI FAGUI HUIBIAN [COMPILATION OF CHINESE AND FOREIGN LAWS AND REGULATIONS ON THE STOCK SYSTEM] (Policy and Law Office of the State Council's State Owned Enterprise Administration ed., 1992).

and practice also exerted significant influence.<sup>118</sup> Reflecting these influences, the Company Law requires periodic reporting by listed companies on financial position and operational situation, complementing the Securities Law's continuing disclosure provisions requiring that "important events" (ranging from operational and organizational issues to financial questions) be published as well as reported to regulators.<sup>119</sup>

Based on a draft that had been submitted in March 1993, after undergoing years of refinement and debate,<sup>120</sup> and on various "opinions" on stock companies and limited liability companies,<sup>121</sup> the Company Law went into effect July 1, 1994. Revised in 1999, the statute runs to 230 articles covering the establishment and organization of companies, bond issues, accounting matters, mergers, bankruptcy and liquidation, responsibilities of branches of foreign companies, and other matters. The Company Law imposes duties and process requirements on company operations, through regulation of boards of directors and company managers. Article 46 makes the board of directors of limited liability companies answerable to shareholders, a provision matched in Article 112 for companies limited by shares, Article 59 prohibits directors and managers of limited liability companies from engaging in corrupt activities, and Article 61 prohibits directors and managers from committing conflicts of interest. Parallel provisions are imposed in Articles 123 on directors and managers of companies limited by shares. Thus, the law provides a tentative framework for fiduciary relations within the corporation, albeit subject to Party interpretations of public interest.<sup>122</sup> Article 17 of the Company Law limits Party intrusion only to the requirements of the Party's own Charter, which in turn may subject company decisions and behavior to political and policy imperatives.

The Company Law empowers shareholders as owners of companies to exercise control over management and operations. The shareholders board of limited liability companies is comprised of all shareholders and is described

118. See, e.g., GUDONG ZHAIQUAN QUANSHU [ENCYCLOPEDIA OF STOCKS AND BONDS] (Jin Jiandong et al. eds., 1992).

119. Company Law of the PRC, *supra* note 71, arts. 156 & 175, Securities Law of the PRC, art. 62. Compare with discussion of U.S. securities law models in Joel Seligman, *The Reformulation of Federal Securities Law Concerning Non-Public Information*, 73 GEO. L.J., 1115, and D.L. JOHNSTON, CANADIAN SECURITIES REGULATION 1-36 (1977).

120. See *Draft Corporate Law Submitted*, FBIS DAILY REP.: CHINA, Feb. 16, 1993, at 29; *Speech by Qiao Shi at Closing of NPC*, FBIS DAILY REP.: CHINA, Apr. 1, 1993, at 22. One source from which many of the Company Law's provision were drawn is the Provisional Regulations of Shenzhen Municipality on Companies Limited by Shares (Mar. 17, 1992), reprinted in CHINA L. & PRAC., May 7, 1992, at 12.

121. See, e.g., *Gufen You Xian Gongsi Guifan Yijian [Opinion on Standards For Limited Liability Stock Companies]*, in RENMIN RIBAO [PEOPLE'S DAILY], June 19, 1992.

122. See Michael Irl Nikkel, "Chinese Characteristics" in *Corporate Clothing: Questions of Fiduciary Duty in China's Company Law*, 80 MINN. L. REV. 503, 526 (1995).

as the company's most powerful authority.<sup>123</sup> The board is empowered to determine business policy and investment plans; to appoint and replace directors and supervisors; and to examine and approve operations, financial plans, and reporting.<sup>124</sup> In companies limited by shares, the shareholders meeting is the most powerful authority.<sup>125</sup> The shareholders meeting is authorized to determine business policies and plans; appoint and replace directors and supervisors; and to examine and approve operations, financial plans, and reporting.<sup>126</sup> While directors and managers of companies limited by shares have significant operational authority and discretion, they are ultimately responsible to the shareholders meeting.<sup>127</sup> Consistent with principles of company law in North America and Europe, China's company law provisions on shareholders reflect a basic property rights principle linking ownership and operational control.<sup>128</sup>

Influenced by German law models, the Company Law also provides for a supervisory committee, whose role is to oversee the Board of Directors and ensure it serves the interests of shareholders.<sup>129</sup> Article 52 requires a supervisory committee for limited liability companies, whose scope of business is relatively large, and requires one to two supervisors for smaller companies. Article 124 requires companies limited by shares to have a supervisory committee. Revisions to the Company Law enacted in 1999, extended the supervisory committee provisions to wholly state-owned companies, whereas previously these committees were limited to limited liability and share-holding companies.<sup>130</sup> Through these measures, the Company Law attempts to strengthen accountability of company management, shareholder interests, and also the public interest. While corruption has weakened the effect of these measures in practice, they nonetheless represent both a recognition of the need for, and a mechanism for carrying out, corporate governance norms imported from international practice.

