China’s WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform

INTRODUCTION

China’s accession to the World Trade Organization (“WTO”) thrusts formidable challenges on Chinese leadership to honor promises relating to the country’s rule of law developments. One major challenge involves establishing an independent judicial review system in a country not known for judicial independence. This ill in China’s court system has not only aroused grave concerns among ob-


2. In this article, any reference to China’s judiciary means the country’s court system only unless stated otherwise. In China, “judiciary” or “judicial organs” (sifa jiguan) consist(s) of courts, procuratorates, public security organs, and judicial administrative organs. For an explanation of this nomenclature, see DANGDAI SIFA TIZHI YANJIU [CONTEMPORARY RESEARCH ON INSTITUTIONAL REFORM OF THE JUDICIARY] 12-14 (Guo Chengwei & Song Yinghui eds., 2002).
servers of China, but has also become an issue more openly acknowledged by Chinese judges.

Under Article 2(D) of the Protocol on the Accession of the People's Republic of China, China agrees to establish, among other things, tribunals for the prompt review of certain WTO-related administrative actions. Such tribunals “shall be impartial and independent of the agency entrusted with administrative enforcement.” These “review procedures shall include the opportunity for appeal” and “if the

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4. In a 1998 survey of 288 judges, each respondent was asked this question: “in your opinion, to what extent has the constitutional principle that ‘judges shall independently exercise their adjudication rights in accordance with laws’ been realized?” Of these judges, 0 answered “completely realized” and 164 chose “basically realized” (56.9 percent). Of the remaining 124 judges (43.1 percent), 98 said “basically not realized” and 26 said “not realized”. See Qin Dachang & Huang Jinbo, Lun Faguan Duli Shenpan Jiqi Zeren Zhi [Discuss Judges’ Independent Adjudication and their Accountability System], Zhongguo Fayuan Wang [Chinese Courts Net], Oct. 8, 2003 (the authors are from the intermediate court of Yichang City, Hubei Province).

See also Luo Nanqiao, “Zhonghua Renmin Gongheguo Xingzheng Susong Fa” Zai Shenpan Shixian Zhong Cunzaide Jige Wenti Qianxi [Brief Analysis of Several Problems Existing in the Implementation of the “Administrative Litigation Law of the People’s Republic of China”], Zhongguo Fayuan Wang [Chinese Courts Net], Apr. 13, 2004 (the author is from the basic court of Jiangyang District, Luzhou City, Sichuan Province); Zhao Yuanjiang & Huang Jinbo, Tan Xingzheng Susong De Xianzhuang Yu Durice [Discuss the Current Situations of Administrative Litigation and Countermeasures], Zhongguo Fayuan Wang [Chinese Courts Net], Mar. 22, 2004 (Zhao is from the basic court of Huting District, Yichang City, Hubei Province and Huang is from the intermediate court of the same city); Wang Guozhong, Xingzheng Shenpan Xianzhuang Yu Duice [The Current Situations of Administrative Litigation and Countermeasures], Zhongguo Fayuan Wang [Chinese Courts Net], Jan. 14, 2004 (the author is from the basic court of Pujiang County, Chengdu City, Sichuan Province); Pang Shengxian, WTO Guize Yu Woguo Xingzheng Shenpan Chutan [Preliminary Study of WTO Rules and Our Country’s Administrative Litigation], Zhongguo Fayuan Wang [Chinese Courts Net], Dec. 3, 2003 (the author is from the basic court of Pingnan County, Guiyang City, Guizhou Province); Wang Enxin & Zhang Yulan, Xingzheng Shenpan De Neiwei Sifa Huanjing [Explore the Internal and External Judicial Environment of Administrative Litigation], Zhongguo Fayuan Wang [Chinese Courts Net], Oct. 8, 2003 (the authors are from the basic court of Lu County, Sichuan Province); Hu Tiemin, Qianlun Faguan Duli [Brief Discussion of Judges’ Independence], Zhongguo Fayuan Wang [Chinese Courts Net], Aug. 14, 2003 (the author is from the basic court of Siyang County, Jiangsu Province).

5. The Protocol on the Accession of the People’s Republic of China (WT/L/432, Nov. 23, 2001), art. 2(D).
initial right of appeal is to an administrative body, there shall in all cases be the opportunity to choose to appeal the decision to a judicial body.”

In short, China agrees that there shall in all cases be an opportunity for an impartial and independent judicial body to review specified administrative actions.

Judicial review of administrative actions in China is regulated by several pieces of legislation; the principal one is the *Administrative Litigation Law of the People’s Republic of China* ("ALL"). The ALL stipulates that citizens, legal persons or other organizations whose legitimate interests are infringed upon by certain types of administrative acts have rights to bring lawsuits to courts. The aim is to ensure that administrative organs exercise their authority in accordance with laws. Most ALL cases (i.e. administrative litigation cases or, simply, administrative cases) are tried by basic courts as the court of first-instance, unless the complexity of the case requires courts at upper levels – intermediate courts, high courts, or even the Supreme People’s Court ("SPC") – to do so. Each court must establish an administrative division to handle ALL cases.

In August 2002, the SPC promulgated a judicial interpretation that requires judicial review of WTO-related administrative actions to be based on the ALL and handled at least by intermediate courts – more specifically, by their administrative divisions – as the court of first-instance.

In November 2002, the SPC promulgated two other judicial interpretations to prescribe that first-instance anti-dumping or countervailing ALL cases should be tried by the high court where the
defendant administrative organ is located, or by any intermediate court designated by such high court.16

China has been a member of WTO for two and a half years, yet it is still too early to see any pattern of judicial practices emerging from WTO-related ALL cases.17 Nonetheless, my study of judicial practices in China’s entire ALL system – a mechanism by which different types of ALL cases including WTO-related ones are handled – reveals that the system is not independent. Part I of this paper analyzes how interference, inter-court and intra-court influence, and bribery weaken the independence of the judiciary in administrative litigation. The analysis draws on empirical research conducted in Beijing, Shanghai, Chongqing, Wuhan, and Guangdong province since 1998.18 Although much of the evidence is anecdotal, it, together with

16. Zuigao Renmin Fayuan Guanyu Shenli Fanqingxiao Xingzheng Anjian Yingyong Falu Ruogan Wenti De Guiding [Supreme People’s Court’s Rules Concerning Several Questions about Application of Law in Adjudicating Anti-Dumping Administrative Cases], promulgated on Nov. 21, 2002, effective on Jan. 1, 2003, art. 5 [hereinafter Anti-Dumping Judicial Interpretation]; Zuigao Renmin Fayuan Guanyu Shenli Fanbutie Xingzheng Anjian Yingyong Falu Ruogan Wenti De Guiding [Supreme People’s Court’s Rules Concerning Several Questions about Application of Law in Adjudicating Countervailing Administrative Cases], promulgated on Nov. 21, 2002, effective on Jan. 1, 2003, art. 5 [hereinafter Countervailing Judicial Interpretation].

17. “Judicial practices” means a cluster of judicial propensities including the day-to-day routine that the courts follow in handling cases, judges’ patterns of thought and behavior in the decision-making process, and judicial culture which covers judges’ attitudes, values, beliefs, and expectations about law, legal institutions, and their role in the legal system. Chinese law scholars have emphasized the need of understanding the functions and actual operation of any legal institution we study. See, e.g., Stanley Lubman, The Study of Chinese Law in the United States: Reflections on the Past and Concerns about the Future, 2 WASH. U. GLOBAL STUD. L. REV. 1, 33 (2003); LUBMAN, supra note 3, at 36-37; and William P. Alford, Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China, 72 C ALIF. L. R EV. 1245, 1280 (1984).

18. I interviewed about two hundred judges, officials, professors, lawyers, and litigants as well as observed eight cases and obtained the judgments for analysis. For a description of my field research in China before 2003, see Hung, supra note 3, fn 12. I conducted another round of research in Beijing and Shanghai from March to April 2003. These interviews took place in Guangdong (Dec. 29, 1998-Jan. 19, 1999), Wuhan (June 9-29, 1999), Beijing (Aug. 2-19, 1999), Chongqing (Dec. 13, 1999-Jan. 14, 2000), as well as Beijing and Shanghai (Mar. 14-Apr. 11, 2003).

Among those interviewees who did not speak on the condition of anonymity include the following: (1) distinguished scholars such as Cao Jinqing (East China University of Science and Technology), Chen Duanchong (Peking University), Chen Ruhua (Peking University), Chen Weidong (People’s University), Chen Xingliang (Peking University); He Haibo (Peking University), He Weifang (Peking University), Hu Angang (Tsinghua University), Jiang Minguang (Peking University), Li Dun (China Academy of Social Sciences), Li Zongxing (Shanghai Academy of Social Sciences), Ma
extensive literary sources, helps shed light on a topic on which indepth analysis in existing literature is still limited and official statistics and related official explanations alone cannot depict a complete picture.

Part II outlines measures taken by the Chinese government to reduce the magnitude of these problems in WTO-related ALL cases. These include steps taken to combat judicial bribery, bolster judicial competence, and make existing legislation and judicial interpreta-

19. See, e.g., Lubman, supra note 17, at 4. Lubman, basing on his four decades’ experience as a practicing lawyer and scholar of Chinese law, observes that “For the most part, however, scholarship on Chinese legal institutions during the two decades under discussion here was limited to exegetical surveys. Moreover, although the number of articles on Chinese law increased greatly, many were law review articles and notes written by students who knew little about China or Chinese law. Practicing lawyers with little knowledge of China also contributed to the quantity of articles, although not necessarily to their quality.” See also fn 17.


20. These statistics help illustrate trends in litigation in China, but one should not merely rely on them because their accuracy has aroused concern. Xiao Yang, President of the Supreme People’s Court, once criticized some local courts for rejecting cases or failing to register them at the end of the year in order to report a higher percentage of completed cases. See China’s Top Judge Criticizes Lower Courts’ “Low Efficiency,” XINHUA NEWS AGENCY, BBC WORLDWIDE BROADCASTS, Apr. 7, 2000, available in LEXIS, News Library, News Group File. To tackle the problem, the National Bureau of Statistics has adopted sampling methods to verify reports submitted by local governments. See China to Crack Down on Statistic Fraud, XINHUA GENERAL NEWS SERVICE, Dec. 27, 2000, available in LEXIS, News Library, News Group File.
tions more consistent with WTO rules so as to provide a stronger basis for judges to apply the law accurately.

Part III points out that these efforts, though quite impressive, cannot eliminate the fundamental obstacles to an independent judicial review system in China. These obstacles persist because local governments and the Chinese Communist Party ("CCP") exercise power over the courts' personnel and financial arrangements, and because of the overall primacy of CCP policies over law. To resolve these problems, political reform is needed to redefine the current relationships among courts, the CCP, and local governments.

A series of statements made by the Chinese leadership since 2001 signal the emergence of political reform initiatives to redefine the relationship between courts and local governments. These include the SPC’s unusually strong criticisms of interference and its plan to deal with the problem, as well as the CCP’s proclamation at its Sixteenth National Congress on institutional reform in the court system. These initiatives, if pursued cautiously, could lead to reform of the CCP’s role in China’s political structure. The article concludes with some suggestions on how the international community can respond to this unprecedented opportunity for reforming the relationships among courts, local governments, and the CCP.

I. THREE MAJOR PROBLEMS

A. Interference

Two phenomena in China’s administrative litigation best illustrate the interference problem. The first is that courts accept (shouli) a relatively small number of administrative cases. A court accepts an administrative case filed by an aggrieved party only if certain prescribed conditions are met. From 1990 to 2002, courts across the country accepted about 60 million first-instance criminal, administrative, civil, and commercial cases. Administrative cases only accounted for slightly more than one percent of this caseload. (See TABLE ONE) Approximately 75 percent of Chinese laws are administrative laws and regulations," a professor and a judge noted, “One would then expect that administrative cases account for a higher percentage. But it isn’t the case. Why?”

21. ALL, supra note 8, art. 41.
23. Interviews with a judge in Zhuhai, Guangdong, Jan. 19, 1999; a professor in Guangzhou, Guangdong, Jan. 14, 1999. Both respondents referred to “75 percent.” It might be a pure coincidence or the figure was publicized in China.
TABLE ONE – FIRST-INSTANCE CASES ACCEPTED IN CHINA, 1990-2002

<table>
<thead>
<tr>
<th>Year</th>
<th>Total24</th>
<th>Administrative Cases</th>
<th>Administrative Cases/Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>2,916,774</td>
<td>13,006</td>
<td>0.45</td>
</tr>
<tr>
<td>1991</td>
<td>2,901,685</td>
<td>25,667</td>
<td>0.88</td>
</tr>
<tr>
<td>1992</td>
<td>3,051,157</td>
<td>27,125</td>
<td>0.89</td>
</tr>
<tr>
<td>1993</td>
<td>3,414,845</td>
<td>27,911</td>
<td>0.82</td>
</tr>
<tr>
<td>1994</td>
<td>3,955,475</td>
<td>35,083</td>
<td>0.89</td>
</tr>
<tr>
<td>1995</td>
<td>4,545,676</td>
<td>62,596</td>
<td>1.36</td>
</tr>
<tr>
<td>1996</td>
<td>5,312,580</td>
<td>79,966</td>
<td>1.51</td>
</tr>
<tr>
<td>1997</td>
<td>5,288,379</td>
<td>90,557</td>
<td>1.71</td>
</tr>
<tr>
<td>1998</td>
<td>5,410,798</td>
<td>98,350</td>
<td>1.82</td>
</tr>
<tr>
<td>1999</td>
<td>5,692,434</td>
<td>97,569</td>
<td>1.71</td>
</tr>
<tr>
<td>2000</td>
<td>5,356,294</td>
<td>85,760</td>
<td>1.60</td>
</tr>
<tr>
<td>2001</td>
<td>5,344,934</td>
<td>100,921</td>
<td>1.89</td>
</tr>
<tr>
<td>2002</td>
<td>5,132,199</td>
<td>80,728</td>
<td>1.57</td>
</tr>
<tr>
<td>Total:</td>
<td>58,323,230</td>
<td>815,239</td>
<td></td>
</tr>
</tbody>
</table>

The second phenomenon is that a significant portion of accepted administrative cases is subsequently withdrawn from courts. From 1990 to 2002, approximately 43 per cent of all accepted administrative cases were withdrawn. (See Table Two)25

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24. “Total” here refers to the total number of first-instance criminal, commercial, civil, and administrative cases accepted by courts during the year and those accepted but were not completed in the preceding year.

