

CHINESE USE OF ADMINISTRATIVE PROCEEDINGS TO ENFORCE INTELLECTUAL PROPERTY RIGHTS: EVALUATING AND IMPROVING ADR IN CHINA

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I. INTRODUCTION

Since its entry into the World Trade Organization (“WTO”) in 2001, China has significantly reformed its legal system in order to enforce its commitment to protecting Intellectual Property (“IP”). Yet, there remains a lingering suspicion of the actual level of Chinese commitment—as indicated by continuous infringement claims from nations such as the United States. With an increasing number of disputes loading the court dockets and putting pressure on judges,¹ and given China’s “deep-rooted historical preference for informal and non-adversarial means of dispute resolution,”² there is enormous potential for further development of ADR in this field. Indeed, the culturally preferable way of resolving disputes in China, particularly civil disputes, is through the use of informal methods such as mediation and adjudication.³

Going through administrative channels instead of the judicial system is “widely viewed as the quickest and least expensive way to

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¹ See SUP. PEOPLE’S CT., *Intellectual Property Protection by Chinese Courts in 2009* (April 2010), available at <http://www.jdsupra.com/post/documentViewer.aspx?fid=dc4f35f4-8e78-472a-b6d1-b01bec3d5703>; see also SUP. PEOPLE’S CT., *Intellectual Property Protection by Chinese Courts in 2010* (Apr. 19, 2010), available at <http://www.cpahklt.com/UploadFiles/20110509082512655.pdf>.

² Rungao Zheng, *ADR in P.R.China*, www.softic.or.jp/symposium/open_materials/11th/en/RZheng.pdf, at 2 (last visited Sep. 2, 2011); see also Yu Fan, *Developing and Perfecting ADR Mechanism in Modern China* (当代中国非诉讼纠纷解决机制的完善与发展), 1 XUE HAI (学海) J. 77 (2003).

³ Urs Martin Lauchli, *Cross-Cultural Negotiations, With a Special Focus on ADR With the Chinese*, 26 WM. MITCHELL L. REV. 1045, 1062–64 (2000).

combat I[n]tellectual P[ro]perty R[ights] infringement,”⁴ and as such, remains the most popular method for dealing with violations in China.⁵ However, administrative proceedings tend to appear opaque compared to those in other countries—leading to the widespread belief in the U.S., E.U., and Japan that administrative penalties in China neither sufficiently deter infringement, nor provide any real, substantive IP enforcement and protection.⁶ This Note proposes that despite the problems of the administrative review process, it nonetheless strikes a reasonable balance between the preservation of the relationship between the parties on the one hand, and between the traditional cultural concepts of *li* (customs, rituals) and *fa* (law).⁷ This combination makes the administrative process highly appropriate to solving IP disputes in China.

Section II of this Note first surveys the basic Chinese legal structure and then investigates how the current Chinese approach to IPR protection, and of the ADR system in general, developed over time. The Section focuses on the unique use of the administrative review system for IPR protection. Section III goes on to analyze the advantages, as well as the problems of China’s administrative review process as compared to the judicial litigation process. Finally, Section IV proposes that on balance, the unique advantages and cultural appropriateness of the administrative review process warrant its use in the Chinese IP enforcement system. Section IV also presents suggestions for improvement. Ultimately, this Note concludes that foreign companies doing business in China should strongly consider using these more informal forms of dispute resolution before going through the trouble and expense of litigation.

⁴ Ryan Ong, *Tackling Intellectual Property Infringement in China*, CHINA BUS. REV. (Mar. 2009), at 1, available at <http://www.chinesebusinessreview.com/public/0903/ong.html> (last visited May 25, 2012).

⁵ *Id.*

⁶ See Justin Hughes, Professor of Law, Benjamin N. Cardozo School of Law, Written Statement Before the U.S.-China Econ. & Sec. Comm’n: *IP Enforcement in China, a Potential WTO Case, and U.S.-China Relations* (June 8, 2006).

⁷ Lauchli, *supra* note 3, at 1059.

II. GENERAL BACKGROUND

A. *The Chinese Legal System: An Introduction*

The Chinese Constitution (中华人民共和国宪法) [Zhonghua Renmin Gongheguo Xianfa] establishes the judicial system of the People's Republic of China (PRC) in articles 123–135.⁸ It is further supplemented by details found in the Organic Law of the People's Courts (法院组织法) [Fayuan Zuzhifa].⁹ For the purposes of this Note however, the former suffices.

The judicial branch consists of two main structures, the courts (“法院”) [Fayuan] and their corresponding procuratorates (“检察院”) [Jianchayuan],¹⁰ whose powers are respectively set forth in articles 123–128¹¹ and articles 129–133 of the Constitution.¹² For example, the procurators not only oversee investigations by public security organs and decide whether or not to prosecute, but also supervise the legal activities of the courts and the execution of judgments.¹³ The courts (and their corresponding procuratorates) follow a four-tiered system: 1) the Basic People's Courts (“基层人民法院”) [Jiceng Renmin Fayuan] at the county and town level, 2) the Intermediate People's Courts (“中级人民法院”) [Zhongji Renmin Fayuan] at the municipality level, 3) the Higher People's Courts (“高级人民法院”) [Gaoji Renmin Fayuan] at the provincial level, and 4) one Supreme People's Court (“最高人民法院”) [Zuigao Renmin Fayuan].¹⁴ In addition, there are courts of special jurisdiction for Maritime, Military,

⁸ XIANFA arts. 123–35 (1982) (China), available at http://www.gov.cn/gongbao/content/2004/content_62714.htm, translated in http://english.gov.cn/2005-08/05/content_20813.htm.

⁹ FAYUAN ZUZHIFA (法院组织法) [Organic Law of the People's Courts] (2006) (China), available at <http://www.dffy.com/faguixiazai/xf/200611/20061101194326.htm>.

¹⁰ The term procurator comes from Roman times, where a procurator was an officer of the Roman Empire entrusted with management of the financial affairs of a province, receiving both administrative powers and judicial powers as agents of the emperor. MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/procurator>.

In the modern context, procurators are officers of the state charged with both the investigation and prosecution of a case, acting as “agents” of the state. See JianChaYuanZuZhiFa (检察院组织法) [Public Procurators' Law] (1995) (China), translated in <http://english.dbw.cn/system/2009/07/02/000142891.shtml>.

¹¹ XIANFA arts. 123–28 (1982) (China).

¹² XIANFA arts. 129–33 (1982) (China).

