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CURRENT LEGAL DEVELOPMENTS IN CHINA

by

ROY J. GIRARA*

PREFACE

In January, 1993, after decades of following the significant events in China, from the overthrow of Chiang Kai- shek to the present development of a market economy, I visited the People's Republic of China (PRC). During the three week stay, I met numerous officials, diplomats, consulate and trade personnel, company executives, officials of the American Embassy, professors and, also, students during the time of the Tiananmen Square massacre. I purchased all the translated books and materials available to me. This paper reflects some of the developments of US-PRC legal and trade relations to the present date.

HISTORICAL BACKGROUND

China, historically, has always been an enigmatic, far away place which has intrigued Europeans and others for the past millennium. Confined to the Asiatic region, it made few or no forays abroad beyond the region. China was the focus of invasions, visits and other periodic attempts to open its ports to the outside world. It has the longest recorded history, predating the Roman Empire by two thousand years. All schoolchildren know of the 13th Century voyage of Marco Polo who found an incredibly advanced civilization in the East. In 1601, Matteo Ricci, a Jesuit priest, was permitted to establish his religion within Beijing and environs due mainly to his knowledge and teaching of Renaissance advances in science, technology and other intellectual pursuits to the Qing Emperor. Prior to Ricci, Arab traders had developed a Spice trade, particularly with Mongols along the Silk Road.

In the 1600s, the East India Company developed an extensive trade with China in tea, silk, porcelain (china is gained after the country), and other imports. The city of Canton was the port through which trade took place. In the late 1700s, the British began exporting opium to China from India. When the Qianlong Emperor sought to cease its import, British gunboats, in the Opium War of 1839-1842, were sent to China to continue the trade. In the Peace Treaty of 1842, Hong Kong was given to the British by the reluctant Emperor.

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Numerous additional ports were open to international trade. The Chinese were compelled to purchase opium in exchange for their silk and other commodities.

The Taiping revolt of 1848–1864 by a Christian leader, Hong Xiuquan, who alleged he was a brother of Jesus Christ, led to further British and French interference and resulted in the grant of concessions to them, particularly in Shanghai and Beijing. After a losing war with Japan (1894–1895), secret societies formed within China which aimed at expelling foreigners. The brief Boxer Rebellion, which was suppressed by Western powers, eventually led to the demise of the Qing dynasty in 1911.

The rebellion of Sun Yat-sen and his followers led to the formation of a republican government. His government lasted briefly. China disintegrated into a state led by warlords seeking control of the country. After World War II, revolutionary movements arose, including the Chinese Communist Party in 1921. Communists collaborated with Sun Yat-sen's organization (the Kuomintang). Chiang Kai-shek became the head of the Kuomintang, expelling and executing communist members. His rule lasted until 1949 when the Communists took over under the leadership Mao Tse-Tung, whose country became known as the People's Republic of China.

China under Mao was a closed society. Considering the historical misdeeds of foreigners, including the Korean War (1950–1953), it is not surprising that China sought to go it alone. Ultimately, famines and China's arguments and brief conflict with the Soviet Union in 1960s led it to seek an opening to the Western World. It became obvious that the industrial world was greatly surpassing China's economy. Japan's industrialization to the East and the Soviet border threat caused it to open its ports anew to the West. President Nixon's visit in 1972 provided the opportunity to expand China's horizons. The ascent of Deng Xiaoping following Mao's death in 1976 led to the modernization program. With old-line Communist leadership dying, the ideological underpinnings of the Communist Party became loosened. In 1989, however, the incipient democracy movement was suppressed. The Party today is still in control, but it is more akin to a central American dictatorship rather than a totalitarian society. At a Party Congress in October, the party declared that ideology and economics were to be separated. Removing economics from the Party is akin to removing Christ from Christianity. Today, one can see that the free-market economy is quickly replacing China's planned economy.

