
Kong Qingjiang
Zhejiang Gongshang University, Hangzhou, China

Follow this and additional works at: https://scholarlycommons.pacific.edu/globe
Part of the International Law Commons

Recommended Citation
Available at: https://scholarlycommons.pacific.edu/globe/vol21/iss1/7

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in Global Business & Development Law Journal by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Kong Qingjiang*

As a result of the globalization of China’s economy, particularly its accession to the World Trade Organization (WTO), the Chinese intellectual property rights (IPR) regime has undergone a remarkable transformation. In theory, the IPR laws provide for strong protection of IPRs. However, as experts have focused on the enforcement of China’s IPR laws, international IPR holders have noticed that Chinese IPR rules are often ignored in practice, and the political economy of IPR in China has largely been ignored.

This paper argues that through evidence found in Chinese patent laws, industrial policy aimed at the promotion of economic development is driving the evolution of China’s IPR regime. It further examines the emergence of a comprehensive Chinese IPR strategy, also stemming from the same driving forces. It is further noted that while such forces might have a bearing on the IPR regime, it is China’s political economy that will predominantly drive its IPR regime forward in the direction now championed by the West.

I. INTRODUCTION

A. What is Behind an IPR Regime?

Historically, an IPR regime is often used as an instrument of industrial policy for countries in late-developer status. For example, Japan’s patent system was used to import foreign technology and distribute it among domestic firms for quite a long time.1 In the context of governmental attitudes towards the role of foreign technology in national development, one of the explicit goals of a patent regime is to achieve independence and autonomy through indigenization of technology, and to diffuse and promote this knowledge throughout the economy.

A number of economists, legal scholars and officials advocate the use of industrial policy initiatives to institute and carry out an IPR regime. They argue that it is crucial to maintain a socially desirable patent system.2

---

* Professor of Law, Zhejiang Gongshang University, Hangzhou, China. The author sincerely thanks Tracy Owens for her most helpful work in refining the paper.


2. For example, Robert J. Girouard noted that even the U.S. government to some degree views the patent...
To be fair, it is the industrial policy strategy that is behind an IPR regime. In the opinions of those who advocate the industrial policy approach, any real-world IPR regime must be amenable to interference—regardless of whether it is carried out by the political whims of the administrative agency or by judicial discretion to reluctantly accord stronger protection—in the service of promoting economic development and national interests. If the IPR regime results in considerable problems for foreign IPR holders seeking patents in the country in question, the industrial policy strategy would be blamed.

II. SOME THOUGHTS ON THE POLITICAL ECONOMY OF THE CHINESE IPR REGIME-BUILDING

China has pursued a strategy of economic modernization since the late 1970s. The strategy has been naturally made based on technological upgrading as well as openness to foreign investment and further integration into the global economy. In this context, one of China’s top policy priorities at the outset of its modernization drive was to formulate its own IPR regime. As a result, the Trademark Law and the Patent Law were enacted in 1982 and 1984 respectively.

A noteworthy feature of the IPR regime-building process in China has been its gradualism, which means that the scope of the protection for IPR and the standards for such protection are made to correspond to the level of economic development and are responsive to the needs of economic development in the country. This gradualism accounted for the delayed enactment of the Copyright Law until 1990, as well as the relatively narrow scope and low standard of the protection that was provided in China’s IPR regime before 1992. Interestingly, this gradualist approach also made the development of the IPR regime adaptive

---

3. On May 12, 1977, just before Deng Xiaoping (who launched a modernization drive in China) reemerged among the top Chinese leadership, directed that a patent system be put into place during a meeting with Fang Yi and Li Chang, who were in charge of administering technology and education ministries. The highlights of Deng’s speech transcripts are available at http://www.cas.cn/html/cas50/bns/1977.html.


to the conditions of scientific and technological development of the society. The changes introduced into the IPR regime to deal with the digital environment served as an illustrative example.7