¹³ *Id.*

¹⁴ Judicial Protection of IPR in China, *The Organization, Functions, and Powers of People's Courts*. <http://www.chinaiprlaw.com/english/courts/court1.htm> (last visited Sep. 24, 2011). See also Kate Colpitts Hunter, *Here There Be Pirates: How China is Meeting its IP Enforcement Obligations under TRIPS*, 8 SAN DIEGO INT'L L. J. 523, 527 (2006–2007).

and Railway Transport. Courts of general jurisdiction are further designated to deal with specialized matters. For example, with the continued need to resolve IPR issues, the local Intermediate People's Courts (with jurisdiction available either in the local court for the locale where the infringement took place, or based on the residence of the infringer) started acting as courts of first instance in infringement cases¹⁵ in 2006.¹⁶ These have been expanding rapidly since—Beijing alone now has eight courts of first instance dealing with IPR protection, the most prominent of which is the Beijing First Intermediate People's Court.¹⁷

The specifics of IPR Protection by the Chinese judicial and administrative branches will be discussed in more detail later in this Note, but the dual track nature of IPR protection—with IPR being enforced either through administrative or judicial tracks—is a key feature.¹⁸ Indeed, as many authors point out, the administrative process is “more common than litigation.”¹⁹ Evaluating the effectiveness and weaknesses of each approach will necessarily play an important role in shaping the development of this key area of Chinese law.

Finally, it is important to note that traditionally, unlike in the United States, China's judiciary is not an independent branch.²⁰ While the law states that, “the people's courts exercise judicial

¹⁵ Colpitts Hunter, *supra* note 14, at 527.

¹⁶ See *China to Open Anti-piracy Court*, B.B.C. NEWS (Mar. 10, 2006, 15:18 GMT), <http://news.bbc.co.uk/2/hi/business/4793530.stm>.

¹⁷ China Beijing Zhanghongwei Lawyers (北京张宏伟律师事务所), *Beijing Now has Eight IP Trial Courts – How to choose where to sue?* (北京已设立8个知识产权审判庭要打官司如何选择) (May 20, 2011, 9:32:53 AM), <http://www.zhanghongwei.com.cn/page/Default.asp?ID=880>.

¹⁸ U.S. DEP'T OF COMMERCE INT'L TRADE ADMIN., *Protecting Your Intellectual Property Rights (IPR) in China: A Practical Guide for U.S. Companies* (Jan. 2003), available at http://www.mac.doc.gov/china/docs/businessguides/intellectualpropertyrights.htm#CHINAS_IPR_ENFORCEMENT_SYSTEM.

¹⁹ Colpitts Hunter, *supra* note 15 at 528 (citing Mikhaelle Schiappacasse, *Intellectual Property Rights in China: Technology Transfers and Economic Development*, 2 BUFF. INTELL. PROP. L.J. 164, 178 (2004)). See also Lauchli, *supra* note 3 at 1064–68 (discussing how ADR is not really “alternative,” but rather “mainstream,” and litigation is generally disfavored); Fan, *supra* note 2 at 77 (calling ADR the traditional form of dispute resolution).

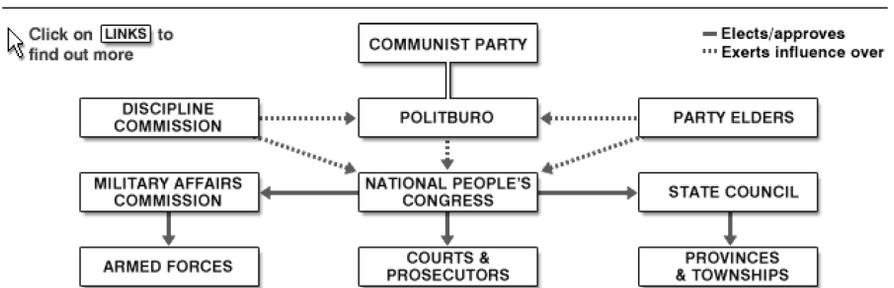
²⁰ *How China is Ruled*, B.B.C NEWS, http://news.bbc.co.uk/2/shared/spl/hi/in_depth/china_politics/government/html/1.stm (last visited May 1, 2012). See chart below.

power independently,”²¹ they are ultimately “responsible to the National People’s Congress and its Standing Committee.”²² In other words, it is with the National People’s Congress (全国人民代表大会) [Quanguo Renmin Daibiao Dahui], the “highest organ of state power,”²³ that lies the ultimate authority to interpret law. To a certain degree this is unsurprising given that modern China mostly adopted a German-style civil law format for its legal system.²⁴ Yet this approach to the law, combined with the traditional Confucian philosophy of social control through moral education and the remains of socialist law,²⁵ has led to the development of a unique legal system. One of the most remarkable areas of legal change has been in the intellectual property protection arena, whose history we now briefly turn to.

B. A Brief History of IPR Protection in Modern China

1. The Rapid Transformation from No IPR to a Comprehensive Formal System

There is no denying that China’s transformation from a country without IPR to one with a systematic protection system has been nothing short of revolutionary.²⁶ China has long recognized personal property and “accorded its holders legal rights to buy, sell



²¹ XIANFA art. 126 (1982) (China).

²² XIANFA art. 128 (1982) (China).

²³ XIANFA art. 57 (1982) (China).

²⁴ ABOUTLAWSSCHOOLS.ORG, *Civil Law*, <http://www.aboutlawschools.org/legalsystems/civil-law/> (last visited July 22, 2012) (subdividing civil law into three groups: French, German, and Scandinavian; and citing China as an example of a country having adopted German civil law).

²⁵ For example Chinese real estate law has no unified concept of real property— that is, with the state owning the land but not the structures upon it. See WUQUANFA (物权法) [Property Law] (2007) (China).

²⁶ Deli Yang, *The Development of Intellectual Property in China*, 25 WORLD PATENT INFO 131, 136 (2010). See also Hughes, *supra* note 6, at 2.

or trade it as a commodity” since early in its history.²⁷ However, no similar right was granted to producers of what we now term intellectual property.²⁸ In fact, traditional Chinese social ideology valued agriculture highly, and despised the development of industry and commerce.²⁹ Rulers simply could not see need for science and development.³⁰ As a result, traditional Chinese culture did not provide an encouraging environment for intellectual property protection to develop.³¹

Confucian principles, by far the most dominant influence on Chinese culture throughout its long history, emphasized the development of society rather than the pursuit of individual reward³²—something that also echoed with the Chinese Communists ideals. Indeed, copying was positively encouraged since it would disseminate knowledge to society.³³ Under such a tradition, it is not surprising that the concept of intellectual property and the legal mechanisms to enforce such rights, were perceived as fundamentally “antithetical” to the Chinese culture.³⁴ As a result, “the concept of IP was almost unknown . . . and the value of intellectual assets had yet to be recognized,”³⁵ even as little as thirty or so years ago.³⁶

China first established a formal IPR system back in 1979, when it re-opened its doors to the outside world.³⁷ At that time, it realized that IP laws were necessary to attract foreign investors.³⁸ China soon demonstrated its commitment to this new endeavor, joining the World Intellectual Property Organization (“WIPO”) in 1980.³⁹ By 1990, in addition to joining WIPO, China had also ratified the Paris Convention (1985) and Madrid Agreement (1989)

²⁷ Andrew Evans, *Taming the Counterfeit Dragon: the WTO, TRIPS and Chinese Amendments to Intellectual Property Laws*, 31 GA. J. INT’L & COMP. L. 587, 588 (2002–2003) (citing Julia Cheng, *China’s Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT’L L.J. 1941, 1953 (1988)).