The Legal System

Historically, the legal system and codes of law of China derived from the Emperor. It was an ethics based law which blended dynastic codes with Confucian ethical principles. Each dynasty promulgated codes of law, some of which pre-dated the Christian era. With the ascendancy of the Communist movement in China, there were attempts commencing in 1951 to introduce a variety of laws in anticipation of its seizure of power. World War II interrupted the Communist takeover of the government.

As in the Soviet Union, law became subservient to the state. Marxist theory and practice relegated all governmental institutions to the service of the state, including the judicial system. From 1949 to 1957, after abolishing all laws enacted by the previous government, a few laws were passed dealing with law reform, marriage and trade unions. Judges had to decide cases in accordance with governmental policy. Between 1958 to 1966, no laws were passed; rather 420 decrees were enacted. Anarchy reigned during the Cultural Revolution in the late 1960s and early 1970s. The death of Mao in 1976 led to significant reforms. The People's Congress, which previously merely approved pre-ordained mandates, became invigorated. Legislation was drafted and enacted which lent some credibility to the rule of law within China. The Ministry of Justice, which had ceased to exist in 1959, was re-established in 1979. The laws, which are discussed below, are a few of the significant legislative enactments which have been promulgated. They reflect China's renewed entry in the global marketplace and a reaffirmation that modernization entails a much greater expanding and cooperation with global and local market forces.

The underlying philosophy which formulates much of the precepts of China, as well as most of Asia, is Confucianism. The rule of law is based, not upon conflict resolution, i.e., a neutral observer (judge) who determines a result after combatants for the parties (attorneys) have presented their evidence, but rather upon a system of conciliation and compromise. Confucianism in an ethical system the basis of which is li (reason) rather than fa (law).

The threat to sue, so familiar to Western thought, is utterly abhorrent in Asia. Dispute resolution is a multi-step process commencing with friendly discussion followed in successive order by conciliation, mediation and arbitration. Litigation is left to those who lack virtue and modesty. Reason reigns supreme over law.

It is important to recognize the immense cultural differences between Western democracies and Eastern political developments. China has not had a Western style Lockian/Jeffersonian historical evolution. Its history, through its succession of autocracies, developed over a period in excess of four millennia (from the 21st Century B.C.). From an early slave owning society, China's history is marked by a succession of dynasties.
FORMS OF DOING BUSINESS IN CHINA

There are primarily six ways of doing business in China: (1) representative offices; (2) processing and assembling operations; (3) technology transfer; (4) equity joint ventures; (5) cooperative joint ventures; and (6) wholly formed enterprises. The first four methods are not legal persons, while the last two are legal persons within the PRC.

Representative Offices

These offices represent other offices of a multinational company. They may engage in sales and purchases, bargain with local and state governments and enterprises, engage in market studies and collect information. They should exhibit a commitment to the Chinese market. They may, however, not engage in direct business activities, i.e., they cannot execute contracts or bind their home offices. They may negotiate without making final decisions. In reality, much decision-making does take place by them. They are primarily liaison offices. The PRC in 1980 wanted technology with a heavy emphasis on manufacturing and the acquisition of management skills. It did not want foreign companies to provide service facilities inasmuch as they were to be reserved to China companies, such as Chinese import-export companies.

It is anticipated that representative office will be replaced by a true branch office. These offices will have some greater leeway but may not engage in direct business activities.

Processing and Assembling Operations

This method of doing business is most favored by Hong Kong. Companies therein ship raw materials and parts to China where they are assembled and exported. It may take the form of compensation trade wherein the foreign enterprise supplies the equipment and is repaid by the product produced within China. Regulations promulgated in 1987 govern them. These regulations do not attempt to limit such activities but rather are informational to the government. The Ministry of Foreign Economic Relations with Trade of the PRC (MOFERT) in Beijing, approves the enterprises. Local commissions in the locality have direct authority over them. Similar regulatory provisions apply to joint ventures and other forms of doing business. If the enterprise is in excess of $100 million, the State Council above MOFERT must approve. Provincial approval authority governs contracts of $30 million and local authorities have approval authority of up to $10 million.