Another noteworthy feature of the IPR regime-building process in China is that it has been intertwined with its foreign trade relations, or more precisely, much of the process has been propelled by international pressure, particularly from the U.S., who has consistently pressured China to expand the scope of, and raise the standard for, IPR protection.8 During the prolonged negotiations before China's accession to the General Agreement on Tariffs and Trade (GATT) and later to the World Trade Organization (WTO), much pressure was exerted upon China in this regard.9

It is not difficult to see that by 1992, increased foreign pressure circumvented the gradualist approach that China had been accustomed to in its IPR regime building. The reform of its IPR regime suddenly became a major and urgent policy issue under such pressure. As a result, there were far more moves between 1992 and 2001—some of them very radical—than had been seen during the previous decade. In the Sino-U.S. Agreement on China's accession to the WTO in 1999, China committed itself to bring its IPR regime into full compliance with the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement)10 and reiterated this position later in the Protocol on the Accession of China to the WTO (Accession Protocol).11 China agreed to expand its IPR regime to cover all main areas of IPR so that protection of geographical indications and layout designs of integrated circuits would be available,12 to raise the substantive

---

7. For a survey of how the Chinese copyright regime responded to the needs arising from technological development, see Qingjiang Kong, Old Bottle for New Wine, PRC Copyright Legislation in the Digital Context, ISSUES & STUDIES Sept.-Oct. 2000, at 158-175.

8. See ANDREW MERTHA, POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA (Singapore University Press 2006).


12. Although the relevant rules of the State Administration of Industry and Commerce and the State General Administration of the People's Republic of China for Quality Supervision and Inspection and Quarantine partly provided protection for geographical indications (including appellations of origin) the pre-amendment Trademark Law did not have a specific provision on the protection of geographical indications. Similarly, although China was one of the first countries to sign the Treaty on Intellectual Property in Respect of Integrated Circuits in 1989, it did not promulgate the specific Regulations on the Protection of Layout Designs
standards of protection, including procedures for the acquisition and maintenance of IPR; to take further measures to control abuse of IPR; and to fortify enforcement.

For example, in relation to IPR enforcement, China committed itself to amending civil judicial procedures and remedies, making available provisional measures,\textsuperscript{13} strengthening administrative sanctions against IPR infringement, improving special border measures for IPR protection, and lowering the threshold for initiating criminal procedures to ensure full compliance with the TRIPS Agreement.\textsuperscript{14} Moreover, China committed itself to implementing the TRIPS Agreement immediately upon accession—with no transition period. Consequently, upon its accession to the WTO, China had already put into place an IPR regime that was relatively consistent with the international standard for IPR protection as dictated by the TRIPS Agreement.

However, the WTO-compatible IPR regime has not been able to completely dispel the anxiety of IPR holders, Chinese or foreign, for widespread piracy and counterfeiting. The reason for this continued anxiety seems to be lack of enforcement.

Paradoxically, the new IPR regime which stipulates a higher standard for protection has since triggered a lively debate among Chinese businesses, officials and intellectuals. It is argued that such an IPR regime, with its efficient and transparent regulatory framework, should be able to facilitate the process of technology diffusion associated with knowledge transactions between Chinese and foreign firms, as well as foster the innovative capacity of China in its transition to a knowledge-based economy. However, given the fact that most IPR’s are held by foreign investors, particularly multinational corporations, the Chinese IPR regime is actually giving foreign IPR holders a competitive edge by providing a high standard of protection for foreign IPR. This has given rise to the concern that Chinese enterprises will be disadvantaged in IPR-based competition with multinational companies.

Thus, as a countermeasure, China has begun to implement a separate national IPR strategy to improve its competitiveness. Although details of the new IPR strategy have not been made public, its implementation and impact on the further development of China’s IPR regime and foreign IPR holders are worth careful attention and study.

To be sure, every nation’s experience with its IPR regime is shaped by complex (and probably unique) historical, political, and cultural forces, but there may be some general principles at work across various specific cases. To understand the political economy of the Chinese IPR regime, a case study of the of Integrated Circuits until April 2001, which then became effective Oct. 1, 2001.

\textsuperscript{13} Although there were provisions on property preservation in China’s patent law, no explicit stipulations had been provided to authorize the people’s court to take measures to prevent infringements prior to formal institution of a lawsuit.