²⁸ *Id.*

²⁹ Deli Yang, *supra* note 26, at 133.

³⁰ *Id.*

³¹ *Id.*

³² Evans, *supra* note 27, at 589 (citing Cheng, *supra* note 27, at 1979–80).

³³ *Id.* (citing Cheng, *supra* note 27, at n. 278).

³⁴ *Id.* at 589–90 (citing Jing Kai-Syz, *A Proposal for Patent Protection of Computer Programs*, 5 J. CHINESE L. 349, 353 (1991)).

³⁵ See *China’s IP Journey*, WIPO MAGAZINE (DEC. 2010), http://www.wipo.int/wipo_magazine/en/2010/06/article_0010.html (quoting Comm’r Tian Lipu of SIPO China).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Evans, *supra* note 27, at 590 (citing Cheng, *supra* note 27, at 1942).

³⁹ *China’s IP Journey*, *supra* note 35.

and established the Chinese State Intellectual Property Office (“SIPO,” which is in charge of patents), the Trademark Office, and the State Copyright Administration of China (“SCA”).⁴⁰ This revolution has continued as China has demonstrated its intentions to change the Intellectual Property Protection (IPP) environment in its continuing efforts to attract advanced technologies from developed countries as well as to protect its own indigenous technology.⁴¹

Internationally, China ratified more treaties and conventions on the subject such as the Berne Convention (1992), the Universal Copyrights Convention (1992), Geneva Convention (1993), and the Patent Cooperation Treaty (1994).⁴² Domestically, the Chinese government has enacted a complete set of relevant laws for Patents (enacted in 1992, amended in 2001), Trademarks (enacted in 1993, under current revision), and Copyrights (enacted in 1991, amended in 2002).⁴³ Indeed, the recently proposed draft of the Chinese Trademark Law was published earlier this year to invite comments and suggestions with the American Bar Association among those groups submitting comments. A similar process is currently underway for Chinese Copyright Law.⁴⁴

It is important to note that the “strong protection regime for intellectual property rights is losing steam due to criticism that the protection has gone too far.”⁴⁵ Indeed, in recent years, there have been efforts to reduce protections as opponents assert that rights owners use “abusive litigation tactics” to enforce their rights,⁴⁶ thereby “stifl[ing] substantial technological innovation.”⁴⁷ This remains something to consider as China continues to develop its system. However, this does not affect the subject of this Note. This analysis proceeds under such an assumption that a stronger IPR protection regime would greatly benefit China. This remains a reasonable assumption given China’s historically weak protection.

⁴⁰ Yang, *supra* note 26, at 136.

⁴¹ *Id.* at 137.

⁴² *Id.* at 136.

⁴³ *Id.*

⁴⁴ The ABA’s involvement stems from the author’s personal knowledge and participation in both of those efforts.

⁴⁵ Xuan-Thao Nguyen, *The China We Hardly Know: Revealing the New China’s Intellectual Property Regime*, 55 ST. LOUIS U. L.J. 773, 779–80 (Spring 2011).

⁴⁶ *Id.* at 780.

⁴⁷ *Id.* at 781 (citing Ted Frank, *There is a Role for Congress in Patent Litigation Reform*, AM. ENTER. INST. OUTLOOK SER. 1, at 1, 5 (2008), available at http://www.aei.org/files/2008/02/21/20080221_nolFebLO_g.pdf).

2. Structural Challenges to Further Development

With the rapid rise of the Chinese economy and increased cross-border transactions, issues of IPR have become increasingly common,⁴⁸ placing a heavy burden on the young Chinese IPR system to prove that it is capable of truly enforcing these obligations. China faces frequent criticism from developed nations such as the United States, Japan, and the European Union.⁴⁹ One major complaint, for example, is China's alleged inability to curb piracy of goods developed by U.S. citizens. This remains a primary interest to the United States government,⁵⁰ as evidenced by hearings on the subject and frequent U.S. suits against China in the WTO.⁵¹

The exponential growth in the courts' caseloads⁵²—whether due purely to an increase in the number of transactions (and its associated increased number of problematic transactions) or because it also reflects increased awareness of IPR as a right protectable at law—has put a significant burden on the Chinese judicial system.⁵³ From 2009 to 2010 alone, the number of first instance IP civil cases received by local courts in China increased by 40.18% to a total of 42,931.⁵⁴ This suggests the necessity of using less formalized means of dispute resolution. In recognition of this problem, the Chinese government has issued directions heavily emphasizing the need to resolve these issues “harmoniously”⁵⁵ through non-confrontational means.⁵⁶ In implementing such a policy, courts re-

⁴⁸ Yang, *supra* note 26, at 141.

⁴⁹ Colpitts Hunter, *supra* note 14, at 542. See also Yang, *supra* note 26, at 138.

⁵⁰ See, e.g., Hughes, *supra* note 6, at 1–22.

⁵¹ See *U.S. Takes China Piracy Cases to WTO*, N.Y. TIMES, Apr. 9, 2007, <http://www.nytimes.com/2007/04/09/business/worldbusiness/09iht-trade.5.5204152.html> (reporting actions taken by the United States against China after bilateral talks on piracy failed to resolve the widespread piracy of American media).

⁵² Compare SUP. PEOPLE'S CT., *Intellectual Property Protection by Chinese Courts in 2009*, available at <http://www.jdsupra.com/post/documentViewer.aspx?fid=dc4f35f4-8e78-472a-b6d1-b01bec3d5703> with SUP. PEOPLE'S CT., *Intellectual Property Protection by Chinese Courts in 2010*, available at <http://www.cpahklt.com/UploadFiles/20110509082512655.pdf>.

⁵³ This is perhaps best reflected in the fact that judges are now literally pushing for ADR methods such as mediation as a way to “clear dockets” (and not only because the Chinese prefer less confrontational means of dispute resolution). See Stan Abrams, *China pushes Mediation, the Harmonious Alternative to Litigation*, CHINA HEARSAY BLOG (Jul. 8, 2010), <http://www.chinahearsay.com/china-pushes-mediation/>.

⁵⁴ CHINESE CHAMBER FOR THE PROMOTION OF INTERNATIONAL TRADE (CCPIT), Patent and Trademark Law Office, *Supreme People's Court published White Paper on IPR Protection by Chinese Courts in 2010* (Apr. 19, 2010), available at <http://www.ccpit-patent.com.cn/News/2011051201.htm>.

