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EDITOR'S PREFACE

China today is the world's "enigma wrapped in a mystery." Just as the former Soviet Union was once an unknown and feared other, China now faces the same level of misunderstanding and distrust. What we have attempted to do in this Symposium Issue is demythologize the People's Republic of China by providing the reader with the tools to evaluate and analyze contemporary issues in Chinese law for him/herself. We do offer a point of entry into a culture that continues to survive and thrive after 3000 years. China deserves our professional attention and our respect. Her scholars merit this and other opportunities to engage in meaningful dialog with colleagues around the world.

Most of all, I hope this issue makes us all think more about the role of China and other non-western countries in the evolution and development of the rule of law. We, as attorneys and other educated people, must expand our understanding of law to include the rich traditions of our non-western colleagues if we are to fully appreciate the opportunities in a truly global society.

Finally, and perhaps most importantly, I would like to thank the following people for their efforts in this project: Jeff Fugal, Rebecca Knoll, Donna Valin-Penrose, Adrienne Quill, Michelle Sommer, and Chris Arvin. In addition, I would like to thank the following members of the faculty for their special attention to this project: Professor Jeff Grove and Professor Jim Nehf. Dean Norman Lefstein deserves special mention for his unwavering belief in and support of the *Indiana International and Comparative Law Review*. Last but not least, I offer my heartfelt thanks to Chuck Smith for putting up with me during this vexatious process of publication: I could not have done it without you.

Kim L. Milone
Executive Symposium Editor
Indianapolis, 1996

CHINA LAW SYMPOSIUM INTRODUCTORY ESSAY:
TRACKING THE DRAGON

*Jeffrey W. Grove**

Long a paradigm of civilization—a center of rich culture, learning and scientific innovation—China approached the last half of the nineteenth century on the brink of steep political decline. By century's end, following its humiliating defeat in the Sino-Japanese War, China entered a disastrous period in foreign relations during which it found itself occupied by foreign powers who vied for territorial and economic concessions.¹ Within little more than the first decade of the twentieth century, the Middle Kingdom's last dynasty had fallen, and China's first republic was proclaimed.² The complex political turmoil within China which followed, and accelerated, even as the Japanese again invaded in 1937, eventually resolved itself into a military contest between the Kuomintang Party of Chiang Kai-Shek and the Chinese Communist Party. The civil war ended with the installation of the Communists' regime in Peking in October 1949. The People's Republic of China was born.

This China Law Symposium contains a collection of articles about a nation now less than 50 years old and in the throes of dynamic economic change, in the midst of cultural instability and adaption, and in the grip of an unpredictable political system. In combination, these are volatile—even dangerous—ingredients. Among the six self-styled Communist governments remaining in the world (which also include Cambodia, Cuba, Laos, North Korea and Vietnam), China alone claims a role on the stage of international power and influence, its professed political values antithetical to those of Western liberal democracies, as well as to those of established and emerging democracies in the East, such as Japan and Taiwan. Given its muscular presence in the world and its anti-democratic posture, China's headlong rush toward a new market-based economy, its cultural confusion and its political uncertainties pose obvious dangers, not only to its immediate neighbors and to the world community, but to China itself.

As the most populous country on earth seeks to find its place in the world as a modern, prosperous and engaged nation, it must struggle to overcome daunting traditions of internal authoritarianism and international isolationism. When the People's Republic of China was founded in 1949,

* Professor of Law and Director of the China Summer Program, Indiana University School of Law, Indianapolis.

1. See D. CLUBB, 20TH CENTURY CHINA 15-16 (1978).

2. See *id.* at 41-42.

its bedrock was a feudal, dynastic and insular past stretching back thousands of years. The new emperor was Mao Zedong. As with many emperors before him, he claimed legitimacy by virtue of impressive military victories on the field of battle. However, unlike his predecessors, Mao also asserted the legitimacy of a relatively new and powerful ideology. In his role as Chairman of the Chinese Communist Party, Mao became the principal interpreter and exponent of this ideology. As the self-styled Great Theoretician, his pronouncements and policies guided and misguided his nation's fortunes and misfortunes for more than 25 years.

After vigorously and often ruthlessly consolidating power in the new China, in 1956 Mao invited the country's intellectuals to "let a hundred flowers bloom and a hundred schools of thought contend." This invitation was soon revoked by the Anti-rightist Campaign in 1957; intellectuals who naively, and often reluctantly, had heeded Mao's call to speak out in constructive criticism of his regime were rewarded with prison sentences, or reform through labor or exile. In 1959 Mao mobilized the nation's peasants for his Great Leap Forward, a program as devastating as it was utopian. Assembled into huge communes, the peasant masses were set to work in backyard steel furnaces which melted pots and pans but produced no steel. Agricultural production having been preempted by this new form of "industry," a three year famine ensued in which tens of millions perished. In 1966 Mao launched the Great Proletarian Cultural Revolution. His purpose was to animate an ideological precept having the earmarks of a political slogan: "class struggle." Mao appealed directly to university and middle school students across China to challenge and then denigrate their teachers, and ultimately to attack anyone and everyone suspected of having a "bourgeois" past or "reactionary" tendencies. In the anarchistic environment that resulted from the dedicated ferocity of these so-called "Red Guards," society turned against itself: in a stunning reversal of Confucian ideals, student "struggled" against teacher and child against parent. Husband and wife informed on one another, colleague exposed colleague, friend turned against friend.³ Hundreds of thousands of Chinese experienced psychological or physical torture, were imprisoned or sent to labor reform camps, or died, some by their own hands. Millions more were "sent down" to the countryside to live and work among the peasants, often in isolated and remote areas.⁴ The hardships they suffered surely elicited little

3. See Thurston, *The Dragon Stirs*, THE WILSON Q. 27 (Spring 1993).

4. Mao's directive stated:

Vast number of cadres should be transferred to do manual labor in the countryside. This is a chance for them to relearn the lessons of the masses. Apart from the aged, the weak, and the sick, all cadres should be sent to the countryside to facilitate their remolding. Cadres at their posts should be transferred in turn to the countryside to do manual labor.

CHIHUA WEN, THE RED MIRROR 16 (1995).

sympathy from their peasant hosts⁵ for whom a harsh existence was a way of life—albeit one for which they, unlike the newly “rusticated,” had some preparation. Ten years passed before the excruciating upheavals of the Cultural Revolution were brought to an end upon Mao's death and the subsequent arrest of the Gang of Four.⁶

When in 1978 Deng Xiaoping emerged victorious from the power struggle that ensued following the death of Mao two years earlier, China was struggling for purchase. Decades of political persecutions, social chaos, economic privation and international isolation had produced pervasive demoralization, both among the Chinese masses and the ruling elite. Deng's solution has been to promote economic recovery by loosening socialist constraints and encouraging economic liberalization through a “socialist market economy with Chinese characteristics.” The result has been widely hailed as the greatest economic miracle of the twentieth century. China is now the fastest growing economy in the world; within the next 15-20 years it could well become the world's largest.⁷

5. One young victim reported:

I begged the leadership of the commune to lend us some grain against our next year's grain distribution. I told them, “I don't care that you labeled my father a counterrevolutionary. He is dying of starvation. He has to have enough to eat if he is going to reform himself.” The leaders refused me. One of them, a young man in his twenties, told me, “Your father lived a luxurious life before the liberation, serving the KMT. How dare you stand up for that old reactionary? You say he is dying of starvation? He deserves it. So do you, you little reactionary.”

Id. at 113.

6. For further personal accounts of depredations brought about by the Cultural Revolution, see *id.* at 31-165. Another account is reported in F. BUTTERFIELD, CHINA: ALIVE IN THE BITTER SEA 309 (1983):

Later, when I met her mother, a slender, well-preserved middle-aged woman with a brittle manner, I understood. ‘In 1966, in the Cultural Revolution, the Red Guards in our school came to our apartment and searched it for a whole day,’ her mother recounted. ‘They took all our furniture, my jewelry, all our books and records, many of which had been gotten from abroad. They left us with only one set of clothes. They made us carry our books and records down to the courtyard by the armloads. Then they held a bonfire on our campus. It lasted for three days.’

Before the Cultural Revolution, we Chinese lived under a great illusion. We believed the Communists could save China and make it prosperous and strong again. People were very idealistic and hardworking. Now people have seen through this, and they have suffered a terrible loss of faith. This is the key to understanding China today. The cadres have become concerned only with their own privileges, the factory workers are lazy, and the young people have lost ten years of schooling and don't have jobs. People have become selfish.

7. *China's Trade Status: Hearings Before the Senate Finance Comm.*, ___ Cong., ___ Sess. ___ (1996) (testimony of Charlene Barshefsky, Acting United States Trade Representative) [hereinafter cited as *Hearings*].

At the same time, Deng has pursued a policy of strict political control. His authorization of the brutal suppression of the Tiananmen Square protests in 1989⁸ was an object lesson to those pro-democracy and anti-corruption activists, and their sympathizers, who mistakenly believed that political reform would quickly follow on the heels of economic reform. And yet, it may be impossible over the longer haul for China to open its economic door to the world while keeping its political door closed to its own people. This is essentially the dilemma that now confronts the Chinese Communist Party.

Moreover, it is a dilemma compounded by the internal consequences of China's new economic policies. As a centrally planned economy gives ground to market forces and to economic experimentation at local and provincial levels, the choke hold of Beijing bureaucrats loosens. When in 1992 Deng visited the Special Economic Zone (SEZ) of Shenzhen in Guangdong Province, just north of capitalist Hong Kong, he lauded the economic success he found. His advice to "go faster" has led to the creation of additional SEZ's, some self-proclaimed and reaching far up the Yangtze River, the so-called tail of the Chinese dragon. The mounting influence and self-sufficiency of these localized centers of economic growth, together with the acceleration of economic development in Shanghai, have brought about decentralization of authority within the ranks of the Communist Party.⁹

In addition, the privatization of many state industries, as well as the entrepreneurial opportunities promoted by the infusion of foreign capital and technology and the establishment of private joint ventures, are creating a new sector of the Chinese work force, one which is unmoored from the oversight and constraints and of the traditional "work units"—the principal organizational structures and locus of social control in Communist China. These workers have less stake in the received system and, as the main beneficiaries of the evolving system, their rising expectations will not be easily dampened by confused political rhetoric.

Furthermore, the growing disparities between the incomes of urbanites and peasants, and between those living in the coastal regions and in the interior areas of China, are fueling increasing social unrest and dislocation. It has been reported that "[t]he World Bank estimates that there are 100m - 150m rural workers on the move in China, a huge and potentially volatile population."¹⁰

Finally, the increase of economic crime in China, which the Communist Party has endeavored with limited success to control, and the well-known corruption within the ranks of the Party itself, have resulted in wide-spread disillusionment.¹¹ During my two most recent visits to China

8. See MING, DENG XIAOPING: CHRONICLE OF AN EMPIRE 25-26 (1994).

9. See *China's Communists*, THE ECONOMIST 21 (June 4th-10th, 1994).

10. *Id.* at 20.

11. See *Interview with Wang Shan: A Sharp and Mischievous Eye on China*, NEWSWEEK 28 (Mar. 6, 1995).

in 1994 and 1996, I traveled throughout the country: to Ningbo in the southeast, to the walled city of Xian in the northwest, to Kunming in the southwest, to Chongqing in the heart of China, and through the famous Three Gorges on the Yangtze River to Wuhan. I also visited Hangzhou, the capital of Zhejiang Province; Shanghai, China's largest city and its financial center; and Beijing, the nation's capital. Everywhere I went, people talked in the same breath about the dream of "getting rich" and the nightmare of spiritual pollution and corruption.

Deng Xioping is 92 years old and widely-rumored to be in ill health. Although he is still the acknowledged seat of power in China, to his successors will fall the dilemma of accommodating the nation's economic and political choices. The identity of his successors will be crucial to the choices which are made and to the ways in which the dilemma is resolved, at least in the near term. It is the unpredictability of this process of succession, and of its results, that pose the foremost immediate hazards for China's future and for geopolitical stability.

The United States, along with the rest of the world, must deal with China on a range of important, sensitive and potentially explosive issues. In 1997 Hong Kong will return to Chinese sovereignty. (A huge clock on the facade of the Museum of History on the eastern perimeter of Tiananmen Square ticks off the days until reunification.) Will Hong Kong's economy be allowed to continue flourishing? To what extent will its citizens continue to enjoy the perquisites of an open political society?

Of course, no foreign policy matter is of greater significance to China than the status of Taiwan.¹² Will China pursue its objective of bringing Taiwan within the suzerainty of the Mainland through diplomacy or force? How will other nations react if China's military exercises in the Taiwan Straits become increasingly menacing? Indeed, what do Taiwan's 21 million people want to do about China's overtures? After all, 90 percent of Taiwan's current population was born in Taiwan, not on the Mainland, and in 1996, for the first time in Chinese history, a Chinese leader was democratically elected in Taiwan.

The world must wonder, moreover, to what extent China can be expected to champion the cause of its Communist neighbor, North Korea, and with what results. What policy will China follow with respect to extending and protecting, or withholding and punishing, the exercise of human rights within its own borders?¹³ Will the People's Liberation Army (PLA) continue the Chinese government's policy of suppressing the political and religious aspirations of the Tibetan people and of eradicating the Tibetan

12. The United States' policy regarding Taiwan is set forth in the Taiwan Relations Act, 22 U.S.C. § 3301-16 (1979).

13. See Peerenboom, *What's Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics*, 6 Harv. Human Rights J. 29 (1993).

culture?¹⁴ Can China be expected to join international treaties on nuclear non-proliferation? Will it continue to sell weapons of mass destruction to rogue nations such as Iran? How will China's desire for trade, investment and technology transfer play out against the interests of its trading partners and foreign investors in securing protection of intellectual property rights, investment capital and profits, and in enforcing trade agreements and arbitration awards?¹⁵

Of course, China cannot and should not be expected to abandon its own perceived needs and interests or to compromise its own sovereignty. But will its government abide by established rules of international law and by its domestic legal norms which are in the process of being re-fashioned?¹⁶ In the end, China's commitment to, or rejection of, the rule

14. See J. TYSON & A. TYSON, CHINESE AWAKENINGS 117 (1995):

For most of the history of relations from the seventh century until the Communist invasion, however, Tibet succeeded in resisting subjugation by China. The Himalayan kingdom enjoyed full independence from China for spans of several hundred years at a time. Tibetan rulers rejected the role of imperial vassals and bowed to the authority of Chinese emperors in name only. They saw the tributary ritual as a formality for trade and diplomatic ties with China, not as a stamp of their subservience. They viewed their relationship with Chinese emperors as a personal one between priest and patron: Tibet's Buddhist leader provided spiritual guidance to the Chinese emperor, who in turn worshiped and protected him. This relationship was established in the thirteenth century and served on and off through the end of China's last dynasty, the Qing, in the early 1990s.

Tibet enjoyed one more brief period of independence after the fall of imperial China in 1911. But in September 1951, Mao's battle-hardened troops, fresh from their revolutionary victory in 1949, marched into the Tibetan capital of Lhasa and completed their military occupation of Tibet. The Communists had achieved China's long-standing goal of annexing Tibet. But they miscalculated in believing they could readily subdue Tibetans like Sonam and uproot a civilization that in many ways rivaled their own.

The view expressed in the last sentence of this passage does not accord with my own observations when I visited Lhasa, the capital of Tibet, in 1996. Although China's control in the sparsely populated hinterlands might be less thorough-going, the presence of perhaps 200,000 PLA troops in and around Lhasa seemed to me effectively to have subdued the Tibetans living there.

15. See Bersani, *The Enforcement of Arbitration Awards in China*, 10 J. Int'l. Arb. 47 (1993).

16. Although the Chinese Communist Party has never counted the rule of law among its "four cardinal principles" of governance—Marxism-Leninism-Mao Zedong Thought, the socialist road, the dictatorship of the proletariat and the leadership of the communist party—since 1978 it has engaged in legal codification and legal institution-building. See, e.g., Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategies*, 39 Am. J. Comp. L. 293 (1991).

Of course, the existence of the People's Republic of China accounts for only a tiny fraction of China's long history in which rich legal traditions emerged and competed. See ESSAYS ON CHINA'S LEGAL TRADITION (1980).

of law at home and abroad will guide its approach to all of these questions.¹⁷ The articles which appear in this Symposium have as a common thread the emergence, meaning and influence of law and legal norms in modern China.

17. Winston Lord, Assistant Secretary of State for East Asian Affairs, was the United States Ambassador to the PRC during the Tiananmen Square turmoil in 1989. Although he supported withdrawal of China's "Most Favored Nation" (MFN) trade status in the wake of Tiananmen, he recently testified in favor of MFN renewal, arguing that China has come a long way in displaying cooperation on several fronts, *e.g.* in refusing blanket aid and comfort to North Korea and in exercising restraint in using its veto power in the United Nations Security Council. *Hearings, supra* note 7 (testimony of Winston Lord)

PHILOSOPHICAL INFLUENCES ON CONTEMPORARY CHINESE LAW

Weng Li*

INTRODUCTION

Those unfamiliar with China's legal system frequently raise two questions: whether "Chinese law" is a meaningful concept¹ and whether there is value in discussing the philosophical influences on China's legal traditions? I offer an affirmative reply to both questions. China today has a developed legal system which includes such mainstays as Constitutional Law, Criminal Law, Civil Law, Procedural Law, Economic Law, and the like. The Chinese legal system, however, is not only socialist but retains the unique vestiges of China's philosophical heritage. Whether one agrees or disagrees with the proposition that the rule of law is a meaningful concept in China or with the view that it is valuable to discuss the Chinese legal tradition, it is worthwhile for Westerners to study the new Chinese legal system if they want to develop a relationship with China. To develop a clear understanding of the Chinese legal system and the law which it embodies, one must study it within the context of Chinese social, cultural, political and legal history. Only through the comparative method may an objective conclusion be reached.

I. OVERVIEW OF LEGAL DEVELOPMENT IN CHINA

A. *Establishment of the Socialist Legal System*

This essay challenges the naive view that there is no legal system as such in the People's Republic of China (PRC). In February of 1949, the Chinese Communist Party (CCP) swept away the Guomindang Government, including its judicial organs and the entire body of laws. The CCP issued the Directive Regarding the Abolition of the Guomindang's Complete Book of

* Assistant Professor, Department of Law, Hangzhou University, P.R. China. LL.M. 1988, Southwest Political & Legal Science Institute (Chongqing, P.R. China). Professor Weng Li has published nearly 20 articles dealing with Chinese and Western legal problems. He was a visiting Scholar-in-Residence, Valparaiso University School of Law in 1990-91. The author gratefully acknowledges the assistance of Dean and Professor Edward Gaffney, Professor Richard Stith, and Professor Jack Hiller of Valparaiso University School of Law.

1. For example, in light of the "Tien'an men Square Event" on June 4, 1989, some have questioned whether China's current government takes the rule of law seriously.

Six Codes² and the Affirmation of the Legal Principles in the Liberated Areas. In September, 1949 the CCP directive was incorporated into the Common Program of the Chinese People's Consultative Conference, which was the temporary basic law of the country until 1954. Article 17 of the Common Program states that "[a]ll laws, decrees, and judicial systems of the Guomindang reactionary government which oppress the people shall [no longer] be enacted and the people's judicial system shall be set up." Two commentators have noted that "[h]aving done away with the Nationalist legal institutions, the new government began experimenting with the establishment of formal, Soviet style judicial organs, such as people's courts and people's procuracies."³

This was a period of revolutionary euphoria manifested by swift policy changes and the implementation of communist political philosophy. Law, however, was used as a political tool to empower the working class. In 1952 and 1953, Soviet legal scholars came to China to teach and Chinese students went to the Soviet Union to study law. Under the influence of Soviet legal concepts and models, the period from 1954 to mid-1957 has been referred to as the golden age of legal development in the PRC because of the considerable progress made in the creation of a formal legal system. The framework for the system was established in 1954 with the promulgation of the first PRC Constitution. The Constitution was later supplemented by organic laws for the courts and the procuracy based on Stalin's 1936 Constitution.

Soviet legal code and principles were readily accepted as models for codification of Chinese laws until 1957 when a most dramatic shift in Chinese politics took place. Led by Mao Zedong, the Soviet-Chinese alliance shattered, and China's leaders abandoned the Soviet legal model. In the wake of the political fallout, some Chinese jurists, legal scholars, and legal authorities urged modernization of the legal system. They even sought to establish such Western legal concepts as judicial independence, equal justice before the law, and due process of law. Unfortunately, their reform movement came to a sudden halt in 1959 when these reformers were condemned as rightist intellectuals with anti-socialist views attempting to use law against the Party and to negate the class nature of law.

Chairman Mao's Cultural Revolution began in 1966, and this destroyed any possibility of China adopting either a totally Soviet-style legal system based on Communist principles or a totally Western-style legal system. From 1966 to 1976, the Ministry of Justice was disbanded, law schools were closed, and legal research was halted. The legal profession disappeared, with almost no laws enacted and no law books or journals published. Revolutionary

2. This term is used to refer to the whole body of Guomindang's laws, including the Constitution, Commercial Law, Civil Code, Criminal Code, Civil Code of Procedure, and Criminal Code of Procedure, which are modeled on European legal codes.

3. Hsia Tao-tai & Wendy I. Zeldin, *Recent Legal Developments in the People's Republic of China*, 28 HAR. INT'L L.J. 251 (1987).

morality dominated political ideology, and the Party, the mass organization of the people, ruled the state. Members of the Chinese legal profession had to seek new nonlegal careers.

With the death of Mao and the fall of the "Gang of Four" in 1976, a new China began to emerge, one that emphasized "social legality" and noticed the protection of individual rights. The Ministry of Justice was revived, and today it oversees lawyers and notaries. This organ's responsibilities also extend to collecting laws and decrees, conducting legal research in cooperation with scholarly institutions, and coordinating legal publication activities. Furthermore, the "People's Lawyer System" was restored, and since 1986, the Ministry of Justice has held the Chinese National Bar Examination every other year, providing a continuous flow of thousands of qualified new attorneys to renew the staff of the judicial system.

B. *Legal Training and Education*

With the reestablishment of the legal and judicial systems in China, formal legal education achieved new prominence. The Ministry of Justice is in charge of five political and legal science institutes, which are scattered across China in the cities of Chongqing, Beijing, Shanghai, Xi'an, and Wuhan. The sheer variety of sources for legal education represents the general direction of higher legal education in present-day China. In addition, major Chinese national and provincial universities also train undergraduate and postgraduate law students. Undergraduates are required to receive both a theoretical and a practical legal education for four years; postgraduates must complete the further requirement of a dissertation during an additional two or three years of study. Finally, the central and provincial governments in China now run about thirty "legal cadre" training schools.

In the process of re-establishing the Chinese legal and judicial system, over one hundred law periodicals and newspapers, such as *Law Science Research* and the *Fazhi Ribao*, have become available to the public. Moreover, a special encyclopedic volume on law was published in 1984. This volume includes sections on law in general, specific fields of domestic law, foreign and international law, legal history, and biographical sketches of jurists.

In 1983, China's leader Deng Xiaoping stated that it was necessary to formulate a series of laws, decrees, and regulations to put democracy "in writing."⁴ On November 22, 1985 the National People's Congress Standing Committee decided to initiate a five-year public education program on China's laws and legal system.⁵ This program lasted from 1986 to 1990 and was aimed at eliminating "legal illiteracy" and educating all Chinese citizens, including government officials, regarding the importance of the legal system

4. See THE SELECTED WORKS OF DENG XIAOPING 319 (1980).

5. *Legal Studies: A Nationwide Assignment*, BEIJING REVIEW, Dec. 23, 1985.

and the purpose which it serves. In addition, newspapers published articles explaining the new legal system. Law-related personnel attended lectures on law, some of which were broadcast on television and radio. Law schools prepared materials of a popular nature for distribution. Perhaps most importantly, public trials and articles about trials were also used as educational tools. In sum, the legal education program has brought about gratifying results.

C. *Chinese Socialist Democracy and Legislation*

At the heart of China's concept of a socialist democracy are the constitutional ideas that "[a]ll citizens of the People's Republic of China are equal before the law" and that "[a]ll power in the People's Republic of China belongs to the people."⁶ Deng Xiaoping elaborated on these ideas when he observed that "[d]emocracy has to be institutionalized and written into laws so as to make sure that institutions and laws do not change whenever the leadership changes, or whenever the leaders change their views or shift the focus of their attention." The CCP's idea of reshaping the personality to acquire the correct proletarian attitudes, according to one scholar, stretches back to "the Confucian emphasis on self-cultivation and molding of the personality as the basis for moral and political life."⁷

Some Western jurists think that the current Chinese leadership uses the law to inculcate its citizens through the five-year legal education program, viewing the legal education program as an attempt to indoctrinate socialist ideology into the minds of Chinese citizens. The term "democracy" in the Western sense refers to a group of individuals being governed voluntarily by those whom they have chosen to lead them. But in China, "democracy" appears to stand for the idea that the CCP is governing in the best interests of the people. Even though the citizens have no significant role in determining the Party's policies, which remain somewhat different from those of the legal system, the CCP members are all considered outstanding representatives of the people who are able to rule in the best interest of the PRC. In Western countries the legislature as the law-making body and the judiciary as the law-interpreting body are two distinct entities, while in China, the two institutions are still inseparably linked. This may help explain why in June 1989, the "Tien'anmen Square Event" was labeled a "Counterrevolutionary Rebellion" and finally suppressed by force.⁸ According to Marxist legal theory, the law equals the rules imposed by those who govern and are enforced by the will of the ruling class. In June 1989, martial law was again used as a political tool to keep Chinese society in order.

6. Constitution of the People's Republic of China, arts. 33 and 2.

7. RAYMOND DAWSON, *CONFUCIUS* 86 (1981).

8. According to Chinese Criminal Law, counter-revolution is one of the most serious crimes.

On November 29, 1979, the NPC Standing Committee adopted a resolution declaring that all laws enacted during the 1950s and 1960s were to remain in effect if they did not conflict with the Constitution or more recently enacted legislation.⁹ The passage of new legislation in China involves a four-step procedure: bill proposal and submission; examination and discussion; adoption; and promulgation. The legislative procedure is initiated when the State Counsel, the NPC, or any other high-level body outlines the need for a particular type of legislation or an amendment to existing law. The appropriate governmental organization will be mobilized to submit the bill or amendment.

Contrary to the opinion of some commentators, the CCP does not initiate this legislative process. The CCP is not involved as an organization in drafting legislation, although individual lawmakers are members of the CCP. Normally, Chinese legislation also provides foreigners with access to the people's courts despite the preference for conciliation between the parties. Attention should be paid both to the nature and to the scope of the new socialist legal system. This system can be viewed as encompassing all legislation in China, whether for foreigners or for domestic implementation. Thus it is reasonably regarded as a single system with two threads. Chinese laws are best understood by focussing on the domestic context while viewing the legislation relating to foreign investment as an outgrowth of internal concerns. For example, the Bankruptcy Law fits this pattern.¹⁰

Perhaps the complexity of explaining the intricacies of merging socialism with Western legal concepts deters Western jurists from understanding the process of the Chinese socialist legal system. Just as democratic forms of government in Western countries provide the intellectual impetus for an independent judiciary, Marxist-Leninist-Maoist thought in China is the root of the ideological framework for all institutions, including the legal system. The ideological foundation of the new socialist legal system is revealed most clearly in the 1954 PRC Constitution: "The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants."¹¹

Although the theory of legislation in today's China certainly differs from the philosophies of Taoism, Confucianism, and Legalism, these philosophies remain the underpinning of Chinese political and legal theory. To completely

9. On July 1, 1979, the second session of the fifth NPC promulgated seven new laws: the Organic Law of the Local People's Congresses and Local People's Governments, the Electoral Law for the National People's Congress and Local People's Congresses of all Levels, the Organic Law of People's Courts, the Organic Law of People's Procuratorates, the Criminal Code, the Code of Criminal Procedure, and the Law on Joint Ventures.

10. For further examples of the interconnectedness of China's domestic and foreign laws, see Zhao Youg Qing, *The Company Law of China*, 6 Ind. Int'l. & Comp. Law Rev. 461 (1995) and John D. Osgathorpe, Note, *A Critical Survey of the People's Republic of China's New Company Law*, 6 Ind. Int'l. & Comp. Law Rev. 493 (1995).

11. Constitution of the People's Republic of China, art. 1.

understand the intricacies of the Chinese legal system, it is necessary, especially for Western jurists, to examine the philosophical foundations of China's legal system.

II. TRADITIONAL SOURCES OF CHINESE LEGAL THEORY

China's long history, extending over more than three thousand years, has produced numerous philosophical ideas. China, like classical Greece, saw a heightened period of philosophical thought between the sixth and third centuries B.C., with the golden era of Chinese thought known as the Periods of Springs and Autumns (772-481 B.C.). Although there was no lack of highly original doctrines in Chinese legal philosophy, those ideas can be regarded as detailed developments and enrichments of ideas from earlier periods. Si Ma-qian (?145-86 B.C.) in his monumental historical work *Shiji*, The Records of the Historian, mentions six schools: Yin and Yang, Confucianism, Moism, Nominalism, Legalism, and Taoism. Of the six, only Taoism, Confucianism, and Legalism are traditionally viewed as main planks in the foundation of the Chinese conception of law. While the Legalists and the Confucianists influenced Chinese legal theory much more than the Taoists, each of these three schools of philosophy must be examined in further detail.

A. *Taoism*

The school of thought and the spirituality known as Taoism is represented by the two great philosophers Lao Zi and Zhuang Zi, whose works sufficiently express the authentic Taoist ideas for purposes of this essay. Taoism holds that the universe is dominated by a fundamental principle known as *Tao*, which translates as the Way. According to this tradition, if one follows this great Way, without interference from an arbitrary act of will, all is well. Like water flowing over rocks, *wu wei* or inaction will let you follow the Way. As contrary in logic as it seems to Western minds, the Taoists advocated inaction, whereby "[i]f we study, our knowledge increases day by day. If we follow the *Tao*, our desire decreases day by day. Thus we can arrive at the state of inaction, by desiring less and less. Doing nothing, we do everything."¹² Equally, the principle of inaction is the essence of government. Thus, Taoism considers all human action as a disturbance of the natural order.

B. *Confucianism*

Confucianism is diametrically opposed to Taoism in that it denounces the principle of *wu wei* or inaction. The followers of Confucius believe in a more active form of governance and a more rigid social order. According to

12. LAO ZI, *TAO DE JING*, Book II, 48.

them the world of man is radically different from the world of nature. The latter is dominated by an eternal hierarchy after whose example the world of man must be constructed. The Confucianists call the natural laws which govern this physical world *Tao* or *Tian Dao*, meaning "heavenly way." Although these laws govern the world of nature, they do not directly govern the world of man. Therefore, it is necessary for man to establish rules in his world. These rules are known as *Li* or "rites" and they imitate the natural laws. The Taoists' "Way" seems to have in it an animation and a mystery which gives life the whole universe. But for the Confucianists, the "Way" is only a basic impersonal principle. It is true that Confucius and his followers often invoked Heaven and the divinity, but their religiosity is hardly passionate. In the *Lun Yu*,¹³ where Confucius' sayings are collected, one can read that "Confucius spoke neither of marvels, nor of extraordinary force, not of disorder, nor of divinity."¹⁴ When Zi Lu, a disciple of Confucius, asked the master if one should serve the gods, Confucius replied "if I cannot yet serve men well, how shall I serve the gods?"¹⁵ Thus Confucius was clearly preoccupied with the world of man. Likewise, one of the most illustrious Confucianists Xun Zi wondered if "it better to know the divine cause why things came into being or the reasons why human things happen? Reality gets out of sight if you admire Heaven without paying any attention to the world of man."¹⁶ At the beginning of the Han period (206 B.C. - 220 A.D.) Dong Zhong-shu, another most illustrious Confucianist, advanced the theory that man and Heaven influence one another, Heaven sending scourges to warn the sovereign that his government does not please the gods. There is some mysticism in this theory, which reigned in the minds of all Chinese princes until the nineteenth century, but its main purpose is not so much to exact the religiosity of the prince as to encourage good government.

C. *Legalism*

The third philosophical pillar in the foundation of the Chinese legal system today is Legalism, a remarkable school of thought that merits much more attention than I can give it in this short essay. The Legalists assert that the social life of man must be strictly governed by positive law. The Confucianist wants the world of mankind, which he sees essentially in hierarchical terms, to be dominated by the rules of *Li*, the Rite. In contrast, the laws envisaged by the Legalists are social rules, applicable to all with equal effect.¹⁷ Like weights and measures, legal rules must be standard and stable. Many Legalists have treated positive laws like weights and measures. Han

13. CONFUCIUS, LUN YU [THE ANALECTS].

14. *Id.*

15. *Id.*

16. HSUN-TZU, XUN ZI, Book II, ch. 17.

17. For detailed discussion of the difference, see T'UNG-TSU CHU 226.

Fei-zi, the most illustrious Legalist, provides us with a good example when he posits that although a good carpenter can measure accurately by eye, he still uses a rule for measuring. A wise man can make a wise decision on the spur of the moment, but he always consults the opinions of the ancients. Thus one can cut crooked wood straight, if the ruler is accurate; one can level the ground if one's level is flat; one can weigh accurately and properly if there are scales; one can measure capacity correctly if one has the right measure. If a sovereign wants to govern a country according to the law, mere promulgation and application of it will do. The law does not favor nobles, as the ruler does not bend to measure bent things. In the application of the law, the wise cannot make excuses, nor can the brave oppose it. Guilty ministers do not escape punishment. Rewards for the kindnesses of little men are not forgotten.¹⁸

For the Legalists, laws must have a clear meaning and be known to all. The current leadership of China adopted this point of view to launch the movement to educate all citizens on law. But the Confucianists' rules of the Rite do not descend to the common man, and the penal rules do not rise to affect the nobles. The Legalists do not wish to leave the world to govern itself spontaneously, and it would appear that the Legalists reject the Taoist principle of inaction.

The Legalists are concerned with constructing a well-ordered world, and in this sense their ideas do not seem so different from those of the Confucianists. But in reality there is a stronger contrast between Legalism and Confucianism than between Legalism and Taoism. The Legalists seem to be partisans of Taoism, as Han Fei-zi devotes two chapters of his famous book on the law to a commentary on the *Dao de Jing*. Given the superficial differences between the Legalists and the Taoists, many Chinese scholars have suspected that these two chapters were interpolated. However, even if they were interpolated, it could only have been done by the Legalists, rendering irrelevant for this analysis the ultimate authenticity of the work.

In what sense, then, can it be said that the Legalists agree with the Taoists? Is the recommendation of laws compatible with the principle of inaction? The apparent contradiction disappears when we observe that the Legalists are trying to attain, by means of positive laws, the ideal world of the Taoists. Unlike the Confucianists, the Legalists do not consider the world of mankind as running parallel with the world of nature. Law for the Legalists is only a means of realizing their final goal. They consider that the *Tao* is impartial: it favors no one and it rejects no one. He who follows the *Tao* of his own will is filled with eternal life, but the number of people who reach this moral and intellectual level is very limited. Confucianists are mistaken in believing that if such intelligent persons behave honestly and according to the Rite, ordinary men would become honest by following their example, for the truly wise man appears only very rarely in this world, and ordinary men do not necessarily emulate them when they do. The aim of positive law, according

18. See HAN FEI-ZI, Ch. 6.

to the Legalists, is to ensure the maintenance of an ideal world through the use of punishment and reward. With the aid of law, people will realize that each individual is a morally autonomous being, i.e., that each has a soul with a moral self-regulating mechanism. They will be able to follow the principle of non-action without any disadvantage, with no obstacle to the functioning of that mechanism, and as hitherto by-passed by superfluous human efforts.

One might simplify the analysis by saying that the Legalists tend to be realists and the Confucianists tend to be idealists. To idealists, the law is the reflection of the idea of justice that a particular community accepts or must accept under religious precept. Stability is the traditional Chinese conception of law. It has, of course, undergone various changes in detail, but it is nonetheless true that it has changed little, and that it will be a long time before it changes in its essentials. For the mentality of a people, as determined by ecological and characterological factors which are difficult to alter, inevitably influences its conception of the law.

No one doubts that the vast revolution presently taking place will radically transform China's social, political and economical organization. But China remains China through out all these changes. As the great Yellow River has run since time immemorial and will run for centuries to come, although its waters change ceaselessly, so it will be long before that basic conception of the law, which is typically Chinese, will lose its unique character, even if its outward manifestations are sometimes hardly recognizable.

III. CONCLUSION

I have urged that understanding Chinese law is facilitated by adopting a Sinocentric approach. So this essay has provided some objective responses to the two questions frequently directed toward the Chinese legal system and its tradition.

First, there is law in China. The question "Is there Chinese law?" reveals more about the questioner than about modern China's nascent legal framework. The development of law in the PRC may be divided into five periods: (1) 1949-1953, when the groundwork was laid for the establishment of a socialist legal system; (2) 1954 to mid-1957, when a system of legal institutions was inaugurated; (3) 1957-1965, when the "Maoist" policies of mobilizing the country for a rapid transition to full Communism seriously undermined the policy of developing further the formal legal apparatus; (4) 1966-1976, when the triumph of radical policies resulted in the virtual destruction of the formal legal system; and (5) 1976 to the present, a period of restoration and development of the legal system along lines established from 1954 through 1956. In short, the Chinese socialist legal system with some typical characteristics does exist but its relevancy will depend upon a host of reasonable factors. In order to understand the role of the legal system in China, foreigners must refer to the historical, political and sociological elements in Chinese culture and tradition.

Second, the theory of Chinese law, more or less, has been under the influence of Legalism and Confucianism until now. As we know, Confucian philosophy is a personal and social morality which defines the natural order of things. For over two thousand years the natural law of Confucian philosophy was adopted by many of China's governments, but the current government of the Mainland prefers the Legalist philosophy. Taoism, comparatively, effects the law less because religion does not play as important a role in Chinese political society as it does in that of many Western countries. China's long history of feudal rule left it without a Western-style democratic or legal tradition, and the Communist takeover in 1949 was completed only after a long period of armed struggle.

At present, there are several legal problems to be solved by the leadership of China. Will the current Chinese legal system be stable after the old revolutionary leaders disappear from the state political theater? Is Chinese law just on paper, nonexistent in practice? Obviously, the PRC has still not overcome many serious obstacles to its program of strengthening the legal system, but there are several factors that bode well for future legal development in China. One positive sign is that shifts in political orientation are likely to be less dramatic. For citizens, it may be difficult to distinguish between the merits of the old approach to law and the new socialist legal system. It seems only when the legal system becomes part of the fabric of Chinese society and is seen as relevant to individuals that its permanency will be more assured, rather than when relying upon the continuity of political personality for leadership. But in a country so vast and so populous, with such a low level of education and such limited experience with modern legal and economic systems, it will be a long time before new attitudes toward Chinese law can firmly take hold.

LABOR AND EMPLOYMENT IN THE PEOPLE'S REPUBLIC OF CHINA: FROM A NONMARKET-DRIVEN TO A MARKET-DRIVEN ECONOMY

*Vai Io Lo**

INTRODUCTION

From 1949 to the present, the People's Republic of China (China) has promulgated numerous labor-related statutes, regulations, and decrees to meet changes engendered by shifting economic and social policies.¹ This article attempts to provide a legislative analysis of labor and employment in China, illustrating the labor-management problems China has experienced and the corresponding policies and measures designed to resolve them. In doing so, this article will concretely depict the economic, social, and political environments in which Chinese laborers have lived and to which law as an institution has contributed.

To accomplish its objective, this article is divided into two main parts: labor measures in a nonmarket-driven economy and labor legislation in a market-driven economy. The year of 1979 is chosen as the watershed because around that time China began to launch its economic reforms.² Specifically, the discussion on labor reforms before 1979 is designed to provide background information for the current labor and employment issues in China. A larger portion of this article, however, concentrates on labor legislation since 1979, because many important labor-related statutes and regulations were passed after China had formally embarked on reforming its economy. In addition, the statutes and regulations selected here are discussed in chronological order, detailing the evolving trend of labor legislation in China. To facilitate reading, the subsequent discussion will also focus on such areas as recruitment and hiring, remuneration and benefits, discipline, termination, unemployment insurance, occupational safety and health, unionization and worker participation, and dispute resolution. Except for Special Economic Zones, this article confines its

* Ph.D. Candidate, Asian and Comparative Law, University of Washington. This article is based on the author's LL.M. paper with the same title.

1. As of November 1991, China had promulgated 1,682 laws, regulations, and rules in 29 categories, while 28 provinces, autonomous regions, and municipalities directly under the central government had their own local laws and regulations for labor protection. *State Council White Paper on Human Rights* [hereinafter *White Paper*], BBC Summary of World Broadcasts, Pt. 3: The Far East, Nov. 8, 1991, available in LEXIS, World Library, ALLWLD File. The statistical data provided here are designed to assist the reader in understanding the magnitude of China's labor and employment legislation.

2. See generally THE POLITICAL ECONOMY OF REFORM IN POST-MAO CHINA [hereinafter POLITICAL ECONOMY] (Elizabeth J. Perry & Christine P. Wong eds., 1985).

scope to national laws because the discussion of autonomous regional, provincial, or municipal regulations will be beyond manageability.

Last of all, as in many other fields, theory and practice may not necessarily converge. This phenomenon may be more so in China, partly because law began to regain legitimacy only in the last decade, and partly because the country is in a transition resulting from the implementation of various reforms. In order to better understand labor relations and employment issues in China, especially those before the passage of the Labor Law of the People's Republic of China (Labor Law),³ the reader should heed such recurrent themes as theory versus practice, foreign versus domestic, and national versus regional.

I. LABOR AND EMPLOYMENT IN A NONMARKET-DRIVEN ECONOMY

The labor policies and legislation of China in its former nonmarket-driven economy can be divided into the following three periods. To a large extent, the major problems facing management in China today can be attributed to these policies and measures.

A. *The Founding Years*

In the early years, while the Chinese government tried to consolidate the country, it also enacted regulations to deal with labor relations in industrial and commercial enterprises that had survived the civil war. The subsequent discussion will highlight regulations relating to unionization and labor insurance because they have laid the regulatory foundation for labor and employment in China.

1. *Unionization and Worker Participation*

In 1950, the government promulgated the Trade Union Law of the People's Republic of China (1950 Trade Union Law), which empowers all manual and mental wage workers in enterprises, institutions, and schools the right to form unions.⁴ Under this law, all trade unions must be organized in accordance with the constitution of the All-China

3. Zhonghua Renmin Gongheguo Laodong Fa [The Labor Law of the People's Republic of China] [hereinafter Labor Law], July 5, 1994, reprinted in RENMIN RIBAO [People's Daily] (overseas ed.), July 7, 1994, at 2. Also reprinted and translated in 2 CHINA LAWS FOR FOREIGN BUSINESS—BUSINESS REGULATIONS [hereinafter 2 CHINA LAWS], ¶ 12-500 (CCH Australia 1993). The Labor Law took effect on January 1, 1995.

4. The Trade Union Law of the People's Republic of China, June 28, 1950, art. 1, translated in SELECTED LEGAL DOCUMENTS OF THE PEOPLE'S REPUBLIC OF CHINA [hereinafter SELECTED LEGAL DOCUMENTS] 301 (Joseph En-Pao Wang ed., 1976).

Federation of Trade Unions (ACFTU) and the resolutions adopted by the All-China Labor Congress and various congresses of industrial unions.⁵ Trade unions in state-owned or collectively owned enterprises have the rights to represent staff and workers to participate in production management and to sign collective contracts with management.⁶ Similarly, trade unions in privately owned enterprises have the rights to represent staff and workers to negotiate with owners, to attend consultative conferences between capital and labor, and to enter into collective contracts.⁷

At the same time, trade unions have the duties to protect the interests of staff and workers; to supervise the owners' or managements' implementation of labor protection, labor insurance, wage standards, factory sanitation, and safety measures; and to improve the material and cultural life of staff and workers.⁸ More specifically, trade unions should do the following tasks to protect the basic interests of the working class: (1) to educate and organize staff and workers in upholding the law, implementing governmental policies, cultivating a new attitude toward labor, and observing labor discipline; (2) to organize emulation drives or production movements to fulfill production targets; (3) to protect public property, combat corruption, waste and bureaucracy, and fight against saboteurs in state-owned or collectively owned enterprises, institutions, and schools; (4) to promote in private enterprises the policies of developing production and of benefitting both labor and capital; and (5) to oppose all deeds which violate the law or obstruct the growth of production.⁹

In addition, trade unions should be notified of any engagement and discharge of staff and workers and can object to decisions in violation of laws or decrees or in contravention of the collective agreement.¹⁰ The wages of full-time union officials are to be paid by trade unions, while union officials continue to share labor insurance and welfare benefits paid by owners or managements.¹¹ Most of all, owners or managements of enterprises should not interfere with union activities.¹²

5. *Id.* art. 3. Primary trade union committees (grassroots unions) can be established in productive and administrative units that have 25 or more staff and workers. *Id.* art. 13.

6. *Id.* art. 5.

7. *Id.* art. 6.

8. *Id.* art. 7.

9. *Id.* art. 9.

10. *Id.* arts. 21-22. This does not apply to personnel appointed by the governments at various levels. *Id.*

11. *Id.* art. 17.

12. *Id.* art. 18.

Therefore, in theory, the 1950 Trade Union Law allows workers to have union representation, but most of the functions of the Chinese trade union are not advocative as in the Western sense. Moreover, although the 1950 Trade Union Law had been in effect for over forty years until its recent repeal, its effectiveness has been minimal because trade unions have been subordinate to the commands of the Communist Party (Party).¹³ Nonetheless, the preceding highlights should provide a framework to understand the past and present role of trade unions in China.

2. *Labor Insurance*

In 1951 and 1953, the Chinese government respectively promulgated and amended the Labor Insurance Regulations of the People's Republic of China (Labor Insurance Regulations) to provide coverage for injury, sickness, disability, death, maternity, and retirement pensions.¹⁴ Enterprises not covered by these regulations can settle matters relating to labor insurance through collective agreements after consultation between the owners or managements of such enterprises or of the industries to which such enterprises belong and their trade unions.¹⁵

Basically, the owner or management is responsible for the entire cost of labor insurance.¹⁶ Certain expenses are disbursed directly by the management while others are paid from a labor insurance fund managed by the trade union.¹⁷ Each enterprise is required to make a monthly payment in an amount equal to three percent of its total payroll to the labor insurance fund.¹⁸ Thirty percent of this amount is paid to the ACFTU as the general insurance fund, whereas seventy percent is paid

13. John Bruce Lewis & Bruce L. Ottley, *China's Developing Labor Law*, 59 WASH. U. L.Q. 1165, 1175 (1982). Lewis and Ottley explain that unions have been used as a vehicle to transmit Party policy downward and that their power has been limited by the Party's transferring control over unions to local Party committees. In addition, during the Great Leap Forward (1958-60), many of the administrative functions formerly performed by unions were transferred to the Party. *Id.*

14. Labor Insurance Regulations of the People's Republic of China [hereinafter Labor Insurance Regulations], Feb. 26, 1951 (amended Jan. 2, 1953), translated in SELECTED LEGAL DOCUMENTS, *supra* note 4, at 311. Enterprises covered under these regulations are (1) mines and enterprises employing 100 or more staff and workers; (2) post, railway, water and air transport, and telecommunications enterprises; (3) capital construction units of factories, mines, and transport enterprises; and (4) state-owned building companies. *Id.* art. 2.

15. *Id.* art. 3.

16. *Id.* art. 7.

17. *Id.*

18. *Id.* art. 8.

to the primary trade union committee to pay pensions, allowances, and relief benefits.¹⁹

In addition, the amounts of benefits that staff and workers or their dependents receive depend on whether the injury, sickness, disability, or death occurs on the job or away from work and whether the staff and workers are union members.²⁰ Demobilized army combat heroes working in enterprises or model staff and workers who have made outstanding contributions to their enterprises can receive preferential treatment.²¹ Male workers who have worked for twenty-five years, including five years in the enterprise concerned, are eligible for retirement at the age of sixty, and female workers who have worked for twenty years, including five years in the enterprise concerned, can retire at the age of fifty [fifty-five].²² Maternity benefits include fifty-six [ninety] days' paid leave for pregnancy, fourteen [fifteen] additional days' paid leave in case of complicated delivery or birth of twins, and a maximum of thirty days' paid leave for miscarriage during the first seven months of pregnancy.²³

Consequently, the Labor Insurance Regulations enabled workers to receive a wide range of benefits based on their personal circumstances and union affiliation. In addition, social insurance and welfare benefits were basically tied to an individual's employment. Over the years,

19. *Id.* art. 9. In the first two months, the monthly sum is to be paid entirely to the ACFTU. *Id.*

20. *Id.* arts. 12-14, 18.

21. *Id.* art. 19.

22. On June 2, 1978, the State Council promulgated the Guowuyuan Guanyu Gongren Tuixiu Tuizhi de Zanxing Banfa [Provisional Measures of the State Council Concerning Workers' Retirement and Resignation], reprinted in LAODONG ZHENGYI SHENPAN SHOUCHE [LABOR DISPUTES TRIAL MANUAL] [hereinafter LAODONG SHOUCHE] 422 (1994). Article 1 of the Measures states that, in general, male workers who are 60, or female workers who are 50, and who have worked for 10 years, should retire. *Id.* art. 1. In addition, the retirement age for women who work in State organs is 55. Guojia Jiguan Gongzuo Renyuan Tuixiu Chuli Zanxing Banfa [Provisional Measures Concerning the Handling of the Retirement of Personnel in State Organs], Dec. 29, 1955, art. 2, reprinted in ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN [A COLLECTION OF THE LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA] [hereinafter FAGUI HUIBIAN] 708 (July-Dec. 1955).

23. Labor Insurance Regulations, *supra* note 14, art. 16. The provisions on maternity of the Labor Insurance Regulations were repealed by Nuzhigong Laodong Baohu Guiding [Regulations on Labor Protection of Female Staff and Workers] [hereinafter Female Workers Protection Regulations], July 21, 1988, reprinted in ZHONGHUA RENMIN GONGHEGUO CHANGYONG FALU DAQUAN [A COMPENDIUM OF FREQUENTLY USED LAWS OF THE PEOPLE'S REPUBLIC OF CHINA] [hereinafter FALU DAQUAN] 1337 (1992). Article 8 of the Female Workers Protection Regulations states that the maternity leave of female staff and workers is 90 days; an additional 15 days shall be given in case of a complicated delivery; an additional 15 days shall be given for each additional baby born in a single birth; and a certain period of leave shall be given in case of a miscarriage based on medical certification. *Id.* art. 8.

diversity exists in the administration and interpretation of these regulations,²⁴ and shop officials have had wide discretion to determine insurance benefits.²⁵

3. *Summary*

Although statutes and regulations in this period were enacted to protect the interests of labor in a system still based on employment contract,²⁶ the 1950 Trade Union Law and the Labor Insurance Regulations did lay the foundation for administering future labor relations and employee benefits. At the same time, a nonmarket-driven economy had been planted, and new labor policies and measures were on the horizon.

B. *From 1956 to 1965*

By the middle of 1950's, the government had succeeded in nationalizing all major industrial and commercial enterprises. Therefore, it formulated new labor policies and measures in order to meet the needs of a nationalized economy.²⁷ Among these measures, the eight-grade wage scale, the system of labor allocation through administrative assignment, and lifetime tenure have certainly contributed to China's current labor-management problems.

1. *Remuneration*

In 1956, an eight-grade wage scale was adopted.²⁸ The determining factors for each grade included the complexity, strenuousness, and responsibility of a job.²⁹ Within a given grade, workers with the same educational and work experiences earned the same base wages, even though workers in certain industries or geographical areas were given subsidies for

24. Lewis & Ottley, *supra* note 13, at 1213.

25. ANDREW G. WALDER, COMMUNIST NEO-TRADITIONALISM: WORK AND AUTHORITY IN CHINESE INDUSTRY 99 (1986).

26. Henry R. Zheng, *An Introduction to the Labor Law of the People's Republic of China*, 28 HARV. INT'L L.J. 385, 386 (1987). Cf. John B. Lewis & David Fleshler, *China Charts A New Course for Labor*, E. ASIAN EXECUTIVE REP., Mar. 1987, at 9, 9. Lewis and Fleshler state that the lifetime employment system as discussed later in this article was adopted in 1952.

27. In this period, the government concentrated on regulating workers' remuneration and benefits, providing safe working conditions, and certifying standards for labor assignment. Zheng, *supra* note 26, at 387.

28. Jamie P. Horsley, *Chinese Labor*, CHINA BUS. REV., May-June 1984, at 16.

29. *Id.*

specific working conditions or price levels.³⁰ Generally, wages of the highest grade were about three times those of the lowest grade.³¹ Although the principle of "to each according to his work" was recognized, it focused the reward system on "potential labor" rather than the outcomes of labor.³² However, the government also awarded cash bonuses or compensated on a piece-rate basis to reward production that exceeded the established quotas.³³

During the Great Leap Forward (1958-1960), although material incentives were not entirely abolished, the emphasis was on moral or psychological rewards.³⁴ Bonuses and piece-rate pay were eliminated because they encouraged competition among workers and hindered the development of a collective spirit that should prevail in a socialist country.³⁵ However, since the policy of moral rewards had a negative impact on the Chinese economy, the government returned to wage increases, bonuses, and piece-rate pay during the early 1960's so as to recover from the natural and political disasters of the Great Leap Forward.³⁶

2. *Worker Participation*

In 1956, the government permitted staff and workers in enterprises to form congresses (staff-and-worker congresses),³⁷ which had the power to examine and discuss production plans, finances, and wages; and to decide how enterprise funds for bonuses and welfare projects should be used.³⁸ More importantly, these congresses had the power to suggest the removal of³⁹ and to elect⁴⁰ factory directors. Nevertheless, the introduction of staff-

30. Brian E. Becker & Yang Gao, *The Chinese Urban Labor System: Prospects for Reform*, J. LAB. RES., Fall 1989, at 411, 417.

31. Horsley, *supra* note 28, at 16.

32. Becker & Gao, *supra* note 30, at 413-14.

33. Lewis & Ottley, *supra* note 13, at 1186.

34. *Id.* at 1186-87. In addition, Walder states that during the Great Leap Forward, China focused on expanding industrial employment for capital construction and accumulation, but the efforts were not sustainable; and that so many factories and shops were closed at the beginning of 1960s that surplus workers were relocated to the rural areas. WALDER, *supra* note 25, at 36-37.

35. Lewis & Ottley, *supra* note 13, at 1186.

36. *Id.* at 1187.

37. WALDER, *supra* note 25, at 119 n.31. Walder states that congresses of workers were established in 1956. However, Horsley states that congresses of workers were introduced in 1957. Horsley, *supra* note 28, at 22. The congresses meet once or twice a year, and the trade unions perform their work while they are not in session. *Id.* at 23.

38. Lewis & Ottley, *supra* note 13, at 1180-81.

39. *Id.* at 1181.

40. WALDER, *supra* note 25, at 119 n.31. Walder states that Party committees organized congresses of workers to elect new factory directors whom they would find more pliable. *Id.*

and-worker congresses had not really resulted in direct worker participation in management, because they had the right only to put forth criticisms and suggestions.⁴¹

3. *Recruitment and Hiring*

During this period, the practice of allocation of labor through administrative assignment also emerged. Under this system, job seekers were assigned by local labor bureaus to state-owned enterprises on the basis of administrative planning without reference to their interests, aptitude, or training.⁴² This labor practice was designed to: (1) check the growth of the urban population and maintain urban living standards by restricting permanent employment in state-owned enterprises to people with urban household registration and (2) allocate jobs among industries, geographic locations, and occupations.⁴³ In effect, employment based on contract applied only to temporary workers.

In other words, the practice of labor allocation through administrative assignment had not only given urban workers employment security but also deprived them choice of occupation. For one thing, it is impracticable, if not impossible, to guarantee employment for all eligible job seekers. For another thing, high unemployment among urban high school graduates had caused local labor bureaus to pressure enterprises to employ additional workers irrespective of actual needs, which resulted in overstaffing and decline in productivity.⁴⁴ Therefore, worker lethargy was pervasive among state-owned enterprises, resulting in low-quality goods and services.⁴⁵

Furthermore, permanent employment was the presumption.⁴⁶ Employees were usually guaranteed full wages or relocation by the

41. Lewis & Ottley, *supra* note 13, at 1181.

42. HILARY K. JOSEPHS, *LABOR LAW IN CHINA: CHOICE AND RESPONSIBILITY* 14 (1990).

43. *Id.*

44. *Id.* at 9.

45. W. Gary Vause & Georgia Bush Vrionis, *China's Labor Reform Challenge: Motivation of the Production Forces*, 24 *STAN J. INT'L L.* 447, 447-48 & accompanying notes (1988).

46. JOSEPHS, *supra* note 42, at 11. The presumption of permanent employment may be overcome by an agreement between the parties. *Id.* Walder states that workers virtually had lifetime tenure, except for the 16 million people hired during the Great Leap Forward. During 1961-1962, most of these workers were returned to the rural areas, but some long-term workers were dismissed as well. WALDER, *supra* note 25, at 42 & n.12. Moreover, problem workers were retained and then unloaded on others, while expulsion [discussed later in this article] for political and legal offenses is more common. WALDER, *supra* note 25, at 73. Even though Lewis and Flesher said that the lifetime employment system was adopted in 1952, *supra* note 26, at 9, the author discusses it here because labor through administrative assignment and presumption of permanent employment are closely related.

government to other permanent positions if their employers partially or completely ceased operations.⁴⁷ Since social benefits such as housing, medical insurance, and pensions were tied to a person's employment, labor immobility prevailed.⁴⁸

4. *Summary*

The eight-grade wage scale had been employed for many years until its recent reform.⁴⁹ The problems this wage system has generated include: (1) egalitarian distribution with no link between wages and the performance of either individual workers or enterprises, (2) numerous and confusing wage scales, resulting in many contradictions among trades or professions and among workers, (3) wage management structure with excessive centralism and rigid control, depriving enterprise management of the necessary power to make decisions about wage distribution.⁵⁰ In addition, the practices of administrative assignment and lifetime tenure have deprived workers of choice of occupation and contributed to labor surplus, worker lethargy, and labor immobility.

C. *From 1966 to 1978*

Around 1966, the notorious Cultural Revolution began. Laws were criticized as the legacy of capitalism. At the workplace, the following occurrences have left significant impact on the current labor relations in China.

1. *Remuneration*

First of all, bonuses and piece-rate pay were abandoned since Mao Zedong (Mao) emphasized political education as the means of creating the "new socialist man" who would work for the collective good without material rewards.⁵¹ Instead, workers were paid a fixed "supplementary

47. JOSEPHS, *supra* note 42, at 12.

48. Zheng, *supra* note 26, at 387. As one editorial said, enterprises cannot exercise their right to make recruitment decisions because those who are needed are not recruited and those who are not needed do not go away. "Renmin Ribao" Editorial Praises the Socialist Contract Labor System, BBC Summary of World Broadcasts, Sept. 16, 1986, Pt. 3: The Far East, available in LEXIS, World Library, ALLWLD File.

49. See *infra* text accompanying notes 173-75.

50. Minister of Labor and Personnel on Wage Reform [hereinafter *Wage Reform*], BBC Summary of World Broadcasts, June 11, 1986, Pt. 3: The Far East, available in LEXIS, World Library, ALLWLD File.

51. Lewis & Ottley, *supra* note 13, at 1187.

wage,"⁵² to which only those who had been on the job by 1966 were entitled.⁵³ Moreover, as generations aged, the enforcement of a wage freeze resulted in new forms of inequity.⁵⁴ As a result, workers perceived the situation to be greatly unfair.⁵⁵

2. *Discipline*

During the Cultural Revolution, work discipline was lax because after factory administrators had been criticized for taking the "capitalist road," held in temporary isolation cells, and demoted to menial tasks in the shop, they returned to find that the political environment was not conducive to the strict enforcement of rules.⁵⁶ In addition, demoralized managers had few incentives to enforce factory rules, because they did not receive bonuses, and the financial criteria for evaluating enterprise performance were loose and seldom enforced.⁵⁷ Hence, administrative punishments for violating work discipline were not enforced.⁵⁸

3. *Union Representation*

In 1966, the national union system was abolished as a reactionary.⁵⁹ Trade unions and staff-and-worker congresses were replaced by revolutionary committees that were responsible for making and implementing policies.⁶⁰ Consequently, workers did not have unions as avenues of discussing their livelihood problems.⁶¹ However, although Mao did not support a general rule to strike, he regarded bureaucracy as a major obstacle to his ideal society and endorsed strikes and boycotts as a means to obstruct bureaucracy.⁶² Thus, the right to strike was first provided in the 1975

52. WALDER, *supra* note 25, at 192.

53. *Id.* at 203. Workers who began work after 1966 did not receive this "supplementary wage." *Id.*

54. *Id.* at 193. Despite increasing family burdens as workers aged, many workers did not receive wage readjustments for more than ten years, so they came in late, left early, worked slowly, chatted during work hours, pretended to be ill, and often requested personal leave. *Id.* at 198.

55. *Id.* at 204.

56. *Id.* at 206-07. Work discipline met minimum standards only when most factories were under the rule of military officials from 1968-71. *Id.* at 205.

57. *Id.* at 205.

58. *Id.* at 210.

59. Lewis & Ottley, *supra* note 13, at 1176. Walder states that trade unions were disbanded in 1967 and were not formally reestablished until 1974. WALDER, *supra* note 25, at 201.

60. Lewis & Ottley, *supra* note 13, at 1181.

61. WALDER, *supra* note 25, at 201.

62. Lewis & Ottley, *supra* note 13, at 1195.

Constitution.⁶³ From 1973 to 1977, large-scale strikes and work stoppages did occur.⁶⁴

4. *Aftermath*

In 1978, the replacement-by-children (*dingti*) practice was formally adopted.⁶⁵ Under this practice, a retired worker from a permanent job could designate a child as the successor in the same enterprise, even though the successor did not necessarily hold the same position.⁶⁶ On one hand, the replacement system allowed enterprises to have limited autonomy in hiring and operated as a means of labor discipline (the loss of employment meant the loss of a future job for the employee's child).⁶⁷ On the other hand, the replacement system provided employment opportunities for high school graduates at a time when there were few options, and enabled the working class to have a formal mechanism for providing for its children.⁶⁸ However, some parents pretended to be sick in order to take early retirement or chose physically unfit children to take over their jobs, which resulted in the employment of unskilled workers and decline of production.⁶⁹

Furthermore, the National People's Congress promulgated a revised Constitution in 1978, which guarantees the right to work,⁷⁰ the right to rest,⁷¹ and freedom to strike.⁷² However, citizens are not allowed to disrupt the economic order of society and undermine the economic plans of the State.⁷³ Specifically, citizens must observe labor discipline and public order.⁷⁴ Hence, it has been argued that the 1978 Constitution was a compromise

63. ZHONGHUA RENMIN GONGHEGUO XIANFA [CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA] [hereinafter XIANFA] (1975), art. 28, translated in SELECTED LEGAL DOCUMENTS, *supra* note 4, at 65.

64. Lewis & Ottley, *supra* note 13, at 1196.

65. See Provisional Measures of the State Council Concerning Workers' Retirement and Resignation, *supra* note 22, art. 10.

66. JOSEPHS, *supra* note 42, at 15.

67. *Id.* at 15-16.

68. *Id.* at 16.

69. See Guowuyuan Guanyu Renzhen Zhengdun Zhaoshou Tuixiu Tuizhi Zhigong Zinu Gongzuo de Tongzhi [Notice of the State Council Concerning Conscientiously Rectifying the Recruitment of the Children of Retired and Resigned Staff and Workers], Sept. 3, 1983, reprinted in LAODONG SHOUCHE, *supra* note 22, at 449; JOSEPHS, *supra* note 42, at 16-17.

70. ZHONGHUA RENMIN GONGHEGUO XIANFA [CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA] (1978) [hereinafter 1978 CONSTITUTION], art. 48, translated in II SELECTED LEGAL DOCUMENTS OF THE PEOPLE'S REPUBLIC OF CHINA 125 (Joseph En-Pao Wang ed., 1979).

71. *Id.* art. 49.

72. *Id.* art. 45.

73. *Id.* art. 8.

