



The Initiative for Policy Dialogue

Task Force on Institutional Design for China's Evolving Market Economy Follow-up Meeting

February 7-8, 2007
Calder Lounge, Uris Hall, Columbia University

Agenda

Agenda Overview

February 7th, 2007

Residence of Joseph Stiglitz and Anya Schiffrin

07.00 Dinner

February 8th, 2007

Calder Lounge, Uris Hall, Columbia University
New York, NY 10027

09.00 – 09.30 Introduction, discussion of the agenda, overview of issues
09.30 – 10.30 Foundational issues: setting the stage for the reform discussion
10.30 – 10.45 *coffee break*
10:45 – 12.15 Foundational issues *cont.*
12.15 – 12.45 *Break to get lunch*
12.45 – 02.15 Working lunch: Property rights
02.15 – 03.45 Competition law & intellectual property rights
03.45 – 04.00 *coffee break*
04.00 – 06.00 Next Steps



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Calder Lounge, Uris Hall, Columbia University
Feb 8th, 2007

Detailed Agenda

9.00-9.30 **Introduction, discussion of the agenda, overview of issues**

9.30-12.15 **Foundational issues: setting the stage for the reform discussion** This session could include a discussion of how to ensure that these foundational issues are addressed in ways that reflect the particularities of China at this stage of its transition to a market economy, that are abstract enough to provide general principles which can be applied in a variety of areas of institutional and legal reform, and, at the same time, concrete enough to provide meaningful guidance in shaping these applications, including those to be discussed later in the day

This discussion might include:

i. "Learning and Self-Adaptive Institutions and Legal Structures," focusing on what should be the dynamic nature of legal and other institutions; this paper, or a sequel, might look at the long standing debate between civil codes vs. common law from this perspective; there might be a paper addressing issues such as: should the legal and institutional structures adopted now be thought of as a framework, within which there will be specific provisions, explicitly recognized as temporary, to be changed as China passes through different stages of its development? Can this be done in a way which provides the legal certainty which the business community often demands?

ii. "Embedding New Institutions and Legal Structures into Pre-existing Frameworks," emphasizing that one never introduces new legal institutions onto a clean slate; there are always pre-existing property rights, often implicit rather than explicit. What are some of the pre-existing property rights which might be affected by any new institutional or legal infrastructure? In what ways should these pre-existing property rights affect the design of the new legal and institutional framework? Can or should this be done in ways which do not, in effect, simply maintain existing vested interests? This discussion may evolve into a discussion of the political economy of reform. Should there be a separate paper addressing the issues of the political economy of reform in the China?

coffee break

iii. "Evolution vs. Revolution," naturally following upon this, might emphasize the virtues and vices of breaks with the past—and perhaps the impossibility of complete breaks with the past. What does this mean for legal and institutional reform in China? To what extent does the answer depend on the specific areas of legal and institutional reform?

iv. "Hidden Redistribution," emphasizing that any reform has distributional consequences, often more important than those on overall efficiency, and that indeed these distributional concerns provide much of the impetus for reform—as well as much of the opposition. Even if making the hidden redistributions more transparent leads to more coherent reforms, will it make reform easier or more difficult?

v. "Ideology and pragmatism," which might look at the ways in which legal structures and other institutions are described versus the way they actually work. What are some of

the ideological issues to which any institutional and legal reform in China must pay attention? Can this be done in a way which is consistent with other reform objectives?

vi. “Legal harmonization:” how important is it that the new legal and institutional frameworks be harmonized with those prevailing in other countries, especially trading partners and suppliers of capital? To the extent that there are constraints imposed by international agreements (such as WTO or bilateral trade agreements), how much effort should China exert to “get around” the dictates, especially when these were imposed as entry conditions (in what has been called “extortion at the gate”)? Where are there likely to be conflicts with standard practices elsewhere and what might be better suited for the objectives and circumstances of China?

12.15-12.45 *break to get lunch*

12.45-2.15 **Working Lunch: Property rights**, trying to clarify the qualified nature of property rights—how and why even market oriented economies put limits on property rights; the on-going debates on those limits. There might be more focused discussions on particular areas, such as property rights in land. What are the areas where such attention might be particularly valuable, either to illustrate general principles or because general principles might have to be modified or adapted?

2.15-3.45 **Competition law & intellectual property rights**—as two specific examples of property rights (and restrictions on property rights)

Competition law: Among the questions that might be addressed are the following:

(a) To what extent should law reflect “Chicago” economics vs. modern “IO” economics? For example, what should be the presumptions in allegations of predatory pricing?