⁵⁵ Abrams, *supra* note 53.

⁵⁶ *Id.*

cently have actively pushed conciliation and mediation.⁵⁷ Furthermore, as will be shown next, this is also the culturally preferred solution, appealing to strong traditional Chinese cultural values.⁵⁸

C. *Alternative Dispute Resolution in China*

1. ADR in Chinese Traditional History

ADR, being non-confrontational (or at least less confrontational than litigation), has had a rich history in China, appealing to the traditional Confucian values of harmony in society being obtained through well-functioning social relationships (*li*, or propriety) rather than formal law (*fa*).⁵⁹ At the same time, ADR remains a fluid concept, whose characteristics have varied along with political and social changes.⁶⁰ The “Mao Era ADR” for example, was used for its political functions, to reflect the prevalent philosophy of class struggle, and had but few relations to the almost non-existent legal system.⁶¹ On the other hand, “Deng Xiaoping Era ADR” was characterized by the concurrent development of the legal system and ADR.⁶² It is interesting to note that at least one paper has found that from 1990 to 2000, the number of mediators and arbitrators as well as the number of cases submitted through ADR processes actually decreased,⁶³ whereas in contrast court docket loads exhibited a dramatic increase.⁶⁴ Yet at the same time it is undeniable that the common perspective remains that ADR methods rather than litigation, are preferable to solve disputes.⁶⁵ Whether this perspective is correct and how to maximize the untapped potential, if any, of ADR for IPR infringement cases, especially in light of the rapidly growing pressures on the courts, are key in shaping the development of the Chinese IP system.

2. Definitions: Modern (Westernized) Concept of ADR

One final word about ADR in China: despite China’s long history of cultural preference for informal forms of dispute resolution,

⁵⁷ *Id.*

⁵⁸ Lauchli, *supra* note 3, at 1064.

⁵⁹ *Id.* at 1059.

⁶⁰ See Fan, *supra* note 2, at 77.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 79.

⁶⁴ See SUP. PEOPLE’S CT., *supra* note 52; CCPIT, *supra* note 54.

⁶⁵ Ong, *supra* note 4, at 1.

the concept of ADR as it is understood by the general population today, whether in China or abroad, refers to the much more recent growth of “U.S. Style” ADR,⁶⁶ characterized by its informal (in comparison to litigation) and non-judicial nature.⁶⁷ For this reason, the study and acceptance of this concept by the Chinese business and legal communities has been relatively recent.⁶⁸ Under this definition, administrative review by an agency of a dispute between an alleged infringer and the allegedly infringed party clearly satisfies the requirement of ADR, even though under the traditional Chinese framework its formality makes it more similar to litigation.⁶⁹ Given the audience for this Note is likely to be Western, the Note employs the generally understood definition of ADR.

3. The Administrative Review Procedure for IP Infringement Disputes in China

In China, IP rights are enforced through three different channels: civil, criminal (under the control of courts), or administrative actions.⁷⁰ Unlike administrative agencies in the U.S., these agencies perform as judicial courts would to resolve disputes between two parties; one company files a complaint and the agency eventually issues a ruling.⁷¹ In contrast, the USPTO, for example, has no jurisdiction over questions of enforcement or infringement.⁷² In other words, Chinese administrative agencies have broader powers than their U.S. counterparts since they can act as a substitute for formal courts and alleviate the burden on the latter.

Despite the dramatic increase in litigation, administrative channels are still viewed by the general Chinese population to be the quickest and least expensive way to combat IPR infringement.⁷³ Cases are generally handled quicker and the filing and adjudication processes are more straightforward.⁷⁴ The basic

⁶⁶ Zheng, *supra* note 2, at 1.

⁶⁷ Fan, *supra* note 2, at 78.

⁶⁸ *Id.*

⁶⁹ Zheng, *supra* note 2, at 3 (presenting litigation and arbitration as formal processes similar to each other, and in contrast to conciliation or mediation).

⁷⁰ Lilian Liu, Trademark Attorney at Ella Cheong, LLP (HK), Beijing Office, *Trademark Infringement in China*, Oral Presentation at Ella Cheong, LLP, Beijing, China (June 10, 2011). Ms. Liu’s profile is available at <http://www.ellacheong.com/profiles/ll.html>.

⁷¹ Ong, *supra* note 4, at 2.

⁷² U.S.P.T.O., *General Information Concerning Patents* (Nov. 2011), http://www.uspto.gov/patents/resources/general_info_concerning_patents.jsp.

⁷³ Ong, *supra* note 4, at 1.

⁷⁴ *Id.*

procedure is as follows: to initiate an administrative investigation, a rights holder must first “file a complaint indicating infringement of its IPR-protected products to a local administrative agency – generally at the district or county level.”⁷⁵ It is important to note that depending on the specific facts (type of IPR, location of alleged infringement etc), the rights holder company can choose among several agencies.⁷⁶ The local administrations of Administration of Quality Supervision, Inspection, and Quarantine; the SCA; SIPO; and the Trademark Office are but a few examples of such agencies.⁷⁷ Not surprisingly, the last three are the major managing agencies, which are in charge of IPR examination and approval, interpreting IP laws, supervising IPR activities, and administrative settlements to disputes.⁷⁸

In addition, local public security bureaus (PSBs) can carry out administrative investigations to determine if criminal sanctions may be appropriate.⁷⁹ As a general rule, the rights holder bears the burden of convincing local officials to carry out an official investigation.⁸⁰ In other words, he must usually gather a substantial amount of evidence when presenting their case to the relevant agency.⁸¹ After the complaint is filed, the agency then conducts a formal administrative investigation before issuing a ruling.⁸² If it finds infringement, it has the authority to “order the infringer to stop producing and selling the infringing goods, seize the infringing goods and equipment used in their manufacture, and levy an administrative fine.”⁸³ Both parties have the right of judicial review and can appeal to the Supreme People’s Court if unsatisfied with the local agency’s ruling.⁸⁴

Many experts⁸⁵ as well as foreign nations such as Japan and the U.S.⁸⁶ have criticized the use of this form of ADR as being ineffective to enforce IP rights.⁸⁷ These voices advocate spending time and effort focusing on the development of formal litigation

⁷⁵ *Id.* at 2.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Yang, *supra* note 26, at 132.

⁷⁹ Ong, *supra* note 4, at 2.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Hughes, *supra* note 6.

⁸⁶ See Colpitts Hunter, *supra* note 14, at 543.