74. *Id.* art. 57.

between the alleged request of Mao to insert the freedom to strike in the 1975 Constitution and the subsequent leaders' commitment to modernization and rapid economic growth.⁷⁵ Although the 1978 Constitution does not clearly state when strikes are permissible, Chinese sources reveal official support for strikes to protect workers' democratic rights as well as health and safety.⁷⁶ Moreover, the 1978 Constitution states: "He who does not work, neither shall he eat" and "from each according to his ability, to each according to his work."⁷⁷ Therefore, rewards will be given on the basis of performance. All these provisions, as critics suggest, did not entirely abandon Mao's thoughts but reinterpreted his thoughts in such a way as to emphasize work, labor discipline, and material incentives.⁷⁸ Consequently, bonuses were again awarded on the basis of the quality and quantity of work, absence of waste, regular attendance, and working conditions.⁷⁹

By the end of this period, most workers had received wage readjustments.⁸⁰ The ACFTU had been formally reactivated,⁸¹ and the Ninth National Trade Union Congress had adopted a revised constitution, which detailed the structure, basic tasks, and income sources of trade unions.⁸² The central government under the leadership of Deng Xiaoping was committed to the modernization of China's industry, agriculture, science and technology, and military defense. To achieve these objectives, China opened its door to foreign investment and embarked on developing a market economy that will enhance productivity and economic performance.

II. LABOR AND EMPLOYMENT IN A MARKET-DRIVEN ECONOMY

For many years, agricultural production in China had been made on a collective basis. Depending on the number of households, production units were designated as communes, brigades, and production teams.⁸³ Near the end of the 1970's, economic reforms started with the decollectivization of agricultural production. The so-called production responsibility system allowed households to contract with their production

75. Lewis & Ottley, *supra* note 13, at 1196.

76. *Id.*

77. 1978 CONSTITUTION, *supra* note 70, art. 10.

78. Lewis & Ottley, *supra* note 13, at 1171.

79. *Id.* at 1191. In some factories, workers themselves also made bonus decisions. *Id.*

80. WALDER, *supra* note 25, at 202-03. Wage readjustments were made in 1972 and 1977, but only the lowest paid workers and those whose promotions had been delayed received raises in 1972. *Id.*

81. Lewis & Ottley, *supra* note 13, at 1176.

82. *Id.* at 1177-79.

83. For example, 50 families were grouped as a production team, 300 families became a brigade, and 900 families formed a commune.

teams, manage their production activities, and keep whatever was left after they had fulfilled their quotas.⁸⁴

Since major gains resulted in peasants' income,⁸⁵ the government decided to extend economic reform to urban areas where surplus workers were retained, productivity had been low, and subsidies were frequently used to keep enterprises from ceasing operations.⁸⁶ Simply stated, urban economic reforms entailed the introduction of various financial reforms in China's industrial system⁸⁷ and increased autonomy for enterprise management to make production and personnel decisions,⁸⁸ thus making enterprise management accountable for profits and losses.⁸⁹ Coupled with the enormous inflow of foreign investment, changes resulting from these reforms thus necessitate a shift in labor policy and the enactment of new labor laws.

A. From 1979 to 1990

During this period, the National People's Congress and the State Council promulgated a number of national statutes and regulations on labor and employment. These national laws generally contain broad language and authorize provinces, autonomous regions, and municipalities directly under the central government to fill in gaps in order to meet the particular needs and problems of their respective areas.⁹⁰ If contradictory

84. See generally Vause & Vrionis, *supra* note 45, at 452-57; Kathleen Hartford, *Socialist Agriculture Is Dead; Long Live Socialist Agriculture, Organizational Transformation in Rural China*, in *POLITICAL ECONOMY*, *supra* note 2, at 31, 34-38.

85. Vause & Vrionis, *supra* note 45, at 454-55. See also Terry Sicular, *Rural Marketing and Exchange in the Wake of Recent Reforms*, in *POLITICAL ECONOMY*, *supra* note 2, at 83, 83-84.

86. One recent example of this practice is reported as follows: One-fourth of state enterprises under the central government operated at a loss in 1988, which caused the government to spend more than 15 percent of its budget to keep them in business. JOSEPHS, *supra* note 42, at 144-45 (citing Kristof, *Socialism Grabs a Stick: Bankruptcy in China*, N.Y. TIMES, Mar. 7, 1989, at D6).

87. See generally Barry Naughton, *False Starts and Second Wind: Financial Reforms in China's Industrial System*, in *POLITICAL ECONOMY*, *supra* note 2, at 223.

88. *Id.* at 226.

89. In the past, enterprise management was not accountable for losses, because "numerous avenues exist for enterprises to escape the consequences of misguided decisions in investment or production." *Id.* (quoting Janos Kornai's terminology of "soft budget constraint").

90. See, e.g. Regulations for Labor Management of the Tianjin Economic and Technological Development Zone, July 25, 1985, *reprinted and translated in 2 CHINA LAWS FOR FOREIGN BUSINESS—SPECIAL ZONES AND CITIES, 1985-1994* [hereinafter 2 SPECIAL ZONES], ¶ 92-009 (CCH Australia 1995); Measures of the Dalian Economic and Technological Development Zone on Labor Management for Foreign Investment Enterprises, July 25, 1987, *reprinted and translated in 2 SPECIAL ZONES*, *supra* note 90, ¶ 83-009.

provisions exist, national laws will prevail over local laws; specific provisions will override general provisions.⁹¹

In addition, China's current labor market is bifurcated in two ways. First, the domestic-sector labor market consists of workers or job seekers who work or would like to work in state-owned or collectively owned enterprises, whereas the foreign-sector labor market is open to those who work or want to work for foreign-funded companies. Second, the regular-worker market is composed of full-time, either permanent or contract, workers, whereas the non-regular-worker market contains temporary, seasonal, and rotation workers.⁹²

As a result, the applicability of the relevant labor and employment laws of China depends on the ownership of an enterprise, the location of an enterprise, and the nature of a particular job. The following discussion will focus on the major labor and employment laws applicable to state-owned enterprises, equity joint ventures, wholly foreign-owned enterprises, and Special Economic Zone enterprises.

1. *State-Owned Enterprises*

As analyzed above, the practices of administrative assignment, lifetime tenure, and replacement-by-children have resulted in deprivation of occupational choice, surplus workers, labor immobility, and low productivity. In 1980, the central government began to restore merit selection and restrict the use of administrative assignment and replacement-by-children by having local labor bureaus to adopt the system of "introduction" of candidates.⁹³ Under this system, a state-owned enterprise was required to submit a hiring plan to its department-in-charge and the local labor bureau for approval.⁹⁴ Once the hiring plan was approved, the enterprise might advertise at the labor offices of local street

91. Zheng, *supra* note 26, at 390. Zheng states that generally national laws prevail when they conflict with regional or local laws, but when national laws contain only broad principles or are silent, the more detailed regional or local laws prevail unless they contradict the spirit or objectives of national laws. *Id.* Therefore, in theory, national laws take precedence over regional laws. However, some areas may disregard national laws to protect local interests, thus causing a discrepancy between theory and practice. This issue merits in-depth discussion but is beyond the scope of this article.

92. Rotation workers are peasants recruited to work in enterprises such as mines. They will return to the countryside after the end of the term, and another group will be sent by their team to do the same kind of work.

93. JOSEPHS, *supra* note 42, at 17. In anticipation of the abolition of the replacement-by-children practice, many skilled workers took early retirement in the early 1980s so that their children could be assured jobs. WALDER, *supra* note 25, at 58. Hence, there were an increase of unskilled workers and a decrease of skilled workers.

94. JOSEPHS, *supra* note 42, at 17.

committees the number of job openings, nature of those jobs, job requirements, wages and benefits, and job locations.⁹⁵ Applicants in some cities had to take a standardized written examination (sometimes even character and physical fitness tests), after which formal assignments, subject to the approval of the enterprise, were made on the basis of test scores and applicants' preferences.⁹⁶

Notwithstanding the introduction of open merit recruitment, enterprises could not engage in formal hiring without official approval, could generally hire only individuals with urban household registration, and were sometimes required to hire individuals only from particular geographical locations within the city.⁹⁷ In addition, although the bonus system had been resumed to motivate workers and to increase productivity, bonuses had been made on the basis of egalitarianism, arbitrarily enlarged, and drawn on funds diverted from production, thus not "rewarding the advanced, pushing the backward forward or stimulating production."⁹⁸ Owing to the ineffectiveness of the "introduction" system, the government officially introduced the contract employment system in 1983.⁹⁹

Simply stated, the contract employment system allows management and labor to enter into an employment relationship by written agreement which automatically terminates upon expiration of the contractual term. At the beginning, the government encouraged state-owned enterprises in certain municipalities to use the contract employment system. Owing to its success, the government decided to apply it nationwide.¹⁰⁰

In 1986 and 1987, the State Council promulgated a total of five sets of regulations to facilitate the implementation of the contract employment

95. *Id.* at 17-18.

96. *Id.* at 18.

97. *Id.*

98. Lewis & Ottley, *supra* note 13, at 1192 (quoting from *Correctly Handle the Bonus Issue*, NANFANG RIBAO, May 19, 1980, and *Correctly Implement the Bonus System in Line With the Principle of "to Each According to His Work,"* Beijing Xinhua, May 18, 1979).

99. JOSEPHS, *supra* note 42, at 21 (citing Laodong Renshibu Guanyu JiJi Shixing Laodong Hetongzhi de Tongzhi [Notice of the Ministry of Labor and Personnel on Active Trial Implementation of the Contract Employment System], 6 STATE COUNCIL GAZETTE 213 (1983)). Although this notice has the effect of a policy statement, it proposes the following reforms: allowing enterprises to keep a percentage of above-target profits for distribution as bonuses, permitting piece-rate pay, linking a portion of wages to the profitability of the enterprise, and increasing pay differentials between skilled and unskilled jobs, light and heavy manual labor, and production and administrative work. *Id.* at 22.

100. See "Renmin Ribao" Editorial Praises the Socialist Contract Labor System, *supra* note 48. Under the labor contract system, the material interests of workers are tied to their labor; job security is linked to the destiny of enterprises; and workers efforts for society, enterprises, and themselves are merged into one. *Id.*

system.¹⁰¹ The following summarizes these regulations and the Provisions on Reward and Punishment of Staff and Workers in Enterprises (Reward and Punishment Provisions).¹⁰²

(a) General Provisions

The Provisional Regulations on the Implementation of the Contract Employment System in State-Owned Enterprises (Implementation Regulations) states that the duration of an employment contract can be long-term (over five years), short-term (one to five years), or fixed-term for rotation workers.¹⁰³ In addition, the employment contract should include: (1) standards for the quantity and quality of production, or work to be performed, (2) the probationary period and the duration of the employment contract, (3) production and working conditions, (4) compensation, labor insurance, and fringe benefits, (5) labor discipline, (6) liability for breach of the employment contract, and (7) other matters which the parties consider necessary.¹⁰⁴ However, the parties can modify the contract if (1) the enterprise's department-in-charge has approved change of its production or adjustment of its production duties or (2) circumstances have changed and the parties agree after mutual consultation.¹⁰⁵

101. Guoying Qiye Shixing Laodong Hetongzhi Zanxing Guiding [Provisional Regulations on the Implementation of the Contract Employment System in State-Owned Enterprises] [hereinafter Implementation Regulations], July 12, 1986 (amended 1992), *reprinted in* FAGUI HUIBIAN, *supra* note 22, at 775 (amendment *reprinted in* FALU DAQUAN, *supra* note 23, at 1316); Guoying Qiye Zhaoyong Gongren Zanxing Guiding [Provisional Regulations on the Hiring of Workers in State-Owned Enterprises] [hereinafter Hiring Regulations], July 12, 1986, *reprinted in* FAGUI HUIBIAN *supra* note 22, at 784; Guoying Qiye Citui Weiji Zhigong Zanxing Guiding [Provisional Regulations on the Dismissal of Staff and Workers in State-Owned Enterprises for Discipline Violations] [hereinafter Dismissal Regulations], July 12, 1986, *reprinted in* FAGUI HUIBIAN, *supra* note 22, at 787; Guoying Qiye Zhigong Daiye Baoxian Zanxing Guiding [Provisional Regulations on Waiting-for-Employment [Unemployment] Insurance for Staff and Workers in State-Owned Enterprises] [hereinafter Unemployment Insurance Regulations], July 12, 1986, *reprinted in* FAGUI HUIBIAN, *supra* note 22 at 789; and Guoying Qiye Laodong Zhengyi Chuli Zanxing Guiding [Provisional Regulations for the Handling of Labor Disputes in State-Owned Enterprises] [hereinafter Dispute Regulations], July 31, 1987, *reprinted in* FALU DAQUAN, *supra* note 23, at 1322. *See also* JOSEPHS, *supra* note 42, 153-75 for an English language translation of these regulations.

102. Qiye Zhigong Jiangfa Tiaoli [Provisions on Reward and Punishment of Staff and Workers in Enterprises] [hereinafter Reward & Punishment Provisions], Apr. 10, 1982, *reprinted in* FALU DAQUAN, *supra* note 23, at 1307.

103. Implementation Regulations, *supra* note 101, art. 2.

104. *Id.* art. 8.

105. *Id.* art. 10.

(b) Recruitment and Hiring

Under the guidance of the local labor-administration department, enterprises shall thoroughly implement the principles of open recruitment, voluntary application, comprehensive examination of moral, mental, and physical qualifications, and selection based on merit.¹⁰⁶ Specifically, enterprises should publish a hiring notice;¹⁰⁷ emphasize cultural, technical, or physical qualifications;¹⁰⁸ and disclose a list of successful examinees from whom to select for employment.¹⁰⁹ In addition, enterprises cannot use any forms of internal recruitment and are not allowed to use replacement-by-children method.¹¹⁰ However, enterprises can establish a probationary period, which may span from three to six months, depending on the nature of the job.¹¹¹ Any employment in violation of the law will be ineffective, and serious violators are subject to administrative liability.¹¹² Therefore, these provisions attempt to establish an open, merit-based hiring system and to provide enterprises with some broad guidelines on how to select their new hires.

(c) Remuneration and Benefits

First of all, contract workers should enjoy equal rights with permanent workers (those who had been hired prior to the implementation of the contract employment system) with regard to labor, work, learning opportunities, participation in democratic management, and reception of political honors and material incentives.¹¹³ Moreover, a contract worker who

106. *Id.* art. 4.

107. Hiring Regulations, *supra* note 101, art. 4.

108. *Id.* art. 7.

109. *Id.* art. 5.

110. *Id.*

111. Implementation Regulations, *supra* note 101, art. 6.

112. Hiring Regulations, *supra* note 101, art. 13.

113. Implementation Regulations, *supra* note 101, art. 3. More specifically, contract workers receive equal treatment with permanent workers in the following areas: (1) wages, labor insurance, and fringe benefits (to the extent that the contract worker's insurance and fringe benefits are lower than those of the permanent worker, the former will receive a wage subsidy, the amount of which is about 15 percent of his/her standard wages, *id.* art. 18, which specifies the requirements of "doing the same kind of work" and "employed in the same position"); (2) bonuses, allowances, food, labor protection articles, grain subsidies, and cost-of-living allowances, *id.* art. 18 (containing the requirement of "doing the same kind of work," but not the phrase "employed in the same position"); (3) funeral expenses, benefits for direct lineal survivors, and relief allowances if the contract worker died as a result of sickness or work-related injury, *id.* art. 22; and (4) public holidays, marriage or funeral leave, leave to visit relatives, commuting allowances, and heating and cooling allowances. *Id.* art. 24.

has obtained new employment and will be doing the same kind of work will receive wages at the same former grade if he/she passes an examination.¹¹⁴ Nonetheless, if the contract worker will perform a different kind of work, he/she will receive not less than the wages of a grade-two worker during the probationary period.¹¹⁵ After probation, the contract worker will be evaluated, and his/her wage grade will be set accordingly.¹¹⁶ In addition, a worker whose contract has expired or whose contract is terminated due to inability to work after illness or nonwork-related injury, or pursuant to the conditions allowing him/her to terminate the contract, is to be paid a livelihood allowance in an amount equal to one month's standard wages for each year of service, subject to a cap of twelve months.¹¹⁷ However, a worker whose contract is terminated pursuant to the Provisional Regulations on the Dismissal of Staff and Workers in State-Owned Enterprises for Discipline Violations (Dismissal Regulations)¹¹⁸ or due to removal of name, expulsion, labor reeducation, or criminal punishment, or who has quit his/her job without approval, is not entitled to a livelihood allowance.¹¹⁹

For retired contract workers, the government has established a social insurance system. Every month an enterprise shall pay, as a pretax expense, about fifteen percent of the total wages of its contract workers to a

114. *Id.* art. 19.

115. *Id.*

116. *Id.*

117. *Id.* art. 23. A contract worker can terminate a contract in four situations which will be discussed later in this article. See *infra* text accompanying note 137.

118. Dismissal Regulations, *supra* note 101, art. 2. The relevant provisions will be discussed later. See *infra* note 134.

119. Implementation Regulations, *supra* note 101, art. 23. Removal of name (*chuming*) from the enterprise's employee list is usually used when the worker does not change after repeated criticism and education. It is a type of punishment imposed especially in case of absenteeism, but is not an administrative penalty. ZHONGGUO LAODONG RENSHI BAIKE QUANSHU [THE ENCYCLOPEDIA OF CHINESE LABOR AND PERSONNEL] [hereinafter BAIKE QUANSHU] 865 (revised ed. 1991). Expulsion (*kaichu*) is the most serious type of administrative penalty which is imposed on someone who is not suitable for continuously working in State organs, enterprises, institutions, parties, public/social organizations due to violation of the law, neglect of duty, absence of change after education, etc. *Id.* at 152. In case of expulsion, the factory director proposes such a measure, the staff-and-worker congress decides, and the department-in-charge of the enterprise and the local labor or personnel department will be informed. Reward & Punishment Provisions, *supra* note 102, art. 13. Dismissal (*citui*) is used when there has been a violation of discipline, but the conditions for removal of name or expulsion have not been met. A dismissed worker can register as someone waiting for employment and can obtain waiting-for-employment relief and medical allowances. Sometimes the word "dismissal" refers to the expiration of a temporary-work contract, so it contains no connotation of punishment. BAIKE QUANSHU, *supra* note 119, at 1095-96. If an enterprise dismisses a worker, it must solicit the opinions of the union and report to its department-in-charge and local labor-and-personnel department. Dismissal Regulations, *supra* note 101, art. 3.

retirement fund, whereas a contract worker will contribute, by monthly deduction, not more than three percent of his/her standard wages to the retirement fund.¹²⁰ Failure to make payments on time will result in a late charge determined by regulation, and if there are insufficient funds to spend, the State will give an appropriate supplement.¹²¹ Retirement benefits for a contract worker consist of pensions (plus additional subsidies required by regulations), medical allowances, funeral allowances, direct lineal survivors' benefits, and relief allowances.¹²² The amount of pension is to be proportionally determined by the number of years for which contributions have been made, the amount paid, and the average income of the worker in a certain period.¹²³ However, medical allowances, funeral allowances, survivors' benefits, and relief allowances will be set in accordance with relevant regulations.¹²⁴

As a result, the preceding provisions reflect the government's policies to (1) provide contract workers with the same treatment as that of permanent workers, (2) guarantee contract workers the same wages as they change jobs unless the new jobs are of a different nature, (3) allow contract workers to receive a certain sum of money once they become unemployed, and (4) create a social insurance fund for future retired contract workers.

(d) Discipline

The Reward and Punishment Provisions specifically enumerates seven categories of situations in which staff and workers who remain unchanged after criticism and education will receive administrative or economic sanction.¹²⁵ "Administrative punishment" means warning, demerits,

120. Implementation Regulations, *supra* note 101, art. 26.

121. *Id.*

122. *Id.* art. 27.

123. *Id.* A retired contract worker will receive a pension every month until death. *Id.* A contract worker who has contributed to the retirement fund for a relatively short period of time can obtain his/her pension in a lump sum. *Id.*

124. *Id.*

125. Reward & Punishment Provisions, *supra* note 102, art. 11. The seven categories are as follows: (1) violation of labor discipline, frequent tardiness, early departure, absence from work without good cause, slow-down, and failure to finish production or work assignments; (2) insubordination without proper reasons concerning work assignment, transfer, command, or causing trouble without grounds, gathering a crowd to create disturbance, and fighting, thus affecting the order of production, work, and society; (3) neglect of duty, violation of operational and safety rules, or giving orders in violation of rules, which results in accidents causing losses of life and property; (4) being irresponsible, producing scraps, damaging facilities or equipment, or wasting raw materials and energy, which results in economic losses; (5) abuse of power, violation of policies and decrees, violation of financial and economic discipline, tax evasion, nonremittance of profits, abusive

demotion, removal from office, retention under observation (probation), and expulsion.¹²⁶ When an enterprise imposes an economic punishment, the amount of fines should not exceed 20 percent of the standard wages of the staff or worker.¹²⁷

In administering administrative or economic punishment, the enterprise should solicit the opinion of the trade union and allow the staff or worker to defend.¹²⁸ The examination and approval of punishment must be done within five months from the date of the verification of the mistake in the case of expulsion and within three months for other types of discipline.¹²⁹ Moreover, the staff or worker may appeal to the leading organ above the enterprise within ten days of the announcement of the punishment, which will also be administered while the appeal is pending.¹³⁰ Therefore, these provisions outline the circumstances under which labor discipline will be imposed and equip workers with procedural safeguards to contest disciplinary measures.

(e) Termination

The Implementation Regulations state that the duration of an employment contract is to be determined through consultation between the enterprise and the worker.¹³¹ Generally, the contract automatically expires at the end of its term, but if production or work requires, the parties can

granting of awards, wasting of the country's resources and capital, and obtaining personal gains at the expense of the public; (6) corruption, theft, profiteering/speculation, smuggling, bribery, extortion, or any other conduct which is illegal or violates discipline; and (7) any other serious mistakes. These kinds of behavior can be serious enough to constitute crimes. *Id.* The Reward and Punishment Provisions apply to staff and workers in enterprises owned by the whole people and urban collectively owned enterprises. *Id.* art. 4.

126. *Id.* art. 12. An enterprise may also impose a one-time fine at the same time. *Id.* When an enterprise administers the punishment of retention under observation, the retention period should be from one to two years, during which the disciplined staff or worker will receive only living expenses that are less than his/her wages. *Id.* art. 14. After the observation, the staff or worker can become a formal employee again if his/her performance is good, and his/her wages will be determined anew. *Id.* art. 14. However, if his/her performance under observation is poor, the staff or worker shall be expelled. *Id.* art. 14. If an enterprise removes a staff or worker from office, it may, if necessary, lower his/her wage grade. *Id.* art. 15. In addition, if an enterprise decides to punish by demotion, the staff or worker should be demoted generally by one grade, not exceeding two grades. *Id.* art. 15. If a staff or worker is absent from work without good reasons for more than 15 consecutive days or more than 30 days in one year, the enterprise can remove his/her name. *Id.* art. 18.

127. *Id.* art. 16.

128. *Id.* art. 19.

129. *Id.* art. 20.

130. *Id.* art. 21.

131. Implementation Regulations, *supra* note 101, art. 9.

agree to renew the contract, except for rotation workers.¹³² In addition, the contract automatically terminates upon the worker's being removed of name, expelled, ordered for labor reeducation, or criminal punishment.¹³³

Basically, an enterprise can terminate a labor contract if any of these circumstances arises: (1) the worker is found to be unqualified for employment during the probationary period, (2) the worker becomes sick or sustains nonwork-related injury and is unable to perform his/her original job after the end of sick leave, (3) the worker should be dismissed in accordance with the Dismissal Regulations,¹³⁴ and (4) the enterprise has declared bankruptcy or is undergoing reorganization at the verge of bankruptcy.¹³⁵

Nonetheless, an enterprise cannot terminate a contract if: (1) the contract has not expired, and any of the aforementioned four conditions is not met, (2) the worker has been confirmed by the labor-review committee to be suffering from occupational disease or work-related injury, (3) the worker is on sick leave for illness or nonwork-related injury, (4) a female worker is pregnant, on maternity leave, or nursing a baby, and (5) the enterprise has to comply with State regulations.¹³⁶

At the same time, a worker can terminate the contract under these circumstances: (1) as affirmed by the government agencies concerned, adverse safety and health conditions of the work site will seriously endanger the bodily health of the worker; (2) the enterprise cannot pay compensation pursuant to the labor contract; (3) having received the enterprise's consent, the worker undertakes education at or above the middle technical school level at his/her own expenses; and (4) the enterprise does not perform its contractual duties, violates the State's policies, laws, regulations, or intrude upon the worker's lawful rights and interests.¹³⁷

In any case, either party must give one month's advance notice to terminate the contract, and the enterprise must report to its department-in-

132. *Id.*

133. *Id.* art. 13.

134. According to the Dismissal Regulations, an enterprise can dismiss a staff or worker in these situations after education or administrative punishment prove to be ineffective: (1) serious violation of labor discipline, which affects the order of production and work; (2) violation of operating rules, damaging facilities or equipment, or wasting raw materials and energy, which results in economic losses; (3) poor service manner, frequent arguments with customers, or deeds injuring the interests of consumers; (4) reluctance to being transferred in the normal course of business; (5) corruption, theft, gambling, jobbery, or fraud which does not amount to a crime; (6) making trouble without grounds or fighting, causing a serious disruption of social order; and (7) other serious mistakes. Dismissal Regulations, *supra* note 101, art. 2.

135. Implementation Regulations, *supra* note 101, art. 12.

136. *Id.* art. 14.

137. *Id.* art. 15.

charge and the local labor-administration department for record.¹³⁸ If the breaching party has caused the other party to incur economic losses, it should compensate the latter for the losses, depending on the consequences and extent of responsibility.¹³⁹ When an enterprise wants to terminate an employment contract, it should solicit the opinion of the trade union.¹⁴⁰ If a dismissed worker disagrees over the dismissal decision, he/she can appeal to local labor-dispute arbitration committee within fifteen days of the receipt of the dismissal certificate.¹⁴¹ If the arbitration decision is not acceptable, the dispute can be brought to the local people's court.¹⁴² Therefore, the preceding provisions not only set forth the conditions under which termination of an employment contract is permissible but also allow a staff or worker to refute the dismissal decision.

(f) Unemployment Insurance

A contract worker who is waiting for employment [unemployed] can receive unemployment relief and a medical allowance in accordance with governmental regulations.¹⁴³ The Provisional Regulations on Waiting-for-Employment [Unemployment] Insurance for Staff and Workers in State-Owned Enterprise apply to (1) staff and workers in bankrupt enterprises, (2) staff and workers laid off in enterprises undergoing reorganization pending bankruptcy, (3) workers whose contracts have expired and been terminated, and (4) dismissed staff and workers.¹⁴⁴ In addition, the administration of the unemployment insurance fund is done by the labor-service company under the local labor-administration department,¹⁴⁵ and the sources of the unemployment insurance fund consist of 1 percent of the total standard wages of all staff and workers, interest earned therein, and subsidies of local financial authorities.¹⁴⁶

Based on the average standard wages of the staff or worker during the two years prior to his/her departure, the monthly payment of unemployment assistance shall be given as follows: (1) a staff or worker of a bankrupt enterprise or an enterprise undergoing reorganization will receive a

138. *Id.* art. 16.

139. *Id.*

140. *Id.* art. 17; Dismissal Regulations, *supra* note 101, art. 3.

141. Dismissal Regulations, *supra* note 101, art. 5.

142. *Id.*

143. Implementation Regulations, *supra* note 101, art. 25.

144. Unemployment Insurance Regulations, *supra* note 101, art. 2. See *infra* notes 322-25 and accompanying text for subsequent changes in unemployment insurance.

145. *Id.* art. 12. The duties of the labor-service company include registration of unemployed staff and workers, management and disbursement of the unemployment insurance fund, job counseling and placement, provision of job retraining, etc. *Id.*

146. *Id.* art. 3.

maximum of twenty-four months if his/her seniority is five years or more (60 to 75 percent of standard wages from the first to twelfth month and 50 percent of standard wages from the thirteen to twenty-fourth month), and a maximum of twelve months at the rate of 60 to 75 percent if his/her seniority is less than five years; (2) a worker whose labor contract has expired or been terminated may obtain unemployment relief in accordance with (1), starting from the month following termination of his/her livelihood allowance; and (3) a dismissed worker may receive unemployment relief as provided in (1).¹⁴⁷

However, a staff or worker may not obtain unemployment relief if (1) he/she has received the maximum benefits under article 7, (2) he/she is reemployed (including self-employment), (3) he/she turns down two introductions to a job without proper reasons, and (4) he/she receives labor reeducation or serves a criminal sentence during the unemployment period.¹⁴⁸ Therefore, these provisions enable workers in a mobile labor market to receive financial assistance once they become unemployed.

(g) Unionization and Worker Participation

As discussed above, the 1950 Trade Union Law empowers staff and workers to form grassroots unions, whose functions are more welfare-oriented and educative rather than advocative. 1982, China revised its Constitution and deleted the provision on freedom to strike. The deletion of the right to strike has been attributed to the Chinese leaders' reaction to the Polish Solidarity movement.¹⁴⁹ It has also been regarded as another step by the State to strengthen labor discipline.¹⁵⁰ Thus, in theory, workers in China have no right to strike. However, according to a spokesman for the ACFTU, workers may temporarily evacuate the work site if the working conditions endanger their lives or even hold short-term strikes after they

147. *Id.* art. 7.

148. *Id.* art. 9.

149. Bruce L. Otley & John Bruce Lewis, *Labor Law in the SEZ's: Moving Toward Western Norms*, E. ASIAN EXECUTIVE REP., Feb. 1983, at 11-12. Otley and Lewis report that this view is supported by article 15 of the 1982 Constitution, which has been newly added and states that "disturbances of the orderly functioning of the socialist economy or disruption of the state economic plan by any organization or individual is prohibited." *Id.* (citing XIANFA (1982)).

150. *Id.* Otley and Lewis cite article 28 of the 1982 Constitution (the government will punish actions that "disrupt the socialist economy") and article 52 (citizens must "protect public property, observe labor discipline and public order, and respect social ethics") to support their view.

have exhausted all normal means of presenting their reasonable demands.¹⁵¹ In addition, the 1982 Constitution gives workers the right to participate in the democratic management of state-owned enterprises through the establishment of staff-worker congresses.¹⁵²

(h) Dispute Resolution

When a dispute arises out of the performance of a labor contract, the parties may request mediation from the enterprise's labor-dispute mediation committee or directly apply for arbitration from the local labor-dispute arbitration committee.¹⁵³ If the mediation committee agrees to accept the case, it must resolve the dispute within thirty days of either the oral or written request for mediation.¹⁵⁴ If the dispute is not resolved within thirty days, the mediation effort will be considered unsuccessful.¹⁵⁵

If the dispute arises out of the performance of a labor contract, the parties should request arbitration in writing within sixty days of the occurrence of the dispute or thirty days of the date on which mediation failed.¹⁵⁶ However, if the dispute arises out of expulsion, removal of name, or dismissal for violation of discipline, the parties should request arbitration in writing within fifteen days of the announcement of the enterprise's decision.¹⁵⁷ In addition, the arbitration committee shall decide whether or not to accept the case within seven days of its receipt of the written request for arbitration and provide explanation if it decides not to take the case.¹⁵⁸

If a party does not appear in the arbitration proceeding without proper justification after it has been notified twice of the time and place of the arbitration, the arbitration committee may proceed to arbitrate in its absence.¹⁵⁹ Particularly, if the arbitration committee agrees to arbitrate, it should conclude the case within sixty days.¹⁶⁰ If one or both parties do not accept the arbitral award, the dispute can be brought to the people's court

151. Horsley, *supra* note 28, at 23. Zheng also states that the Interim Regulations on Union Inspectors for the Supervision of Labor Protection permit union inspectors to direct workers to refuse to work if working conditions endanger their lives or health. Zheng, *supra* note 26, at 399-400.

152. XIANFA (1982), art. 16, *reprinted and translated in* 1 CHINA LAWS FOR FOREIGN BUSINESS—BUSINESS REGULATIONS [hereinafter 1 CHINA LAWS], ¶ 4-500 (CCH Australia 1993). *See also* text accompanying notes 37-41.

153. Dispute Regulations, *supra* note 101, art. 5.

154. *Id.* art. 15.

155. *Id.*

156. *Id.* art. 16.

157. *Id.*

158. *Id.* art. 17.

159. *Id.* art. 21.

160. *Id.* art. 24.

within fifteen days of its receipt.¹⁶¹ Likewise, if one party does not comply with the arbitration decision or sue, the other party may apply to the court to have the arbitration award enforced.¹⁶²

Therefore, to resolve a labor dispute, the parties must first go through administrative channels before they can have it adjudicated in court. In practice, labor disputes have been resolved mainly through mediation and arbitration channels, while lawsuit is the last resort.¹⁶³

(i) Discussion

The contract employment system is designed to reduce the problems generated by the practices of administrative assignment, lifetime tenure, and replacement-by-children. On one hand, the contract employment system allows workers to move to those sectors where demand for their labor exists, thus eliminating the burden of enterprises to support surplus workers.¹⁶⁴ Moreover, since workers are permitted to change jobs, the contract employment system facilitates propagation of technical knowledge, decreases over-specialization, and reacts to changes in individual attitudes towards work."¹⁶⁵

On the other hand, it is estimated that about thirty years must pass before all workers in state-owned enterprises are covered by the contract employment system.¹⁶⁶ In addition, government and Party officials in rural provinces tend to be more conservative about reform and to resist change in the power structure.¹⁶⁷ Enterprises may also require workers who have extensive training or technical skills to sign very long-term contracts, because they will not invest in training workers without knowing that the training will benefit them.¹⁶⁸ Consequently, the objective of developing a full-scale labor market will be frustrated.

161. *Id.* art. 25.

162. *Id.*

163. In 1990, as incomplete statistics reveal, labor-dispute mediation committees and local labor-dispute arbitration committees throughout the country handled 18,573 cases and settled 16,813 cases, of which 15,881 were settled through mediation with a success rate of 94 percent. *White Paper*, *supra* note 1. Nine hundred and thirty-two cases were settled through arbitration, whereas 218 cases were settled through lawsuit after arbitration failed. *Id.* Moreover, an earlier survey showed that most arbitration cases involved direct or indirect dismissals, and workers won most cases reaching the dispute resolution process because enterprises failed to comply with procedural requirements. JOSEPHS, *supra* note 42, at 116-18.

164. JOSEPHS, *supra* note 42, at 10.

165. *Id.*

166. Lewis & Flesher, *supra* note 26, at 11.

167. *Id.* at 12.

168. *Id.* at 11.

In addition, the contract employment system has generated other problems. First of all, nepotism and avoidance of dirty, difficult, or dangerous jobs have resulted.¹⁶⁹ Job insecurity, in particular, has caused some workers to doubt about the desirability of economic reforms.¹⁷⁰ Hence, there must be a concomitant change of attitude among workers so that they will be able to handle the fear and discomfort associated with the new system.

Along with those who avoid "three Ds" jobs, workers who have been dismissed as a result of labor rationalization will aggravate the problem of unemployment.¹⁷¹ Since the problem of redundant workers can also be attributed to the renovation of existing manufacturing facilities, the contract employment system alone will not suffice. Thus, the government must find ways to provide retraining and to place displaced workers.

Furthermore, contract workers have received discriminatory treatment in the areas of membership to unions and staff-and-worker congresses, opportunity to receive further education, pay raises, job assignments, housing, medical treatment, sick leave benefits, and financial entitlements.¹⁷² Therefore, this situation will also hinder the implementation of the contract employment system.

169. *Workers Set to Lose Their "Iron Rice Bowls,"* The Xinhua General Overseas News Service, July 29, 1991, available in LEXIS, World Library, ALLWLD File.

170. Nicholas D. Kristof, *Capitalist-style Layoffs Ignite Sabotage and Strikes in China*, N.Y. TIMES, June 11, 1992, at A1. This article reports the following: Workers in several cities had attacked factory directors who tried to introduce market-oriented changes, and there were increasing reports of strikes and acts of sabotage. For example, Huang Chuanying, a bank director, began dismissing bank employees considered incompetent and unproductive. Cao Weihua, a dismissed employee, firebombed Huang's house and severely wounded Huang, his wife, and their two children. Cao was sentenced to death. In addition, a laid-off driver at a toothpaste factory drove his truck over his boss. The central government suggested that the manager be hailed as a "martyr" for reform, but the workers refused to nominate the manager for the honor. These incidents suggested that opposition to fundamental change came not only from octogenarian communist hard-liners but also from ordinary blue-collar workers, who had, in the past, taken initiative and pushed liberalization more quickly than the Politburo intended. The article also states that most workers seemed not to be as antagonistic to change as worried by it, and that some people preferred economic liberalization. *Id.*

171. In 1988, the official figure for unemployment was 3 million. Guy Dinmore, *Labor Disputes Simmer under China's Austerity Program*, THE REUTER LIB. REP., Apr. 12, 1989, available in LEXIS, World Library, ALLWLD File. In 1993, China's urban unemployment rate was 2.6 percent, and the total number of jobless people in cities was to amount to about 5 million in 1994. Chris Yeung, *Laws Planned to Curb Layoffs*, SOUTH CHINA MORNING POST, Apr. 27, 1994, § News, at 10, available in LEXIS, World Library, ALLWLD File. To solve the problem of unemployment, the government has tried to encourage private enterprises and establish rural nonagricultural enterprises. Vause & Vrionis, *supra* note 45, at 450 n.12.

172. Vause & Vrionis, *supra* note 45, at 464, n.79.

Actually, the reduction of worker lethargy depends on the success of wage reforms. During the 1980's, China started a number of programs to reform its eight-grade wage system. In state institutions and public organizations, the graded wage system has been abolished and replaced by the structural wage system in which wages are to be related to specific work posts.¹⁷³ In state-owned enterprises, wage reforms include the method of linking the total payroll with the economic results of the enterprise and simplifying and unifying the wage scales of staff and workers.¹⁷⁴ For example, the method of linking the total payroll of the enterprise with either the profit or taxes paid to the State has been used, and in 1985, reference wage scales were introduced, which simplified and merged the 300 or so complicated wages scales into five wages scales for three industries in one locality.¹⁷⁵ However, it takes time for the wage reforms to be fully implemented, and an effective performance appraisal system is also indispensable to their success.

Other than that, if the trade union in China is not advocative, the protection of workers will depend more on the institution of staff-and-worker congress. In some enterprises, staff-and-worker congresses include members of the Party committee, factory directors, engineers, and technicians, even though the majority of the delegates must be workers.¹⁷⁶ It has been reported that (1) a few congresses have exercised decision-making authority over enterprise policies pertaining to such areas as production, budgets, labor safety, formulation and revision of rules, and distribution of funds; (2) factory directors in many enterprises are required to submit work reports to the congresses at regular intervals; and (3) many congresses have the power to elect workshop directors, section chiefs, and other grassroots leaders.¹⁷⁷ In several factories, congresses also have the power to elect directors, subject to the approval by the government.¹⁷⁸

Nonetheless, staff-and-worker congresses have also met opposition. Even though congresses can elect factory directors, they are still subject to the control of the Party secretaries, who are appointed to factories by higher

173. *Wage Reform*, *supra* note 50.

174. *Id.*

175. *Id.*

176. Lewis & Ottley, *supra* note 13, at 1182. A staff-and-worker congress should include workers, technicians, managerial personnel, and leading cadres, and one-fifth of the representatives should be leading cadres. Quanmin Souyouzhi Gongye Qiye Zhigong Daibiao Dahui Tiaoli [Provisions on Staff-and-Worker Congresses in State-Owned Enterprises], Sept. 15, 1986, art. 12, *reprinted in* LAODONG SHOUCHE, *supra* note 22, at 59.

177. Lewis & Ottley, *supra* note 13, at 1183.

178. *Id.* Horsley also reports that by late 1983, over 200,000 state-owned enterprises had established staff-and-worker congresses, and workers in over 15,000 enterprises and mines had elected their directors. Horsley, *supra* note 28, at 22-23. It is not clear to what kind of director Horsley refers.

Party officials.¹⁷⁹ Congresses had been established in 80 percent of the factories in Shanghai and Beijing, but they were "still far from being an authoritative organ for the workers to become the masters of an enterprise and run it."¹⁸⁰ In particular, the scope of the functions and powers of staff-and-worker congresses is limited and varies among factories.¹⁸¹ Hence, if the staff-and-worker congress is designed to control the increased autonomy of factory managers and to resolve labor dispute before it becoming a full-blown conflict, its effectiveness is yet to be seen.

Last of all, housing shortage is a very serious problem in China and can reduce labor mobility. As one article said, "[i]t is impossible to overstate the significance of the housing shortage and allocation system as an impediment to the development of a more efficient labor system."¹⁸² Since labor immobility due to housing shortage will frustrate the current efforts of labor reform, the government must also find ways to increase the availability of housing.

In any event, the government appears to have great faith in the contract employment system and plans to have it fully implemented throughout the country.¹⁸³ One report states that there were about 35 million contract workers in state-owned enterprises in 1994.¹⁸⁴

2. *Equity Joint Ventures and Wholly Foreign-Owned Enterprises*

In order to attract foreign capital and technology, China promulgated the Law of People's Republic of China on Sino-Foreign Joint Equity Enterprises (Joint Venture Law) in 1979.¹⁸⁵ From 1980 to 1990, the

179. Fox Butterfield, *China Is Testing Worker Voting in Its Factories*, N.Y. TIMES, Oct. 12, 1980, §1, pt. 1, at 11.

180. *Id.* (quoting WORKERS' DAILY).

181. Lewis & Oulley, *supra* note 13, at 1184. In the Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People, Apr. 13, 1988, *reprinted and translated in* 2 CHINA LAWS, *supra* note 3, ¶ 13-534, art. 52, the functions and powers of staff-and-worker congresses are delineated.

182. Becker & Gao, *supra* note 30, at 419. See also JOSEPHS, *supra* note 42, at 143. Josephs states that enterprises usually allocate housing based on seniority, that a contract worker who changes jobs will not be able to accumulate the necessary seniority for housing, and that housing available in major cities is beyond the means of the average worker.

183. As discussed later in this article, the newly promulgated Labor Law, *supra* note 3, indicates the government's intent to use the contract employment system throughout the nation.

184. *China's Parliament Passes Copyright Rules*, Agence France Presse, July 5, 1994, p. Financial (quoting Xinhua News Agency), available in LEXIS, World Library, ALLWLD File.

185. The Law of the People's Republic of China on Sino-Foreign Joint Equity Enterprises [hereinafter Joint Venture Law], July 1, 1979 (amended 1990), *reprinted and translated in* 1 CHINA LAWS, *supra* note 152, ¶ 6-500. The Law of the People's Republic

government issued a series of regulations to provide foreign investors with some guidelines on labor relations in equity joint ventures or wholly foreign-owned enterprises.¹⁸⁶ The following summary should provide a framework to understand labor relations in foreign-funded enterprises in China.

(a) General Provisions

The Joint Venture Law states that (1) the board of directors is empowered to discuss and act on important issues, such as labor and wage plans as well as the appointment or hiring of general managers, chief engineer, chief accountant, and auditor, and (2) provisions governing the employment and dismissal of employees of a joint venture shall be stipulated in the agreement concluded between the parties in accordance with the law.¹⁸⁷ To provide foreign-funded enterprises with more guidelines,

of China on Sino-Foreign Cooperative Enterprises was also promulgated on Apr. 13, 1988, *reprinted and translated* in 1 CHINA LAWS, *supra* note 152, ¶ 6-100; articles 13 & 14 generally refer to employment conditions stipulated in labor contracts and the establishment of trade unions. *Id.*

186. Regulations of the People's Republic of China on Labor Management in Joint Ventures Using Chinese and Foreign Investment [hereinafter Labor Management Regulations], July 26, 1980, *reprinted and translated* in 1 CHINA LAWS, *supra* note 152, ¶ 6-520; Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment [hereinafter Joint Venture Implementation Regulations], Sept. 20, 1983 (amended 1986), *reprinted and translated* in 1 CHINA LAWS, *supra* note 152, ¶ 6-550; Provisions for the Implementation of the Regulations on Labor Management in Joint Ventures Using Chinese and Foreign Investment [hereinafter Labor Management Implementation Provisions], Jan. 19, 1984, *reprinted and translated* in 1 CHINA LAWS, *supra* note 152, ¶ 6-522; Law of the People's Republic of China concerning Enterprises with Sole Foreign Investment [hereinafter Sole Foreign Investment Law], Apr. 12, 1986, 2 CHINA LAWS, *supra* note 3, ¶ 13-506; State Council Regulations concerning Encouragement of Foreign Investment [hereinafter Encouragement Regulations], Oct. 11, 1986, 2 CHINA LAWS, *supra* note 3, ¶ 13-509; Regulations on the Right of Autonomy of Foreign Investment Enterprises in the Hiring of Personnel and on Employees' Wages, Insurance, and Welfare Expenses [hereinafter Autonomy Regulations], Nov. 10, 1986, 2 CHINA LAWS, *supra* note 3, ¶ 12-590; Implementation of the Right of Autonomy of Foreign Investment Enterprises in Their Use of Personnel [hereinafter Autonomy Implementation], Apr. 25, 1988, 2 CHINA LAWS, *supra* note 3, ¶ 12-606; and the Detailed Rules for the Implementation of the Law of the People's Republic of China on Sole Foreign Investment Enterprises [hereinafter Rules for Sole Foreign Investment Enterprises], Dec. 12, 1990, *id.*, ¶ 13-507.

187. Joint Venture Law, *supra* note 185, art. 6. The labor plans of a joint venture, after being decided by the board of directors, must be filed with the department-in-charge of the joint venture and the local labor-and-personnel department. Labor Management Implementation Provisions, *supra* note 186, art. 1. The Encouragement Regulations also state that foreign-invested enterprises should report their recruiting, hiring, dismissal, or termination of staff and workers to the local labor-and-personnel department. Encouragement Regulations, *supra* note 186, art. 15.

subsequent laws and regulations state that matters concerning the terms and conditions of employment, including hiring, dismissal, resignation of staff and workers; tasks of production or work; wages, awards, and punishment; working time and vacation; labor insurance and welfare; labor protection; labor discipline; the duration of the contract; the conditions for modifying and terminating the contract; and the rights and obligations to be executed by both parties must be stipulated in labor contracts.¹⁸⁸

In addition, joint ventures may conclude and sign collective labor contracts with the trade unions established therein or individual labor contracts with their staff or workers.¹⁸⁹ If a joint venture has no trade union, the labor contract may be concluded between the joint venture and the representatives of staff and workers.¹⁹⁰ The labor contract or its amendment, however, must be submitted to the labor-and-personnel department of the provincial, autonomous regional, or municipal government for approval.¹⁹¹

(b) Recruitment and Hiring

At the beginning, a joint venture recruiting new employees could select them only within the areas stipulated by the labor-and-personnel department.¹⁹² However, it was allowed to hire outside its locality engineering, technical, operations, and management employees who were not available in its area, subject to the approvals of the labor-and-personnel department of the provincial, autonomous regional, or municipal government and of the relevant district.¹⁹³ Subsequently, a foreign-invested enterprise may recruit staff and workers outside its locality and no longer needs to obtain the approval of the labor-and-personnel department at the provincial level, even though the labor-and-personnel department of the relevant district shall organize, coordinate, and serve.¹⁹⁴ In any event, selection of

188. Labor Management Regulations, *supra* note 186, art. 2; Labor Management Implementation Provisions, *supra* note 186, art. 5; Sole Foreign Investment Law, *supra* note 186, art. 12; Rules for Sole Foreign Investment Enterprises, *supra* note 186, art. 67.

189. Labor Management Regulations, *supra* note 186, art. 2; Labor Management Implementation Provisions, *supra* note 186, art. 5.

190. Labor Management Implementation Provisions, *supra* note 186, art. 5.

191. Labor Management Regulations, *supra* note 186, art. 2 (labor contract); Labor Management Implementation Provisions, *supra* note 186, art. 5 (labor contract and its amendment). "Municipality" refers to a city which is directly under the control of the central government. The provincial, autonomous regional, and municipal labor-and-personnel department can also delegate its approval to the labor-and-personnel department above the county level. Labor Management Implementation Provisions, *supra* note 186, art. 5.

192. Labor Management Implementation Provisions, *supra* note 186, art. 2.

193. *Id.* art. 3; Autonomy Regulations, *supra* note 186, art. 1(1).

194. Autonomy Implementation, *supra* note 186, arts. 1 & 3.

prospective employees should be based on examination of qualification,¹⁹⁵ and a probation period can be set.¹⁹⁶

Perhaps because foreign investors complained of having difficulties in recruiting workers of their choice and in raising productivity,¹⁹⁷ subsequent regulations provide that the units to which operations and management employees, engineering and technical personnel, and workers belong should give active support, permit transfer, and not use unreasonable tactics such as collection of fees or withdrawal of housing to create restrictions.¹⁹⁸ If the original unit unreasonably obstructs the transfer, the staff or worker who wants to transfer to a foreign-funded enterprise may resign, and his/her years of service may be consecutively calculated.¹⁹⁹ If a dispute arises, the parties may apply to the local labor-dispute arbitration committee or the personnel-exchange service agency authorized by the local government for arbitration.²⁰⁰ Most of all, when circumstances warrant, the local labor-and-personnel department may directly handle the transfer.²⁰¹ Therefore, these provisions indicate that foreign investors are getting more governmental assistance in their recruitment efforts. Apart from that, high-ranking managerial personnel appointed by the Chinese party to a foreign-invested enterprise shall be people capable of grasping policies, familiar with technology, equipped with management ability, courageous to develop, and able to cooperate and work together with foreign investors.²⁰² In fact, managers and directors should not be transferred during their term of office without authorization.²⁰³ If a transfer of managerial personnel is necessary, the board of directors must give its approval.²⁰⁴ In case of a director, the unit which assigns the Chinese director shall seek the views of both the enterprise's reviewing-and-approving organ and the other parties to the joint venture.²⁰⁵ These provisions appear to ensure that the hiring of managerial

195. Labor Management Regulations, *supra* note 186, art. 3.

196. A joint venture may set a probationary period for those whom it has directly recruited or who are recommended by its department-in-charge or the labor-and-personnel department. After the probationary period, the joint venture officially employ those who qualify and return those who failed. If the rejected person is a permanent staff member or worker, he/she shall be reinstated by the original unit. Labor Management Implementation Provisions, *supra* note 186, art. 3.

197. Lewis & Fleshler, *supra* note 26, at 12.

198. Encouragement Regulations, *supra* note 186, art. 15; Autonomy Regulations, *supra* note 186, art. 1(ii); Autonomy Implementation, *supra* note 186, art. 2.

199. Autonomy Implementation, *supra* note 186, art. 2.

200. *Id.*

201. *Id.*

202. Autonomy Regulations, *supra* note 186, art. 1(iii).

203. *Id.*; Autonomy Implementation, *supra* note 186, art. 6.

204. Autonomy Regulations, *supra* note 186, art. 1(iii).

205. Autonomy Implementation, *supra* note 186, art. 6.

personnel will be based on qualifications rather than personal connections. In addition, since talent-raiding has been growing in China²⁰⁶ and the continuity of management will lead to greater efficiency, these provisions seem to be enacted for the purpose of protecting enterprises from losing valuable employees.

Last of all, foreign-funded enterprises are required to enhance the occupational and technical training of their employees and to establish an assessment (examination) system so that the production and management skills of their employees can match the production and development requirements of the enterprises.²⁰⁷ Therefore, training programs would be an important component in the personnel management of foreign-funded enterprises.

In sum, foreign-funded enterprises may directly recruit their staff and workers, though once geographically restricted, outside their localities. Moreover, joint ventures should select their prospective employees through examination and may establish a probationary period before offering employment. In addition, the government has tried to assist foreign enterprises in recruiting and maintaining competent personnel by providing means to facilitate transfer and prevent talent-raiding. Finally, the provisions on training and acquisition of skills reflect the government's policy of promoting management and technical expertise in the Chinese workforce.

(c) Remuneration and Benefits

At the outset, the wages of staff and workers of a joint venture were to be set at 120 to 150 percent of the "real wages" of staff and workers of state-owned enterprises of the same trade in the locality.²⁰⁸ The "real wages" means the average wages of staff and workers in state-owned enterprises of the same trade in the locality with similar production capacity and technical conditions, and the specific amount is to be determined by the local labor- and personnel department, finance department, and the

206. The demand for local managers far exceeds supply, with joint ventures often raiding one another for managerial talent. *12.00 Labor* [hereinafter *12.00 Labor*], BUS. INT'L INVESTING LICENSING & TRADING, Feb. 1, 1993, available in LEXIS, World Library, ALLWLD File.

207. Joint Venture Implementation Regulations, *supra* note 186, art. 92; Rules for Sole Foreign Investment Enterprises, *supra* note 186, art. 68. See also Labor Management Implementation Provisions, *supra* note 186, art. 6. The Labor Management Implementation Provisions also state that joint ventures shall provide training for new employees, formally employ those who have passed examinations, and either return those who have failed or extend their training period. Labor Management Implementation Provisions, *supra* note 186, art. 2.

208. Labor Management Regulations, *supra* note 186, art. 8.

department-in-charge of the enterprise.²⁰⁹ In addition, wage increases are to be determined by the board of directors in accordance with the joint-venture contract and production and operations conditions; hence, joint ventures do not have to synchronize their wage increases with those of state-owned enterprises.²¹⁰

Several years later, the wage level of staff and workers in foreign-funded enterprises is to be determined by the board of directors and cannot be less than 120 percent of the average wages of employees of similar state-owned enterprises of the same industry in the locality.²¹¹ Moreover, the wages will be adjusted gradually in accordance with the economic performance of the enterprise.²¹² In other words, if economic performance is good, wages may be increased significantly; if economic performance is poor, they may be slightly increased or not increased at all.²¹³ Nonetheless, wage standards, the form of wages, rewards and subsidies of staff and workers, and the salaries of high-ranking officials in joint ventures are to be determined by the board of directors,²¹⁴ and the wage-and-bonus system must adhere to the principles of "to each according to his work" and "more pay for more work."²¹⁵

Other than wages, a joint venture must pay for its workers' labor insurance, medical expenses, welfare benefits, and the amount which the government subsidizes for housing, basic living necessities, culture, education, and hygiene and health of workers, in accordance with the standards existing in state-owned enterprises.²¹⁶ The amount of the aforementioned payments should be checked and determined by the labor-and-personnel department of the province, municipality, or autonomous region; finance department; and other relevant departments.²¹⁷ In fact, it must be adjusted correspondingly to any changes of labor insurance, welfare

209. Labor Management Implementation Provisions, *supra* note 186, art. 12.

210. *Id.*

211. Autonomy Regulations, *supra* note 186, art. 2(I).

212. *Id.*

213. *Id.*

214. Labor Management Regulations, *supra* note 186, art. 9; Joint Venture Implementation Regulations, *supra* note 186, art. 94.

215. Joint Venture Implementation Regulations, *supra* note 186, art. 93.

216. Labor Management Regulations, *supra* note 186, art. 11; Labor Management Implementation Provisions, *supra* note 186, art. 13. The Labor Management Implementation Provisions state that the joint venture may request a variance. Labor Management Implementation Provisions, *supra* note 186, art. 14. The Autonomy Regulations also state that foreign-funded enterprise will disburse a housing subsidy in accordance with requirements of local governments to be used for construction and purchase of housing for staff and workers. Autonomy Regulations, *supra* note 186, art. 2(iii).

217. Labor Management Implementation Provisions, *supra* note 186, art. 13.

benefits, and government subsidies in state-owned enterprises.²¹⁸ Along with that, a foreign-invested enterprise will disburse old-age pension and unemployment insurance funds in accordance with the requirements of local governments.²¹⁹ Nevertheless, export and technologically advanced foreign enterprises are exempt from paying state subsidies, except labor insurance, welfare costs, and housing subsidies.²²⁰

Last of all, joint ventures are required to give compensation to staff and workers who are dismissed within the labor contract period or those who are dismissed upon the expiration of the labor contract.²²¹ A dismissed staff and worker will receive one month's average wages for each year of service.²²² For more than ten years of service, the dismissed staff and worker shall receive one-and-a-half months' average wages, starting from the eleventh year.²²³ For a staff and workers who has resigned, the joint venture does not need to grant compensation.²²⁴

As a result, the wages of the staff and workers in a foreign-funded enterprise are higher than those of their counterparts in a state-owned enterprise. In theory, pay raises are tied to the economic performance of an enterprise. Moreover, although a joint venture may pay subsidies and bonuses which are to be determined by its board of directors, it must pay for labor insurance, medical expenses, welfare benefits, state subsidies, old-age pensions, and unemployment insurance which are to be determined by the government. Nonetheless, to promote export and attract advanced technology, the government requires export-oriented and technologically advanced enterprises to pay only labor insurance, welfare costs, and housing subsidies. In cases of dismissal, joint ventures are required to make severance pay.

(d) Discipline

A joint venture may, according to the severity of the case, criticize, educate, or impose administrative punishment on its staff and workers whose violations of labor discipline and its rules and regulations have engendered "certain consequences."²²⁵ In addition, a joint venture may impose a lump-

218. *Id.*

219. Autonomy Regulations, *supra* note 186, art. 2(ii).

220. Encouragement Regulations, *supra* note 186, art. 3. This amount of subsidies generally equals to 15 percent of the total wages. Lewis and Flesher, *supra* note 26, at 12.

221. Labor Management Implementation Provisions, *supra* note 186, art. 7.

222. *Id.*

223. *Id.*

224. *Id.* art. 8.

225. *Id.* art. 10. See also Encouragement Regulations, *supra* note 186, art. 15; Autonomy Regulations, *supra* note 186, art. 1(iv).

sum fine or economic compensation when necessary and may discharge serious offenders who refuse to change after repeated admonition.²²⁶ If a joint venture takes disciplinary action, it must solicit the opinions of the trade union, listen to the defense of the staff or worker, and have the general and deputy-general manager decide.²²⁷

Compared with the Provisions on Reward and Punishment, these provisions are broad and vague, but they give joint ventures or wholly foreign-owned enterprises more flexibility in administering labor discipline. On the whole, these provisions emphasize oral reprimand and economic penalty.

(e) Termination

A joint venture may lay off surplus staff and workers resulting from changes in production and technical condition or those who remain unqualified after training and are unsuitable for other available positions.²²⁸ A notice of dismissing a staff and worker based on redundancy or other reasons must be given to the trade union and the worker personally one month in advance and be filed with the department-in-charge of the joint venture and the local labor-and-personnel department.²²⁹

Although punishment by discharge is permissible, a joint venture was at first required to obtain the approval of its department-in-charge and the labor-administration department.²³⁰ Subsequently, a foreign-funded enterprise was required only to report the dismissal to the local labor-and-personnel department.²³¹ However, a joint venture cannot dismiss staff and workers who are under medical treatment or recuperation due to work-related injury or occupational disease, who are receiving treatment in hospital for sickness or nonwork-related injury, or who are six months or more pregnant or on mater-nity leave.²³²

On the other hand, if an employee of a joint venture wants to leave for special circumstances and submits his/her resignation through the trade union one month in advance, the joint venture should give its consent if

226. Labor Management Implementation Provisions, *supra* note 186, art. 10.

227. *Id.*

228. Labor Management Regulations, *supra* note 186, art. 4. The discharged staff and worker will receive other work assignment from the department-in-charge of the joint venture or the labor-administration department. *Id.* See also Encouragement Regulations, *supra* note 186, art. 15; Autonomy Regulations, *supra* note 186, art. 1 (iv).

229. Labor Management Implementation Provisions, *supra* note 186, art. 7.

230. Labor Management Regulations, *supra* note 186, art. 5.

231. Encouragement Regulations, *supra* note 186, art. 15. Indeed, the Autonomy Regulations do not mention any approval or reporting requirement. Autonomy Regulations, *supra* note 186, art. 1(iv).

232. Labor Management Implementation Provisions, *supra* note 186, art. 7.

proper reasons are given.²³³ If the resignee has received training paid by the joint venture but has not worked for the number of years stipulated in the labor contract, he/she shall refund a certain amount of the training expenses as provided in the contract.²³⁴

Furthermore, no department, unit, or individual can intervene when a foreign-invested enterprise dismisses a staff or worker in accordance with the provisions of the contract or other relevant regulations.²³⁵ If the dismissed staff or worker was borrowed from another unit, he or she shall be accepted back by the original unit.²³⁶ However, if the dismissed staff or worker was recruited and employed by the foreign-funded enterprise, he or she shall register as waiting for employment with the labor-service company or personnel-exchange service agency of the local area prior to his/her employment.²³⁷ In that case, the departments concerned may introduce employment which the dismissed worker may accept, or the dismissed worker can seek employment on his or her own.²³⁸

Consequently, a foreign-funded enterprise can discharge its staff or workers due to changes in production or technical condition or as a disciplinary measure. A staff or worker can obtain an earlier termination of the labor contract, but he/she is required to reimburse the enterprise for training expenses. This requirement probably is to ensure that enterprises will not hesitate to invest in future employees. Most of all, the government has removed the approval requirement for termination and attempted to eliminate barriers to legitimate dismissals.

(f) Occupational Safety and Health

Joint ventures are required to implement the relevant rules and regulations of the Chinese government on labor protection and to guarantee safe and "civilized" production.²³⁹ The labor-administration department is authorized to supervise and inspect their compliance.²⁴⁰ Joint ventures are also required to provide labor protection articles to staff and workers with reference to the standards used in state-owned enterprises.²⁴¹ In case of work-related injury or death, serious occupational poisoning, or injury from

233. *Id.* art. 8.

234. *Id.*

235. *Autonomy Implementation, supra* note 186, art. 5.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Labor Management Regulations, supra* note 186, art. 13. *See also* *Labor Management Implementation Provisions, supra* note 186, art. 15.

240. *Labor Management Regulations, supra* note 186, art. 13.

241. *Labor Management Implementation Provisions, supra* note 186, art. 16.

occupational accident, a joint venture shall report in time to its department-in-charge, the local labor-and-personnel department, and the trade union, as well as accept their investigation and handling of the incident.²⁴²

Basically, these provisions are broad guidelines and direct foreign-funded enterprises to follow specific labor safety and health regulations. In addition, the requirement of reporting any injury or death will enable the government to monitor industrial accidents and formulate necessary policies.

(g) Unionization and Worker Participation

Staff and workers of a joint venture *have the right* to form a primary trade union and carry on trade union activities.²⁴³ In addition, since trade unions are representatives of the interests of staff and workers, they have the power to represent staff and workers to sign labor contracts with joint ventures and to supervise the execution of those contracts.²⁴⁴

The basic tasks of trade unions in joint ventures are as follows: (1) to protect the democratic rights and material interests of staff and workers in accordance with the law; (2) to assist joint ventures in arranging and rationally utilizing welfare and bonus funds; (3) to organize political, professional, scientific, technical studies as well as conduct literary, artistic, and sports activities; and (4) to educate staff and workers to observe labor discipline and strive to complete the economic tasks of the enterprise.²⁴⁵

Furthermore, trade union representatives have the right to attend as nonvoting members the meetings of the board of directors held to discuss important issues such as development plans, production and operational activities, and so forth, and to *reflect* the opinions and demands of the staff and workers.²⁴⁶ In board meetings held to discuss and deliberate on employee awards and penalties, wage system, welfare benefits, labor protection and insurance, and so forth, trade union representatives can attend as nonvoting members, and the board should *listen* to the opinions of the trade union and obtain its cooperation.²⁴⁷ In cases of termination and punishment, trade unions have the right to object on the basis of unreasonableness and send representatives to seek a negotiated settlement with the board of directors.²⁴⁸

At the same time, a joint venture shall actively support the work of the trade union and provide housing and facilities for the union's office work,

242. *Id.* art. 17.

243. Joint Venture Implementation Regulations, *supra* note 186, art. 95.

244. *Id.* art. 96.

245. *Id.* art. 97.

246. *Id.* art. 98.

247. *Id.*

248. Labor Management Regulations, *supra* note 186, art. 6.

meetings, and welfare, cultural, and sports activities.²⁴⁹ Each month a joint venture shall pay 2 percent of the total real wages of its staff and workers as a trade union's fund, which the union shall use in accordance with the relevant budget-management rules formulated by the ACFTU.²⁵⁰

Initially, staff and workers in a wholly foreign-owned enterprise *may* establish a trade union which may conduct union activities and protect their legitimate rights and interests.²⁵¹ However, subsequent rules state that the staff and workers of a wholly foreign-owned enterprise *have the right* to establish primary trade unions and conduct union activities.²⁵² The duties of such a union,²⁵³ its representatives' attendance of board meetings,²⁵⁴ and the required support from the enterprise²⁵⁵ are similar to those of the trade union in a joint venture.