The majority of the people interviewed in China for this study considered interference from administrative agencies and the CCP as the primary factor for the two phenomena noted above and shared their observations about the forms and causes of interference. Other reasons, as discussed in the following paragraphs, are only of subsidiary importance.\(^\text{30}\)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Cases Completed(^\text{26})</th>
<th>W/d by pf(^\text{27}) (%)</th>
<th>W/d after act altered(^\text{28}) (%)</th>
<th>Total cases w/d (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>12,040</td>
<td>[ ](^\text{29})</td>
<td>[ ](^\text{29})</td>
<td>4,346 (36.10)</td>
</tr>
<tr>
<td>1991</td>
<td>25,202</td>
<td>[ ](^\text{29})</td>
<td>[ ](^\text{29})</td>
<td>9,317 (36.97)</td>
</tr>
<tr>
<td>1992</td>
<td>27,116</td>
<td>[ ](^\text{29})</td>
<td>[ ](^\text{29})</td>
<td>10,261 (37.84)</td>
</tr>
<tr>
<td>1993</td>
<td>27,958</td>
<td>6,662 (23.83)</td>
<td>4,888 (17.48)</td>
<td>11,550 (41.31)</td>
</tr>
<tr>
<td>1994</td>
<td>34,567</td>
<td>9,564 (27.67)</td>
<td>5,753 (16.64)</td>
<td>15,317 (44.31)</td>
</tr>
<tr>
<td>1995</td>
<td>51,370</td>
<td>14,247 (27.73)</td>
<td>11,743 (22.86)</td>
<td>25,990 (50.59)</td>
</tr>
<tr>
<td>1996</td>
<td>79,537</td>
<td>22,174 (27.88)</td>
<td>20,741 (26.08)</td>
<td>42,915 (53.96)</td>
</tr>
<tr>
<td>1997</td>
<td>88,542</td>
<td>28,710 (32.43)</td>
<td>22,025 (24.88)</td>
<td>50,735 (57.30)</td>
</tr>
<tr>
<td>1998</td>
<td>98,390</td>
<td>29,011 (29.49)</td>
<td>18,806 (19.11)</td>
<td>47,817 (48.60)</td>
</tr>
<tr>
<td>1999</td>
<td>98,759</td>
<td>28,681 (29.04)</td>
<td>15,714 (15.91)</td>
<td>44,395 (44.95)</td>
</tr>
<tr>
<td>2000</td>
<td>86,614</td>
<td>21,967 (25.36)</td>
<td>9,855 (11.38)</td>
<td>31,822 (36.74)</td>
</tr>
<tr>
<td>2001</td>
<td>95,984</td>
<td>23,231 (24.20)</td>
<td>7,852 (8.18)</td>
<td>31,083 (32.38)</td>
</tr>
<tr>
<td>2002</td>
<td>84,943</td>
<td>19,921 (23.45)</td>
<td>6,131 (7.22)</td>
<td>26,052 (30.67)</td>
</tr>
<tr>
<td>Total:</td>
<td>811,022</td>
<td></td>
<td></td>
<td>351,600</td>
</tr>
</tbody>
</table>

\(^{26}\) “Total” here refers to the total number of first-instance administrative cases completed by courts during the year.

\(^{27}\) Cases withdrawn by plaintiffs.

\(^{28}\) Cases withdrawn by plaintiffs after administrative organs altered their administrative acts.

\(^{29}\) “[ ]”, wherever found in any table presented here, means that no data is available.

Subsidiary Reasons for the Small ALL Caseload

The small ALL caseload is often attributed to the three problems of the aggrieved parties (referred, in this article, as “three nots”): dare not sue (bu gangao), not willing to sue (bu yuangao), and do not know how to sue (bu donggao or bu zhigao or bu huigao).  

Parties dare not sue because they are afraid of reprisals resulting from direct confrontation with administrative organs, especially those that have wielded enormous power. Individuals fear public security organs (i.e. police) most. Private enterprises are afraid of suing organs responsible for regulating commercial activities, such as departments of taxation as well as industry and commerce, because these departments can easily wage a war of attrition against any enterprise by, for instance, not granting administrative approvals needed for doing business in China.

The statistics reflect the fear felt by business. According to the official data, “industry and commerce” administrative cases only account for about two to three percent of all first-instance administrative cases. (See Table Three). This statistic is surprising given the extensive regulation of economic activities by “industry and commerce” departments in China, where, industrial and commercial sectors have been booming since the country’s economic reform began about two decades ago. It is also surprisingly low given the fact that the body of legislation enforced by these departments has been growing.

31. Id. See also Fang Fu, Xingzheng Shenpan 20 Nian: Qusi Bugaoguan Cheng Wangshi [20 Years of Administrative Litigation: Being Upset to Death But Still Do Not Sue Officials is a Matter of the Past], ZHONGGUO FAYUAN WANG [CHINESE COURTS NET], Feb. 23, 2004; Wang Guozhong, supra note 4; Wang & Zhang, supra note 4; Jiang Bixin, Xingzheng Guanli Xiangduiren De Quanli Jiuji [Remedies for Targeted Parties of Administrative Acts], in ZOU XIANG QUANLI DE SHIDAI: ZHONGGUO GONGMIN QUANLI FAZHAN YANJIU [TOWARD AN ERA OF RIGHTS: RESEARCH ON THE CIVIL RIGHTS DEVELOPMENT IN CHINA] 552, 559-62, 571-76, 578-83 (Xia Yong ed., 2d ed. 2000)(Jiang Bixin is Vice President of the Supreme People’s Court and is specialized in administrative litigation).

32. For detailed discussion of individuals’ fear of suing public security organs and the implications for China’s re-education through labor system, see Hung, supra note 3, at 319-21.

33. See, e.g., Mark L. Clifford, Banking’s Great Wall, BUSINESS WEEK, June 2, 2003, available in LEXIS, News Library, News Group File. For a brief discussion of the Chinese government’s control over the securities market including what government approvals a company needs before it can conduct an initial public offering, see Hutchens, supra note 3, at 617-18.


35. As of December 1999, industry and commerce departments enforced more than 150 laws and regulations as well as over 800 rules and other normative documents. See Gongshang Xingzheng Zili Guiju, Qianghua Neibu Zhifa Jiandu [Administrative Agencies of Industry and Commerce Draft Their Own Rules, Strengthen Internal Supervision of Law Enforcement], FAZHI RIBAO [LEGAL DAILY], Dec. 16, 1999. As of January 2002, this body of legislation has grown to over 2,000 pieces. See Gongshang Xingzheng Guanli Jiguan Qunian Chachu Weifa Anjian 176 Wanjian [Last
Table Three – First-Instance “Industry and Commerce” Administrative Cases Accepted in China, 1990-2002

<table>
<thead>
<tr>
<th>Year</th>
<th>Total 36</th>
<th>Industry &amp; Commerce</th>
<th>Industry &amp; Commerce/Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>13,006</td>
<td>[]</td>
<td>[]</td>
</tr>
<tr>
<td>1991</td>
<td>25,667</td>
<td>[]</td>
<td>[]</td>
</tr>
<tr>
<td>1992</td>
<td>27,125</td>
<td>710</td>
<td>2.62</td>
</tr>
<tr>
<td>1993</td>
<td>27,911</td>
<td>571</td>
<td>2.05</td>
</tr>
<tr>
<td>1994</td>
<td>35,083</td>
<td>886</td>
<td>2.53</td>
</tr>
<tr>
<td>1995</td>
<td>52,596</td>
<td>1,556</td>
<td>2.96</td>
</tr>
<tr>
<td>1996</td>
<td>79,966</td>
<td>1,486</td>
<td>1.86</td>
</tr>
<tr>
<td>1997</td>
<td>90,557</td>
<td>1,817</td>
<td>2.01</td>
</tr>
<tr>
<td>1998</td>
<td>98,350</td>
<td>2,640</td>
<td>2.68</td>
</tr>
<tr>
<td>1999</td>
<td>97,569</td>
<td>2,708</td>
<td>2.76</td>
</tr>
<tr>
<td>2000</td>
<td>85,760</td>
<td>2,897</td>
<td>3.38</td>
</tr>
<tr>
<td>2001</td>
<td>100,921</td>
<td>3,351</td>
<td>3.32</td>
</tr>
<tr>
<td>2002</td>
<td>80,728</td>
<td>2,892</td>
<td>3.58</td>
</tr>
</tbody>
</table>

Individuals and private businesses are, however, quite ready to sue administrative agencies under two circumstances. First, they sue when they feel that they are immune to retaliation by these agencies. Such retaliation-proof parties may have good connections (guanxi) with officials or party members who are more influential than defendant agencies, causing the latter to forego any reprisal plan. They may be foreign investors who could arouse enormous media attention or whose investments contribute or would contribute so significantly to the economic development of a particular locality or the country as a whole that local or even national leaders would guard against any retaliation.37 A former judge of the highest court in Shanghai explained, “Chinese courts are careful with multinationals because of the international image they want to send. They want their judgment to appear reasonable.”38 Indeed, quite a few major foreign investors such as Honda and Johnson & Johnson showed no fear of suing government agencies.39

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36. “Total” here refers to the total number of first-instance administrative cases accepted by courts during the year and those accepted but were not completed in the preceding year.
The second circumstance under which individuals and private enterprises are ready to sue government agencies arises when interests outweigh fear. Loss of liberty—for instance, the police imposes an administrative sanction called re-education through labor, under which an individual can be locked up in a labor camp for up to four years—is one example. Loss of significant economic interests such as real property is another. Individuals or entrepreneurs who are unfairly evicted from their homes or business places and peasants whose farmland is unfairly reclaimed by the government have little fear of suing the government. Xu Haiming, a Shanghai entrepreneur who was ordered to vacate his property for which he was inadequately compensated, shows such sentiments: “Without this property, I don’t have a life.” In fact, the Chinese government has identified administrative cases concerning eviction and reclamation of farmland as among the most prominent types of administrative cases.

The second “not” refers to aggrieved parties’ unwillingness to sue. This is partly rooted in the Chinese legal culture of settling disputes informally to save time, energy, and money as well as to maintain harmony in society. But such unwillingness is mainly due to the lack of faith in the impartiality of judges, particularly in cases against administrative agencies. Judges are often perceived in China as incompetent, unfair, and controlled by administrative organs and the CCP. In a survey conducted in 11 cities, including Beijing and Shanghai, as many as 40 percent of 5,673 respondents (who were 18 years old or above) perceived Chinese judges as people who pervert the law or as “cold, mysterious, and neither honest, trustworthy, nor morally upright.”

File (Johnson & Johnson Inc. sued China’s State Administration of Industry and Commerce); Updating IP: Shanghai Addresses Its Own Intellectual Property Concerns, CHINA LAW & PRACTICE, July 1, 2003 (Honda sued China’s State Intellectual Property Office).

40. See Hung, supra note 3, at 320.
43. See generally Lubman, supra note 3, Chs. 3, 8; Liu Guangan & Li Cunpeng, Minjian Taojie Yu Quanli Baohu [Mediation in Society and Protection of Rights], in Xia Yong, supra note 31, at 251.
44. The survey was conducted in Beijing, Shanghai, Guangzhou, Wuhan, Xian, Zhengzhou, Shenyang, Dalian, Xiamen, Nanning, and Chengdu in January 1999. Of the 5,673 respondents, 33.3 percent perceived Chinese judges as people who pervert the law and 6.7 percent found them “cold, mysterious, and neither honest, trustworthy, nor morally upright.” 26.4 percent of these respondents considered Chinese judges to be ordinary people and opposed perceiving them as people who pervert the law, 21.6 percent found them “honest, trustworthy, and morally upright,” 9.5 percent perceived them as “having the ‘business is business’ attitude, bureaucratic, and formalistic,” and the remaining 2.6 percent perceived them as “awe-inspiring and powerful but also cold and mysterious” See Ling Xiao, Faguàn, Shixie Shenme Ren? [Judges, What Kinds of People are They?], report published by the company which
The poor reputation of Chinese judges seems most distinct among better-educated people. In another survey, 40.7 percent of 504 Internet surfers (85 percent of whom were students, enterprise managers, white collar personnel, and professionals working in educational, research, cultural, and health care fields) considered judges to be “chaotic, of low quality, practicing favoritism, and bureaucratic,” 39.9 percent found judges “difficult to approach, stiff, and bureaucratic,” and 20 percent found them mysterious.\(^{45}\)

Even the Chinese government recognizes that citizens have negative impressions of judges. Official statistics show that most complaints lodged with China’s national legislature during the first 11 months of 2003 were against courts, procuratorates, and the police.\(^{46}\) Xiao Yang, President of the SPC, admitted that many Chinese see the judiciary as unfair and far from independent.\(^{47}\)

The third “not” refers to aggrieved parties’ insufficient knowledge of administrative litigation. More and more ordinary citizens in China may have heard of the term administrative litigation but do not know exactly how to sue.\(^{48}\) This shows that the Chinese government’s public legal education (pufa) programs have some, but limited, impact.\(^{49}\)

The limited availability of legal aid and the relatively high lawyer fees hinder access to legal advice.\(^{50}\) Even if citizens can afford to retain lawyers, most lawyers are not keen on handling administrative cases for fear of losing their license to practice law.\(^{51}\) One case

\(^{45}\) See id. The survey was conducted in 1999.

\(^{46}\) See Chinese NPC Seeking to Solve Increasing Complaints about Local Government, Judiciary Organs, XINHUA GENERAL NEWS SERVICE, Jan. 27, 2004, available in LEXIS, News Library, News Group File (reporting that complaints about the police, courts and procuratorates of all levels accounted for about 40 percent, those about administrations accounted for 33 percent, and the rest were about corruption and injustice).


\(^{48}\) See, e.g., Zhao & Huang, supra note 4.


\(^{50}\) See Hung, supra note 3, at 321-22. One major reason is inadequate funding for legal aid. In 2003, China invested RMB150 million (US$18.14 million) in legal aid, which was only about one-fifth of the total amount needed. As a result, 70 percent of qualified parties (i.e. parties in about 500,000 cases) were not helped. See Chinese Law School Graduates Donate Legal Aid, XINHUA GENERAL NEWS SERVICE, Mar. 24, 2004, available in LEXIS, News Library, News Group File. For discussion of non-governmental organizations' efforts in providing free legal advice in China, see David Lee, Legal Reform in China: A Role for Nongovernmental Organizations, 25 YALE J. INT’L L. 363 (2000).

\(^{51}\) See Hung, supra note 3, at 321-22.
that I observed in 1999 suggests these difficulties. Mr. Xu, the plaintiff, had had difficulty in getting legal representation in a suit brought against the local government of Nanan District, Chongqing. No lawyers in the district were willing to handle his case because they worried that the local justice bureau (sifa ju) would not renew their licenses in the following year. Eventually, two lawyers who worked in the urban area of Chongqing represented Mr. Xu. They were not afraid because their licenses were issued by the Chongqing Justice Bureau, which was part of the Chongqing People’s Government and was thus not subject to the pressure exerted by the local government in Nanan District.

The recent experiences of Zheng Enchong may have heightened a sense of fear among lawyers. Zheng, a prominent lawyer in Shanghai who had handled over 500 eviction cases, was stripped of his license to practice law, followed by a sentence of three years’ imprisonment for disclosing state secrets. Zheng’s plight is widely believed to be a result of his having offended powerful local party officials when he advised over two thousand residents to sue the city’s land administration authorities. Zheng alleged that these residents were evicted to make way for a project of a wealthy property developer, who was acting in collusion with some local party officials.