\textsuperscript{14} See WTO ACCESSION PROTOCOL, supra note 11.
Chinese patent law is given below. A look at the history of Chinese patent law legislation from the Patent Law of 1984, to the amendment of 2000 in accordance with the TRIPS Agreement will meaningfully illustrate how economic development policy, international trade relations and IPR have been intertwined with one another. Having done this, we will also be in a better position to look ahead to the future. After all, tomorrow’s IPR regime may be no more than a logical extension of the political economy of today’s IPR regime.

III. HISTORICAL PERSPECTIVE: FROM 1984 TO 2000

Although the current patent regime is at the core of the present discussion, it is helpful to look at the twisted path that China has taken in instituting a patent law system in its modern history. The patent regime in China dated back to the late Qing Dynasty, when the Imperial Court was forced or induced to sign the treaties on navigation and commerce with the Powers.\(^5\) Some of these treaties provided for a reciprocal patent-granting arrangement whereby citizens of one contracting party could apply for and secure patent rights for their inventions in the other contracting party. Since the number of inventions by Chinese citizens was much smaller, the reciprocal treatment that was built into the treaties really only granted privileges to foreigners, and were often criticized as being unfair to China.

Besides foreign pressure, domestic aspirations for a modernized nation also partly accounted for the emergence of the nascent patent regime. Then, in the second part of the 19th century, the Imperial Court of the Qing Dynasty was pressured to reform itself for its own survival. It was in the course of struggle for survival that the very first piece of patent law in Chinese history, entitled “Charter of Rewards on Invigoration of Industry and Art”, came to be passed on July 12, 1889.\(^6\)

Not long after the passing of the patent law, the Qing Dynasty was overthrown in 1911. The succeeding Republican Government replaced the short-lived Charter of Rewards with the Interim Charter on Rewarding Industrial and Artistic Products. Thereafter, the Nationalist Government put into effect a series of other provisions governing patents, and in 1944 it promulgated a “modern” Patent Law. Unfortunately, the new Patent Law soon ceased to be effective on mainland China (i.e. the People’s Republic of China) due to the fact that the Communist Party of China (CPC)\(^7\)

---

15. For instance, on August 18, 1903, China and the United States concluded a treaty on navigation and commerce.
16. Charter of Rewards on Invigoration of Industry and Art, promulgated by Qing Dynasty on July 12, 1889.
17. The CPC nullified all the laws and regulations that were applicable in China under the Nationalist Government.
defeated the Nationalist Government. Soon after the founding of the People's Republic in 1949, the Central People's Government adopted the Provisional Regulations on the Protection of the Invention Rights and Patent Rights. The purpose of those provisions was to encourage invention. But the new government was preoccupied with other urgent matters, and from its promulgation until its abolition in 1963, only six invention certificates and four patent certificates in total were issued. During the Cultural Revolution, the country was obsessed with political struggles and the elimination of private ownership, and the newly created primitive patent system was on the verge of being abolished. Only after the government decided to embark on the course of economic modernization in late 1970s, was the re-establishment of a patent system again put on the agenda of the post-Mao government.

However, the priority was not to protect the rights of inventors but to promote inventions. It was in this spirit that in 1978 the Regulations on Awards for Inventions were adopted. Interestingly, when China began to negotiate the Agreement on Trade Relations with the United States, it realized the need to put into place a patent system and took a series of steps. In March of 1980, China entered into the World Intellectual Property Organization (WIPO). In December 1984, it acceded to the Paris Convention for the Protection of Industrial Property. The Patent Law was promulgated on March 12, 1984 and took effect on April 1, 1985. It underwent a substantial revision in 1992 and was further amended in 2000 to keep it in line with international practice. The Patent Law

---


22. United States of America and China Agreement on Trade Relations, signed at Beijing July 17, 1979. Among other things, the U.S. insisted during negotiations that each party agree to protect IPR of citizens of the other party.