As a result, unions in foreign-funded enterprises are supposed to represent the interests of workers, but they are also required to assist in arranging and utilizing welfare and bonus funds, to organize activities, and to reduce the disruption of economic tasks. Moreover, even though union representatives can attend board meetings, they do not have power because the law requires enterprises to only *listen* to their opinions. Therefore, the provision of funds and facilities alone will not enable unions to fully represent the interests of workers.

(h) Dispute Resolution

A labor dispute occurring in a joint venture should first be resolved through consultation.²⁵⁶ If consultation fails to settle the dispute, either party or both parties may ask for arbitration by the labor-administration department of the people's government of the province, autonomous region,

249. Joint Venture Implementation Regulations, *supra* note 186, art. 99.

250. *Id.*

251. Sole Foreign Investment Law, *supra* note 186, art. 13.

252. Rules for Sole Foreign Investment Enterprises, *supra* note 186, art. 69.

253. *Id.* art. 71.

254. *Id.* The representatives of a trade union in a wholly foreign-owned enterprise can attend meetings of the enterprise held to discuss and decide on such issues as employee awards and penalties, wage system, welfare benefits, labor protection and insurance, and the enterprise shall *listen* to the union's opinions and obtain its cooperation. However, the trade union is not given the right to attend meetings held to discuss development plans as well as production and operational activities. *Id.*

255. A wholly foreign-funded enterprise shall actively support the trade union, provide necessary office space and facilities, and allocate funds for the union to use. Sole Foreign Investment Law, *supra* note 186, art. 13; Rules for Sole Foreign Investment Enterprises, *supra* note 186, art. 72.

256. Labor Management Regulations, *supra* note 186, art. 14.

or municipality where the joint venture is located.²⁵⁷ Moreover, if one party disagrees to the arbitration outcome, it may file a suit in court.²⁵⁸

This pattern of dispute resolution is similar to that required in state-owned enterprises. As of now, information about the actual practice of resolving labor disputes in joint ventures and wholly foreign-owned enterprises is not readily available. However, it has been reported that labor disputes were ended by the intervention of local authorities as well as arbitration.²⁵⁹

(i) Discussion

The foregoing discussion demonstrates that the government has been increasingly accommodative toward foreign investors. Compared with their state counterparts, foreign enterprises have been given much more latitude in deciding their personnel matters. To a certain extent, the sphere of "managerial prerogatives" has been preserved by the apparent absence of staff-and-worker congresses in foreign-invested enterprises, as well as the general and somewhat precatory language of the provisions regarding trade unions. Nevertheless, the reality facing foreign investors is less optimistic than it appears.

As of now, foreign-funded enterprises have encountered several problems, most of which are identical or similar to those in state-owned enterprises. First of all, it is difficult for foreign-owned enterprises to recruit skilled workers because the current Chinese workforce is characterized by an oversupply of unskilled labor and an undersupply of skilled and professional labor.²⁶⁰ In addition, joint ventures that used the existing workforce of or delegated hiring responsibility to their Chinese partners experienced pressure to overstaff or take nonproductive employees due to

257. *Id.*

258. *Id.*

259. In Tianjin, one strike had lasted for almost a month until the local labor bureau negotiated a settlement, and another strike was resolved after several weeks of arbitration. Andrew Quinn, *Strikes Hit Foreign Factories in China's Tianjin*, THE REUTER LIB. REP., Sept. 28, 1993, available in LEXIS, World Library, ALLWLD File. In Zhuhai, officials from the Zhuhai Municipal Government Labor Bureau and Zhuhai Administration Service Center for Foreign Investment would also mediate a labor dispute at the Japanese National Panasonic Motor Company. *Strikes at Japanese Firm in S. China Ends*, U.P.I., § Financial, Jan. 17, 1995, available in LEXIS, World Library, ALLWLD File.

260. JOSEPHS, *supra* note 42, at 19. It has been reported that although many companies have found recent university graduates who are talented and highly motivated, the shortage is acute in South China, which has far fewer institutions for higher education. *China—Investment Climate*, 1995 NATIONAL TRADE DATA BANK MARKET REPORTS, June 8, 1995 [hereinafter *China—Investment Climate*], available in LEXIS, World Library, ALLWLD File.

individuals' Party affiliations.²⁶¹ Along with that, since discipline was quite lax during the Cultural Revolution, management now faces a pool of workers, many of whom are not used to administration of labor discipline. Most of all, owing to a shortage of qualified persons for managerial and technical positions, foreign companies have to spend considerable amounts of money on training courses and seminars.²⁶²

In order to improve the situation, one provision states that the departments concerned should educate leaders of various levels as well as staff and workers to increase their understanding and ensure foreign-invested enterprises' right of autonomy in their use of personnel according to international practice.²⁶³ To those who have violated the relevant regulations and the suggestions therein and caused aberration in the areas of recruitment and dismissal of employees, education and criticism would be given.²⁶⁴ In serious cases, legal responsibility will be pursued in accordance with actual circumstances, or administrative penalties will be imposed.²⁶⁵ Notwithstanding these provisions, it is difficult to predict how much deterrent effect they will have. Actually, one report states that innovative measures are made to circumvent the law so as to tackle unforeseen circumstances.²⁶⁶

On the other hand, many foreign-funded enterprises have not complied with the law. Despite the fact that the regulations require foreign-funded enterprises and workers or their unions to sign labor contracts, this mandate

261. Vause & Vrionis, *supra* note 45, at 469.

262. Currently, it is difficult to find people with specialized technical skills or training in accounting, finance, marketing, advertising, and management. Most engineers are either not specialized or bound for employment in state-owned enterprises. Chinese universities have just begun to offer Western-style business classes. A Shanghai joint venture brought in experts from its overseas headquarters several times a year to train employees, which cost \$5,000 per employee per year, \$1,000 more than the average annual pay packet. On average, Beijing companies spent 3,000-5,000 renminbi on training regular staff in the first year of employment and at least about 10,000 renminbi on annual management training. Joint ventures trying to fill a gap in the Chinese manufacturing discover a corresponding gap in the educational preparation. 12.00 *Labor*, *supra* note 206.

263. Autonomy Implementation, *supra* note 186, art. 8.

264. *Id.*

265. *Id.*

266. Owing to complaints filed by state-owned enterprises that they were losing their best employees for not being able to offer wages comparable to those of foreign investment enterprises, the government issued internal directives that allowed the wage levels of Chinese employees to exceed 120 percent only when increased efficiency and profits allowed, and that wage levels exceeding 150 percent must be approved by the enterprises' departments-in-charge and the local labor bureaus. Christine Casati, *Satisfying Labor Laws—and Needs*, CHINA BUS. REV., July-Aug. 1991, at 16, 17-18.

has not been conscientiously observed.²⁶⁷ In addition, many workers have been employed without going through any recruitment formalities.²⁶⁸ This practice can lead to nepotism or corruptive actions. Similarly, it has been reported that foreign-funded enterprises have imposed innovative and/or strict disciplinary measures.²⁶⁹ Even worse, many foreign-funded enterprises have not provided workers with safe working conditions.²⁷⁰

As of the end of 1993, only about 10,000 of China's more than 40,000 foreign-owned enterprises had any forms of union organization.²⁷¹ Indeed,

267. One article states that more than 90 percent of Taiwan-funded enterprises and other wholly foreign-owned enterprises in Xiamen, 70 percent of all foreign-funded enterprises in Shantou, and 90 percent of all foreign-funded enterprises in Zhuhai have not signed employment contracts with their workers. "Massive Survey" Accuses Foreign Firms of "Wantonly" Abusing Workers [hereinafter *Massive Survey*], BBC Summary of World Broadcasts, Mar. 2, 1994, Pt. 3: Asia-Pacific, available in LEXIS, World Library, ALLWLD File. Moreover, in Shandong, 70-80 percent of foreign firms have not signed labor contracts with their staff and workers. *Survey in Shandong Shows Workers Now Rejecting Foreign Firms as Employers*, BBC Summary of World Broadcasts, July 5, 1994, Pt. 3: Asia-Pacific, available in LEXIS, World Library, ALLWLD File.

268. *Massive Survey*, *supra* note 267. In 1992, 19.5 percent of the 280,000 staff and workers in the 2,055 sampled enterprises in Shenzhen were employed without going through any recruitment formalities. *Id.*

269. Workers at foreign-owned factories in Tianjin went on strike over low pay and bad conditions at least ten times in 1993. One strike began after the bosses at a South Korean factory forced slow workers to kneel before them and sometimes kicked their legs. Quinn, *supra* note 259 (citing BEIJING YOUTH NEWS). Other reports state that workers were beaten for producing poor-quality goods, fired for dozing on the job during long work hours, fined for chewing gum, and locked up in a doghouse for stealing. Sheila Tefft, *Growing Labor Unrest Roils Foreign Businesses in China*, CHRISTIAN SCIENCE MONITOR, Dec. 22, 1993, § World, at 1, available in LEXIS, World Library, ALLWLD File. In Shanghai, a joint venture forbade its employees to spend more than five minutes in the lavatory, and employees were allowed to use it only once a day. Graham Hutchings, *Unrest Flares as Workers Face Abuse in China*, DAILY TELEGRAPH, Apr. 1, 1994, § International, at 18 (citing OUTLOOK), available in LEXIS, World Library, ALLWLD File.

270. In Tianjin, 30 women workers of a foreign-funded enterprise lived in a room of 20 square meters in area, and they had no beds. All the windows in the workshop were sealed by welding, and the window glass was painted over. In addition, a poisoning case in a garment factory in Dalian causing 42 casualties was a result of poisonous gas being released by fabric supplied by an overseas customer for processing. Similarly, a survey conducted among five township/town clinics in Shenzhen indicates that they received a total of 11,679 in-patients during the survey period, 8.84 percent of whom were workers from foreign-owned enterprises and had been injured in industrial accidents. *Massive Survey*, *supra* note 267. In the first half of 1994, 127 foreign-employed workers were killed at work, and the Taiwanese owner of a cutlery factory refused to compensate 142 workers who had lost fingers and limbs. *Beijing Sets Minimum Wage for China's Workers*, EXTEL EXAMINER, Nov. 9, 1994, § Miscellaneous, available in LEXIS, World Library, ALLWLD File.

271. Geoffrey Crothall, *Strikes Prompt Call to Unionize; Call to Unionize Strike-Plagued Foreign Enterprises*, SOUTH CHINA MORNING POST, Feb. 22, 1994, § News, at 1, available in LEXIS, World Library, ALLWLD File. Cf. *Trade Unions Play Important Role*

many small, wholly foreign-owned enterprises in South China are not unionized,²⁷² even though workers in those enterprises are more susceptible to abuses and need the most protection. Almost all coastal provinces and cities have issued regulations to require the establishment of trade unions in joint ventures.²⁷³ Since 1991, the ACFTU has started a recruitment drive to establish unions in joint ventures.²⁷⁴ Based on the preceding discussion, however, it is doubtful whether the establishment of unions alone will lead to greater worker protection.

Last of all, although the law provides special protection for female workers,²⁷⁵ they have been discriminated in effect because employers do not want to hire them due to expensive costs of maternity leave.²⁷⁶ Consequently, there has been a divergence between theory and practice of labor relations in foreign-funded enterprises.

in *Foreign-Funded Companies*, Xinhua News Agency, Apr. 28, 1995, available in LEXIS, World Library, ALLWLD File, which states that by the end of 1994, there had been 32,000 unions in foreign-funded enterprises, 40.6 percent of the enterprises.

272. *China—Foreign Labor Trends 1990-92* [hereinafter *Foreign Labor Trends*], NATIONAL TRADE DATA BANK MARKET REPORTS, Dec. 17, 1992, available in LEXIS, World Library, ALLWLD File.

273. *Id.* However, one reports states that some enterprises have agreements with localities not to establish unions in their factories. *China—Investment Climate*, *supra* note 260.

274. *Foreign Labor Trends*; Hiroyuki Akita, *Union Leader Says Cooperation Key; China Law Targets Workers at Foreign Companies*, THE NIKKEI WEEKLY, Feb. 6, 1995, §Asia & Pacific, at 18, available in LEXIS, World Library, ALLWLD File, which states that the grassroots section of the ACFTU wants to establish unions in 80 percent of all foreign firms in China by the end of 1995 (all foreign firms in coastal areas and 60 percent in the interior). On November 1, 1994, the ACFTU, the Organization Department of the Central Committee of the Communist Party, the State Economic and Trade Commission, the Ministry of Foreign Trade and Economic Cooperation, the Ministry of Labor, and the State Administration for Industry and Commerce jointly issued the Circular on Several Issues About Strengthening the Work Regarding Labor Union in Foreign-Funded Enterprises, which urged all localities to step up efforts to organize workers in foreign investment enterprises. *Labor; Circular Urges Establishment of Trade Unions in Foreign-Funded Firms*, BBC Summary of World Broadcasts, Nov. 5, 1994 (citing Xinhua News Agency), Pt. 3: Asia-Pacific, available in LEXIS, World Library, ALLWLD File.

275. See generally *Female Workers Protection Regulations*, *supra* note 23. In addition, China subsequently promulgated the Law on the Protection of Female Rights and Interests, which states that enterprises cannot discriminate women in cases of recruitment or promotion. *Zhonghua Renmin Gongheguo Funu Quanyi Baozhang Fa* [The Law of the People's Republic of China on the Protection of Female Rights and Interests] [hereinafter *Female Rights Law*], Apr. 3, 1992, arts. 22, 24, reprinted in FAGUI HUIBIAN 27 (1992).

276. *Foreign Labor Trends*, *supra* note 272. Discrimination against women occurs in both the foreign-sector and domestic-sector labor markets. In the domestic-sector labor market, women are the first to lose their jobs when layoffs are necessary. *Id.* This issue merits in-depth discussion but is beyond the scope of this article.

3. *Special Economic Zones*

Since 1978, China has established five Special Economic Zones (SEZs) to attract foreign capital, advanced technology, and modern management techniques.²⁷⁷ The regulations for implementing the Joint Venture Law state that joint ventures established in the SEZs shall abide by the laws and regulations adopted by the National People's Congress, its Standing Committee, or the State Council.²⁷⁸ As a result, the activities of SEZ enterprises are governed by national laws and SEZ regulations. In 1980, the National People's Congress adopted the Regulations on Special Economic Zones in Guangdong Province.²⁷⁹ Subsequently, the Guangdong Provincial People's Congress enacted two sets of regulations.²⁸⁰ Since three SEZs exist in the Guangdong Province, this article will summarize the salient provisions of the preceding regulations.²⁸¹

277. Otley & Lewis, *supra* note 149, at 11. In 1978, China established four SEZs—three in Guangdong Province (Shenzhen, Zhuhai, and Shantou) and one in Xiamen, Fujian Province. Later, the Hainan Island was added to the list, so Hainan is not mentioned in the article. The principal forms of business arrangement in the SEZs are compensation trade, cooperative production, and wholly foreign-owned enterprises. *Id.* n.1.

278. Joint Venture Implementation Regulations, *supra* note 186, art. 116. *See also* Labor Management Implementation Provisions, *supra* note 186, art. 18.

279. Regulations of the People's Republic of China on Special Economic Zones in Guangdong Province [hereinafter SEZ Regulations], Aug. 26, 1980, *reprinted and translated in* 1 CHINA LAWS FOR FOREIGN BUSINESS—SPECIAL ZONES AND CITIES, 1985-1994 [hereinafter 1 SPECIAL ZONES], ¶ 70-800 (CCH Australia 1995).

280. Regulations on Trade Unions in Enterprises in the Special Economic Zones in Guangdong Province [hereinafter Guangdong Trade Union Regulations], May 8, 1985, *reprinted and translated in* 1 SPECIAL ZONES, *supra* note 279, ¶ 70-855; Labor Regulations Governing the Special Economic Zones in Guangdong Province [hereinafter Labor Regulations on SEZs], Aug. 12, 1988, *reprinted and translated in* 1 SPECIAL ZONES, *supra* note 279, ¶ 70-885 (these regulations are applicable to foreign investment enterprises, art. 2). (On Nov. 17, 1981, the Interim Provisions for Labor and Wage Management in Enterprises in the Special Economic Zones in Guangdong Province, which were repealed by the 1988 Regulations, also dealt with labor relations in SEZ enterprises.)

281. Subsequently, Shenzhen promulgated the Provisional Regulations of the Shenzhen Special Economic Zone on Labor Management for Foreign Investment Enterprises, Aug. 1, 1987, *reprinted and translated in* 1 SPECIAL ZONES, *supra* 279, ¶ 73-544 and the Rules of the Shenzhen Special Economic Zone on Laborers, June 22, 1993, *reprinted and translated in* 1 SPECIAL ZONES, *supra* note 279, ¶ 73-541. Since this article focuses more on general regulations applicable to SEZ enterprises in Guangdong Province, these two provisional regulations will not be discussed. However, for purposes of comparison, this article will also refer to the Regulations on Labor Management in the Xiamen Special Economic Zone, July 14, 1984 [hereinafter Xiamen Regulations], *reprinted and translated in* 1 SPECIAL ZONES, *supra* note 279, ¶ 76-506.

First of all, employment relationship in the Guangdong SEZs is based on a labor contract.²⁸² Moreover, a labor-service company is to be established in each of the SEZs.²⁸³ Basically, SEZ enterprises may recruit on their own in the locality, and if this does not meet their personnel needs, they can recruit from other places with the consent of a local labor bureau.²⁸⁴

In addition, the wage form, wage standards, and measures for wage distribution of staff and workers of SEZ enterprises are to be determined by the enterprises themselves, subject to a minimum wage set by local government.²⁸⁵ However, enterprises must distribute wages at least once a month, and fines for wages in arrears are set at 1 percent, starting from the sixth day.²⁸⁶ Maximum working hours of six days a week and eight hours a day are set forth, while overtime limits and compensation are also provided.²⁸⁷ Like foreign-funded enterprises in other areas, SEZ enterprises are required to pay severance pay of one month's wages for each year of service.²⁸⁸ Specifically, enterprises and workers must participate in labor insurance for medical, work injury, unemployment, and retirement.²⁸⁹

282. Labor Regulations on SEZs, *supra* note 280, arts. 3 & 9. *See also* Xiamen Regulations, *supra* 281, art. 5.

283. SEZ Regulations, *supra* note 279, art. 19.

284. Labor Regulations on SEZs, *supra* note 280, art. 19. *See also* Xiamen Regulations, *supra* note 281, art. 4. The provisions of obtaining consent with the local labor bureau is inconsistent with the Autonomy Implementation, *supra* note 186, arts. 1 & 3. Since the activities of SEZ enterprises are governed by national laws and SEZ regulations, it is logical to conclude that SEZ enterprises should obtain consent.

285. Labor Regulations on SEZs, *supra* note 280, arts. 37-39. However, the basic amount of the total wages of state-owned enterprises, their adjustment proportions, and the standards for income distribution are to be determined by the administration department in charge of the enterprise. *Id.* art. 37.

286. Labor Regulations on SEZs, *supra* note 280, art. 40.

287. *Id.* arts. 30-33. Overtime work cannot exceed four hours after shift or 48 hours per month. *Id.* art. 31. Overtime pay is either 150 percent or 200 percent of a worker's average daily or hourly wages in that month. *Id.* art. 32. In addition, the Xiamen Regulations also require that overtime be not longer than 12 hours a week, extra pay not be lower than 150 percent of the wages of the workers, and extra pay for those who work on holidays be not lower than 200 percent of their wages. Xiamen Regulations, *supra* note 281, art. 11.

288. Labor Regulations on SEZs, *supra* note 280, art. 26. A worker who has worked less than one year is entitled to receive one month's wages, and a worker who has worked less than six months can receive a half month's wages. *Id.* *See also* Xiamen Regulations, *supra* note 281, art. 14 (one month's wages for every year of service, but one-and-a-half months' wages for the eleventh month and subsequent year).

289. Labor Regulations on SEZs, *supra* note 280, art. 52. The Xiamen Regulations state that enterprises shall contribute 25 percent of the total wages of Chinese workers to a social labor insurance fund every month. Xiamen Regulations, *supra* note 281, art. 8. In addition, Xiamen requires an employer to take out an employer liability policy to cover on-the-job injuries, disabilities, deaths, and occupational diseases of staff and workers. Xiamen Regulations, *supra* note 281, art. 10.

Based on the severity of the case, SEZ enterprises may discipline workers or discharge those who have not changed after education and administrative punishment.²⁹⁰ If an enterprise terminates a labor contract, it should promptly notify the trade union and report to the local labor bureau.²⁹¹ On the other hand, employees of SEZ enterprises can submit their resignations for such reasons as jobs not allowing employees to utilize skills, personal insults, nonpayment of wages for two consecutive months, failure of the enterprise to perform the labor contract, adverse working conditions, etc.²⁹² Regarding dispute resolution, the same pattern of consultation/mediation, arbitration, and lawsuit is applicable to SEZ enterprises.²⁹³

Lastly, staff and workers of SEZ foreign-funded enterprises *may/have the right to* form trade unions and participate in unions.²⁹⁴ In particular, a labor-capital consultative meeting system shall be set up in a sole foreign investment enterprise.²⁹⁵ The tasks of trade unions in SEZs are similar to those of the trade union in a joint venture.²⁹⁶ In case of dispute between an enterprise and a union, the parties can resolve the dispute first through mutual consultation, then by mediation, and finally in the people's court.²⁹⁷

As a result, the contents of the regulations in the SEZs are very similar to those applicable to foreign-funded enterprises in other areas of the country. On one hand, many SEZ enterprises have disregarded the law in instances identical to those of joint ventures and wholly foreign-owned

290. Labor Regulations on SEZs, *supra* note 280, arts 50 & 24. See also Xiamen Regulations, *supra* note 281, art. 18 (no specific reference to education and administrative punishment).

291. Labor Regulations on SEZs, *supra* note 280, art. 13; Guangdong Trade Union Regulations, *supra* note 280, art. 14. See also Xiamen Regulations, *supra* note 281, art. 14 (notifying the worker, trade union, and labor-service company). However, in case of discharge for violating labor discipline, enterprises should inform the worker, trade union, and labor bureau in writing. *Id.* art. 18.

292. Labor Regulations on SEZs, *supra* note 280, art. 25. See also Xiamen Regulations, *supra* note 281, art. 15.

293. Labor Regulations on SEZs, *supra* note 280, arts. 58 & 59. See also Xiamen Regulations, *supra* note 281, art. 19.

294. Guangdong Trade Union Regulations, *supra* note 280, art. 4 ("may"); Labor Regulations on SEZ's, *supra* note 280, art. 57 ("have the right"). The Labor Regulations on SEZs were enacted later in time, but the Guangdong Trade Union Regulations are specific regulations. The Xiamen Regulations state that workers *have the right to* form grassroots trade unions. Xiamen Regulations, *supra* note 281, art. 13. As discussed later in this article, the Trade Union Law of 1992 gives workers in enterprises within Chinese territory the right to organize trade unions, so workers in SEZ enterprises should have the right to set up unions.

295. Guangdong Trade Union Regulations, *supra* note 280, art. 13.

296. *Id.* arts. 6-12. See also Xiamen Regulations, *supra* note 281, art. 13.

297. Guangdong Trade Union Regulations, *supra* note 280, art. 22.

enterprises outside the SEZs.²⁹⁸ On the other hand, operating in a labor market with constraints similar to those of joint ventures, SEZ enterprises must tackle such problems as shortage of skilled labor, scarcity of managerial personnel, and labor discipline.

B. *From 1991 to Present*

After more than a decade of legislation, China has gained experience to evaluate the effectiveness and the scope of its earlier statutes. From 1991 to 1993, China promulgated a number of labor statutes and regulations which have applicability nationwide.²⁹⁹ Of these statutes and regulations, the Trade Union Law of the People's Republic of China (Trade Union Law),³⁰⁰ the Regulations on Waiting-for-Employment [Unemployment] Insurance for Staff and Workers in State-Owned Enterprises,³⁰¹ and the Regulations of the People's Republic of China on Labor-Dispute Handling in Enterprises³⁰² merit most attention. Their highlights are as follows:

298. See *supra* notes 267-68, 270.

299. E.g. Jinzhi Shiyong Tonggong Guiding [Regulations on Prohibiting the Use of Child Labor], Jan. 18, 1991, reprinted in FALU DAQUAN, *supra* note 23, at 1338; Qiye Zhigong Shangwang Shigu Baogao He Chuli Guiding [Regulations on Reporting and Handling of Incidents of Injury and Death in Enterprises], Feb. 22, 1991, reprinted in FALU DAQUAN, *supra* note 23, at 1344; Quanmin Suoyouzhi Zhaoyong Nongmin Hetongzhi Gongren de Guiding [Regulations on Hiring of Peasants as Contract Laborers by Enterprises Owned by the Whole People], July 25, 1991, reprinted in FALU DAQUAN, *supra* note 23, at 1327.

300. The Trade Union Law of the People's Republic of China [hereinafter Trade Union Law], Apr. 3, 1992, reprinted and translated in 2 CHINA LAWS, *supra* note 3, ¶ 12-501. To implement the Trade Union Law, regional authorities, such as Beijing, Guangdong Province, and Hainan promulgated trade union regulations, respectively. 1995 CHINA LEGAL DEVELOPMENTS BULLETIN, Vol. 1, No. 4, at 27. The Implementing Measures of Guangdong Province for the Trade Union Law of the People's Republic of China were promulgated on Sept. 15, 1994. Noteworthy points are as follows: (1) trade unions can negotiate with foreign investment enterprises and other private companies to establish positions for union professionals when the number of union members exceeds 200, (2) if enterprises want to dismiss workers who are the chairs or vice-chairs of unions, the trade union at a higher level must be notified, and (3) when enterprises delay or reduce payment of union dues, trade unions may file a complaint with the court. *Id.* at 27-28.

301. Guoyou Qiye Zhigong Daiye Baoxian Guiding [Regulations on Waiting-for-Employment [Unemployment] Insurance for Staff and Workers in State-Owned Enterprises] [hereinafter 1993 Unemployment Insurance Regulations], Apr. 12, 1993, reprinted in FAGUI HUIBIAN 1043 (1993).

302. Zhonghua Renmin Gongheguo Qiye Laodong Zhengyi Chuli Tiaoli [Regulations of the People's Republic of China on Labor-Dispute Handling in Enterprises] [hereinafter Labor-Dispute Handling Regulations], July 6, 1993, reprinted in FAGUI HUIBIAN 1054 (1993). An English translation is also provided in 2 CHINA LAWS, *supra* note 3, ¶ 12-618.

1. *Trade Union Law of 1992*

The basic provisions of the Trade Union Law of 1992 (Trade Union Law) are the same as those of the 1950 Trade Union Law. However, the following provisions are noteworthy:

Article 3 states that laborers doing physical and mental work in enterprises, institutions, and government organs within Chinese territory who earn their living primarily from wages *have the right to participate in and form unions*, irrespective of their nationality, race, gender, occupation, religious belief, or level of education.³⁰³ In addition, trade unions of enterprises or institutions owned by the whole people and collectively owned shall organize its staff and workers to participate in democratic management and democratic supervision.³⁰⁴ The staff-and-worker congress in an enterprise owned by the whole people is the primary organ through which staff and workers exercise their rights to democratic management, and the trade union committee is its working body responsible for conducting daily work and inspecting and supervising the implementation of the resolutions of the congress.³⁰⁵ Hence, these provisions imply that staff-and-worker congresses are to be organized in state enterprises, but workers in foreign investment enterprises may be not able to participate in democratic management.

With respect to organization, trade unions at various levels shall be established in accordance with the principle of democratic centralism.³⁰⁶ The establishment of a primary trade union, local various-level federation of trade unions, or a national or local industry-specific trade union must be reported to the trade union of the next highest level for approval.³⁰⁷ In consequence, these provisions indicate that organized labor in China will be subject to close scrutiny because the formation of a union requires the approval of a union organization of a higher level, and the ACFTU, even though officially independent, must follow Party policies.

Moreover, state-owned or collectively owned enterprises, institutions, or government organs must pay two percent of their monthly total wages to trade unions as operating funds, whereas Sino-foreign equity joint ventures, Sino-foreign cooperative enterprises, or wholly foreign-owned enterprises shall allocate funds to their trade unions in accordance with relevant regulations.³⁰⁸ Since the implementing regulations for the Joint Venture Law state that joint ventures are required to pay two percent of their total wages

303. Trade Union Law, *supra* note 300, art. 3.

304. *Id.* art. 7.

305. *Id.* art. 30.

306. *Id.* art. 11.

307. *Id.* art. 13.

308. *Id.* art. 36.

as union funds,³⁰⁹ the aforementioned provision suggests that foreign investors may be required to contribute different amounts as union funds, depending on their form of business.

Along with that, trade union committee members of a state-owned or a collectively owned enterprise, institution, or government organ who are released from regular work duties to act as full-time union personnel shall have their wages, bonuses, and allowances paid by the unit's administration.³¹⁰ This provision is a departure from that of the 1950 Trade Union Law, which states that the wages of these union personnel will be paid by the trade union.³¹¹ Therefore, the 1950 provision may lead to some union independence, but the 1992 provision reaffirms the more administrative, less advocative, role of trade unions in China.

With respect to representation, the trade union may sign a collective contract with the enterprise or institution, the draft of which shall be submitted to the staff-and-worker congress or the entire body of staff and workers for discussion and adoption.³¹² If the trade union believes that the enterprise's dismissal or punishment of a staff or worker is inappropriate, it has the right to *voice* its opinions.³¹³ In cases of expulsion or removal of name, the state-owned or collectively owned enterprise must notify the trade union of its reasons beforehand, and if the administration of the enterprise has violated laws, regulations, or the relevant contract, the trade union can *demand* that the case be investigated and handled anew.³¹⁴ Similarly, when a trade union discovers circumstances endangering the lives and safety of workers, it has the right to suggest that the workers abandon the dangerous site, and the enterprise's administration must promptly decide on a resolution.³¹⁵ Moreover, if stop-work or slow-down occurs, the trade union should negotiate a settlement with the enterprise's administration or other relevant authorities concerning the reasonable and resolvable demands of staff and workers so that the normal production process can be resumed as quickly as possible.³¹⁶ Hence, the trade union can intervene in cases of a dismissal in violation of the law, is empowered in situations involving worker health and safety, but has the duty to maintain continuous production.

As to matters concerning wages, welfare benefits, production safety, labor insurance, labor protection, and the rights and interests of staff and

309. See *supra* text accompanying note 250.

310. Trade Union Law, *supra* note 300 art. 35.

311. See *supra* text and accompanying note 11.

312. Trade Union Law, *supra* note 300, art. 18.

313. *Id.* art. 19.

314. *Id.*

315. *Id.* art. 24.

316. *Id.* art. 25.

workers, trade union representatives in state-owned enterprises shall *participate* in meetings held to discuss such matters.³¹⁷ However, Sino-Foreign joint ventures and cooperative enterprises shall *listen* to the opinions of the trade unions on such matters,³¹⁸ while the trade unions of wholly foreign-owned enterprises shall *resolve such matters through consultation* with the enterprises' administration.³¹⁹ Therefore, depending on the ownership of an enterprise, the trade union will operate differently in connection with the matters mentioned above.

In sum, the Trade Union Law is very similar to the 1950 Trade Union Law. Neither does it enhance the power of the trade union, nor has it stressed the role of union as an advocate for workers. One article states that since the ACFTU continues under the command of the Communist Party, there have been reports of activities by underground trade unions, as well as attempts by the Chinese government to suppress them.³²⁰ Actually, the Trade Union Law implies that the extent of participation by worker organizations in domestic and foreign enterprises is not quite the same.

2. *Unemployment Insurance Regulations and Labor-Dispute Handling Regulations*

In 1993, China promulgated two sets of regulations repealing the 1986 provisional regulations on unemployment insurance and labor-dispute resolution. Since the basic tenets of the former and current regulatory schemes are similar, the following will provide only the highlights.

With respect to unemployment insurance, an enterprise should contribute 0.6 percent of its total wages of staff and workers, but local governments can adjust the amount in case of deficiency or surplus in the unemployment insurance fund, subject to the maximum limit of 1 percent.³²¹ For a worker whose length of service is at least one year but less than five years, he/she is entitled to a maximum of twelve months of unemployment relief; for a worker whose length of service is five years or more, he/she is entitled to the maximum of twenty-four months.³²² In addition, unemployment relief is to be received monthly, and its amount should be equivalent to 120 to 150 percent of social relief in the locality.³²³ Apart from disbursements for unemployment relief, medical care, funeral, and

317. *Id.* art. 32.

318. *Id.* art. 33.

319. *Id.*

320. *Foreign Labor Trends*, *supra* note 272.

321. 1993 Unemployment Insurance Regulations, *supra* note 301, art. 5. *Cf.* text accompanying *supra* note 146.

322. *Id.* art. 12. *Cf.* text accompanying *supra* note 147.

323. *Id.* art. 13. *Cf.* text accompanying *supra* note 147.

direct lineal descendants, the unemployment insurance fund can also be used for retraining and production self-help.³²⁴ Finally, the labor-administration department of the State Council will manage the country's unemployment insurance, while local unemployment insurance funds are to be administered by local labor-administration departments.³²⁵

Concerning labor disputes, the three-step procedure—mediation, arbitration, and adjudication—applies to enterprises within the territory of China.³²⁶ The kinds of labor dispute can arise out of (1) expulsion, removal of name, dismissal of workers, or workers' resignation with or without approval; (2) enforcement of regulations relating to wages, insurance, welfare, training, and labor safety; and (3) performance of labor contract.³²⁷ In addition, the mediation committee within the hiring unit will consist of representatives from staff and workers, the enterprise, and the trade union, and it will be chaired by the union representative.³²⁸ The arbitration committee will be composed of representatives from the labor-administration department, the trade union, and the economic comprehensive management department as designated by the government, and it will be chaired by the person in charge of the labor-administration department.³²⁹ Moreover, the parties can be represented by counsel or authorized persons during the arbitration.³³⁰ Third parties whose interest will be affected by the outcome of the arbitration can also participate in the arbitration.³³¹ If one party does not attend the arbitration hearing without proper reasons or withdraws from the hearing without the approval of the arbitration tribunal, the plaintiff's case will be considered withdrawn or the arbitration will be made in the defendant's absence.³³²

As a result, the provisions on the establishment of an unemployment insurance fund and the broad scope of disbursement indicate that the government believe in the necessity of a social insurance program in a mobile labor market based on contract employment. In addition, the

324. 1993 Unemployed Insurance Regulations, *supra* note 301, art. 10.

325. *Id.* art. 17. Cf. text accompanying *supra* note 145.

326. Labor-Dispute Handling Regulations, *supra* note 302, art. 2. Cf. Dispute Regulations, *supra* note 101 (applying only to state-owned enterprises). Under the Labor-Dispute Handling Regulations, the parties should first resolve the dispute by mutual consultation. If they do not want to go through mutual consultation or the consultation failed, the parties should seek mediation or directly seek arbitration. *Id.* art. 6. Since arbitration committee usually performs mediation first and the last step is to bring the dispute to the court, the resolution process generally consists of three steps. *Id.* arts. 27, 6.

327. *Id.* art. 2.

328. *Id.* arts. 7, 8.

329. *Id.* art. 13.

330. *Id.* art. 19.

331. *Id.* art. 22.

332. *Id.* art. 26.

extension of the Labor-Dispute Handling Regulations to all enterprises in China reflects the government's policy of having the same procedures applied to resolve labor disputes in both domestic and foreign-funded enterprises. Actually, the arbitration hearing is made formal by allowing the parties to have representatives, the third party to join, and the arbitration panel to enter default judgment. However, the provisions on the role of unions in mediation and arbitration reveal more the neutrality of unions than its representation of workers.

3. *Labor Unrest*

For the past several years, there have been numerous reports of labor unrest. In state-owned enterprises, the decline of living standards caused by high inflation has triggered urban workers to strike.³³³ Moreover, the dismissal of surplus workers as a result of rationalization has contributed to abundant labor dissatisfaction.³³⁴ Most importantly, ineffective state-owned enterprises on the verge of bankruptcy were not able to pay their workers.³³⁵

In foreign-owned enterprises, strikes were caused by unreasonable demands on unskilled workers,³³⁶ administration of strict factory rules and

333. Andrew Roche, *China's Trade Unions Open Congress amid Labor Discontent*, REUTERS LIB. REP., Oct. 22, 1988, available in LEXIS, World Library, ALLWLD File.

334. *Peking Alarmed at Incidents in Factories*, Central News Agency, May 29, 1992, available in LEXIS, World Library, ALLWLD File. Based on the South China Morning Post which also quotes Chinese sources, this article reveals that incidents involving demonstrations and destruction of equipment occurred in factories which had laid off workers in the course of efficiency drives. In addition, the state-owned Seagull Watch Factory in Tianjin had laid off almost half of its 4,000 or so workers, but the laid-off workers were entitled to only a fraction of their wages for about six months. Angry workers smashed equipment and clashed with the police which were called in to maintain order.

335. It has been reported that governments and banks in many cities have run out of money to pay workers, some of whom are owed several months' wages. The State Council has ordered banks and administrations to pay strikers' wage demands in state-owned factories, but they refused to pay because they have no money or do not want to print money to exacerbate inflation. Willy Wo-lap Lam, *Fear of Unrest as Money Runs Out*, SOUTH CHINA MORNING POST, May 17, 1994, § News, at 1, available in LEXIS, World Library, ALLWLD File.

336. Guy Dinmore, *China Reports Strikes in Joint-Venture Companies*, REUTER LIB. REP., July 29, 1988, available in LEXIS, World Library, ALLWLD File. This article cites the following case from the CHINA YOUTH NEWS: A Hong Kong-based toy manufacturer forced employees to work up to 18 hours a day with inadequate overtime pay and no time-off on Sundays. Thirty women went on strike after a pregnant woman fainted from exhaustion, but the management fired the ringleader as a warning. Similarly, workers in a Guangzhou joint venture went on strike after management forced them to work for two months without a single day off. Crothall, *supra* note 271 (citing CHINA DAILY). In addition, fines are imposed on workers under pretexts, such as sick leave and refusal to work overtime. *Massive Survey*, *supra* note 267.

disciplinary measures,³³⁷ low pay,³³⁸ poor and unsafe working conditions,³³⁹ and breach of contract.³⁴⁰ These kinds of abuses could be the product of corruption,³⁴¹ lack of enforcement of the law, and even lack of communication between management and labor.³⁴²

Nonetheless, one common cause of labor unrest exists in both the state and foreign sectors. That is, in a market-driven economy, in which the "iron rice bowl" system is to phase out, managerial prerogatives are emphasized, and accountability of profits and losses is the norm, weak representation of the interests of workers has contributed greatly to labor unrest. Of the more than 100 strikes in joint ventures in 1993, ninety percent of them occurred in enterprises that did not have a union or was only partially unionized.³⁴³ Although trade unions exist in some foreign-funded enterprises, they are not really advocating the interests of workers.³⁴⁴ Since trade unions have been given the mandate to provide a stable investment environment for foreign investors, increase productivity in enterprises, and arrange emulation and recreational activities for workers, they generally will not protest unreasonable or inappropriate management actions so long as the latter are in line with Party policies. In state-owned enterprises, many union officials are appointed because of their political

337. See *supra* note 269.

338. The wage range in most labor-intensive enterprises is between 200 and 300 yuan a month, much lower than the wage level for workers doing the same kind of job abroad and slightly lower than the wage level for many state-owned enterprises. *Massive survey, supra* note 267.

339. See *supra* note 270.

340. Dinmore, *supra* note 336 (citing CHINA YOUTH NEWS: 70 percent of strikes in Shenzhen were caused by management's breach of contract). In some cases, two copies of labor contracts were prepared, one in Chinese and another in English, each consisting of different terms. Nick Driver, *China Reports Massive Labor Strife, To Unionize Foreign Ventures*, Proprietary to the UPI, Feb. 21, 1994, § International (citing CHINA DAILY), available in LEXIS, World Library, ALLWLD File.

341. In 1995, an anticorruption drive netted 779 cadres at or above the rank of county and section chiefs, and 39 cadres were at the level of head of department or bureau. Willy Wo-lap Lam, *War on Graft Nets 779 Cadres; Inquiries Reveal Corrupt Governor*, SOUTH CHINA MORNING POST, June 26, 1995, at 7, available in LEXIS, World Library, ALLWLD File.

342. Although foreign investors are attracted to the cheap labor force in China, expatriate managers must understand that labor is not a commodity and it is imperative to understand the needs of workers. In addition, they should tell workers what their expectations are. If management and workers understood their respective needs and had open communication, the current labor unrest could have been reduced.

343. Crothall, *supra* note 271.

344. *Id.* A union official made the following remarks: "In reality our unions are much more concerned with mediating between management and labor in a bid to secure the best deal for both sides," even though "[i]t is our job to make sure managers do not violate workers' rights and take that very job very seriously." *Id.*

affiliations,³⁴⁵ so it is questionable whether they are competent enough to perform their job adequately and whether they give first priority to workers' interests.

Similarly, although staff-and-worker congresses in state-owned enterprises are designed to provide democratic management and supervision, their ultimate strength and effectiveness are questionable. In foreign-invested enterprises, labor-management committees, if allowed under progressive management or required by SEZ regulations, are nothing more than consultative bodies. Therefore, underground unions have been discovered in cities ranging from Beijing to Shenyang.³⁴⁶ Since independent unions pose a threat to political incumbents of the country, their activities will be closely monitored.

In sum, labor unrest in the domestic sector has been caused mainly by the removal of the "iron rice bowl" system, high inflation generated by an overheated economy, and arrears of wages. In the foreign sector, labor unrest stems largely from violations of current laws and regulations, corruption of officials, and management's lack of understanding of its workforce. In both cases, it appears that the administrative role of trade union has deprived workers of sufficient representation so that they finally take their fate in their own hands.

4. *The Labor Law of 1994*

Owing to the growing labor unrest, union leaders have long cried for the enactment of a labor code to protect the rights and interests of workers.³⁴⁷ The draft of the Labor Law had been revised more than thirty times, and many years had passed before its final enactment.³⁴⁸ It applies to (1) enterprises and individual economic units within Chinese territory (hiring units) and laborers who have employment relationship with the hiring

345. Roche, *supra* note 333. This article states that according to Chinese sources, workers in several Peking factories staged unprecedented ballot-box rebellions by rejecting official candidates for union posts and writing on branch election ballot slips the names of workers with no affiliation to the authorities.

346. *Peking Alarmed at Incidents in Factories*, *supra* note 334 (citing SOUTH CHINA MORNING POST).

347. See e.g. Chris Yeung, *Union Leaders in Call for Labor Laws*, SOUTH CHINA MORNING POST, Mar. 25, 1993, § News, at 11, available in LEXIS, World Library, ALLWLD File.

348. See *China Law Seeks to Avert Social Chaos*, Agence France Presse, Mar. 2, 1994, § Financial, available in LEXIS, World Library, ALLWLD File. Apparently, no official reasons have been given for the delay. However, it is possible that the government needs to spend more time in resolving ideological problems (conflicting priorities of promoting economic growth and protecting workers), observing how the contract employment system has developed, and making sure that the Labor Law will not deter foreign investment.

units and (2) government organs, institutions, and public/social organizations and their respective laborers who have entered into labor contracts.³⁴⁹ The significant provisions of the Labor Law are as follows.

(a) Labor Contract

An employment relationship is to be established through a labor contract,³⁵⁰ which legally binds the parties.³⁵¹ However, a labor contract will be void *ab initio* if (1) it violates any laws and administrative regulations or (2) it is concluded by means of fraud or threat.³⁵² Even so, if a portion of the labor contract is void, the remainder of the contract will still be valid.³⁵³

In addition, a labor contract should be written and contain these mandatory provisions: the duration of the contract, job contents, labor protection, labor conditions, compensation, labor discipline, grounds for termination, and liabilities for breach.³⁵⁴ The duration of a labor contract can be definite, indefinite, or job-specific.³⁵⁵ When a laborer who has worked continuously for ten years or more in the same unit requests an indefinite contract at the time of contract renewal, the unit should make an indefinite contract.³⁵⁶ Moreover, a labor contract can specify a probation period, which cannot last more than six months.³⁵⁷ The parties can also stipulate provisions in the labor contract about maintaining the confidentiality of the hiring unit's trade secrets.³⁵⁸

349. Labor Law, *supra* note 3, art. 2. "Institution" refers to those units dealing with education, science and research, arts, TV and radio news broadcasts, sports, social welfare, agriculture, forestry, water conservancy, etc., and their directive objective is not to accumulate capital for the country. BAIKE QUANSHU, *supra* note 119, at 648-49. The term "laodongzhe" literally means laborers. In the following discussion, "laborers" and "workers" are used interchangeably.

350. Labor Law, *supra* note 3, art. 16.

351. *Id.* art. 17.

352. *Id.* art. 18.

353. *Id.*

354. *Id.* art. 19.

355. *Id.* art. 20. For enterprises doing foreign business and trade, a definite contract can be short-term, medium-term, and long-term. In general, the hiring unit should sign long-term contracts with key business and management personnel. Duiwai Maoyi Jingji Hezuobu Guanyu Quanguo Waijingmao Qiye Quanmian Shixing Laodong Hetongzhi Youquan Wenti de Tongzhi [Notice of Ministry of Foreign Trade and Economic Cooperation Concerning Questions about the Full Implementation of the Labor Contract System by Foreign Business and Trade Enterprises throughout China] [hereinafter Notice on Labor Contract System], Dec. 15, 1994, *reprinted in* CHINA L. & PRAC.—CHINA L. LIB., Mar. 31, 1995, at 49.

356. Labor Law, *supra* note 3, art. 20. In addition, the hiring unit should also sign indefinite contracts upon request with workers who have worked for a longer time and will reach the retirement age within ten years. Notice on Labor Contract System, *supra* note 355.

357. Labor Law, *supra* note 3, art. 21.

358. *Id.* art. 22.

Apart from that, an enterprise can make a collective contract with its staff and workers, and the draft of the contract is to be discussed and adopted by the staff-and-worker congress or the entire workforce.³⁵⁹ The union should sign a collective contract on behalf of staff and workers, and if there is no union, the elected representatives of staff and workers will sign the contract.³⁶⁰ A collective contract becomes effective after fifteen days of its receipt by the labor-administration department if no objections have been raised.³⁶¹ Since the hiring unit and the entire workforce are legally bound by the collective contract, any individual staff or worker cannot sign a labor contract with compensation and employment provisions lower than those of the collective contract.³⁶²

(b) Remuneration and Benefits

The Labor Law reiterates the principles of "to each according to his work" and "equal pay for equal work."³⁶³ Although the State will regulate the total amount of wages macroscopically and wage levels are to be raised gradually based on economic development,³⁶⁴ the hiring unit can autonomously determine its methods of wage distribution and wage levels in accordance with its production and operations characteristics as well as economic performance.³⁶⁵ In particular, provincial, autonomous regional, and municipal governments directly under the central government are to

359. *Id.* art. 33.

360. *Id.* During consultation, each side has an equal number of representatives, ranging from three to 10. Laodongbu Guanyu Yinfa Jiti Hetong Guiding de Tongzhi [Notice of the Ministry of Labor Concerning the Printing and Distributing of "Collective Contract Regulations"] [hereinafter Notice Concerning Collective Contract], Dec. 5, 1994, art. 8, reprinted in CHINA L. & PRAC.—CHINA L. LIB., Mar. 31, 1995, at 51. The labor contracts of the representatives of staff and workers cannot be terminated within five years from the date they became representatives, unless a serious mistake has been committed. *Id.*, art. 11. If the parties cannot reach an agreement through consultation or unexpected problems arise, they can suspend their consultation, the duration of which cannot exceed sixty days. *Id.* art. 14.

361. Labor Law, *supra* note 3, art. 34. The duration of a collective contract may span from one to three years. Notice concerning Collective Contract, *supra* note 360, art. 16. If the parties decided to amend a collective contract, they should report it to the labor-administration department for examination within seven days of its revision. *Id.* art. 19. If any provisions of a collective contract are ineffective, the parties should amend those provisions and submit them within 15 days to the labor-administration department for reexamination. *Id.* art. 28.

362. Labor Law, *supra* note 3, art. 35.

363. *Id.* art. 46.

364. *Id.*

365. *Id.* art. 47.

establish minimum pay which will be reported to the State Council.³⁶⁶ To determine minimum pay, the government concerned should comprehensively refer to the following elements: the minimum living expenses for the laborer and the average support of a family, the average wage level of society, the labor production rate, the employment situation, and any differences in economic development among regions.³⁶⁷

More importantly, wages are to be paid monthly in currency to workers, and any embezzlement or arrears of wages without cause are forbidden.³⁶⁸ During legal holidays and leaves for wedding, funeral, or legally required participation of social activities, the hiring unit should pay wages in accordance with the law.³⁶⁹ In addition, if the labor contract is

366. *Id.* art. 48. One report states that by August 1995, 28 provinces, autonomous regions, and municipalities directly under the central government had officially adopted minimum wage standards. *China Publishes "White Paper" on Human Rights* [hereinafter *Human Rights*], 1995 BBC Summary of World Broadcasts, Dec. 29, 1995, Pt. 3: Asia-Pacific, available in LEXIS, World Library, ALLWLD File (citing Xinhua News Agency). As of 1995, the minimum wage in the Zhuhai Special Economic Zone is 380 yuan per month, while Guizhou's minimum wage is 120 yuan. These wages do not include overtime pay or subsidies. Willy Wo-lap Lam, *Mainland in Push to Set Up Pay Minimum*, SOUTH CHINA MORNING POST (International Weekly), Jan. 7, 1995, at 1. In addition, the minimum wage in Shenzhen covers remuneration for normal labor during statutory working time, including basic wages, bonuses and subsidies or allowances paid in the form of wages, but excluding statutory labor insurance and welfare benefits, etc. 1995 CHINA LEGAL DEVELOPMENTS BULLETIN, at 29 (summarizing Regulations of the Shenzhen Special Economic Zone on Minimum Wage, Nov. 2, 1994).

367. Labor Law, *supra* note 3, art. 49. On November 24, 1993, the Ministry of Labor promulgated the Qiye Zuidi Gongzi Guiding [Notice on Regulations of Minimum Wage in Enterprises], reprinted in LAODONG SHOUCHE, *supra* note 22, at 330, which directs local authorities to establish a minimum wage. After the passage of the Labor Law, the Ministry of Labor promulgated another notice amending and supplementing the 1993 Notice. Specifically, food and housing allowances which are not currency income are not to be included in calculating the minimum wage. Laodongbu Guanyu Shishi Zuidi Gongzi Baozhang Zhidu de Tongzhi [Notice of the Ministry of Labor concerning the Implementation of Guaranteed Minimum Wage System], Oct. 8, 1994, reprinted in CHINA L. & PRAC.—CHINA L. LIB., June 27, 1995, at 21.

368. Labor Law, *supra* note 3, art. 50. In 1994, the Ministry of Labor issued the Provisional Regulations on the Payment of Wages, which require employers to record details of wages and hours worked (and the name and signature of the person entrusted to collect wages if the worker is unable to collect wages in person) and keep the records for two years. In addition, only individual income tax contributions, social insurance contributions, and support or other payments ordered by the court can be deducted from wages. If an employee causes damages to the employer, the latter may deduct not more than 20 percent of the employee's monthly wages as long as the remaining wages do not fall below the local minimum pay requirement. 1995 CHINA LEGAL DEVELOPMENTS BULLETIN, Vol. 2, No. 1, at 11-12 (summarizing the Provisional Regulations on the Payment of Wages, Dec. 6, 1994).

369. Labor Law, *supra* note 3, art. 51. Legal holidays are New Year, Spring Festival, International Labor Day, National Day, and any other days designated by laws and regulations. *Id.* art. 40.

terminated based on mutual agreement, inability to work after illness or nonwork-related injury, failure to become qualified, subsequent changes in objective circumstances, or reduction of workforce, the hiring unit must give its workers economic compensation pursuant to relevant State regulations.³⁷⁰

Furthermore, the State is to develop a social insurance system and establish a social insurance fund to enable laborers to obtain assistance and compensation under circumstances such as old age, sickness, work-related injury, unemployment, and childbirth.³⁷¹ The hiring unit and its workers must participate in social insurance and make social insurance

370. *Id.* art. 28. The Ministry of Labor's Measures on Economic Compensation for Violation and Termination of Labor Contract provide the following: In case of termination based on mutual agreement, the hiring unit should pay one month's wages for each year of service, subject to a cap of 12 months, and one month's wages for service less than one year (art. 5.) In case of termination due to inability to work after illness or nonwork-related injury, the hiring unit should pay one month's wages for each year of service and a medical allowance of at least 6 months' wages (art. 6). For serious illness or terminal disease, an additional amount of 50 or 100 percent of the medical allowance should be paid, respectively (art. 6). In case of changes in objective circumstances or layoffs due to reorganization or serious difficulty in production or operations, the hiring unit should pay one month's wages for each year of service (arts. 8 & 9). The term "wages" mean the average wage of the worker for the preceding 12 months under the circumstances of normal production (art. 11). If the hiring unit does not pay economic compensation after the termination of a labor contract, it will have to pay an additional amount equal to 50 percent of the economic compensation (art. 10). Laodongbu Weifan he Jiechu Laodong Hetong de Jingji Buchang Banfa [Ministry of Labor's Measures on Economic Compensation for Violation and Termination of Labor Contract] [hereinafter Economic Compensation Measures], Dec. 3, 1994, reprinted in CHINA L. & PRAC.—CHINA L. LIB., June 27, 1995, at 31.

371. Labor Law, *supra* note 3, art. 70. It has been reported that reforms have been formulated for both the pension insurance system and the unemployment insurance system. Lijun Chen, *A New Model of Old-Age Pension Insurance Will Be Implemented*, CHINA LAW UPDATE, June 25, 1995, at 8. In March 1995, the State Council issued the Circular Concerning the Deepening of Reform of the Endowment Insurance System for Staff and Workers of Enterprises, establishing a pension insurance system that combines social overall planning and personal accounts. *Human Rights, supra* note 366. Under the new system, an enterprise will contribute 13 percent of its total wages, and the individual worker will contribute as much as 3 percent of his/her salary. The contribution by individuals will increase by around 1 percent every two years until it amounts to the portion required under unified social planning. The use of personal accounts reflects the level of wages and the difference between various kinds of work, thus creating a direct incentive to work efficiently. Owing to differences among various provinces, the State Council provides two programs which differ on the percentage of personal accounts for provinces to choose. Chen, *supra* note 371. In addition, the unemployment insurance will be extended to urban workers employed in enterprises of different forms of ownership and staff workers who have signed labor contracts with government agencies, institutions, and social organizations. The unemployment relief standards will be related to local minimum wage standards, and the duration of relief payment will vary with length of service and not exceed 24 months. *Id.*

contributions.³⁷² Although the criteria for receiving social insurance benefits are to be determined by laws and regulations, workers must be paid in full on time.³⁷³ In addition, the hiring unit is encouraged to establish a supplementary insurance, while the laborer is encouraged to keep savings.³⁷⁴

(c) Maximum Hours and Overtime Work

Workers cannot work more than eight hours a day or forty-four [forty] hours a week³⁷⁵ and must be guaranteed at least one day's [two days'] rest per week.³⁷⁶ Any variations of these requirements must be approved by the labor-administration department.³⁷⁷ For those who are paid on a piece-rate basis, the hiring unit should reasonably determine their labor quantity and the standards of piece-rate compensation in accordance with the eight-hour or forty-four-hour system.³⁷⁸

If the hiring unit has production or management needs, it should consult the union and its workers to extend the working hours.³⁷⁹ Generally, overtime work cannot exceed one hour per day.³⁸⁰ When special circumstances render it necessary to have longer overtime work, the hiring unit, having taken the health of workers into consideration, may ask workers to do overtime work for a maximum of three hours per day or thirty-six hours per month.³⁸¹ However, restrictions of overtime work can be disregarded if (1) natural disasters, mishaps, and any other situations threatening the lives, health, or property of laborers have occurred and need to be handled immediately, (2) the malfunction of

372. Labor Law, *supra* note 3, art. 72. See *supra* note 371 for the required amounts of contribution.

373. Labor Law, *supra* note 3, art. 73. See also *supra* note 371.

374. *Id.* art. 75.

375. *Id.* art. 36. In March, 1995, the State Council authorized the adoption of a five-day work week. Regulations of the State Council governing Working Hours for Workers [hereinafter Working Hours Regulations], Mar. 25, 1995, art. 3, reprinted and translated in 2 CHINA LAWS, *supra* note 3, ¶ 12-622. If an enterprise or institution has difficulties in implementing these regulations, they may defer implementation (the latest day for institutions is January 1, 1996, and the latest date for enterprises is May 1, 1997). Working Hours Regulations, *supra* note 375, art. 9. Officials said that the new system will boost productivity and create one million new jobs. *China Marks May Day by Adopting Five-Day Work Week*, Agence France Presse, May 1, 1995, § Int'l News, available in LEXIS, World Library, ALLWLD File.

376. Labor Law, *supra* note 3, art. 38. Since workers work eight hours a day and 40 hours per week, most of them will probably have two days off.

377. *Id.* art. 39.

378. *Id.* art. 37.

379. *Id.* art. 41.

380. *Id.*

381. *Id.*

production facilities, communications and transportation lines, or public utilities has affected production and public interest so that immediate repair must be done, or (3) any situations determined by laws or administrative regulations.³⁸²

In addition, overtime pay rate is set forth as follows: 150 percent of the normal-hour wages for overtime work after regular hours, 200 percent for overtime work done in the rest day when no other day can be arranged for rest, and 300 percent for overtime work done during legal holidays.³⁸³ Laborers who have worked for more than one year are entitled to annual vacation with pay, and the details will be established by the State Council.³⁸⁴

(d) Occupational Safety and Health

The hiring unit must establish and perfect a labor protection and health system, vigorously carry out labor safety and health regulations and standards, educate workers on labor safety and health, prevent accidents during the labor process, and reduce occupational hazards.³⁸⁵ On one hand, the hiring unit must provide its workers with labor safety and health conditions established by the State and necessary labor-protection articles, as well as regularly check the health of workers who are engaged in work with occupational hazards.³⁸⁶ On the other hand, workers must strictly observe safety rules during the labor process,³⁸⁷ while they have the rights (1) to refuse to carry out orders that violate safety rules and force them to experience risks and (2) to criticize, report, and file charge against behavior endangering their lives and safety.³⁸⁸ In any event, injuries, deaths, and occupational diseases are to be reported for the purposes of compilation of statistics and risk management.³⁸⁹

(e) Training

Laborers who want to engage in special operation must go through special training and obtain qualifications for the special operation.³⁹⁰ Workers who will engage in technical work must receive training before

382. *Id.* art. 42.

383. *Id.* art. 44.

384. *Id.* art. 45.

385. *Id.* art. 52.

386. *Id.* art. 54.

387. *Id.* art. 56.

388. *Id.*

389. *Id.* art. 57.

390. *Id.* art. 55.

assumption of their duties.³⁹¹ In addition, local governments at various levels should include occupational training in their economic development plans.³⁹² The hiring unit should establish a system of occupational training and withdraw funds from the training budget in accordance with State regulations to provide laborers with occupational training.³⁹³ Last of all, a system of certification will be implemented for acquisition of occupational skills.³⁹⁴

(f) Termination

The parties to a labor contract can terminate it after reaching an agreement through consultation.³⁹⁵ Moreover, the hiring unit can terminate a labor contract if (1) the worker is proved to be unqualified for employment during the probation period, (2) the worker has seriously violated labor discipline or the rules and regulations of the hiring unit, (3) the worker has seriously neglected job duties or has committed jobbery and fraud, causing great damage to the interests of the hiring unit, or (4) the worker is being criminally prosecuted.³⁹⁶ Likewise, the worker can terminate a labor contract at any time if (1) he/she is on probation, (2) the hiring unit uses violence, threat, or illegal restraint of freedom to force labor, or (3) the hiring unit has not paid compensation or has failed to provide the employment conditions pursuant to the labor contract.³⁹⁷

In addition, a hiring unit can terminate a labor contract with a written notice given thirty days in advance if (1) the worker cannot resume the original job or perform another job arranged by the hiring unit after the treatment period for sickness or nonwork-related injury has passed, (2) the worker is unable to perform his/her job, even after training or change of post, or (3) substantial changes in objective circumstances have subsequently occurred, which render the performance of the contract impossible, causing the parties to fail to reach any new agreement after consultation.³⁹⁸ Similarly, a worker can terminate a contract by giving a thirty-day written notice, even though the law is silent as to whether he/she must provide proper reasons.³⁹⁹

391. *Id.* art. 68.

392. *Id.* art. 67.

393. *Id.* art. 68.

394. *Id.* art. 69.

395. *Id.* art. 24.

396. *Id.* art. 25.

397. *Id.* art. 32.

398. *Id.* art. 26.

399. *Id.* art. 31.

Most of all, when it becomes necessary to retrench workers during the period of reorganization pending bankruptcy or serious difficulties in production and operations, a hiring unit can lay off workers if it has given a thirty-day notice to the trade union or the entire workforce, has listened to its opinions, and has reported to the labor-administration department.⁴⁰⁰ However, if the hiring unit wants to hire workers within six months of the dismissal, it must first hire those who have been laid off.⁴⁰¹ Regarding the termination of a labor contract, the union can voice its opinions if it deems the decision inappropriate, or it can demand the case to be handled anew if there have been any violations of laws or regulations or breach of contract.⁴⁰² If the worker requests arbitration or files a lawsuit, the union should give its support and assistance.⁴⁰³

Nevertheless, in the following situations, the hiring unit cannot terminate a labor contract based on such reasons as inability to resume work, lack of qualifications, change in objective circumstances, or reduction of workforce: (1) the worker has suffered occupational disease or work-related injury and has been affirmed of having lost or partially lost work ability, (2) the worker is on sick leave for illness or injury, (3) the female worker is being pregnant, giving birth to a baby, or nursing a baby, and (4) any other circumstances mandated by laws and administrative regulations.⁴⁰⁴

(g) Unionization and Worker Participation

Laborers have the rights to participate in and organize unions, which represent and protect laborers' legal rights and interests as well as conduct activities independently in accordance with the law.⁴⁰⁵ Laborers, through staff-and-worker congresses or some other forms of representation, participate in democratic management or consult with the hiring unit to protect their legal rights and interests.⁴⁰⁶

(h) Dispute Resolution

Generally, whenever a labor dispute arises, the parties can either resolve it through mutual consultation or request mediation, arbitration, and adjudication in accordance with the law.⁴⁰⁷ Moreover, a labor dispute should

400. *Id.* art. 27.

401. *Id.*

402. *Id.* art. 30.

403. *Id.*

404. *Id.* art. 29.

405. *Id.* art. 7.

406. *Id.* art. 8.

407. *Id.* art. 77.

be resolved based on the principles of lawfulness, justice, and promptness.⁴⁰⁸ The parties to a labor dispute can request mediation by the labor-dispute mediation committee in the hiring unit.⁴⁰⁹ If mediation proves unsuccessful, one party can ask for arbitration from the labor-dispute arbitration committee.⁴¹⁰ One party can also directly request arbitration from the labor-dispute arbitration committee, and if it does not accept the arbitral decision, it can bring a legal action.⁴¹¹

In particular, if a labor dispute arises out of the formation of a collective labor contract, the parties can resolve it through mutual consultation, and if consultation fails, the local labor-administration department can coordinate the parties concerned to resolve the dispute.⁴¹² Moreover, in case of a labor dispute arising out of the performance of a collective labor contract, the parties can request arbitration if consultation fails.⁴¹³ If one party does not accept the arbitral ruling, it can sue in court within 15 days of the receipt of the arbitration decision.⁴¹⁴

The mediation committee within the hiring unit will consist of representatives from staff and workers, the hiring unit, and the trade union, and it will be chaired by the union representative.⁴¹⁵ The arbitration committee will be composed of representatives from the labor-administration department, same-level trade union, and the hiring unit, and it will be chaired by the labor-administration department's representative.⁴¹⁶ Arbitration should be requested in writing within sixty days of the labor dispute, and arbitration decision should generally be given within sixty days of the receipt of the arbitration application.⁴¹⁷ If one party objects to the arbitral award, it can bring a legal action within fifteen days of the receipt of the arbitration decision; if one party does not carry out the arbitral ruling

408. *Id.* art. 78.

409. *Id.* art. 79.

410. *Id.*

411. *Id.*

412. *Id.* art. 84. If the labor-administration department decided to handle a dispute regarding the signing of a labor contract, it should resolve the dispute within 30 days; for complicated cases, the labor-administration department can extend it up to 15 days. Notice Concerning Collective Contract, *supra* note 360, art. 35. In addition, enterprises cannot terminate employment relationship with representatives of staff and workers during the dispute period. *Id.*, art. 36.