Most interviewees agreed that the “three nots” problem, though it exists, is less serious than it was in the early 1990s. The public’s growing rights-consciousness, judges’ and administrative agencies’ better understanding of law, and an improved legal aid system have all helped gradually dispel fear and improve access to inform-

55. See, e.g., Irene Wang, Beijing Citizens Turn to the Law; Residents Are Suing More Local Officials, but Achieving Justice is Not Easy Task, SOUTH CHINA MORNING POST, Jan. 6, 2004, available in LEXIS, News Library, News Group File; Gao Hongjun, Zhongguo Gongmin Quanli Yishide Yanjing [The Evolution of Chinese Citizens’ Rights Consciousness], in Xia Yong, supra note 31, at 43.
56. For judges’ improved competence, see infra text accompanying notes 110-18, 154-87. For improvements in the overall education level of administrative officials, see infra text accompanying note 76.
57. The State Council adopted a regulation, stipulating for the first time that provision of legal aid is a government’s legal duty. Falu Yuanzhu Tiaoli [Legal Aid Regulation], adopted by the State Council on July 16, 2003, effective on Sept. 1, 2003. Further, more and more non-governmental groups are established to provide legal aid. For example, a group of administrative law experts established a center in Beijing to help parties whose interests are infringed upon by governments. See Beijing Duyijia Minban Fayuan Zhongxin Jiepai [Beijing’s First Non-Governmental Legal Aid Center Unveils its Doorplate], FAZHI RIBAO [LEGAL DAILY], Dec. 6, 2003. See also Alonzo Emery, Testing Times for Legal Aid, SOUTH CHINA MORNING POST, Apr. 6, 2004, available in LEXIS, News Library, News Group File, (reporting that General
tion on administrative litigation. Such improvement is indirectly reflected in the increase in both the number of ALL cases and the percentage that these cases account for in all first-instance cases accepted by courts. (see Table One)

Subsidiary Reasons for the High Withdrawal Rate

Like the phenomenon of the small ALL caseload, the high withdrawal rate is often explained by three reasons aside from interference. First, administrative organs come to realize that their acts are wrongful and alter their acts so that the plaintiffs stop pursuing their claims. Second, plaintiffs, owing to their insufficient knowledge of administrative litigation, wrongly sue administrative organs. When they realize that their suits are groundless, they withdraw their cases. Third, these cases are withdrawn because the parties settle outside the judicial process, even though any form of mediation of administrative litigation cases is prohibited by the ALL.58

Official statistics cannot suggest which of the three reasons is most responsible for the high withdrawal rate. The statistics distinguish two categories of withdrawn cases: those withdrawn after administrative organs altered their acts and those withdrawn on the initiative of the plaintiffs. (See Table Two) The former category, as Chinese officials often explain, refers to cases in which the defendant agencies alter their acts upon realizing that the acts are wrongful; whereas the latter category refers to cases in which plaintiffs withdraw their cases upon learning that their claims are groundless. This official explanation is incomplete. Under either situation, the withdrawal may simply be a result of negotiation between the plaintiff and the defendant and may not originate from either party’s admission of wrongdoing.

Interviewees also cannot suggest which of the three reasons best explains the high withdrawal rate. Nonetheless, all of them mentioned that xietiao (literally meaning “coordination” or “harmonization”) happened all the time, even though mediation, as noted above, is explicitly prohibited. They admitted that xietiao is essentially mediation except that at the end of the formal mediation process, there is a “mediation document,” whereas there is none for xietiao. During xietiao, parties may “reconcile” and settle their dispute voluntarily. What is most worrying is that plaintiffs may be pressured by administrative organs or even judges to settle their cases. Such interference, as discussed below, is not uncommon.59

Motors China donated RMB175,000 to fund a student legal aid center at East China University of Politics and Law in Shanghai.

58. ALL, supra note 8, art. 50.

59. See also Luo Nanqiao, supra note 4; Zhao & Huang, supra note 4; Wang Guozhong, supra note 4.
1. Forms and Causes of Interference

Interference from administrative officials and party members may occur at any time during the entire course of handling an administrative case, but is especially common before the case is accepted. At subsequent stages, judges may be pressured to uphold the administrative act, or aggrieved parties are pressured to have the case withdrawn. Since most administrative officials are CCP members, it is very difficult – and unnecessary as some interviewees suggested – to distinguish one source of interference from another.

Interference from administrative organs and the CCP takes various forms. It is seldom in a form that blatantly violates laws. The more senior an official is, the more carefully he balances his personal status and benefits in the government and the consequences of violating laws. Upon being summoned by courts to attend trials, some low rank officials simply ignore the orders. For instance, a basic court in the Jiangxi province handled over 200 first-instance administrative cases from 1989-2000. However, the defendants failed to show up in 95 per cent of cases that required their attendance. Some officials may take further actions to obstruct administration of justice. In a case that took place in the Henan province, the police, whose administrative authority was being challenged in court, locked up the plaintiff three days before the trial, in the hope of stopping the court proceeding.

Administrative organs and party members may interfere with a trial by harassing witnesses. The two lawyers who represented Mr. Xu in his suit against the local government originally had a witness willing to testify in Mr. Xu’s favor. The officials at the local industry and commerce bureau cautioned the witness and his family, eight


61. See Xu Lai, Xingzheng Shenpan: Xiying Fazhi Chuntian [Administrative Litigation: Welcome the Spring of the Rule of Law], FAZHI RIBAO [LEGAL DAILY], Apr. 2, 2004; Zhao & Huang, supra note 4; Chinese Officials Evading Lawsuits to “Save Face”, Lawmakers Complain, BBC MONITORING INTERNATIONAL REPORTS, Mar. 12, 2003, available in LEXIS, News Library, News Group File. To set a good example, some top officials chose to attend the trials by themselves, instead of sending their legal representatives. See, e.g., Chen Xiaoying, Gaoguan Shouci Chuting Yingxu Min Guo Guan An [Senior Official Attends ‘Citizens Suing Officials’ Trial For The First Time], FAZHI RIBAO [LEGAL DAILY], Apr. 3, 2004, (reporting that a deputy chief of the Trademark Division of the State Bureau of Industry and Commerce Administration attended the trial).


63. See Xun Xian, Fangai Susong Gongan Shoufa [Public Security Organ was Punished for Obstructing Litigation], FAZHI RIBAO [LEGAL DAILY], Feb. 1, 2000.
members of which were running their own businesses, to “pay a little more attention to what they say.” Worrying that the industry and commerce bureau might revoke their business licenses, the witness refused to testify.64

Administrative organs and party members may also hinder a case from being transferred out of their jurisdiction. Under the law, upper courts may, out of their initiative or at lower courts’ request, exercise their power to hear (as courts of first-instance) cases over which the lower courts have jurisdiction.65 At times, an upper court may choose this course of action to guard against the high level of influence that the local administrative organs and party groups may have over a case. However, administrative agencies and party members often step in to stop the transfer.66

Such interference happened in a case in Guangdong. The government of a city in Guangdong announced that a certain piece of land would be reclaimed for building roads to resolve traffic congestion. Business licenses of hundreds of stalls located on that piece of land were revoked without compensation. The stall owners filed an ALL suit with the intermediate court in the city to sue the government. The government had reportedly pressured the intermediate court to not accept this case, so that the case would be heard by a basic court. The government wanted to avoid the possibility of an appeal from the intermediate court. Should that happen, the appeal would be heard by the Guangdong High People’s Court, which fell outside the government’s sphere of influence. Apparently supported by the High People’s Court, the intermediate court finally refused to succumb to pressure.67

Interference usually takes the form of administrative officials and CCP members approaching judges to “inquire” about a case and to “exchange” their views about the case to ensure favorable treatment for the defendant agency. Such favorable treatment includes letting the agency win or simply rejecting the case right after the aggrieved party files it.

The “exchange” of views often concerns the interpretation of any law involved in a case. If a piece of legislation designates a particular administrative agency to have the final interpretative power of that legislation, judges must defer to that agency’s interpretation. But

64. Interviews with two lawyers in Chongqing, Dec. 19, 1999. See also supra text accompany notes 50-53.
65. ALL, supra note 8, art. 23.
66. Most ALL cases fall within the jurisdiction of the basic courts as the court of first-instance. Compared with high and intermediate courts, a basic court has jurisdiction over a much smaller community. Within that community, the court is so closely related to local administrative organs and party groups that it is susceptible to their interference. See also supra text accompanying note 11.
even if an administrative agency does not have such power, some judges are quite ready to show deference and decide in favor of the defendant agency.\textsuperscript{68} A judge emphasized, “the plaintiff may have a strong case, but if the defendant finds a loophole and uses it skillfully to make the defendant’s argument sound ‘not too unreasonable’, the defendant can win.”\textsuperscript{69} Two other judges added, “if the law is ambiguous and the administrative organs’ interpretation is different from judges’ interpretation, whoever has higher rank wins.”\textsuperscript{70}

Unfortunately, it is not difficult to find a loophole in Chinese legal rules, most of which are loosely drafted.\textsuperscript{71} This kind of interference was also revealed by an earlier study. In 1995, courts across the country accepted about 53,000 administrative cases (See TABLE ONE). A leading scholar commented that the number would have been higher had some courts not been pressured to reject cases on the ground that these cases were outside the scope of administrative litigation.\textsuperscript{72}

Interference also takes the form of pressuring plaintiffs to have the case withdrawn from courts.\textsuperscript{73} This problem is not uncommon. A judge disclosed an “internal” investigation conducted in Guangdong. A hundred cases randomly selected from all withdrawn cases in Guangdong during 1997 and 1998 were investigated. On the record, these cases were withdrawn voluntarily by the plaintiffs. But the investigation revealed that most plaintiffs were pressured by administrative organs to withdraw their cases.\textsuperscript{74}

There are four major causes of interference from administrative organs and the CCP.\textsuperscript{75} First, administrative officials and CCP members do not have enough legal knowledge and respect for law. Al-
though some improvements have been made, they have not been great enough to eradicate all interference. Some officials still find the transition from "citizens being administered by officials" to "citizens governing officials" resulting from the enactment of the ALL "unexpected."

Upon hearing that the government of a county in Henan province lost an administrative case, a leader of that county party committee who was also a delegate to the national legislature said, "had I known that the ALL would lead to such consequences, I would not have voted for it."

Second, the problem of guanxi ("connections") is pervasive in China. Solutions to problems including legal disputes lie not entirely in rules but in whether one knows an influential person to bend the rules.

A partner of an international law firm referred to his client's insight: "If you have a strong case but don't use guanxi, you may not win. If you have a weaker case and don't use guanxi, you will definitely lose."

Chinese people are ready to do a favor for a friend or a friend's friend because this enhances the offeror's face (mianzi), that is, showing how influential he or she is, and helps secure a favor in return should the offeror need the offeree's assistance in the future.

A law professor embarrassedly admitted, "The irony is . . ."
in any legal dispute, the first thing that comes to my mind is not law but connections."

Third, local administrative organs and party officials practice local protectionism (difang baohuzhuyi). They influence judges to decide in favor of the party that contributes significant revenue to the local economy. A case in Guangzhou illustrates well how local protectionism affects administrative litigation. A Guangzhou construction company subcontracted part of a construction project to a construction company based in Heilongjiang, a place in the northern part of China. Dissatisfied with the work done by the Heilongjiang company, the Guangzhou company did not pay for the work. The Heilongjiang company brought a case to a Heilongjiang court to sue the Guangzhou company for breach of contract. The Heilongjiang company won but the Guangzhou company refused to pay the damages. Meanwhile, a Guangzhou bureau that was in charge of examining the quality of construction projects sided with the Guangzhou company, claiming that the Heilongjiang company's construction work had violated certain legal rules and should pay a fine. The Heilongjiang company brought an action suit to a court in Guangzhou but the court finally upheld the bureau's administrative act. The Heilongjiang company refused to pay the fine.

The SPC finally resolved the stalemate. It decided that the Heilongjiang company did not violate any legal rule and should not be punished by the bureau. The construction work was done in accordance with the contract. The Guangzhou company's failure to pay for the construction work constituted breach of the contract and the company should pay the damages. It is believed that the Guangzhou court's decision of upholding the bureau's act was made to protect the Guangzhou company's interests.

The fourth major cause of interference is that administrative organs practice departmental protectionism (bumen baohuzhuyi). Most departments in the Chinese government, especially those in less developed areas, are run under tight budgets. In theory, the total amount of revenues from fines and other fees go to the treasury. But, in practice, the more the department contributes to the treasury, the bigger the budget it will receive from the government the follow...
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Interference is, therefore, common in cases in which plaintiffs request defendant agencies to compensate for their losses.

2. Judges' Susceptibility to Interference

Judges are susceptible to pressure from local governments and the CCP because they control courts' financial and personnel arrangements.

Although China is nominally a unitary state, court budgets, judges' salaries and other benefits are determined and provided not by the central government but by the people's governments at corresponding levels, and at each level ultimate control over the courts is exercised by political-legal committees (zhengfa weiyuanhui) of local party organizations. The courts' heavy reliance on local funds creates tremendous pressure on judges.

Local governments in some poorer regions even assigned "economic duties" to courts, requesting them to collect a certain amount of fines per year, as well as to assist in attracting economic investments to the regions.

These "duties" can have extreme consequences. In January 2004, according to CCTV, an official television station of China, a court in the Hubei province arrested two merchants in the Henan province on the ground that they failed to follow a court ruling to compensate two "plaintiffs" who had purchased shoddy steel from them. The two merchants were not released until their families paid the court RMB230,000 (US$28,750), the alleged amount of compensation. The truth was that the two "plaintiffs" never went to Hubei to buy steel; nor did they ever receive the "compensation" from the court. The alleged purchase and court trial were all made up by the court to fulfill its "economic duty". Should the court fail to fulfill the duty, judges would not receive their salaries.

In one town, RMB320,000 (US$40,000) in fines were collected in 1999, accounting for 28.2 percent of the total revenue.

The significance of fines in these localities renders judges who preside...
Personnel arrangements in courts also weaken the impartiality of judges. In China, judges include court adjudicators (shenpan yuan) and assistant court adjudicators (zhuli shenpan yuan). Senior court adjudicators usually have administrative positions such as president or vice president of the court or chief judge or deputy chief judge of the court's different divisions.

The National People's Congress ("NPC") appoints the president of the SPC and the Standing Committee of the NPC appoints vice-presidents and other court adjudicators of the SPC. People's congresses appoint presidents of people's courts at corresponding levels. The standing committees of people's congresses appoint other court adjudicators upon the nomination given by the president of the relevant court. Presidents of people's courts appoint assistant court adjudicators. Before any of these appointments are made, there is "democratic examination or appraisal" to collect extensively opinion from the "masses" about a candidate.

While this appointment system may appear democratic, in reality it is not. Although judges are responsible only to people's congresses, the local government's power to decide court budgets renders judges susceptible to its pressure. Some interviewees called the appointment of presidents by people's congresses a "sheer formality" because they were actually appointed by local governments and party committees. During the time when a president is seeking to be reappointed, interference is most serious.