(b) How important is it to harmonize with practices elsewhere?

(c) Do China’s circumstances require rebalancing “rule of reason” vs. “per se” violations? Given a lack of administrative capacity, should there be a greater emphasis on per se violations? (Paper might deal with specific examples)

(d) How should state enterprises be treated within competition policy? How should natural monopolies be treated? (Is this a topic that should be left to a later discussion on regulatory policy?)

(e) Should there be regulations against provincial and local subsidies? How can such restrictions be reconciled with development objectives? (Is this a topic that should be left to a later discussion on industrial policy?)

(f) Should dumping laws and domestic competition policy be unified? Should this be done even if it is WTO legal to differentiate? ...even if America and Europe continue to differentiate, and use dumping laws as a protectionist device?

(g) Should China move towards approaches that are closer to those of Europe or to those in the U.S.? Should there be both civil and criminal violations? ...with similar or different standards? ...with imprisonment for officers of companies found in violation?

(h) Should there be a multiplicity of oversight or unified oversight? ...at multiple levels? ...with delegation to specialized agencies like FCC in the case of regulated sectors? ...with an administrative approach, like FTC, and a criminal approach, through the Department of Justice?

(i) How should global cartels be handled? Can those injured outside China seek compensation in Chinese courts when Chinese citizens are among those injured (cf. Epigram?)

(j) To what extent should any paper address specific issues such as

- i. Can those who are ultimately injured sue for damages, or only direct purchasers (Illinois Brick)?
- ii. The level of damages (triple? Quadruple?) Should even larger punitive damages be imposed in cases where abuses of market power are particularly flagrant?
- iii. What are the damages that can be recovered? (narrowly or broadly defined, e.g., Iowa, Kansas state laws);
- iv. Should class action suits be allowed?
- v. Should the circumstances in which they are allowed be highly restrictive? Should the compensation of the lawyers bringing the cases be highly restricted? Are there other institutional arrangements by which consumers/purchasers can recover damages, when there are a large number of those injured?
- vi. Can or should the issue of incentives be separated from the issue of compensation?
- vii. Should the principles that guide the answer to these questions be the same as those that guide other areas in which individuals face harm (such as torts)?

Intellectual property: Among the questions that we may want to address are the following:

- (a) To what extent should we or can we address issues of intellectual property apart from a broader discussion of China's innovation system, a task that might require a volume on its own?
- (b) Presumably any discussion of intellectual property would begin with a discussion of the costs and benefits intellectual property and the various dimensions that define a country's intellectual property regime
 - i. What can be patented?
 - ii. Standards
 - iii. Administrative issues
 - a. challenges before the patent has been issued
 - b. the extent to which owners of intellectual property can prevent others from using their intellectual property, while a patent is being challenged, as opposed to receiving compensation in the event that the patent is upheld
 - c. whether agreeing to paying a royalty proscribes suing the licensee from challenging the patent

To what extent should the paper delve into these specific issues? Is there a list of the most important issues that need to be addressed?

- (c) More fundamentally, to what extent should such questions be left to Courts? Specified within the law? If specified within the law, what is the best way for the law to be changed as circumstances change, or as experiences suggest problems? Should there be an intellectual property review board? The optimal IP system may differ depending on the stage of development; within WIPO, the developing countries have called for a development oriented IP system. To what extent should China's IP system reflect its current stage of development? Or should China's IP be system appropriate to the stage of development to which it aspires? Even if that system may not be ideal for China's current stage of development, are their significant benefits from legal certainty?
- (d) Should there be a set of specialized courts to review IP cases?

(e) To what extent does TRIPs restrict the design of the IP system? What are important areas of remaining flexibility? How important is it to harmonize China's IP law with that of the US, EU? Where there are differences between EU and US practices, which make most sense? Can China pick and choose, or is there a certain coherence among the provisions?

(f) There are a set of issues associated with the interaction between intellectual property and competition; for instance, under what circumstances should normal IP be constrained? What should constitute an abuse of the monopoly power derived from IP?

(g) How and when should IP be modified to accommodate other values and concerns, e.g. health (through compulsory licensing)?

(h) What changes in standard IP are required to sustain/encourage Open Sourcing?

(i) IP protection is now typically divided into copyrights and patents. Does this provide adequate differentiation?

3.45-4.00 *coffee break*

4.00-6.00 **Next Steps**