The latest incentive granted by authorities permit new material and equipment to be "bonded goods" which escape import and export taxation.

Technology Transfer

The foreign party licenses its technology which is protected by intellectual property statutes and regulations. Technology import regulations (patents, trademarks, copyrights, property technology (know-how) and computer software come within the purview of the statutes and regulations.

China joined the Berne Convention of 1886 for Protection of Copyrights. Technology transfer contracts must be approved by MOFERT. Regulations provide that the technology must be advanced or allow China to conserve resources or stimulate exports. In practice, the restrictions are not onerous. Contracts may not have the following provisions: (1) tying of technology with output; (2) price-fixing; (3) if foreign party supplies part, it cannot limit production; (3) restrictions on exports using the technology, except where the foreign company already gave exclusive territories to other companies. The regulations specify a ten year limit to royalties at the end of which the recipient party may utilize the technology. The contract can restrict re-licensing. It is therefore important to have majority control of the Board of Directors of the joint venture so as to prevent the venture from exceeding the limitations desired by the foreign partner.

A company providing the technology can apply to the Government for special approval for exceptions to the above. Although the law says a company is under the above constraints, the Government in practice is fairly liberal in granting exceptions. The applicant must ensure that the technology is complete and accurate. The licensor must agree to defend the licensee against claims respecting the technology. New regulations being adopted allow the parties to decide how to allow parties to decide licensing arrangements. Royalties are subject to a withholding tax of 20%, reduced to 10% by treaty and in special economic zones.

Equity Joint Ventures

The most popular form of doing business in the PRC is the equity joint venture. The legal basis is derived from the 1979 enactment of the "Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures" and its 1983 regulations implementing the legislation. Inasmuch as there is no joint company law (Business Corporation Law) in the PRC which defines the rights and obligations of the parties, one must look to the individual statutes and regulations to determine one's rights and obligations.

The statute is rather brief, containing 15 articles which provide the framework for the enterprise. Considering the previous xenophobic governmental attitude towards investments,
the law was an extraordinary opening to the outside world. Article I states the purpose of the legislation which is to expand international economic cooperation and technological exchange.

The regulations elaborate the statute's overall purpose. Article 3 states that the joint ventures shall be engaged in the following activities: (1) energy resources development, construction materials, chemical and metallurgical industries; (2) machine-building industries, and water, power, transport, and offshore oil-exploring activities; (3) electronics, computers, and communications equipment manufacturing; (4) light industries, textiles, food, pharmaceutical, medical, and packaging industries; (5) agriculture; and (6) tourism.

The joint venture must satisfy at least one of the following requirements: (1) adopt advanced technology, equipment, and scientific techniques; increase the variety and quality of output of products and conserve energy and materials; (2) benefit technical renovation of the venture and achieve quick results and large profit with small investment; (3) expand exports and increase the foreign exchange surplus; and (4) train technical or managerial personnel.

Establishment

The joint venture with the Chinese enterprise must take place within the PRC. The agreement must be in writing, which agreement, together with the articles of association, and other relevant documents, are to be examined and approved by MOFERT. Once it approves the joint venture, it then authorizes the local or regional authorities under the State Council to examine and approve the joint venture.

Application, in Chinese, for permission to establish a joint venture commences with its submission by the Chinese party to the department of government in charge. The application consists of: (1) an application or establishment of the joint venture; (2) a preliminary feasibility study report; (3) the joint venture agreement; (4) contract and articles of association; (5) the names of the chairman, vice-chairman, and the other members of the Board of Directors; and (6) the signed opinions about the joint venture or the departments of government in charge of the Chinese ventures of the local governmental authorities. Approval or disapproval of the authorities is rendered within three months unless revisions of the documents are requested. Within one month after approval, the applicants are to register with local authorities in charge of industry and commerce. The joint venture comes into effect upon approval of the registration.