413. Labor Law, *supra* note 3, art. 84. If a dispute arises out of the performance of a contract, it must be resolved in accordance with the Labor-Dispute Handling Regulations. Notice Concerning Collective Contract, *supra* note 360, art. 39.

414. Labor Laws, *supra* note 3, art. 84.

415. *Id.* art. 80.

416. *Id.* art. 81.

417. *Id.* art. 82.

and does not sue within the legal time limit, the other party can apply to the court for enforcement.⁴¹⁸

(i) Protection for Women and Minors

The Labor Law states that laborers will not receive employment discrimination on the basis of nationality, race, gender, and religious belief.⁴¹⁹ More specifically, women are to receive equal employment opportunities, and employers cannot refuse to hire women or raise the qualifications for female applicants, except for jobs or positions designated by the State to be unsuitable for women.⁴²⁰ With respect to minors, hiring units are forbidden to hire anyone under the age of sixteen, except for artistic, sports, and special craft units that have obtained State approval and guaranteed the rights of minors to receive education.⁴²¹ For those who are at least sixteen but younger than eighteen, hiring units must not arrange them to engage in such jobs as mining and poisonous/hazardous work and should have them receive regular physical check-up.⁴²²

(j) Implementation

The labor-administration departments at the county level or above are empowered to supervise and inspect the compliance of labor regulations and to stop or order hiring units to correct their illegal behavior.⁴²³ The labor inspector can enter the hiring unit to check compliance, read necessary materials, and inspect the workplace, but in doing so, he/she must show identification and follow relevant regulations.⁴²⁴ In addition, the trade unions at various levels and the relevant departments of local governments at the county level or above can supervise the hiring unit's compliance with

418. *Id.* art. 83.

419. *Id.* art. 12.

420. *Id.* art. 13. In fact, protective measures for women include prohibition of work in mines; restriction of work under high altitude, low temperature, and cool water during menstruation period; and prohibition of overtime and night work for women who are over seven-month pregnant or who are nursing babies less than one year old. Moreover, maternity leave must be at least 90 days. *Id.* arts. 59-63.

421. *Id.* art. 15.

422. *Id.* arts. 64, 65.

423. *Id.* art. 85. In September, 1995, two national inspection teams checked on the enforcement of the Labor Law in 15 cities and provinces, and the Ministry of Labor sponsored a two-month inspection which would visit enterprises and employment services in such areas as Heilongjiang, Liaoning, Jilin, Jiangsu, Shanghai, Zhejiang, Fujian, and Hebei. Cao Min, *China: Firms Face Labor Team Inspection*, REUTER TEXTLINE CHINA DAILY, Sept. 23, 1995, available in LEXIS, World Library, ALLWLD File.

424. Labor Law, *supra* note 3, art. 86.

labor laws and regulations.⁴²⁵ Lastly, any organization or individual can report and file charge against behavior in violation of labor laws and regulations.⁴²⁶

(k) Sanctions

In general, if the labor rules of a hiring unit violate labor laws and regulations, the labor-administration department can give warnings and order it to make corrections, or hold it liable for damages incurred by its workers.⁴²⁷ If a hiring unit obstructs labor supervision and inspection without cause or retaliate against informers, either fines will be imposed or criminal liability be pursued.⁴²⁸ Specifically, different types of sanction are spelled out for different kinds of violation under the Labor Law,⁴²⁹ and the

425. *Id.* arts. 87 & 88.

426. *Id.* art. 88.

427. *Id.* art. 89.

428. *Id.* art. 101.

429. Labor Law, *supra* note 3, arts. 90-100, 102-04. The following is a summary of these provisions:

Wages, Overtime, and Social Insurance

The labor-administration department can order the hiring unit to pay wages or economic compensation, and damages under these circumstances: (1) embezzlement or arrears of wages without cause, (2) refusal to pay overtime wages, (3) paying wages below the local minimum pay standard, and (4) nonpayment of economic compensation after the termination of a labor contract. If there are violations of overtime provisions, the labor-administration department can give a corrective warning and impose a fine. If the hiring unit does not pay social insurance without cause, the labor-administration department can order it to pay by a certain date and can impose a delay penalty for not paying within by designated time.

Labor Safety and Health

If there are violations of the provisions on labor safety and health, the labor-administration department or other departments concerned can order the hiring unit to rectify the situation and impose a fine, or apply to local governments at the county level or above for suspension of production in serious cases. If the hiring unit does not adopt policies to deal with accidents or hidden dangers, which results in serious accidents causing loss of lives or property damage, the responsible person(s) will be prosecuted for criminal liability. If the hiring unit forces workers to perform dangerous work in violation of rules and regulations and serious injuries or deaths result, the responsible person(s) will be prosecuted for criminal liability.

Protection for Women and Minors

If the hiring unit employs anyone who is younger than 16, the labor-administration department can order it to take corrective actions and impose a fine, or have the industry-and-commerce-administration department revoke its business license. In case of violations of the protective measures for women and workers who are at least 16 but younger than 18, the labor-administration department can order it to take corrective actions and impose a fine, or have it pay compensation to those who have suffered damage.

Forced Labor

The security department can detain responsible persons for less than 15 days and impose a fine, or warn if they (1) use violence, threat, or illegal restraint of freedom to force labor or

measures of "economic compensation,"⁴³⁰ "administrative penalties,"⁴³¹ and

(2) insult, administer bodily punishment, beat, illegally search, or detain its workers. Any of the preceding conduct can amount to a crime, in which case the responsible person will be prosecuted for criminal liability.

Violation of Labor Contract

If the hiring unit causes a worker to incur losses as a result of an invalid labor contract, it should compensate the worker. Moreover, if the hiring unit terminates a labor contract in violation of the Labor Law or intentionally delays signing a labor contract, the labor-administration department can order it to take corrective actions or have it compensate the worker if there has been any damage. If a hiring unit employs someone whose labor contract has not been terminated and has caused economic losses to the original unit, it should be jointly responsible for compensation. If the worker terminates a labor contract in violation of the Labor Law or in breach of his/her duty not to disclose confidential information, which has caused economic losses to the hiring unit, he/she should be responsible for compensation.

Misconduct of Public Officials

If the personnel of the labor-administration department or other departments concerned abuse their power, neglect their duty, and commit jobbery and fraud, they will be prosecuted for criminal liability if such conduct amount to a crime, or they will receive administrative punishment if such conduct does not amount to a crime. If any government official or agent of social-insurance organs embezzles social insurance funds and such conduct amounts to a crime, he or she will be prosecuted for criminal liability.

430. It appears that economic compensation is to be given when: (1) the labor contract is terminated upon mutual agreement or due to inability to work, change in objective circumstances, or layoffs, *see* Economic Compensation Measures, *supra* note 370, or (2) the provisions of labor statutes and regulations have been violated. For instance, if the hiring unit embezzles wages or delay payment of wages without cause, or refuses to make overtime pay, it must pay the total amount of wages owed plus a 25 percent as economic compensation. Economic Compensation Measures, *supra* note 370, art. 3. If the hiring unit pays below the minimum wage, it must pay the difference between the minimum wage and what has been paid plus a maximum amount of 25 percent as economic compensation. *Id.* art. 4.

431. Specific administrative penalties for violation of the Labor Law have been reported as follows: (1) employers who force workers to work overtime without consulting the union or workers are subject to a corrective warning and a fine of up to RMB 100 for each hour of overtime work; (2) employers who embezzle or hold back wages without cause, refuse to pay overtime wages, pay wages below the local minimum pay, or fail to pay economic compensation upon termination of labor contracts will be ordered to pay the remuneration and economic compensation plus an amount equal to one to five times the total; (3) if employers do not pay social insurance fees on behalf of their workers, they will pay a daily penalty of 0.2 percent of the outstanding amount; (4) if employers do not meet safety standards, they may be ordered to take corrective action within a time limit and be fined up to RMB 50,000 for noncompliance; (5) employers who violate regulations and cause accidents such as acute poisoning, serious injury, or death may be fined up to RMB 10,000 for each case; (6) employers who violate the rights of women and those who are at least 16 but younger than 18 may be fined up to RMB 3000 per person per infringement; and (7) repeated offenders may be fined up to five times the normal fines. 1995 CHINA LEGAL DEVELOPMENTS BULLETIN, Vol. 2, No. 1, at 12-13 (summarizing Measures concerning Administrative Penalties for Violations of the Labor Law of the People's Republic of China, Dec. 26, 1994).

damages⁴³² are supplemented by subsequent administrative rules.

(1) Discussion

To a certain extent, the Labor Law is a recapitulation of existing labor statutes and regulations.⁴³³ However, it has also filled in gaps left by these statutes and regulations. For instance, the provisions on allowing the parties to stipulate a trade-secret confidentiality clause in the labor contract and permitting the hiring unit to seek damages for economic losses⁴³⁴ will enable employers to protect their business know-how, while the provisions on maximum hours and overtime pay⁴³⁵ will provide local authorities with uniform standards to follow.

432. In the Weifan Laodongfa Youguan Laodong Hetong Guiding de Peichang Banfa [Measures on Damages for Violating the Labor Contract Provisions of the Labor Law], May 10, 1995, arts. 3-6, *reprinted in CHINA L. & PRAC.—CHINA L. LIB.*, Sept. 13, 1995, at 19, the following damages are enumerated: (1) work-related injury (25 percent of the medical costs) (medical treatment paid by the hiring unit also); (2) injury to the bodily health of women and workers who are at least 16 but younger than 18 (25 percent of medical costs) (medical treatment paid by the hiring unit also); (3) the laborer's termination of a labor contract in violation of regulations or the labor contract (recruitment costs, training costs, direct economic losses to production and operations, and any other damages stipulated in the labor contract); (4) hiring of a laborer whose employment contract has not been terminated (joint liability being not lower than 70 percent of the total economic losses to the original unit); (5) disclosure of confidential information, causing economic losses to the hiring unit (article 20 of the Against Improper Competition Law will apply), etc.

433. *See e.g.* Implementation Regulations, *supra* note 101, art. 2 (duration of a labor contract); *Id.* art. 8; Labor Management Regulations, *supra* note 186, art. 2; Labor Management Implementation Provisions, *supra* note 186, art. 5 (contents of a labor contract); Implementation Regulations, *supra* note 101, art. 12 (circumstances under which the enterprise can terminate a labor contract); *Id.* art. 14; Labor Management Implementation Provisions, *supra* note 186, art. 7 (circumstances under which the enterprise cannot terminate a labor contract); Implementation Regulations, *supra* note 101, art. 31; Labor Management Regulations, *supra* note 186, art. 14 (dispute resolution); Dismissal Regulations, *supra* note 101, art. 5 (protesting dismissal); Labor Management Implementation Provisions, *supra* note 186, art. 7 (one month's advance notice for dismissal); Labor Management Regulations, *supra* note 186, art. 4; Autonomy Regulations, *supra* note 186, art. 1(iv) (lay-offs permissible due to changes in production and technological condition); Labor Management Implementation Provisions, *supra* note 186, art. 3 (probationary period); *Id.* art. 17 (reporting industrial accidents); Female Workers Protection Regulations, *supra* note 23, arts. 3, 5-8, 10 (protection of female staff and workers); Female Rights Law, *supra* note 275, arts. 22, 24 (no discrimination in hiring and promotion on the basis of gender); Trade Union Law, *supra* note 300, art. 19 (trade union to voice its opinions and demand a dismissal case to be handled anew).

434. Labor Law, *supra* note 3, arts. 22 & 102.

435. *Id.* arts. 36 & 41.

In addition, the Labor Law uses the word "unemployment" rather than "waiting for employment."⁴³⁶ In a way, this change of wording indicates that the government has accepted unemployment as one aspect of labor in a socialist market economy. Nonetheless, while the Labor Law allows managers to lay off workers, it also requires them to offer dismissed workers employment if they recruit within the following six months.⁴³⁷ Hence, the government also tries to ensure that workers will not be arbitrarily dismissed. As a matter of fact, some provisions of the Labor Law reflect the veracity of the alleged abuses of workers. For example, the prohibition of using violence, threat, or restraint of freedom to force laborers to work⁴³⁸ and the empowerment of the security department to detain or fine violators⁴³⁹ indicate the truthfulness of the news reports regarding innovative and strict labor discipline.⁴⁴⁰ Likewise, the provisions on maximum hours, overtime work, and monthly payment of wages⁴⁴¹ confirm the reports about excessive overtime work and arrears of wages.⁴⁴² Moreover, the sanction against the hiring of workers whose contracts have not terminated⁴⁴³ reflects the government's concern for the current phenomenon of poaching employees among foreign-funded companies⁴⁴⁴ and between private and foreign-owned enterprises.

Most of all, the Labor Law provides a range of sanctions for different types of noncompliance,⁴⁴⁵ even though its provisions are still broad guidelines, giving the labor-administration department much discretion to determine the exact penalties. To a certain extent, the inclusion of penalties in the Labor Law is a significant step of China's efforts in regulating labor and employment. Of the major statutes and regulations discussed above, the phrases "administrative liability" and "administrative penalty" are commonly used.⁴⁴⁶ Owing to their vagueness, these regulations are devoid of deterrent effect. In contrast, the Labor Law contains a large section on sanctions, ranging from warnings, orders to take corrective actions, fines, suspension of production, revocation of

436. *Id.* arts. 70 & 73.

437. *Id.* art. 27.

438. *Id.* arts. 32 & 96.

439. *Id.* art. 96

440. *See supra* note 269.

441. Labor Law, *supra* note 3, arts. 36, 41, 50.

442. *See supra* notes 335 (overdue payment of wages) & 337 (excessive overtime work).

443. Labor Law, *supra* note 3, art. 99.

444. *See supra* note 206.

445. Labor Law, *supra* note 3, arts. 91, 100 (wages, overtime, & social insurance); 92, 93 (labor safety and health); 94, 95 (protection for women and minors); 96 (forced labor); 97-99, 102 (violation of labor contract); 103-04 (misconduct of public officials).

446. *See e.g.* Hiring Regulations, *supra* note 101, art. 13; Autonomy Implementation, *supra* note 186, art. 8.

license, compensatory damages, to criminal liability.⁴⁴⁷ As discussed above, the Ministry of Labor has already issued implementing measures on economic compensation and administrative penalties to supplement the Labor Law. Hence, violators now will not disregard the law without first considering the consequences of his or her actions.

On the whole, the basic provisions of the Labor Law reflect the government's industrial policies. For instance, the provisions on labor contract⁴⁴⁸ reveal the government's intent to establish a labor market based on employment contract which will eliminate lifetime tenure,⁴⁴⁹ increase labor mobility, and reduce worker lethargy. To accomplish this objective and maintain social stability, there must also be a social insurance fund which will provide for the unemployed and the retired workers. The Labor Law not only requires both the hiring unit and the laborer to contribute to the social insurance fund, but also encourages the hiring unit to establish a supplementary insurance and the laborer to keep savings.⁴⁵⁰ These provisions reflect the government's intent to establish a mobile labor market buttressed by an administratively managed social insurance system to which enterprises and workers contribute.

Similarly, to increase technical competency and promote economic development, the government emphasizes occupational training and industrial peace. Regarding occupational training, the Labor Law contains provisions on the development of training programs, certification of occupational skills, and establishment of job services.⁴⁵¹ To promote industrial peace, the Labor Law not only reiterates the progressive pattern of consultation, mediation, arbitration, and lawsuit to resolve labor disputes, but also sets forth specific time limits to expedite the resolution process.⁴⁵²

447. Labor Law, *supra* note 3, arts. 89-104.

448. *Id.* arts. 16-20.

449. One exception is that if the worker has worked consecutively for 10 or more years, he/she can request a labor contract with an indefinite duration. *Id.* art. 20.

450. *Id.* arts. 72, 75.

451. *Id.* arts. 10-11, 66-69.

452. *Id.* arts 77-84. By the end of June, 1995, about 92 percent of local counties had established labor-arbitration committees. Cao Min, *China: New Labor Law Worked On*, REUTER TEXTLINE CHINA DAILY, July 5, 1995, available in LEXIS, World Library, ALLWLD File (quoting Labor Minister Li Boyong). Moreover, in 1994, labor-arbitration committees at all levels accepted and handled a total of 19,098 cases, an increase of 6,740 cases from the previous year. The settlement rate was 94 percent. *Labor Ministry Issues Data on Employment in 1994*, 1995 BBC Summary of World Broadcasts, June 27, 1995, Pt. 3: Asia-Pacific, available in LEXIS, World Library, ALLWLD File (citing RENMIN RIBAO). The disputes concentrated on minimum wage and welfare; in Guangdong, more than 40 percent of the disputes happened in foreign-funded enterprises or joint ventures, most of whose outcome favored employees. *China to Launch Campaign to Publicize Labor Law* [hereinafter *Launch Campaign*], 1995 Xinhua News Agency, June 10, 1995, available in LEXIS, World Library, ALLWLD File.

Other than that, the principle of "equal pay for equal work"⁴⁵³ evidences the government's policy of eliminating discrimination against women and equalizing the pay packages of Chinese and expatriate managers. The sanction against disclosing trade secrets⁴⁵⁴ reveals the government's intent to protect businesses from losing competitiveness. In addition, even though the government allows enterprises to have increased autonomy in making wage decisions, it will regulate wages at the macroeconomic level.⁴⁵⁵ These provisions reflect the government's intent to oversee wage reforms in order that economic and social stability will not be disturbed. Despite the legislative intent behind the enactment of the Labor Law, several areas of labor and employment in China are still unresolved. In the first place, it appears that the union is not given more power to advocate the interests of workers. As analyzed above, the Trade Union Law requires foreign-funded enterprises to listen to the opinions of the union, while strikes as an economic weapon are not a right of workers. Hence, despite the passage of the Labor Law, unions in China still have limited power and thus cannot fully advocate the interests of workers even if they choose to do so.

Likewise, article 80 of the Labor Law provides that the trade union's representative will chair the mediation committee.⁴⁵⁶ Therefore, the role of the trade union is more neutral, not advocating the interests of workers. However, article 81 also suggests that the trade union's representative will represent the worker in the arbitration committee.⁴⁵⁷ These provisions have certainly generated confusion. In any event, it is reasonable to conclude that using the American ideology to analyze unions in China may not be appropriate. If the role of Chinese trade union is administrative, the protection of workers will totally depend on market forces as well as protective legislation and its enforcement.

Apart from union representation, wage reform is another area of labor and employment left unresolved by the Labor Law. As discussed above, wage reforms have been implemented so that the practice of egalitarian distribution will end, reward will be linked to performance, and workers will be more motivated. However, since China has a population of more than one billion, must constantly create new jobs, and still has a relatively backward economy,⁴⁵⁸ its wage reform can be accomplished only gradually and within these national constraints. In addition, since China is a socialist country, it must also resolve

453. Labor Law, *supra* note 3, art. 46.

454. *Id.* art. 102.

455. *Id.* arts. 46-47.

456. *Id.* art. 80.

457. *Id.* art. 81.

458. *Wage Reform, supra* note 50.

ideological issues in its efforts to reform the wage system. That is, when China tries to eliminate the practice of egalitarian distribution gradually and adhere to the principle of distribution according to work, it must also avoid excessive differences in income.⁴⁵⁹ Since wage reform is a very significant component of labor reform in China, the enactment of the Labor Law is only part of the overall efforts.

More importantly, the problems of surplus workers and unemployment need to be resolved. It has been reported that many Chinese enterprises are overstaffed by as much as 30 percent in some state-owned enterprises, and almost five million people were jobless.⁴⁶⁰ Although the five-day work week has been adopted to create additional jobs, some bosses will simply organize rosters rather than hire new employees.⁴⁶¹ Therefore, other solutions must be designed to reduce unemployment and worker redundancy.

In conclusion, the Labor Law is a basic, national law, delineating government policies, providing uniform standards, and leaving details for implementation to local authorities. The Ministry of Labor has promulgated a number of rules and regulations to provide more guidance concerning certain provisions of the Labor Law.⁴⁶² Nonetheless, problems relating to weak union representation, wages, surplus workers, and unemployment still need to be resolved.

5. *The Regulations on Labor Management in Foreign Investment Enterprises*

Since the Labor Law applies to all enterprises and economic units located in China,⁴⁶³ the distinction between domestic and foreign-funded enterprises should be either abolished or narrowed. Therefore, this gesture will result in the equal treatment of domestic and foreign enterprises. Nevertheless, the subsequent Regulations on Labor Manage-

459. *Id.*

460. *China: Weekend Win for China's Workers*, SYDNEY MORNING HERALD, May 10, 1995, available in LEXIS, World Library, ALLWLD File.

461. *Id.*

462. The supplementary rules and regulations to the Labor Law include special protection for minors, working hours, minimum wage and payment of wages, collective contract, economic compensation for violation or termination of a contract, lay-off for economic reasons, sick leaves or medical treatment period for nonwork-related injuries, on-the-job training, etc. *Supportive Regulations Issued for Labor Law*, Xinhua News Agency, Feb. 3, 1995, available in LEXIS, World Library, ALLWLD File. Several of these supplementary rules have been discussed in the foregoing sections.

463. Labor Law, *supra* note 3, art. 2.

ment in Foreign Investment Enterprises (FIE Regulations) have once again cast doubt on this development.⁴⁶⁴

To a certain extent, the FIE Regulations appear to reinstate the distinction between domestic and foreign-funded enterprises and take back some autonomy already granted to foreign investors by the Labor Law and previous regulations. For instance, the FIE Regulations require foreign-funded enterprises to obtain prior approval from the local labor-administration department if they want to recruit directly or from other areas.⁴⁶⁵ In addition, if a foreign investment enterprise wants to terminate a labor contract with a thirty-day advance notice, it must obtain the consent of the trade union.⁴⁶⁶

Similarly, the FIE Regulations require employers to pay a livelihood allowance in three cases.⁴⁶⁷ The amount of allowance is one month's actual wages for every year of service, but in the event of termination due to inability to work, the FIE must also pay a medical subsidy equal to three months' actual wages for service under five years, or six months' pay for service of five years or more.⁴⁶⁸ The basis for computing the amounts of livelihood allowance and medical subsidy is the average monthly wages for six months preceding the termination of the labor contract.⁴⁶⁹ Hence, these provisions are different from those stated in the Measures on Economic Compensation for Violation and Termination of

464. The Regulations on Labor Management in Foreign Investment Enterprises [hereinafter FIE Regulations], Aug. 11, 1994, *reprinted and translated in 2 CHINA LAWS*, *supra* note 3, ¶ 12-626. This set of regulations was promulgated by the Ministry of Labor and the Ministry of Foreign Trade and Economic Cooperation.

465. *Id.* art. 5. *Cf.* Autonomy Implementation, *supra* note 186, arts. 1, 3.

466. FIE Regulations, *supra* note 464, art. 12. However, article 26 of the Labor Law does not mention the consent of the trade union. Labor Law, *supra* note 3, art. 26.

467. The FIE Regulations require an enterprise to pay a livelihood allowance in these situations: (1) the parties agree to terminate the contract; (2) the employee terminates the contract because the employer has used violence, threat, or confinement to force labor or has infringed upon his/her rights; (3) the enterprise terminates the contract due to the employee's inability to work after illness or nonwork-related injury, employee's failure to be qualified after training or change of post, change in objective circumstances rendering performance of the contract impossible, or other legal requirements. FIE Regulations, *supra* note 464, arts. 11, 12 & 19. However, if an enterprise declares its dissolution or if parties agree after consultation to terminate the labor contract, the enterprise must pay a lump sum for living expenses and social insurance premium to the social insurance organ if one of the following also applies: (1) the employee has work-related injury or suffers occupational disease, and has been certified by hospital to be undergoing medical treatment, (2) the employee after medical treatment has been certified to have lost completely or partially his/her work ability, (3) the employee who has died as a result of work-related injuries has dependents, (4) a female employee is pregnant, on maternity leave, or nursing a baby, or (5) the employee is not covered by any type of social insurance. *Id.* art. 21.

468. *Id.* art. 20.

469. *Id.*

Labor Contract (Economic Compensation Measures) subsequently promulgated by the Ministry of Labor.⁴⁷⁰ Moreover, the amount of compensation for paying wages below the minimum pay is the difference between what has been actually paid and the minimum pay plus an amount equal to 20 to 100 percent of the difference,⁴⁷¹ while the Economic Compensation Measures set it at a maximum rate of 25 percent.⁴⁷² Therefore, the question is whether the Economic Compensation Measures are designed to supersede the FIE Regulations or the government intends to apply different measures to foreign-funded enterprises.

The conflicting provisions of the Labor Law and FIE Regulations suggest either that the respective drafters have not coordinated their efforts, or that the subsequent, more specific statute is what the government intends. Since the FIE Regulations were promulgated by administrative agencies while the Labor Law was passed by the National People's Congress, the Labor Law should take precedence.⁴⁷³ However, one may also argue that a more specific statute prevails over a general law. How about the conflicting provisions on medical subsidy and compensation below minimum wage subsequently issued by the Ministry of Labor? Nonetheless, even though the FIE Regulations take a somewhat reverse stance, it does not appear that China wants to provide a restrictive, instead of hospitable, environment for foreign investment.

III. CONCLUSION

On one hand, the enactment of a national labor law will enable workers to have more protection and allow management to have more specific guidelines in making personnel decisions. Moreover, a uniform labor law can reduce inconsistent and *ad hoc* decisions by courts and agencies at various levels and in different places.

On the other hand, the passage of the Labor Law will not necessarily relieve workers from their plight or facilitate management in its personnel decisions, because the mere existence of a piece of legislation is ineffectual if it is not enforced. If the existing legal regulations had been conscientiously enforced, there should not be so

470. See *supra* note 370.

471. FIE Regulations, *supra* note 464, art. 29.

472. See *supra* note 430.

473. However, the FIE Regulations explicitly state that conflicting provisions in all the previous regulations regarding labor management in foreign-funded enterprises will be superseded. FIE Regulations, *supra* note 464, art. 36.

much labor unrest in the first place.⁴⁷⁴ In 1994, a dozen provinces and almost 1,000 cities and counties established labor supervisory organizations to monitor compliance with the law.⁴⁷⁵ Certainly, this kind of programs will expedite enforcement efforts. Hence, China needs not only a comprehensive labor law replete with sanctions, but also its vigorous enforcement by all groups concerned.

In addition, the successful implementation and enforcement of the Labor Law entails both administrative commitment and judicial independence. As discussed above, corruption among officials has been rampant. Meanwhile, the judiciary is subject to the Party's influences and administrative control.⁴⁷⁶ To achieve the purposes of the Labor Law, China must also carry out reforms to eliminate corruption and strengthen its judiciary. Likewise, laws must be accessible in order to be effective. To assist workers in understanding their legitimate rights and the importance of observing the law, they should be educated as to what the law provides for them and requires of enterprises.⁴⁷⁷ Once workers know

474. It has been reported that local officials side with foreign businesses for fear of losing investment. Sheila Tefft, *Restive Workers, Not Students, Vex Beijing*, CHRISTIAN SCIENCE MONITOR, June 1, 1994, § World, at 1, available in LEXIS, World Library, ALLWLD File. In addition, an October 1995 report states that many Sino-foreign joint ventures in Shanghai forced employees to work overtime, did not give them contracts, and did not pay insurance. An inspection of 450 joint ventures by the city's labor bureau revealed that 9,820 out of 38,844 workers had no contract, 7,764 workers had not gone through proper employment procedures, and 3,224 migrant workers were illegally employed. A Sino-Japanese joint venture forced its employees to work 80 hours of overtime in July, and the labor bureau fined the joint venture 3,000 yuan and ordered it to obey the rules on work time. *Joint Ventures in Shanghai Break Labor Laws*, Reuters World Service, Oct. 4, 1995, available in LEXIS, World Library, ALLWLD File. The report does not clearly state whether all of these violations occurred in 1995 or some happened before the passage of the Labor Law.

475. *China Survey Reveals Labor Abuses*, UPI, Nov. 1, 1994, available in LEXIS, World Library, ALLWLD File. Statistics from 15 provinces covered by the inspection reveal that enterprises had retroactively signed contracts with 2.62 million of their employees and rectified 789,000 cases of irregularities in labor relations, and that employers paid \$39.5 million in overdue wages and said they would stop forced overtime in 9,000 firms. *Id.*

476. Currently, judicial independence is lacking in China, because (1) the judges or members of the collegiate bench who hear a case in open court do not have full power to decide the case, (2) judges do not enjoy any security of tenure and, as judicial cadres, may be transferred away or removed, (3) courts are not adequately funded, and (4) it is difficult to enforce judgments. ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 119-23 (1992).

477. In October, 1994, the Ministry of Labor and the ACFTU organized activities to spread knowledge about the Labor Law. *Beijing Consulting Services on Labor Law*, Xinhua News Agency, Oct. 9, 1994, available in LEXIS, World Library, ALLWLD File. Another report states that the Ministry of Labor was going to launch a week-long drive in July 1995 to publicize the Labor Law. *Launch Campaign*, *supra* note 452.

their rights, they will be able to tell whether their rights and interests have been infringed.⁴⁷⁸ Actually, trade unions can play a rather significant role in implementing the objectives of labor laws, a role they have already assumed.⁴⁷⁹

As analyzed above, many labor-management problems encountering China today are the legacy of past decades, and social problems generated by recent economic reforms necessitate the formulation of new policies and measures. Labor laws and regulations embody these new policies. The passage of the Labor Law and its supplemental regulations is a commendable move. Nonetheless, their effectiveness in alleviating the conditions of abused workers and easing the difficulties of managers remains to be seen. Apart from effective enforcement of the law, judicial independence, elimination of corruption, and knowledge of one's legal rights, labor reforms depends on the success of wage reforms, reduction of housing shortage, and establishment of a social insurance program.

In conclusion, the preceding legislative analysis of labor and employment in China is somewhat panoramic. However, it does provide the reader with a basic understanding of the Chinese labor and employment laws and various concomitant issues. Given the past and present economic, social, and political environments in which Chinese laborers have lived, it is no wonder that there exists a divergence between law theory and practice.⁴⁸⁰ The purpose of this article—to understand China's labor and employment in its own light and the role of legislation in such a context—is therefore achieved. Hopefully, the Chinese model and its future developments may provide policymakers in other countries with insights into their own labor reform efforts.

478. The recent increase of labor disputes has been attributed to the passage of the Labor Law. *Labor Disputes on the Rise in Chinese Capital*, Deutsche Presse Agentur, May 31, 1995, § Financial Pages, available in LEXIS, World Library, ALLWLD File (citing CHINA DAILY).

479. It has reported that some trade unions set up legal advisory groups for workers, which gave lectures on laws, rendered consulting services, offered legal assistance in lawsuits, and ran law courses for workers. *Other Reports: Trade Union Leader on Strengthening the Legal System*, BBC Summary of World Broadcasts, June 18, 1983, Pt. 3: The Far East, available in LEXIS, World Library, ALLWLD File. In fact, the Labor Law empowers unions to supervise the compliance of labor statutes and regulations. Labor Law, *supra* note 3, art. 88.

480. *E.g.*, In 1995, Wei Jiangxing, Chairman of the ACFTU, admitted that there would be difficulties in carrying out the Labor Law, especially when the social insurance system was still immature and money-losing enterprises were still great in number. *Trade Union Chief Admits "Difficulties" in Carrying Out Labor Law*, 1995 BBC Summary of World Broadcasts, July 24, 1995, Pt. 3: Asia-Pacific, available in LEXIS, World Library, ALLWLD File.

AN EXAMINATION OF CHINA'S EMERGING INTELLECTUAL
PROPERTY REGIME: HISTORICAL UNDERPINNINGS, THE CURRENT
SYSTEM AND PROSPECTS FOR THE FUTURE

Geoffrey T. Willard*

INTRODUCTION

In the past decade, the People's Republic of China (PRC or China) has significantly upgraded its intellectual property rights protection regime.¹ Despite the advent of a legal framework designed to protect intellectual property, however, infringement of intellectual property rights remains pervasive throughout the PRC.² This fact arouses serious concern in the international community about the Chinese government's commitment and ability to enforce its intellectual property laws and to provide adequate protection to legitimate manufacturers and rights holders in China.³

* J.D., Washington College of Law, American University, May 1996; B.A., East Asian Studies & International Politics, New York University, 1993. The author will join Jones, Day, Reavis & Pogue as an associate in September 1996. Thanks are extended to: Professor Yongxin Song of the Hangzhou University School of Law for his helpful comments and criticisms of this piece, Professor Julie Higashi for her constant encouragement, Eileen Lee for her editing assistance and support of this endeavor, and Simon Luk, Esq., who taught me the importance of an eye for detail. The topic for this article was suggested during a discussion in Hong Kong with attorneys Stephanie Mitchell and Ann Elizabeth Bang.

1. See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* 1 (1995) (noting Chinese efforts to promulgate formal legal protections for intellectual property); Jesse T.H. Chang & Charles J. Conroy, *Trade Mark Law in the People's Republic of China*, FOREIGN TRADE, in INVESTMENT & LAW IN THE PEOPLE'S REPUBLIC OF CHINA 427, 448 (Michael J. Moser, ed. 1987) (stating that development of China's trademark system has brought it closer "to common international practice"); Michael J. Moser & David Y.W. Ho, *The Registration and Protection of Patents in China*, in FOREIGN TRADE, INVESTMENT & LAW IN THE PEOPLE'S REPUBLIC OF CHINA 453, 470 (Michael J. Moser, ed. 1987); JARI E. VEPSÄLÄINEN, FOREIGN INVESTMENT IN THE PEOPLE'S REPUBLIC OF CHINA, 272-73 (declaring that "there have been significant improvements in [intellectual property] legislation since introduction of the open-door policy").

2. Alford, *supra* note 1, at 1. Alford declares that "[a]lthough scholars . . . credit the Chinese with having contributed paper, movable type, and ink to humankind, China has yet to develop comprehensive protection for what is created when one applies inked type to paper." *Id.* He concludes that, notwithstanding recent developments, "protection for intellectual property remains closer to rhetoric than reality" in mainland China. *Id.*

3. Regardless of this situation, and although China opened to foreign investment less than 20 years ago, there is already more foreign investment in China than in Japan. *A World Trade Ordeal*, THE ECONOMIST, Nov. 4, 1995, at 38.

This article offers an overview of the state of intellectual property protection in China. In order to provide a background for evaluating intellectual property in modern China, Part I looks at the history of intellectual property protection in both imperial China and the early years of the PRC.⁴ Part II examines the significant new intellectual property laws enacted by China in the 1980s and early 1990s.⁵ Part III discusses the main difficulties faced by China's central government as it attempts to enforce these laws and discusses trade friction with the U.S. resulting from the enforcement dilemma.⁶ Finally, Part IV reports on future prospects for the protection of intellectual property in China, concluding that intellectual property rights will not be fully protected in China until the nation educates its citizens about the need to protect such rights and creates viable mechanisms to deal with infringing activities.⁷

I. INTELLECTUAL PROPERTY RIGHTS IN TRADITIONAL CHINA AND THE EARLY YEARS OF THE PRC

A. *Intellectual Property Rights Before 1949*

Certain forms of intellectual property were recognized and protected at various times throughout the history of imperial China.⁸ No Chinese government, however, had enacted comprehensive laws governing the protection of such rights until the PRC began to strengthen its intellectual property framework in the 1980s.⁹ A brief examination of the development of rights related to trademarks,¹⁰ patents,¹¹ and copyrights¹² in traditional China follows.

4. See *infra* part I. For purposes of this article, Imperial China will refer to the myriad dynasties before the birth of the Republic of China in 1912; the Republic of China lasted until the Communist rule of China began in 1949 with the People's Republic of China.

5. See *infra* part II.

6. See *infra* part III.

7. See *infra* part IV.

8. See ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW 21-22, 51-52, 86-88 (1987) (discussing historical development of intellectual property rights in traditional China); but see William P. Alford, *Don't Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China*, 7 J. CHINESE L. 1, 4-5 (1993) (concluding that imperial China never developed an indigenous counterpart to intellectual property law as understood in the United States, despite "evidence of restrictions on the unauthorized reproduction of certain books, symbols and products").

9. See *infra* part II (describing these intellectual property reforms).

10. As used herein, the term "trademark" refers to any word, name, symbol, device or combination thereof used by a merchant or manufacturer to identify its goods from those sold or produced by others. DONALD A. GREGORY ET AL., INTRODUCTION TO INTELLECTUAL PROPERTY LAW 81 (1994). Trademarks can thus include "symbols, numbers, slogans, nicknames of products," and so forth. *Id.*

11. As employed herein, a "patent" is a right of exclusive use over a particular invention or innovation, which is granted to a person or entity (the "patentee"). A patent

1. Trademarks

The first known trademarks surfaced in China nearly 3000 years ago, during the reign of the Zhou Dynasty.¹³ Yet despite a long history of trademark use in China, direct government involvement in trademark protection largely has been a recent development.¹⁴ The first recorded case involving trademarks did not appear until the 1730s, during the rule of Qing Emperor Qian Long.¹⁵ In that case, local authorities forbade a cloth merchant to sell his wares under another merchant's trademark and set their decision in stone to ensure against a recurrence of such activity.¹⁶ Although government officials were involved in this case, private measures to protect trademarks were more typical during the imperial era. For example in 1825, a group of Shanghainese merchants, without government involvement or affiliation, banded together to protect each other's trademarks — pledging not to use similar marks to identify similar products.¹⁷

gives the patentee the privilege to make, sell or use a particular invention to the exclusion of all others for a specified period of time. ARTHUR R. MILLER & MICHAEL H. DAVIS, *INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS & COPYRIGHT* 10 (1983). Two main justifications underlie the notion of patent protection. The "contract theory" suggests that people will be encouraged to create new inventions if they are given an incentive. *Id.* at 14. The second justification founded on a "natural rights" theory, emphasizes that "the product of mental labor is by right the property of the person who created it." *Id.* at 15. Under this theory, the inventor possesses all title to the invention and has the right to be compensated for any use thereof. *Id.*

12. As used herein, "copyright" refers to exclusive privileges granted to publishers of text. GREGORY ET AL., *supra* note 10, at 165.

13. ZHENG, *supra* note 8, at 21; Chang & Conroy, *supra* note 1, at 427. Zheng cites the PEOPLE'S DAILY, July 13, 1982, at 3. Alford notes that one of the earliest surviving trade symbols known in China was a "white rabbit" mark used by the Liu clan of Jinan, Shandong, evidence of which appears in records of the Northern Song dynasty. Alford, *supra* note 8, at 15-16.

14. This is not to say that no marks were protected, as certain imperial symbols were protected under Qing dynasty law. See Da Qing Lü Li [Laws of the Great Qing Dynasty] art. 429, translated in THE GREAT QING CODE 408 (William C. Jones, ed./trans. 1994) (declaring punishment for non-imperials who weave dragon and phoenix symbols in silk); see also ALFORD, *supra* note 1, at 15 (noting that although imperial laws did little to protect "proprietary symbols," dynastic codes restricted use of "certain symbols associated with either the imperial family . . . or officialdom"). Alford also mentions that forgery of the marks employed by craftsmen "making goods for exclusive imperial use" was prohibited. *Id.*

15. ZHENG, *supra* note 8, at 21.

16. *Id.*

17. *Id.* According to Alford, various sources indicate that producers of goods (including tea, cloth, medicine, silk, and paper) sought to protect their trade symbols and marks by declaring that others could not use such markings, and by registering them with local officials or guilds. Alford, *supra* note 8, at 16. He notes, however, that the goal of protecting "proprietary marks" was difficult to accomplish. *Id.*

Although seen only rarely in the purely domestic realm, trademark issues arose fairly prominently in 19th and early 20th century treaties concluded between the Qing and Western nations.¹⁸ In a representative treaty, the Qing government agreed to protect "British trade-marks against infringement, imitation, or colourable imitation by Chinese subjects."¹⁹ Unfortunately, the Qing Code²⁰ did not contain a national trademark law at the time many of these treaties were entered into, leaving unanswered the question of how best to effect protection of foreign-owned trademarks.²¹ Finally, in the waning years of Qing rule, an imperial decree established the first Chinese trademark law.²² Surprisingly, this law afforded little protection to native trademark holders and primarily benefitted foreign businessmen,²³ particularly the Japanese.²⁴

Republican-era governments enacted two more trademark laws after the 268-year rule of the Qing came to an end in 1912.²⁵ China's first trademark office was established in 1923, by Northern Chinese warlords, under a trademark law which granted trademark protection for twenty years (with possible extension for the same term) and which created a registration framework involving a first-use priority system.²⁶ The Nationalist Government published a similar, but more comprehensive trademark law in 1930.²⁷ The Nationalist law was amended in 1935,²⁸ and by 1946, approximately 40,000 trademarks obtained registration thereunder.²⁹

Despite some efforts to protect trade symbols and marks, the overall record of trademark protection in pre-1949 China was quite poor.³⁰ Well-

18. See ALFORD, *supra* note 1, at 36 (stating that "[t]rademark protection was the centerpiece of the intellectual property issues addressed in commercial agreements" with major powers).

19. ALFORD, *supra* note 1, at 36-37.

20. For a comprehensive translation, see THE GREAT QING CODE, *supra* note 14.

21. ALFORD, *supra* note 1, at 37.

22. Prior to the imperial decree, certain traders were able to protect their brands, often seeking the assistance of local officials to prevent unauthorized counterfeiting. Any protections achieved were purely local and "in any event, unavailable to foreigners." ALFORD, *supra* note 1, at 35.

23. Joshua R. Floum, *Counterfeiting in the People's Republic of China: The Perspective of the "Foreign" Intellectual Property Holder*, 28 J. WORLD TRADE 35, 44 (1994).

24. ZHENG, *supra* note 8, at 21-22. The Emperor's decree was entitled, "Trial Implementing Regulations for the Registration of Trademarks." *Id.* at 21.

25. ZHENG, *supra* note 8, at 22.

26. ALFORD, *supra* note 1, at 51.

27. 1930 Trademark Law.

28. ALFORD, *supra* note 1, at 51 n.141.

29. ZHENG, *supra* note 8, at 22.

30. Out of fairness to the Chinese, it should be noted that American protection of intellectual property during the 18th and much of the 19th centuries was also poor.

known products and their trademarks were frequently counterfeited.³¹ Although appeals were sometimes made to local magistrates, official help was limited³² because often no formal legal provisions specifically prohibited the pirating activities.³³ Thus, despite some efforts by the Chinese, and assurances made in treaties with the West, trademark protection in pre-Communist China was largely illusory and, to the extent that it existed at all, it was available "more in name than fact."³⁴

2. *Patents*

The Chinese characters used today to represent the English word "patent" came into use nearly three millennia ago in the Zhou Dynasty and correspond more closely to "monopoly."³⁵ Patents as understood in a modern sense did not appear in China until approximately 100 years ago.³⁶ The idea of a modern patent system first surfaced during the Taiping Rebellion era,³⁷ but no legislation in this area was drafted until the close of the 19th century, when one of the last Qing rulers issued a set of "Regulations to Promote Industrial Technology."³⁸ In 1912, the Republican government enacted China's second patent law, under which 692 patents were granted by 1944.³⁹ In 1949, the Guomindang published China's third patent law.⁴⁰ Because of the influence of various Japanese invasions,⁴¹ World War II,⁴² and civil war,⁴³ patents in China received

31. ALFORD, *supra* note 1, at 16 (declaring that "[t]here appears to have been massive counterfeiting").

32. *See supra* notes 15-16 and accompanying text (noting general lack of official protection).

33. *See* ALFORD, *supra* note 1, at 16 (stating that appeals to local officials were based on principles of fairness and prevention of deception and not specific legal provisions); ZHENG, *supra* note 8, at 21 (noting that self-help activities of Shanghai merchants "did not involve local authority or law").

34. ALFORD, *supra* note 1, at 41.

35. ZHENG, *supra* note 8, at 51.

36. *Id.*

37. *See* ZHENG, *supra* note 8, at 51-52 (describing development in 1858 of a "petty patent system" by a Taiping leader).

38. Regulations to Promote Industrial Technology (1899). According to Zheng, this "first true . . . patent law in China" existed "in law for less than two months." ZHENG, *supra* note 8, at 52.

39. ZHENG, *supra* note 8, at 52.

40. Patent Law of the Republic of China (1949). The law, as amended, is still in use in Taiwan. Patent Law of the Republic of China (1986), *translated in* 9 EAST ASIAN EXEC. REPS. 20-23 (1987).

41. For a thoughtful discussion of Japanese machinations and involvement in China during the 1920s and 1930s, see JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 388-434 (1990).

42. *See id.* at 443-83 (discussing the impact of World War II in and on China).

43. *See id.* at 438, 484-515 (detailing events in civil war period from 1945-49).

little real protection during this era.⁴⁴ Therefore, despite the actual existence of patent laws during this period, China had virtually no tradition of patent protection entering the modern era.

3. *Copyrights*

As with the other forms of intellectual property in China, copyright has been recognized in some sense for many years.⁴⁵ For instance, during the Tang Dynasty (which saw the birth of printing), imperial decrees banned the unauthorized copying of legal pronouncements, calendars, and other materials.⁴⁶ There is also evidence that during the Song Dynasty, authors would state on the final page of their publication that "reproduction was prohibited."⁴⁷ However, in reality such admonitions against unauthorized reproduction were largely ineffective, and compliance with "copyright" was quite limited.⁴⁸ This failure might be attributed to Chinese tradition and the widespread notion that "[d]etailed replication of art and written texts is considered the highest form of hon[or] to the master."⁴⁹

In the last years of the Qing, an effort was made to formalize protection of authors' interests through the enactment of a limited copyright law.⁵⁰ This first "true" copyright law was short lived, however, as the Qing government was overthrown only one year after its promulgation.⁵¹ Two subsequent copyright laws were published in pre-Communist China, one by the warlords,⁵² and the other by the Republican government in 1928.⁵³ The Guomindang's "Law on Authors' Rights" provided for copyright registration, and the protection of foreign authors' works, but only if each particular foreign author's country protected Chinese works.⁵⁴

44. See ZHENG, *supra* note 8, at 52 (suggesting that only paucity of patents were granted on mainland under Nationalist's patent).

45. Professors Zheng and Pendleton assert that copyright originated in China with the development of printing. ZHENG CHENGSI & MICHAEL PENDLETON, *COPYRIGHT LAW IN CHINA* ii (1991). Professor Alford, however, writes that he finds "neither a formal nor informal counterpart to copyright . . . law." ALFORD, *supra* note 1, at 9.

46. Alford, *supra* note 8, at 11-12.

47. Yiping Yang, *The 1990 Copyright Law of the People's Republic of China*, 11 UCLA PAC. BASIN L.J. 260, 263 (1993).

48. See Zheng Chengsi, *Chinese Copyright Law, in CHINA FOREIGN ECONOMIC LAW* 16 (Hong Kong Int'l Law Inst. 1994) (noting that prior to 1978, even the rights of Chinese authors were virtually meaningless).

49. Floum, *supra* note 23, at 35; see ALFORD, *supra* note 1, at 29 (stating that in China's Confucian tradition, "true scholars wrote for edification and moral renewal rather than profit").

50. *Authors' Rights in the Great Qing Empire* (1910).

51. ZHENG, *supra* note 8, at 87.

52. *Law on Authors' Rights* (1915).

53. *Republic of China, Law on Authors' Rights* (1928).

54. ZHENG, *supra* note 8, at 87.

4. *The Overall Intellectual Property Framework Before 1949*

As the passages above suggest, respect for intellectual property rights in China was minimal prior to 1949. Although both Imperial and Republican regimes recognized some rights,⁵⁵ intellectual property laws were enforced infrequently. As a consequence, such rights were violated regularly and aggrieved parties were left with virtually nothing in the way of legal recourse or redress.

B. *Early Attitudes Toward Intellectual Property in the PRC*

The situation of intellectual property rights in China did not change immediately with the founding of the PRC. When the Chinese communists assumed power in 1949, they rejected and rescinded the entire corpus of Guomindang law,⁵⁶ and began to develop a new legal system based largely on the Soviet model.⁵⁷ With regard to intellectual property, the Soviet experience proved satisfactory to the fledgling Chinese communists because in large measure "the values . . . underl[y]ing the Soviet model reflected traditional Chinese attitudes toward intellectual property."⁵⁸ Thus, as a result of both cultural and political influences, the intellectual property regime which emerged in the early years of the PRC rested heavily on the notion that individual accomplishments belonged to all of society.⁵⁹

The Cultural Revolution⁶⁰ ground to a halt the development of intellectual property laws in China.⁶¹ During this era, many intellectuals, including jurists and attorneys, suffered greatly.⁶² Starting in 1966, the

55. See generally *infra* part II.A.

56. LAW IN THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARY, READINGS AND MATERIALS 8 (Ralph H. Folsom & John H. Minan eds., 1989) [hereinafter LAW IN THE PRC: COMMENTARY].

57. *Id.* at 5, 9; ALFORD, *supra* note 1, at 56.

58. ALFORD, *supra* note 1, at 56. See Brian Barron, *Chinese Patent Legislation in Cultural and Historical Perspective*, 6 INTELL. PROP. L. J. 313, 314 (1991) (discussing influence of Marxist thought on development of Chinese patent law); Laurence P. Harrington, Comment, *Recent Amendments to China's Patent Law: The Emperor's New Clothes?*, 17 B.C. INT'L & COMP. L. REV. 337, 342 (1993).

59. See ALFORD, *supra* note 1, at 56-57 (discussing influence of Marxist thought on development of early intellectual property law in PRC and comparing elements of Marxism and Confucianism to demonstrate certain ideological affinities between the two).

60. Called the "Great Proletariat Revolution," and lasting from 1966-1976, this movement began as an attack by Mao on his rivals within the Party and intellectuals and bureaucrats who were separated from "the hardships of peasant work." LAW IN THE PRC: COMMENTARY, *supra* note 56, at 10. For more on the Cultural Revolution, see SPENCE *supra* note 41, at 603-17; LUCIAN W. PYE, CHINA: AN INTRODUCTION 287-306 (1984).

61. See ZHENG, *supra* note 8, at 90 (commenting that "the Cultural Revolution brought everything to a standstill, including the preparation of ideas for establishing a copyright system").

62. LAW IN THE PRC: COMMENTARY, *supra* note 56, at 11.

government shut down law schools and sent legal workers to the countryside for "re-education" in revolutionary values.⁶³ As a consequence of Mao's policies, "law and legal institutions were dismembered in a frenzy of hysterical fanaticism."⁶⁴ The destruction of China's legal system⁶⁵ necessarily resulted in a dismantling of virtually all protection for intellectual property from 1966 until formal legal institutions and mechanisms began to resurface after Mao's death in 1976 and the fall of the "Gang of Four" later that year.⁶⁶

Following are brief descriptions of the intellectual property laws extant during the formative years of the PRC.

1. *The Early Patent Laws of the PRC*

The PRC originally promulgated patent legislation in the 1950s,⁶⁷ creating a system under which inventors were given the option of taking a patent (entitling the inventor to exclusive rights of use) or a certificate entitling the inventor to honorific and monetary awards, but with either election, title to the invention passed to the government.⁶⁸ Dramatic political changes, however, soon led to a situation where "the idea of granting proprietary rights in inventions to individuals had become politically unpalatable."⁶⁹ Consequently, in 1963, the State Council adopted "Regulations on Awards for Inventions,"⁷⁰ which stated that "[a]ll inventions are the property of the state, and no person . . . may claim a monopoly over them All units may make use of [Chinese] inventions"⁷¹

With the arrival of the Cultural Revolution,⁷² the climate for registration of patents severely chilled. It was not until the late 1970s that

63. *Id.* at 12. For a discussion of how China functioned without lawyers and how it has continued to function with a very limited number of legal practitioners, see generally VICTOR H. LI, *LAW WITHOUT LAWYERS* (1978).

64. *LAW IN THE PRC: COMMENTARY*, *supra* note 56, at 12.

65. See Wu Jianfan, *Building New China's Legal System*, in *CHINA'S LEGAL DEVELOPMENT* 13 (John R. Oldham, ed., 1986) (declaring that China's legal system suffered such great damage that some "termed it a 'disaster area'").

66. Post-Cultural Revolution legal reconstruction is discussed *infra* part II.A.

67. Baozhang Famingquan [Provisional Regulations on the Protection of Invention & Patent Rights] (1950).

68. See Gary Watson, *Business Law in the People's Republic of China*, 27 *AM. BUS. L.J.* 315, 343 (1989) (describing 1950's patent system in PRC). Apparently, the "two-track" system was created as a means of soothing the anxieties of Chinese rights-holders and intellectuals, while still ensuring state access to needed technologies. ALFORD, *supra* note 1, at 58.

69. Watson, *supra* note 68, at 344.

70. Faming Jiangli Tiaoli [Regulations on Awards for Inventions] (1963).

71. *Id.* art. 23.

72. See *supra* notes 60-66 (discussing impact of Cultural Revolution on Chinese legal system).

the PRC's new leadership undertook efforts to revive the old patent laws. In 1978, the 1963 Patent Regulations were reinstated, allowing inventors to again receive pecuniary rewards for their work.⁷³ These developments set the stage for the creation of a new patent regime for China in the early 1980s.⁷⁴

2. *Trademark Law Following the Communist Revolution*

Soon after the founding of the PRC, the nation adopted its first regulations relating to trademark.⁷⁵ Subsequently, new regulations were passed in 1963.⁷⁶ These regulations were not particularly useful to foreign parties who were given only limited opportunities thereunder to register marks in the PRC.⁷⁷ This limitation resulted largely because Chinese authorities wished to register only the marks of foreigners whose native countries recognized Chinese marks and had signed reciprocity agreements with China. However, in 1978, China waived these restrictions, finally opening the trademark registration process to all foreign parties.⁷⁸

3. *Copyright Law in the Early Years of the PRC*

Prior to the start of the "open-door policy," copyright law in the PRC was the least developed of the recognized forms of intellectual property.⁷⁹ In the early 1950s, China's National Publication Conference established a set of preliminary guidelines dealing with certain copyright issues.⁸⁰ The first efforts to draft copyright legislation occurred later that decade when the Ministry of Culture wrote several documents dealing with copyright.⁸¹ Although these documents laid the foundation for future copyright legislation, the drafts were never published, possibly because of ongoing political movements at the time.⁸²

In general, China's post-1949 copyright provisions were "in the form of administrative orders or internal regulations"⁸³ and primarily dealt with

73. ALFORD, *supra* note 1, at 65.

74. *See infra* part III.

75. Provisional Regulations Governing Trademark Registration (1950). *See Chang & Conroy, supra* note 1, at 427-28 (discussing early PRC trademark legislation).

76. Regulations of the People's Republic of China Governing the Control of Trademarks (1963). *See Chang & Conroy, supra* note 1, at 428-29 (reporting on 1963 Trademark Regulations).

77. Chang & Conroy, *supra* note 1, at 428-29.

78. *Id.* at 429.

79. WEI JIA, CHINESE FOREIGN INVESTMENT LAWS AND POLICIES: EVOLUTION & TRANSFORMATION 136 (1994).

80. ZHENG, *supra* note 8, at 88.

81. *Id.* at 90.

82. *Id.*

83. Yang, *supra* note 47, at 263.

remuneration issues.⁸⁴ Even this weak system of regulation, however, was dismantled during the Cultural Revolution⁸⁵ and did not re-emerge until the late 1970s.⁸⁶ By any measure, however, it is obvious that before 1990 the PRC's copyright laws were seriously inadequate.

II. THE ECONOMIC REVOLUTION AND THE EMERGENCE OF THE NEW CHINESE INTELLECTUAL PROPERTY REGIME

A. *The Economic Reform*

Soon after Deng Xiaoping's return to power in July of 1977,⁸⁷ China embarked on an ambitious program of economic reform.⁸⁸ Chinese officials realized that legal reform was a necessary co-requisite for economic transition and began a major overhaul of the nation's legal system.⁸⁹ Within a short time, the government started drafting and implementing significant and ambitious pieces of new legislation.⁹⁰ During this era, the

84. *Id.*

85. See ZHENG, *supra* note 8, at 90 (discussing retarding effects of Cultural Revolution on development of copyright system in PRC).

86. Yang, *supra* note 47, at 263.

87. U.S. DEP'T OF STATE, BACKGROUND NOTES ON CHINA 5 (Bureau of East Asian & Pacific Affairs, Office of Chinese & Mongolian Affairs 1993). After a period of internal exile, Deng was rehabilitated and reinstated as vice-chairman of the Standing Committee of the Politburo. PYE, *supra* note 60, at 327.

88. See KENNETH LIEBERTHAL, GOVERNING CHINA, FROM REVOLUTION THROUGH REFORM 243-59 (1995) (detailing economic reforms); PYE, *supra* note 60, at 337-52 (discussing policy changes implemented by Deng). Deng's reforms began with the idea that Communist principles and certain capitalist ideas might work together for the good of the nation. Summarizing his philosophy toward reform, Deng declared, "[i]t doesn't matter if the cat is black or white, as long as it catches mice." STEVEN WARSHAW, CHINA EMERGES, 155 (1990).

89. *E.g.*, William R. Baerg, *Judicial Institutionalization of the Revolution: The Legal Systems of the People's Republic of China and the Republic of Cuba*, 15 LOY. L.A. INT'L & COMP. L.J. 233, 242 (1992); LIEBERTHAL, *supra* note 88, at 151. Lieberthal notes that the first foreign firms seeking to invest in the PRC were asked and required to sign contracts subject to regulations and rules that were kept secret and not published. *Id.*

90. The overall legal reform efforts were extensive and included the drafting of a new constitution for China. XIANFA [PEOPLE'S REP. OF CHINA CONST.] (1982), translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982 (1987). Major economic laws enacted during the reform era include: Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures (1979), translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-1982 150 (1987); Income Tax Law of the People's Republic of China for Chinese-Foreign Equity Joint Ventures (1980), translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-1982 190 (1987); Economic Contract Law of the People's Republic of China (1981), translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-1982 219 (1987); Income Tax Law of the People's Republic of China for Foreign Enterprises, translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-1982 237 (1987).

PRC took its first steps toward the creation of a comprehensive intellectual property regime. The leadership thus acknowledged the fact that foreign investors would be more willing to invest in China if the nation protected investors' rights, particularly in the area of intellectual property.⁹¹

B. *Intellectual Property Reforms - The New Legislation*

1. *The Trademark Law*

The 1983 "Trademark Law of the People's Republic of China"⁹² was the first reform-era intellectual property law enacted by China.⁹³ Subsequently amended,⁹⁴ this legislation: 1) replaced China's "1963 Regulations Governing Trademarks," 2) established an administrative framework for the registration of trademarks,⁹⁵ 3) detailed the rights of trademark holders,⁹⁶ 4) outlined activities constituting trademark infringement,⁹⁷ and 5) provided legal remedies and sanctions for violation of a holder's rights under this law.⁹⁸

Overall, China's new trademark laws provide a viable framework for the protection of most marks, designs, and symbols within the PRC.⁹⁹ In addition to the changes mentioned above, the law is notable in that it establishes certain priority rights for registrants who are nationals of countries party to the Paris Convention, includes a new process for

91. PITMAN R. POTTER, *FOREIGN BUSINESS LAW IN THE PRC: PAST PROGRESS AND FUTURE CHALLENGES* 41 (1995). See Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 *GEO. WASH. J. INT'L L. & ECON.* 327, 347 (1993-94) (arguing that the PRC is "eager to begin instituting a new 'world class' intellectual property regime so that it can attract foreign investment"). Giunta and Shang declare that "absent adequate protection, foreign firms will less readily transfer technology to local companies." *Id.* at 354.

92. *Zhonghua Renmin Gongheguo Shangbiaofa* [Trademark Law of the People's Republic of China] (1982), translated in *THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982*, at 305 (1987).

93. POTTER, *supra* note 91, at 41.

94. *Zhonghua Renmin Gongheguo Shangbiaofa* (1993 Nian Xiuding Ben) [Trademark Law of the People's Republic of China (1993 Revision)], translated in *CHINA LAWS FOR FOREIGN BUS.: BUS. REG. (CCH Austr.) 14,001* (1993)[hereinafter Trademark Law of the PRC (Revised)].

95. *Id.* arts. 2-22

96. *Id.* arts. 23-26.

97. *Id.* art. 38.

98. *Id.* arts. 39-40. There is also a criminal penalty for infringement of a registered trademark. Criminal Law of the People's Republic of China, art. 127 (1979), translated in *THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-1982*, at 87, 109 (1987). The criminal sanction for counterfeiting is imprisonment for a maximum of three years, a fine, or criminal detention. *Id.* See POTTER, *supra* note 91, at 41.

99. *But see* Chang & Conroy, *supra* note 1, at 429 (insinuating that limited protection for service marks in China is problematic for foreign service industries).

publication of and opposition to marks,¹⁰⁰ and contains provisions for a party disputing a registered mark to apply for its cancellation.¹⁰¹ Finally, the law incorporates a broad definition of infringement, which should make it easier for injured mark holders to prosecute infringers and eliminate infringing activities.¹⁰²

2. *The Advent of Modern Patent Law in China*

In 1980, as the economic reforms began to take hold, China joined the World Intellectual Property Organization as a Member State.¹⁰³ Then, on March 12, 1984, the National People's Congress (NPC) enacted the "Patent Law of the People's Republic of China."¹⁰⁴ Later that year, China signed the Paris Convention for the Protection of Industrial Property.¹⁰⁵ Subsequently, the Patent Law was amended, by a September 4, 1992 act of the NPC.¹⁰⁶

The Patent Law, as amended, evidences a commitment on the part of the PRC to encourage foreign investment and technology transfer.¹⁰⁷ Importantly, the revised law addresses many concerns voiced by the U.S. during negotiations to resolve a Section 301 investigation of Chinese intellectual property practices.¹⁰⁸ As now formulated, the Chinese patent laws contain many provisions very similar to U.S. law. Importantly, China

100. Trademark Law of the PRC (Revised), *supra* note 94, arts. 19-20.

101. *Id.* art. 22.

102. *Id.* art. 38. Under this article, infringing activities include: unauthorized use of a mark "identical or similar to the registered trademark," sale of goods bearing a "fake trademark being passed off as a registered trademark," forgery of a registered trademark, or acts causing "prejudice to the exclusive right to use the registered trademark of another person." *Id.*

103. CORPORATE COUNSEL'S GUIDE TO DOING BUSINESS IN CHINA § 11.002 (Kenneth A. Cutshaw & Jianyi Zhang eds., 1995); Tong Cai, *Legal Protection for Foreign Trade Marks in China: A Practical Note*, 27 WORLD COMPETITION 115 (1994).

104. Zhonghua Renmin Gongheguo Zhuanlifa [Patent Law of the People's Republic of China] (1984), translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1983-1986, at 65 (1987). This law was implemented one year later, after the publication of administrative regulations. Zhonghua Renmin Gongheguo Zhuanlifa Shishi Xize [Implementing Regulations of the Patent Law of the People's Republic of China] (1985) translated in CHINA LAWS FOR FOREIGN. BUS.: BUS. REG. (CCH Austr.) 14,001 (1993).

105. Paris Convention for the Protection of Industrial Property, 1968, 6 I.L.M. 981; see POTTER, *supra* note 91, at 42 (discussing China's signing of the convention).

106. Zhonghua Renmin Gongheguo Zhuanlifa (1992 Nian Xiuding Ben)[Patent Law of the People's Republic of China (1992 Revision)][hereinafter PRC Patent Law], translated in CHINA LAWS FOR FOREIGN. BUS.: BUS. REG. (CCH Austr.) 14,201 (1993). The amended legislation modified Articles 11, 25, 29, 30, 34, 39-45, 48, 50-52, and 63 of the PRC Patent Law.

107. Harrington, *supra* note 58, at 337.

108. See Harrington, *supra* note 58, at 357-69 (discussing American demands and amendments to China's patent law in 1992). See also *infra* part III.B (discussing U.S.-China intellectual property disputes).

now affords protection to patented inventions for 20 years (an increase from 17),¹⁰⁹ has eliminated many unconditional compulsory licensing requirements,¹¹⁰ and has finally afforded protection to pharmaceuticals, agricultural goods, and chemical products.¹¹¹

3. *The 1990 Copyright Law*

Despite the fact that Deng Xiaoping personally instructed the Committee on Legal Affairs of the NPC to begin work on a copyright law,¹¹² the NPC did not enact one until September 1990. Passage of the long-awaited "Copyright Law of the People's Republic of China"¹¹³ was a major milestone on the road to protection of written works in China.¹¹⁴ The groundwork for this law was laid in the 1982 Constitution¹¹⁵ and with the enactment of China's 1986 Civil Law.¹¹⁶ Under the 1986 Civil Law, citizens and legal Chinese persons are entitled to rights of authorship.¹¹⁷ Moreover, the Civil Law authorizes copyright infringement actions, allowing authors to seek compensation from or receive civil injunctions against infringers.¹¹⁸

As formulated, the Chinese Copyright Law of 1990 is designed to:

[P]rotect the copyright of authors of literary, artistic, and scientific works, as well as to safeguard their copyright-related rights and interests, to encourage the creation and publication of works which contribute to the development the socialist . . . culture and to promote the development and prosperity of socialism's cultural and scientific institutions.¹¹⁹

109. PRC Patent Law, *supra* note 106, art. 45.

110. *Id.* arts. 51-52.