23. See VAI LO & XIAOWEN TIAN, LAW AND INVESTMENT IN CHINA: THE LEGAL AND BUSINESS ENVIRONMENTS (Routledge 2005). The World Intellectual Property Organization (WIPO) is one of the specialized agencies of the United Nations. WIPO was formally created by the Convention Establishing the World Intellectual Property Organization (Signed at Stockholm on July 14, 1967 and as amended on September 28, 1979). Under Article 3 of this Convention, WIPO seeks to “promote the protection of intellectual property throughout the world.”


stipulates the procedures and standards for granting patent rights for inventions, utility models and designs.

In the process of building a patent regime, three major events should be mentioned: First, in 1984, China became a party to the Paris Convention on the Protection of Industrial Property; second, in 1992 China reached an agreement with the U.S. in the form of the Memorandum of Understanding between China and the U.S. on the protection of IPR; and third, in 2001 China entered the WTO by committing itself, among other things, to enforcing the TRIPS Agreement. Thus, seen from a historical perspective, it took almost 100 years for China to establish a patent system consonant with the prevailing standards of the international community.

IV. INTERACTION BETWEEN INTERNATIONAL TRADE RELATIONS AND THE CHINESE PATENT LAW

A central feature of the 1984 Chinese Patent Law was the narrowness of its scope of protection. It failed to provide protection for inventions of pharmaceutics, chemicals, food, beverages and condiments, among other things. It was not until the conclusion of the Memorandum of Understanding between China and the U.S. (and its requirement that all signatory nations provide the same treatment to foreigners as it provides to its own nationals)—nearly a century after the passage of the first patent provision—that China finally pledged itself to expand the scope of protection. The enlargement of the scope of protection was formally incorporated into the Chinese patent law with the amendment of the Patent Law in 1992.

De facto discrimination against foreign inventors is another feature of the 1984 Patent Law. For example, whether a foreign inventor was entitled to the protection provided by the Patent Law was dependent upon reciprocity or authorization by an agreement between China and the inventor's own country.

26. WORLD TRADE ORGANIZATION, WORKING PARTY REPORT: ACCESSION OF CHINA, WT/ACC/CHN/49/Add.2 at 54 (Oct. 1, 2001)

27. According to Article 25 of the 1984 Patent Law, the following subject matters are not covered by patent protection: scientific discoveries; rules and methods for mental activities; methods for diagnosis or treatment of diseases; animal and plant varieties; substances obtained by means of nuclear transformation.


29. Id.
Another example in this regard is the stipulated procedure of application for a patent by foreign inventors.\textsuperscript{30} However, for the sake of attracting foreign investors, China nevertheless accorded equal treatment to foreign inventors under the Patent Law (under the condition that the inventor’s country of citizenship accord reciprocal protection to inventions by Chinese inventors).\textsuperscript{31} Even then, it must be admitted that recognition of foreigners’ rights was extended rather grudgingly, and in such a manner that effective protection of foreign inventions was largely denied within the Chinese borders. A useful illustration of this general phenomenon is the problem of forced technology transfers, whereby foreign investors were coerced into transferring technology as a condition of the approval of a joint venture. Technology transfer relating to investing activities by foreigners was once mandatory in laws, regulations and in industrial policies,\textsuperscript{32} which inevitably encroached upon the interests of foreign investors and was an object of much resentment among them. This practice was not put to an end until the laws and regulations concerning foreign investment and industrial policies were revised between 2000 and 2001.

It is rather easy to understand the rationale for China’s early policy as indicated in the 1984 Patent Law; China was primarily an importer of technologies, and simple economics dictated that it leave foreign technology unprotected. For example, a survey found that 97.4 percent of the new drugs produced by Chinese pharmaceutical companies produce are modeled after foreign products, while only 2.6 percent are their own inventions.\textsuperscript{33} The de facto discrimination against foreign inventions can be explained as an attempt to build up a domestic invention-based industry by allowing it to “free ride” on inventive efforts of foreigners, and it can be argued that China’s patent policy was part of a larger strategy to promote the development of domestic infant industries. Providing patent protection only for inventions, which Chinese enterprises are technologically capable of making, worked to the advantage of the growing Chinese economy. Because of this provision, Chinese enterprises could use foreign inventions at relatively low cost (since they were not obligated to pay royalties to the foreign inventors). Of course, this kind of practice is not

\textsuperscript{30} Article 18 of the Patent Law provided that [If a foreigner, foreign enterprise or other foreign organization having no regular residence or place of business in China files an application for a patent in China, the application shall be handled under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or any international treaty to which both countries are party, or on the basis of the principle of reciprocity.]