As stated previously, there are three basic documents required for submission. The joint venture agreement is the document in which the parties consent to the establishment of a joint venture and state the basic principles for its establishment. The joint venture contract states the rights and obligations of the parties. The document shall include: (1) the names, countries of registration, legal addresses of the parties as well as the names, position and nationalities of their legal representatives; (2) the name, legal address and purpose of the venture, and the scope of its operation; (3) the total amount of investment, its registered capital, amount to be invested by each party, the ratio of their contribution, and the time limits for further contributions; (4) the ratio of sharing profits and losses; (5) the composition of the Board of Directors as well as their respective responsibilities; (6) the equipment, technology and sources of supply for sale; (7) the manner in which raw and processed materials are to be purchased and products sold as well as the ratio of internal sales to export sales; (8) receipt and expenditures of foreign exchange funds; (9) labor management, wages and fringe benefits for employees; (10) finance, accounting and auditing principles; (11) term of joint venture and procedures for dissolution and liquidation; (12) liabilities for breach of contract; (13) method of dispute resolution; and (14) language(s) to be used.

NOTE: Chinese law is to govern with respect to all aspects of the joint venture contract.

The joint ventures articles of association follow the contract very closely. They are to include the names, addresses and purpose of the joint venture, its scope and term, the names of all parties and representatives, the amount of investment registered capital, ratio of contributions as well as profit and loss allocation; composition of Board of Directors, management structure together with the responsibilities of the principal officers as well as the procedures for their appointment or dismissal; principal financial, accounting and auditing systems; and dissolution and liquidation and method for amendment of the article.

There may be other ancillary agreements such as distribution, licensing, land-grant and/or purchase agreements.

What if a party desired to enter into a joint venture in the PRC but lacked a corresponding Chinese party? The regulations provide that it should submit a preliminary joint venture proposal to the national China International Trust and Investment Corporation or a local similar agency with authority to introduce it to a partner.

Status

The equity joint ventures is a "limited liability company". Its precise definition is not found either in the statute and regulations or in other legislation. It is thus necessary to explain what it means in the joint venture contract. The statute and regulations do state that the liabilities of the parties are limited to the amount of
investment each has undertaken in the joint venture. The 1979 statute mandated that the foreign party must invest not less than 25% of the registered capital of the joint venture. Most foreign parties invest 51% or more of the capital.

The registered capital (similar to "stated capital" in the U.S.) is the total amount registered with the government agency when the joint venture was established and is the sum of the investment by all parties. The joint venture may not diminish the registered capital, but may increase or assign it provided the Board of Directors and governmental authorities approve. If a party wishes to assign its interest, governmental approval will be necessary and is subject to the right of first refusal by the other party to the joint venture.

The difficulty of the joint venture having a strictly Chinese person as its lack of ability to branch out beyond the national boundaries. It appears, however, that MOFERT may approve a branch office of the joint venture outside of China.

Capitalization

The investment in a joint venture may be in cash, buildings, plant equipment, machinery, international property rights, technology, or right to use a site. The parties to the joint venture are to fix the value of the investment in a reasonable manner. Foreign currency should be converted to renminbi at the foreign exchange rate set by the State Administration of Exchange Control. The rate tends to be considerably lower than black market exchange rates although the currency may be exchanged into foreign currency at the same governmental rate.

The right to use a site must be compensated for either as a credit to the Chinese party as a part of its investment or to the government. The regulations are obviously tipped greatly in favor of the Chinese party. For example, if machinery, equipment or other materials are contributed by the foreign party, they must be: (1) indispensable to the joint venture; and (2) made in China or the price, quality or delivery time would not satisfy the joint venture requirements; and (3) their fixed value may not exceed their current international market price for the equipment. The Chinese party is not bound by the provisions.