⁸⁷ *Id.*

and criminal prosecution, and insisting on more transparency.⁸⁸ Proponents of this position advance several good arguments. For example, they argue that fines are too low to be able to deter any substantial infringement (especially given the large benefits derived from infringement);⁸⁹ that the opaque nature of the process makes it more susceptible to corruption⁹⁰ and improper considerations such as local protectionism;⁹¹ and that agencies are limited in their abilities to conduct investigations and procure all necessary evidence.⁹² These weaknesses are certainly present, but whether this is enough to render the use of administrative channels inefficient in light of its advantages is something that needs to be evaluated with more care, comparing them to the strengths and weaknesses of using litigation and the formal Chinese court system.

III. WHY SHOULD THE ADMINISTRATIVE REVIEW PROCEEDINGS BE KEPT? EVALUATION OF STRENGTHS AND WEAKNESSES

Are the weaknesses of the administrative process enough to render their use inefficient? To answer that question, one needs to evaluate the strengths and weaknesses of the administrative process and compare them to those of the alternative choice, the formal judicial system. This section argues that, on balance, the advantages of the administrative process outweigh its weaknesses. Its advantages also trump the advantages of the judicial process. This section also addresses common but misleading critiques of the administrative review process. Ultimately, while there are weaknesses to the administrative review process, it nonetheless possesses significant strengths in both absolute terms and in relation to the judicial system.

A. *Strengths and Advantages of the Administrative Process*

There are several compelling reasons why China should shy away from formal litigation and move towards ADR for IP cases.

⁸⁸ *Id.* at 543–44.

⁸⁹ Ong, *supra* note 4, at 2.

⁹⁰ *Id.*

⁹¹ *Id.* at 2–3; Lauchli, *supra* note 3, at 1064.

⁹² Ong, *supra* note 4, at 2, 3.

Firstly, IP litigation can become heavily technical, not surprisingly when we consider the technical nature of patents for example. The argument is similar to arguments for agency adjudication in US administrative law: the various relevant agencies are likely to have the requisite expertise to resolve the case more efficiently, with more straightforward procedures and quicker resolutions.⁹³ Agency administrators at agencies such as SIPO or the Trademark Office, for example, while maybe lacking a legal degree, have the requisite technical expertise to adequately judge the cases at hand, if only through practical experience.⁹⁴ Familiarity and technical know-how then logically lead to a faster and more efficient solution. Indeed, there is widespread agreement that administrative proceedings are viewed so positively due to their efficiency and cost effectiveness.⁹⁵

Furthermore, because ADR is such a flexible concept, it better reflects different cultural traditions and practices (for example, Chinese ADR includes many “hybrid processes”—ADR combined with court and arbitration proceedings— as well as more classical, non-hybrid processes).⁹⁶ Indeed, looking at administrative actions, the very fact that China has developed the channel of administrative actions and its popularity⁹⁷ reflect its general suitability to the needs of the country.⁹⁸ As previously argued, the Chinese cultural preference for less formal means of dispute resolution has a long and rich history.⁹⁹ In other words, informal law should play a principal role in resolving IP disputes, not least because it already does.¹⁰⁰ Not everything has to rise to the level of formal law.

But even taking a purely practical perspective, the large Chinese population and the exponential increase in courts’ caseloads¹⁰¹ will make this use a necessity. Given such concerns, the focus should not be on cutting down on the number of alterna-

⁹³ *Id.* at 1–2.

⁹⁴ For example, out of the eleven SIPO officials on exchange at the Benjamin N. Cardozo Law School during the Fall 2011 semester, only one has any legal background. Most of the participating officials have science and technical backgrounds.

⁹⁵ Ong, *supra* note 4, at 2. Chinese practitioners expressed similar views during presentations by attorneys to the author during the author’s 2011 summer internship at Ella Cheong LLP in Beijing, China.

⁹⁶ Zheng, *supra* note 2, at 2.

⁹⁷ Ong, *supra* note 4, at 1.

⁹⁸ *Id.*

⁹⁹ Zheng, *supra* note 2, at 2 (characterizing the Chinese as having a “deep-rooted historical preference for informal and non-adversarial forms of dispute resolution”).

¹⁰⁰ *Id.*

¹⁰¹ CCPIT, *supra* note 54, at 1.

tives but rather improving each so as to achieve better efficiency. Many Chinese academics share the view that courts should only deal with disputes that cannot be resolved in any other way—that is, as a last resort.¹⁰² The administrative action can be viewed as an intermediate solution between fully informal means of dispute resolution (culturally preferred, but outcomes are hard to enforce and, as such, not preferred by foreign firms) and formal adversarial litigation (dissatisfying in terms of the traditional preference towards preserving a good relationship though technically better for enforcement). It combines formality (unlike traditional Chinese concepts of “ADR”¹⁰³) and flexibility; is regarded by most Chinese as a relatively fair process, making it more legitimate; and provides a compromise between traditional Chinese cultural preferences and the Western desire for more formalized “rule of law” processes. So while not denying that the administrative process has flaws, with some changes, the administrative review process should provide an excellent alternative to courts, even more so than it already does. It is unsurprising that even now, despite its problems, it is still the favored method of resolution for IP cases.¹⁰⁴

B. *Problems with Litigation and the Judicial System*

Certain weaknesses in the formal litigation system also weigh in favor of further development of the administrative channel. Firstly, in recent years, judges themselves have actually pushed forward mediation settlements¹⁰⁵ and more “informal” forms of dispute resolution.¹⁰⁶ These steps follow the spirit of the political branch’s directive to move towards “harmonious” resolution.¹⁰⁷ Putting aside the question of whether the implementation of such a goal is something that courts should also be involved in, it remains that this is a current evolution that companies in China will have to

¹⁰² Fan, *supra* note 2, at 84.

¹⁰³ Zheng, *supra* note 2, at 2.

¹⁰⁴ Ong, *supra* note 4, at 1 (stating that administrative channels “remain the most popular option”); Lauchli, *supra* note 3, at 1064 (stating that ADR is truly “mainstream” rather than “alternative”).

¹⁰⁵ *Courts Can Mediate, But Enforcement is Another Matter*, http://www.danwei.org/front_page_of_the_day/courts_can_mediate_but_enforce.php (citing Beijing Youth Daily article from Jul 7, 2010) (last visited Sept. 1, 2011).

¹⁰⁶ Abrams, *supra* note 53.

¹⁰⁷ *Id.*

deal with.¹⁰⁸ In the experience of many foreign practitioners, the so-called mediation courts' "encouragement" often ends up being a somewhat forced settlement pushed by the judge.¹⁰⁹ Parties may thus end up having to bear the costs and comply with the more complex litigation rules and yet not even obtain the benefits associated with the more formal processes.¹¹⁰ Under such circumstances, administrative channels are preferable to litigation.¹¹¹ Furthermore, evidence suggests that judge-encouraged mediation settlements are rarely implemented.¹¹² This would be highly disheartening to a party who has already invested significant time, money, and effort in the formal process.