\textsuperscript{31} Patent Law, art. 18.


particularly unique to China. In fact, the early history of international patents in the West told the same story: discrimination against foreigners was the rule in international patent relations until the middle part of the nineteenth century.³⁴

The Chinese experience during the crucial 20 years between the promulgation of the Patent Law in 1984, and the revision of the Patent Law in accordance with the TRIPS Agreement in 2000, is instructive. During its first eight years, the protectionist provision of the 1984 Patent Law served quite well to promote domestic research and development. At least partly thanks to the imitation and indigestion of foreign patented technology, which was made possible by the relatively low standard and narrow scope of protection, Chinese research and development saw much growth in this period.

What then, accounted for the shift away from patent protectionism? This is an enormously complex question, and no single factor can possibly offer an explanation for this dramatic worldwide trend. But one thing is clear: if China had continued to balk on liberalizing and reforming its patent policies, foreign investors would have eventually become disenchanted with the Chinese market and China would have sustained significant losses in the amounts of foreign capital and technology, upon which the country’s economic modernization was so dependent. A substantial decline in foreign investment would have also dimmed the prospects for increased efficiency, innovation, and competitiveness for domestic Chinese enterprises. Thus, there was a strong motivation among Chinese leaders and officials to continue the gradual enlargement of protection for patented inventions of foreigners, which ultimately eliminated the practice of forced technology transfers.

But this was not the full story; there were more subtle and complex forces at work as well. Recognition of foreign patent rights is not simply a response to increased exports of patented products or the transfer of patented technology; it is also connected with a country’s importer-exporter status change. While giving recognition to foreign patents is disadvantageous to countries that are importers of patented products, it is advantageous to those that are primarily exporters of such products. As China climbed the developmental ladder, it changed from being a simple importer to both importer and exporter of intellectual creations, and simultaneously changed from a host country of foreign investment to both a host and source of foreign investment. As China underwent this status change, the cost-benefit ratio in recognizing foreign IPR shifted. China was satisfied, in effect, to offer the following deal to others: we will provide patent protection for the products of your inventors if you provide reciprocal protection for our inventors under your patent law. This was due to the realization that China had more and more to gain from the protection of their inventors outside its borders, in comparison to what they stood to lose by offering protection to foreigners.

In fact, the history of international patent relations bore out this simple opposition between exporters, or foreign investors (favoring reciprocal recognition of foreign inventions) and importers, or Chinese partners (resisting such recognition). Western experience in this regard offered a good example. The first country to agitate for the principles of "international protection of IPR" was the U.S., one of the major exporters of IPR products and investors in patented technology. The U.S. tolerated rampant patent infringement and hence exerted intense diplomatic pressure on China as the latter denied patent protection to U.S. inventions. As a matter of fact, the amendment to the 1984 Patent Law in 1992, which enlarged the scope of patent protection to cover pharmaceu-
tics, chemicals, food, beverages and condiments, and also extended the protection terms, was also dictated by the Memorandum of Understanding between China and the United States on the protection of IPR.35

V. THE ROLE OF ECONOMIC DEVELOPMENT POLICY IN THE SHAPING OF THE PATENT REGIME

While emphasizing the interaction between international trade relations and the Chinese Patent Law, we should not lose sight of the role of economic development policy in shaping the patent regime. In fact, concerns for economic development have given a distinctive character to China’s Patent Law. Status change of state-owned enterprises in the patent regime was an obvious example in this regard. From 1984 until 1992, although economic reform was launched and continued, China’s economy was still dominated by the state sector.36 The government tried to maintain this dominance, allowing non-state-owned enterprises to play a mere complimentary role in the economy, and the state-owned enterprises were still more or less controlled by the government. Correspondingly, the 1984 Patent Law contained some special arrangements for state-owned enterprises: first, a state-owned enterprise could not own, but rather could “hold” a patent right; second, a state-owned enterprise holding a patent right could not transfer the patent without permission from the relevant administrative governmental authority.37 In other words, state-owned enterprises were actually disadvantaged in the 1984 Patent Law despite the fact that they were given a wide range of privileges vis-à-vis non-state-owned