Principles centered on private corporate property rights remain subject to

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123. Company Law of the PRC, *supra* note 71, art. 37.

124. *Id.* art. 38.

125. *Id.* art. 102.

126. *Id.* art. 103.

127. *Id.* art. 112.

128. *Id.* art. 4.

129. Art & Gu, *supra* note 114.

130. Extending the protections of the Company Law to state-owned companies had been seen as inviting abuse by government agencies with both regulatory responsibility and financial interests in companies. Chuan Roger Peng, *Limited Liability in China: A Partial Reading of China's Company Law of 1994*, 10 COLUM. J. ASIAN L. 263 (1996) (extending the powers of the supervisory committee to state-owned enterprises may help enforce accountability).

general requirements of compliance with law and regulation, which express imperatives of social and state interest, with promotion of public welfare.<sup>131</sup> A significant element of this relates to information disclosure. The Company Law emphasizes information disclosure for both companies and transactions, although the primary recipients appear to be regulators rather than investors. Article 22 of the Company Law requires that the Articles of Association for limited liability companies, submitted to the regulatory authorities as a condition for licensing, contain information on scope of business, capital, names of shareholders, capital contributions, organization and management procedures, and other matters. Article 27 permits regulatory authorities to investigate registration documentation prior to licensing. Parallel provisions are set out in Article 79 and Articles 84-86 for companies limited by shares.

In the area of securities issues, the Company Law contains further provisions on information disclosure, requiring prospectus documentation for companies limited by shares to include information on: (i) the number of shares subscribed to be promoters; (ii) the par value and issue price of each share; (iii) the total number of non-registered shares issued; (iv) the rights and obligations of subscribers; and (v) the time limit for the public offer and the notification that subscribers may revoke their subscription if the offer is under-subscribed.<sup>132</sup> A new prospectus must be provided for each new share issuance.<sup>133</sup> Applications submitted to the State Council's securities administration department for approval of share offers must include additional information on the company's operating budget and other financial information.<sup>134</sup> Listed companies are required to make public their financial and operational conditions and to publish financial statements every six months of the fiscal year.<sup>135</sup> Violations of the information disclosure provisions (including false or fraudulent reporting) are dealt with by fines and a right of private compensation.<sup>136</sup>

The disclosure requirements are augmented by the Company Law's provisions on accounting. The Company Law requires that yearly financial reporting include balance sheets, profit and loss statements, reports on financial conditions, and profit distribution statements.<sup>137</sup> These reports must also comply with the Accounting Law of the PRC, which was in part revised

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131. Company Law of the PRC, *supra* note 71, art. 14.

132. *Id.* art. 87. See also *Administration of Offerings of New Shares by Listed Companies Procedures* (Mar. 28, 2001) CHINA L. & PRAC., May 2001, at 24.

133. Company Law of the PRC, *supra* note 71, art. 140.

134. *Id.* art. 84.

135. *Id.* art. 156.

136. *Id.* ch. 10.

137. *Id.* art. 175.

in late 1993 to encompass the new forms of business organization brought on by the Company Law.<sup>138</sup> The Company Law sets forth a general principle that issues of shares must be public, fair, and impartial,<sup>139</sup> and imposes fines for improper share issues.<sup>140</sup> In addition to the Company Law's general provisions for sanctions against improper issues of stock, the law also provides penalties for potentially manipulative activities such as false reporting, failing to complete delivery of a sold stock, and other improprieties.<sup>141</sup>

The Company Law's provisions on corporate governance embody changing principles of property and administrative law. Property rights concepts are embedded in corporate governance provisions on the rights of shareholders to obtain information about corporate finances and operations. In addition, the authority of shareholders to appoint and supervise management is grounded in notions linking ownership and management rights in property. As with the Chinese property rights discourse generally, the private rights of shareholders are qualified by provisions on protection of public welfare. Corporate governance provisions also reflect changing norms of administrative law, such that the supervisory authority of company and securities regulators remains subject to the provisions of the Administrative Litigation Law and other measures on judicial review. However, reflecting limits in the Administrative Litigation Law and related measures, company supervision is exercised by state regulators largely immune to external scrutiny. The reporting requirements and compliance rules of the bureaucratic supervisory system play a more central role than the prospects for private action through either judicial or administrative process. Indeed, recurring efforts to expand the capacity for private litigation on corporate and securities matters continue to face strong resistance.<sup>142</sup>

Complementing provisions of the Company Law and Securities Law, additional standards for corporate governance of market listed companies were issued in January 2002 by the Chinese Securities Regulatory Commission and the State Economic and Trade Commission.<sup>143</sup> These

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138. See *Accounting Law of the PRC* (1985, as amended 1993), in CHINA ECON. NEWS, Jan. 24, 1994, at 6.

139. Company Law of the PRC, *supra* note 71, art. 130.

140. *Id.* art. 207.