A judge explained that the president of his court showed no fear of any interference because she...
Almost finished her second term in office and would retire afterwards.

The local governments' control over courts also affects individual judges' performance appraisal and eventually, their career development. The Legal Daily, an official newspaper of China, reported that an excellent basic court judge was not nominated for a performance award because, in the words of his court leader, he "enforced court rulings that should not be enforced." These rulings, which were against the local government or legal entities associated with the government, were meant only to be paper tigers.

Another reason for judges' susceptibility to pressure from the CCP is that if there is any conflict between party policies and law, judges are expected to handle a case in accordance with party policies. In theory, the CCP cannot lead the country by holding its policies above the law.

The constitution stipulates that all state organs, political parties, the armed forces, and other organizations shall abide by the constitution and the law.

In reality, judges have to consider party policies such as those concerning economic development and social stability.

A judge in Guangdong shared his experience of handling a difficult case. The case concerned a Sino-foreign investment project. The Chinese company provided land for development while the foreign investor was supposed to contribute RMB100 million (US$12.5 million). A joint enterprise was established to carry out this project. Two years passed but the foreign investor only invested approximately RMB20-30 million. The Chinese company applied to an administrative bureau in charge of foreign investment to seek approval for dissolving the enterprise. The bureau allowed the application. The foreign investor challenged this decision by administrative litigation. The senior judge said that according to law, the foreign investor should lose. Nevertheless, he emphasized that he had to consider two questions: "Should I simply follow the law to uphold the bureau's act? Will this ruling affect investment here?"

103. Interview with a judge from Anhui province, in Wuhan, June 20, 1999.
104. See Hua Hui, Cong Faguande 'Xianjing' Bei Esha Tanqi [Some Thoughts on a Judge's being Deprived of an Opportunity to be Named "Advanced Judge"], F AZHI RIBAO [LEGAL DAILY], Mar. 2, 2004.
105. Under the principle of democratic centralism, legislative, executive, and judicial organs are under the unified guidance of the people's congresses, which, apart from being the country's legislative organs, are also "organs of state power." This political structure is ultimately led by the CCP. Leadership of the CCP is stated in the preamble of the constitution, which is proclaimed to be the fundamental law of the state and to possess supreme legal authority.
106. Id. art. 5(4).
A similar dilemma arises in cases that involve a large number of plaintiffs. In handling these cases, judges consider whether their decisions will provoke protests and thus disrupt social stability. A professor in Chongqing cited the example of a case in Hubei province in which 4,600 farmers sued the county government for levying illegal fees. The judges concerned had to consider that if they ruled in favor of the farmers, the government would bear the huge financial burden of RMB7 million in compensatory damages. On the other hand, if the farmers lost the suit, they would likely wage a series of protests that would eventually destabilize society in the locality.

Intra-Court and Inter-Court Influence

The lack of independence in the Chinese judiciary is also reflected in the widespread practice of qingshi—that is, junior judges or judges at lower courts frequently reporting to and seeking advice from senior judges or those in upper courts. This practice is claimed to be necessary to ensure that cases are properly handled and that judges are responsible to the parties. While it is doubtful whether the practice has produced these results, it is clear that a major problem has emerged: many court decisions are made collectively. It is highly improbable that the judiciary can cultivate independence amid this strong inter-court and intra-court influence.

The common practice of qingshi is due to several problems. These problems include: (1) an improved, but still poorly qualified judiciary; (2) deficiencies in Chinese legislation; and (3) the existence of a system under which judges can be disciplined if their judgments are considered erroneous.

Low Level of Judicial Competency

The overall competency of the Chinese judiciary has gradually improved. In early 1989, only 30 percent of 210,000 judges and other court employees in China attained the dazhuan level (often translated as college diploma level, which is below the bachelor level) or above. In 1997, there were 280,000 court employees; 170,000 of 108. Interview with a professor in Chongqing, Jan. 7, 2000. 109. Interviews in Guangdong (Dec. 28, 1998-Jan. 19, 1999), Wuhan (June 9-29, 1999), Beijing (Aug. 2-19, 1999), Chongqing (Dec. 13, 1999-Jan. 14, 2000), as well as Beijing and Shanghai (Mar. 14-Apr. 11, 2003). See supra fn. 18. See, e.g., Zhou Hanhua, Fenchai Sifa – Youyi De Changshi [Divide the Judiciary – A Beneficial Attempt], FAZHI RIBAO [LEGAL DAILY], Aug. 28, 2003; Hu Tiemin, supra note 4; He Bing, Fayuan Lide “Da Guo Fan” [“Big Wok Rice” in Courts], FAZHI RIBAO [LEGAL DAILY], June 17, 1999. 110. See ZHONGGUO FALU NIANJIAN 1990 [CHINA LAW YEARBOOK 1990] 133-34. It should be noted, though, that even these diplomas do not indicate that the holder has received a well-structured legal education. Legal education in China is provided at four levels including dazhuan (often translated as “college”), bachelor, master, and doctoral levels.
them were judges and over 80 percent of these judges attained at least the dazhuan level. At present, China has about 210,000 judges and 100,000 other court employees. About 3,000 judges have master or doctoral degrees, representing approximately 1.5 percent of all judges. By contrast, the SPC has a very high percentage (47 percent) of judges holding master or doctoral degrees. A survey of the qualification of judges who worked in the administrative divisions of the courts I visited also illustrates improvements in the education levels of Chinese judges. Overall, the qualifications of judges from high courts and intermediate courts are quite impressive, however, the qualifications of judges from basic courts still need to be improved. In spite of this progress, the overall competency of Chinese judges has not risen to a level that sufficiently meets practical needs. The problem is most acute among judges from basic courts, where grams last for four years and are run by universities. Dazhuan programs last for three years and are usually run by post-secondary colleges including the so-called judges’ evening colleges (yeyu daxue or yeda). Many Chinese judges who were not admitted to bachelor programs attained dazhuan level by completing a three-year on-the-job legal training offered by judges’ evening colleges. As bachelor of law programs increase and the standard for recruiting judges is raised, judges’ evening colleges are being phased out. For an historical overview of judicial training in China, see ZHAO XIAOSHOU, ZHONGGUO FAGUAN ZHIDU JIAGOU [THE FRAMEWORK OF JUDGES’ SYSTEM IN CHINA] 216-24 (2003). For discussion of legal education in China, see Zou Keyuan, Professionalising Legal Education in the People’s Republic of China, 7 SING. J. INT’L & COMP. L. 159 (2003); Zeng Xianyi, Legal Education in China, 43 S. T EX. L. REV. 707 (2002) (Zeng is Dean and Professor of Law, School of Law, People’s University in China).


112. China has one “Chief Grand Judge” (shouxi dafaguan), 41 “Grand Judges” (dafa guan), 30,000-odd “Senior Judges” (gaoji faguan), and 180,000-odd “Judges” (faguan). See ZHONGGUO FALU NIANJIAN 1998 [CHINA LAW YEARBOOK 2003] 155. For the ranking system of Chinese judges, see Judges Law, supra note 94, art. 18.


115. As of January 1999, there were altogether 8 judges in the administrative division of the Guangdong High People’s Court. The administrative divisions of the intermediate people’s courts in Guangzhou, Shenzhen, Shantou, and Zhuhai had 24 judges, and those of the 4 basic courts I visited in these 4 cities had 11 judges. Of these 8 high court judges, 1 had a master degree and 7 had bachelor degrees. Of the 24 intermediate court judges, 6 had a master degree, 10 had bachelor degrees, 7 attained dazhuan level, and 1 was a secondary school graduate. Of the 11 basic court judges, 3 had bachelor degrees, 7 attained dazhuan level, and 1 was a secondary school graduate.

There were altogether 4 judges in the administrative division of the Chongqing High People’s Court, 10 judges in the administrative divisions of the Chongqing’s First and Third Intermediate People’s Courts, and 18 judges in the administrative divisions of the four basic courts I visited in Beibei, Jiangjin, Yuzhong, and Fuling. Of these 4 high court judges, 3 had master degrees and 1 attained dazhuan level. Of the 10 intermediate court judges, 2 had master degrees, 3 had bachelor degrees, and 5 attained dazhuan level. Of the 18 basic court judges, 6 had bachelor degrees and 12 attained dazhuan level.
many judges do not have a full legal education and have difficulty grasping legal concepts. They do not have enough opportunities or time to receive administrative law training. Their courts lack funds to hold training programs or can only send them away to attend sporadic programs for a couple of days. Some basic courts in poorer regions are in such desperate need for personnel and resources that they necessarily put training at a lower priority. For example, Guizhou, a poor province in China's West, still needs 600 judges to meet its demand. Some other basic courts are still struggling to meet the legal requirement of establishing a three-judge panel to preside over administrative cases.

The fact that these poorer regions suffer from a short supply of judges while Chinese leaders and scholars often consider that the country as a whole has too many judges shows the uneven development of the Chinese legal system.

Judges from intermediate courts or other upper level courts have fewer problems. Of the problems that did arise, interviewees mentioned difficulties in trying new types of cases, especially those involving high-tech knowledge. Generally, however, they appeared to be quite confident in their understanding of legal concepts. This difference in the nature of difficulties encountered by judges from basic courts and those from upper courts mainly lies in the latter group's higher level of formal legal education. Judges from upper courts also have more opportunities for training than do lower court judges. Thus, while Chinese university law programs are generally criticized for placing too much emphasis on civil and commercial law courses and for offering administrative law courses that are too theoretical, these judges have at least acquired some concept of administrative litigation, which is lacking in many of their counterparts in basic courts.

2. Deficiencies in Legislation

The common practice of qingshi also stems from deficiencies in Chinese legislation. Whenever a judge has difficulty interpreting any legal provision, he or she, apart from consulting the administrative
agency charged with the final interpretation of that provision, readily seeks advice from his or her colleagues or from senior judges in the same court or courts at higher levels. As the law does not confer any interpretative power on courts below the SPC, junior judges find the advice of senior judges essential and readily adopt their views. If such interaction between senior and junior judges involves genuine exchange of views, one may still argue that this is conducive to careful handling of cases. But the practice has been abused. Many judges rely on senior judges' instructions even though the law authorizes them, not their senior judges, to handle the cases. They do not want to risk making mistakes because this will affect their annual performance appraisal or they may, as explained in the next section, even be punished.

This problem is exacerbated by numerous ambiguous and conflicting legal rules in China. Ambiguity in legislation partly stems from legislating organs' lax attitudes towards drafting clear laws. Such lax attitudes, which were common when economic reform began in the late 1970s, have improved but still exist today. Poor draftsman is another reason. China's legal education, though improved, does not adequately equip law students with drafting skills or skills for investigating social facts that shape legal developments.

The problem of ambiguous legislation is also due to, what a scholar called, “politicization of laws”. The contents of most Chinese legislation are couched in indeterminate language to declare policies rather than in precise and concise terms to enumerate the regulated activities and the legal consequences of any violations.

Conflicting concepts in legislation are caused by poor draftsman and lax attitudes towards legislative work, as described above, 119. For discussion of how judges consider administrative agencies' interpretations of law, see supra text accompanying notes 68-72.

120. The Supreme People's Court has the power to interpret “any problems of the concrete application of laws or regulations in the course of litigation.” See Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falu Jieshi Gongzuo De Jueding [Resolution of the National People's Congress Standing Committee on Strengthening Legal Interpretation Work], adopted on June 10, 1981.


as well as by local and departmental protectionism. Local legislative organs or administrative agencies promulgate local or departmental legislation to protect or advance the interests of the localities or the agencies, even though the legislation contravenes national legislation. The uncertain legal status of rules promulgated by multiple entities in China's political structure also contributes to the problem of conflicting legislation. The Law on Legislation, which came into effect on July 1, 2000, helps remedy some but not all the problems. One major problem that the Law on Legislation does not remedy is the unclear legal status of departmental rules (bumen guizhang) promulgated by ministries and commissions of the State Council, China's highest executive organ. In order of priority of legal effect, the hierarchy of Chinese law looks like this: (1) the laws (falu) made by the NPC and its standing committee, (2) administrative regulations (xingzheng fagui) by the State Council, (3) local regulations (difangxing fagui) by local people's congresses and their standing committees, and (4) local government rules (difang zhengfu guizhang) by local people's governments. The question then is where should departmental rules (bumen guizhang) be placed in this hierarchy? On the one hand, the fact that these ministries and commissions and provincial governments are at the same level in China's administrative hierarchy may lead to the conclusion that departmental rules and local government rules should enjoy the same status in the hierarchy of laws. On the other hand, the fact that ministries and commissions have national jurisdiction within their functions seems to indicate that departmental rules should enjoy a higher status. The Law on Legislation, supra note 126, art. 71. Id. arts. 7, 56, 63, 73. See also Constitution, supra note 95, arts. 89(1), 100.
article 53(2) of the ALL merely offers an ad hoc solution to this problem: courts shall submit any inconsistency between departmental rules and local government rules via the SPC to the State Council for interpretation or resolution.

Not only does the Law on Legislation fail to resolve this problem, it actually throws departmental rules (bumen guizhang) into murkier status. Article 80 provides that local regulations (difangxing fagui) prevail over local government rules (difang zhengfu guizhang). Since Article 82 of the Law provides that departmental rules and local government rules have “equal effect” and “shall be implemented within their respective jurisdictions,” one would logically think that local regulations also prevail over departmental rules.

In fact, such relative status is implicit in the ALL. Courts are required to decide ALL cases on the basis of laws (falu), administrative regulations (xingzheng fagui) and local regulations (difangxing fagui), but only need to refer to (canzhao) local government rules (difang zhengfu guizhang) and departmental rules (bumen guizhang).

“‘To refer to,’ as some State Council officials suggested, means ‘to apply these rules when they do not conflict with superior laws.’” (emphasis added)

In other words, judges are bound to apply laws, administrative regulations, and local regulations under all circumstances but may choose not to apply local governmental rules and departmental rules on the ground that they conflict with superior laws.

Nevertheless, the Law on Legislation does not follow the logic. Article 86(2) provides that if there is any conflict between a local regulation and a departmental rule, the State Council shall formulate an opinion. If the Council considers that the local regulation should apply, the local regulation is then applicable to that locality. If the Council favors the departmental rule, it shall request the Standing Committee of the NPC to make a ruling.

3. Accountability for Erroneous Cases

In September 1998, the SPC issued the Tentative Methods for Pursuing the Liabilities of Judicial Adjudicators of People’s Courts for Violating Laws During Adjudication ("Tentative Methods").

CIAL TIMES, May 14, 2002, available in LEXIS, News Library, News Group File (commenting that “the [Ministry of Foreign Trade and Economic Co-operation] cannot give orders to economic ministries or provincial governments, because they are all at the same bureaucratic level.”)