Secondly, judicial decisions are difficult to implement. Judges sometimes face recalcitrant administrative agencies and enforcement officials¹¹³—such as the police—although this has, admittedly, improved recently¹¹⁴ so as to arguably no longer pose a major problem.¹¹⁵ Similarly, local official biases can hinder implementation.¹¹⁶ Indeed, Hunter argues that local officials often resist enforcing IP laws if such enforcement "c[an] injure the local region's important sources of income and employment" and emphasizes the problem of "outright corruption."¹¹⁷ Those problems lead, in her opinion, to businesses avoiding litigation in China.¹¹⁸ In other words, fear of reprisal from local officials may be a practical reason why litigation may not be the best solution.¹¹⁹ In contrast, the administrative review procedures at least feel less adversarial, striking a balance between enforcement considerations and the preservation of the relationship between the parties, between *li* and *fa*.¹²⁰

Furthermore, the average Chinese citizen is highly suspicious of the formal Chinese legal system, especially regarding issues of great social interest. For example, Chinese citizens have recently

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Ong, *supra* note 4, at 1.

¹¹² *Id.*

¹¹³ Evans, *supra* note 27, at 592.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Colpitts Hunter, *supra* note 14, at 531.

¹¹⁷ *Id.* See also, Lauchli, *supra* note 3, at 1064.

¹¹⁸ Colpitts Hunter, *supra* note 14, at 531.

¹¹⁹ *Id.*

¹²⁰ Lauchli, *supra* note 3, at 1059.

put significant pressure on the courts¹²¹ to impose the death penalty on a young college student who hit a poor rural worker while driving, and in order to avoid the possibility that the victim might sue him, actually stabbed her to death.¹²² As a principle of law, a guilty person deserves a defense just as much as an innocent one, and in his case, there were also mitigating circumstances (giving himself up to the police, his pleading guilty, etc).¹²³ Still, any defense against the death penalty was perceived by the general public to be an unfair outcome resulting from the defendant's privileged background and status as the son of a retired military official.¹²⁴

While this case may not seem directly relevant to IP questions, it demonstrates the Chinese public's lingering skepticism about the judicial system, and may be just as significant as foreign skepticism of administrative actions.¹²⁵ Indeed, anecdotal evidence from family members suggest that confidence in the central government and its agencies is fairly high, while confidence in local governments, courts, and media is extremely low. This is at least partially supported by the prevalence of citizens going to Beijing to protest to the central government over local actions instead of relying either on the courts or the local agencies and media.¹²⁶ Changing such a perception will not necessarily be any easier than improving the administrative review process. By contrast, the more shielded nature of administrative reviews and its focus on more technical issues raise much less controversy and suspicion among the general public, which logically would suggest more recognition and acceptance as well as potentially easier enforcement, though it is true there is no substantial evidence either way.

Finally, although there has been a trend towards better-educated legal professionals, concerns about the quality of the judiciary still limit the effectiveness of litigation.¹²⁷ The very recent nature of the modern Chinese legal system, and the constant evolu-

¹²¹ Shuze Chen, *Chinese People Say "Yao" to Death Penalty*, USC ANNENBERG CHINA MEDIA (Apr. 4, 2011), <http://ascportfolios.org/chinaandmedia/2011/04/04/chinese-people-say-%E2%80%9Cyao%E2%80%9D-to-death-penalty/>.

¹²² *China Executes Hit-and-run Killer*, IOL NEWS (Jun. 7, 2011, 9:08AM), <http://www.iol.co.za/news/world/china-executes-hit-and-run-killer-1.1079620>.

¹²³ *China: The Murder Case of Yao Jiaxin*, GLOBAL VOICES ONLINE, <http://globalvoicesonline.org/2011/04/21/china-the-murder-case-of-yao-jiaxin/> (last visited May 25, 2012).

¹²⁴ *Id.*

¹²⁵ See, e.g., Hughes, *supra* note 6.

¹²⁶ Informal conversations with various family members and friends in China throughout the years.

¹²⁷ Randall Peerenboom & Xin He, *Dispute Resolution in China: Patterns, Causes, and Prognosis*, 4 E. ASIA L. REV. 1, 16 (Spring 2009).

tion over the past few decades, mean that there remains a lack of judges and attorneys who are well versed in the appropriate procedures and laws.¹²⁸ More specifically, even today there are few attorneys “educated about the intricacies of national and international IP Law.”¹²⁹ Agency administrators, by contrast, will have the requisite technical background to resolve a dispute even without a legal background.

C. *Evaluating and Responding to Critiques of the ADR System*

It is obvious that the administrative review process, despite its numerous advantages over litigation, also has some weaknesses. Still, many “weaknesses” commonly talked about when discussing the administrative procedure can be answered. Firstly, many argue that fines are too low to effectively deter infringers.¹³⁰ Often infringers treat infringement fines as part of the necessary costs of doing business.¹³¹ For example, China caps trademark infringement fines at the lesser amount of “either three times the illegal revenue or RMB 100,000.”¹³² Indeed, most judgments issue fines that are much less than this cap.¹³³ On the other hand, courts are able to impose stricter, stronger penalties.¹³⁴ Courts are less limited in the remedies they can provide: temporary and permanent injunctions, compensation for damages, confiscation of infringing products and goods, and imposition of court fees and attorney fees.¹³⁵ More importantly, courts can also impose criminal liability, which may serve as a strong deterrent.¹³⁶ However, while critics may argue that China’s courts can simply add stricter penalties for IPR violations,¹³⁷ such an argument does not, by itself, justify abandonment of administrative channels.

Rather, a simple time-benefit analysis reveals that for less serious infringement violations, completing a series of quick and suc-

¹²⁸ *Id.*

¹²⁹ Evans, *supra* note 27, at 593. In the words of the attorneys at the firm the author interned over the summer of 2011, it is would be very easy for the author to find a job in China if she specializes in IP and passes a U.S. bar.

¹³⁰ Ong, *supra* note 4, at 2; Liu, *supra* note 70.

¹³¹ Liu, *supra* note 70.

¹³² Ong, *supra* note 4, at 2.

¹³³ *Id.*

¹³⁴ *Id.* at 3.

¹³⁵ Liu, *supra* note 70.

¹³⁶ *Id.*, Ong, *supra* note 4, at 3.

¹³⁷ Evans, *supra* note 27, at 615.

cessful ADR actions might be a better than a less assured, more time-consuming and more expensive litigation.¹³⁸ Potentially larger benefits from a successful judicial claim of IPR would probably warrant the time and expense of judicial action as the severity of the scope of infringement increases. As Liu summarizes, if there is a serious infringement then litigation will probably be the best option, whereas in cases whether infringement scale is smaller, the ease of administrative actions would trump.¹³⁹ Other practitioners share similar views, with a patent attorney at the same firm advancing the same opinions.¹⁴⁰ In short, while it is true that the small fines usually imposed by administrative agencies perhaps are inadequate to deter truly “serious” infringements,¹⁴¹ with infringers likely to view it as a worthwhile risk of conducting business,¹⁴² its binding nature and the ability of agencies to issue cease-and-desist orders¹⁴³ will ensure some reward. Depending on a firm’s risk preferences—whether to accept a smaller, but more guaranteed award, or to go through the trouble and expense of litigation, this might well be the preferred alternative.