111. *Id.* art. 25.

112. ALFORD, *supra* note 1, at 76.

113. Zhonghua Renmin Gongheguo Zhuzouquan Fa [Copyright Law of the People's Republic of China] (1990) [hereinafter Copyright Law], translated in CHINA LAWS FOR FOREIGN. BUS.: BUS. REG. (CCH Austr.) 14,561 (1993). The State Copyright Bureau put the law into effect by promulgating a set of implementing rules under the new copyright law. Zhonghua Renmin Gongheguo Zhuzuo Qunfa Shishi Tiaoli [Implementing Rules for the Copyright Law of the People's Republic of China] (1990), translated in CHINA LAWS FOR FOREIGN. BUS.: BUS. REG. (CCH Austr.) 14,621 (1993).

114. See Jianming Shen, *The P.R.C.'s First Copyright Law Analyzed*, 14 HASTINGS INT'L & COMP. L. REV. 529, 529 (1992) (declaring that new enactment represents a "step toward greater legal certainty in the area of intellectual property law").

115. XIANFA, *supra* note 90, art. 47. This provision declares State support and encouragement for works beneficial to the development of the country.

116. Zhonghua Renmin Gongheguo Minfa Tongze [General Principles of the Civil Law of the People's Republic of China] (1986), translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1983-1987, at 225 (1987) [hereinafter Civil Law of the PRC].

117. *Id.* art. 94.

118. *Id.* art. 118.

119. Copyright Law, *supra* note 113, art. 1.

Although seen as a useful addition to the Chinese intellectual property regime, the Copyright Law, unfortunately, is of somewhat limited utility to foreigners.¹²⁰ Perhaps the most inequitable aspect of the law is that, under its terms, Chinese authors are protected whether their works are published in China or not,¹²¹ whereas foreign authors, unless covered by a treaty granting them more extensive rights, must be published in China in order to gain protection from copyright infringers.¹²²

Subsequent to the enactment of the Copyright Law in 1990, China joined the Berne and Universal Copyright Conventions in 1992,¹²³ and signed on to the Geneva Phonogram Convention in April 1993.¹²⁴ By joining these international agreements, China signaled its intention to provide greater protection to copyrighted works.¹²⁵ Moreover, China has agreed to amend its laws to make them consistent with these agreements,¹²⁶ evidencing a significant commitment to move toward protection of foreign copyrights.

120. For an examination of the strengths and weaknesses of the Copyright Law, see ALFORD, *supra* note 1, at 78-81. With particular regard to the issue of whether foreigners receive only limited protection under the Copyright Law, see ZHENG & PENDLETON, *supra* note 45, at 112-14 (arguing that Chinese law provides foreign copyright holders greater protection than the laws of most other countries); *but see* Shen, *supra* note 114, at 557 (stating that China's Copyright Law "is one of the most complete in the world").

121. Copyright Law, *supra* note 113, art. 2, ¶ 1. The law states, "[w]orks of Chinese citizens . . . shall enjoy copyright protection . . . whether or not the[ir] works are published." *Id.*

122. Copyright Law, *supra* note 113, art. 2, ¶¶ 2-3. According to Article 2:

Works of foreigners that are first published in Chinese territory shall enjoy copyright protection pursuant to this Law. Works of foreigners published outside Chin[a] . . . shall enjoy copyright protection in accordance with agreements signed between China and the relevant country or international treaties to which they are joint participants and shall receive protection pursuant to this law.

Id.

123. China was obligated to join the Berne and Geneva Conventions under the terms of an 1992 agreement with the United States. USTR, *China, United States Conclude Intellectual Property Agreement: Protection for U.S. Computer Software, Patented Products Enhanced*, Press Release 92-3, Jan. 6, 1992, at 1 [hereinafter USTR Press Release 92-3] (available from USTR's Flash-Fax Service) (copy on file with author).

124. USTR, 1995 TRADE POLICY AGENDA AND 1994 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, 59 (1995) [hereinafter 1995 TRADE POLICY AGENDA/REPORT].

125. *See id.*; USTR Press Release 92-3, *supra* note 123, at 2 (noting that 1992 agreement showed China's willingness to bring its trading regime closer to international norms).

126. 1995 TRADE POLICY AGENDA/REPORT, *supra* note 124, at 31; USTR, *China IPR Fact Sheet*, Jan. 17, 1995, at 1 [hereinafter *IPR Fact Sheet*] (available from USTR's Flash-Fax Service) (copy on file with author).

4. *The Software Protection Regulations*

In the late 1980s and early 1990s, China received increasing pressure, especially from the U.S., to provide adequate protection for computer software developers.¹²⁷ Foreign manufacturers and software developers sought to protect software from ever-expanding software pirating operations in the PRC.

Because of the relatively new nature of the computer software industry, China had no precursor laws governing the protection of computer programs. Like many other nations, China decided to base its software protection regime on copyright. Thus, only three days after enacting its Copyright Law, government authorities released the PRC's "Computer Software Protection Rules."¹²⁸

Similar to the Copyright Law,¹²⁹ "the seemingly broad statement of rights [in the Computer Software Rules] is subject to a variety of qualifications."¹³⁰ Moreover, as with copyright, Chinese citizens are eligible for protection whether they release their software in China or not, while foreigners must release their programs in China in order to gain protection.¹³¹

The rules go on to enumerate specific rights of software copyright holders¹³² and establish rules governing rights to software developed jointly by two or more units or individuals.¹³³ The Rules also address rights for parties (a) working on commission to develop software¹³⁴ or (b) developing software as a work task assigned by a work unit or government

127. See *infra* part III.B (discussing pirating of software in PRC and U.S. response to this and other problems with intellectual property protection in PRC).

128. Jisuanji Ruanjian Baohu Tiaoli [Computer Software Protection Rules] (1991) [hereinafter Computer Software Protection Rules], translated in CHINA LAWS FOR FOREIGN. BUS.: BUS. REG. (CCH Austr.) 14,681 (1993). The Rules were implemented by Jisuanji Ruanjian Zhuzouquan Dengji Banfa (1991) [Measures for Computer Software Copyright Registration], translated in CHINA LAWS FOR FOREIGN. BUS.: BUS. REG. (CCH Austr.) 14,751 (1993). According to the regulations, the Computer Software Rules were:

formulated in accordance with the Copyright Law of the [PRC] to protect the rights of persons holding computer software copyright, to regulate the beneficial impact occurring from the development, transmission and usage of computer software, to encourage the development and circulation of computer software and to promote the expansion of undertakings using computers.

Id. art. 1.

129. See *supra* note 120 (discussing limitations on protection of foreigners' copyrights).

130. ALFORD, *supra* note 1, at 80.

131. Computer Software Protection Rules, *supra* note 128, art. 6.

132. *Id.* art. 9. These rights include those: of publication (¶1), acknowledgement (¶2), usage (¶3), licensing (¶4), and assignment (¶5).

133. *Id.* art. 11. What this provision applies to is software developed by one or more persons or entities not of Chinese origin.

134. *Id.* art. 12.

department.¹³⁵ The rules create a twenty-five year protection period for copyrighted software, and allow a one-time extension of a registered software copyright for an additional twenty-five years.¹³⁶ Although the Chinese recently agreed to increase copyright protection for software to a period of fifty years, apparently, authorities have yet to amend the relevant provision of the software protection rules.¹³⁷

It is noteworthy that the Computer Software Protection Rules allow state authorities (whether engaged in teaching, scientific research, or carrying out State duties) to make a limited number of copies of computer programs in their possession if necessary to conduct non-commercial activities.¹³⁸ This exception, which clearly aims at allowing the government to continue technological advancement while limiting its cost exposure,¹³⁹ greatly disturbs foreign software manufacturers and developers.¹⁴⁰ Indeed, software producers' concerns seem valid, as the special government exception does little to encourage others (particularly those in the private sector) to obey the letter or spirit of the Rules.¹⁴¹

Finally, the Computer Software Rules are of lessened utility because of several provisions limiting the scope of rights granted to software developers on "national interest" grounds.¹⁴² On this basis, the Rules prohibit Chinese nationals from licensing software developed in China to foreigners without prior approval from the relevant "software registration

135. *Id.* art. 13.

136. *Id.* art. 15. However, the copyright period for the right of acknowledgement, *id.* art. 9, ¶ 2, is not subject to any time limitation.

137. *China IPR Fact Sheet*, *supra* note 126, at 1. Surprisingly, the implementing rules for software registration, issued in April 1992, three months after the agreement, make no mention of extending the protection period.

138. Computer Software Protection Rules, *supra* note 128, art. 22.

139. See Amy E. Simpson, Comment, *Copyright Law and Software Regulations in the People's Republic of China: Have the Chinese Pirates Affected World Trade?*, 20 N.C. J. INT'L L. & COM. REG 575 (1995) (noting that while the Chinese government hopes to curb piracy, it does not want enforcement of intellectual property laws to stifle economic development); cf., William P. Alford, *How Theory Does—And Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 22 (1994) (suggesting that in dealing with China, balance must be struck between protection of intellectual property and need for access to data allowing "further innovation"); Dennis S. Karjala, *Copyright, Computer Software and the New Protectionism*, 28 JURIMETRICS J. 33, 94 (1987) (arguing that an "appropriate balance between incentive and efficient diffusion of technology" is necessary to limit the scope of protection of copyrighted software).

140. *IPR Industry to Offer USTR Mixed Assessment of Chinese Enforcement*, INSIDE U.S. TRADE, Aug. 11, 1995, at 20.

141. Attempts have been made to rectify this situation. For example, in the recent US-China intellectual property rights accord, the Chinese agreed to ensure that unauthorized copies of computer software are removed from the computer systems of public entities. USTR, *United States and China Reach Accord on Protection of Intellectual Property Rights, Market Access*, Press Release 95-12, Feb. 26, 1995 (available from USTR's Flash Fax Service). It remains to be seen what progress has been made on this front.

142. ALFORD, *supra* note 1, at 81.

control organ."¹⁴³ More troubling is Article 31 of the Rules, which eviscerates many of the rights granted in other sections of the Rules. This provision states that the development of software "similar to existing software . . . shall not . . . constitute an infringement of the existing software's copyright"¹⁴⁴ if the similar software is essential for "implementing relevant State policies, laws, rules [or] regulations"¹⁴⁵ or "implementing State technological standards,"¹⁴⁶ or "when the various forms of expression available for selection and use are limited."¹⁴⁷ By not defining "state policies" or "technological standards," the Rules leave open ample room for the infringement of software developers' rights under the guise of "national interest."¹⁴⁸

Thus, although China has made great strides toward the creation of an effective software protection regime, the law itself contains several suspect provisions. Until these legal loopholes are closed, it will remain difficult, if not impossible, to protect software developers' rights in the PRC.

III. THE PROBLEM OF ENFORCEMENT AND CONFLICT WITH THE UNITED STATES

A. *The Difficult Road to Enforcement*

In recent years, China clearly has made serious efforts to enhance its intellectual property legislation.¹⁴⁹ Although the new laws may not be ideal from the perspective of all foreign businesses and investors in China,¹⁵⁰ they represent elements of a comprehensive movement to modernize the PRC's legal regime. Laws alone, however, cannot solve the problem of intellectual property abuse in China. The largest barrier to the protection of intellectual property rights in China is now the lack of viable mechanisms to enforce the country's intellectual property laws and regulations.¹⁵¹ This author contends that the PRC's current inability to enforce its intellectual property laws is largely the result of 1) the lack of a

143. Computer Software Protection Rules, *supra* note 128, art. 28.

144. *Id.* art. 31.

145. *Id.* art. 31, ¶ (1).

146. *Id.* art. 31, ¶ (2).

147. *Id.* art. 31, ¶ (3). This broadly worded provision seems to imply that the government can copy software and make minor changes therein without violating a holder's copyright virtually without justification.

148. See ALFORD, *supra* note 1, at 81 (pointing out these substantive deficiencies).

149. See *supra* part II (discussing new patent, trademark, and copyright laws).

150. See Copyright Law, *supra* note 113, art. 2 (limiting ability of foreigners to obtain protection for their copyrights in China).

151. See *infra* part III.B (detailing U.S. dissatisfaction with Chinese implementation of MOU and Chinese domestic intellectual property laws). According to Alford, China's "post-Cultural Revolution law reform efforts in general were characterized by the creation of rights without adequate provision for their realization." ALFORD, *supra* note 1, at 117.

tradition respecting the sanctity of intellectual property rights, 2) provincial, local, and military involvement in counterfeiting, and resistance to the enforcement of national laws, and 3) the lack of viable and impartial judicial and administrative systems for dealing with intellectual property disputes.

1. *Lack of a Tradition of Respect for Intellectual Property Rights*

Although various forms of intellectual property rights have existed throughout China's history, true respect for these rights and legal recognition thereof has been slow to evolve.¹⁵² The lack of a strong tradition of respect for intellectual property rights makes it very difficult for willing authorities to stamp out piracy and counterfeiting.¹⁵³ Because of China's massive economic boom, such pirating activities are so widespread and anti-counterfeiting forces so limited, that it is virtually impossible to combat retail level activities.¹⁵⁴ Moreover, even when illegal manufacturing bases are shut-down, their facilities often re-open in a new locale.¹⁵⁵

A related problem is the lack of public awareness of intellectual property issues. Many of the concepts created by recent intellectual property legislation in the PRC are new, or even "peculiar to [Chinese] judges, lawyers" and citizens.¹⁵⁶ Media coverage of recent intellectual property lawsuits has increased public awareness of the issue, but domestic involvement in support of the system is still low.¹⁵⁷ Until China moves closer to a market economy, and economic incentives for the protection of intellectual property grow, it will be difficult to increase enthusiasm for intellectual property protection.¹⁵⁸

152. See generally ALFORD, *supra* note 1 (considering why the notion of intellectual property has not taken root in China).

153. For example, officials of the NPC's Education, Science, Culture & Public Health Committee recently reported that "some . . . people are still not fully aware of the importance of patent protection." Xinhua News Agency, *China Makes Progress in Patent Protection*, May 6, 1995, available in LEXIS, NEWS Library, CURNWS file.

154. Despite some "steps in the right direction," by the government, individual dealers are lured into selling pirated goods by "profit margins as high as 40%." Amy Borrus, et al., *Counterfeit Disks, Suspect Enforcement*, BUS. WEEK, Sept. 18, 1995, at 29. The massive economic growth which China continues to experience greatly exacerbates this problem. Limited police forces must combat piracy at an ever-growing host of retail establishments, which makes enforcement exceedingly difficult.

155. *Id.* (noting that after authorities have halted production and moved-on, factories often re-open).

156. Jianyang Yu, *Protection of Intellectual Property in the P.R.C.: Progress, Problems, and Proposals*, 13 UCLA PAC. BASIN L.J. 140, 160 (1994).

157. *Id.*

158. See *id.* (arguing that establishment of market economy is ultimate solution to problems with intellectual property infringement).

2. *The Role of Regionalism and Impact of Infringing Activities by Government Owned Entities*

The growth of regional power bases has always been a fear of the central leadership in China.¹⁵⁹ Today, that fear has never been more justified, as massive economic growth in the southern coastal provinces has allowed provincial and military leaders to create entrenched power bases far from Beijing.¹⁶⁰ Indeed, despite concerns in the central government, the spread of regionalism may have been inadvertently fostered by Beijing, which encouraged growth in certain areas before others.¹⁶¹ Some have suggested that the massive economic disparities now in place may result in "political particularism and separatism," as was seen during the Warlord Era.¹⁶² Localized "trade wars" have erupted between some provinces,¹⁶³ suggesting that the provincial authorities are far more concerned with developing their local economies than with participating in a national scheme for economic growth.¹⁶⁴ This situation obviously does not bode well for the enforcement of national laws and international obligations undertaken by the central government.¹⁶⁵

Centralized enforcement efforts have been hampered by a related situation: ownership or stake holdings by provincial organs, the military, and government cadres in numerous economic ventures,¹⁶⁶ particularly those involving piracy.¹⁶⁷ With an obvious economic stake in such illicit activities, it is highly unlikely that provincial and military leaders will be

159. LIEBERTHAL, *supra* note 88, at 321-23 (discussing the growing problem of regionalism in China and noting concern that this phenomena threatens "nation's territorial integrity").

160. *See generally* CHINA DECONSTRUCTS: POLITICS, TRADE AND REGIONALISM (David S.G. Goodman & Gerald Segal eds., 1994) (analyzing growth of regionalism in China stemming from uneven economic development and decentralization of power).

161. David S.G. Goodman, *The Politics of Regionalism*, in CHINA DECONSTRUCTS: POLITICS, TRADE AND REGIONALISM 1 (David S.G. Goodman & Gerald Segal eds., 1994).

162. *Id.* at 1, 3.

163. *Id.* at 7.

164. *Id.*

165. *See* LIEBERTHAL, *supra* note 88, at 335 (positing that Beijing's ability to ensure compliance with international economic agreements has been limited by rapid economic growth and reforms).

166. Although apparently acting without endorsement from Beijing, various provincial governments permitted official units and cadres to engage in economic activities before the crackdown on corruption in 1993. WILLY WO-LAP LAM, CHINA AFTER DENG XIAOPING 81 (1995). While not facially troublesome, the entry of low-level government bodies into the economic sphere created an atmosphere highly conducive to corruption.

167. *See* James Cox, *U.S. Firms: Piracy Thrives in China*, USA TODAY, Aug. 23, 1995, at 2B (reporting that many factories suspected of piracy are wholly or partly owned by local governments or those with strong Communist Party connections).

scrupulous enforcers of China's intellectual property laws.¹⁶⁸ Because of the major profits that can be achieved through pirating activities, Beijing can also expect to face great difficulty wresting control of illicit operations from the hands of the military and various lower-level governmental bodies.

3. *A Judiciary Inadequate to Deal Effectively With These Problems*

The legal and administrative systems in China are generally ill-prepared to deal with piracy problems.¹⁶⁹ Administrative fines are often viewed as "paltry" and infringers often continue illegal operations even after official sanctions.¹⁷⁰ Other pirates openly flaunt the law by relying on protection from friends in government.¹⁷¹

The court system is widely regarded as ineffectual,¹⁷² and although China recently established courts in major cities to deal specifically with intellectual property cases,¹⁷³ these courts are "still relatively inexperienced in the interpretation and implementation of intellectual property related laws."¹⁷⁴ Many of the courts are also understaffed and have few resources.¹⁷⁵ Moreover, many of the judges appointed to the special courts

168. See Borrus, *supra* note 154, at 29 (noting that Beijing is willing to combat piracy, but that its clout is diminished because local officials now have increased autonomy in managing economic affairs); Yu, *supra* note 156, at 157 (noting that local protectionism and governmental intervention make enforcement of intellectual property laws difficult).

169. Tan Loke Khoon, *Counter Feats: The Art of War Against Chinese Counterfeiters*, CHINA BUS. REV., Nov. 1994, at 12. See Seth Faison, *Razors, Soap, Cornflakes: Piracy Spreads in China*, N.Y. TIMES, Feb. 17, 1995, at A1 (reporting that counterfeiting of consumer goods is "so widespread that restraining it appears to be far beyond Beijing's grasp").

170. See *IPR Industry to Offer USTR Mixed Assessment of Chinese Enforcement*, *supra* note 140, at 20 (noting that some pirate plants closed in government crackdown have restarted operations).

171. Borrus, *supra* note 154, at 29. Faison, *supra* note 169, at A1.

172. See Donald C. Clarke, *Justice and the Legal System in China*, in CHINA IN THE 1990s 91-92 (1995) (discussing limited role played by courts and noting that courts in PRC "are just one bureaucracy among many" and finding that limited competence of courts stems naturally from traditional Chinese views of relationship between government and law).

173. These courts were first placed in: Beijing, Tianjin, Shanghai, Guangzhou, Shenzhen, Zhuhai, and Shantou. See Xinhua News Agency, *Round Up: China Stresses Protection of Intellectual Property Rights*, Aug. 23, 1995, available in LEXIS, NEWS Library, CURNWS File (discussing measures taken by government to protect intellectual property rights). The creation of special courts began in Beijing, where Intellectual Property Divisions were created in the Municipal High People's Court and the Municipal Intermediate People's Court. Yu, *supra* note 156, at 147.

174. Tan, *supra* note 169, at 12.

175. The PRC has a serious shortage of lawyers, particularly those trained in intellectual property law. Yet, even those qualified to handle intellectual property cases could improve their services and raise their levels of competency. Yu, *supra* note 156, at 161.

have had little experience dealing with intellectual property issues,¹⁷⁶ while others "lack the necessary background" to try and rule on cases under their jurisdiction.¹⁷⁷

As a consequence, until China provides stiff administrative penalties, invigorates its judiciary, and provides it with much needed resources, training,¹⁷⁸ and manpower, the bulk of intellectual property cases likely will be bogged down in the courts, handled by inexperienced personnel, or left to the vagaries of political solutions.

B. *Intellectual Property Protection in China: A U.S. Perspective*

Intellectual property rights issues have long been a focus of U.S.-China trade considerations and negotiations.¹⁷⁹ Officials in the U.S. (and U.S. businesspersons) perceive the Chinese government's failure to enforce foreign intellectual property rights as a significant market access barrier which discourages many U.S. firms from exporting products and technology.¹⁸⁰ Moreover, they view the illegal use of U.S.-owned intellectual property as substantially contributing to the continuing and widening trade deficit with China.¹⁸¹

176. Cf. Yu, *supra* note 156, at 161 (advocating system of regular programs and seminars to help educate judges dealing with intellectual property disputes and keep them abreast of changes in field).

177. Tan, *supra* note 169, at 12.

178. One author notes that "legal education on intellectual property in universities has improved" with some schools even offering second degrees in intellectual property law. Yu, *supra* note 156, at 149-50. As educational and training opportunities for attorneys and jurists in the PRC expand, there is a hope that the protection of intellectual property in China will improve.

179. ALFORD, *supra* note 1, at 113; 1995 TRADE POLICY AGENDA/REPORT, *supra* note 124, at 58. According to Alford, during the Bush administration, "intellectual property protection became a defining issues in relations with the PRC." ALFORD, *supra* note 1, at 113. Alford notes that the Clinton administration has followed a route substantially similar to that of Bush, purposefully pursuing the issue with the Chinese. *Id.* at 114-15. The USTR reports that it has engaged in detailed discussions with the Chinese in an effort to improve the protection of intellectual property in the PRC. 1995 TRADE POLICY AGENDA/REPORT, *supra* note 124, at 58.

180. See Wallace Collins, *Protecting U.S. Copyrights in China and Elsewhere*, N.Y. L.J. Mar. 31, 1995, at 5 (noting lack of protection of U.S. intellectual property rights and reporting that Chinese demand for pirated goods is fueled in part by government restrictions on the importation of certain entertainment products); 1995 TRADE POLICY AGENDA/REPORT, *supra* note 124, at 58 (noting that Special 301 investigation of Chinese IPR practices focused on issue of "market access for IP-based products").

181. Collins, *supra* note 180, at 5 (declaring that piracy of copyrighted material "substantially contribut[es] to the trade imbalance"). According to Alford, intellectual property protection issues have become a central feature of PRC-U.S. relations because of the "manner in which affected American industries have brought such concerns to the foreground politically." ALFORD, *supra* note 1, at 115. Alford writes:

Some U.S. companies, particularly high technology and pharmaceutical firms, are wary of entering the Chinese market because of fears that their intellectual property rights, although purportedly recognized by the PRC,¹⁸² are meaningless and unprotected within China's borders.¹⁸³ According to estimates by the International Intellectual Property Alliance, piracy of U.S. copyrighted works had reached an annual level of approximately \$1 billion by 1994; piracy of patented and trademarked products greatly increased that total.¹⁸⁴ Despite their magnitude, these

Although counterfeiting had long been a problem, it was [during the mid-1980's] . . . that key domestic industries succeeded in fostering a politically potent perception that their losses were linked to the nation's larger trade difficulties. Calculating losses on the presumption that current infringers would buy at list price rather than cease using their products, they contended that infringement accounted for much of the burgeoning U.S. trade deficit—especially in East Asia—and, moreover, that it threatened the very service and high-technology industries on which a rosier future was supposed to be based.

Id. (citation omitted).

182. In 1992, the U.S. and China concluded an historic agreement covering this issue. *Memorandum of Understanding Between the Government of the People's Republic of China and Government of the United States of America on the Protection of Intellectual Property* [hereinafter MOU], Jan. 17, 1992, reprinted in 34 I.L.M. 676 (1995). Pursuant to the MOU, the Chinese government implemented legislation for the protection of intellectual property rights within China. However, the U.S. government believed that China did not take the necessary steps to guarantee that this new intellectual property regime would be enforced. UNITED STATES INTERNATIONAL TRADE COMMISSION, THE YEAR IN TRADE 1993: OPERATION OF THE TRADE AGREEMENTS PROGRAM 96-97 (USITC 1995)[hereinafter 1993 OTAP].

183. See, e.g., Borrus, *supra* note 154, at 29 (discussing endemic piracy of CD's, CD-ROM's, and computer software in China and lack of effective government action to shut down counterfeiters); *Software Piracy Still Critical, Despite Sino-US Pact in China*, BUS. CHINA, Sept. 18, 1995 (Economist Intelligence Unit Report)(stating that "the bulk of China's software pirates continue to slip through the . . . largely ineffectual-dragnet thrown out by the government's . . . enforcement agencies"); James Cox, *U.S. Firms: Piracy Thrives in China*, USA TODAY, Aug. 23, 1995, at 2B (reporting that China is waging war against peddlers of bootleg software but ignoring software pirates). In addition to its recent agreements with the U.S. dealing with the enforcement of intellectual property laws in the PRC, China joined both the Berne Convention and the Universal Copyright Convention in October 1992. USTR, 1995 NATIONAL TRADE ESTIMATES REPORT 55 (1995).

184. USTR, *Fact Sheet: Special 301 Investigation*, at 1 (Dec. 31, 1994)(available from USTR's Flash Fax Service)(copy on file with author). Other estimates on the value of goods pirated and sold by China bootleggers vary widely. Trade and industry groups estimate that piracy cost U.S. businesses between \$830 million and \$ 870 million in 1994. See Jeffrey Parker, *As U.S. Looks In, China Software Pirates Flourish*, THE REUTER EUROPEAN BUS. REP., Aug. 23, 1995 (available in LEXIS, NEXIS library, CURNWS file)(supporting \$830 million figure for software alone, based on data supplied by the Business Software Alliance); James Cox, *U.S. Firms: Piracy Thrives in China*, USA TODAY, Aug. 23, 1995, at 2B (alleging losses of \$866 million, broken down as follows: software, \$351 million; recorded Music, \$345 million; books, \$120 million; videos, \$50 million). According to the USTR,

American firms stand to lose nearly \$2 billion a year from the sales of pirated goods in

estimates may be far too low. For example, Nintendo Corporation estimates that it alone loses \$1.2 billion per year to counterfeiters in the PRC, and the Chinese government itself has conceded that "95 percent of all CD's sold in China are pirated."¹⁸⁵ Moreover, these figures do not take into account the trade diversion effects of piracy, which may, in one narrow area alone, result in the export from China of over seventy million pirated CD's per year.¹⁸⁶

Although the U.S. and China concluded an important memorandum of understanding concerning intellectual property rights in early 1992,¹⁸⁷ concerns about the protection of intellectual property rights in China continued to mount. As a consequence, on December 1, 1993 the USTR placed the PRC on a "priority watch list,"¹⁸⁸ alleging that China was not enforcing intellectual property rights.¹⁸⁹ Six months later, after identifying China as a "priority foreign country" under Special 301, USTR Kantor began an investigation of China's intellectual property rights enforcement practices.¹⁹⁰ Numerous rounds of bilateral discussions took place between Chinese and American negotiators in the ensuing half-year. On December 31, 1994, Kantor released a proposed determination finding that China's intellectual property enforcement mechanisms were inadequate, unreasonable, and burdensome or restrictive to U.S. commerce. Because the two sides still sought to reach an acceptable settlement, the investigation was

China. *Id.*

185. M. Margaret McKeown et. al., *IP Protection in China: Reality or Virtual Unreality?*, LEGAL TIMES, May 15, 1995, at 24.

186. See 1995 TRADE POLICY AGENDA/REPORT, *supra* note 124, at 58 (reporting that Chinese CD factories are capable of producing over 75 million CD's per year, when the Chinese market can absorb only 5 million CD's). According to one source, the Business Software Alliance, CD's bootlegged in China now cut into sales as far off as South America. Borrus, *supra* note 154, at 29.

187. MOU, *supra* note 182. The USTR touted the 1992 MOU as an agreement under which "China w[ould] make significant improvements in its patent, copyright, and trade secret laws," and as demonstrating a willingness on the part of China to "take important steps toward bringing its trade regime closer to international norms." USTR Press Release 92-3, *supra* note 123, at 1-2. For a thorough overview of the background events relating to this document and the U.S. position on intellectual property protection by the Chinese, see ALFORD, *supra* note 1, at 112-23.

188. See Seth Goldberg, *Internal and External Forces: Why and How the Major Record Companies Will Successfully Access the Chinese Market*, 7 N.Y. INT'L L. REV. 51 (1994) (noting that despite this action, formal investigation of Chinese practices was not begun).

189. See International Trade Administration, *China Issues Summary*, at 1 (available from the Dep't of Commerce - "Flash-Fax Service") (copy on file with author). The ITA notes that although China had taken significant steps to improve protection of U.S. rights in the areas of copyrights, patents, and trade secrets, the PRC's enforcement of these rights was a "growing problem." *Id.*

190. USTR, *USTR Announces Special 301 Decision*, Press Release 94-38, June 30, 1994; USTR, *Initiation of Investigation*, 59 Fed. Reg. 35,558 (1994).

extended to February 4, 1995.¹⁹¹ Subsequent to this action, however, the USTR issued a preliminary list of imports from China under consideration for retaliation in the event that no agreement could be reached by the new deadline.¹⁹² On that date, the USTR published a final retaliation list, targeting over \$1 billion worth of Chinese imports for increased tariffification.¹⁹³

After a protracted series of negotiations, and threats of counter retaliation by the Chinese against U.S. exports, the two sides reached an agreement to end their intellectual property dispute.¹⁹⁴ USTR Kantor and China's Minister for Foreign Trade and Economic Cooperation, Wu Yi, concluded the investigation through an exchange of letters. The writings included an annex titled "Action Plan for Effective Protection and Enforcement of Intellectual Property Rights" which established a detailed agenda for intensified Chinese protection of intellectual property rights and enforcement of Chinese laws related thereto.¹⁹⁵ The head of the U.S. negotiating team, Deputy USTR Barshevsky, enthusiastically declared that this agreement was one of the most "comprehensive IPR agreements" ever achieved by the U.S..¹⁹⁶

Despite the alleged strengths of the most recent agreement reached with China and the PRC's alleged commitment to root out counterfeiting and infringing activities, violation of intellectual property rights continues virtually unabated.¹⁹⁷ For example, although Chinese officials have raided and closed down a number of illegal factories manufacturing pirated CD's, CD-ROM's, and computer software,¹⁹⁸ reports indicate that many of the factories which had been shut down are now operating again.¹⁹⁹ Moreover, enforcement efforts in the area of software protection have even

191. USTR, *Extension of 301 Investigation*, 59 Fed. Reg. at 1,830 (1994) (noting that complex issues in negotiations could not be resolved before the statutory deadline and extending investigation).

192. 60 Fed. Reg. 7,230 (1995).

193. USTR, *United States and China Reach Accord on the Protection of Intellectual Property Rights, Market Access*, Press Release 95-12, Feb. 26, 1995 (available from USTR's Flash Fax Service)(copy on file with author).

194. 60 Fed. Reg. 12,583 (1995) (announcing end of investigation).

195. *Measures by the Government of the People's Republic of China and the Government of the United States of America Regarding Intellectual Property Rights*, Feb. 26, 1995, reprinted in 34 I.L.M. 881 (1995) [hereinafter *1995 IPR Measures*]; see USTR *Announces Agreement on IPR with China*, INSIDE U.S. TRADE, Mar. 3, 1995, at 1, 4.

196. *USTR Announces Agreement on IPR with China*, *supra* note 195, at 1.

197. See, e.g., Borrus, *supra* note 154, at 29 (reporting that six months after accord, "[t]here are even signs the bootleg boom will get worse"); Cox, *supra* note 184, at 2B (stating that costs of piracy "show no sign of abating"); Economist Intelligence Unit, *Software Piracy Still Critical, Despite Sino-U.S. Pact*, CHINA BUS., Sept. 18, 1995, available in LEXIS, NEWS Library, CURNWS File .

198. *IPR Industry to Offer USTR Mixed Assessment of Chinese Enforcement*, *supra* note 140, at 20.

199. *Id.*; Borrus, *supra* note 154, at 29.

been hampered by the lack of a government decree instructing government ministries not to pirate such programs for their own use.²⁰⁰ These new reports are especially disturbing given the recent commitments to bolster China's intellectual property enforcement measures and mechanisms.²⁰¹ These indicators suggest that intellectual property rights issues will remain a thorn in the side of U.S.-China trade relations for some time to come.²⁰²

IV. FUTURE PROSPECTS - MOVING TOWARD INTERNATIONAL STANDARDS OF INTELLECTUAL PROPERTY PROTECTION

By most accounts, recent Chinese efforts to strengthen the nation's intellectual property rights protection regime are encouraging.²⁰³ On paper, China's intellectual property laws are now among the world's most comprehensive and modern.²⁰⁴ However, laws without enforcement are meaningless, as are rights without remedies.²⁰⁵ The next step for the Chinese is to establish mechanisms for the enforcement of legal rights under

200. See *IPR Industry to Offer USTR Mixed Assessment of Chinese Enforcement*, *supra* note 140, at 20; McKeown, *supra* note 185, at 26 (stating that provincial governments' ties to pirating operations complicate enforcement efforts).

201. See generally, *1995 IPR Measures*, *supra* note 195 (outlining China's obligations relating to the protection of intellectual property rights).

202. See Arthur Wineburg, *The Close of Round Two: Intellectual Property Rights Protection In China*, *CHINA BUS. REV.*, July 1995, at 20 (discussing problems involving protection of intellectual property in China and providing overview of *1995 IPR Measures*).

203. See Giunta & Shang, *supra* note 91, at 353 (declaring that China "is implementing its intellectual property commitments in good faith" and that increased protection has boosted foreign confidence and attracted foreign investment); McKeown et al., *supra* note 185, at 24 (discussing encouraging developments in IP protection). Among recent measures taken by China were the creation of specialized courts, in eight Chinese cities, to deal with intellectual property matters, as well as the adoption of new laws increasing fines and possible prison sentences for copyright violators. *Id.*

204. See, e.g., Chang & Conroy, *supra* note 1, at 447 (declaring that China's trademark system is approaching "common international standard"); Giunta & Shang, *supra* note 91, at 347 (mentioning Chinese efforts to build "world-class" intellectual property regime); Shen, *supra* note 114 (asserting that PRC's copyright law is among world's most complete); Simpson, *supra* note 139, at 627 (calling China's software and copyright regulations some of world's most sophisticated).

205. For example, representatives of American intellectual property rights holders recently reported that despite the recent US-China IPR Agreement, enforcement efforts in the PRC "lack aggressive raids, announcement of criminal prosecutions, and administrative fines." One source claims that such actions would prove a strong deterrence to piracy. *IPR Industry to Offer USTR Mixed Assessment of Chinese Enforcement*, *supra* note 140, at 20. A serious problem in the past has been lack of adequate remedies in Chinese courts. However, U.S. companies [are now beginning] to test the limits of the Chinese legal system on the protection of intellectual property," despite the fact that "it has been difficult to win such cases" in the past and that previous victories have typically been dampened by mere token penalties. Jeffrey Parker, *China Targets Users of Illegal Software*, *WASH. POST*, Apr. 15, 1995, at A11. See *supra* part III.A.3 (identifying inadequate judicial system as obstacle to enforcement Chinese laws).

its new intellectual property laws.²⁰⁶ Moreover, it is critically important that the Chinese strengthen the position of an independent judiciary to facilitate enforcement of legal rights, including those involving intellectual property.²⁰⁷ Yet, before these changes can be achieved, a fundamental development must occur in China; that is, the notion of "rights consciousness" must be instilled in the Chinese people and ingrained in their legal institutions.²⁰⁸ In essence, this means that the people need to believe "individuals are endowed with rights that they are entitled to assert even with respect to those in positions of authority."²⁰⁹

As a result of major changes over approximately the last sixteen years, China now has viable intellectual property laws in place. Therefore, current and future efforts must be aimed at educating the public about the costs of infringement and strengthening China's legal institutions to ensure that these laws are executed and enforced.²¹⁰ It is important to remember that Chinese courts have only recently begun to grapple with the administration and enforcement of intellectual property laws which, as alluded to above,

206. See ALFORD, *supra* note 1, at 117 (discussing post-Cultural Revolution legal reform in China and noting that "law reform efforts in general were characterized by creation of rights without adequate provision for their realization"). Alford concludes that even the 1990s revisions of Chinese intellectual property law:

[E]ither still fails to sufficiently address the issue of remedies, as in the case of patent and copyright, or remains heavily dependent on administrative remedies redolent of the days of the controlled economy, as in the case of trademark. But even if the remedies that parties could invoke and shape were stated more fully, the institutional vehicles through which these might be realized—be they administrative or judicial—remain insufficiently independent and professional.

Id.

207. See, e.g., ALFORD, *supra* note 1, at 88 (noting hesitation on part of courts to proceed in copyright actions directed at colleagues in PRC's procuracy); 1995 TRADE POLICY AGENDA/REPORT, *supra* note 124, at 58 (1995) (reporting that U.S. has discussed with China, in detail, enforcement of its intellectual property laws); Economist Intelligence Unit, *Software Piracy Still Critical, Despite Sino-US Pact*, BUS. CHINA, Sept. 18, 1995, at 1, available in LEXIS, NEWS Library, CURNWS File (declaring that "more cases are finding a greater sympathy in the intellectual property court system"); Arthur Wineburg, *The Close of Round Two: Intellectual Property Rights Protection in China*, CHINA BUS. REV., July 1995, at 20 (stating that "the lack of a strong, independently functioning judicial system . . . presents problems for effective IPR protection"); but see Editorial, *Fulfilling Obligations*, SOUTH CHINA MORNING POST, Aug. 7, 1995, at 16 (lauding China's first conviction for violation of intellectual property rights). According to Parker, the Chinese courts are being watched closely to determine whether China shows "signs of greater determination . . . to deal with . . . infringement." Parker, *supra* note 205, at A11.

208. ALFORD, *supra* note 1, at 117.

209. *Id.*

210. Alford identifies as one particularly difficult obstacle, the fact that meaningful protection of intellectual property rights is not even available for the Chinese themselves. He observes that "it is inconceivable that a system designed largely to protect [foreign property interests] . . . could be sustained in modern China, given the bitter legacy of more than a century of foreign privilege." *Id.* at 17.

“have little cultural grounding.”²¹¹ This process has proven, and will remain, difficult.²¹² Yet, with time, change will come.²¹³ According to an ancient Chinese proverb, “*even a journey of 1,000 miles must begin with a first step.*” Today, China has completed the first steps of a long journey toward full protection of intellectual property²¹⁴— the journey, however, must continue.

211. See ALFORD, *supra* note 1, at 119 (mentioning the “late appearance and relative insignificance of intellectual property in the Chinese world”). Alford posits that the enactment of intellectual property laws with a foundation in Western, not Chinese, tradition, will likely prove to be of limited utility, unless there is “a concomitant nurturing of the institutions, personnel, interests, and values capable of sustaining a liberal, rights-based legality.” *Id.* at 118.

212. See, e.g., Cox, *supra* note 167, at 2B (discussing difficulties encountered by government in efforts to control piracy).

213. Lately, there have been many encouraging signs that the Chinese government has become serious about enforcing its intellectual property laws. Evidence has come in the form of stepped-up raids, the creation of special intellectual property courts (see above), and the devotion of greater resources to violations of the law. For a sampling of these encouraging changes, see Borrus, *supra* note 154, at 29 (stating that Beijing has made some moves in right direction); Editorial: *Fulfilling Obligations*, *supra* note 207, at 16 (lauding first conviction by Chinese authorities of man selling bootlegged CD’s); Tan, *supra* note 169, at 12 (discussing strategies for combating piracy in China and noting small success in China’s campaign to “clamp down” on infringing activities); Gene Koprowski, *Mickey Kantor*, FORBES, Aug. 28, 1995, at 68 (noting that recent enforcement efforts by China are “real” and that U.S. will continue to support PRC’s attempts to combat counterfeiting).

214. Cf. Borrus, *supra* note 154, at 29 (stating that with regard to eliminating piracy in China, “we’re on the one-yard line—with 99 yards to go”) (quoting executive at Business Software Alliance).

CHOICE OF LAW FOR CONTRACTS IN CHINA: A PROPOSAL FOR THE OBJECTIVIZATION OF STANDARDS AND THEIR USE IN CONFLICTS OF LAW

*Luo Junming**

INTRODUCTION

Choice-of-law in the area of contracts is one of the most complex and confused areas within the larger discipline of conflict of laws, but it is one in which many foreign jurists and businessmen are and must necessarily be interested. In China, both judicial practice and legislation in this area are imperfect but not as complex or confused and unmanageable as many foreigners suppose. Because of the uniformity of China's legal system, the problems inherent in the choice of law system are capable of being remedied. China does not have a private international code,¹ but Chinese jurists have proposed one and are prepared to adopt such a code that would reflect the main principles of choice of law for contracts that prevail in international law. In fact, those involved in civil and commercial transactions in China have adopted such principles in theory and in practice.

This article will examine the main elements of conflicts theory² that must be analyzed in choice of law situations common to international contracts, namely the concepts of party autonomy, place of most significant relationship, and character of performance. Finally, in part four, this author proposes an additional form of analysis in which to decide the proper choice

* Luo Junming is an Associate Professor of International Economic Law at Ningbo University, Ningbo, Zhejiang, PRC. He holds a number of other positions, including the following: Conciliator of Ningbo Conciliation Centre, China Chamber of International Commerce, Council Member of Ningbo Association of Legal Advisers for Enterprises, Specially Invited Lawyer of Ningbo Asian-Pacific Commercial Law Office, Ningbo Foreign Economic Law Office and Daxie Development Zone Law Office.

1. This term is used by some jurists and is synonymous with "conflict of laws."
2. Inconsistencies or differences between the laws of different states or countries can arise when rights are acquired, obligations incurred, injuries inflicted, or contracts entered into between people of different territories or jurisdictions. Deciding which law or system is to govern in a particular case or for a particular part of a contract is a complex and specialized area of law. A number of principles are used by courts to determine the applicable law, *e.g.* substantive versus procedural concerns; center of gravity; *renvoi*; *lex fori*; grouping of contracts; and place of most significant relationship. The choice of law clause in a contract is an essential provision wherein the parties designate the state whose law will govern the contract as a whole or any given part of it, or which will govern in case of dispute or to resolve issues of definition, *e.g.* of breach.

of law in international contracts: an objectivization of the standards of analysis embodied in the established principles of conflicts theory. The People's Republic of China (PRC), due to its unique relationships with economic powers such as Hong Kong, Macao, and Taiwan and its own potential for economic explosion onto the world's economic stage, can and should take the lead in coming to terms with the myriad and subjective tools currently used by the jurists of the world to decide conflicts of law. This author proposes that the fairest and most predictable manner in which to resolve such conflicts is through the objectivization of the standards already established in conflicts theory.

I. PARTY AUTONOMY PRINCIPLE

The principle of party autonomy gives the parties to a contract freedom to select the law which is to govern the contract. It is the theoretical cornerstone of conflicts theory for contracts, a rule of law currently embodied in the private international laws of almost all countries. China only recently formally and officially recognized the principle of party autonomy with the promulgation of the Law of the Peoples' Republic of China on Economic Contracts Involving Foreign Interest;³ Article 5 of which provides that "[t]he parties to a contract may choose the proper law applicable to the settlement of contract disputes."⁴ This principle was reconfirmed by the promulgation of the General Principles of the Civil Law of the People's Republic of China.⁵

General Principles of the Civil Law of the People's Republic of China became effective January 1, 1987.⁶ Article 145 of this law provides that "[t]he parties to a contract involving foreign interest may choose the law applicable to settlement of their contract disputes, except as otherwise stipulated by law."⁷

This is a progressive step adopted to improve the legal environment in China, but there is a shortcoming in the language of this article in that it is applicable to disputes whereby the parties "may choose the proper law applicable to the settlement of contract disputes," without specifying what a dispute means. For example, what law is to be chosen to regulate the performance of the contract or to enforce the rights and duties of the parties to the contract? This defect in the wording of the law was overcome in the

3. Law of the People's Republic of China on Economic Contracts Involving Foreign Interest, March 21, 1985, in 1 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 484 (1991).

4. *Id.* at 347.

5. General Principles of the Civil Law of the People's Republic of China, April 12, 1986, in 1 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 347 (1991).

6. *Id.*

7. *Id.*

Maritime Code of the People's Republic of China;⁸ Article 269 of which provides that "[t]he parties to a contract may choose the law applicable to the contract, except as otherwise stipulated by law."⁹ This provision is in accordance with the principles of civil and commercial law of China, as Article 3 of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest provides that "[c]ontracts shall be concluded according to the principle of equality and mutual benefit and the principle of achieving agreement through consultation."¹⁰ Furthermore, Article 4 of the General Principles of the Civil Law of the People's Republic of China provides that "[i]n civil activities the principles of voluntariness, fairness, making compensation for equal value, honesty and credibility shall be observed."¹¹ These articles indicate that parties to a contract are entitled to negotiate and to determine their rights and duties under a contract equally and voluntarily, making it essential that they be authorized to choose the law to be applicable to the contract.

When can the parties to a contract choose the law to be applied to the contract? There is no definite stipulation in Chinese Law. According to the judicial interpretation of the Supreme Court of the People's Republic of China, the parties can do so at the time of making the contract, after the dispute arises over the contract, and before the trial.¹² A rigid time limit for choosing proper law does not comport with the purpose behind the theory of party autonomy. The parties ought to have the right to choose proper law for the contract at any time before the dispute is settled. A change of the choice of proper law to a contract should not affect the validity of the form of the contract or the right of third parties. This point of view complies with the requirements of Article 3(2) of the Rome Convention which makes it possible for parties to a contract under its jurisdiction to change the governing law, either by changing their own expressed choice or by making a choice where previously they had not done so, without prejudicing its formal validity or adversely affecting the rights of third parties.¹³

As to the manner of choosing proper law, there is no definite regulation in Chinese law. However, in the judicial interpretation of the

8. Maritime Code of the People's Republic of China, November 7, 1992, in 4 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 389 (1994).

9. *Id.*

10. Law of the People's Republic of China on Economic Contracts Involving Foreign Interest, *supra* note 3, at 484.

11. General Principles of the Civil Law of the People's Republic of China, *supra* note 5, at 332.

12. China Supreme People's Court's Answers to some Questions on Application of Law of the People's Republic of China on Economic Contracts Involving Foreign Interest 2(4), in COMPLETE COLLECTION ON JUDICIAL INTERPRETATIONS OF SUPREME PEOPLE'S COURT & SUPREME PEOPLE'S PROCURATORATE 255-58 (1994).

13. COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW 320 (1986).

Supreme Court of the People's Republic of China, it is provided that the parties to the contract shall do so by means of an express choice-of-law clause.¹⁴ Many countries, in their domestic law and in the international treaties they have signed recognize the rule that gives the parties to the contract the power, within reasonable limits, either by a choice-of-law clause in the contract or by some other clear manifestation of their intention, to choose the law which will govern the contract. Section 187(2) of the Restatement (Second) of Conflict of Laws supports this proposition by stating that "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement direct to that issue."¹⁵

Subtle differences in policy emerge when the positions outlined above are compared. Both require the use of an express choice-of-law clause, but in China it is not enacted in a specific code but rather operates by force of judicial interpretation. The implied selection of the proper choice of law operates in practice in China but is not sanctioned under color of law. This is in stark contrast to most other countries where this implied selection has been enacted by force of law.

The approval of an express selection of proper law will honor the parties' intention. It is unreasonable to refuse the implied selection of proper law only because of the parties' failure to express their intention explicitly. In order to determine the parties' implied selection of the governing law, the content and nature of the provisions of the contract may be examined, along with the accepted customs and practices of business and convenience, the language of the contract, and the presence of a jurisdiction clause. Such a jurisdiction clause may specify that any litigation or arbitration undertaken in a certain country may provide a basis for the inference that the parties intended the law of that country to govern.¹⁶

It remains a separate question for analysis as to whether even an express choice of law clause is applicable to the whole contract or to only a limited part of it. Many countries, in their domestic laws and in the international treaties they enter into, recognize the potentially messy implication that a choice of law clause can properly be applied to the whole contract or to only a part or parts of it.

There is no definite regulation, law, or judicial interpretation corresponding to this particular point, but certain inference can be drawn from closely related law. First, Article 30 of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest states

14. China Supreme People's Court's Answers to some Questions on Application of Law of the People's Republic of China on Economic Contracts Involving Foreign Interest 2(2), *supra* note 12.

15. RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (1971).

16. J.D. McCLEAN-MORRIS, THE CONFLICT OF LAWS 255 (1993).

that “[f]or a contract consisting of several independent parts, some may be rescinded according to the provisions of the preceding article while the other parts remain valid.”¹⁷ This means that a contract can be divided into independent parts and some parts can be rescinded as to be applied to different laws.

Second, the China Supreme People's Court's judicial interpretation of the term “contract disputes” in Article 5 of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest states that the term “contract disputes” includes the disputes between the parties arising from the formation, the beginning of the effectiveness, the interpretation of the content, the liability for the breach, the assignment, the modification, the rescission and the termination of the contract.¹⁸ This means that according to the general principles of application of law, the proper law of the contract does not apply to all the questions of the contract. For example, the form of the contract and the capacity of the parties to enter into the contract are two distinct issues which may not be governed by the specific choice of law clause in the contract.

Third, Article 3(1) of the widely accepted Rome Convention states that “[b]y their choice the parties can select the law applicable to the whole or a part only of the contract.”¹⁹ This provision can be introduced easily into formal Chinese law, as the application of this principle would not break the balance of the rights and duties to the parties.

As to the question whether the law chosen by the parties to be applied to the contract is substantive law or the procedural law (i.e. conflict of laws), the answer is not found in China's statutory provisions but in the judicial interpretations of the China Supreme People's Court, which indicates that the proper law chosen by the parties shall be the substantive law, a selection which does not include the law of conflict of laws.²⁰ There is a similar provision in the Rome Convention in Article 5 whereby “[t]he application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.”²¹

17. Law of the People's Republic of China on Economic Contracts Involving Foreign Interest, *supra* note 3, at 487.

18. China Supreme People's Court Answers to Some Questions on Application of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest 2(1), *supra* note 12.

19. COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW, *supra* note 13, at 320.

20. China Supreme People's Court Answers to Some Questions on Application of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest 2(5), *supra* note 12.

21. COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW, *supra* note 13, at 325.

This provision, reflecting the same point of view as expressed by the Supreme People's Court, could be transplanted into China's private international law in order to avoid the endless circling and uncertainty associated with the doctrine of *renvoi*. The doctrine of *renvoi* forces a court to resort to the adoption of foreign laws as to conflict of laws, which rules may in turn refer the court back to the law of the forum. Similarly, if China accepts the theory of Article 5 in the Rome Convention, the concept of choice of law in conflicts involving international contracts shall not be extended to foreign procedural law.

As to the questions of restrictions on the reach of the applicable law, two articles in the General Principles of the Civil Law of the People's Republic of China are relevant to this discussion. First, Article 145 states that "[t]he parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law." Similarly, Article 150 provides that "[t]he application of foreign laws or international practice in accordance with the provisions of this chapter shall not violate the public interest of the People's Republic of China."²² Additionally, one provision of the Law of the People's Republic of China on Economic Contracts Involving Foreign-Related Matters is relevant in that Article 4 provides that "[i]n concluding a contract, the parties must abide by the law of the People's Republic of China and shall not harm the public interest of the People's Republic of China."²³ While this article is not directly on point, the choice of law clause is a part of a contract which must abide by the law of the PRC and shall not harm the public interest of the country.

According to the above statutory provisions, there are two restrictions on the reach of applicable law in conflict theory. First, there is possible restriction by law. It must be clarified that restriction by law means that the application of the proper law chosen by parties shall not violate mandatory provisions in Chinese law. For example, article 5(2) of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest provides that "[t]he law of the People's Republic of China shall apply to contracts that are to be performed within the territory of the PRC, namely contracts for Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and Chinese-foreign cooperative exploration and development of nature resources[.]"²⁴ and this law cannot be violated by the party autonomy principle.

Article 7(1) of the Rome Convention explains the importance of recognizing a mandatory rule, providing that "effect may be given to the

22. General Principles of the Civil Law of the People's Republic of China, *supra* note 5, at 347-48.

23. *Id.* at 484.

24. Law of the People's Republic of China on Economic Contracts Involving Foreign Interest, *supra* note 3, at 484.

mandatory rules of the law of another country with which the situation has a close connection, if and insofar as under the law of the latter country, those rules must be applied whatever the law applicable to the contract."²⁵ This article goes on to specify that "[i]n considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequence of their application or non-application."²⁶ Article 7(2) goes on to specify that "[n]othing in this Convention shall restrict the application of rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."²⁷ Article 7(2) is given effect in the laws of many countries while Article 7(1) is not so widespread due to its vagueness and failure to identify criteria by which to judge which country might be thought to have a close connection.

The second possible restriction is by reference to public interest. It is expressly provided for in article 150 of the General Principles of the Civil Law of the People's Republic of China. This provision is substantially the same as the public policy limitation often invoked on the use of the party autonomy principle widely accepted by jurists around the world.

The practice of public policy being used to void the choice of law clause in a contract can be evaluated by focusing on four factors.²⁸ The first factor is the strength of the policy.²⁹ The second is whether the policy is strong or fundamental enough to justify overriding the parties' choice.³⁰ The third consideration is whether the public policy is embodied in a statute or a common law rule.³¹ Finally, the fourth issue is whether the contract is immoral, inherently vicious, wicked, abhorrent to public policy, or offensive to justice or to the public welfare.³² These evaluations can be introduced in the enforcement of Article 150 of the General Principles of the Civil Law of the People's Republic of China and enacted into Chinese private international law.

The third possible restriction is by the court. It is the common judicial practice in the United States, for instance, for the court to not only have but to use the right to void the choice of law clause in a contract if certain conditions are present. First, if the chosen law of the state "has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice."³³ then the choice can be invalidated. Likewise, invalidation can occur if "the interests of a given

25. COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW, *supra* note 13, at 322.

26. *Id.*

27. *Id.*

28. EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 663-64 (1992).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. RESTATEMENT (SECOND) CONFLICT OF LAWS, *supra* note 15, § 187(2)(a).

state override the stipulation.”³⁴ Third, the concept of comity requires that “if only one state has contacts with the parties and with the contract, and invalidates it, the parties will not secure validity for it by trying to stipulate to have the issue governed by the law of some other place.”³⁵

These reasons and factors can be considered by the China Supreme People's Court in voiding the choice-of-law clause in contracts. But it is also apparent that the party autonomy principle and the methods used to assert it are recognized in theory if not always in adopted law in China.

II. MOST SIGNIFICANT RELATIONSHIP PRINCIPLE

The most significant relationship principle is the foundation of choice of law, allowing for the continuous development of the increasingly complex relationships established by contracts in international business transactions. This principle is so important because it improves predictability, flexibility, objectivity, reasonability and fairness in the application of law. The principle of most significant relationship as a guide for solving conflicts of laws issues has been adopted in China and is found at Article 145(2) of the General Principles of the Civil Law of the People's Republic of China whereby “[i]f the parties to a contract involving foreign interest have not made a choice, the law of the country to which the contract is most closely connected shall be applied.”³⁶ Furthermore, Article 5 of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interest states that “[i]n the absence of such a choice by the parties, the law of the country which has the closest connection with the contract shall apply.”³⁷ Similarly, Article 269(2) of the Maritime Code of the People's Republic of China states that “[i]f the parties to a contract involving foreign interests have not made a choice, the law of the country with which the contract is most connected shall be applied.”³⁸

This principle, however, is well-developed and in use in the West. The Restatement's position is that if there is no stipulation in the contract as to governing law, the law of the state with the most significant relationship should be applied.³⁹ Article 4(1) of the Rome Convention likewise provides that “[t]o the extent that the law applicable to the contract has not been chosen in accordance with Article 3 (on Freedom of Choice), the

34. DAVID D. SIEGEL, *CONFLICTS IN A NUTSHELL* 204 (1994).

35. *Id.* at 202.

36. General Principles of the Civil Law of the People's Republic of China, *supra* note 5, at 347.

37. *Id.* at 484.

38. Maritime Code of the People's Republic of China, *supra* note 8, at 389.

39. RESTATEMENT (SECOND) CONFLICT OF LAWS, *supra* note 15, § 188(1).

contract shall be governed by the law of the country with which it is most closely connected."⁴⁰

The most significant relationship principle, as evidenced above, has been enacted into China's laws, but there is no detailed guidance for its application. The *Restatement, (Second) Conflict of Laws* provides guidance for the use of this principle in international contracts, offering the following. First, "a court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." Second, when there are no such directives, the following factors are relevant to the choice of the applicable rule of law:

the needs of the interstate and international systems; the relevant policies of the forum; the relevant policies of other interested states and the relative interest of those states in the determination of a particular issue; the protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability and uniformity of results; and the nature of the case in the determination and application of the law to be applied.⁴¹

These factors are not to be considered independently; rather they "are to be evaluated according to their relative importance with respect to the particular issue."⁴²

Chinese jurists can learn much from the use of these factors. However, according to practice and theory in China's international private law, the procedure to use to formulate the methods and principles to solve the choice of law problem in the absence of an explicit choice by the parties to the contract involves a number of other considerations. Most Chinese jurists agree that the way to solve the problem of choice of law is the equal communication and mutual benefit theory which derives from China's diplomatic policy as embodied in the Five Principles of Peaceful Co-existence: (1) absorbing the merits of various theories on international private law; (2) favoring the uniformization of private international laws of various nations to promote the establishment of a uniform legal system for international business transactions; (3) including in the rules adopted for choice of law such elements so that the uniform system is convenient for all in the transaction of international business; (4) respecting the interest, public policy and legal system of the nations concerned; (5) keeping in mind always fairness and justice to all parties and paying great attention to the justified expectations of them; (6) considering the predictability, uniformity, certainty, flexibility, feasibility and serviceability of the choice of law.

40. COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW, *supra* note 13, at 320.

41. RESTATEMENT (SECOND) CONFLICT OF LAWS, *supra* note 15, § 6.

42. RUSSELL J. WEINTRAUB, COMMENTARY ON CONFLICT OF LAWS 378 (1986).

Under the above guidelines, additional criteria are necessary to determine the proper law for any particular contract and include the following. The first additional consideration is known as "prominent interest[:]" that is, the country with the strongest interest in the contract. Second, group counting must be considered when a choice of law issue arises whereby the court will consider and compare the number of contacts with one party (i.e. country) and compare with the number of contacts with the other party to the contract (i.e. the other country). Third is the Center of Gravity doctrine in which a court finds for the country that has relatively more contacts with a contract and contacts of more importance. The fourth criterion is that of Characteristic Performance: the proper law of a contract is determined according to the domicile or the place of the business of one of the parties whose performance of the contract represents the character of the contract. Finally, the doctrine of Most Significant Relationship is considered, which as discussed above involves an evaluation of which party has the closer connection to the contract.

Now that the complete list of factors has been laid out, the questions becomes how to determine which country's law has the most significant relationship with the contract? First, display the main contacts or the connecting factors to see which ones have a relationship with the contract. The contact points are as follows: (1) place of contracting; (2) place of performance; (3) place of negotiation; (4) parties' place(s) of business; (5) place of incorporation; (6) place of loading or discharging of the goods; (7) nature and location of the subject matter of the contract; (8) parties' domicile(s); (9) parties' place(s) of residence; (10) parties' nationality or nationalities; (11) currency designated as that in which payment is to be made; (12) content and form of the contract, including any documents made with respect to the transaction and the style and terminology in which the contract is drafted; (13) provisions quoted in the contract; (14) arbitration clauses; (15) jurisdiction clauses; (16) indemnity and guarantee clauses; (17) documents attached to the contract; (18) language used in the contract; (19) connection with a preceding transaction; and (20) whether any of the parties is a government.

The remaining procedures then flow from this list of twenty factors. The second stage is to choose the connected contracts or connecting factors according to the nature, kind and purpose of the contract. The third is to list the connected contacts or connecting factors in descending order of importance to the contract. Fourth, count the number of connected contacts or connecting factors, with the higher scoring country likely to go on to be chosen as the proper source of law to settle contact disputes. The fifth step will confirm the selection in the fourth: compare the country with the higher number of the contacts or connecting factors with the country with the most important contacts or connecting factors to determine which country's law will be used as the proper law of the contract. Compare by testing with the criteria listed above, including group counting, predominant interest, center of gravity, characteristic performance, and most significant relationship.

Which contacts or connecting factors to be connected with a contract is a question of fact. Which contacts or connecting factors are more important is a question of law, differing from country to country and much more difficult to establish. In the absence of an effective choice of law by the parties, the preference for the proper law of a contract is different in various countries. Switzerland tends to use *lex fori*; Germany uses *lex solutionis* or *lex domicilii*; Japan uses *lex actus*; and the U.S. and the ECC both use the law of the place of most significant relationship. Chinese jurists should work out the descending-order-of-importance list of contacts in harmony with these international conventions while continuing to use China's laws and public policy for reference. This combination will improve the predictability, certainty, serviceability, flexibility and feasibility of choice of law.

The following solutions expand on the above basics for determining applicable law for a contract and can be used as an easy reference. First, if according to Chinese law, foreign law is to be applied to a contract and that foreign country is composed of different jurisdictions, the rules governing that foreign country's domestic conflict of laws should be used to determine the applicable law for this contract. If that foreign country has no such rule, the closest connection principle should be used to determine the applicable law of this contract. Similarly, to determine the contacts when the nationality of a party to the contract is in question, use the involved country's law to determine the nationality, and from that will flow the further identification of other contacts which will show which forum's law is to be applied.

The substantive validity of the choice of law to be applied to a contract is determined first and foremost by the law chosen. The validity of the provisions of a sales contract or the contract itself is governed by the law provided for by the international convention concerned and entered into if the law is in force. If one of the parties holds that he does not agree to it, the law of the place of his business governs the contract, so long as the choice of law by the above two ways is not reasonable.⁴³

The substantive validity of any provision of a contract itself is determined by the international convention concerned and entered into by the countries which the parties to the contract belong. If the circumstances show that the above solution is not reasonable, any one of the parties may deny the duties under the authority of the Rome Convention and call for the application of the law of the place of their own habitual residence.⁴⁴ The formal validity of a contract made by the parties in the same country, which

43. Draft Convention on the Law Applicable to Contracts for the International Sale of Goods, Nov. 18, 1983, at Hague, art. 10, in *COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW* 341 (1986).