131. Similar provision is included in the Law on Legislation. See Law on Legislation, supra note 126, art. 86(3).

132. ALL, supra note 8, art. 52.

133. Id. art. 53.

134. J IANFU CHEN, supra note 3, at 118.

135. Renmin Fayuan Shenpan Renyuan Weifa Shenpan Zeren Zhuijiu Banfa (Shixing) [Tentative Methods for Pursuing the Liabilities of Judicial Adjudicators of...
The purpose of this system is to ensure that judges exercise their powers in accordance with laws, facilitate the establishment of a clean court system, and safeguard judicial fairness. But the side effect is an increase in qingshi because judges are afraid of being punished for their mistakes. Judges have legitimate reasons for being cautious. Under the Tentative Methods, they can be held liable if in adjudicating and enforcing a case, they “intentionally violate any laws and regulations that are related to adjudication work” or if they “negligently (guoshi) violate any laws and regulations that are related to adjudication work and this leads to serious consequences.” The Tentative Methods does not clearly explain what “negligently violate” or “serious consequences” mean. It does list a few circumstances under which judges are not held liable: (1) “erroneous decision caused by a deviation from the correct understanding and comprehension of laws and regulations”; (2) “erroneous decision caused by a deviation from the correct understanding of the facts and evidence of the case”; (3) “change in decision because of emergence of new evidence”; (4) “change in decision because of amendment to laws of the country or adjustment in policies”; and (5) other circumstances for which judges should not be held liable. This list, however, cannot clarify the ambiguities. It is difficult to distinguish “negligent violations of laws and regulations” – for which judges are accountable – from these five circumstances, especially the last item of the list, which is a catch-all phrase that itself needs explanation.

In 1999 and 2000, approximately 2,000 judges at all levels throughout China were held responsible for violating laws during adjudication. Bribery in the judiciary is a problem that even the Chinese government publicly acknowledged. In 2000, Xiao Yang, President of the SPC, condemned some judges for “lack[ing] the knowledge needed to do their jobs” and others for being “involved in authorizing torture, forging documents and using trials to make money.” People’s Courts for Violating Laws During Adjudication], promulgated and effective on Sept. 4, 1998.

136. Id. art. 1.  
137. Id. art. 2.  
138. Id. art. 22.  
139. See, e.g., Qin & Huang, supra note 4; Zhou Hanhua, supra note 109. These authors (Qin and Huang are judges) call for clear definitions of erroneous decisions.  
A more recent example is a series of conferences held in early 2004, where Xiao Yang and leaders of the CCP's Central Discipline Inspection Commission reiterated the need for eradicating corruption in the judiciary and vowed to step up efforts to "probe into cases of taking bribery and perversion of law."

The China Daily, an official newspaper of China, even linked corruption to the fact that the national legislature has consistently passed the report of the SPC with a relatively low approval rate.

The magnitude of judicial bribery is little known. Official sources report that approximately 7,500 judges and other court employees in China were punished for violating laws or disciplinary rules from 1998 to 2003.

Exactly how many of these violators were punished for corruption, including bribery, remains unclear. But official references to violations of laws or disciplinary rules in courts are often put in the context of corruption. Such emphasis by Chinese leaders, who are usually evasive about ills in the government, suggests that corruption in the judiciary is so serious that cover-ups or denial would be useless.

The perceptions of citizens may shed some light on the topic. According to a survey conducted in 10 provinces and cities including Beijing and the Jiangsu, Guangdong, and Hebei provinces, 32.2 percent of over 12,000 respondents ranked anti-corruption efforts as a topic about which they were most concerned. This indicates that the perceived importance of this issue was just below that of unemployment and social security.

Respondents further identified five areas where, in their opinion, corruption was most prevalent.

144. For an analysis of judicial corruption in China, see SIFA FUBAI FANGZHI LUN [DISCUSSION ON THE PREVENTION OF JUDICIAL CORRUPTION] Ch. 2 (Tang Shigui ed., 2003).
146. See sources cited in fn. 141-42, 144. See also Reports of the Supreme People's Court 2000-2004; Xu Lai, Jianjue Chengzhi Sifa Fubai Quebao Quanli Zhengque Xingzhi [Steadfastly Determine to Eradicate Judicial Corruption to Ensure Proper Exercise of Power], FAZHI RIBAO [LEGAL DAILY], Apr. 8, 2004.
147. Respondents could choose more than one issue about which they were most concerned. 51.42 percent of these respondents chose "unemployment", compared to 34.67 percent, 32.2 percent, 31.46 percent, and 28.77 percent choosing "social security", "anti-corruption efforts", "reform of medical care system", and "youth education" respectively. See Sun Chengbin, Wuda Lingyu Shi Qunzhong Xinmuzhong De "Fabai
Corruption in the legal system (police, procuratorates, and courts) as well as corruption in construction projects were two areas that most respondents identified as "relatively more serious".

The pervasiveness of bribery in China's judiciary easily leads one to speculate that the same problem exists in administrative litigation. However, most interviewees found bribery rarely occurred in this area. According to them, plaintiffs – the aggrieved parties – dare not bribe judges into ruling against administrative organs; whereas defendants – the administrative organs – need not bribe judges into declining administrative cases or ruling in favor of them because they may attain this goal through interference.

This explanation sounds reasonable, but my personal experience in Chongqing shows that bribery extends beyond plaintiffs and defendants, and that 'third party' (disanren) litigants have motivation to bribe court officials. After a basic court finished a trial that I observed, the judges and I had dinner. On the way out of the restaurant, the third party litigant greeted us and gave each of us cigarettes and RMB10 (for taxi fare). He included me in his generosity, although I had been introduced to all parties as engaged in field research. The judges readily declined the offer but looked very embarrassed. Third party litigants' interests can be preserved if the challenged administrative act is upheld. This particular third party litigant was not afraid of bribing judges in front of me. Is it because he did not know that what he did was wrong? Or is it because he knew that it was wrong but did not care since bribery was so common?

The experience of a Mainland Chinese immigrant in Hong Kong indicates that most ordinary citizens in China do not consider giving gifts to judges wrong. Upon winning a divorce and custody suit in Hong Kong, the immigrant offered the Hong Kong judge cash, brandy and cigarettes to thank him. "The judge did a very good job. The court helped me a lot and I decided to sponsor them." She continued, "[in China] if the judge is good, we will sponsor him . . . People there always tell you to offer sponsorship to judges. It is seen as a good thing to do." She was convicted of offering an advantage to an official and was sentenced to three-month suspended imprisonment.

Zhongdi' [Five Areas are in the Eyes of the Mass the Most Serious], FAZHI RIBAO [LEGAL DAILY], Jan. 28, 2004.

See id.

The other three areas were medical care system (29.24 percent), education system (26.13 percent), and government personnel system (21.2 percent).

See ALL, supra note 8, art. 27, which allows any citizen, legal person or organization who has interests in the administrative act under litigation may, as a third party litigant, file a request to participate in the proceedings or may participate in them when so notified by the people's court.

In sum, China's administrative litigation system is not independent because the court system is hampered by interference, inter-court and intra-court influence, and bribery. The major reasons for interference are the control of local governments and the CCP over the personnel and financial arrangements of local courts, and the prevalence of CCP policies over law. The low level of judicial competency, deficiencies in legislation, and the existence of the "accountability for erroneous cases" system contribute to the widespread practice of seeking instructions within the judiciary. Although judicial bribery may not be a serious problem in administrative litigation, it does exist.

II. REMEDIAL MEASURES

To reduce the magnitude of these problems in WTO-related ALL cases, the Chinese government has taken some remedial measures and announced others. A number of initiatives that have been introduced since the promulgation of the SPC's *Five-Year Court Reform Plan* (1999-2003) help tackle the problems.

Since China acceded to the WTO, the government's reform efforts have intensified. Among these efforts is the promulgation of three judicial interpretations by the SPC. In the *Supreme People's Court's Rules Concerning Several Questions about Adjudication of Administrative Cases Relating to International Trade* ("International Trade Judicial Interpretation"), the Court requires the first-instance trials of all WTO-related administrative cases to be handled by intermediate courts or courts at upper levels.

In the other two judicial interpretations – *Supreme People's Court's Rules Concerning Several Questions about Application of Law in Adjudicating Anti-Dumping Administrative Cases* ("Anti-Dumping Judicial Interpretation") and *Supreme People's Court's Rules Concerning Several Questions about Application of Law in Adjudicating Countervailing Administrative Cases* ("Countervailing Judicial Interpretation"), the Court specifies that first-instance trials of all anti-dumping and countervailing administrative cases shall be handled by the high court where the defendant administrative organ is located or any intermediate court designated by such high court.

As analyzed in Part I, basic court judges generally experience more interference and are less qualified than judges from upper level courts. These three judicial interpretations are, therefore, welcome.

151. *Renmin Fayuan Wunian Gaige Gangyao* [The People's Courts' Five-Year Reform Plan], promulgated by the Supreme People's Court on Oct. 20, 1999 [hereinafter Court Reform Plan].

152. See supra text accompanying notes 13-15.

153. See supra text accompanying note 16.
Overall, China has bolstered the competency of judges by providing more training to existing judges and reforming the selection system. To provide a stronger basis for accurate application of law and thus reduce the occurrence of inter- and intra-court influence, the Chinese government has brought its body of legislation and judicial interpretations closer in line with WTO rules. To combat bribery, the government launched a plan to reduce the number of judges in order to have more money for increasing the salaries of remaining judges, prepared more disciplinary rules to guide judges' behavior, and established a nationwide inspection mechanism to ensure proper enforcement of these rules.

A. Bolster Overall Competency of Judges

1. Judicial Training

In order to prepare judges for the demanding work after China's entry into the WTO, the Chinese government has, over these years, organized training programs on foreign law and legal systems. Some programs, sponsored by different organizations including the Ford Foundation and Temple University, are run in China. Other programs are conducted overseas. The sponsors of these overseas programs include the National Committee on United States-China Relations, a New York-based organization, the University of Wisconsin.

154. For example, in the summer of 1999, the Ford Foundation funded the South Central University of Politics and Law and the National Judges' College, China's primary training center for senior judges, to offer two-month training to about 60 administrative judges from Anhui, Jiangsu, and Jiangxi provinces as well as Chongqing. Leading Chinese scholars and experts lectured on administrative law, legal system, legal theories, contract law, and environmental law. They included Professors Luo Haocai, Guo Daohui, Guan Baoying, Jiang Mingan, Zhu Suli, Ying Songnian, He Weifang, Liang Huixing, and Supreme People's Court Judge Jiang Bixin. Judge Stephen Williams of the D.C. Circuit of the United States Court of Appeal was also invited to deliver lectures on the United States Administrative Law. I participated in the program and attended most of the training sessions.


156. The organization sponsored a study tour for about ten judges from high courts in Shanghai and Shandong to help them gain a better understanding of the judicial system and civil trial procedures in the United States. As these participants were high court judges and were requested to deliver papers and ask questions during their visits, the tour appeared to be highly beneficial and was not transformed into pure tourism. The tour was entitled "Civil Trial Procedure Delegation of Shanghai and Jinan Judges," Oct. 20-Nov. 4, 2000. I was invited to accompany these judges during their visits in San Francisco.
The SPC has reportedly sent more than 200 outstanding young and middle-aged judges to study law in developed jurisdictions; over half of them have already returned to play important roles in handling cases involving foreign parties.

Programs focusing on WTO rules have also been organized. Chinese officials and experts who were involved in the negotiation of China's accession to the WTO have been invited to lecture on the topic across the country. The National Judges College, China's primary training center of senior Chinese judges, has held many WTO courses aimed at senior judges and judges who are responsible for handling cases involving foreign parties.

Foreign parties such as Temple University and the International Law Institute, a Washington, D.C.-based institute, have been involved in these programs. In 2002, Temple University's Institute for International Law and Public Policy invited eight Chinese participants, including five leading Chinese scholars and a judge from the Supreme People's Court, to research and study legal issues relating to WTO at the university. These participants also met with government officials and others directly engaged in U.S.-China trade relations in Washington, D.C. These included representatives from the Congressional-Executive Commission on China, the U.S.-China Business Council, the Office of the United States Trade Representative, and the Commerce Department's Office of Chief Counsel for International Commerce. In the end, Chinese participants presented their research at a two-day roundtable. The papers resulting from the roundtable were published in Spring 2003 in a symposium issue of the Temple International and Comparative Law Journal. Information collected by Seth Garz from <http://www.temple.edu/iilpp/RoundtableWTO.htm> and through his telephone conversation with Professor Jeff Dunoff on Apr. 20, 2004.
A Washington-based not-for-profit organization, also helped organize some WTO-related training programs. The value of these training programs is partly illustrated in the following comments written by a professor of the National Judges' College, who participated in a Canada-China Senior Judges Training Project funded by the Canadian government:

This program has deepened my understanding of the meaning of procedural law. . . Procedural fairness marks the existence of the rule of law, and, in turn, "openness" is the essence of fairness. . .

As of today, the making of judgments in China is still far below the "openness" standard. The majority of judgments present only a brief introduction of facts and parties' arguments and the final decision. As regards how judges or collegial panels reach the conclusion, that is, how every piece of evidence is examined and weighed, which fact forms the basis, which legal provision or judicial interpretation is applicable etc., [the judgments] do not provide the details. Moreover, because a lot of information is categorized as notes taken by collegial panels, parties are not allowed to read it, let alone other people. This is equivalent to confining the right to know the entire decision-making process to the courts themselves, intensifying the mystery surrounding adjudication. This practice is inconsistent with the principle of procedural openness and should be changed.

Such positive comments are encouraging but improvements to judicial training programs are needed. Some interviewees pointed out that training programs should at least last for one month, to allow participants to properly digest and absorb the knowledge. The above-mentioned Ford Foundation-sponsored program is a good example. Approximately 60 judges from Chongqing and Anhui, Jiangsu, and Jiangxi provinces participated in this two-month program. According to my observation, all lectures were of fairly high quality and most participants were attentive. Few questions were raised but whenever this occurred, the discussion was vivid and judges were ready to share difficulties as well as their solutions. Participants generally commended the program and found Judge Stephen William's lectures on the United States Administrative Law informative.

In early 2004, the International Law Institute held a three-week training program in Beijing for more than 100 Chinese judges from all over China. The seminars covered historical background of the WTO and WTO agreements. Information was obtained by Seth Garz through telephone conversations with staff members of the Institute, Parashu Nepal and Kiril Glavev.

See supra text accompanying note 159.

particularly thought provoking. “He talked about judicial review of legislation. We can’t do this here because we can’t review ‘abstract administrative acts.’ We never thought about how judges could do it,” one judge said.

On the critical side, participants found the lectures too theoretical and suggested adding more discussion of practical examples. A few judges also explained that there were no incentives for participants to study hard because they would not be tested at the end of the program and their good performance would not help their promotion.

In fact, a few participants left the program early and some simply copied answers from others when asked to fill out an evaluation form about the program.

Li Dun, Professor of the China Academy of Social Sciences, together with several foreign experts, conducted appraisals of this program and other training programs for administrative judges.