37. Prior to the 2000 amendment, Article 20 of the Patent Law provided that [I]f a Chinese entity or individual intends to file an application in a foreign country for a patent on an invention or creation completed in China, it or he shall first file an application for patent with the Patent Office and shall, with the consent of the relevant competent department under the State Council, entrust a patent agency designated by the State Council to act on its or his behalf.
enterprises in many other areas. However, beginning in 1992, the government introduced a set of new policies virtually liberalizing the non-state sector in the economic development. Economic changes brought about by this new policy were a contributory factor to the amendment to the Patent Law in 2000, which removed the restrictive provisions for state-owned enterprises and accorded equal treatment to both state-owned and non-state owned enterprises or institutions in obtaining patent ownership rights. This will help to promote fair competition among state-owned and non-state enterprises, and encourage them to undertake technological inventions.

The role of economic development policies in the formation of the Chinese patent regime is most evident in the Patent Law's provision on practical applicability.\textsuperscript{38} The Patent Law requires that an invention or utility model can be made or used in some industries or under circumstances that effective results can be produced. This requirement indicates that the goal of the Patent Law is to encourage inventive activities for developing the national economy. It should be noted, however, that the term "practical applicability" has a broader meaning than the term "industrial applicability" adopted in other countries.\textsuperscript{39} The selection of this term enables more inventions and utility models to qualify for a patent.

The interaction between the level of economic development and standard for patent protection is also indicative of the role of economic development policies in the formation of the Chinese patent regime. It is known that prior to the 1992 amendment to the 1984 Patent Law, food, beverages and flavorings, pharmaceutical products and substances obtained by means of a chemical process were not patentable.\textsuperscript{40} The 1984 Patent Law also treated animal and plant varieties as non-patentable. Article 25 of the current Patent Law, however, provides that the processes used in producing animal and plant varieties may be granted patent rights, subject to the other provisions of the Patent Law.\textsuperscript{41} The deletion of these items from the non-patentable list represents a major step forward in China's patent regime, and put China's Patent Law in line with the international standards. In fact, even microbes are made patentable under the relevant provisions of the Regulations for the Implementation of the Patent Law and the Guidelines for the Examination of Patent Applications.\textsuperscript{42} On the other hand, the State Intellectual Property Office (SIPO) has

\textsuperscript{38} Patent Law, supra note 4, at art. 22.
\textsuperscript{39} As the \textsc{International Association for the Protection of Intellectual Property} (APPI) observed in a document entitled "Resolution Q180", the term "practical applicability" is intended to include inventions that are applicable to achieve a practical result, no matter whether they are to be used in commercial spheres, while in most countries, the criterion of industrial applicability excludes from patentability inventions which can be made and used only in the private or non-commercial sphere. For more information, please see http://www.aippi-china.org/main_09_q180r.html
\textsuperscript{40} Patent Law, supra note 4, at art. 25.
\textsuperscript{41} \textit{Id}.
\textsuperscript{42} Guidelines for Patent Applications (promulgated by the State Intellectual Property Office, 2006),§2.6.2.
so far been reluctant to award patent rights to gene patent applications. One explanation for this attitude towards gene patentability is that China fears that multinational corporations and Western researchers might use gene or so-called "patents on life" to seize control of potentially lucrative biological resources. Another explanation however, points to the relatively low level of scientific research in this area and economic development in general. Gene protection may be too "advanced" an issue for contemporary China in its specific stage of scientific and economic development.