44. Rome Convention, art. 8, in *COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW* 323 (1986).

complies with the international convention concerned and entered into or with the law of the place of contracting, is in force. The formal validity of a contract made by parties from different countries, which complies with the law of one of the countries, is in force. If the contract is made by an agent, the countries mentioned above are the countries of the agent's act. Acts regarding the contract, which comply with the law that the international convention concerned and entered into provides for, or comply with the law that will be applied, or with the law of place of the act, render the contract valid.⁴⁵ Finally, if a party has more than one place of business, the law which is most connected with one of the places of business, is the law of the contract. If the parties have no places of business, their habitual residences are to be considered.⁴⁶

If a contract does not fall generally into a jurisdiction and is silent on choice of law, the contract is governed by the well-established principles of contracts. If the contract is made through mail, by telegram, or by telephone, the law of the primary place of offer will regulate.⁴⁷ The contract with foreign elements is governed by the law chosen by the parties. Without such an explicit choice, the contract will be regulated by the law of the place where both parties live. If both parties do not live in the same place, the contract is governed by the law of contracts. If it is a non-reimbursement contract, the law of the place where the party providing the interest habitually lives will regulate.⁴⁸ If the parties to a contract have the same nationality, the local law governs. Without the same nationality, the law of the place of contracting is applied to the contract.⁴⁹ If both parties are of the same nationality and do not make an explicit choice of law, the local law will be applied to the contract. With different nationalities, the parties face the law of the place of acting in the regulation of the contract.⁵⁰ To take a more specific example, as in a contract of employment, the law of the place where the employee habitually provides his service will be applied to the contract. Without a recognized habitual-workplace, the law of the place of the business which employs him will govern the contract. If, in general, the contract has the closer connection with the other country, the law of the country will be applied to the contract.⁵¹

45. *Id.* art. 9.

46. Draft Convention on the Law Applicable to Contracts for the International Sale of Goods, *supra* note 42, art. 5(1), (2), at 339.

47. *Traite Concernant l'Introduction aux Pays-Bas, en Belgique et au Luxembourg d'une Loi Uniforme sur le Droit International Prive*, le 11 mai 1951, art. 17(3), in *COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW* 126 (1986).

48. Yang Xiankun, *Comparative Study of Laws of Conflicts between Mainland China and Macao*, Annual Symposium of China International Private Law (1994).

49. Thailand's International Private Law is a good example of this principle.

50. Taiwan Law on Application of Civil Law Involving Foreign Interest, art. 6(2), in *NEW COLLECTION OF SIX CODES* 369 (1986).

51. Rome Convention, *supra* note 43, art 6, at 322.

For another example, consider the following. Without an expressed choice of law for the contract, the proper law should be the local law of the place of the habitual residence of the seller when he has received the order. If the order is received by the seller's business office, the local law of the place of the business is applied to the contract. If the order is received in the country which is the place of the buyer's habitual residence or the place of buyer's business, the proper law for the contract is the local law of the buyer's country, notwithstanding that the receiver of the order is the buyer, his representative, or an agent of his salesman.⁵²

The above formulations are instructive for Chinese jurists to work out a list in descending order of importance the contact points for a contract being disputed. It will help improve the predictability, certainty, serviceability, flexibility, and feasibility of choice of law questions in the area of international contracts.

III. CHARACTER OF PERFORMANCE PRINCIPLE

Character of performance theory⁵³ requires that courts determine the proper law of a contract in dispute based on which party's performance represents the character of the contract, the essence of the agreement, with the law of that party's domicile or the domicile of the party's business being the proper law to apply to the conflict.

The steps in this process are systematic and will lead to an objective finding by the court. First, classify contracts into different kinds according to their nature, purpose, content, and such (e.g. loan, agency, rendition of service, sale of chattels, insurance, auction). Second, identify the contract in issue to be under which kind of choice of law. Different contracts have different rules to govern them. Third, identify which party's performance of the contract represents the character of the contract. Fourth, determine whether the law of the party's domicile or place of business will be the proper law of the contract.

The strong points of the character of performance method are numerous. In this approach, different rules are applied to different contracts and the relationship between the contracting parties and the countries concerned is considered. Character of performance becomes the central criterion for determining the applicable law. This approach embodies the most connected relationship principle and avoids uncertainty by enriching the theory of closest relationship. It is easy for the court to determine which law is most connected with the contract without complex analysis,

52. Convention sur la Loi Applicable aux Ventes a Caracteres International d'Objects Mobiliers Corporels, le 15 juin 1955, a la Haye, art. 3, in COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW 303 (1986).

53. This approach was first formulated in the Convention sur la Loi Applicable aux Ventes a Caractere International d'Objects Mobiliers Corporels, see *supra* note 52.

and it makes the closest relationship principle more serviceable. It is for these merits that many countries, such as Poland, the former Czechoslovakia, Austria, the former Yugoslavia, and the EEC, as well as many international conventions, have adopted and enacted this approach to the selection of the proper law for a contract.

The character of performance approach was adopted by the Interpretation of Some Issues of the People's Supreme Court of the People's Republic of China in October 1987 in the Application of the Foreign Economic Contract Law. According to the character of performance principle, the laws applicable to thirteen kinds of contracts are listed. First, to the international sales of goods contract, the law of place of seller's business is applied; and if the seller has more than one place of business, the law of the place of the principal business which is most connected with the contract is applicable. If the contract is negotiated and contracted at the place of the buyer's business or is made according mainly to the buyer's conditions on tender, or it is expressly provided in the contract that seller must deliver the goods at the place of the buyer's business, the law applicable to the contract shall be the law of the place of the buyer's business when the contract is made.

Second, to the loan contract or guarantee made by a bank, the law of the place of the loaning bank or the guaranteeing bank is applied. Third, to the insurance contract, the law of the place of the insurer's business is applied. Fourth, to the "One-off" production contract, the law of the place of the business of the manufacturer is applied. Fifth, to the technology transfer contract, the law of the place of business of transferee is applied. Sixth, to the engineering project contract, the law of the place of the project is applied. Seventh, to the technological advice contract or the designing contract, the law of the place of the trustor's business is applied. Eighth, to the service contract, the law of the place of service rendition is applicable. Ninth, to supply and equipment contract, the law of the place of installation and operation is applicable. Tenth, to the contract of agency, the law of the place of agent's business is applied. Eleventh, to the lease sale or mortgage of immovables, *lex situs* is applicable. Twelfth, to the renting movables contract, the law of the place of the renter's office is applied. And thirteenth, to warehousing and custody contracts, the law of the place of the business of the bailee is applied.⁵⁴

This shows that the judicial authorities of the People's Republic of China not only accepts the characteristic performance theory, but also has formulated and stipulated detailed provisions to implement it in accordance with international practice. And furthermore, it is also stipulated in the Interpretation that if the party has more than one place of business, the law of the most connected place of business is the proper law of the contract; if

54. China Supreme People's Court Answers to Some Questions on Application of 2(16), *supra* note 12, at 255-58.

the party has no business office, the law of the party's domicile is applicable.

While this list is extensive, it is not exhaustive. Other kinds of contracts ought to be listed and their proper laws indicated. For example, to the procedure of a case arising from a contract, the law of the forum ought to be applied. To the limitation, the proper law is applied. To the performance of a contract, the law of the place of performance is applicable.⁵⁵ To the way of performance, the law of the place of performance and its mandatory provisions ought to be applied.⁵⁶ To the party's performance of a special obligation in a contract, the law of the place of the habitual residence of the party is applied.⁵⁷ To the existence of legal personage or judicial association, the law of the place of the legal person or the judicial association is applied; the place at which the main office is situated is the place of the legal person.⁵⁸ To the compulsory distribution of benefit, the law of the place of compulsory execution is applied.⁵⁹ To the interpretation of the proper law, the law of the country of the proper law is applied. To the transport contract, the law of the place of departure is applied. If the seller delivers the goods at the place of the buyer's business, the law of the place of destination is applied. To the auction contract, the law of the place where the auction takes place is applied.⁶⁰ To the exchange business contract, the law of the place of the exchange is applicable.⁶¹ To the contract of trust, the law of the place of the trustee's residence or his activity center is applied. To the brokerage contract, the law of the place of his residence or his activity center is applicable. To the donation contract, the law of the donor's residence is applicable. To the consumer contract, the law of the consumer's residence is applied. To issue, sale, or transfer of bonds contracts, the law of the place of issue, sale, or transfer is applied. To the ordinary loan or guarantee contract, the law of the lender or guarantor is applied. To the contract for transfer of copyright, the law of the author's residence is applied. To the transfer of trademark contract, the law of the transferee's country is applicable. To the payment contract, the law of the place of payment is applied. To the usage, issue, transfer, acceptance, or payment of commercial documents, the law of the place of its act is applied.

55. Rome Convention, *supra* note 44, art. 10, at 324.

56. Traite Concernant Introduction aux Pay-Bas, en Belgique et au Luxembourg d'une Loi Uniforme sur le Droit International Prive, *supra* note 47, at 127.

57. Rome Convention, *supra* note 44, art 4(2), at 320.

58. *Id.*

59. *Id.*

60. Draft Convention on the Law Applicable to Contract for the International Sale of Goods, *supra* note 43, art. 9, at 341.

61. *Id.*

IV. OBJECTIVE PROPER LAW PRINCIPLE

While the foregoing principles for resolution of choice of law issues are relevant and useful, I propose the adoption of a fourth principle which sums up the main choice of law theories but goes on to make the choice of law procedure more objective and more serviceable.

This principle is based on the following elements. First, the objective proper law for a particular contract is in objective existence. For hundreds of years, jurists all over the world have strived to find the best proper law for various contracts and other legal disputes by making their own international private laws and participating in international conventions on uniform law of conflict of laws. Although there is still no uniform international private law, the international private laws of various countries and various conventions on conflict of laws are tending toward unification. This trend shows that there is, in fact, an objective proper law for every particular contract and other legal disputes.

Second, it is a fact that contracts are of different content, nature, character, purpose and kind (such as agency; bailment; bill of exchange and banking; carriage by air, land, or sea; credit and security; employment; gaming and wagering; insurance; restrictive trade agreements; sale of goods; and the like).⁶² Third, and closely related, it is also a fact that a contract involves scores of contacts and connecting factors as delineated above. Fourth, the connection or non-connection of some of these connecting factors with a particular contract and the number of those connections are also objective reality. Fifth, the difference in relative importance of these connecting factors with a particular contracts is also in objective existence. Sixth, a contract involves many factors and questions, the complexity of which are objective. Hence, for the choice of proper law, contracts ought to be classified into various kinds according to their content, nature, character, and purpose. The same kind of contracts can also be divided into sub-divisions according to feature. The more minute the subdivision, the smaller the scope of choice of law and the easier to find the proper law for the contract.

The connecting factors can be divided into three groups. Group A consists of those factors that alone without regard for the other connecting factors can determine the proper law for a contract. An example would be if the subject matter of a contract is real property, then the law of the place of the subject matter would be applicable. Group B consists of those where two connecting factors together can determine which law is proper. For example, to the contract of agency, if the principal has established the office in the main place of the agent's activities, or no office but the residence of

the principal is there, the law of that place is to be applied.⁶³ Group C consists of the connecting factors which are not as important as those of groups A or B; rather these connecting points are designated of the same kind or sub-kind of contract and awarded a point value between 10 and 1 according to its importance to the contract. Which country's law for a particular contract in the kind or sub-kind gets more points will be the proper law for the contract.

Now, the sale of goods contract will be taken as an example to illustrate the application of this objective proper law principle. First, suppose division of contracts in general is divided further into: a) sale of goods contracts; b) documentary sale contracts; c) auction contracts; and c) sale-in-exchange contracts. The choice of law for the auction contract and the sale-in-exchange contract are very simple. To the auction contract, the law of the place where auction takes place is applied.⁶⁴ To the sale-in-exchange contract, the law of the place of the exchange is applicable.⁶⁵ Both the connecting factors in those two contracts are in the group A, those which alone can determine the proper law.

Second, consider when two connecting factors together determine the proper law for the contract for the sale of goods. If the place of performance of the contract is the place of the performing party's office (other than its main office) the law of the place of performance is applicable.⁶⁶ Usually in sale of goods contracts, the law of the place of the main office is to be applied. The analysis then focuses on whether the contracting place is the place of the seller's business or buyer's business, the answer to which determines the proper law of the contract. The proper law for this sale of goods contract is the law of the place of the seller's habitual residence when he receives the order for the goods. If the order is received by the seller's business office, the proper law is the law of the place of seller's business.⁶⁷ If the order is received by the seller or his agent in the country of the place of the buyer's business or his habitual residence, the law of this country is the proper law of the contract.⁶⁸

Third, all of the connecting factors which may appear in a sale of goods contract are to be assigned a point value between 10 and 1, according to the importance of each in the determination of the proper law for a particular kind of contract. The main connecting factors for a sale of goods contract are as follows: *Lex personalis* which involves an analysis of the

63. Convention on the Law Applicable to Agency, concluded on March 14, 1978 at Hague, art. 6, in COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW 332 (1986).

64. Convention sur la Loi Applicable aux Ventes a Caractere International d'Objects Mobiliers Corporels, *supra* note 52, art. 3, at 303.

65. *Id.*

66. *Id.* at 44.

67. *Id.*, art. 3, at 303.

68. *Id.* at 44.

main place of business and the habitual residence, domicile, or nationality; *Lex loci actus* which involves an analysis of the place of contracting, place of performance, and place of negotiation; and *Lex situs* which involves the place of loading, place of discharging, and nature and location of the subject matter. Laws connecting with the contract that also must be considered include provisions quoted, the existence of an arbitration clause or a jurisdiction clause; any documents attached; the language used in the contract; and any connection with a preceding transaction.

It is difficult to mark the multitude of connecting factors relating to a sale of goods contract, a point that shows the vital importance of those points to choice of law analysis. The problem can be solved in two ways. The first method involves dividing the contract into smaller chunks such as the formal validity of the contract, the substantive validity of the contract, and the capacity of the parties to contract. By focusing on these smaller packets of information, there are fewer connecting factors relating to each aspect. It is much easier to make a descending order list or to mark the connecting factors in accordance to its importance to the choice of law issue; furthermore, this method of dividing reveals some of the smaller aspects as having a definite proper law for each. For example, many countries recognize that the proper law for a contract governs the substantive validity of the contract. If a party disagrees, the law of the place of the party's business is applicable.⁶⁹

To formal validity, many countries have accepted that if both parties who make a contract are of the same country, the law of that country is applicable; in the alternative, if a contract is made in a country where one of the parties is domiciled, then the law of that country of just one of the parties can be applicable. The next law applicable to the formal validity is the law of the place of the act.⁷⁰ Thus, the descending order of the connecting factors for the formal validity is as above. To the capacity or the capacity for rights, the local law is applied, which is a widely accepted premise.⁷¹

The second way to solve the problem is by listing in descending order the connecting factors according to the events or issues relating to the contract. Some issues or events have a definite applicable law which is widely recognized. For example, to the examination of goods, the law of the place of the examination is applied.⁷² To the seller's rights before the price of the goods is not paid, such as in the case of a lien, the law of the

69. Draft Convention on the Law Applicable to Contracts for the International Sale of Goods, *supra* note 43, art. 10, at 341.

70. *Id.*

71. *Traite Concernant l'Introduction aux Pays-Bas, en Belgique et au Luxembourg d'une Loi Uniforme sur le Droit International Prive*, *supra* note 47, art. 2, at 122.

72. *Convention sur la Loi Applicable aux Ventes a Caractere International d'Objets Mobiliers Corporels*, *supra* note 52, art. 4, at 304.

place where the claim is made first is applied.⁷³ As to the ownership of the goods, if the third person has made a claim to them, the law of the place where the claim was made is applicable.⁷⁴ The law applicable to corporeal property may be the law of the place of the subject matter, the law of the place of delivery, which depends on the state, or on whether the subject matter is to stay put, is in transit, or is slated for delivery to the buyer.

All the above shows that we can determine the proper law through objective means by marking the connecting factors as they relate to a contract. Each point is given a value according to its importance related to the choice of law issue with the country who has the most points being designated as the source of the proper law for the contract. In this way, the proper law chosen is more objective, more proper, more stable, and more fair.

In order to attain the standard we must emphasize several procedures. First, it is vitally important to classify the contract into as many subdivisions as logically possible. Second, be sure to divide a contract into parts that are governed by different laws. Third, choose the law applicable to the contract according to the events or issues related to the contract. In the course of subdividing a contract, some definite proper laws for them may emerge. This not only solves a part of the problem of conflict of laws but also provides the grounds to make each connecting factor a point. For the sale for goods contract, the connecting factors can be marked as follows. The connecting factors in Group A, those which can alone determine the proper law for a contract, should be given a point value of 6 or more. The connecting factors in Group B, those which work in pairs to determine the proper law for the contract, should be given a point value per pair of between 6 and 10. The pair which can determine the proper law for a contract in any condition without being affected by any other connecting factors is worth a point value of 10. The same connecting factor may be given a different point value, for example, when the connecting factor of nationality is considered in choosing the applicable law and may be given 10 points, while in the auction contract, nationality may be worth only 1 point. The connecting factors, except those in Groups A and B may be worth a point value of between 1 and 5 according to the importance of each in choice of law. If several countries' laws relate to a contract, the country which gets more points is to be the source of proper law for the contract. In this way we can determine the proper law for a particular contract more objectively and more properly, thus the name the Objective Proper Law Principle.

73. Convention sur la Loi Applicable au Transfert de la Propriete en Cas de Vent a Caractere International d'Object Mobiliers Corporeals, conclude le 15 avril, a la Haye, art. 4, in COLLECTION OF CONVENTIONS ON INTERNATIONAL PRIVATE LAW 281 (1986).

74. *Id.*

This principle is developed on the foundation of the theory of the objective method, the most significant relationship principle, and character of performance principle. It is a more objective approach than the most significant relationship principle. It is more accurate than the theory of objective method. And it is more flexible than the character of performance principle in dealing with the complex circumstances relating to contracts. But its utilization takes hard work to make it perfect.

In order to make the point value for each connecting factor more proper and more accurate in accordance with its importance to the particular kind of contract and to enable the principle to be more serviceable, jurists around the world will need to collect every provision on choice of law for every kind or sub-kind of contract. This must be done with regard to every aspect of a contract and for every event or issue relating to the contract. Jurists must draw from a variety of sources — from international conventions on choice of law and from every country's international private law— to complete this comparative study and to work out a uniform choice of law code for the international community. This task may appear to be too complex to be practical, but after the initial collection of source material and distribution of point values, the coalition and calculations will best be completed by computer. This proposed Uniform Choice of Law Code could then be offered to jurists all over the world for reference. Even though conflict of laws doctrines differ from country to country, and even though the international conventions on the subject at times contradict each other, this subject area can be gradually unified under an objective uniform choice of law to be based on objective reality. Just like the effect of the York-Antwerp Rules in the maritime law field, the Uniform Choice of Law Code will contribute to the promotion of the unification of international private law.⁷⁵

IV. CONCLUSION

Although China's international private law is imperfect and there is no international private code in China, reforming and opening to the outside world is one of the basic national policies, and Chinese jurists are enlightened enough and open enough to consider further the reformation of this aspect of China's law. The Chinese legal authorities and most jurists accept the party autonomy principle, the most significant relationship principle, and the character of performance principle. We are willing to absorb all the good legislation, judicial practice, and approaches from any other country in the world to build a law-governing China in the near future.

But this is not to say that the near future will be easy, especially when Hong Kong, Macao, and later Taiwan come back into a close economic

75. I would like to discuss the feasibility of my design with jurists who are interested and to cooperate with anyone interested enough in it to finish the task.

relationship with the People's Republic of China. Soon the PRC will face more complex problems in international private law than even the U.S., as three legal systems (civil, common, and socialist) merge in the realm of international business transaction especially. However, if we insist on using only the established approaches stated above, following only the widely accepted principles of party autonomy, most significant relationship, and character of performance, we will not prosper. Only by absorbing the merits of international private laws of various countries and regions and by introducing and recognizing the principles and provisions of the international conventions on international private law can we solve the complex problems we face.

THE COMPANY LAW OF CHINA

*Zhao Youg Qing**

INTRODUCTION

The Standing Committee of the Eighth National People's Congress approved the Company Law of the People's Republic of China (Company Law) in its Fifth Session on December 29, 1993. On the same day, the President of the People's Republic of China promulgated it, and the Company Law of China came into force on July 1, 1994.

The Company Law is important because for the first time in mainland China the organization and activity of business entities are regulated. For this reason, the Company Law is the foundation of modern socialist enterprises and the market economic system. Many new companies are expected to be established pursuant to the Company Law, and many existing enterprises such as state-owned enterprises, enterprises with foreign investment, and privately owned enterprises will be reorganized under the Company Law. This will allow for the establishment of modern enterprises with clearly defined ownership rights, with articulated boundaries regarding rights and duties between government and enterprises, and with the use of scientific management techniques. The promulgation of the Company Law is also a significant step toward China's compliance with international practices, especially in the field of Company Law.

I. LEGISLATION GOVERNING COMPANIES BEFORE ENACTMENT OF THE COMPANY LAW

Before the birth of the Company Law, China did have some laws and regulations with respect to companies.¹ These laws govern only certain

* Zhao Yong Qing practices law in the PRC as an attorney with the Ningbo Municipal External Lawyer Office. He is also the Vice-Director of the Ningbo Conciliation Centre of CCPIT and a member of the Zhejiang Bar Association's Foreign Law Committee.

1. *See, e.g.* Enterprises Law; Enterprise Bankruptcy Law; Regulation for Registration Management Regarding Industrial and Commercial Enterprises; Provisional Regulation Regarding Company Registration Management; Provisional Regulation On Nationwide Specialized Company Management; Law of the People's Republic of China on Joint Venture using Chinese and Foreign Investment; Wholly Foreign Owned Enterprise Law of the People's Republic of China; Standard Opinion on the Limited Liability Company; Standard Opinion on the Joint Stock Company with Limited Liability. Citations omitted. Throughout this essay, citations to the original Chinese language sources used will be omitted. Various English language translations are available, which the reader can easily consult by referring

kinds of companies or govern only certain aspects of a company. For example, the Enterprise Bankruptcy Law only deals with the bankruptcy of state-owned enterprises. Moreover, all these laws were formulated for use in a planned economy rather than in a market economy.

When state-owned companies and collectively owned companies were established, the company's capital was usually subscribed by a certain government department, and approved documents were issued by the competent government department. The business scope, registered capital, manager, and staff were also verified by the competent authorities. With these approval documents, a company would then apply to its local industrial and commercial administration for issuance of a business certificate.

In the early stage of company regulation after 1949, the People's Republic of China adopted a planned economy. Companies were subject to the state planning system and company managers were appointed by the appropriate government departments. A company's staff, property, materials and supply, production, and sales were arranged in terms of state planning. As the legal representative, the company managers did not have the power to decide the company's business and development schedule. The companies, in fact, were the objects of state planning and were subordinate to governmental departments. Between 1957 and 1978, after the achievement of socialist reform, only two ownership entities existed: the state-owned company and the collectively owned company.

The Regulation of the State-Owned Industrial Enterprises Work in 1961 encouraged enterprises to cooperate in a planned way so that materials could be supplied by appointed units. Companies established were actually administrative companies implementing production and sales plans according to state specifications. In 1964, the Central Committee of the Chinese Communist Party set up a trust. This was a major reform in industrial enterprise management. The trust in fact followed the former Soviet Union's mode of industrial integrated process to conduct specialized production by combining small, medium, and large enterprises' productions. All the trusts, whether nationwide or regional, were established in accordance with administrative orders and were state owned monopolies in an integrated industrial complex. The participating enterprises were not involved out of their own willingness, joining the complex with their own shares and losing their independent legal personality.

In 1979, the 3rd Session of the 11th Congress of the Chinese Communist Party advanced a reform and an open door policy. This Session marked China's transformation from a planned economy to a market economy. In 1980, the State Council approved the Provisional Regulation on the Promotion of Crosswise Economic Co-Operation which advocated setting up all forms of cooperative bodies based on an enterprise's

willingness and without restrictions on operation or ownership. This regulation was the basis of recently developed jointly run companies. Companies emerged quickly and in great number thereafter. By the end of 1986, the registered companies numbered approximately 300,000—including the state-owned, collectively owned, private, jointly run, and foreign invested companies.

However, companies remained unregulated, without guidance as to the establishment, registration, operation, merger, and dissolution of companies. Many companies were attached to government departments and took advantage of the government's power. Some companies with large registered capital had investors who withdrew their capital after the verification of capital—often called “bag companies.” Some so-called companies illegally took over the capital and property of other companies or enterprises. Some companies profited by bribing government officials who held powerful positions in such areas as controlling the sale of export licenses. These problems resulted in the State having difficulties controlling all of the companies.

Due to the chaos in the economic order, the State Council issued the Notification on Further Clearance and Rectification of Companies and the Provisional Regulation Regarding Company Registration Management (Provisional Regulation) in 1985. These regulations cut the attachment of companies to government; suggested that companies actually have the level of capital, technology, personnel, and facilities corresponding to their manufacturing and business plans; and stipulated that the establishment of all companies should be under prior approval by the State Council or its authorized departments and under registration. These regulations also stated that company business items must be verified; that companies should be the economic entities engaging in manufacturing and providing service; that a company's opening, closing or alteration should be publicized; and that all companies should undergo examination at the end of each year.

The Provisional Regulation restricted the establishment of companies by individual businessmen. It emphasized the government's control over the companies. This restriction was due to the belief that flexible business practices espoused by individual businessmen caused chaos within a company and unfair competition. This regulation was of strong planned economy color because it did not regulate all the companies by legislation, but instead regulated by restriction on individual businessman and companies.

In 1988, with the progress of the market economy, the State Council promulgated Provisional Regulation for Private Enterprises which allowed three forms of private enterprises—the sole proprietorship, the partnership, and the limited liability company (LLC). Article 5 provided that “LLC means the enterprise that the investor's liability to the company is limited to its investment while the company shall take the responsibility with its whole assets.” This regulation is a big step toward creating a socialist market economy and complying with international practices. The regulation

also confirmed the legality of private enterprises and advanced the commonly acceptable concept of LLC. However, the fast growing economy, incomplete company laws and regulations, and weak implementation of the laws resulted in a chaotic economy and the second rectification of companies in 1988.

In 1992, the State Restructuring Commission promulgated the Standard Opinions on the Limited Liability Company and the Standard Opinion on the Joint Stock Company with Limited Liability which provide much more detailed descriptions of the establishment procedures for an LLC and for a Joint Stock Company (JSC) with limited liability. The two Standard Opinions are still transitional regulations. They laid the foundation for the current Company Law, which in turn absorbed the two Standard Opinions.

II. THE COMPANY LAW OF CHINA

A. *The Legislative History*

The legislative history of the Company Law, first enacted in 1988, may be divided into three stages. The first stage was from 1983 to 1986. During this stage the State Economic Committee and the State Restructuring Commission began drafting the Company Law. At the time, the economy was predominately a planned economy. Companies were divided in terms of ownership, with most being completely state-owned. These companies did not have shareholders or a share rights system. It was difficult for these companies to enter into a market economy. Although a few standard LLC's existed, JSC's were non-existent. Only two separate regulations on LLC's and JSC's were drafted.

The second legislative stage lasted from 1986 to 1992. During this period, the LLC and the JSC regulations were drafted. The pros and cons of the operation of companies were documented and considered. The problems found during the rectification were numerous. First, the establishment of companies was not standardized, with most companies not having "true capital" ("bag companies"). Second, the Communist Party and State authorities set up companies to take advantage of their commercial and financial powers. Third, the organizational forms were not regulated, and there was no distinction between a company and other forms of enterprises. Fourth, most companies focused on commercial, trade, and financial fields, leading to chaos in circulating fields and to abnormal, abrupt inflation. Fifth, the lack of necessary restraint resulted in chaos and corruption the internal management and in the allotment systems of many companies. These problems gave the impression that companies were specializing in illegal business activities. After Deng Xiao Ping's speech in his tour to southern China, JSC's emerged. To meet this situation and to regulate the LLC and JSC, the State Restructuring Commission formulated the Standard Opinions on LLC and JSC.

The third legislative era was from 1992 to 1993. As the representatives of the National People's Congress and other interested parties encouraged the formulation of the Company Law, the State Council formally proposed the LLC draft law to the Standing Committee of the National People's Congress. The Committee members felt that to meet the developing needs of the market economy, the Company Law should be more broad and complete. In accordance with the chairman of the Standing Committee of the National People's Congress decision, the Law Work Committee of the Standing Committee placed draft LLC and JSC regulations in the Company law by revising the Standard Opinions, consulting with legal and economic experts and the relevant central and local authorities, as well as analyzing developed nations' company legislation.

In December of 1992, the Law Work Committee handed a draft of the Company Law to the Thirtieth Session of the Seventh National People's Congress for examination. In June of 1993, after many revisions, the Company Law draft was handed to the Second Session of the Eighth National People's Congress for reexamination. The Company Law was approved by the Fifth Session of the Standing Committee of the Eighth National People's Congress.

B. The Contents of the Company Law of China

The Company Law of China absorbed the successful points of other nations' corporate law, yet retains its own Chinese characteristics. The Company Law is divided into eleven chapters with 230 articles. The first chapter deals with general principles, while the second chapter describes the establishment of LLC's and their organizational structures. The third chapter deals with the establishment of JSC's and their organizational structure. The fourth chapter is concerned with issuance and transfer of shares of JSC's. The fifth chapter relates to company debenture, while the sixth chapter deals with company finance and accounting. The seventh chapter covers mergers and divisions, while the eighth chapter governs a company's bankruptcy, dissolution and liquidation. The ninth chapter concerns branches and subsidiaries of foreign companies. The tenth chapter describes legal liability, and the eleventh chapter is the appendix.

For the fifteen years since China's opening to the outside world, the concept of the company has been quite ambiguous. It does not differ from the concept of general enterprise. The Provisional Regulation Regarding Company Registration Management (1985) provides that the "company" in this regulation means "the economic entity engaging in production, trade or service industry which is established pursuant to the formalities provided by this regulation and has its own assets and conducts business on its own decisions and undertakes its own losses and taking the economic liabilities

in accordance with the laws."² There is no substantial difference between this definition and the definition of a general enterprise.

The Company Law provides that LLC's and JSC's are legal enterprise entities.³ As of LLC, the shareholder's liability to the company shall take the liability to debts with its whole assets. As of JSC, its whole assets shall be divided into equal shares, with the shareholder's liability limited to the shares subscribed; the company shall take the liability to debts with its whole assets. The Company Law only governs LLC's and JSC's within Chinese territory. It does not govern other forms of companies within Chinese territory, so the Company Law does not give a common definition of all forms of companies.

Under the current socialist market economy in China, a company should, for the purpose of profit-making, be a legal enterprise entity established pursuant to laws and based on shareholder's investment. The General Principles of Civil Law requires that a legal entity should meet the following requirements: be established pursuant to laws; have its own assets or capital; have its own name, organizational structure and residence; and independently take civil liability.

C. Companies Established Before the Enforcement of the Company Law

Even before the enforcement of the Company Law of China, there were a great deal of companies. As the Company Law of China only governs LLC's and JSC's, how to deal with the existing non-LLC and non-JSC companies established before the enforcement of the Company Law became a problem. According to Article 229 of the Company Law, the companies established pursuant to laws, regulations, local laws, and the Standard Opinions on LLC's and JSC's before the enforcement of this law, as well as those not in compliance with this law, shall remain and shall meet the legal requirements within a stipulated time.⁴ The State Council is required to set the stipulated time. However, the State Council still has not promulgated the enforcement rule or set the deadline for the companies not in compliance. These companies will likely continue to exist for a considerable period of time.

Recently, the State Industrial and Commercial Administration, the highest authority on company registration in China, promulgated Certain Opinions on Implementation of Company Registration Regulation of the People's Republic of China. The Opinion in Article 1 provides that from the date of enforcement of the Company Law and the Company Registration Regulation, new companies shall be registered pursuant to the Company

2. Provisional Regulation Regarding Company Registration Management, art. 2 (1985).

3. *Id.* art. 3.

4. The Company Law, art. 229.

Law and the Company Registration Regulation. Those not in compliance with the above mentioned Law and Regulation shall not be regarded as legitimately registered LLC's or JSC's and shall not be named as companies.

From the above statement, it is clear that after a certain period of time forms of companies other than LLC's and JSC's will not exist because the Company Law only confirms the legality of LLC's and JSC's. Contrary to the Chinese Company Law, the company laws of many other countries confirm not only LLC's and JSC's but also other forms of companies. For instance, the British Companies Act governs LLC's including Companies Limited by shares, those limited by guarantee, and those unlimited. The Hong Kong Companies Ordinance also permits LLC's and JSC's limited by guarantee and those that are unlimited companies. In Japan, four different legal forms of companies exist under color of law: the partnership, the limited partnership, the limited company, and the stock corporation.

D. Company's Approvals And Registration

The Company Law of China stipulates that LLC's or JSC's must be registered if the terms and conditions provided in the law are met; otherwise nothing could be registered as an LLC or JSC.⁵ If other laws or regulations require prior approval for certain kinds of companies, the companies shall be subject to prior approval before the registration.

This stipulation is a major breakthrough from the original procedures. Before the Company Law, all the investors had to obtain prior approvals from the state planning departments and competent authorities. After obtaining these approval documents, application for registration of a company could be made. According to current Company Law, if the business items are not required by law or regulation for special approvals, the shareholders or promoter may, with the articles of association and capital verification report issued by a certified accountant or auditor and other documents, directly apply for issuance of a business certificate to establish an LLC. This is a major measure of China's company registration reform in compliance with international practices. However, this does not mean the state will not control the registration of companies, as Articles 8 and 11 require companies in certain industries or businesses to be subject to prior approval.

In connection with these provisions, the Company Law requires prior approvals in certain situations. First, the laws or regulations require prior approval for certain companies, the typical example of which is that all the foreign funded companies are now subject to such from the State Planning Commission and the Ministry of Foreign Trade and Economic Co-operation or their authorized authorities. Second, the laws or regulations require certain business items be subject to approval, such as manufactory and sales

5. The Company Law, art. 8.

of goods made of gold or silver. In these case, the promoters or shareholders may with these approval documents and other documents apply to local industrial and commercial administration for issuance of business certificates.

E. *A Company's Name*

In accordance with the Company's Law, the company's name shall indicate certain things, including the following: (1) whether the company is an LLC or a JSC; (2) the registration authority's jurisdiction; (3) the company's trade and business character; and (4) the company's trade name. Pursuant to article 14 of the Company Registration Regulation of the People's Republic of China, the company's name shall be verified. If laws or regulations require prior approval for certain companies or prior approval for certain business items, then the company's name shall be previously verified before the application for prior approval. The application for approval shall carry the company's name verified by the company's registration authority. When the company's name goes through previous verification, the following documents must be presented: (1) an application for previous verification of company's names signed by all shareholders of the LLC or all promoters of the JSC; (2) the shareholder's or promoter's legal person certificates or the natural person's identity certificate; (3) and such other documents as may be required for the company's registration. The company's registration authority shall, within 10 days from the date of receipt of the above-mentioned documents, decide to verify or not to verify. If the company's registration authority decides to verify the company's name, it shall issue Previous Verification Notification of Enterprise's Name. The previous verified name shall remain valid for six months within the period, and no business shall be conducted unless the company has been established. The verified company's name is non-transferable.

Protection of a company's name is not as strong as the protection of a trademark or patent. There are no special provisions in the criminal law for protection of a company's name. China has become a member state of the Paris Treaty on the Protection of Intellectual Property which has undertaken the obligations of the protection of intellectual property including the protection of a foreign company's name. In comparison, sections 20.21 and 22 of the Hong Kong Companies Ordinance provides detailed requirements on the use and the registration of a company's name. These sections prohibit the use of certain names and regulate the change of a company's name.

F. *A Company's Residence*

A company's residence will have various legal effects in China. First, in civil litigation, it is the basic standard used to determine a court's

jurisdiction and a legal document's delivery.⁶ Second, in contract relation, if the place of performance is not clear, the company's residence determines the place of performance of a contract.⁷ Third, a company's residence should comply with the jurisdiction of the industrial and commercial administration authority. Finally, in foreign civil relations, a company's residence decides the application of the proper law.

Designation of the place of the company's residence is one of the necessary requirements for establishing a company⁸ and should be decided before attempting to establish a company. The residence shall be the location of the principle office.⁹ The residence is one of the registered matters, and any alteration of a company's residence shall be reported to the company registration authority. When the applicant applies for company registration, evidence must be presented to prove the company is entitled to the use of the residence.¹⁰ In general, a company's residence must be in compliance with its registered office. In contrast, Singapore and Hong Kong Company Laws only require the registered offices of a company to be in the country or region. Usually, the registered offices are in solicitors' offices or certified accountants' offices, while the business locations or residences are in other places.

G. *A Company's Capital*

In the Company Law and the germane regulations, "capital" has multiple meanings. Registered capital: (1) must be carried in the articles of association;¹¹ (2) must be raised sufficiently before the establishment of the company; (3) shall not be less than the minimum limit;¹² and (4) must be registered. According to relevant laws and regulations, the registered capital must be in conformity with the paid up capital.

Great Britain and its former colonies, such as Australia, Singapore, Hong Kong, and New Zealand, adopt authorized capital, allowing the capital to be paid by installments. Consequently, there are concepts such as unpaid capital, issued capital, uncalled capital, reserve capital, and the like. In comparison, China imposes harsher requirement on capital. The Company Law requires that total capital must be carried in a company's articles of association, that it shall not be less than the minimum limit, and that it must be raised sufficiently when the company is established. The capital is fixed to maintain a company's capacity of repayment of debts and to protect the creditor's interests; the amount of the company's reinvestment to set up its

6. The Civil Litigation Law of the People's Republic of China, art 79.

7. The General Principle of Civil Law, art 88.

8. The Company Law of China, art. 79.

9. The Company Law, art. 10.

10. Company Registration Regulation.

11. The Company Law, arts. 22, 79.

12. *Id.* arts. 23, 78.

subsidiary or other enterprises shall not exceed 50% of its net assets.¹³ In addition, the JSC shall not issue stocks at a price below par value.¹⁴ Except for the special purposes by special procedure as stipulated in the Company Law, a company may not redeem its own stock,¹⁵ and a company may not, before making up for losses and drawing accumulated funds and public welfare funds, distribute profits to its shareholders.¹⁶ In addition, a company's registered capital shall not be altered unless legal procedures are followed. According to the Company Law, any increase or decrease of registered capital shall be approved at a shareholders' meeting. Meanwhile, a company's balance sheet and asset inventory shall be made for reduction of registered capital. Notification to the creditors should be issued and publication for reduction shall be made in a newspaper at least three times within thirty days.¹⁷ Any violation of these stipulations may result in fines.

H. *Limited Liability Company (LLC)*

According to Article 3 of the Company Law, shareholders of an LLC shall be liable to the company with their subscription, but the company shall take full responsibility for its debts with its whole assets. An LLC under the Company Law is similar to a private company limited under the laws of Britain, Hong Kong, and Singapore and a close corporation under U.S. law.

Certain requirements must be met before setting up an LLC. First, membership shall not be less than two members and not more than fifty. An exception is for state-owned companies which may have less than two members. This requirement is in conformity with other countries. The Hong Kong Companies Ordinance provides the same requirement in sections 4 and 29. Japan, France, and Belgium also limit membership to fifty members. However, the Company Law permits a state-owned LLC with a sole investor.¹⁸ This stipulation has taken into account the fact that most of the state-owned enterprises are created by single investor.

Second, an LLC must meet a minimal level of capital via shareholder's subscription. According to article 23 of the Company Law of China, an LLC's registered capital shall be the paid-up capital registered in the company's registration authority. The Company Law imposes varying requirements on different LLC's. Some of these varying requirements include: (1) not less than RMB 500,000¹⁹ for a manufactory LLC; (2) not less than RMB 500,000 for wholesale LLC; (3) not less than RMB 300,000

13. *Id.* art. 12.

14. *Id.* art. 131.

15. *Id.* art. 149.

16. *Id.* art. 177.

17. *Id.* art. 116.

18. *Id.* arts. 21, 64.

19. U.S. \$1 is equal to 85 RMB.

for retail LLC; and (4) not less than RMB 100,000 for technological development, consultation, and service LLC's. The Company Law also stipulates that other laws or regulations may impose requirements which demand the minimum registered capital for an LLC on special industries higher than the above-mentioned. The Company Law also permits the shareholders to subscribe with other property, intellectual property, non-patent technology, and any land use right other than capital. All of these must be fairly appraised. In practice it is difficult to know the real value of intellectual property and non-patent technology. For this reason, the Company Law provides that subscription with intellectual property shall not exceed 20% of the registered capital. The shareholders shall, if subscribing with capital, deposit the sufficient capital into the LLC's provisional account in a bank. If subscribing with other property, intellectual property, non-patent technology or land use right, the shareholder shall transfer the rights to them to the LLC.²⁰ After sufficient subscription, a legal verification institution shall be invited to verify the subscription, and a capital verification certificate shall be issued by the institution. However, the Company Law does not specify what institutions are legal verification institutions. Before the enforcement of the Company Law, a bank's certified accountant office, or auditor's office might issue valid capital verification certificates. Company registration authorities would accept these certificates. But only certified accountants may verify the subscription of foreign funded enterprises.

Third, shareholders must make articles of association. An LLC's articles of association comprise the written document stating the company's organizational rules and regulating the company's actions. It should be signed by all of the shareholders jointly. The articles of association are binding on all shareholders, a company's organizational structure and a company's staff. The following matters are required to be carried in articles of association: (a) the company's name and its residence; (b) the company's business scope; (c) the company's registered capital; (d) the names of the shareholders; (e) the rights and obligations of shareholders; (f) the subscription means and amounts for each shareholder; (g) the terms and conditions for transfer of a shareholder's subscription; (h) the company's structure and a summary of all powers and rules of procedure; (i) the name of the company's legal representative; (j) the company's dissolution and liquidation provisions; and (k) such other matters as shareholders think necessary.

Fourth, the LLC shall have a name and should establish an organizational structure. LLC's should not dispense with the wording "limited" in Chinese characters. Section 21 of the Hong Kong Companies Ordinance allows companies to dispense with "limited" if such company was established in order to promote commerce, art, religion, charity or any

20. The Company Law, art. 25.

other useful object and prohibits the payment of any dividend to its members.

Finally, LLC's shall have a fixed manufacturing and business location and maintain the necessary facilities, such as a factory building, machinery, transportation vehicles, technology, and professional personnel.

I. Procedures for Establishing LLC

The following are nine procedures required to establish an LLC. The first step involves the promoter's promotion. After a feasibility analysis, the promoters shall sign a promotion agreement or meeting resolution. Before the establishment of a company, promoters should take joint and unlimited liability. In this stage, their agreement or resolution is regarded as a partnership agreement.

Second, articles of association must be drafted. The articles of association regulate all of the involved parties' actions. Consequently, the articles of association must strictly comply with all applicable laws and regulations. Hong Kong and Singapore company laws require the articles of association to be attested by third parties (usually solicitors). The Company Law of China does not impose this requirement, but it requires all shareholders' signatures. The articles of association shall come into force after its approval by a company's registration authority.

Third, the necessary approval must be obtained. In most circumstances, promoters may directly apply for registration of a company without other authority's approval. However, in certain situations prior approval from some other authority is required.²¹ Currently, companies engaging in (without limitation to) tobacco, stock, finance, and medicine shall be previously approved.

Fourth, capital must be accumulated through subscription. When signing a promotion agreement or articles of association, the promoters shall subscribe their investment. If the subscription is in money, it shall be deposited in the company's provisional bank account. If the subscription is in property, intellectual property, non-patent technology, or a land-use right, all their rights shall be transferred to the company.

Fifth, certification of subscription is necessary. After the full subscription of their investment, the promoters shall invite an eligible verification institution to verify the subscription and request the institution to issue a capital verification certificate.

Sixth, the company must apply for registration. After satisfaction of the formalities, the promoters or their agents may directly apply to the company's registration authority for registration of the company. This is done with a written registration application and requires attachment of the articles of association, capital verification certificate, and approval

21. The Company Law, art. 8.

documents if so required by law or regulation. An application for setting up a branch shall be submitted if the branch is intended to be set up at the same time.

Seventh, registration and issuance of business certificate follows. A company registration authority shall examine the application and issue a business certificate for those qualified. The issuing date of the business certificate is the date of the LLC's establishment. The company may conduct business thereafter. An LLC's branch may conduct business after obtaining a business certificate, but all liability shall be borne by the LLC itself.²²

After establishment, the LLC shall issue subscription certificates to the shareholders who have fully subscribed their investment. The subscription certificate shall carry the following matters: (a) the company's name; (b) the registration date of the company; (c) the company's registered capital; (d) the shareholder's name and their subscription date; and (e) the subscription's number and issuing date. The subscription certificate shall be affixed with the common seal of the company, and the subscription is neither freely transferable nor negotiable. Chinese laws and regulations prohibit the Communist Party and State organizations from being shareholders. Those who hold stock in another company may be shareholders in this company; however, other companies may not hold stock of other companies.

The company shall prepare a shareholders' book to register the shareholders' names and places of residence, the shareholder's subscription amount, and the number of subscription certificates. The rights of the shareholders include the following: to attend the shareholder's meeting and at such to participate in the making of policy and to choose the managers; to be eligible to be elected as the director of the board and a member of the supervision council; to obtain the distribution of dividend in proportion to each shareholder's investment; to transfer his subscription and to enjoy the right of first refusal for purchase of other shareholder's in any transfer of subscription; to examine the minutes of the shareholder's meetings, any recordings, financial reports and statements; to supervise the company's business activities; to obtain the distribution of the company's spare assets when the company is dissolved; to enjoy other legal rights.

The shareholder's obligations, on the other hand, include the following: to pay in full his investment; to refrain from withdrawing his investment after the registration of the company; to abide by the company's articles of association; to be loyal to the company and to other shareholders; to execute his rights pursuant to legal procedures; to perform other legal obligations required of him.

22. The Company Law, arts. 13 and 2.

J. LLC's Organizational Structure

An LLC shall make policy, implement the policy, and supervise the establishment of the power structure, the administration, and any supervisory organs. The shareholder's meeting is the power organ for the LLC. The meeting is a non-standing organ comprised of all shareholders expressing the company's ideas. Except for solely state-owned or foreign funded LLC's, each LLC has shareholder meetings. The meeting shall not represent the company externally and shall not conduct the actual concrete business of the LLC. This does not mean that the shareholders are not permitted to engage in the company's business when they become members of the administrative organ. With the latter, identity is no longer that of a shareholder.

According to article 38 of the Company Law of China, the shareholder's meeting is to perform the following function: to decide the company's business principles and investment plan; to elect and change directors and decide the remuneration of directors; to elect and change the supervisory councilors and to decide the remuneration of the supervisory councilors; to examine and approve the board's report; to examine and approve the supervisory council or supervisory councilor's report; to examine and approve the company's annual financial budget and final accounts; to examine and approve the company's profit distribution plan and the losses remedy plan; to make resolution on any increase or decrease of the company's registered capital; to make resolution on issuance of the company's debentures; to make resolution on transfer of shares to non-shareholders; to make resolution on the company's merging, division, dissolution, liquidation or alteration of its form; and to amend the company's articles of association.

Many countries grant different powers to shareholders for actions during their meetings. Under the Company Law, the first shareholder's meeting shall be convened and presided over by the shareholder owning the most shares. The shareholder's regular meeting shall be held according to articles of association. Shareholders representing 1/4 or more voting power of 1/3 or more directors or supervision council may suggest holding a provisional meeting. The shareholder's meeting shall be presided over by the chairman of the board or his appointed vice chairman or director. Notice of the shareholder's meeting should be issued fifteen days prior to the meeting to each shareholder. The meeting record shall be signed by all attending shareholders.

The company's administrative organ is the board of directors or executive director. The directors should be elected by the shareholders at their meeting. The board of directors or executive director is to perform the shareholder resolutions, authorized matters, or any other matter set in the articles of association and to engage in day-to-day management and representation of the company externally.

According to the Company Law, an LLC's board shall have the following powers: to convene shareholder meetings and report its work to such meeting; to implement all the resolutions passed by shareholders at their meetings; to make the company's business plan and investment schemes; to make the company's annual budget and prepare its final accounts; to make the company's profit distribution proposals and losses remedy plan; to make proposals for any increase or decrease of the company's registered capital; to make proposals for the company regarding possible merger, division, alteration, or dissolution; to decide the company's internal administration structures; to employ or dismiss the company's manager, and according to the manager's recommendation, to employ the company's vice manager and person in charge of the company's finances, and to decide their remuneration; and to make the company's administrative rules.

For an LLC without a board, the executive director's powers may be made similar to those of the board as set out in the articles of association. In accordance with the Company Law, the board shall be composed of three to fifteen directors. The Company Law requires that for an LLC invested in by two or more state-owned enterprises, the board should have a staff representative who shall be democratically elected by the staff. The board shall have one chairman and one or two vice chairmen. The election rules for chairman or vice chairmen may be set in the articles of association. The chairman of the board is the legal representative. For an LLC without a board, the executive director should be the legal representative.

The tenure for each director's position may be set in the articles of association, but each position period shall not exceed three years. The director shall continue his position if elected continually. Before the expiration of the director's position, the shareholders shall not dismiss the director from his post without legal cause. The Company Law, however, does not specify the causes under which the director's position could be terminated; so the causes shall be set in the articles of association and other relevant regulations or stipulated to in compulsory legal documents.

The board meeting shall be convened by the chairmen of the board or his authorized director. The directors with one-third or more members of the board may propose to open the board meeting. The notice for the board meeting shall be issued to all of the board members 10 days prior to the board meeting.

All the members attending the board meeting shall sign their names on the meeting record book. The company's manager, who is appointed by the board, shall preside over the day-to-day management of the company, and he shall be responsible to the board. If he is incapable of his duties or is in violation of any laws, regulations, or the company's own articles of association, the board may dismiss him. The executive director of an LLC operating without a board is permitted to be the company's manager.

The Company Law does not specify the situation which will result in the compensation of the director in default to the company or if the company or shareholders may file litigation against the director in default. In Japan, the commercial code was revised in part as of June 4, 1993, and came into force as of October 1 of the same year. One feature of this revised code proposed to make derivative action by shareholders more available than they have been. A derivative action refers to a legal action filed by a shareholder on behalf of the company because of the failure by directors of the company to take the necessary legal action for some failing by the company or its board of directors. This is a means of strengthening the duties of the company's directors and any individual shareholder's rights. Where a legal action is used, the auditor of the company is, in principle, entitled to institute a suit against the board of directors and represent the company.²³

K. *The Supervisory Organ*

The Company Law provides that LLC's shall have a supervisory organ in the form of either a council or a councilor. The duty of this supervisory organ is to supervise the business activities of the company's administrative organ. The supervisory councilor may, when he performs his duty, represent the company externally.

The supervisory council or supervisory councilors shall exercise the following functions or powers: to examine the company's finances; to supervise the directors' or managers' acts for violations of laws, regulations, or the articles of association when they exercise their duties; to require the director or manager to rectify their acts prejudicing the company's interests; to propose to hold provisional shareholder meetings; to exercise other powers as provided by the articles of association of the company.²⁴

The supervisory councilors may attend shareholder's meetings. According to the article 52, the directors and managers are not permitted to act as the supervisory councilors. In addition, the Company Law provides that the supervisory council is to be, in part, made up representatives from the staff and also shareholders. The Company Law prohibits certain kinds of persons acting as directors or supervisory councilors, such as incapable persons, persons who are personally liable for the enterprise's bankruptcy, and these committing economic offenses.

23. Commercial Code 275(4)

24. The Company Law, art. 54.

L. Transfer of Subscription and Increases or Decrease Of Registered Capital

The Company Law of China restricts the LLC shareholder from free transfer of his subscription. Any shareholder may transfer his shares to another shareholder of the same company. But if the shares are to be transferred to a person other than a shareholder of the same company, consent of more than 5% of shareholders is required. The shareholders not consenting to the transfer should purchase the transferred shares or the nonpurchase shall be regarded as consent to the share transfer. Any other shareholder has the right of first refusal for purchase of transferred shares.

Any increase in an LLC's registered capital must be based on special resolution at a shareholder meeting. The articles regarding the registered capital and subscription should be altered accordingly. After a shareholder's subscription, he shall apply for alteration of registration. For decrease of capital, the shareholders shall deal with the same formalities as increase of capital. Furthermore, the shareholders shall, within ten days after the resolution notify the creditors and shall disclose it in the newspaper by publication at least three times. The creditors may within thirty days after the acceptance of notification or ninety days after the first disclosure in the newspaper, demand the company to settle the debts or to provide guarantee.

M. Wholly State-Owned LLC

The permission of wholly state-owned LLC's reflects the characteristic of China's state-dominated economy, and it is also the character of the Company Law of China. Currently, many companies in China are state-owned enterprises and companies. These companies will gradually be transformed into wholly state-owned LLC's. Wholly state-owned LLC's shall not have shareholder meetings; rather, the board of directors shall perform part of shareholders' duties and decide important matters. But the problems regarding the company's merger, division, dissolution, increase or decrease of the registered capital, and issuance of the company's debentures must be decided by the state authorized investment institutions or departments which will exercise the powers of supervision and management of state owned assets.

The main distinction between wholly state-owned LLC's and other LLC's include the following. First, boards of wholly state-owned LLC's possess more powers than boards of ordinary LLC's. Second, only one investor is allowed in a wholly-state owned LLC while ordinary LLC's are allowed to have two or more investors. Third, wholly state-owned companies may, under prior approval, issue the company's debentures while ordinary LLC's are not so permitted. Fourth, designated fields, professions, and special product companies are required to take the form of a wholly state-owned LLC.

N. *JSC's Establishment Procedures*

The number of promoters for a JSC must meet the minimum legal requirement of five or more, among which at least half must be a resident within Chinese territory. For wholly state-owned enterprises, which are to be transformed into JSC's, there may be less than five promoters, but it shall be established by raising capital. Likewise, the share capital subscribed by the promoters or the public must reach the minimum legal requirement. According to the Company Law of China, JSC's lowest registered capital amount shall not be lower than RMB 10 million.

The issuance of shares and preparation of other official company matters must comply with all applicable laws and regulations. The articles of association made by the promoter must be approved at the establishing meeting. The company's name must be chosen and the company's structure must comply with the legal requirements for a JSC. The fixed production or business location must be available, and other necessary production and business conditions must be ready.

O. *Documents Required by the Company Registration Authority for the Establishment of a JSC*

According the Company Registration Regulation of the People's Republic of China, the applicants should present the following documents to the company registration authority. A written application signed by the chairman of the board is required for the establishment of a JSC. Appropriate approval documents must be issued by the State Council, authorized departments, or the provincial, autonomous region or municipal governments, with approval documents issued by the State Council Securities Administration if the JSC is established by means of raising capital. A copy of the meeting record of the establishing meeting is also required, along with the company's articles of association, an audited financial report for the prepared JSC, a capital verification report issued by a legal verification institution. In addition, legal personality proof or natural person identity cards of the promoters are necessary, as is a certified document indicating the JSC's directors, supervisory councilors, and the manager's names, residences, and their dates of employment election or appointment. An appointment document for the company's legal representative and his identity certificate is also necessary. Finally, the previously verified name of the JSC and the company's residence proof completes the list of necessary documentation.

One of the distinct characteristics in establishing JSC's is that the JSC must be approved by the State Council authorized department or provincial level government, in addition to the State Council Securities Administration. This is not required in the establishment of LLC's. The requirement for JSC's implies that the government is more cautious and prudent in

establishing JSC's. This requirement also reflects the fact that since JSC's have more capital, the public has a direct interest. This public interest is in avoiding social instability on the one hand, and because Chinese securities markets are still not mature, in preventing securities fraud on the other hand. Consequently, it is necessary to strengthen the state's participation and control. After obtaining the above-mentioned approvals and formalities, the promoters or their agents may apply for registration of the JSC.

The Company Law provides that JSC's may be established by means of promotion by raising capital. Establishment by means of promotion means that all the shares of the JSC are subscribed by all of the promoters. Establishment by means of raising capital means that the promoters subscribe part of the issued shares, and the other shares are sold to the public. In this situation, the promoters should subscribe at least 35% of all issued shares. The promoters must submit written applications for capital raising to the State Council Securities Administration, together with the following documents: (1) prospectus; (2) articles of association; (3) business estimation; (4) each promoter's name, subscribing share numbers, and subscription means along with a capital verification certificate; (5) approval documents for the establishment of the JSC; (6) the name and address of the agency bank for accepting the share capital; and (7) the name of the institutional underwriter and a copy of the underwriting agreement.

Without prior approval from the State Council Securities Administration, the promoter should not issue shares to the public. In accordance with the State Council's Special Stipulation on Issuing and Listing of JSC Shares Outside Chinese Territory (Special Stipulations), a JSC may issue shares outside Chinese territory after prior approval of the State Council Securities Administration. The stocks may be traded in the Stock Exchanges outside China, but the applicant should submit written application and such other materials as required by the State Council Securities Administration for approval. The shares issued and listed abroad (foreign capital shares) should take the form of registered stocks or other stock forms indicating RMB par value and subscribed with foreign currency. If the state-owned or state asset-dominated enterprises are restructured to be JSC's, issuing and listing their shares abroad as such, the JSC's promoters may be less than five, but only if established by means of promotion. If they are so established, they may issue shares. A JSC which has issued shares and been listed abroad may issue its shares ("domestic shares") to domestic investors, but its domestic shares should be registered. After the board's issuance of foreign shares and approval of the domestic shares scheme by the State Council Securities Administration, the JSC may make arrangements and implement them within fifteen months of the above approvals. The JSC's foreign and domestic share's issuance schemes should be disclosed in its prospectus. Any adjustment of the scheme must be disclosed again. All the planned foreign and domestic shares must be raised unless otherwise approved by the State Council Securities Administration.

The State Council Securities Administration and the company registration authority may provide compulsory articles to be set by all JSC's in their articles of association. JSC's articles of association are binding on the JSC, its directors, shareholders, supervisory councilors, managers and other senior management staff (including the person in charge of the JSC's finances). These persons have rights and can claim their rights by tendering a request for arbitration or submitting to litigation pursuant to the articles of association. Meanwhile these persons have the obligation to be loyal and diligent to the company. They should at all times abide by the company's articles of association and safeguard the company's interests, and at no time shall they take advantage of their powers for their own interests. The owners of foreign shares may, pursuant to the laws where the shareholders' book is maintained or where the stocks are listed, request to register their stocks under their nominal beneficial owners. The foreign shareholders' book is strong evidence to prove that the shares are owned by the shareholders.

Any allegation of alteration of the foreign shareholders' book may be ruled on by the foreign court having jurisdiction if so required by its local laws. The foreign shareholders may apply for reissuance of the stocks according to stipulations of the place where the original shareholders' book is kept or the foreign Stock Exchange rules if they lose the stocks. The notice for holding shareholder meetings should be issued forty-five days prior to the meeting in which the matters are expected to be discussed, with the date and place for the meeting specified. Shareholders expecting to attend the meeting shall answer in writing to the company twenty days before the meeting. The shareholders who have more than 5% voting right may put forward new proposals in writing at the annual shareholder meeting. The company shall list the proposals on the meeting's agenda if they fall within the scope of the called shareholder meeting.

The company shall retain an independent certified accountant's office to audit the company's annual report and verify other financial statements. The company's payment of dividend and other money shall be declared in RMB and paid in foreign currency. Any dispute in connection with the articles of association or matters between foreign shareholders and domestic shareholders, between the shareholders and directors, manager, and the supervisory councilor, and between foreign shareholders and the company shall be settled by the method set in the articles of association and shall be governed by the laws and regulations of the People's Republic of China.

In terms of the Company Law of China, if the company capital is raised from the public, a prospectus with articles of association must be made and the following matters should be set therein: (1) total share subscribed by the promoters; (2) par value and the issuing price; (3) total amount of unregistered shares; (4) subscriber's rights and obligations; and (5) starting and expiration dates of any attempt to raise capital and an explanation for withdrawal of subscription in case the unsuccessful attempt

goes past the deadline. In addition, the shares should be underwritten by legal securities institutions. After sufficient capital has been raised, the verification institution shall be asked to issue a certificate. The promoters shall then hold an establishing meeting within thirty days, which all the subscribers shall attend.

The establishing meeting shall implement the following powers and say who holds these powers: (1) the power to examine the promoter's report for the preparation of the company; (2) to approve the company's articles of association; (3) to elect the directors of the board; (4) to elect the company's supervisory councilors; (5) to examine the preparation cost estimate for establishing the company; (6) to examine the value of the promoter's assets used for the promoter's subscription; and (7) to decline to establish the company in the case of force majeure or a substantial change of business conditions. The Powers shall be approved by more than half of the attending subscribers. The JSC's promoters shall be jointly liable for the debts in the event the company is unsuccessful. In the establishing process, the promoters should compensate the company if the company's interests are damaged through any action of any of the promoters. The LLC may, after approval, be reorganized as a JSC.

P. Organizational Structures of JSC's

As a JSC usually concerns a wider range of interests, it must establish perfect structures in compliance with the Company Law. The structures of a JSC shall include: shareholder's meeting, board of directors, and a management and supervisory council. All of the organs have similar powers, rights, and obligations as an LLC, but an executive director and supervisory council may not replace the board and supervisory council respectively.

Q. Issuance and Transfer of JSC Shares

The capital of a JSC is divided into shares of equal value. The issuing price of shares may exceed the par value, but the issuing price cannot lower the par value. Prior approval from the State Council Securities Administration is required. Stocks that are issued to the promoters, to the state authorized institutions, or to legal persons must be registered before shares can be issued with a higher price than the par value. Stocks issued to the public may be registered or unregistered.

The Company Law of China does not provide specific stipulations regarding the classes of shares. Preference shares or deferred shares do not exist. However, the Company Law authorizes the State Council to determine whether or not to create other classes of shares. The State Council and its agencies are reportedly considering whether or not to draft rules or regulations regarding issuance of preference shares, company employee shares, or special RMB shares.

The company shall, if issuing registered stocks, prepare the shareholders' book to reflect the following information: each shareholder's name and residence, the amount and number of each holder's stocks, and the date of acquisition. For unregistered stocks, the company shall retain a record of the number, amount, and issuing date. The company may issue new stocks if all the terms and conditions are met and approval is obtained. After sufficient capital has been raised, the company must apply for registration and publish its intent to issue stock.

The issued shares are transferable in legal stock exchanges. The promoter's stocks are prohibited from transfer within three years from the date of establishment of the company. The company's directors, supervisory councilors, or manager should not transfer all of their personal shares during their position period. The state authorized investment institutions may transfer the stocks they hold and may also purchase the stocks other shareholders hold. But the transfer and purchase are subject to approval. Companies should not purchase their own stocks, unless for the purposes of reducing their capital or merging with other companies having their shares. In the latter case, alteration of registration and publication are required within ten days from the date of partial deduction of the registered capital. If the registered stocks are stolen or lost, the shareholder may apply to the court for declaration of their invalidity and apply to the company for reissuance of the stocks.

R. *The Listed Company*

A listed company is a JSC whose stock is traded in the stock exchange after approval by the State Council Securities Administration. A company applying for listing must meet the following requirements: (1) the stock has been issued to the public after being approved by the State Council Securities Administration; (2) the total amount of registered capital is not less than 50 million RMB; (3) the company has been operating for more than three years, with the previous three years showing a profit; (4) at least 1,000 shareholders have over 1000 yuan of the par value stock, with at least 25% of the total shares offered to the public, and the company's total registered capital has been over 400 million RMB, with its total shares offered to the public exceeding 15%; (5) the company does not have any serious violation of laws and does not have any false recording in its financial statements; and (6) such other terms and conditions as may be provided by the State Council. The JSC may apply to the State Council Securities Administration for listing in both domestic or foreign Stock Exchanges. The State Council Securities Administration may order the suspension of a listing for any violation of the above requirements.

S. *Debenture*

A JSC, wholly state-owned LLC, and other LLC's invested in by two or more state-owned investors may, for the purposes of raising capital to support its business or production, issue debentures according to the law. The company shall apply to the State Council Securities Administration for issuance of debentures. Certain requirements must be met for the issuance of debentures, such as the company's net assets, investment direction, interest rates, and other terms and conditions as provided by the State Council. The raised capital must be used for the approved course only.

When applying for approval of issuance of debenture, the company is required to present the following documents: (1) an incorporation certificate; (2) articles of association; (3) a description of the intended means for raising debenture capital; and (4) an appraisal report of assets and an investment verification report. After approval, the company must publish a description of the intended method for raising debenture capital. The following must be included in such a publication: the company's name, the total debentures and their par value, the interest rate, the date and method of repayment of principal and interests, the starting and expiration date of issuance of debenture, the net value of the company assets, the total debentures which have been issued and are due, and the underwriter of the company's debenture.

The company's debentures may be registered or unregistered. As for the registered debentures, the company must prepare a debenture holder book, which registers the name and residence of every holder, the acquired date and number of the holders' total debentures and their par value, the interest rate, the date and method of the repayment of principal and interests, and the issuing date of the debentures. Regarding the unregistered debentures, the following should be recorded: the total debentures, the interest rate, the date and method of repayment, and the issuing date and their number. Debentures are transferable, and their price shall be based on the agreement of the transferor and transferee.