In an English article, he writes about the problems with China’s judicial training programs:

“Once a training course has ended, the judges will immediately fall back into the world of reality, even if they accepted some new ideas. On the other hand, the lecturers, including those regarded as the best, have confined their efforts to influencing judges with new ideas, short of teaching them how to operate in some workable way according to the new ideas.”

He concludes that although judicial training programs in China “have an indispensable role for the transformation of the Chinese society”, “their short-term effect is rather limited.”

2. Selection
The Court Reform Plan proposed another way for improving the competency levels of judges. The Plan proposed changes in the selection system, calling for gradual increases in the selection of judges of upper courts from “excellent judges at lower courts” and from “lawyers and other high-level legal talents in society.”

The Plan also requires new law school graduates to work at intermediate courts or

166. Interview with a judge from Chongqing, in Wuhan, June 25, 1999. For Chinese judges’ lack of power to review legislation, see ALL, supra note 8, arts. 11-12; 2000 Explanation, infra note 196, arts. 1-5.


168. Id.


170. Id.

171. Id.

172. Court Reform Plan, supra note 151, para. 32.
below before they can be promoted to courts at upper levels. In July 2002, the SPC issued a circular to formally request all lower courts to adopt these practices.

The idea of recruiting judges from legal talents in society is welcome, but positive results have yet to be seen. In March 1999, the SPC launched a pilot project to recruit 10 senior judges from among distinguished lawyers, law professors, legal researchers, and legal workers in legislatures and law enforcement departments. Candidates had to be between 35 and 50 years old, registered Beijing residents, and holders of at least a master of law degree. They also had to pass written tests and interviews. In the end, however, very few high-level lawyers and professors applied for the posts, either because they did not have registered households in Beijing – two interviewees found this requirement discriminatory – or because they were dissuaded by the low salaries and the unclear rank of these 10 “senior” judges.

Higher standards have been set for newly appointed and incumbent judges. New judges must pass the national unified judicial examination and a test administered by provincial high courts, and must receive special training for a certain period of time.

The unified judicial examination replaced the separate tests for future judges, prosecutors, and lawyers. Candidates seeking jobs in these professions must satisfy the academic and professional requirements prescribed by the Judges Law, the Procurators Law, or the Lawyers Law. According to the Judges Law, anyone who desires

173. Id. para. 32.
176. Interviews with a professor in Wuhan, June 29, 1999 and Jiang Mingan, Professor of Law, Peking University, Beijing, Aug. 6, 1999.
177. Interviews with a professor in Beijing, Aug. 10, 1999; Jiang Mingan, Professor of Law, Peking University, Beijing, Aug. 6, 1999; Chen Weidong, Professor of Law, People’s University, Beijing, Aug. 6, 1999; Chen Duanhong, Professor of Law, Peking University, Beijing, Aug. 16, 1999; Ma Huaidi, Professor of Law, China University of Politics and Law, Beijing, Aug. 19, 1999; and two lawyers in Chongqing, Dec. 23 and 29, 1999.
to be a judge must have (1) a bachelor of laws degree (or any other bachelor degree but the person must possess professional knowledge of law) and at least two years of legal practice experience;\textsuperscript{180} or (2) a master or doctoral law degree (or any other master or doctoral degree in addition to possessing professional knowledge of law) and at least one year of legal practice experience.\textsuperscript{181} Candidates are tested on legal theories, existing legal provisions, professional ethics, and their ability to apply law to facts.\textsuperscript{182} More than 360,000 people took China’s first national uniform judicial examination in March 2002.\textsuperscript{183} The examination reportedly set such a high standard that only 7 percent of candidates passed it.\textsuperscript{184}

Incumbent judges who do not have these appointment qualifications must receive training to meet the requirement.\textsuperscript{185} If they fail to obtain the qualifications even after the training, they will be dismissed or reassigned to other positions in the court system.\textsuperscript{186} A rule allows for exceptions in regions that the SPC has identified as having “real difficulty” in satisfying the above qualification requirements. This exceptional rule will, however, expire on December 31, 2006.\textsuperscript{187} 


180. Judges Law, supra note 94, art. 9(6)(1). If the candidate seeks to be a judge in a higher level court or the Supreme People’s Court, he or she must have practiced law for at least three years. Id. art. 9(6)(1).

181. Id. art. 9(6)(1). If the candidate seeks to be a judge in a higher level court or the Supreme People’s Court, he or she must have practiced law for at least two years. Id. art. 9(6)(1).

182. National Judicial Examination, supra note 179, art. 7.


185. Judges Law, supra note 94, art. 9(6)(2).

186. See China’s Supreme Court Calls for Raising Judges’ Professional Competence, supra note 174. But the Supreme People’s Court has yet to specify a time limit for incumbent judges to meet these qualification requirements. It only requires local high courts to design training plans that are suitable for local situations. See Zuigao Renmin Fayuan Guanyu Guanche Luoshi “Zhonghua Renmin Gongheguo Faguan Fa De Tongzhi [The Notice of the Supreme People’s Court Concerning the Coherent Implementation of the ‘Judges Law of the People’s Republic of China’]”, promulgated and effective on July 11, 2001, para. 5.

187. These places include Tibet, autonomous counties in all provinces, and counties that the State Council identified as main places for combating poverty. They are allowed to appoint judges who only have diplomas (dazhuan) in law. See Judges Law, supra note 94, art. 9(6)(3); Zuigao Renmin Fayuan and Zuigao Renmin Jiancha Yuan Guanyu Zai Bufen Difang Fangkuan Daoren Faguan Jiuchuang “Tuojian De Tongzhi [A Notice of the Supreme People’s Court and the Supreme People’s Procuratorate Concerning the Relaxation of Rules on Judges’ and Procurators’ Educational Qualifications in Certain Areas]”, promulgated and effective on Jan. 18, 2002.
B. Improve the Body of Legislation and Judicial Interpretations

To provide a basis for an accurate application of law in handling WTO-related cases, China has been reviewing its legislation to ensure that they are consistent with WTO rules. It has reviewed over 2,500 pieces of WTO-related legislation. As a result, 830 pieces were repealed, 325 pieces were amended, and then 118 new pieces of legislation were enacted.\textsuperscript{188} To ensure the quality of legislation, China also requires all local governments to file their legislation with the State Council, China's highest executive organ. Any citizen, social organization, enterprise and government agency can also request the Council to review a particular piece of filed local legislation if it is believed to be in conflict with a national law. By the end of 2003, 2,026 pieces of local legislation had been reportedly filed.\textsuperscript{189}

The body of judicial interpretations has also been improved. The SPC examined all of its 2,600-odd judicial interpretations and related documents and repealed 177 of them.\textsuperscript{190} It also formulated almost 200 judicial interpretations from 1998 to 2003,\textsuperscript{191} some of which concern the adjudication of WTO-related ALL cases. For example, as discussed above, the court issued the \textit{International Trade Judicial Interpretation}, the \textit{Anti-Dumping Judicial Interpretation}, and the \textit{Countervailing Judicial Interpretation} to designate upper level courts to handle antidumping, countervailing, and other WTO-related administrative cases.\textsuperscript{192} The \textit{International Trade Judicial Interpretation} also provides that Chinese courts must apply domestic law. This puts to rest different speculations about whether WTO agreements are directly applicable in China or whether they must be applied through Chinese law.\textsuperscript{193}

Another judicial interpretation titled \textit{Supreme People's Court's Rule Concerning Several Questions Relating to Evidence in Administrative Litigation ("Judicial Interpretation of Evidence") was issued in

\textsuperscript{188} See Suan Yuanzhong, Shimao Zuzhiyo Yanjiuhui Renzhong Daoyuan [The Research Committee on WTO Organizational Law has a Significant Role to Play], FAZHI RIBAO [LEGAL DAILY], Jan. 8, 2004
\textsuperscript{190} See Report of the Supreme People's Court 2002.
\textsuperscript{191} See Wu Kun, Jiaqiang Xianfa Xuanchuan Jiaoyu Weihu Xianfa Quanwei Zunyan [Strengthen Publicity and Education on Constitution, Safeguard the Authority and Dignity of the Constitution], FAZHI RIBAO [LEGAL DAILY], Dec. 4, 2003; Reports of the Supreme People's Court 2003 and 2004.
\textsuperscript{192} See supra text accompanying notes 11-16 and 152-53.
July 2002. It prescribes rules of evidence for administrative litigation.\textsuperscript{194} Like other trials in China, ALL trials have been weakened by inadequate guidance on admissibility of evidence and party responsibility for adducing evidence in court. The ALL has only six articles relating to evidence,\textsuperscript{195} as does a judicial interpretation that was adopted in November 1999 to implement the ALL.\textsuperscript{196} The \textit{Judicial Interpretation of Evidence}, however, has 80 articles, prescribing the burden of proof and time limit for adducing evidence;\textsuperscript{197} requirements that adduced evidence must satisfy;\textsuperscript{198} collection and preservation of evidence;\textsuperscript{199} cross-examination and verification of evidence;\textsuperscript{200} as well as authentication and recognition of evidence.\textsuperscript{201}

These efforts are quite impressive but have not cleared all the problems. Three major issues should be noted. First, citizens, social organizations, and enterprises have not adequately taken advantage of the above-mentioned process to review the quality of filed legislation, even though official sources acknowledge that some filed local rules are inconsistent with national laws or were adopted in breach of legal procedures.\textsuperscript{202}

Second, the Chinese government failed to include a provision in the recent constitutional amendment to establish a transparent mechanism – be it a court or a committee within the national legislature – to review the constitutionality of legislation. Under Chinese law, judges cannot do so. If they are uncertain of the validity of a piece of legislation, they must seek advice from their court leaders, giving rise to more opportunities for inter-court and intra-court influ-


\textsuperscript{195} ALL, supra note 8, arts. 31-36.


\textsuperscript{197} Judicial Interpretation of Evidence, supra note 194, arts. 1-9.

\textsuperscript{198} Id. arts. 10-21.

\textsuperscript{199} Id. arts. 22-34.

\textsuperscript{200} Id. arts. 35-52.

\textsuperscript{201} Id. arts. 53-73.

ence and even interference. Nevertheless, judges can choose not to apply a local governmental rule or a departmental rule if it is found to be inconsistent with a national law, but they cannot declare it “invalid.”

Recently, however, a judge boldly did just that and was dismissed for making a serious mistake. The case sparked widespread discussion and the judge was considered a heroine by local rule-of-law activists.

Third, new deficiencies may emerge because many pieces of new legislation and judicial interpretations were apparently prepared in haste. An analysis of several provisions prescribing rules of evidence for handling anti-dumping and countervailing administrative cases illustrates the problem. At issue are Articles 7-9 of the Anti-Dumping Judicial Interpretation and the same articles under the Countervailing Judicial Interpretation. Since the two documents are identical (except that one document uses the word “anti-dumping” whereas the other uses the word “countervailing”), any comments on the Anti-Dumping Judicial Interpretation in the remaining paragraphs of this section should be read to also include the Countervailing Judicial Interpretation.

There are four major deficiencies under the Anti-Dumping Judicial Interpretation. First, the relationship between this document and the Judicial Interpretation of Evidence is unclear. None of the provisions under the Anti-Dumping Judicial Interpretation expressly refer to the Judicial Interpretation of Evidence. Presumably, the rules prescribed by the Judicial Interpretation of Evidence are applicable to all administrative cases including anti-dumping administrative cases because the preamble of the Judicial Interpretation of Evidence provides that the document is enacted for, inter alia, the purpose of “fairly and promptly adjudicating administrative cases” (emphasis added). If this reading is correct, judges, in handling anti-dumping administrative cases, should refer to evidentiary rules prescribed by Articles 7 to 9 of the Anti-Dumping Judicial Interpretation and the Judicial Interpretation of Evidence.

But if there are discrepancies between these two sets of rules, which one shall prevail? For example, Article 1(2) of the Judicial Interpretation of Evidence requires that if the defendant administrative

203. See supra text accompanying notes 132-34.

204. See Chen Liguo, Shi Panjue Weifa, Haishi Biaoshu Qiantuo [Does the Judgment Violate the Law or were its Expressions Inappropriate?], FAZHI RIBAO [LEGAL DAILY], Nov. 27, 2003; Xie Yuandong, Zhongzi Guanside Yiwai Zhanfang [Accidental Blossom of the 'Seed' Case], FAZHI RIBAO [LEGAL DAILY], Nov. 26, 2003; Zhang Qianfan, Fazhi Guocheng Zhongde Quanli Zhiheng [The Balance of Power During the Transition to the Rule of Law], FAZHI RIBAO [LEGAL DAILY], Jan. 29, 2004. For more comments on the lack of constitutional review mechanism, see Veron Hung, China's Constitutional Amendment is Flawed, INTERNATIONAL HERALD TRIBUNE, Mar. 5, 2004; Lin, supra note 1, at 270-81.

205. Judicial Interpretation of Evidence, supra note 194, pmbl.
organ, “owing to force majeure or other proper matters that cannot be objectively controlled,” cannot submit all evidence upon which its administrative act is based by the deadline set forth in the ALL, it shall, within 10 days of receiving a copy of the bill of complaint, apply for a court’s approval for delay in submitting the evidence.\textsuperscript{206} Article 1(1) of the \textit{Judicial Interpretation of Evidence} further provides that if the defendant fails to provide the evidence or is late in submitting its evidence without proper reasons, it shall be taken to mean that there is no evidence for supporting the challenged administrative act. Yet the \textit{Anti-Dumping Judicial Interpretation} does not impose these restrictions on the defendant. Article 7(1) of the \textit{Anti-Dumping Judicial Interpretation} merely stipulates that the defendant shall have the burden of proof for the challenged anti-dumping administrative act and shall provide the evidence and normative documents upon which the act is based.

Such discrepancy causes a problem. If the defendant of an anti-dumping administrative case is late in submitting its evidence but fails to seek a court’s approval for doing so, the plaintiff may, based on Article 1(1) of the \textit{Judicial Interpretation of Evidence}, argue that the court should take it to mean that there is no evidence for supporting the challenged anti-dumping administrative act and should rule in favor of the plaintiff. But the defendant agency may argue that it is not bound to seek a court’s approval because the \textit{Anti-Dumping Judicial Interpretation} does not have this requirement. How should the court decide?

In the case of any conflict between provisions of two pieces of legislation enacted by the same entity, the Law on Legislation stipulates explicitly that a special provision prevails over a general provision and a new provision prevails over an old provision.\textsuperscript{207} However, the Law on Legislation only governs the relationships among different types of legislation. It is not applicable to judicial interpretations. The SPC must clarify this issue. If the court follows the rule of “new provision prevailing over old provision,” the provision under the \textit{Anti-Dumping Judicial Interpretation} prevails because it was promulgated after the \textit{Judicial Interpretation of Evidence}. If the court fol-

\textsuperscript{206} Article 43(1) of ALL provides, \textit{inter alia}, that “A people’s court shall send a copy of the bill of complaint to the defendant within five days of accepting the case. The defendant shall provide the people’s court with the documents on the basis of which a specific administrative act has been undertaken and file a bill of defence within ten days of receiving the copy of the bill of complaint. The people’s court shall send a copy of the bill of defence to the plaintiff within five days of receiving it.” \textit{ALL}, supra note 8, art. 43(1).