The role of economic development policies in the formation of the Chinese patent regime is also illustrated in the coexistence of the Patent Law and other regulations encouraging inventions, which is also a distinctive feature of the Chinese patent regime. It has been a long-standing national policy to promote scientific research and invention. It was clearly stated in the 1984 Patent Law that the law was designed to "promote the development of science and technology and meet the ends of the socialist modernization." The modern patent system in the Western sense is exclusively based upon Patent Law, but the 1984 Patent Law in China was concurrently effective with the Regulations on Awards for Inventions, making the Patent Law a less prominent legal issue. In fact, there has been no real change to this policy since the inauguration of the patent regime. The framers of the 1984 Patent Law attached as much, if not more, importance to the encouragement of inventions as to the protection of rights of inventors. In the 1980's, there were more inventions submitted for governmental awards in accordance with the Regulations on Awards for Inventions than there were submitted for legal protection pursuant to the Patent Law. It seems fair to argue that the promotional policy for scientific inventions adds an important dimension to China's approach to patent regime building.

43. Patent Law, supra note 4, at art. 1.
44. In the 19th century, the patent system in Prussia was a combination of the patent law and a patent awarding system. However, no such traits can be found in patent regimes of modern nation-states.
45. According to Huang Kunyi, then Director of the Patent Office, both the Patent Law and the Regulations on Awards for Inventions are intended to encourage inventions. But the Patent Law applies in most instances to conceptual methods for resolving technical problems that have not yet been put into practice. The Regulations on Awards for Inventions applies to new scientific or technological achievements already utilized and proven through actual application. Few patented inventions conform to the requirements of the Regulations on Awards for Inventions, for it usually takes several (sometimes more than ten) years for patented inventions to be put into application. Some inventions, though in conformity with the requirements of the Regulations on Awards for Inventions, are not eligible for patent application. The Patent Law and the Regulations on Awards for Inventions also contain significantly different considerations and approval procedures. It should be noted that patents are generally granted to entities that produce economic benefits conducive to the development of scientific research and the application of new technology to production. On the other hand, invention awards are generally granted in circumstances where the inventor's workplace does not directly benefit from the innovation.
46. See Regulations on Awards for Inventions, supra note 21. The Regulations were promulgated on December 18, 1978 and revised on April 25, 1984 and June 28, 1993.
47. The Regulations on Awards for Scientific and Technical Improvements were promulgated by the State Council on Sept. 12, 1984 and revised on June 28, 1993.
Incidentally, the organizational changes in the governmental agency responsible for patent administration are reflective of the change in the perceived importance of the patent regime. The agency in charge of patent affairs had long been the Patent Office, which was merely a subordinate office under the administration of the Ministry of Science and Technology (MOST). This situation remained unchanged until March 1988, when the Patent Office was transformed into the State Intellectual Property Office (SIPO), which is a ministerial-level agency directly under the administration of the State Council. This should be interpreted as nothing less than a governmental recognition of the increasingly important role that patents will play in economic development, and a policy switch that was made to take full advantage of IPR for the purpose of economic development.

VI. CONCLUSION

The exploration of the history of Chinese patent law, and in particular the history of its international patent relationships, reveals that concerns for economic development underlie the country’s IPR laws: China’s stage of economic development dictates the pattern of IPR regime both in terms of scope and the level of IPR protection.

It is obvious that China has simply taken up the old views once advocated and now repudiated by the West, i.e., that the regime of IPR (particularly patents) is an instrument for economic development. In contrast, the West developed new ideas about IPR regimes, the authority of multilateral institutions and the rule of law, and even human rights.

Of course, one would be foolish to project this simple model onto tomorrow’s complex world of international patent relations and IPR relations in general. But there is something useful in the above-mentioned framework that may provide a proper perspective with which to solve future IPR problems.

In the foreseeable future, as China remains far behind in terms of economic development (as evidenced by science and technology), China will steadily induce a return to moderate IPR protection. However, China is now driving to excel in science and technology. Its strategic investment plan for science and technology lists dozens of areas where it hopes, in time, to become the world’s innovation leader. If it can harness market forces to its objectives, it has a fair chance of achieving many of them. In light of this, the Chinese IPR regime is bound to be ushered onto a genuine fast track to the modernization of IPR protection.