Another major critique of the ADR system, advanced by major foreign countries,¹⁴⁴ is that the opaque nature of the process makes it more susceptible to corruption¹⁴⁵ and improper considerations such as local protectionism.¹⁴⁶ The main problem with such an argument is that it is hard to evaluate. The critics do not explain how corruption is more prevalent in administrative actions, especially given the evidence of significant judicial corruption.¹⁴⁷ In other words, this is a systemic problem, and has not necessarily been shown to be more prevalent in the administrative process. The same can be said for “improper considerations” such as local protectionism. These are examples of systemic problems and are not useful for comparison purposes.

Other critiques focus on the agencies’ limited ability to conduct investigations and yet placing a high burden on the rights-

¹³⁸ Ong, *supra* note 4, at 3. See also Liu, *supra* note 70.

¹³⁹ Liu, *supra* note 70.

¹⁴⁰ Jeff Chen, Patent Attorney at Ella Cheong LLP (HK), Beijing Office. Mr. Chen’s profile is available at <http://www.ellacheong.com/profiles/jc.html>.

¹⁴¹ Colpitts Hunter, *supra* note 14, at 543.

¹⁴² Ong, *supra* note 4, at 2.

¹⁴³ Liu, *supra* note 70.

¹⁴⁴ Colpitts Hunter, *supra* note 14, at 542. See also Yang, *supra* note 26, at 138.

¹⁴⁵ Colpitts Hunter, *supra* note 14, at 542.

¹⁴⁶ Ong, *supra* note 4, at 2–3.

¹⁴⁷ Peerenboom & He, *supra* note 129, at 17–18.

owners to conduct due diligence to find infringing products.¹⁴⁸ Furthermore, rights-owners often must present a substantial body of such evidence and present it to local officials before these ones will conduct an official investigation.¹⁴⁹ This assertion may be true, and the administrative process could probably ease the burden on rights owners if agencies were more proactive (for example, through more funding). However courts too require substantial evidence for the rights-owners to succeed, and the other costs associated with formal litigation are usually higher. In other words, while pointing out a weakness of the administrative channel, critics have again failed to demonstrate that the formal judicial system is any better. Furthermore, the multiplicity of agencies could give the alleged infringed party the opportunity to seek out the evidence that is easiest to get.

This proliferation of agencies does lead to a rarely mentioned but important problem: the confusion that arises as to what agency has jurisdiction and/or which agency to bring an action in. While choice is usually regarded as positive, enabling the company to choose the forum it thinks will be most favorable, too much choice can become a negative factor, as the company struggles to figure out the most appropriate agency. Just to name a few, China's IPR Enforcement Agencies include the Administration for Quality Supervision, Inspection and Quarantine (AQSIQ), the State Administration for Industry and Commerce (SAIC), the Antimonopoly and Anti-Unfair Competition Bureau, the State Food and Drug Administration, the General Administration of Press and Publication and numerous others in addition to the China Trademark Office (trademarks), the State Intellectual Property Office (patents), and the National Copyright Administration of China (copyrights).¹⁵⁰ This difficult choice of agency is especially likely to affect foreign companies, which are likely to be less familiar with the intricacies of the Chinese bureaucracy. This problem is exacerbated by the fact that there is considerable lack of coordination between these administrative agencies.¹⁵¹ However, even this weakness could be solved in a relatively straightforward manner, through the hiring of local counsel.

Finally, an argument could be made that the dramatic increase in caseload in the courts is due to an increased faith in the judicial

¹⁴⁸ Ong, *supra* note 4, at 2.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 5–8.

¹⁵¹ Colpitts Hunter, *supra* note 14, at 530 (citing Evans, *supra* note 27, at 591).

system.¹⁵² Instead of turning to ADR, society should encourage further development of the formal system, especially given China's poor historical record. But even assuming an increased faith in the judicial system,¹⁵³ this does not necessarily lead to the conclusion that such trust is lacking or cannot also be developed in the administrative channels. Despite the rapid increase in the number of civil actions, there is widespread agreement among scholars that administrative channels are the way to proceed in most cases, affirming their cost and time effectiveness.¹⁵⁴ Certainly there has been no suggestion, either from the literature or actual practice, that the administrative process is so broken as to not be useful.¹⁵⁵

IV. GENERAL EVALUATION OF THE SYSTEM AND SUGGESTIONS FOR IMPROVEMENT

A. *Evaluation*

It is important to keep in mind that those arguing against the use of the ADR system are in effect arguing for more use of litigation through the formal judicial system.¹⁵⁶ From a purely logical standpoint, the systemic weaknesses of the Chinese IP regime, which affect both ADR and litigation, cannot justify the switch away from ADR towards the formal system. As shown in the previous sections, though there are justified critiques aimed at the "opaque" administrative review system, most fail to demonstrate the superiority of the formal judicial system.

The central, systemic problem Chinese IPR faces is not inadequate legal framework, which China has worked hard to improve,¹⁵⁷ but rather simply insufficient enforcement.¹⁵⁸ Substantive change will necessarily take time. Accusations of corruption,

¹⁵² Abrams, *supra* note 53.

¹⁵³ *Id.*

¹⁵⁴ See Ong, *supra* note 4, at 1. See also Liu, *supra* note 70.

¹⁵⁵ Much literature focuses on problems encountered in enforcement, but there is a consensus that China has already made tremendous improvements, and there is no denial that there is a continued focus on IP protection, as can be seen from the development of new laws (e.g., the proposed new Trademark Law), and can be inferred from the comments of the officials in charge. See *China's IP Journey*, *supra* note 35.

¹⁵⁶ See, e.g. Abrams, *supra* note 53.

¹⁵⁷ See Yang, *supra* note 26, at 141 (noting China's extensive participation in IP enforcement activities and its systemic IP system).

¹⁵⁸ *Id.* (pointing to inadequate punishment, restrictions on copyright holders' rights as examples of inadequate implementation).

opaqueness among others are but specific symptoms of this general problem. While there is truth to these critiques, there has not been any study demonstrating, even through anecdotal evidence, which the shielded nature of administrative review leads to *more* bias and corruption as compared to the judicial system. There is no reason to think judges are not influenced by the same pressures that the administrative heads are facing.¹⁵⁹ Indeed, it is worth it to recall that courts are subordinate to the National People's Congress, part of the legislative branch,¹⁶⁰ and hence likely to be subject to as much political and social pressure.