Listed companies may issue debentures which may be converted into stocks after the resolution of the shareholder's meeting. In this case, certain conditions must be met, including prior approval from the State Council Securities Administration.

T. *Company's Finance and Accounting*

All companies are required to establish financial and accounting systems which comport with the relevant laws, regulations and stipulations. Companies are also required to make certain reports and statements, *e.g.*, balance sheets and profit allotment statements. These reports should be made available to the shareholders for their inspection. Companies are also

required to draw public accumulation funds and public welfare funds. Any violation may result in the compulsory return of profit from shareholders to the companies.

U. *Company's Merging and Division*

A merger or division is subject to shareholder resolution. For JSC's, a merger or division is also subject to the approval of the State Council, authorized departments, or provincial level governments. In a merger, all of the debts and credits from the merging JSC's are passed through to the surviving company. In a division, the company's property and debts shall also be decided correspondingly. Under both situations, the companies shall publish news about the merger or division in the newspaper three times within thirty days or notify the creditor directly if possible. The creditors may demand acceptance or notification ninety days from the first publication.

Companies may also reduce their registered capital. The procedures are the same as merging and division, including notification of the creditors or publication in the newspaper, but the reduction of the registered capital shall not cause the registered capital below the minimum requirement of registered capital as set by the Company Law. Companies may also increase their capital, but must meet legal requirements and deal with relevant formalities. Companies are required to apply for an amendment to their business certificate in case of any alteration.

V. *Bankruptcy, Dissolution, and Liquidation*

Currently, China has a bankruptcy law which applies to the state-owned enterprises, including state-owned companies, but it does not apply to all companies. The National Peoples Congress is reportedly considering new bankruptcy laws which will govern all companies. With bankruptcies, the Company Law has only one general article which says that "[i]f a company is unable to settle its debts due and is declared bankrupt, the people's court should, according to relevant laws, organize shareholders, relevant authorities and professional people to establish liquidation group to conduct liquidation."²⁵

A company's dissolution may be voluntary or compulsory. The former situation may include the occurrence of dissolution for reasons stipulated in the articles of association, expiration of the business period, the resolution of the shareholders meeting, or a merging or division dissolution. Except in cases of a merger or division, the dissolving company shall form a liquidation group composed of shareholders. The compulsory dissolution occurs in circumstances where the company violates laws and regulations

25. The Company Law, art. 189.

and is ordered to close. In this situation, relevant authorities shall organize shareholders, other relevant authorities, and professional people to establish the liquidation group, which group shall conduct the liquidation. A liquidation group performs the following duties during the liquidation period: (1) inventorying and liquidating the company's assets and making balance sheets; (2) publishing notice of the liquidation or otherwise notifying creditors; (3) dealing with any unsettled business in relation to the liquidation; (4) paying off all owed taxes; (5) setting credits and debts; (6) disposing of all remaining property of the company after clearance of debts; and (7) participating in any civil litigation activities on behalf of the company.

The liquidation group has ten days to form, notify creditors, and to set up publication of notice in the newspaper at least three times within sixty days. The creditors may, within thirty days from the acceptance of notification or ninety days from the first publication, report their credits and provide evidence. The liquidation group shall register credits and report its liquidation proposals to competent authorities for approval. The company's assets will be disposed of in the following order: (1) payment of liquidation charges; (2) worker's salary and labor insurance premium; (3) payment of owed taxes; and (4) settlement of the company's other debts. After these procedures, the remaining assets may be allotted to the shareholders according to their investment proportion or shares. The company is prohibited from engaging in any business activity in the liquidation period. If the liquidation group find that the company's assets are not sufficient to settle all debts, it shall apply to the court for bankruptcy. If the company is declared bankrupt by the court, the liquidation group shall handle the liquidation matters before such court.

After liquidation, the liquidation group must compose a liquidation report for the confirmation of shareholders or competent authorities, and report to the company's registration authority for permission to terminate the company. The liquidation group should be loyal to its duties and should implement its liquidation obligations lawfully. It should not take advantage of its powers to accept any bribe or any other illegal income, and should not take the company's property. Any default of its members in the performance of their duties resulting in losses to the creditors may result in personal liability to the injured creditors.

W. Foreign Invested Companies

Before the birth of the Company Law of China, China did draft three laws governing Sino-foreign joint ventures, Sino-foreign cooperative joint ventures, and wholly foreign owned enterprises. These laws are still valid, and suggest that all foreign invested companies utilize the LLC format.

In the Company Law, there is no special chapter regulating foreign invested companies. The Company Law "applies to foreign invested LLC's.

If laws have special stipulations in relation to Sino-foreign joint ventures, Sino-foreign cooperative joint ventures, wholly foreign owned enterprises ["3 laws" collectively], these stipulations shall prevail."²⁶ Indeed, by comparing the Company Law and these 3 laws, we may find many differences in their stipulations.

Four main differences include the following. First, a single foreign investor is permitted to establish a wholly foreign owned company with limited liability according to the Wholly Foreign Owned Enterprise law. However, the Company Law only allows two or more investors (except for a wholly state-owned company) to set up either a limited company or a joint stock company with limited liability.

Second, the three laws do not require foreign invested companies to set up the organs of shareholder (investors) meetings or a supervisory council. The board of directors is the most powerful organ and to a great extent it executes shareholder powers. The Company Law requires all companies to establish shareholder meetings, a board of directors, and a supervisory council. Each organ has its own clear duties and responsibilities and work in a system of checks and balances to restrain each other.

Third, the 3 laws require more complicated establishment procedures. For instance, each foreign invested company is required to be approved by the State Planning Commission, Ministry of Foreign Trade and Economic Cooperation, and other authorities of the People's Republic of China or by local authorities. After these approvals, the investors may apply for a business certificate recording the establishment of the company.

X. Company Laws Beyond Chinese Sovereignty

Company Law provides that all of the investors may, without any approval, directly apply for registration of the company. This may be done if all of the legal requirements have been met, other than those for which the law has special provisions or if the business items require previous approval. Joint stock companies are still required to have previous approvals by the Company Law.

Fourth, business certificate may be issued to the investors of foreign invested companies before subscription has been verified by a duly authorized institution. This certificate marks the formal establishment of the foreign invested company. The investors may not make one full payment of the all registered capital they intend to subscribe unless their contract and Articles of Association have been so approved by relevant authorities. The 3 laws provide that the first payment shall not be less than 15% of the registered capital, and it must be made within thirty days if the payment is made in installments. The rest of the payments are subject to the terms of the contract and the Articles of Association. If the payment of registered

26. The Company Law, art. 18.

capital is not made in installments, all of the registered capital shall be made available within six months from the date of issuance of the business certificate. This condition is similar to authorized capital of uncalled shares under the British Company Act and the Hong Kong Company Ordinance. The Company Law adopts the principle that shareholders must pay their investment in full, whether it is toward the establishment of an LLC or a JSC.

Y. A Foreign Company Subsidiary

A foreign company is a company established pursuant to foreign company law and headquartered in a foreign country. Foreign companies are permitted to set up their branches and subsidiaries in China pursuant to this company law, engaging in the production and business activities but remaining subject to the approval of competent authority in Chinese government. In this connection, the foreign company's Articles of Association, incorporation certificate, and other required documents, shall be presented. After approval, the foreign company may apply for registration of its branches or subsidiaries and acquire a business certificate. The competent authority refers to the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China or its authorized local authority. In general, the foreign company's branches and subsidiaries require a foreign company's representative offices to refrain from the import or export goods directly by themselves. Their business items are limited. Except the foreign representative office, there are no other forms of branches or subsidiaries. Because wholly foreign-owned companies are registered in China, they are Chinese legal persons and are not recognized as the foreign company's branch or subsidiary. As article 203 provides, the foreign company's branch or subsidiary's activities are activities within Chinese territory. The foreign company should offer capital to its branch or subsidiary in correspondence with their business activities. Although the Company Law requires a minimum level of capital, the State Council has not yet made corresponding stipulation on a foreign company's branches or subsidiaries that their assets are not permitted to move abroad unless its branches or subsidiaries have settled their debts in China.

Z. Legal Liabilities

Any violation of the Company Law may result in civil and/or criminal liabilities. Chapter ten of the Company Law focuses mostly on civil liabilities for violation of the company law, such as the imposition of a fine on the violators. In an effort to enforce the Company Law more strongly, the Standing Committee of the National People's Congress passed a Decision on Cracking Down on Crimes in Violation of Company Law on February 2, 1995. This decision covers a number of crimes, including false

registration of a company; the promoter's or shareholder's false subscription or withdrawal of registered capital; making an untrue prospectus; the use of a false method of issuing the company debentures for raising capital; misleading use of or non-disclosure of facts relevant in accounting report that result in injury to shareholders or to the public's interest. Furthermore, when in liquidation, it is a crime to conceal the company's assets, making an untrue balance sheet, distributing the company's assets before settling debts, and hurting creditor's interest. It is also a crime to offer untrue evidence in relation to assets appraisal, capital verification, or audits. It is illegal to, without prior approval, issue stocks or the company debentures. The government official's illegal granting of approval or registration certificate in relation to the company's establishment, registration application, application for stocks or debentures constitutes a crime, as does the company's director, supervisory councilor or staff demanding or accepting a bribe. To occupy the company's property, divert the company's capital for personal use or offering a loan from the company's funds to other people is also illegal.

It is a difficult task to enforce the Company Law and its corresponding regulations and decisions because of wide existence of non-compliance with the law, especially regarding the status of the withdrawal of the company's registered capital and false proof of the subscription of the registered capital. Untrue statements and reports are not rare for companies. It is a long procedure to formalize the activities of the company, including its shareholders, directors, managers, and supervisory council, but individuals found guilty of violating the Company Law may face five years imprisonment and/or a fine of up to 200,000 yuan.

In this article, the company laws beyond Chinese sovereignty refer to the company laws of Hong Kong, Macao, and Taiwan. The Company Law of China does not have a stipulation regarding the company laws in those areas. According to former Chinese leader Deng-Xiao-Ping, China is one state with two systems of governance, and it is likely that the Company Laws in these areas will basically remain unchanged despite the drawing near of Hong Kong's return to China. People are very concerned about Hong Kong's future, including the impact of this political change on its laws. This fear merits a special look at Hong Kong's company law.

Pursuant to section 3.3 of the Joint Declaration between Chinese Government and British Government on December 19, 1984, Hong Kong Special Administrative Region will enjoy administration power, legislative power, independent judicial power, and the power of final trial. The current status shall remain basically unchanged. The Basic Law of Hong Kong Special Administrative Region also provides the similar stipulation in its article 8.

AA. *Hong Kong's Current Company Law: the Companies Ordinance*

Chapter 32 of Hong Kong's Ordinances were very influenced by the British Company Act. Compared with the Company Law of China, Hong Kong's Companies Ordinance is much more sophisticated. The current Companies Ordinance has 365 sections and 13 schedules, applying to unlimited companies and companies with limited liability (which may also be divided into companies limited by shares and companies limited by guarantee). It governs the company establishment, winding up of operations, companies incorporated outside Hong Kong, and other aspects. To some extent, the Company Law of China borrows from Hong Kong's company law such provisions as the restriction of members from two to five for an LLC.

But the Company Law of China differs in other areas from the Hong Kong Companies Ordinance. For instance, the Company Law of China does not require a Memorandum of Association, as does the Hong Kong Company Ordinance. The Company Law of China applies to LLC's and JSC's without other forms of companies available, but the Hong Kong Companies Ordinance covers an unlimited variety of companies, such as companies with limited liability (including companies limited by shares and limited by guarantee). Because the Companies Ordinance has operated smoothly in Hong Kong, one may assume that mainland China and Hong Kong will each continue to have their own independent company law and operate in different areas.

IV. PERFECTION AND IMPROVEMENT OF THE COMPANY LAW

In general, the Company Law is good law compared with some other laws in China, but there is room for further perfection and improvement. Currently, the Company Law only provides for basic legal principles and frameworks for companies in China, many detailed regulations, with many corresponding stipulations still needed to supplement the law. It is estimated that over thirty articles require supplement and perfection. Over eight implementing regulations or stipulations have been drafted, including: the Company Registration Regulation of the People's Republic of China, the Special Rules for Rallies and Listings Abroad by Joint Stock Companies Limited, and the Decision on Cracking Down on Crimes in Violation of the Company Law. Others will involve such issues as reorganization of state-owned enterprises into companies, the issuance of preference shares, transfer of ownership of assets of state-owned enterprises, branches of wholly foreign owned companies, standardization of existing companies pursuant to the Company Law, and the like.

Currently, the Company Law imposes different requirements on different companies. For example, state-owned LLC's only require a single

investor, as do wholly owned foreign LLC's, while other LLC's are required to have least two investors. In addition, Article 159 provides that JSC's, state-owned LLC's, and two or more investors in state-owned and subscribed LLC's may, for purposes of raising production and business capital, issue company debentures pursuant to this law. This article excludes the possibility for other LLC's to issue debentures to raise capital. These discrepancies cause unfair competition and treatment. We may expect that all LLC's will be face unified requirements and enjoy the same treatment in the future.

A. *Controversial Problems and Proposals*

With regard to the drafting process of the company law, the following points are quite controversial. First, there is the relationship between Company Law and Enterprises Law, the two laws currently operating parallel to each other with each under enforcement. The Company Law is based on the market economy, while the Enterprises Law was drafted on the basis of a planned economy. Many enterprises were established under the company's name pursuant to Enterprises law and still exist. That causes disorder in the application of laws because the theory behind these two laws differ greatly.

Second, types of companies that can be formed remain limited. Some suggest that the Company Law should govern all companies, including the unlimited company. Considering the practices regarding the unlimited company and that other forms of companies are still not sophisticated in China, legislators finally opted to limit the application of the law to LLC's and to JSC's. The spirit of the law does not prohibit other forms of companies, but the State Industrial and Commercial Administration (the top authority for company registration) in its Certain Enforcement Opinion of Company Registration Regulation of the People's Republic of China provides that nothing should be registered as names if the company fails to meet the conditions and procedures of the Company Law and the Company Registration Regulation. This clause obviously excludes the possibility of other forms of companies other than LLC's and JSC's.

Third, single shareholder companies, while the trend world-wide, remains problematic. Some suggest permitting this form of LLC because it has exists elsewhere so widely. Most people were opposed to this suggestion and agreed to restrict this form to state-owned the company because it is difficult to ascertain the true owner of assets, and it is risky for outsiders. The Company Law adopts this point of view.

Fourth, some suggested that all aspects of the company's establishment should be subject to prior approval and permission. Others suggested that one of the most important characteristics of the market economy is that companies should be set up freely without prior approval and permission, and except in special industries, the Company law now takes opposing

attitudes on this point for LLC's and for JSC's. The former may be set up without prior approval and while the latter should be subject to prior approval and permission.

Fifth, the principle of true capital focuses on whether or not to recognize authorized capital. Considering that the most serious contribution to the economic chaos of 1985-89 was untrue claims of capital and false subscription, the legislators deny the principle of authorized capital and require availability of capital before registration of companies.

Sixth, the debate over equal rights of shares centers on whether or not JSC's shall keep the method of directional raising of capital and keep the division of the state shares, legal person shares, individual shares and foreign shares. In view of insufficient publicity of directional raising of capital and activities not in compliance with the nature of JSC's, the legislators absorbed the viewpoint that no division of shares would be made, with all shares of equal rights.

Seventh, the question became which authority or institution shall, on behalf of the state, control the state's shares. The Company Law only provides a general stipulation. It shall be specified by other law. The Company Law remains controversial on this issue.

Eighth, some people think that since the LLC's scale is comparatively smaller than that of a JSC, the internal institutions of the LLC shall be flexible and at the investor's option. Some other people insist that the internal mechanisms are for the protection of the shareholder, the company, and creditors.

V. CONCLUDING THOUGHTS AND SUGGESTIONS

In view of the imperfections with the current Company Law, we are expecting modification of the Company Law in its next amendment on the following points. First, the quick publication of corresponding regulations and decision of the Company Law will occur, so that the Company Law and its regulations and decisions will constitute the entire code to be used in governing all matters of companies. Second, to permit the other forms of companies, so that the Company Law will meet the desires of different shareholders and investors and have wider application to all kinds of businesses. Third, the Company Law will come to allow a single shareholder company of any type, not just state-owned. Each shareholder, no matter whether the state, a legal person, or an individual, shall be treated equally. In fact, an LLC established by a shareholder with 1% of the shares should be treated no differently from a shareholder with 99% of the shares.

Fourth, companies shall have equal opportunities to promote their company with fair competition in a healthy market economy. One of the typical examples is that only state owned or invested LLC's and JSC's may issue debentures to raise capital, while others are still prohibited. The other example is with the subscription of capital, in that the foreign funded

companies are permitted capital by installment while other LLC's are prohibited from such. That causes unfair competition and treatment.

Fifth, the Company Law should absorb all other related laws and apply to all companies. This would require abolishing the Sino-Foreign Joint Venture Law, the Sino-Foreign Cooperative Joint Ventures Law, and the Wholly Foreign Owned Enterprises Law, among others. For to a great extent, these laws exclude the application of the Company Law due to their special provisions. Foreign investors and shareholders would not change the nature of LLC's or JSC's in this regard, but the Company Law should be unified to apply to all companies.

Sixth, currently, the Company Law only provides a general word regarding subsidiaries, with no definition or specific requirement imposed. The Company Law should have a detailed stipulation on what a subsidiary is, how to form it, and its relation with the parent company.

Seventh, the Company Law should be amended so as to permit the existence of all classes of shares, especially preference shares, so that the shareholders may enjoy different rights and bear different obligations. Deferred shares, although rarely used even in foreign countries, should also be permitted.

A CRITICAL SURVEY OF THE PEOPLE'S REPUBLIC OF CHINA'S NEW COMPANY LAW

INTRODUCTION

The bulk of the analytical debate regarding the new Company Law¹ of People's Republic of China, which became effective in July of 1994, has focused strictly on the structure of statutory requirements and internal governance. This note reviews the internal governance structures under China's new Company Law but goes on to raise several critical questions about the weaknesses of the Company Law. These critical questions are posed from the perspective of an American holder of a Chinese company's stock.²

This note begins by reviewing the ideological and pragmatic purposes behind this first piece of national company legislation promulgated in the People's Republic of China since its founding. Although, the transition from China's more traditional socialist economic structure will quicken under the Company Law, the enactment of this statute does not foreshadow the coming of capitalism. The Company Law does not even indicate the coming of privatization in China.

This note continues with a review of the types of corporations an American investor is most likely to purchase stock in under the Company Law. After discussing some practical effects of the requirements for incorporation, the note evaluates the corporate governance structure under the Company Law. For instance, Chinese corporations have both a board of directors and a board of supervisors. Further, the Company Law enumerates fiduciary duties that are held by the members of each board and other corporate officials.

Finally, this note analyzes the powers of shareholders in China. The Company Law explicitly states that shareholders are the most powerful force in a corporation. The rights given to shareholders in China actually exceed those of American shareholders in some respects. However, the American shareholder of a Chinese company's stock benefits only marginally from these expansive powers. The reasoning for the marginal control an

1. Different authors refer to this commercial statute as either the Company Law or the Corporation Law. This note will refer to the statute interchangeably as the Company Law and the Corporation Law.

2. Although this paper concentrates its discussion on the potential difficulties of a U.S. investor in China with relation to the Company Law, the discussion should be equally relevant to any foreigner who invests in The People's Republic of China via stock ownership.

American shareholder could assert in a Chinese corporation is that the government will remain the majority shareholder in most companies.

I. THE NEW COMPANY LAW AND THE PEOPLE'S REPUBLIC OF CHINA³

The national Company Law of the People's Republic of China [hereinafter China] became effective in July of 1994.⁴ The Corporations Law is "the first piece of national company legislation promulgated in China, since the founding of the People's Republic of China in 1949."⁵ It adopts and codifies most of the organizational and structural principles found in the Western capitalist countries' traditional limited liability companies. There can be no doubt that the Company Law is a very comprehensive body of law and an amazing step by the Chinese government toward conforming Chinese business organizations to international standards.

A. *Purposes Of the Corporation Law*

There are many reasons why China has decided to enact a national Corporation Law. The ultimate ideological goal of the Corporation Law is to unite Western capitalist corporate structures with existing Chinese enterprises while concurrently retaining and promoting the "socialist market economy."⁶ However, this ideological goal does not envision a replacement of the state sector by private enterprises.⁷ Instead, the pragmatic purpose of the Company Law is to allow the government to remove itself from the micro-management of enterprises. By removing itself from the day-to-day affairs of a corporation, the government hopes enterprises will become more productive and efficient by the ensuing competition. The competitive enterprises are to then develop and mature, while the means of production remain safely in the hands of the people, who are represented by the Chinese government. In short, with the Company Law the government hopes market discipline will force Chinese enterprises to become more

3. The Company Law is an extensive piece of legislation including eleven chapters and 230 articles. Yabo Lin, *New Forms and Organizational Structures of Foreign Investment in China Under the Company Law of the PRC*, 7 *TRANSNAT'L LAW* 327, 329 (1994).

4. Howard Gensler, *Company Formation and Securities Listing in the People's Republic of China*, 17 *HOUS. J. INT'L L.* 399, 400 (1995). A supplement to the Company Law, called the Special Regulation on Limited Stock-Companies and Listing Abroad, was adopted in August of 1994. This note treats the Corporations Law and the Special Regulation as a single body of legislation.

5. Lin, *supra* note 3, at 329.

6. Corporation Law, art 1., in 2 *China L. For. Bus.: Bus. Reg. (CCH Int'l)* ¶¶ 13-518 (1994).

7. Robert C. Art & Minkang Gu, *China Incorporated: the First Corporation Law of The People's Republic of China*, 20 *YALE J. INT'L L.* 273, 275 (1995).

productive and efficient. However, the government intends the private sector to only be a supplement to the state sector.⁸

A second goal of the Company Law is to keep the means of production in the hands of the people. This goal underscores the important point that the Company Law is not an effort or willingness by the Chinese government to encourage or allow enterprise privatization, such as that occurring in the former communist states of the Eastern Europe.⁹ Under the Company Law, "the [Chinese government] will still maintain the ultimate control and majority ownership of the largest enterprises. . . ."¹⁰ These are the same type of enterprises that will most often offer stock to foreign investors.

The implications of the ideological and pragmatic purposes behind the promulgation of the Company Law are fundamental. China is adopting Western corporate organizational structures that will appear familiar to stock investors from the United States. Nonetheless, the ideological underpinning is unquestionably socialist in nature and explicitly rejects capitalist ideology. This foundation evidences the operative attitude of the Chinese government that "[c]ompan[ies] are a necessary evil to be closely regulated rather than an economic engine to be encouraged and released."¹¹

B. *Types of Corporations*

Three types of limited liability companies are defined by the Company Law.¹² There are limited liability companies (limited companies), limited

8. *Id.*

9. Generally, privatization in the former communist states of the Eastern Europe entails a shift of control over enterprises from the state to the private sector. *Id.* at 282.

10. *Id.* at 275.

11. *Id.* at 289. See generally Barbara Campbell Potter, *China's Equity Joint Venture Law: A Standing Invitation to the West for Foreign Investment?*, 14 U. PA. J. INT'L BUS. L. 1, 4-6 (1993). Although Potter's article addresses Equity Joint Ventures which have been in existence in China since 1983, government sentiment does not appear to have changed. To some extent the sentiment is based on the ideologic underpinning of the Chinese concepts of Li and Fa. Simplistically, Fa is law, and Li is propriety. Li looks to moral force to maintain order. Within this structure, the rules of conduct are defined by relationships. This moral force is equated with good. Fa looks to physical coercion to enforce order. The sanction of physical coercion is tainted with evil. Thus, statutory law, such as the Company Law, is tainted with evil. See also Benjamin Schwartz, *On Attitudes Toward Law In China, in GOVERNMENT UNDER LAW AND THE INDIVIDUAL*, AMERICAN COUNCIL OF LEARNED SOCIETIES 27 (Milton Katz ed., 1957).

12. It is important to note that the Company Law does not supersede the previous laws regarding equity joint ventures, contractual or cooperative joint ventures, and wholly owned state enterprises. "Article 18 of the Company Law provides that the Company Law is to apply to foreign invested-limited liability companies, but that the laws regarding foreign investment enterprises will prevail over the Company Law if the former provides otherwise." Lin, *supra* note 3, at 341. For a good brief review of these forms of enterprises and the laws that govern them see Lin, *supra* note 3, at 331-40.

stock-companies (stock companies) and companies wholly owned by the state (state companies). This note will concentrate on the limited stock-companies, and a specific subcategory of limited stock-companies called listed companies.¹³ These two categories are the most relevant because they are the types of corporations where a foreign investor will most commonly purchase stock.

The procedures for forming limited stock companies and listed companies are specifically defined in the Company Law. As a practical matter, limited stock-companies have generally already existed before an enterprise has become a listed company. Listed companies may list their stock on any approved securities exchange, foreign or domestic.¹⁴ This should make the stock of listed companies the most readily available to United States investors. For both types of corporate formations there are the following requirements. First, 10,000,000 Renminbi (RMB) must be fully subscribed. Second, "the company must be organized at a stockholders' meeting."¹⁵ Third, the issuance of stock and the formation of the company must conform to all regulations. Fourth, a company constitution or articles of incorporation must be drafted by the initiators.¹⁶ Fifth, "the company [must have] an appropriate name . . ." and "appropriate organization."¹⁷ Sixth, the company must have an established permanent residence.¹⁸ Seventh, "the company [must have] adequate resources to begin operation."¹⁹ Eighth, "the board of directors [must have] applie[d] to the Registrar of Companies for registration of the company by submitting the

13. Gensler, *supra* note 4, at 426. Different authors vary as to the exact names of these corporate categories. The direct Chinese translation of the category this note has termed limited stock-companies is "shareholding limited company." Art & Gu, *supra* note 7, at 291 n.109. Lin, *supra* note 3, at 329. Gu has altered the direct translation of "shareholding limited company" to "joint stock company." Art & Gu, *supra* note 7, at 291. The bases for his different translations is that "[w]hat the term [shareholding limited company] denotes is that the company is characterized by share ownership and provides limited liability to shareholders. Because all corporations provide limited liability, [this translation] . . . uses the phrase 'Joint Stock Company' as the most descriptive translation." *Id.* at 291 n.109. Gensler calls this category of companies "limited stock-companies." He further differentiates between the limited stock companies who can list only domestically and those that can list both domestically and abroad. Those that can list abroad fall under the heading "listed company." Gensler, *supra* note 4, at 413. This note uses Gensler's terminology out of personal preference.

14. The New York Stock Exchange is an approved securities exchange.

15. Gensler, *supra* note 4, at 414.

16. *Id.* Initiators are the initial investors who organize the limited stock company. Initiators have many of the same functions and liabilities as promoters in the United States. *Id.*

17. *Id.*

18. *Id.* Residence of the corporation is determined by its primary place of business.

19. *Id.*

appropriate document[s].”²⁰ Last, the government must give its approval.²¹

The following additional requirements must be met when forming a listed company. First, the minimum amount of registered capital is raised to 50,000,000 RMB. This minimum capital must be fully subscribed. Second, stock issuance must have been approved by the securities administration department. Third, the enterprise must have been in business for a minimum of three years. Fourth, no major unlawful acts may have been committed by the company within the last three years. Finally, the company must not have made a false statement in any financial report for three years.²²

Listed companies are further divided into two groups: small companies and large companies. The additional requirements for small companies are: (1) “the company [must have] earned profits in the last three years; [2] there [must be] more than 1000 stockholders; [3] the par value of the stock exceeds 1000 RMB; and [4] at least twenty-five percent of the stock [must be] held publicly.”²³ For large companies the capital stock must exceed 400,000,000 RMB; and at least fifteen percent of the stock must be held publicly.²⁴

The effects of these requirements are relatively straight forward. Each requirement reinforces the belief that corporations are a dangerous albeit necessary means to an end. The Company Law does not make incorporation a right; rather it is a privilege. The privilege will only be granted in such a manner as to “protect against corporations being established wantonly.”²⁵

The requirements of minimum registered capital and minimum amounts of time the corporation has been in business are fashioned to prevent wanton establishment of corporations. These requirements are intended to impede the Company Law from becoming the province of small entrepreneurs. Although, “[a] secondary function of the Company Law is to . . . promote the development of small private enterprises,”²⁶ the government does not want the Company Law to start wholesale establishment of fly-by-night enterprises. The fundamental focus of the Company Law is on reforming the state-owned enterprise, not on the

20. *Id.*

21. *Id.*

22. Gensler, *supra* note 4, at 415, 426.

23. *Id.* at 427. According to one author “public shareholders” means government entities. Art & Gu, *supra* note 7, at 303.

24. Company Law, art. 152(4).

25. Art & Gu, *supra* note 7, at 289 n.103 (quoting Quanguo Renda Falu Weiyuanhui Guanyu ‘Zhonghua Renmin Gongheguo Gongsifa (Chaoan)’ Shenyijieguo de Baogao [The Law Committee of the National People’s Congress, Report Concerning the Examination of Chinese Company Law (draft)] (Dec. 17, 1993)).

26. Art & Gu, *supra* note 7, at 275.

development of entrepreneurial, capitalist businesses.²⁷ The registered capital and the time-in-business requirements work to preserve this fundamental focus. Additionally, the requirement that corporate formation occur at a shareholders' meeting foreshadows the tremendous power that the shareholders will exercise over the corporation.

From the perspective of the American holder of a Chinese company's stock, each of these requirements are positive. The pre-incorporation requirements work to assure the U.S. investor that incorporated Chinese enterprises are relatively large and secure businesses that will be controlled by shareholders. Of course, providing a feeling of stability and security to the foreign investor is a goal of the Company Law, although not explicitly mentioned as such. To this end, the requirements for incorporation provide a great deal of screening before an enterprise can incorporate. In short, with this list of pre-incorporation requirements, the government assures the potential stock investor that an incorporated enterprise is a substantive enterprise.

C. *The Structure of Corporations Under China's Company Law*

The structure of a company under China's Company Law is very similar to that of a traditional limited liability corporation in the United States. Significantly, "the Corporations Law adopts the familiar principle that a corporation is a 'legal person,' an entity that enjoys civil rights and owes civil responsibilities to the full extent of its assets."²⁸ Shareholders are explicitly protected from liability beyond their capital contributions.²⁹ The American shareholder of a Chinese company's stock should favor the existence of this familiar legal fiction.

However, the corporation, as a legal entity, has the added Chinese characteristic of a human "legal representative."³⁰ Generally, "the legal representative is the chairman of the board [of directors] or president" of the corporation.³¹ The legal representative serves as an agent for the Chinese corporation in that he can "act on behalf of and . . . bind the company."³² Distinctively, the Chinese corporation's legal representative is also subject to sanctions for the corporation's improper activities. For example, "the legal representative is personally at risk if the corporation engages in business beyond its authorized scope, conceals facts from registration and tax authorities, or hides [corporate] property to evade repayment of [corporate] debts."³³

27. *Id.*

28. Art & Gu, *supra* note 7, at 293.

29. *Id.* at 293-94.

30. *Id.* at 294.

31. *Id.*

32. *Id.*

33. Company Law, art. 49.

The penalties imposed on the legal representative can be very serious. The legal representative may be "fined or subjected to administrative sanctions, [ranging from] warnings . . . [to] dismissal from office, with the attendant loss of prestige, status, and face." All violations of the Company Law also have the potential to have criminal liability attach.³⁴ "[I]f the company's offense constitutes a crime, the legal representative may be criminally prosecuted."³⁵ In China, "[t]he punishment for white collar crimes can be [extremely] severe, including . . . death."³⁶

The reasons for adopting the legal representative are numerous. First, the legal representative appears intended to provide some amelioration for the limited liability of the Company Law. The possible rationale being that since the legal representative can be punished for the corporation's wrongs, he will strive to prevent those wrongs. Thus, if some improper action occurs an actual person is punished, not a faceless corporation. Therefore, the legal representative appears to represent a compromise between socialism and limited liability. Interestingly, the practical effect of attaching liability places the legal representative in the position of watchdog over corporate affairs.³⁷

The importance of the legal representative to the American purchaser of Chinese stock is not readily apparent. Superficially, it does appear to give the chairman of the board of directors, as legal representative, a strong incentive to ensure the corporation is operating lawfully. The question is: Should this time-consuming function be that of the Chairman of the board of directors? In the United States, for example, the Chairman of the board of directors, generally is more involved in overall company strategies and planning the corporation's direction. Under the Chinese Company Law the chairman of the board of directors would spend much of his time policing the internal functions of the corporation.³⁸ There is, of course, merit to both positions.

34. Art & Gu, *supra* note 7, at 299. "At least 15 separate articles state that in addition to the other more specific sanctions, criminal liability (which is not defined in the Company Law) applies 'in accordance with the law.'" *Id.* at 299 n.184 (quoting Company Law, arts. 206-14, 217-24).

35. Art & Gu, *supra* note 7, at 294.

36. *Id.* at 299-300 n.185.

37. The Company Law's use of a legal representative and the prohibition about piercing the corporate veil could place the legal representative in the position of a marked man. If a corporate official took some action that resulted in the corporation violating the law then the legal representative could also be punished. It is easy to see how the legal representative concept could be subject to abuse. However, this potential abuse is mitigated by personal liability attaching to a specific director for "action taken that violates law or company policy unless such director dissented." Gensler, *supra* note 4, at 421.

38. The Company Law is silent about what standard the legal representative must adhere to in the performance of his functions. However, his concurrent position as chairman of the board of directors probably provides his standard of performance.

Also, it is critical to note that the Company Law is not making the legal representative personally liable for corporate debts. Thus, the legal representative himself still operates behind a financial corporate veil.³⁹ The legal representative is subjected only to a sanctioning system.⁴⁰ These sanctions do not go to the shareholder, but are fines paid to the government, thus the benefit to American shareholders is strictly the enforcement of the legal representative's watchdog function. This conclusion is strengthened by the Company Law not specifying whether the legal representative is subject to suit by shareholders for not effectively performing his duties.

1. *The Board of Directors*

The Company Law adopts the familiar corporate governance strategy of using a board of directors. "Every [large, limited liability] corporation must have a board of directors, generally elected by the shareholders for terms of up to three years."⁴¹ The number of directors on the board must fall within a range set by the Company Law.⁴²

A Chinese corporation's board of directors must follow many of the same formalities as a board of directors in the United States. For example, the Chinese corporation's board of directors must follow strict notice requirements for shareholders' meetings.⁴³ Further, "[t]he board must meet, at least, twice per year" and directors "should be given at least ten days advance notice [of these] meeting."⁴⁴ Also, "[d]irectors should attend meetings personally or authorize another director in writing to vote with explicit instructions."⁴⁵ Resolutions⁴⁶ before the board of directors are

39. The Company Law does not mention a concept of "piercing the corporate veil." Art & Gu, *supra* note 7, at 294.

40. The use of sanctions points to a fundamental difference between the legal system in China and the legal system in the United States. One commentator has indicated that China has a "disciplinary system" as opposed to a legal system. A disciplinary system attempts to maintain order and coerce cooperative behavior. A legal system concentrates more on the protection of the rights of individuals. See generally THOMAS B. STEVENS, ORDER AND DISCIPLINE IN CHINA (1992) (Although the distinction is inflated by Stevens, the differentiation does provide useful insights into the perspective from which laws are promulgated in China.).

41. Art & Gu, *supra* note 7, at 295. See also Lin, *supra* note 3, at 369.

42. The statutory number of directors in limited stock corporations must fall in a range between five and nineteen. The corporation's constitution should designate the specific number within this range. Company Law, art. 115, in Lin, *supra* note 3, at 369.

43. For instance, "[s]tockholders are to be notified of the [annual shareholders meeting's] agenda thirty days in advance." This is the board of directors responsibility. Gensler, *supra* note 4, at 418. "When a shareholders' meeting is to discuss the issuance of bearer shares, the company must make a public announcement about the matter forty-five days before the convening of the meeting." Lin, *supra* note 3, at 22.

44. Gensler, *supra* note 4, at 420.

45. *Id.* at 421.

"adopted by a simple majority vote of the directors in attendance."⁴⁷ "[T]he minutes of the board meeting must be kept and signed by the attending directors."⁴⁸

The Company Law has adopted responsibilities for the board of directors that are similar to those found in the United States. First, the board must convene and conduct shareholders' meetings and report to shareholders on the performance of the corporation at these shareholders' meetings. Second, they must carry out the decisions reached by shareholders at the meetings.⁴⁹ Third, they must decide "the company's operation and investment plans."⁵⁰ Fourth, the board of directors has the responsibility of "formulat[ing] the company's annual financial budget plans and final accounting plans."⁵¹ Fifth, they must "formulate the company's profit distribution plans"⁵² and a "plan to satisfy any budget deficit."⁵³ Sixth, they must make needed adjustments to the amount of required registered capital. Seventh, they must formulate plans for the issuance of corporate bonds.⁵⁴ Eighth, they have the responsibility "to draft plans regarding mergers, separation[s] [or] dissolution of the company."⁵⁵ Ninth, they must appoint and remove corporate management, including the general manager.⁵⁶ Tenth, the board must "formulate the company's fundamental management system."⁵⁷ Finally, the board of directors may elect, by a majority of all directors, a chair and one or two vice-chair(s) of the board.⁵⁸

46. Both the members of the board of directors and shareholders may propose resolutions.

47. Gensler, *supra* note 4, at 421.

48. Lin, *supra* note 3, at 372.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 369.

53. Gensler, *supra* note 4, at 421.

54. *Id.*

55. *Id.*

56. The general manager of the company has responsibility for the "day-to-day management of the company, to implement the board of directors' resolutions, and to draft various plans on the company's basic management system." He also attends board of directors meetings in a non-voting capacity. Lin, *supra* note 3, at 372.

57. *Id.* at 369.

58. Gensler, *supra* note 4, at 421. See also *supra* notes 12 -14 which point out that the chairman of the board of directors is the legal representative of the company. Further, "while the functions and authorities of the chairman of the board of directors in a limited liability company are not specified, the Company Law provides the following functions and authorities for the chairman . . ." Lin, *supra* note 3, at 24. "First, to preside over the shareholders' meeting, and convene and preside over the meeting of the board of directors. Second, to examine the sufficiency of the implementation of the resolutions of the board of directors; and to sign the company shares and company bonds." *Id.*

A fundamental difference between the American method of legislative enactment of laws and such legislative enactments in China appears when the board of directors' responsibilities are examined. In China, the laws (i.e., legislatively written statutes) are pronounced in generalized format, resembling policy pronouncements rather than traditional laws. Then, it is left to the regional governments to flesh out the specifics. Thus, local interpretation can have a major affect on the board of directors' responsibilities, especially during the early stages of a law's existence. The board's responsibility to determine "the company's operation and investment plans" illuminates this difference. There is no historical reference to determine what this responsibility entails. Hence, the primary roles of Chinese corporate boards of directors — to determine the general direction of the corporation, to make judgments about extraordinary business transactions, and to report such transactions to shareholders, must be refined at the local levels. In practice, this removes some of the American shareholders' protection provided by the national Company Law because of uncertainty as to how the regional government will interpret the national legislation.

2. *The Board of Supervisors*

The Company Law also requires Chinese corporations to have a second board, acting in essence as a board of supervisors.⁵⁹ China has adopted this concept from German corporate law.⁶⁰ The board of supervisors is made up of a minimum of three members, one of which will be elected the convener.⁶¹ The board of supervisors represents "the stockholders and the employees in a proportion established by the company

59. The translations of the Company Law differ between authors in this area. Gu addresses the "board of supervisors" by the name of "supervisory committee," Art & Gu, *supra* note 7, at 295. Lin, however, uses the "board of supervisors" terminology, Lin *supra* note 3, at 273. This note opts to use Lin's version out of personal preference. In addition, there is an inconsistency as to whether a board of supervisors is actually required or whether it is merely optional. Both Gensler and Lin hold that it is required, with Lin qualifying this by stating that it is "mandatory . . . only if the company is of large scale in its business operation." Lin, *supra* note 3, at 373. Gensler, *supra* note 4, at 422. The discussion in this note most relates to large scale business operations. Hence, this note opts to address the board of supervisors as a corporate requirement.

60. See generally Gregory J. Thwaite & Jurgen Pesch, *A Guide for the Perplexed: Some Aspects of German Merger and Acquisition Law Explained for Foreign Counsel*, 20 INT'L BUS. LAW 566 (1992). Additionally, the Czech Republic, the Republic of Slovakia and Poland have all adopted similar supervisory boards. Bulgaria adopts the supervisory board as one of two possible corporate governance structures. See generally Vassil Breskovski, *Directors' Duty of Care in Eastern Europe*, 29 INT'L LAW. 77 (1995). All appear to have borrowed this concept from Germany.

61. Gensler, *supra* note 4, at 422. What exactly this title entails is not made clear by the Company Law, but the conveyor is probably the rough equivalent to a chairman.

constitution."⁶² Examining the following listed duties given to the board of supervisors one must conclude that the board of supervisors, essentially "acts as an auditing watchdog of the company."⁶³

The following responsibilities are given to the board of supervisors by the Company Law. First, the board must "inspect the financial affairs of the company."⁶⁴ Second, it is required to watch for violations of "laws, regulations or [the] articles of association" by the board of directors or the general manager when acting in their corporate capacities.⁶⁵ Third, the board of supervisors must ask "the directors and general managers to correct acts harmful to the interests and benefits of the company."⁶⁶ Fourth, it proposes "interim shareholders' meetings."⁶⁷ Lastly, it performs all other acts designated to it by the company's constitution."⁶⁸ To facilitate performance of each of these tasks, the members of the board of supervisors "attend meetings of the board of directors in a non-voting capacity."⁶⁹

At first glance, the board of supervisors appears to provide extra protection for a company's shareholder; however, there is a problem with this protection. Although the board of supervisors has policing functions, the mechanisms for the board of supervisors to enforce their policing functions are indirect. For example, the board of supervisors can "request" that the board of directors and general managers "correct acts harmful to the interests and benefits of the company."⁷⁰ The weakness of this function is fundamental by its own language, the board of supervisors can make only a "request." If the board of directors does not comply, then the board of supervisors does not have the ability to enforce its request. The only enforcement mechanism available to the board of supervisors under the Company Law is to propose a shareholders' meeting.⁷¹

Because of the government's strong control over the shareholders' meetings, the single enforcement capability effectively transforms the board of supervisors into a private quasi-regulatory representative for the government within each corporation.⁷² In the end, the result of the board

62. *Id.* at 422. "The employee representative(s) must be elected by and from the [corporation's] employees." *Id.*

63. Company Law, arts. 54, 126.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Art & Gu, *supra* note 7, at 296.

70. Company Law, arts. 54, 126.

71. For this to be an effective, albeit indirect, mechanism of enforcement, the board of supervisors would have to contact the shareholders directly.

72. However, the independence of the board of supervisors is strengthened by the requirement that no current members of the board of directors or other corporate officers may be on the board of supervisors.

of supervisors' watchdog function is to run-and-tell the government when the board of directors or other corporate officers have been "bad."⁷³

3. *The Chinese Boards' Duties of Care and Loyalty*

a. *The Duty of Care*⁷⁴

The Company Law states that "[b]oth directors and supervisors owe fiduciary duties to the corporation and are subject to liabilities for breach."⁷⁵ Further, the Company Law states that corporate officials (e.g., directors, supervisors and general managers) must "abide by the company's articles of association and must perform their duties and protect the interests and benefits of the company with loyalty and honesty."⁷⁶ Hence, directors, supervisors, and general managers must perform their duties sincerely and diligently with loyalty and honesty.

The duty of care espoused by the Company Law is the weakest portion of the Company Law. The inherent weakness stems from the absence of any explanation about what sincerely and diligently and with loyalty and honesty mean. The Company Law provides this language but then goes no further. Additionally, there is no mention of the familiar American concept of the business judgment rule or any standard, such as gross negligence.

73. This is probably the intent behind China grafting the supervisory board concept into its Company Law. "A characteristic feature of the German economy, [from which this concept was grafted], is that most German companies are financed not through equity but through bank loans." Lin, *supra* note 3, at 375. There are a few dominant banks in Germany. Thus, the Chinese government, as "The Bank" in China has adopted the German system that has been effective at protecting the large German creditor banks. See generally Breskovski, *supra* note 60. There is, however, some evidence that might be seen as refuting this conclusion: "[t]he Company Law provides that a civil servant, such as a governmental employee is not allowed to serve as a director, supervisor or manager of a company. The policy consideration underlying this provision may be to minimize governmental interference in the operation of a company and to separate the State from the corporate sector." Lin, *supra* note 3, at 375.

74. For a quick review of the duty of care for directors and officers in the United States see 1 ALI, PRINCIPLES OF CORPORATE GOVERNANCE 68 (1994). Section 4.01(a) states, in part, that "[a] director or officer has a duty to the corporation to perform the director's or officer's functions in good faith, in a manner that he or she reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances." See also *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963) (Requiring directors to exercise the degree of care that an ordinarily prudent person would exercise under similar conditions).

75. Art & Gu, *supra* note 7, at 296.

76. *Id.*

In the United States, the duty of care for directors and corporate managers is generally thought to require a mixture of four different duties.⁷⁷ First, there is the "duty of inquiry . . . [or] the duty to follow up reasonably on information that should raise concern."⁷⁸ Second, there is "the duty to employ a reasonable decision-making process" when making corporate decisions.⁷⁹ Third, there is the duty to make decisions that are reasonable.⁸⁰ Finally, there is "the duty to supervise or monitor the conduct of the corporation's business."⁸¹ Each of these sub-duties have substantial case histories that have defined what they encompass. By contrast, in China, the words sincerely, diligently, with honesty and loyalty are all that is known. There are no case histories. In short, the duty of care language in the Company Law sounds positive, but one must critically question how this language's substance will be defined.

In sum, China attempts to graft the Western concept of duty of care into its Company Law; however, the attempt appears very timid and completely ambiguous. To a United States shareholder of a Chinese company's stock, this brevity regarding the duty of care is cause for concern. Nonetheless, it is doubtful, given the sophistication of the Company Law that this weakness results from lack of consideration or insight by the National People's Congress. The weakness probably will be worked out in a fairly short period of time.⁸² Most commentators seem to assume that "sincerely and diligently, [is] a prescription that corresponds to American law's duties of loyalty, good faith, and care."⁸³ This assumption appears premature.

77. This classification process is drawn from Melvin Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U. PITT. L. REV. 948 (1990).

78. Breskovski, *supra* note 60, at 86.

79. *Id.*

80. *Id.*

81. *Id.*

82. This note comes to this conclusion because, *inter alia*,

[u]nder the legal system of China, legislation begins when the National People's Congress adopts a new economic law, composed of general rules and principles. The State Council . . . then promulgates detailed regulations for the implementation of those principles. . . . This system is often criticized by foreign lawyers because of a time lag of more than one year between the enactment of a law by the [National People's Congress] and the promulgation of its implementing regulations by the State Council. However, this system works well because the government receives feedback on the law, allowing it to reevaluate its economic reform and, through implementing regulations, readjust the law to meet policy considerations.

Lin, *supra* note 3, at 333. Although the Company Law has already passed through this usual reevaluation period, the National People's Congress adopted it in 1993, the Company Law is the most extensive economic legislation in China; therefore, it may require more time to "perfect". Art & Gu, *supra* note 7, at 273 n.1.

83. Art & Gu, *supra* note 7, at 295.

b. *The Duty of Loyalty*

In addition to the duty of care, directors and general managers of a corporation "are prohibited from engaging in any acts harmful to the interests and benefits of the company, and any profits derived from such acts will be appropriated by the company."⁸⁴ "If the directors, supervisors, or managers of a company conduct an illegal act and cause damage to the company, they must bear the compensation liability."⁸⁵ With this language the Company Law develops a duty of loyalty.⁸⁶

The Company Law continues by codifying a specific rule against self-dealing⁸⁷ by the corporations's directors, supervisors and managers.⁸⁸ Self-dealing appears defined as a corporate officer⁸⁹ "advanc[ing] any personal interests by exploiting their official positions, . . . accept[ing] bribes [or] other illegal gains."⁹⁰ The following activities are specifically listed as forbidden under the Company Law. First, there must be no lending of corporate funds.⁹¹ Second, no corporate assets may be deposited in the personal accounts of the director or others.⁹² Third, the company assets may not be used to guarantee individual debt.⁹³ Fourth, a director or corporate official may not operate a competing business.⁹⁴ Fifth, a corporation's officer cannot reveal corporate business secrets.⁹⁵ Finally, a corporate official is "prohibited from concluding agreements or conducting other transactions on [his] own behalf or on other people's behalf with his company."⁹⁶

84. Company Law, arts. 61 and 123.

85. Art & Gu, *supra* note 7, at 295.

86. There is no specific demarcation in the Company Law between the duty of care and the duty of loyalty, it is strictly a convention of this note. Further, while the "duties" are discussed in two different areas of the Company Law, articles 59-63 and article 128, each area blends this note's demarcation of the "duties."

87. The term "self-dealing" is not used in the Company Law. This note uses the term simply as a short hand method of referring to the list of activities forbidden under the Company Law which appear to parallel the activities generally referred to as self-dealing in the United States.

88. Some sections of the Company Law address general manager, directors, and supervisors while other do not address all three. This could be significant or just stylization of translations by those authors who have translated the Company Law. Either way, differentiation of "duties" between various corporate officials is beyond the scope of this paper. This note simply uses the translations as given.

89. Corporate officer refers to members of the board of directors, members of the board of supervisors and general managers.

90. Company Law, arts. 59 and 123.

91. Lin, *supra* note 3, at 374.

92. *Id.*

93. *Id.*

94. *Id.*

95. Company Law, art. 123.

96. Lin, *supra* note 3, at 374.

However, significant mitigation of the prohibition of self-dealing exists in the Company Law. Through the appropriate language in the articles of association, a corporation can opt out of all these prohibitions of self-dealing. Further, a self-dealing act may be approved at a shareholders' meeting.⁹⁷ The Company Law leaves whether shareholder approval must be given *ex post* or *ex ante* uncertain. The ability of shareholders to approve self-dealing becomes more menacing upon realizing that the government will remain the majority shareholder.

Notwithstanding these mitigations the Company Law's treatment of the duty of loyalty appears more complete than its treatment of the duty of care. Nevertheless, some vagueness exists. For example, the statute provides no guidance as to what constitutes a competing business or a corporate secret. As previously alluded to the refinement of these details will probably occur at the regional level, which creates the probability of inconsistencies between regions.

There are additional examples of the vagueness under the duty of loyalty. First, the Company Law lacks an explanation of "compensation liability."⁹⁸ The American shareholder of a Chinese company's stock should also be concerned with the opt out provision's lack of clarity regarding *ex ante* or *ex post* application. Because one of the purposes of the Company Law is to allow foreign investors to develop more confidence in the internal governance of Chinese corporations, this vagueness is counterproductive.

In sum, the Company Law provides a point of reference regarding the duties of care and loyalty corporate officials in China must follow when transacting corporate business. Yet, how these duties translate into functional, defensible rights for shareholders remains uncertain.

D. *Chinese Stock Issuers And World Markets Before Company Law*

In 1992, before the enactment of the Company Law, the stock exchanges in Shanghai and Shenzhen China⁹⁹ began selling "a class of shares reserved for [foreigners] and traded only in foreign currency, the so-called 'B Shares.'"¹⁰⁰ "Class A' stock [is] available for purchase by

97. *Id.*

98. Company Law, art. 63

99. Shanghai and Shenzhen were the first and at that time the only stock exchanges in mainland China after the Communist takeover. Although Shanghai remains the largest and most influential stock exchange in China, a number of other exchanges currently exist.

100. Lee B. Spencer, Jr., *Chinese Issuers and the U.S. Market*, 845 PLI/Corp 203, 203 (1994). Mr. Spencer was a partner in the law firm of Gibson, Dunn & Crutcher at the time he wrote this article. In this capacity he "represented either the issue of the underwriter in the first three initial public offerings in the U.S. for China-based [enterprises] (Brilliance China Automotive Holdings Limited, Ek Chor China Motorcycle Co. Ltd. and China Tire Holding Limited) in which the [enterprises] obtained primary listing for their common stock

Chinese citizens only . . . and 'Class H' stock has been used for transactions on the Hong Kong stock exchange."¹⁰¹ Additionally, Chinese enterprises' shares have been available for purchase on the New York Stock Exchange since October of 1992.¹⁰² The difference between shares for foreigners and shares for Chinese nationals has been one of the most distinctive features of young stock companies in China.

E. *Issuance Of Shares Under the Company Law*

Incredibly, the Company Law makes no mention of shares being distinguished by the nationality of the shareholders rather than by their characteristics. This Company Law's silence provides no indication of how holders of A, B and other classes of stock may exercise their rights, leaving open many questions unanswered. For example, whether the various types of shares vote as a common group or whether they vote by class.¹⁰³ If they are to vote by class, would each classes' approval "be necessary to approve a [corporate] resolution[?]"¹⁰⁴ The answers to these unaddressed questions have tremendous ramifications to a holder of B-shares. For example, "a corporation might adopt a rule of equal application on its face that is actually far . . ." less favorable to some shareholder in another class.¹⁰⁵ In sum, the failure of the Company Law to address the different classes of shares is puzzling and a definite weakness.¹⁰⁶

The Chinese word for investor translated literally means "one who throws or tosses capital."¹⁰⁷ The Company Law has made substantial progress in making this literal translation an anachronism by standardizing

on the New York Stock Exchange." *Id.*

101. Art & Gu, *supra* note 7, at 301.

102. There are three "Chinese" companies which made stock offering on the New Stock Exchange before the enactment of the Company Law. All three are Sino-foreign joint venture enterprises. The Company Law as well as the relevant Chinese joint venture laws are both applicable. However, the offerings of these three companies were actually accomplished through holding companies incorporated in Bermuda. The sole asset of each Bermudian company is its respective namesake corporation in China. The three companies are Brilliance China Automotive Holdings Limited, Ek Chor China Motorcycle and China Tire Holdings Limited. The effect of the Company Law on these three companies is far beyond the scope of this paper. See generally Spencer, *supra* note 100.

103. Art & Gu, *supra* note 7, at 301.

104. *Id.*

105. *Id.* For instance, a resolution requiring share transfers to be made by registration in person at the corporate headquarters would affect foreign shareholders far more than Chinese shareholders.

106. This note can only speculate about this conspicuous absence. The Company Law is too thoughtful for this to be a mere oversight. One conceivable answer is that the issue of different types of shares will be addressed in national securities regulation. The national securities regulation is scheduled for enactment in the near future.

107. Matthew D. Latimer, *Note & Comment: Gilding the Iron Rice Bowl: The Illusion of Shareholder Rights in China*, 69 WASH. L. REV. 1097, 1097 (1994).

the issuance of shares.¹⁰⁸ The Company Law does this by first reducing classifications of shares into only two types: registered shares and bearer shares. “[R]egistered shares are share certificates where the names and residences of shareholders must be recorded in the company’s shareholder register, and transfer [of the shares] must be endorsed by the transferring shareholder.”¹⁰⁹ In contrast, recording the name and residence of bearer shareholders is not necessary.¹¹⁰ Transfers of bearer shares can be accomplished by handing the shares over to the transferees at a stock exchange.¹¹¹ Both registered and bearer shares may be issued to the public.¹¹² The “[i]ssuance of shares must conform to . . . ‘open, fair and impartial principles.’”¹¹³ In addition, “shares of the same class must have equal rights and [equal] profits.”¹¹⁴

“The current regulatory framework does not stipulate a method for resolving disputes between B Share holders and the Chinese parties in interest such as the company, its management or A Share holders.”¹¹⁵ Hence, foreign investors may have to rely upon Chinese courts that are not experienced with corporation matters.

The potential difference between the interests of these two types of shareholders gives the extensive powers allocated to shareholders’ by the Company Law an ominous thread. For instance, shareholders making the decisions regarding the company’s operation principles and investment plans has a completely different meaning when the majority shareholder is the Chinese government. Examining these conditions simplistically a reasonable conclusion would be that China has kept centralized economic planning, but is pursuing it under a different implementation regime.

This conclusion is supported when one reviews the other decision that are made only by shareholders at shareholders’ meetings. Recall, both boards are chosen by the shareholders; the compensation for the members of both boards is set by the shareholders; the company’s fiscal budget is decided on by the shareholders; and extraordinary transactions, such as mergers or dissolutions, must be approved by the shareholders.

Hence, if the government, as majority shareholder, decided to pursue an objective other than the maximization of profits, the American shareholder would be at the mercy of the government’s agenda. For

108. “Under the [Company] Law, the capital of a [limited stock corporation] must be divided into shares with equal value for each share.” Lin, *supra* note 3, at 356.

109. Lin, *supra* note 3, at 356. It is important to note that the Company Law does not specifically provide definitions of registered shares or bearer shares.

110. *Id.*

111. *Id.*

112. *Id.* at 374.

113. Art & Gu, *supra* note 7, at 301.

114. *Id.* at 356.

115. Spencer, *supra* note 100, at 208.

example, the government might sacrifice a corporation's profits to achieve another state objective, such as higher employment in the region.¹¹⁶

F. *Shareholders Under the Company Law*

"The idea that . . . [owners] operating a business should be entitled to enjoy profits if [the business] succeeds, but be insulated from liability for losses if it fails, is neither intuitively appealing nor obvious" in China.¹¹⁷ In fact, not long ago "the Chinese government prohibited even discussion about establishing corporations or private ownership of stock because it deemed such concepts inconsistent with . . . China's political and economic system."¹¹⁸ In short, until recently, the fundamental concept of limited liability that the Company Law endorses was explicitly against the socialist ideology and the law in China.

An example of China's dramatic change in regards to private enterprise is evidenced by the changing concept of profits and dividends. Previously these words were synonymous with "exploiting the working class,"¹¹⁹ the antithesis of the Chinese socialist system. However, it must be remembered that limited liability companies in the West, in part, stand on the fundamental presumption that the benefits to society through encouraging commerce outweigh the possible inability of individual claimants to recover for the wrongs done to them by a corporate entity. This fundamental concept does not directly conflict with the socialist ideology.

Nonetheless, considering its history and ideology, China's grafting the legal concepts of Western corporations law onto its powerful economy is an amazing step toward bringing China in line with international business practices. This grafting of Western law includes extensive powers being given to corporate shareholders. In fact, the Company Law states that the "shareholders' meeting is the most powerful authority" within the corporation.¹²⁰

1. *Shareholder Meetings*

The shareholders' meeting being the most powerful authority in a corporation is more than simple sloganism or rhetoric. The shareholders of Chinese companies actually exercise considerable control over a company. For instance, the first shareholders' meeting is called and presided over by the majority shareholder.¹²¹ Generally, subsequent shareholders' meetings

116. Latimer, *supra* note 107, at 1107.

117. Art & Gu, *supra* note 7, at 293.

118. *Id.* at 281. China began the journey to a market economy in 1978.

119. *Id.* at 282.

120. Company Law, art. 102

121. *Id.*, art. 42.

are "called by the board of directors and presided over by the chairman of the board of directors"¹²² who themselves have been elected by the shareholders.

The Company Law ensures the shareholders are active participants by requiring a regular annual shareholders' meeting.¹²³ Additionally, the Company Law requires an interim shareholders' meeting to convene within two months if one of the following events occur: "(1) less than two-thirds of the directors required by Company Law or company constitution are serving;" (2) if unrecovered losses equal one third the total equity capital; (3) a shareholder holding ten percent or more of the shares proposes a meeting; and (4) if the board of directors or board of supervisors considers a meeting necessary.¹²⁴

Most significantly, the Chinese Company Law requires that many crucial decisions be made only at shareholders' meetings. Specifically, the following decisions can only be made by the shareholders. First, the shareholders must decide the company's "operational principles and investment plans."¹²⁵ Second, the directors and supervisors must be elected or removed, and their compensation must be determined.¹²⁶ Third, reports from the board of directors and the board of supervisors must be examined, discussed and approved by the shareholders at the meeting.¹²⁷ Fourth, there must be an examination, discussion and approval of the "company's annual financial budget plans and final accounting plans, and the company's profit distribution plans and loss recovery plans."¹²⁸ Next, resolutions must be made regarding the increase or reduction of the company's registered capital, as well as the issuing of corporate bonds.¹²⁹ Further, the shareholders must approve extraordinary matters, such as corporate merger, division, transformation, dissolution and liquidation.¹³⁰ Any necessary amendments must be made to the corporation's articles of association.¹³¹ Additionally, "the changes in registered capital; decisions regarding the division, merger, or dissolution of the corporation; and amendments to the company's articles of incorporation must be passed by two-thirds of all shareholders holding voting rights."¹³²

122. Lin, *supra* note 3, at 366.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 368. Normally, shareholder decisions are passed by a simple majority.

"[T]he right to inspect the company's articles of association, [the] minutes of shareholders' meetings, and financial accounting reports,"¹³³ aid the shareholders in exercising their power. The shareholders also have "the right to raise inquiries into, and offer proposals [regarding] the operation of the company."¹³⁴

Examining this list of powers held by the shareholders, one is impressed by the extent of control shareholders exercise over the corporation. The most striking result of these extensive powers is the substantial inroads made into the powers delegated by the Company Law to the corporation's board of directors. First, the board of directors' responsibility to determine the company's operation and investment plans is qualified by the requirement that the shareholders must decide upon both plans at shareholders meetings. Second, the board of directors responsibility to formulate annual financial budgets must be approved at the shareholders' meeting. Third, although the board of directors must decided the distribution of profits to shareholders via dividend, this distribution must be approved by the shareholders. Fourth, the board of directors must formulate plans to satisfy the budget deficits, but if there is a loss of one-third or more capital, an interim shareholders' meeting must be called (i.e., the owners are brought in to review things). Fifth, registered capital adjustments made by the directors apparently will be provided by a resolution from the shareholders. Sixth, although the board of directors must draft plans regarding mergers, separations and dissolutions of the corporation, shareholders' must approve of such extraordinary transactions. In short, most of the major powers allegedly held by the board of directors originates from or must be approved by the shareholders at a shareholders' meeting.

At first glance, the U.S. holders of a Chinese company's stock should have few complaints about being a shareholder exercising great control over the company. However, as has been foreshadowed throughout this note, the fellow shareholders are themselves a potential problem.

2. *Big Brother: The Majority Shareholder*

The potential problem with shareholders' rights in China is not that they are insubstantial. To find the potential trouble for American shareholders of a Chinese company stock, one must look behind the Company Law to the other participants in the market.

"The extraordinary power accorded to shareholders is consistent with the Corporation[s] Law's overall approach to managing state-owned enterprises."¹³⁵ The Chinese government in structuring the shareholders'

133. *Id.*

134. *Id.*

135. Art & Gu, *supra* note 7, at 297. This reemphasizes the fact that the Company Law is not an effort to promote privatization.

rights did so with the intent of being the majority shareholder in most large limited liability stock companies. By holding the majority of a corporation's shares the government maintains control over a corporation from a non-regulatory position. The government, thereby, frees itself of micro-management but retains a not-so-invisible hand in corporate affairs. This not-so-invisible hand can be used to ensure that the company does not deviate from the governmental objectives. The potential difficulty for foreign investors in a Chinese company's stock is apparent: a shareholder's interests (i.e., maximization of profits) probably will not match the ultimate interests of the Chinese government, the majority shareholder. Therefore, although the Company Law provides for substantial shareholder control over the corporation via shareholders' meetings, the predicate for this substantial power is that the Chinese government remains the majority shareholder.¹³⁶

The conflict between an American shareholder's interest and the Chinese government's interest is different from the plight of minority shareholders in the United States. In China, as in United States, the American shareholder must be concerned about her minority shareholder's interest not being adequately represented when it conflicts with the interests of the majority shareholder. However, in China, the majority consists of the community (i.e., employees and their families), which is represented by the government. From the perspective of the foreign minority shareholder in China, this situation is similar to a corporate constituency-type problem. In the United States, the concern is that the community (i.e., the company's employees) will suffer in the corporation's pursuit of profits. Conversely, in China, the concern of the foreign minority shareholder is that the corporation will suffer in pursuit of supporting the community. For example, a Chinese corporation could be used simply to manufacture raw components for other Chinese corporations.¹³⁷ The "[p]rofitability of the supply[ing corporation] may not be as important to the [Chinese government] as the allocation of enough components to the other enterprises."¹³⁸ The government could simply make evaluations of the "costs and benefits and make a decision, [as majority shareholder], on pricing, payment, and production costs."¹³⁹ Obviously, this evaluation may not take the interests of the foreign minority shareholders of the supplier corporation into account.¹⁴⁰

In short, although the Company Law dictates a duty of care and a duty of loyalty running from the board of directors, board of supervisors and managers to the corporation, it does not dictate any fiduciary duties between shareholders. Since the Company Law does not address the duties among

136. For example, Chinese companies have not issued shares available to a foreigner in excess of "30 percent of the company's share capital." Spencer, *supra* note 100, at 208.