\textsuperscript{207} Article 83 of the Law on Legislation provides that “In the case of national law, administrative regulations, local decrees, autonomous decrees and special decrees, and administrative or local rules enacted by the same body, if a special provision differs from a general provision, the special provision shall prevail; if a new provision differs from an old provision, the new provision shall prevail.” \textit{Law on Legislation}, supra note 126, art. 83.
allows the rule of "specific provision prevailing over general provision," the provision under the Anti-Dumping Judicial Interpretation also prevails because it is specifically applicable to anti-dumping administrative cases whereas that under the Judicial Interpretation of Evidence is generally applicable to all administrative cases. This conclusion, however, is not desirable because it negates the value of Article 1 of the Judicial Interpretation of Evidence, which prevents defendant agencies from holding their evidence until the last minute to make it difficult for the plaintiffs and their lawyers to prepare their arguments. Therefore, the SPC must consider this matter prudently.

The second major deficiency of the Anti-Dumping Judicial Interpretation concerns Article 7(2) of the document. According to this provision, a court determines the legality of the challenged anti-dumping administrative act by relying on the defendant's written records. Any "factual materials" (shishi cailiao) that were not included in these records at the time when the defendant undertook the challenged anti-dumping administrative act cannot be the basis for proving the legality of the act. But how can a court ensure that the defendant agency does not include "factual materials" in its records after it has undertaken the challenged anti-dumping administrative act? Will there be a mechanism under which the filing of these records is subject to public scrutiny? The judicial interpretation is silent on these issues.

Third, Article 8(2) of the Anti-Dumping Judicial Interpretation states that:

During the anti-dumping administrative investigation process, if the defendant requests, in accordance with legal procedures, the plaintiff to provide evidence, but the plaintiff refuses to provide the evidence without any proper reasons, fails to honestly provide the evidence, or uses other methods to seriously obstruct the investigation, any evidence adduced by the plaintiff during litigation cannot be admitted by the court.

208. This was the problem when the ALL was implemented by the 1991 Opinion, which required defendants to adduce their evidence "before the first instance trial ends." 1991 Opinion, supra note 196, art. 30. Defendants took advantage of this provision to hold their evidence until the last minute, causing great difficulties for the plaintiffs and their lawyers to fully prepare their cases. Interview with a lawyer in Chongqing, Jan. 10, 2000 and see Zhou Shixia, supra note 68, at 5-7. This problem was remedied when the 2000 Explanation was adopted to supersede the 1991 Opinion. Article 26 of the 2000 Explanation shortens this period and requires defendants to present their evidence and the basis of their administrative acts within 10 days of receiving a copy of the bill of complaint. If the defendant fails to provide such information, it shall be taken to mean that there is no evidence or basis of the challenged administrative act. 2000 Explanation, supra note 196, art. 26. Article 1(1) of the Judicial Interpretation of Evidence reiterates this point. Judicial Interpretation of Evidence, supra note 194, art. 1(1).
The phrase “seriously obstruct the investigation” is not defined. It is not clear what amounts to “serious” obstruction.

Finally, Article 9 of the Anti-Dumping Judicial Interpretation states that:

During the anti-dumping administrative investigation process, if the interested party [(lihai guanxi ren)] refuses to provide evidence without any proper reasons, fails to honestly provide evidence, or uses other methods to seriously obstruct the investigation, the governing department of the State Council may, basing on the factual conclusions [(shishi jielun)] derived from available evidence, conclude that there is sufficient evidence.

Again, it is not clear what amounts to “serious” obstruction. It is also unclear whether the “interested party” [(lihai guanxi ren)] refers to the plaintiff, the “third party” [(disanren)] of the anti-dumping administrative case, or both. Under Article 2, the term “interested party” is used to refer to the plaintiff. But Article 4 also provides that other governing departments of the State Council that, under the law, have “interests” [(lihai guanxi)] in the challenged anti-dumping administrative act may participate in the litigation as “third parties.” Arguably, these “third parties” may also be regarded as “interested parties” under Article 9.

These four deficiencies under the Anti-Dumping Judicial Interpretation and the Countervailing Judicial Interpretation show that although new rules have been promulgated to provide Chinese judges with more guidance on handling WTO-related administrative cases, deficiencies in these new rules may cause new problems for them. Relevant authorities in China should remedy the problems without delay.

C. Combat Bribery

In the Court Reform Plan, the SPC pledges to strengthen the honesty of judicial personnel. The past several years have seen some progress. The number of court personnel who have violated laws and disciplinary rules across the country has decreased year after year from 6.7 per thousand in 1998 to 2 per thousand in 2002. It seems that the judiciary’s efforts of combating bribery through prevention and punishment produced some results.

209. See Court Reform Plan, supra note 151, para. 6.
211. See, e.g., Chinese Officials Stress Anti-Corruption Work in Courts, BBC MONITORING INTERNATIONAL REPORTS, Apr. 8, 2004, available in LEXIS, News Library, News Group File. He Yong, member of the Secretariat of the CCP (Chinese Communist Party) Central Committee and deputy secretary of the Central Discipline Inspection Commission, stressed that courts at all levels should persist in punishment and
One major preventive measure was the increase in the salaries of judges. In July 2002, without referring to judicial corruption, the SPC promulgated a notice that provided that it would “gradually increase the salaries of judges, strengthen the attraction of the judicial profession, and protect the pride that the judicial profession should have.”\footnote{Zuigao Renmin Fayuan Guanyu Jiaqiang Faguan Duiwu Zhiyehua Jianshe De Ruogan Yijian [Supreme People’s Court’s Several Opinions Concerning Strengthening the Construction of Professional Judge Contingent], promulgated and effective on July 29, 2002, para. 10(3)[hereinafter Construction of Professional Judge Contingent].}\footnote{China to Cut Back Number of Judges - Supreme Court’s President, supra note 178.}\footnote{See supra text accompanying note 112.}\footnote{See China’s Supreme Court Calls for Raising Judges’ Professional Competence, supra note 174.}\footnote{Zuigao Renmin Fayuan Guanyu Yange Zhixing “Zhonghua Renmin Gongheguo Faguan Fa” Youguan Chengjie Zhidude Ruogan Guiding [Several Rules Concerning the Strict Enforcement of the Severe Punishment System Enshrined in the PRC Judges Law], promulgated and effective on June 10, 2003.\footnote{Zuigao Renmin Fayuan Sifabu Guanyu Guifan Faguan He Lushi Xianghu Guanxi Weihu Sifa Gongzheng De Ruogan Guiding [Several Rules of the Supreme People’s Court and the Ministry of Justice Concerning Regulation of the Mutual Rela-} Xiao Yang, President of the SPC, explained that he wanted judges to be “well-paid so that they can lead a better life.”\footnote{Zuigao Renmin Fayuan Guanyu Jiaqiang Faguan Duiwu Zhiyehua Jianshe De Ruogan Yijian [Supreme People’s Court’s Several Opinions Concerning Strengthening the Construction of Professional Judge Contingent], promulgated and effective on July 29, 2002, para. 10(3)[hereinafter Construction of Professional Judge Contingent].}\footnote{China to Cut Back Number of Judges - Supreme Court’s President, supra note 178.} He emphasized the need for reducing the total number of judges in China – as mentioned above, the country has about 210,000 judges\footnote{See China’s Supreme Court Calls for Raising Judges’ Professional Competence, supra note 174.} – by dismissing incompetent ones.\footnote{Zuigao Renmin Fayuan Guanyu Jiaqiang Faguan Duiwu Zhiyehua Jianshe De Ruogan Yijian [Supreme People’s Court’s Several Opinions Concerning Strengthening the Construction of Professional Judge Contingent], promulgated and effective on July 29, 2002, para. 10(3)[hereinafter Construction of Professional Judge Contingent].} Later in that month, the Court issued a circular to formally request each court to determine, in accordance with its caseload and the population and economic growth of its jurisdiction, a reasonable number of judges it needs.\footnote{See China’s Supreme Court Calls for Raising Judges’ Professional Competence, supra note 174.} These moves would have the effect of discouraging judges from accepting bribes.

Another preventive measure is preparing disciplinary rules to provide judges with clear guidance. The discipline of Chinese judges is governed by 13 prohibitions stipulated in the Judges Law, which prohibit, \textit{inter alia}, judges from taking bribes or engaging in business for profit. In June 2003, the SPC issued a judicial interpretation titled \textit{Several Rules Concerning the Strict Enforcement of the Severe Punishment System Enshrined in the PRC Judges Law}, to stress that any judge who violates any of the 13 prohibitions will be dismissed or disciplined in other ways.\footnote{Zuigao Renmin Fayuan Sifabu Guanyu Guifan Faguan He Lushi Xianghu Guanxi Weihu Sifa Gongzheng De Ruogan Guiding [Several Rules of the Supreme People’s Court and the Ministry of Justice Concerning Regulation of the Mutual Rela-} In March 2004, the Court, together with the Ministry of Justice, issued a regulation to forbid, \textit{inter alia}, judges from accepting money, gifts and securities from a party of a lawsuit or his lawyer. Officials acknowledged that some lawyers bribed judges to get favorable verdicts.\footnote{Zuigao Renmin Fayuan Guanyu Jiaqiang Faguan Duiwu Zhiyehua Jianshe De Ruogan Yijian [Supreme People’s Court’s Several Opinions Concerning Strengthening the Construction of Professional Judge Contingent], promulgated and effective on July 29, 2002, para. 10(3)[hereinafter Construction of Professional Judge Contingent].}
On the punishment front, a new mechanism was established in October 2002 to monitor for illegal and inappropriate conduct by judges. Under this mechanism, high courts at provincial or autonomous regional levels are responsible for monitoring lower level courts by different methods including snap inspections. The SPC has also launched judicial inspections, to verify, inter alia, the enforcement of disciplinary rules across the country.

In February 2004, the CCP took an unprecedented step to issue a regulation on internal supervision. It encouraged all party members to report their corrupt co-workers or leaders through signed letters, guaranteeing that the identities of these whistleblowers will remain confidential. Since most Chinese judges are CCP members, this mechanism, if properly implemented, may also help combat judicial corruption.

III. UNPRECEDENTED OPPORTUNITY FOR REFORMING RELATIONSHIPS AMONG COURTS, LOCAL GOVERNMENTS AND THE CCP

China’s efforts to make its administrative litigation system conform to the WTO “independent judicial review” standard are worthy of some praise. But the limitations of these measures as discussed above should be noted. Moreover, the fundamental problem of China’s lack of an independent judicial review system is rooted in the fact that the CCP and local governments control the courts. To resolve this problem, political reform is needed to change the current relationships among courts, local governments, and the CCP.


The Court Reform Plan does touch on the courts’ personnel and financial arrangements even though it has no clear reference to CCP and local government control. It provides that the SPC will “carry out positive exploration concerning the reform of various systems including the courts’ organizational system, cadre management system, and budgetary management system.” However, the suggested initiatives are quite vague. The plan states that the court will seek revision of the Organic Law of the People’s Courts to gradually construct an organizational system that “is consistent with [China’s] political system and enables courts to exercise adjudication powers independently, fairly, and in accordance with the law.” It further provides that the courts’ cadre management system will be actively explored to better realize the CCP’s leadership and the NPC’s supervision. The establishment of a mechanism to ensure that courts have necessary appropriations to perform their adjudicative duties will also be explored.

That these initiatives are mostly confined to “explorations” is a reflection of the political constraints on the courts. Any meaningful institutional change would involve a substantial reallocation of power within the existing political structure and a reconciliation of two apparently conflicting features of China’s political system: rejection of the doctrine of separation of powers but strengthening of the courts’ ability to exercise adjudication powers independently, fairly, and in accordance with the law. This type of political reform is beyond the SPC’s capacity. The court can only introduce less effective measures to alleviate the interference problem. For example, court leaders are required to rotate their posts regularly to ensure that they do not stay in a locality long enough to develop strong connections.

Intermediate courts are authorized to try all first-instance administrative cases in which “the defendant is the people’s government at the county or higher level, and the cases are not appropriate for a basic court to adjudicate.”

223. Court Reform Plan, supra note 151, para. 6. See also id. paras. 43-45.
224. Id. para. 43.
225. Id. para. 44.
226. Id. para. 45.
227. An exchange between Professor Stanley Lubman, School of Law, University of California (Berkeley), and some legislative affairs officials of the State Council shows these officials’ concern about formal constraints imposed by ideology. In October 2002, while participating in a WTO training program in the United States, these officials asked, “How can the Chinese government make its judges independent without adopting the doctrine of separation of powers?” In Professor Lubman’s opinion, the fact that these officials asked this question seems to indicate their reluctance to change fundamental principles upon which China’s current political system is based if such change involves using liberal-democratic doctrine or institutions. I am grateful to Professor Lubman for sharing the information and his insight.
228. Court Reform Plan, supra note 151, para. 35.
229. 2000 Explanation, supra note 196, art. 8. See also ALL, supra note 8, art. 14(3).
Against this backdrop, a series of statements made by Chinese top leaders are unusual and signal interest in carrying out some meaningful institutional reform in the court system. In July 2002, the SPC made an exceptionally strong statement about interference and its plan to deal with the problem. Xiao Yang, President of the SPC, said, “courts have often been taken as branches of the government, and judges viewed as civil servants who have to follow orders from superiors, which prevents them from exercising mandated legal duties.” Xiao clearly pointed out that judges should be “immune from local interference.”

The court announced that a mechanism would be established “to ensure that judges are free from interventions from local and departmental protectionism.” Around that time, the court issued a 39-paragraph document about strengthening the construction of a professional judge contingent, pledging, once again, to get rid of “interference from administrative organs, social organizations, and individuals” and “interventions from local and departmental protectionism.”

Several months later, the CCP explicitly pledged to “reform” courts’ financial and personnel arrangements at its Sixteenth National Congress. Leading legal scholars whom I interviewed spoke highly of this pledge, commenting that this marked the end of the “exploratory” stage and the beginning of actual reforms. When the CCP adopted a resolution on improving the socialist market economy system in October 2003, it emphasized that “institutional reform” is the priority task of judicial reform.

On this subject, Xiao Yang elaborated that “in the [sic] light of the overall demand pertaining to reform of the judicial system proposed in the 16th CCP National Congress, we must establish new thoughts, set forth new objectives and bring about new development.” But he also stressed that judicial reform must proceed from China’s “fundamental conditions”, dampening any hope of transplanting to China “judicial independence” as understood in the West.