141. *Id.*

142. See Wenhui Cai, *Private Securities Litigation in China: Of Prominence and Problems*, 13 COLUM. J. ASIAN L. 135 (1999); See also Supreme People's Court Notice on Civil Securities Fraud Cases (Jan. 15, 2002).

143. Zhongguo Shangshi Gongsu Zhili Zhunze [Standards For Corporate Governance in Market Listed Companies] (Jan. 9, 2002) (on file with the author).

provisions reiterate general norms of fairness and openness in the issuance of securities, and underscore the authority of the Shareholders Meeting in overseeing company management decisions on issuance of shares.<sup>144</sup> The Shareholders Meeting also has general authority and responsibility to participate in corporate governance.<sup>145</sup> The new measures support the right of shareholders to seek compensation and possibly to file suit in cases of unlawful conduct by the Shareholders Meeting or the Board of Directors.<sup>146</sup> The standards also provide mechanisms for strengthening the oversight role of the Board of Directors, such as specialised directors' committees, procedures for directors meetings, and an increased role for independent directors.<sup>147</sup> The Standards provide additional detail for provisions on the Supervisory Committee, specifying its duties and authority over such matters as accounting, asset management and legal compliance.<sup>148</sup> Finally the new measures expressed renewed commitment to information disclosure by listing companies.<sup>149</sup> In each of these sections, the Standards expand upon provisions of the Company Law and the Securities Law, drawing yet again on international models of corporate governance.

Provisions of Chinese law on corporate governance reveal the effects of selective adaptation. Imported norms from private property are reflected in Company Law provisions on shareholding and ownership of corporations. However, these are mediated by policy imperatives relating to local public welfare, such that company behavior remains dependent on state approval and supervision. And while Company Law provisions on information disclosure reflect the increased influence of globalized norms of transparency, selective adaptation to local concerns is also evident as the beneficiaries of transparency are more often state regulatory agencies than private market actors.

Selective adaptation at work in China's efforts at corporate governance reform reveals elements of perception, complementarity, and legitimacy. Conscious borrowing of foreign models drawn from North America and Europe reflect perceptions about the inadequacy of China's regulatory norms for the state-owned sector, as well as assumptions about the relationship between corporate law regimes and economic growth. In the area of complementarity, a key question is the ability to harmonize regulatory

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144. *Id.*, ch. 1.3.

145. *Id.*, ch. 1.4.

146. *Id.* art 24.

147. *Id.* ch. 2.

148. *Id.* ch. 3.

149. *Id.* ch. 6.

principles of private interest and efficiency with norms of public goods and state-centred economic policies. However, in view of the relatively undeveloped state of company law in China prior to the current efforts at reform, the element of complementarity rests essentially between foreign law models and domestic policy principles. The flexibility of the latter will be an important component of long term complementarity in the regulatory order for corporate governance. Legitimacy is also a factor, as support from local business and bureaucratic sectors, as well as the general populace remains essential to the success of corporate governance reform. Generally, wide support for efforts to regularize corporate governance has the potential to build legitimacy for both the process of selectively adapting foreign models and for the regulatory norms that ensue.

#### IV. SUMMARY

Regulatory reform in China is a major element of China's expanded participation in the international political economy. Following accession to the WTO, China's systems for economic regulation confront conflicting imperatives of compliance with WTO norms and preservation of local interests. On the one hand, China's formal international obligations mandate compliance generally with the norms and expectations of the international market system. This means, in part, support for private property rights, effective judicial review of administrative action, and relative autonomy in corporate governance. Yet the ongoing process of legal and economic reform in China also requires attention to local interests in social welfare and development. Property law in China has begun to support norms of private ownership, although the system stops significantly short of the liberal ideals of private property associated with globalization. China's administrative law regime reflects an effort to make administrative units more accountable and subject to a modicum of judicial supervision. However, there are significant limits to the review powers granted the courts. Regimes for corporate governance also reveal influences of the international system, but also reflect limits derived from local legal culture and policy contexts.

The dynamic of selective adaptation has played a central role in the processes and outcomes by which China pursues reforms in the areas of property law, administrative law and corporate governance. Elements of perception, complementarity, and legitimacy are evident in each of these sectors. As these elements develop and advance the process of selective adaptation, the tensions between patrimonial sovereignty and responsible agency as norms of governance may gradually erode. The very exercise of selective adaptation reflects a willingness to diminish sovereignty in favor of



accountability. While issues of perception and complementarity remain contingent to a significant degree on commitments to norms of patrimonial sovereignty, the element of legitimacy remains a critical factor. To the extent that legitimacy in the process and outcome of selective adaptation remains important, the audience from which legitimacy is sought has expanded opportunities to demand accountability. This process will likely continue to affect the contours for economic regulation in China, and the extent to which these match expectations about compliance with WTO and other norms of globalization.