137. Latimer, *supra* note 107, at 1106 n.59.

138. *Id.*

139. *Id.*

140. *Id.*

shareholders, there are none. Therefore, the Chinese government as, majority shareholder, can pursue any objective when exercising its control over the corporation, provided the objective is legal.

3. *Protecting Shareholder Rights*¹⁴¹

The Company Law does provide methods for protecting the rights assigned to shareholders. If a shareholder finds that "a shareholders' meeting or the board of directors pass[ed] a resolution in violation of . . ." the law or administrative regulation, or the resolution "invades legal interests [of] shareholders," the shareholder has a right to file a law suit in the People's Court.¹⁴² The shareholder has "the right to sue for an injunction and damages."¹⁴³ "The [Company Law] does not provide expressly for derivative actions" thus, a shareholder's suit must be brought by the shareholder on her behalf.¹⁴⁴

A purchaser of shares in a Chinese corporation is statutorily protected if a corporate resolution invades the legal interests of the shareholder or is illegal. As an American holder of Chinese corporate stock the power to sue if a law is violated is comforting and appears to provide added protection.¹⁴⁵

Although these provisions allowing shareholders to sue are comforting, they do not assure vindication of violated rights. "China has traditionally followed a disciplinary model of rule enforcement, its legislation typically has not provided rights to its citizens that may be privately enforced."¹⁴⁶ Thus, determination of damages for business malfeasance is, for the most part, a relatively new concept to the courts.¹⁴⁷ The Company Law

141. In this section it is important to note that overlaps exist between the Company Law and various local securities regulations currently found in China.

142. Art & Gu, *supra* note 7, at 297. The Chinese court system is made up of four levels of People's Court.

143. *Id.*

144. *Id.*

145. Although outside the scope of this paper, a major concern for the holder of Chinese stocks is the difficulty of getting a favorable judgment enforced. "Chinese courts have been notoriously inconsistent in enforcing awards, particularly when an award would harm an interest of a major contributor to the regional economy." Latimer, *supra* note 108, at 1107. "Although in theory China's court system is independent from other government institutions, in reality a court's power to enforce its judgments depends upon cooperation from local banks . . . and political leaders." *Id.* at 1109.

146. *Id.* at 1108. Although Latimer is not speaking strictly within the context of the Company Law, his comments are still correct and informative.

147. [A] final problem confronting those who hold shares in Chinese enterprises is the fundamental conflict between a system of stock ownership and the [socialist] ideals perpetuated in China's most recent constitution. . . . If the constitution declares public ownership to be the basis of China's economic system, it appears, in theory at least, that the measures enacted by the national and local governments vesting private

provides no guidance to the courts in this area. For instance, although the meaning of the term "damages" is self-evident to Americans, a corporation's violation of Chinese law resulting in damages to a shareholder is an unfamiliar concept. Additionally, the determination of such damages is difficult, even with more experienced courts.

Finally, as has been discussed, there is no provision in the Company Law that forces a majority shareholder to maximize corporate profits. Thus, the conflicts with the Chinese government being the majority shareholder are still completely applicable with the power to sue being of no consequence.

III. CONCLUSIONS ON THE CORPORATION LAW AND SHAREHOLDERS

Obviously, the Company Law is an extensive piece of legislation intended to address the structural needs of Chinese companies so that they will have access to capital via stock exchanges. On the surface, the Company Law appears to provide a great deal. It promulgates how to set up a corporation; the rights and responsibilities of shareholders, and responsibilities of the board of directors and the board of supervisors. The Company Law codifies duties of care and loyalty under which corporate management must operate, albeit with varying degrees of success. However, the primary question remains, how will these Western structures, with their unique Chinese characteristics, be applied given the underlying socialist ideology and the legal system in China.

In conclusion, the new Company Law does not provide American shareholders the protections they are accustomed to in the United States. Although, at first glance, the rights of Chinese company's shareholders are equal to and even exceed those of the shareholders in the United States, it remains to be seen how these rights can be executed in China. The current laws of China do not offer adequate levels of foreign shareholder protection because they do not ensure that shareholders can oversee and direct the governance of the Chinese company.¹⁴⁸

*John D. Osgathorpe**

individuals with the right to own shares of enterprises are per se unconstitutional.

Id. at 1113.

148. *Id.* at 1097.

* *John Osgathorpe is a J.D. Candidate, 1997, at Indiana University School of Law - Indianapolis. He holds a Certificate in Chinese Law from the East China Institute of Politics and Law. He received his B.A. from Indiana University, and his A.S. from Vincennes University.*

CHINESE WOMEN EXPERIENCE A NEGATIVE SIDE EFFECT OF THE GROWING PRIVATE SECTOR IN GENDER-BASED EMPLOYMENT DISCRIMINATION

INTRODUCTION

Discrimination against women occurs throughout the world, in all areas of life. Violations persist against women's rights despite condemnation by the international community in addition to individual countries. The women of the People's Republic of China (hereinafter China) face great discrimination as a result of the cultural traditions and values of the Chinese, which in large part are based on Confucian teachings. Mao Zedong attempted to eliminate the stratification between the sexes by placing extreme restrictions on the personal rights of all citizens.¹ Recently, the inherent biases against women in China have re-emerged, especially in the work force, due to the surge of the market economy.²

The Chinese government is loosening its traditionally tight grip on the economy, intending to allow the development of a market economy. Lifting some of the numerous regulations restricting private businesses allows employers more freedom to act on their biases and prejudices, resulting in an increase in gender-based employment discrimination in China. China does have extensive laws and provisions prohibiting discrimination against women, but they are not effectively enforced. The laws prohibit discrimination, mandate equal remuneration, and include protective measures for women. Despite the laws, gender-based discrimination in China's work force continues virtually unchecked.

The United States and the United Nations have repeatedly condemned China's discrimination against women, as well as China's other human rights violations, which are beyond the scope of this comment. The Chinese government claims that it attempts to minimize its violations against women's rights.³ Some sources even point to foreign-invested joint ventures as the primary violators of Chinese labor laws,⁴ which include anti-discrimination provisions. At the same time that foreigners are being blamed, the Chinese government discourages efforts by outside forces attempting to improve human rights practices.

1. JAMES C. HSIUNG, *HUMAN RIGHTS IN EAST ASIA: A CULTURAL PERSPECTIVE* 122 (1985).

2. Leah Makabenta, *China: Economic Progress Makes Life Harder for Women*, INTER PRESS SERVICE, Oct. 7, 1992 available in LEXIS, ASIAPC Library, INPRES File.

3. James Lilley, Address at the Women's Nat'l Democratic Club (May 31, 1994), available in LEXIS, ASIAPC Library, FEDNEW File.

4. *China: Joint Ventures Must Set Up Trade Unions*, CHINA DAILY, Aug. 25, 1994.

The United States does have the means to bring about improvement in the treatment of women in the Chinese work force by pressuring the government through various trade restrictions. American companies could be encouraged, or required, to adopt a code of conduct whereby they could monitor their own human right's practices when dealing with China. Some American companies have already responded to the human rights violations in China by placing voluntary restrictions on business conducted there.⁵ Action by outside sources would serve to notify the Chinese government of the concerns of the international community, improve the treatment of those Chinese employees directly affected, and influence other businesses and companies to join the United States in the fight for the equal treatment of Chinese women.

Although biases need to be addressed and eliminated from within each person individually, the increase in gender-based discrimination cannot be tolerated. The increase in discrimination within the work force needs to be brought under control and prevented from growing along with the economy. If the Chinese government is not enforcing the anti-discrimination laws already in place, the United States can lead the way in addressing the issue and equalizing the opportunities available to both sexes. Developing equality in the work force will reflect in other areas of women's lives, contributing to the benefit and well-being of the country and the people as a whole.

This Comment addresses the increase in gender-based employment discrimination in China as a result of the changing dynamics of the country and the role and responsibilities of the international community in furthering equality among the sexes. Part II looks at the international provisions promoting the rights of women, while part III introduces and evaluates China's own regulations which deal with gender based discrimination. Parts IV and V then discuss the pervasiveness of female oppression, while also looking at the contributing historical, cultural, and political factors. These sections focus on the labor market and how women are being limited in this particular aspect of society. Finally, part VI explores how the international market has effected China's human rights record and what the United States and other foreign investors in China can do to help improve the plight of Chinese women until gender equality is fully recognized and actualized.

I. THE INTERNATIONAL PROHIBITION AGAINST GENDER-BASED DISCRIMINATION AND THE POSITION OF THE UNITED NATIONS

A. *The Charter of the United Nations*

The right of women to be free from discrimination is a fundamental and well established universal right. The Charter of the United Nations

5. Diane F. Orentlicher & Timothy A. Gelatt, *Private Laws, Public Actors: The Impact of Human Rights on Business Investors in China*, 14 J. INT'L. BUS. 66, 67 (1993).

clearly addressees and condemns gender based discrimination at two separate places within its original charter. Article I, section 3 declares that "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect of human rights and for fundamental freedoms for all" there must be equality "without distinction as to race, sex, language, or religion."⁶ This general statement of purpose is followed by the second and more specific call of Article 55:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.⁷

The inclusion of women's rights in the Charter of the United Nations was re-emphasized at the 1993 World Conference on Human Rights.⁸ The conference adopted action requiring a systematic integration of women's issues into the United Nation's human rights programs.⁹

B. *The United Nations Convention on the Elimination of All Forms of Discrimination Against Women*

In the continuing effort by the United Nations to further its fundamental principle of eliminating gender-based discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women was opened for signature in March of 1980.¹⁰ Many reasons are given within the U.N. Women's Convention for the necessity of its ratification including:

discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potential-

6. U.N. CHARTER art. 1.

7. U.N. CHARTER art. 55.

8. *Violations of Women's Human Rights*, DEP'T. OF ST. DISPATCH (U.S. DEP'T OF ST.), Oct. 11, 1993.

9. *Id.*

10. Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 19 I.L.M. 33 [hereinafter U.N. Women's Convention].

ties of women in the service of their countries and of humanity . . . the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields.¹¹

Although discrimination is condemned within the U.N. Charter, as well as in the Universal Declaration of Human Rights¹² and the International Covenant on Economic, Social and Cultural Rights,¹³ it is noted within the U.N. Women's Convention that gender-based discrimination continues and must be addressed further.¹⁴

Members of the U.N. Women's Convention, including China, are requested to embody gender equality within their constitution, and to enact any other legislation necessary to reach the desired end of equality.¹⁵ Article 11 of the U.N. Women's Convention is the section that directly addresses discrimination in the field of employment, and specifically addresses equal opportunity, equal remuneration, safety, and extensive protection against discrimination on the grounds of marriage and maternity.¹⁶ In name, China has met the requirements of the U.N. Women's Conventions on these issues by enacting legislation declaring equality and maternity protection, and by including the anti-discrimination provisions in the constitution.¹⁷ But China has not yet actually been able to realize equality between the genders in the labor market, which is the ultimate goal.

Discrimination against women is defined in Article 1 of the U.N. Women's Convention as "any distinction, exclusion or restriction made on the basis of sex."¹⁸ Temporary special measures to encourage equality are acceptable under the U.N. Women's Convention as long as they do not

11. *Id.* at 35.

12. The Universal Declaration of Human Rights was proclaimed by the general assembly on December 10, 1948, and is the "common standard for achievement for all peoples and all nations." This entitles all people to a set of freedoms, and prohibits distinction of sex in the application of the freedoms. WINSTON E. LANGLEY, *WOMEN'S RTS. IN INT'L. DOCUMENTS* 7 (1991).

13. The U.N.'s International Covenant on Economic, Social, and Cultural Rights guarantees women equal remuneration with men for work of equal value as well as equal opportunities for employment. *Id.* at 10.

14. U.N. Women's Convention, *supra* note 10.

15. *Id.*

16. *Id.* The United States is not a member of this convention because of the requirement of paid maternity leave. "What is good in the conventions is already protected by U.S. law." The United States may declare reservations, limiting the United States required compliance. *Panelist at Senate Foreign Relations Hearing Address Concerns about U.N. Women's Convention*, INT'L. BUS. & FIN. DAILY, Sept. 29, 1994.

17. *See infra* part III.

18. U.N. Women's Convention, *supra* note 10.

result in unequal or separate standards.¹⁹ It also makes clear that the measures protecting maternity leave and pregnancy are not considered discriminatory and are greatly encouraged.²⁰ The Chinese have many laws concerning women.²¹ Most of China's laws purely promote equality, but several of the provisions are considered laws of protection and make clear distinctions between the sexes. Most of the protective laws center around pregnancy and maternity leave, which comply with the provisions of the U.N. Women's Convention.

C. *The International Labor Organization*

Another arm of the United Nations, the International Labor Organization (ILO), addresses women's rights of freedom from discrimination in the work force from the labor angle. The ILO sets out three fundamental human rights as follows: 1) freedom of association; 2) freedom from forced labor; and 3) equality of opportunity and treatment, including freedom from discrimination.²² The preamble of the ILO's Constitution makes specific provisions for the protection of women and the requirement of equal pay for equal work.²³ Gender-based employment discrimination falls squarely within the concerns of the ILO. The ILO allows, and even requires, whatever resources possible to eliminate the problem. The United Nations and the United States have clearly placed the Chinese on notice that the rights of women are of international concern and needs to be successfully addressed by the Chinese government. China has a number of provisions prohibiting discrimination against women, but the effectiveness of these laws is questionable.

II. CHINA'S ANTI-DISCRIMINATION PROVISIONS

A. *The Constitution of the People's Republic of China*

China has extremely firm laws prohibiting any type of discrimination against women. These provisions are found at multiple levels, from the constitution to local regulations. Discrimination against women is explicitly prohibited within Article 48 of the Chinese Constitution (Constitution). Women in The People's Republic of China enjoy equal rights with men in all spheres of life; political, economic, cultural and social, including family life.

19. *Id.* art. 4.

20. *Id.*

21. *See infra* part III.

22. Karen F. Travis, *Women in Global Production and Worker Rights Provisions in U.S. Trade Laws*, 17 YALE J. INT'L L. 173 (1992).

23. Int'l. Lab. Organization Const. Pmb., T.I.A.S. No. 1868.

The state protects the rights and interests of women, applies the principle of equal pay for equal work for men and women alike and trains and selects cadres from among women.²⁴ This constitutional grant of equality is powerfully stated. Women are to be considered and treated as equals in all areas of life, including the work place. The fact that equality is assured within the constitution suggests China's compliance with the mandates of the United Nations.²⁵

B. *Rules on the Labor Protection of Female Workers*

One of the first laws created specifically for the benefit of women, which has now been repealed, was the "Rules on the Labor Protection of Female Workers" (1988 Rules).²⁶ Although the law declared the equality of women, it also included many protective provisions, including those assuring paid maternity leave and prohibiting the dismissal of women due to pregnancy or age.²⁷ The 1988 Rules then set out numerous prohibitions intended to protect women, including one preventing women from working in mines.²⁸ Article 6 restricted women by stating: "No unit may assign any female worker, during her menstruation, to work in high altitude, under low temperature, or in cold water, or to perform manual labor that requires grade three stamina stipulated by the state."²⁹ There were even more provisions describing what pregnant or nursing women can and cannot do.³⁰ These types of protective provisions included in the 1988 Rules distinguish women from men and perpetuate discrimination.

The provisions in the 1988 Rules serve as an example of the Chinese perception of women and their abilities, versus the ability of men. Although the current laws focus more on equal rights than on special rights, the distinctions are still evident in several of the provisions. The Constitution is the only source of women's rights which purely emphasizes complete equality of the sexes.³¹

C. *The Law Protecting Women's Rights and Interests*

China re-emphasized its commitment to gender equality by passing the "Law Protecting Women's Rights and Interests" (1992 Law) on April 3,

24. XIANFA art. 48 [hereinafter CHINA CONST.].

25. See *supra* part II.A.

26. Rules on the Labor Protection of Female Workers, adopted June 28, 1988, in STATUTES AND REG. OF THE PEOPLE'S REPUBLIC OF CHINA (1989).

27. *Id.* art. 4, art. 8.

28. *Id.* art. 5.

29. *Id.* art. 6.

30. See also *infra* text accompanying note 97 (discussing biological differences as primary source of discrimination).

31. See *supra* part III.A.

1992.³² This law states that one of its purposes is to “enable women to play an active role in socialist modernization.”³³ It then repeats what is stated in the Constitution: “Women enjoy the same rights as men in political, economic, cultural, social, and family life. . . . Discrimination against, abusing, or injuring women is prohibited.”³⁴ Chapter IV of this law is entitled “Right To Work” and contains seven articles stating that there can be no discrimination in hiring, pay, or firing.³⁵

The 1992 Law explicitly provides women equal rights with men in all areas of life. The law also goes one step further than the Constitution by including special protection for women during pregnancy and maternity leave.³⁶ The protective measures found in the 1992 Law are not as extensive as those discussed in the 1988 Rules.³⁷ The type of protective measures for women found in the 1992 Law are considered acceptable types of differentiation between the sexes by the U.N. Women’s Convention.³⁸ One final part of the 1992 Law to note is Chapter VIII, Legal Responsibility, providing women with remedies against businesses which violate the law. The remedies range from initiating legal proceedings, to turning to concerned departments or organizations for assistance.³⁹ Despite the given remedies, the law is criticized for having no mechanism for enforcement, and therefore only being useful as an educational tool.⁴⁰

D. *Local Legislation Furthering the Promotion of Women’s Rights*

Even after the 1992 Law was enacted, some municipalities created their own local labor laws to promote the equality of women. The Local People’s Congress of Tianjin adopted detailed regulations for the protection of women’s rights and interests on September 7, 1994.⁴¹ This local law contains provisions which prohibit establishments, including businesses and schools, “from discriminating against women in signing working contracts.”⁴² It also provides that “women cannot be forced to leave their

32. *Law Protecting Women’s Rights and Interests*, DAILY REPORT: CHINA, Apr. 14, 1992, at 17.

33. *Id.*

34. *Id.*

35. *Id.* at 18. *But cf. supra* part III.B. (special protection provisions contained within the law occasionally go too far).

36. *Law Protecting Women’s Rights and Interests*, *supra* note 32, at 25.

37. *See supra* part III.B.

38. *See supra* part II.B. para. 3.

39. *Law Protecting Women’s Rights and Interests*, *supra* note 32, at 20.

40. Sheryl WuDunn, *Profit and Loss: China’s Affection for Capitalism Erodes Gains in Equal Rights*, CHI. TRIB., Sept. 27, 1992, at 5.

41. *Tianjin Formulates Local Regulations to Protect Women’s Rights*, XINHUA NEWS AGENCY, Sept. 18, 1994, available in LEXIS, ASIAPC Library, XINHUA File.

42. *China’s Women Secure More Legal Protection*, UPI, Sept. 20, 1994, available in LEXIS, ASIAPC Library, UPI File.

posts before they reach the retirement age set by the government, sixty, and cannot be dismissed because they are married, pregnant or breast feeding."⁴³ This law is similar to the Law Protecting Women's Rights and Interests in that it includes protective provisions along with the declaration of equality.

The above laws protecting women's rights suggest that China is devoted to this cause and is exercising every effort to realize the desired equality. However, the repetitive laws declaring the equality of women are apparently insufficient to reach the desired goals in that "[f]undamental human rights provided for in the Constitution are frequently ignored in practice."⁴⁴ Because of the strong language of the Chinese Constitution, declaring equality with men "in all spheres of life" and "equal pay for equal work for men and women alike,"⁴⁵ any violations should be challengeable under the Constitution. The 1992 Law is another source to enforce the rights of women workers.⁴⁶ Tianjin evidently did not find this law to be adequate or effective and enacted another mechanism to encourage equality between the sexes.

The Chinese government holds the same attitude with the international human rights standards. Despite public statements declaring compliance with the various documents to which it is a party, "Chinese officials accept only in theory the universality of human rights. They argue instead that a nation's political, economic, and social system and its unique historical, religious, and cultural background determine its concept of human rights."⁴⁷

Unfortunately, gender discrimination persists despite current laws, and a method to effectively address the problem needs to be implemented. Regardless of the laws and provisions discussed above, a report by Amnesty International states that "[t]hese human rights abuses in China are directly linked to grossly inadequate fundamental legal safeguards. The judicial system fails to ensure due process and adherence to basic international standards designed to protect individuals against abuse."⁴⁸ The following

43. *Id.* See also *Tianjin Formulates Local Regulations to Protect Women's Rights*, *supra* note 41.

44. *China Human Rights Practices, 1993* DEP'T OF ST. DISPATCH (U.S. DEP'T OF ST.), Feb. 1994.

45. CHINA CONST., *supra* note 24, art. 48.

46. *Law Protecting Women's Rights and Interests*, *supra* note 32.

47. *China Human Rights Practices, 1994* DEP'T OF ST. DISPATCH (U.S. DEP'T OF ST.), at sec. 4, Mar. 1995.

48. *Prepared Testimony of Louisa Coan Board of Directors, China Country Coordinator, Amnesty International USA before the Committee on International Relations Subcommittee on International Operations and Human Rights*, FEDERAL NEWS SERVICE, July 18, 1995, available in LEXIS, ASIAPC Library, FEDNWS File [hereinafter *Prepared Testimony of Louisa Coan*]. "In practice, China's legal reform efforts have not yet had a significant effect on protecting the rights granted to citizens in China's constitution and criminal and administrative procedure laws." *Human Rights and Democracy in Asia*, DEP'T

factors, dealing with the bases of Chinese society and the nature of the market economy, all contribute to the inferior status of women in China despite the strong laws granting them equality.

III. THE BASIS OF DISCRIMINATION AGAINST WOMEN IN CHINA

A. *Historical and Cultural Basis of Discrimination*

China has a long history of stratification of the sexes in all areas of life. Women were traditionally bought and sold as wives or slaves. The purpose of a woman was to please the whims and fancies of her male superiors and to bear and care for the children, preferably male. This way of life was taught to men and women through the predominate teachings of Confucius.⁴⁹ He taught that every person had a place in society, that the place of a woman was subordinate to that of a man, and that "it is a virtue if a woman has no ability."⁵⁰ Because of these beliefs, women in China have long been viewed and treated as greatly inferior.

The communist party, under Mao Zedong, believed that rooting out individualism would benefit the well-being of society as a whole.⁵¹ As a result, the communist party attempted to eliminate gender-based discrimination by minimizing the differences between the sexes by such acts as outlawing make-up, requiring uniforms, and implementing and enforcing strict employment quotas.⁵² Mao was fairly successful in achieving this goal, but only at the expense of the personal freedoms and liberties of all of the Chinese people.⁵³

Unfortunately, as a result of the Chinese government's loosening its traditional control over society in favor of developing personal freedoms and a market economy, many of the prejudices against women have re-emerged. Practices such as the selling of wives, female infanticide and feticide, and prostitution have all increased since Mao's rule,⁵⁴ so that "[a]s Chinese society focuses more on profit and as Communist morality loses its influence, women in some cases are losing the ground they gained in the Maoist years."⁵⁵ Confucian teachings, promoting the separation of classes and sexes, are now more frequently acted upon by companies and employers.

OF ST. DISPATCH (U.S. DEP'T OF ST.), Apr. 3, 1995.

49. Margaret Y.K. Woo, *Biology and Equality: Challenge for Feminism in the Socialist and the Liberal State*, 42 EMORY L. J. 143, 177-80 (1993).

50. Karen Korabik, *Managerial Women in the People's Republic of China; Competitive Frontiers: Asian Women in Management*, 23 INT'L. STUD. OF MGMT. & ORGANIZATION 47 (1993).

51. HSIUNG, *supra* note 1.

52. WuDunn, *supra* note 40.

53. *Id.*

54. *Id.*

55. *Id.*

B. *Pervasiveness of Discrimination Against Women in China*

Not only does discrimination against women in China have a long history, but it also has spread into most areas of women's lives. Discrimination is reemerging in many aspects of the economy, including labor standards.⁵⁶ Along with that, the sale of women is rising, prostitution rates are increasing,⁵⁷ female feticide continues,⁵⁸ and abuse within the home is still prevalent.⁵⁹ In short, "[m]any Chinese women accept being beaten by their husbands and don't see that it's wrong."⁶⁰ The attitude of superiority held by men and the acceptance of subservience and abuse by women can be blamed as the main sources of society's employment discrimination against women. The discrimination is then carried from the home into other facets of life and society, including the job market. Because the prejudice is learned at the home, it becomes ingrained and extremely difficult to fight outside of the home.⁶¹

The government is attempting to address discrimination in the home, which should result in a reduction in labor market discrimination as well. A study published in March of 1994 on marriage and the family found "one-fifth of all wives had been abused by their spouses."⁶² Recently, new guidelines have been enacted instructing Chinese police officers on how to handle a domestic violence call.⁶³ Domestic violence is rarely reported in China, but when it is, the police usually view it as a family matter and do not interfere.⁶⁴ The new guidelines focus on protecting the victim and any other family members who may be at risk.⁶⁵ The guidelines also encour-

56. Makabenta, *supra* note 2.

57. WuDunn, *supra* note 40. "In 1991 and 1992, police investigated 50,000 cases of women being sold." *Clouds Gather Over Chinese Women's 'half of the sky,'* AGENCE FRANCE PRESSE, Aug. 29, 1993, available in LEXIS, ASIAPC Library, AFP File. *But see China Human Rights Practices, 1994, supra* note 47 (pointing out that in December of 1994, a gang of 48 people were sentenced to prison terms ranging from 19 years to life for abducting, raping, and selling women, showing the government taking action against such atrocities).

58. *China Human Rights Practices, 1994, supra* note 47; *see also China Human Rights Practices, 1993, supra* note 44.

59. Violations against women's rights also extend to the prisons, including forced abortion and forced sterilization. *Prepared Testimony of Louisa Coan, supra* note 48.

60. *Breaking the Silence: China's Women Say No to Abuse by Men*, THE STRAITS TIMES, Aug. 16, 1994, at 11.

61. *Asia-Women: Discrimination Begins at Home, says economist*, INTER PRESS SERVICE, Apr. 25, 1994, available in LEXIS, ASIAPC Library, INPRES File. "Much of the deprivation of women arises not from discrimination in the marketplace but from disparity in intra-household allocation between sexes." *Id.*

62. *China Human Rights Practices, 1994, supra* note 47, sec. 5.

63. Ruth Mathewson, *New Rules to Handle Home Violence; Police Set Code to Deal with Abuse*, S. CHINA MORNING POST, May 1, 1994, at 1.

64. *Id.*

65. *Id.*

age stronger action, ranging from taking the victim to a safe refuge to serving one of the new domestic violence incident notices on the offender.⁶⁶ This will result in more incidents being recorded and acted upon, which may raise awareness and allow women to better protect themselves. The regulations also make injunction orders easier to attain against an abusive partner.⁶⁷ The enforcement of anti-discrimination laws in the domestic realm may lead to more strict enforcement of anti-discrimination policies in other areas, such as the work place, and may help educate women about the rights they do have.

Women in China are subject to greater health risks simply by being born women.⁶⁸ Sex-based selective abortions and female infanticide still exist, especially with the government's one-child family policy and the strong cultural preference for male children.⁶⁹ Female children are often denied the family's scarce resources when it comes to education, food, and medicine.⁷⁰ As a result of the lack of educational opportunities available to women, seventy percent of the illiterate in China are women.⁷¹ All of these factors contribute to the lowly status and lack of well being for women, affecting their standing in other areas of life, including work.⁷² Even when the same criteria is used to evaluate female and male applicants for a position, women do not have the same access as men to attain or develop these skills.⁷³

C. *The Influence of the Market Economy on Women's Status*

The surge of the market economy in a society ingrained with cultural traditions is frequently described as a mixed blessing for the Chinese women even though "[m]ore than a decade of rapid economic growth has raised living standards and enabled growing numbers of Chinese to assume greater control over their own lives. The scope for private economic activity has expanded rapidly, and the degree of government and party control over the economy has continued to decline."⁷⁴ The market reforms have created many new options for women, with the greatest opportunity lying in self-

66. *Id.*

67. *Id.*

68. Carolyn Adolph, *Sex Discrimination Deadly, Report Says*, OTTAWA CITIZEN, Sept. 27, 1994, at A3.

69. Korabik, *supra* note 50; see also *China Human Rights Practices, 1994*, *supra* note 47 (revealing that ultrasound is sometimes used for this purpose in direct violation of the Maternal and Child Health Law which was passed in October).

70. Adolph, *supra* note 68.

71. WuDunn, *supra* note 40; see also Ruth Youngblood, *China's Economic Boom Leaves Women Behind*, UPI, Oct. 10, 1994, available in LEXIS, ASIAPC Library, UPI File.

72. Adolph, *supra* note 68. See *China Human Rights Practices, 1993*, *supra* note 44.

73. Korabik, *supra* note 50.

74. *China Human Rights Practices, 1994*, *supra* note 47, sec. 1.

employment.⁷⁵ But the increased competition has forced private businesses and companies to make more efficient use of their labor resources, resulting in a greater amount of discrimination against women in the labor market.⁷⁶ As a result of the new reforms, women are the last to be hired and the first to be laid off, under the guise of a variety of excuses,⁷⁷ and this is reflected in the startling statistic that “[w]omen make up seventy percent of the twenty million workers made idle by the enterprise reform.”⁷⁸ There are three major battles facing women in the market place: 1) against unemployment and job access; 2) against unequal payment for work done; and 3) against the historic social structure and family responsibilities still imputed to women only.⁷⁹

1. *Female Unemployment and Job Access*

A main factor for the increasing employment distinctions between men and women is that Chinese citizens are now more mobile. Men are more free to move from their homes to where the jobs are located. When this mobility was restricted, the jobs would go to the women in the region, due to the lack of other applicants.⁸⁰ “Faced with the large pool of applicants comprised of entrants, displaced workers and migrants from rural areas, employers can also more easily exercise biases against hiring women that are unrelated to costs.”⁸¹

There are several rationalizations or excuses given by companies as to why they prefer male employees over female employees, reflected in the protective provisions in the 1988 Rules.⁸² First, women are believed to be less versatile than men because they are less capable of heavy manual labor.⁸³ Second, mandatory maternity leave and child care provisions

75. Gale Summerfield, *Effects of the Changing Employment Situation on Urban Chinese Women*, 52 REV. OF SOC. ECON. 1, part IV (1994).

76. *Id.*

77. Woo, *supra* note 49, at 144. See HILARY K. JOSEPHS, *LABOR LAW IN CHINA: CHOICE AND RESPONSIBILITY* 50-51 (1990).

78. *Breaking the Silence: China's Women Say No to Abuse by Men*, *supra* note 60. See also Korabik, *supra* note 50 (discussing the fact that because of China's massive population, there is a large surplus of labor, of which women constitute 64 percent); *Clouds Gather Over Chinese Women's 'half of the sky'*, *supra* note 57 (noting that women make up two-thirds of the urban Chinese who are unemployed).

79. Woo, *supra* note 49, at 175.

80. Summerfield, *supra* note 75.

81. *Id.* at 45. Not all of the new migration into the cities is legal, but the government is no longer actively opposing the illegal migration. *Id.* See *China Human Rights Practices, 1993*, *supra* note 44. See also *Women Account for 70 percent of China Farm Labor*, REUTERS LIMITED, Mar. 9, 1994, available in LEXIS, ASIAPC, TXPRIM (rural women in China earn an average 22 percent less than men and have lower rates of mobility).

82. See *supra* part II.B.

83. JOSEPHS, *supra* note 77; see also Summerfield, *supra* note 75.

impose extra costs on the company.⁸⁴ Finally, women are considered less efficient because of child care and household duties which they also have to undertake.⁸⁵ More than two-thirds of the work units prefer men to women.⁸⁶ Therefore, even of the women graduated from college, eighty to ninety percent have difficulty securing a job.⁸⁷ In this way the protective measures imposed by the laws work as a double edged sword. They prevent employers from mistreating women during pregnancy, but they also cause employers to see women as less desirable than men because of the possibility of an extra burden.⁸⁸

2. *Unequal Remuneration*

Businesses are able to circumvent the "equal pay for equal work" provisions by limiting women to certain types of employment,⁸⁹ so that the equal work requirement, which would require equal pay, does not arise. Women do not do the same work that men do. This practice often results in what is termed a "gender ghetto." Lower standards and lower minimum wages develop which prevail across the market and are therefore not actionable, nor recognized, as discriminatory.⁹⁰

Related to the "gender ghetto" is the glass ceiling that women in China face, similar to that encountered by women in many other countries. The women who are gainfully employed are concentrated in entry level positions.⁹¹ "Male managers still far outnumber the female managers in China . . . the higher the post, the fewer the women."⁹² The areas where women managers exist are the traditionally female industries. This is due to the belief that it is acceptable for women to have positions of authority, as long as they do not have authority over men.⁹³

84. *China Human Rights Practices, 1994*, *supra* note 47; *see also* JOSEPHS, *supra* note 77; *see also* Summerfield, *supra* note 75.

85. JOSEPHS, *supra* note 77; *see also* Summerfield, *supra* note 75.

86. Karen Korabik, *Women Managers in the People's Republic of China: Changing Roles in Changing Times*, 42 *APPLIED PSYCHOLOGY: AN INT'L REV.* 353, 358 (1993).

87. *Id.*

88. Korabik, *supra* note 50.

89. Traditionally women are limited to female industries, low-skilled jobs, or production-operation positions.

90. Travis, *supra* note 22, at 176; *see also* *China Human Rights Practices, 1994*, *supra* note 47. *See also* Noeleen Heyzer & Vivienne Wee, *Obstacles to Women's Advancement*, *BUS. TIMES*, Apr. 30, 1994 (the gender-ghetto effect is pervasive throughout the region); *see also* Korabik, *supra* note 50 ("Despite the equal pay laws, Chinese women earn only about 72 to 74 percent of what men earn."); *see also* Maria Hsia Chang, *Women*, in *HUMAN RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA* 251, 263 (1988); *see also* Youngblood, *supra* note 71 (reporting ratio of income for urban women to urban men as 77:100).

91. Korabik, *supra* note 50.

92. *Id.*

93. *Id.*

3. *Social Structure and Family Responsibilities*

Employees in China can be disciplined for immoral behavior. This is often used as a means to discipline or dismiss women who fail to conform to family planning rules.⁹⁴ Women who are on a maternity leave, or planning to take a maternity leave, are often illegally dismissed under false pretenses.⁹⁵

Some people have taken these biases even further toward excluding women from the work force.

The change away from guaranteeing employment is a big step for socialist ideology A dramatic reversal in attitudes toward women has emerged in praise for the housewife. This has ranged from emphasizing the spiritual role of women in guiding the family to concern for the double burden women face. The proposed way to deal with the double burden is not to socialize domestic chores but to remove women from the labor force.⁹⁶

Even though this is a completely unrealistic view, the existence of this mentality perpetuates and encourages the needless ungrounded discrimination against women in the work place.

One excuse presented for the stratification between women and men is the actual physical/biological differences, based on a woman's power of reproduction. "The latest reality in China is that women's problems are no longer discussed as social problems but rather as a matter of biology."⁹⁷ This is evident in the Law Protecting Women's Rights and Interests, the Rules on Labor Protection of Female Workers, and the new Tianjin law.⁹⁸ China's laws include extensive provisions and prohibitions for women because of strength, menopause, menstruation, pregnancy, nursing, and maternity leave. Although most of these provisions serve a positive purpose, they occasionally go too far.⁹⁹ Companies frequently require women to retire at age sixty, while men may retire at age sixty-five, because of menopause and the duty to take care of the family household.¹⁰⁰ Some employers have even lowered the retirement age for women to forty years

94. JOSEPHS, *supra* note 77; see also STATE DEPARTMENT'S HUMAN RIGHTS REPORT: HEARING OF THE INTERNATIONAL SECURITY, INTERNATIONAL ORGANIZATIONS, AND HUMAN RIGHTS SUBCOMMITTEE OF THE HOUSE OF FOREIGN AFFAIRS COMMITTEE, (Feb. 1, 1994) (statement of Timothy Wirth, Assistant Secretary of State).

95. *Id.*

96. Summerfield, *supra* note 75, at 36.

97. Woo, *supra* note 49, at 145.

98. See *supra* part III.B-D.

99. Woo, *supra* note 49. See also *supra* part III.B. (climate condition restrictions during menstruation).

100. Korabik, *supra* note 50.

of age.¹⁰¹ Women's early retirement age is a burden on employers when hiring women instead of men who could work until age sixty-five.¹⁰² It also limits women's opportunity for career advancements once hired.¹⁰³

The combination of the difficulty for women to find employment, receive equal treatment once employed, and assume the traditional responsibilities of their gender, makes for a difficult climb for Chinese women. Without active participation of the government in improving the status of women throughout society, Chinese women have a nearly impossible task ahead of them to earn respect and equality in an oppressive market place. The traditional prejudices against women in the booming market economy are being increasingly asserted, contrary to the mandates of the international community and China's own laws.

IV. CHINA'S POLITICAL POSITION AND HUMAN RIGHTS STATUS

A. *China's Current Political Forces*

In order to appreciate the sensitive subject of China's human rights practices, and the United State's involvement in China, an understanding of the complex dual system created in China is essential. The former U.S. ambassador to China, James Lilley, described China's current and unique economic and political system:

They say they (China) have to have political authoritarianism and a socialist market economy It has lead to a rapid and sustained economic growth. It has led to fundamental changes in economic structure. It has led to rapidly growing market infrastructure. And it has introduced genuine competition into its economy.¹⁰⁴

Also included in this mix are modern societal problems of personal corruption, inflation, and income disparity.¹⁰⁵ All of these factors contribute to the increased population migrations, unemployment, and discrimination.¹⁰⁶

Culturally, the Chinese are accustomed to a legal system based on the rule of a person, or party, effected through laws. This is directly contrary to the U.S system which is based on rule of law, as enforced by people.¹⁰⁷

101. *China Human Rights Practices, 1994, supra* note 47.

102. Korabik, *supra* note 50.

103. *Id.*

104. Lilley, *supra* note 3.

105. *Id.*

106. *Id.*

107. *Id.*

China's historical dependence on governance by personality could be a contribution to the ineffectiveness of the existing laws.

Because of the Chinese government's tight control over society, information is not frequently released about the status of any particular class in China, and foreigners are unable to conduct independent research. "There are no independent Chinese organizations that publicly monitor or comment on human rights conditions in China. The Government has made it clear it will not tolerate the existence of such groups."¹⁰⁸ Because of this practice, statistics and data are scarce. China's attempt at addressing its human rights practices are the recently published White Papers.¹⁰⁹ The papers enthusiastically defend Chinese practices, while glossing over important problems.¹¹⁰

For example, it is reported that seventy percent of women over the age of fifteen are in the labor force, which is a relatively high and respectable number.¹¹¹ However, the percentage is also misleading because of the business practices described above which are used to keep women's status inferior in the labor market.¹¹² The number of women employed is not necessarily indicative of equality and fair treatment of both sexes. Unfortunately, accurate data is unavailable. Another attempt by China to address women's issues is an organization called the All China Women's Federation.¹¹³ This organization is beneficial to Chinese women, but only to a limited extent because it exists under the control of the state.¹¹⁴

As indicated previously, China has several laws intended to eliminate discrimination against women, but what is written in China does not always reflect what is practiced. "The exercise of [women's] 'constitutional rights' is entirely contingent on the parties determination as to women's 'real' needs and interests."¹¹⁵ This is evident in the protective measures limiting women's activities for various reasons. Most disturbing is the sudden increase in discriminatory practices due to the growth of the private market economy and foreign influence.

B. *The U.S. Perception of the Status of Chinese Women*

The perception by the United States Department of State of women in the Chinese work force is quite different from that presented by the Chinese government. The U.S. Department of State issued a report on China's 1993

108. *China Human Rights Practices, 1994*, *supra* note 47, § 4.

109. *See infra* part V.C.

110. *China Human Right's Practices, 1993*, *supra* note 44.

111. Summerfield, *supra* note 75, at part VII. *See supra* part IV.C.

112. *Id.*

113. Woo, *supra* note 49, at 194.

114. *Id.*

115. Chang, *supra* note 90.

human rights practices, addressing the discrimination against women in China's work force.¹¹⁶

In Fact, most women employed in industry work in lower skilled and lower paid jobs. Women hold relatively few positions of significant influence within the party or government structure. Persistent problems have remained with regard to the status of women, who have often been the unintended victims of reforms designed to streamline enterprises and give workers greater job mobility.¹¹⁷

These practices are not conducive for women to achieve the goal of total equality mandated by the Chinese Constitution and subsequent legislation. Overall, "China's human rights record in 1993 was the worst since the 1989 crackdown."¹¹⁸ The 1995 report from the Department of State, discussing 1994, showed no substantial improvement in the status of women in the Chinese work force. The report attributed much of women's strife to economic reform.¹¹⁹ Reports continuously reach the United States about labor violations against women workers in China. These reports are usually in the form of individual stories or incidents, because of the difficulty of conducting any type of comprehensive investigation in China. Even without access to the daily practices of the Chinese, the widely published events and conditions surrounding the United Nations Fourth World Conference for Women clearly portrayed the Chinese government's attitudes concerning women. China fought and won the right to have the September 1995 conference in Beijing. But once the event arrived, the government was incredibly uncooperative, greatly harming its image in the eyes of the world by attempting to hinder the productivity of the women gathered in the name of human rights.¹²⁰

C. *China's Representation of the Status of Women's Right's in China*

China's own interpretation of women's status within the country represents the problem as minimal, if existent at all. To confront the human rights issues within China, at the request of the international community, the government has begun to publish "White Papers" as a report on various

116. *China Human Rights Practices, 1993, supra note 44.*

117. *Id.*

118. Michel Moutot, *Asia Watch Says China's Human Rights Record Worsening*, AGENCE FRANCE PRESSE, Feb. 20, 1994, available in LEXIS, ASIAPC Library, AFP File.

119. *China Human Right Practices, 1994, supra note 47.*

120. The long term ramifications of the Chinese government's actions during the conference cannot yet be discerned. Such treatment of women gathered together for the purpose of advancing discussion and action in the direction of increased human rights for women around the world cannot bode well for the immediate future of women in China.

human rights issues.¹²¹ A series of White Papers entitled "The Situation of Chinese Women" were published in June of 1994 and made the following representations (among others): that the status of Chinese women is not entirely satisfactory because of the influence of old concepts and the constraints of social development;¹²² that "[f]rom time to time" women experience instances of prejudice, discrimination, and infringement of their rights;¹²³ that extensive legislation exists within the Constitution, the Law on the Protection of Rights and Interests of Women, and various specific state laws, regulations, and administrative measures, which are based on the equal rights of men and women, protection of special rights and interests of women, and elimination of discrimination;¹²⁴ that the basic principle that women enjoy equal working rights with men is detailed;¹²⁵ that enforcement of the granted rights is addressed by creating a committee to conduct surveys and make suggestions for resolution, empowering courts to judge cases of infringement on women's rights and interests, supporting women's organizations including the All-China Women's Federation, and supporting the media and other means furthering the female self-improvement campaigns.¹²⁶

In these statements China does acknowledge that there is still some level of discrimination against women in China, but that everything possible is being done by the government to combat that discrimination.¹²⁷ The cultural background of the people is the main source of the discrimination, but the prejudices are revealed more than "from time to time" as represented by the White Papers.¹²⁸ The mere existence of legislation is insufficient to realize equality among men and women if the legislation is not actively enforced by the government and compliance mandated. Although some recourse is provided for women who are empowered enough to seek it, the government should take independent action to assure compliance to the laws

121. See Orentlicher & Gelatt, *supra* note 5, at 72 (proposing that the White Paper is questionable and biased).

122. *China: White Paper; The Situation of Chinese Women, 1 of 10*, BBC MONITORING SERVICE: FAR EAST, June 11, 1994, available in LEXIS, NEWS Library, TBBCSW File.

123. *Id.*

124. *China: White Paper; The Situation of Chinese Women, 4 of 10*, BBC MONITORING SERVICE: FAR EAST, June 11, 1994, available in LEXIS, NEWS Library, TBBCSW File.

125. *China: White Paper; The Situation of Chinese Women, 9 of 10*, BBC MONITORING SERVICE: FAR EAST, June 11, 1994, available in LEXIS, NEWS Library, TBBCSW File.

126. *Id.*

127. See David Schlesinger, *China: China Keeps Tough Line on Rights before U.S. Visit*, REUTER TEXTLINE, Aug. 27, 1994, available in LEXIS, ASIAPC Library, TXTLNE File (asserting that China is ahead of United States on human rights issues, including ending discrimination against women).

128. See *supra* note 122 and accompanying text; see also *infra* part IV.B.

to protect those who are not able to protect themselves due to the vicious cycle of discrimination. Because the discrimination is increasing instead of decreasing, the international community should consider taking independent steps toward improving the human rights of the Chinese.

V. THE INFLUENCE OF THE UNITED STATES AND FOREIGN JOINT VENTURES ON WOMEN'S RIGHTS IN CHINA

A. *China Blames Foreign-Funded Joint Ventures for Women's Rights Violations*

Chinese organizations have suggested that foreign-funded businesses are not adequately looking after domestic employees' rights.¹²⁹ A decree was issued in April 1994 as a result of pressure from the All-China Federation of Trade Unions (ACFTU), that "by the end of this year, trade unions must be set up in all foreign invested firms in economic development zones and coastal cities."¹³⁰ Wide spread labor unrest is the reason for the new urgency for trade unions, and part of that unrest is in response to the recent surge in gender-based employment discrimination.

The ACFTU is targeting foreign joint ventures as leading contributors to the poor human rights record in the workplace, even though there are at least 8,200 trade unions set up in foreign invested ventures.¹³¹ It was reported from a survey of foreign funded enterprises in Guangdong Province that "the workers are mainly women and many of them complain of sexual harassment, long working hours, beatings and being forced to work on dangerous machinery or stand for many hours even when pregnant."¹³² The ACFTU reported that women working in foreign-owned enterprises experience some form of gender discrimination, such as unequal pay, mandatory overtime without pay, and dismissal for pregnancy or marriage.¹³³ The claim is also made that maternity leave was not granted in nearly one-half of the foreign-funded firms investigated in recent

129. Zhang Xia, *China: State Seeks Expanded Trade Union Role in JVs*, CHINA DAILY, June 29, 1994.

130. *Id.*

131. *Id.* See also *China Human Rights Practices, 1994*, *supra* note 47, §6(a) ("The All-China Federation of Trade Unions is controlled by the Communist Party. Independent trade unions are illegal.") This suggests some inconsistency in the policy and traditional purpose of trade unions to speak for the people. See also *China: Joint Ventures Must Set Up Trade Unions*, *supra* note 4 (specifies greatest offenders as joint-ventures are Hong Kong, Taiwan, the Republic of Korea, and Japan).

132. Yojana Sharma, *China-Labor: A Workers' Paradise Under Market Lenisim*, INTER PRESS SERVICE, July 7, 1994 available in LEXIS, ASIAPC Library, INPRES File.

133. *China's New Labor Law, Other Labor Initiatives: Are Female Workers' Organizations on Horizon?*, E. ASIAN EXECUTIVE REP., June 15, 1994.

years.¹³⁴ A researcher for a Hong Kong based human rights group equates China's labor laws to administrative measures, and states that "many private entrepreneurs, and particularly foreign-funded enterprises think that the labor protection regulations do not apply to them."¹³⁵

Workers' rights, including women's rights, were more closely monitored and protected by the government before the market reforms.¹³⁶ Now that there is a large growth of private enterprises, the workers are vulnerable to exploitation.¹³⁷ This concern prompted the National People's Congress to pass a long awaited labor law which came into effect January 1, 1995, and includes benefits and protections for women workers, including maternity leave.¹³⁸ But this new labor law also includes protective provisions which will not allow women to work under hardship conditions,¹³⁹ perpetuating the concept that women employees are less versatile and therefore less valuable. Although China does not like interference from foreign sources, foreign companies are the main violators of the human rights laws, then international solutions need to be addressed and embraced by China.

B. *Foreign Interference in China's Domestic Realm*

The standard source for any grant of citizens' human rights is the Constitution. In Article 48 of China's constitution, women are explicitly granted equal rights with men in the economic sphere of life as well as in all other areas.¹⁴⁰ Chinese women have been granted equal rights by their constitution, but the enforcement of those granted rights remains problematic. China reiterates the importance of the provision of Article 48 in the Rules on the Labor Protection of Female Workers.¹⁴¹ This demonstrates that China has attempted to make improvements in the

134. *China Union Calls for Improvements for Female Workers*, AGENCE FRANCE PRESSE, Jan 8, 1994, available in LEXIS, ASIAPC Library, AFP File.

135. Sharma, *supra* note 132.

136. *Id.*

137. *Id.*

138. *Id.*

139. *China's New Labor Law, Other Labor Initiatives: Are Female Workers' Organizations on Horizon?*, *supra* note 133. The new law also sets out provisions for employment, labor contracts, working hours, wages, skill development and training, social insurance, dispute resolution, legal responsibility, supervision, and inspection. *China Human Rights Practices, 1994*, *supra* note 47, §4(e). See also Douglas C. Markel, *Finally, a National Labor Law; Labor Law of the People's Republic of China*, 21 CHINA BUS. REV. 6, Nov. 1994, at 46. (The new law still does not provide specific enforcement measures to ensure its goals. Nine new laws are currently underway to lend force to the new Labor Law. *Id.*)

140. CHINA CONST., *supra* note 24, art. 48 (even includes provision requiring "equal pay for equal work for men and women alike").

141. See *supra* part III.C.

enforcement of women's rights in the economic sphere, but international efforts may now be needed to assist in the realization of these rights. Whether the United States is in a position to assist with any type of program is debatable: "Sex discrimination is a human rights issue that can be addressed by national legal systems far more effectively than by international mechanisms."¹⁴² Even when there are explicit laws against discrimination, the laws may not be effective in alleviating the problem for various reasons described above.¹⁴³ International efforts to prevent the breach of human rights can serve as a final resort when the national attempt is ineffective. The international efforts also serve to establish global standards and to educate the government and citizens.¹⁴⁴

China is in a peculiar position to be effectively influenced by outside forces because of its heavy reliance on the international market. In a presentation given on May 31, 1994, the former U.S. ambassador to China, James Lilley, pointed out that China is the largest borrower in the world from the World Bank.¹⁴⁵ The United States was the second largest foreign investor in China in 1993, involved in almost all areas of its market and development.¹⁴⁶ This involvement allows for the possibility of greater influence over Chinese policies. Action by the United States may also inspire others to follow and join in the fight for encouraging equal employment practices for men and women alike.

C. *Specific Action by the United States*

Human Rights issues have been the cornerstone for American-Chinese relations since it was laid out as such by James Baker in 1990.¹⁴⁷ In section 142 of Public Law 236 of the 103rd Congress, enacted on April 30, 1994, the United States recognized that the "issues of gender-based discrimination and violence against women have long been ignored or made invisible."¹⁴⁸ This statement reaffirmed the U.S. commitment to these issues and their importance within the international human rights policy of the government.

By placing various human rights restrictions on trade and investment, the United States does have the power to influence gender-based employment discrimination due to the new dependence of the Chinese on a world market economy. Women's organizations and the ACFTU have pointed to foreign invested joint ventures as perpetuating the poor human

142. Marsha A. Freeman, *Women, Law, and Land at the Local Level: Claiming Women's Human Rights in Domestic Legal System*, 16 HUM. RTS. Q. 559, 563 (1994).

143. See *supra* part IV.C.

144. Freeman, *supra* note 142.

145. Lilley, *supra* note 3.

146. Orentlicher & Gelatt, *supra* note 5 at 68.

147. Lilley, *supra* note 3.

148. Pub. L. No. 103-236, § 142, 108 Stat. 382 (1994).

rights standards in the labor market.¹⁴⁹ The United States displayed its commitment to fighting gender discrimination by declaring at the World Conference on Human Rights that "the elimination of abuses and discrimination against women will be an important factor in our overall consideration of the human rights records of countries interested in receiving U.S. aid and trade benefits."¹⁵⁰ As a world leader, it is especially important that the United States takes visible and strong actions to combat discriminatory labor practices in order to encourage other foreign investors, and the Chinese themselves, to follow.

The Chinese condemn such actions as intrusions on their sovereignty by foreigners. They assert that human rights issues are internal matters, and external intervention or criticism interferes with China's internal affairs and sovereignty.¹⁵¹ The argument is that for one country to use the issue of human rights to effectuate an end result in another country is manipulative and endangers world peace and security.¹⁵²

Even with the implementation of U.S. trade linked to human rights standards, there is no guarantee that it would be effective: "In short, gender-based, discriminatory working conditions and a panoply of other issues of critical concern to women workers remain stubbornly outside the grasp of worker rights provisions in U.S. trade statutes."¹⁵³ The success in reducing the recent surge in gender-based employment discrimination through a U.S. provision depends on several factors as discussed above. There are various means by which the United States, or its companies, may attempt to assert its influence over China, and the two most likely mechanisms are Most Favored Nation status (MFN) and the Miller Principles.

1. *China's Most Favored Nation Status*

In 1994, President Clinton again granted an extension of China's Most Favored Nation status, including a list of conditions which China's government must meet in order to continue to receive nondiscriminatory MFN treatment.¹⁵⁴ One prerequisite is that China must be "taking steps to begin adhering to the Universal Declaration of Human Rights."¹⁵⁵ A fundamental and universal human right included by this clause is freedom from gender-based employment discrimination. Because gender-based discrimination in the work force can be a factor in the determination of

149. See *supra* part VI.A.

150. *Violations of Women's Human Rights*, *supra* note 8.

151. *China Human Rights Practices, 1993*, *supra* note 44.

152. *Chinese Official on Human Rights*, XINHUA NEWS AGENCY, Dec. 28, 1993, available in LEXIS, ASIAPC Library, XINHUA File.

153. Travis, *supra* note 22, at 176.

154. Pub. L. No. 103-236, § 513(a)(3)(A), 108 Stat. 382 (1994).

155. *Id.* See Orentlicher & Gelatt, *supra* note 5, at 79.

China's MFN status, the United States can use this as a tool to encourage China to prevent and punish discriminatory practices.

Granting MFN status places the lowest possible tariffs on China's exports to the United States.¹⁵⁶ Because of this, the grant or withdrawal of the MFN status is of foremost concern to China, as well as to many American companies who deal extensively with China. Some statistics show the United States as China's largest overseas market.¹⁵⁷ American companies, especially those involved in joint ventures, rely on China retaining its MFN status for their own advantage.¹⁵⁸ China's dependence on MFN status should assure the United States that the grant can be used as an incredibly powerful tool to force China's hand on the issue of human rights, but it remains a tool that must be used carefully, as revoking MFN would devastate many innocent people who may not be the ones the United States is attempting to reach with the punishment.¹⁵⁹

2. *The Miller Principles*

Another possible means to effectuate a change in the treatment of Chinese women is through a proposal called the Miller Principles, which as introduced to the U.S. Congress would codify workers rights provisions for U.S. companies working in China.¹⁶⁰ It was developed by U.S. Representative John Miller, and first introduced to Congress in March 1991, but has not yet been accepted by the legislature. The principles are "aimed at encouraging political freedom and liberalization within the People's Republic of China and Tibet."¹⁶¹

The Miller Principles were inspired by The Sullivan Principles, implemented to combat racism and end apartheid in South Africa.¹⁶² The Sullivan Principles were originally adopted by companies on a voluntary basis, like the Miller Principles are today.¹⁶³ Eventually, an executive order was issued by President Reagan forbidding U.S. export assistance to U.S. companies who had not adopted the Sullivan Principles.¹⁶⁴ The

156. *Id.*

157. *Id.*

158. *Id.* at 76. Continuation of China's MFN status benefits American companies as it then costs less to import already cheap Chinese goods; such companies also fear that China will retaliate against American products in favor of foreign competitors if MFN is withdrawn. *Id.* at 79-81.

159. Lilley, *supra* note 3.

160. Jorge F. Perez-Lopez, *Promoting International Respect for Workers Rights through Business Codes of Conduct*, 17 *FORDHAM INT'L. L.J.* 16 (1993).

161. *Id.*

162. Orentlicher & Gelatt, *supra* note 5, at 45; *see also* Perez-Lopez, *supra* note 160, at 22-30.

163. *Id.*

164. *Id.*

principles were then incorporated into the Anti-Apartheid Act of 1986.¹⁶⁵ The Sullivan principles may not have brought an end to apartheid, but they are recognized as a valuable contribution.¹⁶⁶ The Miller Principles could make a similar contribution to the improvement of China's human rights practices in the work place, including gender based discrimination.

The Miller Principles set forth a list of human rights guidelines for American companies who are participating in business ventures or other projects in China.¹⁶⁷ It only applies to those companies which employ more than twenty-five people, or have assets greater than \$25,000.¹⁶⁸ One of the principles addressing discrimination in the labor force provides that companies should "[s]eek to ensure that . . . sex . . . will not prohibit hiring, lead to harassment, demotion, or dismissal, or in any way affect the status or terms of employment in the industrial cooperation project."¹⁶⁹ Although not yet adopted by the legislature when President Clinton renewed China's MFN status for 1994, he endorsed the Miller Principles as a set of voluntary principles for American firms operating in China.¹⁷⁰ Many companies have independently adopted a company code of conduct based on the Miller Principles to apply to their international activities in China.¹⁷¹

Some worry that implementing a code would on balance hurt U.S. businesses and corporations. A public affairs executive for AT&T China Inc. believes that "a code of Conduct would be viewed by the Chinese government as another attempt to influence Chinese domestic politics and would be detrimental to U.S. business."¹⁷² The argument is also made that it is not the role or place of the business community to exert influence on another country's human rights issues. Even if businesses do not have a responsibility to concern themselves with another countries human right practices, businesses do have a market interest in human rights because of the increasing awareness of consumers about a company's internal business practices. Companies also have an interest in assuring their investment is sound, in a stable market and culture.¹⁷³

The adoption of the Miller Principles by Congress would demonstrate the commitment of the United States to equality in the work force in China, but it would only directly effect a very limited number of Chinese

165. *Id.*

166. Steven Mufson, *For U.S. Firms in China, a Struggle Over Rights and Roles*, WASH. POST, Aug. 25, 1994, at B10.

167. Perez-Lopez, *supra* note 160.

168. *Id.*

169. *Id.*

170. Mufson, *supra* at 166.

171. *See infra* part VI.C.3.

172. Mufson, *supra* note 166.

173. Orentlicher & Gelatt, *supra* note 5, at 95-97.

workers.¹⁷⁴ The Miller Principles are only required to be adhered to by the best efforts of the company, retaining a great deal of autonomy for the companies. Another limiting factor is that they would only affect Chinese workers employed by American companies in China. Despite these limitations, "businesses that may or do invest in China bear a responsibility to ensure that their actions do not, however inadvertently, contribute to the systematic denial of human rights in the PRC."¹⁷⁵ The implementation of the Miller Principles would still be valuable to Chinese workers in decreasing gender-based employment discrimination by providing a role model for Chinese companies as well as for other foreign investors in China.¹⁷⁶

3. *Independent Actions Taken by American Companies in the Condemnation of China's Human Rights Violations*

Some companies in the United States are now taking steps to insure that their international branches or suppliers are free from human rights violations. Specifically, Sears, Roebuck and Co. declared in January of 1993 that it would no longer import forced-labor products from China.¹⁷⁷ Phillips-Van Heusen, likewise, has threatened to cancel orders from companies that violate its broad human-rights code.¹⁷⁸ Reebok International Ltd. adopted a human rights code of conduct in 1992 for all of its overseas operations, including China, which governs work place conditions.¹⁷⁹ Similarly, Timberland Company ended its sourcing from China in February of 1993 because of pervasive human rights violations,¹⁸⁰ and Levi Strauss & Co. shortly followed suit.¹⁸¹

American companies are beginning to take individual responsibility to insure their products are not encouraging or perpetuating human rights violations, which include gender-based employment discrimination. Along with American companies acting on their own accord, Beijing was denied the 2000 Olympics because of its marred human rights record.¹⁸² These actions should send a strong message to China that the international

174. Perez-Lopez, *supra* note 160, at 43.

175. Orentlicher & Gelatt, *supra* note 5, at 68.

176. See also Mufson, *supra* note 166 (discussing whether business should be involved with human rights issues and U.S. role of moralizing for others).

177. John McCormick & Marc Levinson, *The Supply Police*, NEWSWEEK, Feb. 15, 1993, at 48. See Orentlicher & Gelatt, *supra* note 5, at 67.

178. Orentlicher & Gelatt, *supra* note 5, at 67.

179. *Id.* at 106-08.

180. *Id.*

181. *Id.*

182. William Drozdiak, *Sidney Tops Beijing for Olympics; China Loses Bid for Games in 2000 by Two-Vote Margin*, WASH. POST, Sept. 24, 1993, at A1. (Although the vote was very close, (45 to 43 for Sydney) human rights violations was the primary or only reason for the loss.)

community is taking these violations against Chinese people seriously and will continue to fight for equality in China, even if it is against the will of the government.

VI. CONCLUSION

Now that China is rapidly expanding its market economy, discrimination against women appears to be increasing, and this trend must be quickly confined and reversed. The most effective method of eliminating discrimination would be by attacking its roots, through the education of men and women about human worth and the value of gender equality: "A higher level of education is needed in order for women to be in a position to take advantage of the new economic opportunities."¹⁸³ Providing women with equality in the work force is a crucial step in developing a sense of equality and confidence in all areas of life, as more and more Chinese women come to accept the necessity of gainful employment in a person's overall well-being. Education is essential to participating successfully in the market, as well as in the rest of society.¹⁸⁴ The education and personal successes of individual women will contribute to the elimination of prejudices in the deeper levels of the society. Although laws and regulations may purport to help those with the heavy burden of discrimination, they do not change the prejudice; that can only come by the educational advancement of the society, and women repeatedly proving themselves as truly equal in all aspects of life.

Even if there were massive educational campaigns, they would need to be supplemented for a more immediate result. Women deserve equality now, and beliefs which are ingrained into a society cannot be reversed overnight; therefore, the Chinese government needs to actively seek and ensure equality for women. The Chinese government could begin by enforcing the provisions already in existence in the Constitution and the Laws Protecting Women's Rights and Interests, by investigating and monitoring companies for violations, and implementing fines or other penalties. Although these provisions may not change the prejudices so deeply held by people, at least women would receive equal opportunities and treatment, allowing the educational process to continue.

In the absence of an aggressive effort by the Chinese government to eliminate the discriminatory treatment against women in the work force, actions by international forces would be the next step. The world as a whole made a strong statement against China's failure to enforce the human rights of its citizens by denying China the 2000 Olympics because of these same violations. The international community has an interest in ensuring equality and human rights within China because of China's active participa-

183. Korabik, *supra* note 86.

184. LANGLEY, *supra* note 12, at xv.

tion in the enlarged international market. Because China's economy does rely on the international market, organizations such as the ILO and the U.N. could use their authority to demand China to act in accordance with their own domestic laws to combat flagrant gender inequality.

The United States particularly has the necessary influence over China to encourage China's compliance with the international communities' standards regarding women's rights. The United States cannot force China to take action against violators. However, extensive pressure can be applied through economic restrictions, such as the withdrawal of China's MFN status or enactment of the Miller Principles, to make it beneficial for China to take action. As the Sullivan Principles had an effect in South Africa, so could the Miller Principle substantially affect China, without encroaching on the Chinese governments sovereignty and domestic authority. Some American companies have adopted the theory of self-regulation behind the Miller Principles into their own policies. Taking independent measures to ensure an absence of human rights violations within their business dealings with China, these companies display concern for the injustice and leadership in the business community while improving the lives of those Chinese they deal with.

The international community is serious about the need of improvements in China's human rights. Measures encouraging the need for elimination of gender-based discrimination by the United States would not only notify China of the international concern, but would serve as a model for other countries investing in China to follow. The United States, and American companies, need to not only check their own practices, but ensure that the Chinese businesses with which they deal have more than anti-discrimination policies, but also actively practice employee equality and discourage gender-based discrimination. These pressures exerted by the United States, and American companies, should be continued and intensified until it is clear that China's government is taking active and effective measures to ensure the elimination of discrimination against women in the work force, as well as in all areas of life.

Allison J. Wells*

* J.D. Candidate, Indiana University School of Law-Indianapolis, May 1996.