231. Id.
232. China to Cut Back Number of Judges - Supreme Court’s President, supra note 178.
233. Construction of Professional Judge Contingent, supra note 212, para. 10.
236. See China’s Supreme Court Head Calls for further Judicial Reform, BBC MONITORING INTERNATIONAL REPORTS, Mar. 10, 2003, available in LEXIS, News Library, News Group File. Along the same line, Jia Chunwang, procurator-general of China’s Supreme People’s Procuratorate, explained that China’s “sifa gaige” (literally means reform of the “judicial system”, which, as explained in fn 2, includes the procu-
Details of institutional reform of China’s judiciary remain unclear. But this topic is not new. Chinese scholars have for a long time proposed various models. According to these scholars, the most desirable model is to replace the current system of horizontal leadership with one that exemplifies vertical leadership (that is, a lower court would be responsible to the court at the next higher level but not to the local government). At the top of this hierarchy would be the SPC, which, together with the legislative and executive branches of the Central People’s Government, would make personnel and financial arrangements for the entire court system. Judges of a lower court would be appointed by the court at the next upper level, but the lower court’s financial resources would be allocated by the Central People’s Government.

This model is unlikely to be adopted in the near future. It would overburden the Central People’s Government with too many responsibilities, and the structural change involved is too drastic. Above all, the central government’s scanty resources and the country’s fragile fiscal system disallow any optimism about central fund allocations. The central government collects only about 16 percent of GDP, compared to the average of 40 percent in developed countries. The fiscal system is susceptible to abuse because approximately 80 percent of the central government’s revenues are collected from local governments, which have been implicated in major cases of organized smuggling and financial fraud.


Less drastic models have been proposed. One model would redesign the jurisdiction of the courts so that they transcend the borders of administrative regions and thus help reduce the impact of local protectionism. For instance, provincial high courts would be replaced with a “circuit appeal court” system that is akin to the one in the United States. Each circuit appeal court has jurisdiction over several provinces. In the context of administrative litigation, the establishment of a separate “administrative court” system similar to that in France has been suggested.241

The SPC has reportedly considered less drastic reform models, such as the establishment of cross-provincial and cross-city judicial district courts as well as circuit tribunals that are attached to the SPC. A cross-provincial judicial district court refers to a court that is formed by merging high courts of several neighboring provinces, whereas a cross-city judicial district court refers to one that is formed by merging intermediate courts of several neighboring cities. This could help reduce interference by local party and government organs. Circuit tribunals that are attached to the SPC can be organized on an ad hoc basis. If a particular court is ill-equipped to deal with a certain type of case (at either the first- or second-instance level), the SPC can send a team of experienced judges to hear the case. The establishment of such circuit tribunals is considered to be conducive to uniform application of law and centralization of judicial power.242

The SPC has yet to finalize which reform model it will adopt. Regardless of the outcome, the Chinese leadership’s support for “institutional reform” in the judiciary is a good sign. Some observers commented that the SPC’s unusually strong statements in July 2002 on interference in the court system were “a radical break from the practice of recent decades in which judges were seen as tools of the ruling Communist Party and appointed for political reasons rather than for their knowledge of the law.”243 This interpretation, however, is too optimistic. The court carefully referred to “interventions

241. See, e.g., Wu Nan, Fayuan Neibu Ying Sheli Xingzhong Fayuan [The Judiciary Should Establish an Administrative Court System], FAZHI RIBAO [LEGAL DAILY], July 3, 2003; Ma Huaide & Jie Zhiyong, Xingzheng Susong Anjian Zhixingnan De Xianzhuang Ji Duice [Current Situations of and Strategies for Dealing with the Enforcement Difficulty of Administrative Litigation Cases], SUSONG FAXUE, SIFA ZHIDU [LEGAL STUDIES ON LITIGATION AND JUDICIAL SYSTEM], No. 2, at 65-69 (2000).


from local and departmental protectionism” only.\textsuperscript{244} There was
neither reference to the central government nor the CCP leadership.

The Chinese leadership’s interest in institutional reform in the
judiciary does, however, signal emergence of some political reform ini-
tiatives to redefine the relationships between courts and local gov-
ernments. If pursued cautiously, these initiatives may serve as an
opening to bring about reform efforts that address the role of the CCP
in China’s political structure. The current circumstances inside and
outside China create a favorable environment for such pursuit.

Externally, China’s WTO membership puts the inner workings of
its economic and legal – and by extension, political – systems under
greater scrutiny. The WTO established a transitional review mecha-
nism to monitor China’s compliance. Under this mechanism, the
WTO’s general council and subsidiary bodies will review China’s im-
plementation of various WTO commitments for eight years.\textsuperscript{245} The
fact that aggrieved foreign parties can always, through their coun-
tries, resort to WTO’s Dispute Settlement Body (“DSB”) for legal re-
dress pressures China to implement meaningful reform to establish
an independent judicial review system. Although the process in-
volved in the DSB is cumbersome and time-consuming,\textsuperscript{246} this alter-
native may still be more appealing to foreign investors than a
domestic judicial review mechanism that cannot independently de-
cide cases in accordance with laws.\textsuperscript{247}

Internally, the CCP seeks to survive a mounting governance cri-
sis resulting from, among other things, high-level corruption and ris-
ing worker and farmer protests.\textsuperscript{248} Developments immediately
before and after the leadership transition from Jiang Zemin to Hu
Jintao show a desire to change on the part of CCP leaders.

While Jiang was still China’s president, more robust discussion
on political reform already took place at party meetings and in party
publications. Foreign political scientists, including harsh critics,
were invited to China to lecture and give advice on the country’s fu-
ture. Chinese researchers were sent overseas to study social demo-

\textsuperscript{244} See China to Cut Back Number of Judges - Supreme Court’s President, supra
note 178.
\textsuperscript{245} Protocol, supra note 5, art. 18.
\textsuperscript{246} See Mark L. Clifford, China’s Fading Free-Trade Fervor, BUSINESS WEEK On-
reported that the Dispute Settlement Body was already overloaded.
\textsuperscript{247} A basic court judge in China made similar observations. See Pang Shengxian,
supra note 4.
\textsuperscript{248} See, e.g., Minxin Pei, China’s Governance Crisis, FOREIGN AFFAIRS, Sept.-Oct.
2002; YINGXIANG QUECE DE GUOQING BAOGAO [A REPORT ON NATIONAL CONDITIONS
THAT INFLUENCE STRATEGIES] (Hu Angang ed., 2002).
ocratic parties and the transitions experienced by former communist parties in Europe.\textsuperscript{249}

Above all, at the CCP’s Sixteenth National Congress, the party decided to incorporate into its charter Jiang’s “Three Represents” theory – the CCP represents, among two other things, “advanced productive forces.”\textsuperscript{250} It was certainly an attempt to justify the extension of CCP membership to the country’s wealthy entrepreneurs, while the CCP has been losing support from workers and farmers. If handled properly, this new development could open a way for China’s newly emerged middle class to change the Chinese legal and political systems so that rights would be more effectively protected. However, if handled improperly, it could lead to stronger business-government ties at the local level and could impede reform. Although the success of this new development hinges on careful implementation of the system, the attempt of welcoming entrepreneurs itself at least manifests the CCP’s pragmatic and creative instincts to introduce reform to sustain its survival.

These favorable circumstances for reforming the relationships among courts, local governments, and the CCP do not seem to have changed under the new Chinese leadership. New leaders, President Hu Jintao and Premier Wen Jiabao, appear to be interested in some degree of political reform.

Hu Jintao’s interest had been noted before he succeeded Jiang. When Hu was head of the Central Party School, a training center for senior party cadres, the school studied various sensitive topics such as political reform, direct elections, and Europe’s “bourgeois” social-democratic parties. When Jiang’s “Three Represents” theory drew vehement attacks from communist stalwarts, the Central Party School’s newspaper, \textit{Study Times}, ran an article to defend the theory.\textsuperscript{251} In late 2002, at his meeting with Finnish President Tarja Halonen, Hu said, without further elaboration, that one of his major tasks was to “strengthen democracy at all levels.”\textsuperscript{252} It is highly unlikely that Hu meant democracy as understood in the West. Nonethe-


\textsuperscript{252} China’s Hu Jintao Wants to Strengthen Democracy; Finnish President, \textit{Agence France Presse}, Nov. 27, 2002, available in LEXIS, News Library, News Group File.
less, if he meant democracy as it is usually understood by Chinese officials, that is, competitive elections inside the CCP, this step represents his interest in some reform and should still be welcomed.

On democracy, Premier Wen Jiabao gave his thoughts during his interview with the Washington Post in late 2003, and at a conference in March 2004. He acknowledged that “without success in political reform, economic reform will not be successful.” But he also stated that China, due to the population’s inadequate education level, can only have direct elections in villages, introduce suffrage for the election of people’s deputies at the level of townships and counties, and practice indirect elections for the leadership of provinces, autonomous regions, municipalities, and central authorities. Wen concluded that China’s current conditions “are not ripe for direct elections at the higher levels.”

Hu’s and Wen’s views on democracy show that they, like other CCP leaders, are not ready to implement any political reform that might, in their opinion, undermine the governance of the party. The leadership’s bottom line is evidenced in Beijing’s tough approach to handling the Hong Kong people’s strong demand for democracy. Yet a series of events that have emerged since the two leaders came into power show that they are willing to depart slightly from their predecessors’ stances to establish a fairer legal and political system. These events include the dismissal of two officials during the Severe Acute Respiratory Syndrome (SARS) outbreak, the abolition of the “custody and repatriation” (shourong qiansong) system after a migrant worker was beaten to death in police custody, and the

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254. Interview with Wen Jiabao, THE WASHINGTON POST, Nov. 21, 2003. See also ZHONGGUO XUANJU ZHUANGKUANG DE BAOBAO [A REPORT ON THE STATUS OF ELECTIONS IN CHINA] (Cai Dingjian ed., 2003). For a review of this book, see GUO HENGZHONG, WOGUO MINZHU XUANJU ZHISHENG YANJIU DE YANJIU [MODEL EMPIRICAL RESEARCH ON OUR COUNTRY’S DEMOCRATIC ELECTIONS], FAZHI RIBAO [LEGAL DAILY], Mar. 20, 2003. One finding of this research is that the “educational background and level” of ordinary citizens is not the only determinant of the quality of elections.
amendment of the constitution to strengthen human rights and private property protection.\textsuperscript{257}

To respond to this unprecedented opportunity for reforming the relationships among courts, local governments, and the CCP, the international community should direct more resources to support programs on this front.\textsuperscript{258} Still, the international community should be realistic about how far the reform can go. The most desirable reform is to eradicate the CCP’s control over courts by strictly separating laws from party policies. Ideally, the CCP would only formulate policies, which the state would transform into laws. Laws would be supreme regardless of any subsequent changes in CCP policies.\textsuperscript{259} Given the party’s utmost concern with its unstable governance, it is unlikely to give up the current entrenched status of party policies. It may, however, be willing to allow courts to be more independent of government and party organs at lower levels, to strip these organs’ power, and to authorize courts to review more rigorously actions taken by these organs.

Therefore, at this stage, the international community should assist China in exploring the possibility of establishing a court system that can be more independent of local governments. They should also study how China can reform its fiscal system so that the central government does not excessively rely on local governments for financial support. The central government will then have enough resources to allow central fund allocations to support a court system that exemplifies vertical leadership, a model regarded by Chinese scholars as the most desirable.

With respect to curbing the power of administrative organs and strengthening the role of courts in reviewing administrative actions, the Chinese government has enacted a licensing law,\textsuperscript{260} and has been

\textsuperscript{257} See Constitution, supra note 95, arts. 13, 33. For comments on the limitations of this constitutional amendment, see Hung, supra note 204.

\textsuperscript{258} For discussion of the international community’s assistance on institution-building in China, see Paul Gewirtz, The U.S.-China Rule of Law Initiative, 11 WM. & MARY BILL RTS. J. 603 (2003); Clarke, supra note 1, 115-17; Lubman, supra note 17, at 29-32.

\textsuperscript{259} See Guo Daohui, Gaishan Dangzai Fazhi Guojia Zhongde Lingdao Guojia Zhongde Dangzai Fazhi Guojia Zhongde Luotu Shouyi (Discuss the Relationship between Law and Policy in Administrative Law Enforcement), FASHANG YANJIU [RESEARCH ON LAW AND BUSINESS], No. 2, at 60 (1999).

\textsuperscript{260} Zhonghua Renmin Gongheguo Xingzheng Xuke Fa [Licensing Law of the People’s Republic of China], promulgated on Aug. 27, 2003 and effective on July 1, 2004. The licensing law aims at restricting administrative organs’ power to grant franchises, permits or certificates to businesses and individuals. Such power has been abused. Some citizens who want to start a business have to spend years before they get more than 100 required official stamps. See Chinese Legal Expert Praises
planning to enact an administrative procedure law and amend the current ALL. The international community should offer assistance in the drafting process to ensure that the administrative procedural law and the amended ALL meet their objectives and should continue to advise on effective implementation of these three pieces of legislation.

It is encouraging to know that international assistance in this area has already begun. In July 2001, the China Law Center at Yale University jointly organized a seminar on regulatory and licensing reform with the Office of Legal Affairs of the State Council. The Center’s expert working group, which included U.S. Supreme Court Justice Stephen Breyer, attended the seminar. In recent years, the Asia Foundation has funded consultations between American specialists on administrative law and a group of Chinese legal experts who are drafting an administrative procedure law under the aegis of the Legislative Affairs Commission of the NPC. In December 2003, as part of this cooperation, the Chinese drafting group met with the American experts for a thorough three-day review of the draft administrative procedure law, which is presently on the agenda of the NPC.

In the near future, the international community’s response to this unprecedented opportunity for reforming the relationships among courts, local governments, and the CCP will likely be confined

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262. See Jiang Anjie et. al., Guanzhu Sanda Susongfa Xiugai, [Pay Attention to the Amendment of Three Major Litigation Laws] FAZHI RIBAO [LEGAL DAILY], Jan. 29, 2004. For recommendations on how the Administrative Litigation Law should be amended, see, e.g., Ma Huaide, Qianyi Xingzheng Susong Zhidu Gaige [Brief Discussion of the Reform of the Administrative Litigation System], FAZHI RIBAO [LEGAL DAILY], Apr. 8, 2004; Liu Shang, XINGZHENG SUSONG YUANLI JI MINGAN JIEXI [THE PRINCIPLES OF ADMINISTRATIVE LITIGATION AND AN ANALYSIS OF FAMOUS CASES] 702-09 (2002).

263. See Yale University President Announces China Law Center, M2 PRESSWIRE, May 9, 2001, available in LEXIS, News Library, News Group File.

264. Communication with Professor Stanley Lubman on Apr. 13, 2004. Professor Lubman was one of the six U.S. professors who participated in the discussions.
to financial support, sharing of foreign countries’ relevant experiences, and advising on the applicability of these experiences to China in the reform areas discussed above. These steps, although small, could accelerate a process of legal and political reform. It remains for the Chinese leadership to assert the political will that is essential for deepening and broadening reform to increase the consistency of China’s legal institutions with the country’s WTO obligations. Strong leadership on these issues would also contribute to changes in China’s legal culture, among officials and the populace alike, that are necessary to help the rule of law take firmer root in Chinese society.