Similarly, challenges such as the inability to implement decisions¹⁶¹ are also challenges to system in general. Ultimately, the key problem is the fact that IP law is still a relatively new concept in China.¹⁶² Thus, while China's formal structure may show great progress, and comply with the requirements of international treaties and agreements such as TRIPS, enforcement will still be weak.¹⁶³ Under these circumstances, it is not surprising that administrative review procedures, which are even less transparent than court actions, will be perceived as troubling and raise suspicion of additional bias and corruption.¹⁶⁴ Still, China has done much to improve its legal structure to attract foreign firms and new technologies, warranting the label of a "revolution,"¹⁶⁵ and its efforts and recognition of the importance of IPR will continue.¹⁶⁶

Finally, it is important to remember that despite the continued focus on the problems found in enforcement of Intellectual Property in China, such enforcement has improved dramatically,¹⁶⁷ at least in large urban centers. Indeed, according to Peerenboom and He, enforcement may even be "less problematic than in many jurisdictions, including in rich countries such as the United States"¹⁶⁸ due to "changes in the economy, general judicial reforms aiming at institution building and increasing the professionalism of the judiciary, and specific measures to strengthen enforcement."¹⁶⁹ The le-

¹⁵⁹ Evans, *supra* note 27, at 588.

¹⁶⁰ XIANFA art. 57 (1982) (China).

¹⁶¹ Evans, *supra* note 27, at 592.

¹⁶² Colpitts Hunter, *supra* note 14, at 543.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 542. See also Yang, *supra* note 26, at 138.

¹⁶⁵ Yang, *supra* note 26, at 136.

¹⁶⁶ *China's IP Journey*, *supra* note 35.

¹⁶⁷ Peerenboom & He, *supra* note 129.

¹⁶⁸ *Id.* at 15 (citing Xin He, The Enforcement of Commercial Judgments in China 2 (n.d.), available at <http://www.fljs.org/uploads/documents/Xin%20%He%231%23.pdf>).

¹⁶⁹ *Id.*

gal system has been rapidly strengthened, and arguably people may even be developing trust in this unfamiliar system (as reflected by the dramatic increase in caseloads courts have to face).¹⁷⁰ The following suggestions should help this process further.

B. *Suggestions*

To accelerate the enforcement of IPR in China through these administrative proceedings, one should consider the potential of granting administrative agencies the right to impose more severe penalties and fines on entities and individuals found to have infringed. Complementary increases in its criminal penalties for infringements could also prove valuable. Currently, only “serious” or “relatively large” infringements (defined as cases where the value of the infringing goods is \$6,024 or higher)¹⁷¹ are subject to criminal prosecution.

Additionally, there is much need for more lawyers and judges familiar with both IP law and adjudicatory and general ADR and mediation skills,¹⁷² and continued education in this area is an easy way to continue and improve the system.¹⁷³ Concurrently, it is obvious that further anti-corruption efforts should remain a top priority.¹⁷⁴

Looking more broadly to the administrative process itself, there are certainly enough agencies and regimes to cover the problem of IPR protection.¹⁷⁵ The problem lies with the lack of coordination and clear scopes of jurisdiction.¹⁷⁶ Efforts to improve the system should thus be about reorganizing and making effective the administrative regime currently in place. A potential streamlining or restructuring of agencies could be beneficial in this aspect, though it may also raise additional political problems. Finally, flexibility of ADR could also be increased by having less rigid procedural requirements, and would benefit the large population which may not be able to be aware of formal requirements, for example in rural areas.¹⁷⁷

¹⁷⁰ CCPIT, *supra* note 54.

¹⁷¹ Evans, *supra* note 27, at 615 (citation omitted).

¹⁷² Liu, *supra* note 70.

¹⁷³ Colpitts Hunter, *supra* note 14, at 546.

¹⁷⁴ *Id.* at 547.

¹⁷⁵ Ong, *supra* note 4, at 5–8; Yang, *supra* note 26, at 136.

¹⁷⁶ Liu, *supra* note 70.

¹⁷⁷ Fan, *supra* note 2, at 84.

Although these suggestions will take time to put into effect, once successful such changes would dramatically improve China's IPR system, and, perhaps even more importantly, the perceptions of other countries and foreign rights owners who may seek to invest in China.

V. CONCLUSION

While China's young IPR system is still evolving, China should further invest in developing alternative methods of dispute resolution that are both more culturally favored¹⁷⁸ and more efficient.¹⁷⁹ The very problems of the ADR system as it currently stands—the difficulties of implementing administrative decisions¹⁸⁰ and opacity of proceedings,¹⁸¹ exist even in formal processes. Foreign nations' lack of faith in China's ability to protect against IPR infractions can only be overcome by continued improvement of ADR.¹⁸² While general suspicion of China's administrative processes for IP protection stems from foreigners' unfamiliarity of Chinese methods, China can disabuse these suspicions with "consistent protection of technology, trademark, and know-how."¹⁸³ Both Chinese history and recent comments by the main administrators in charge of the various IP offices in China suggest that such efforts are certain to continue.¹⁸⁴

China's historical "hybrid" legal structures¹⁸⁵ and cultural preferences for informal, non-judicial means of dispute resolution can provide it with an effective model of dispute resolution, though one that will need both foreign parties as well as Chinese parties to adjust. These are not changes that will happen overnight. China has already made dramatic progress in promulgating formal rules to protect IPR and encourage innovation (with the most recent draft of the Chinese Trademark Law currently submitted for public

¹⁷⁸ Lauchli, *supra* note 3, at 1061.

¹⁷⁹ Zheng, *supra* note 2, at 1.

¹⁸⁰ Evans, *supra* note 27, at 592.

¹⁸¹ See Hughes, *supra* note 6. See also Colpitts Hunter, *supra* note 14.

¹⁸² Colpitts Hunter, *supra* note 14, at 546–57 (providing specific suggestions as to how China's IP enforcement system can be improved by the various interest groups concerned with such improvement).

¹⁸³ Yang, *supra* note 26, at 142.

¹⁸⁴ See *China's IP Journey*, *supra* note 35.

¹⁸⁵ Zheng, *supra* note 2, at 2.

comment).¹⁸⁶ As with any system of resolution, some problems will always persist. Yet overall, even if some discomfort with a different approach to IPR protection is to be expected, companies doing business in China should strongly consider using these methods of resolution, which would allow them to blend in more seamlessly with the local legal culture and sensibilities and would likely be conducive to building better and lasting relationships with the local parties they have to deal with. This alternative method of dispute resolution has evolved out of a large civilization's historic preference for informal forms of dispute resolution and has much to offer. It would truly be a shame to let a few weaknesses overshadow its remarkable potential.

¹⁸⁶ This involvement by the ABA is from personal knowledge, as the author participated in that effort.