Industrial property rights or technology contributed by a foreign party must be capable of producing new products urgently needed in China or are suitable for export, or significantly conserves raw or processed materials, fuel or power. If the foreign party contributes industrial property right or technology, it must furnish abroad as well as the basis for the value affixed thereto. Machinery, equipment or other investment property by the foreign party shall be examined and agreed to by government agent for approval. Not again the above only applies to the foreign party.

The investment is to be examined by an accountant registered in China who verifies the contribution made by each party. Thereafter investment certificates are issued to the parties.

Management

The Board of Directors of the joint venture determines all major questions of the joint venture. It consists of at least three members. The number of directors is determined by the parties who are to take into account the ratio of the investment by each party. The chairman must be the Chinese venture and the vice-chairman (vice-chairmen) will be the foreign investors. The term of office is 4 years and is renewable. At least one annual meeting is mandatory, which meeting is convened and presided over by the chairman, or vice-chairman, if (s)he is not present. At least two-thirds of the Board must be present although a board member may give a proxy to another person to act on his/her behalf. Interim board meetings must be called upon request of one-third of the board members. The meeting is held at the official address of the joint venture.

Although resolutions may be adopted by the percentage vote stipulated in the articles of association, certain resolutions require unanimous approval, to wit: amendment of the articles of the joint venture; termination or dissolution of the joint venture; increase or assignment of the registered capital of the joint venture; any change in the foreign joint venture with another economic organization.

The day-to-day operation of the joint venture is conducted by the officers named by the board of directors. It shall have a president whose duties include the promulgation of all resolutions of the board, representation of the joint venture, appointment and dismissal of personnel and other daily activities. The officers may be Chinese or foreign persons. Board members may be officers. The president and vice-president may not hold similar offices or participate in another economic organization. These officers may be dismissed at any time for dereliction of duty or for corruption.

Taxation

The joint venture is taxed at the basic rate of 30%; 24% in coastal economic zones (Tianjin, Shanghai, Guangdong), and 15% in special economic zones (e.g. Huan). Tax holidays are typically 2 years, 50% reduction for an additional 2 to 3 years plus investment incentives if reinvested.
The joint venture regulations merely recite the necessity of paying taxes in accordance with applicable laws. Imports by a joint venture are exempt from customs duties and from the industrial and commercial consolidated tax with respect to machinery and equipment needed for construction of the factory site or are part of the investment or are used in production of goods for exports and are manufactured within China. Exports may be exempted from industrial and commercial consolidated tax by MOFERT. Exception from taxation may be granted in the early phase of a joint venture.

Foreign Exchange Control
The joint venture must use the Bank of China or other designated bank which supervises all receipts and payments. All receipts and deposits must be made through the account. Foreign accounts may be permitted provided the State Administration of Exchange Control allows them. In such circumstances, they are subject to full disclosure of receipts, payments and bank account statements. Loans for foreign exchange and for local currency may be applied for at the Bank of China in accordance with regulations of the Bank of China. Foreign exchange funds may be borrowed from abroad but a report must be made to the State Administration of Exchange Control. A remission of the net profit after payment of taxes and expenses may take place upon receipt of permission from the Bank of China.

Finance and Accounting
The fiscal year is the calendar year. A treasurer must be appointed to manage the finance and accounting work of the joint venture. An auditor shall also be appointed for larger joint ventures, and the auditor is responsible for examining all financial records pertaining to the enterprise and for submission of reports to the Board of Directors. Internationally used accrual basis and debit and credit accounting systems are to be used. All books and records must be in Chinese.

After-tax profits are to be distributed to a reserve fund, bonus and welfare funds for staff and workers, and to the venture expansion fund as determined by the Board of Directors. The reserve fund is to be used to make up losses of the joint venture as well as for expansion of production. Net profits shall be divided in accordance with the ratio of the investments made by the parties. No profits may be distributed until all prior losses have been paid up.

Quarterly and annual accounting statements are to be submitted to local tax authorities as well as to the parties and local governmental departments. Investments certificates, annual accounting statements and accounting statements upon liquidation of the enterprise must be examined and certified by an accountant registered in China.

Term: Dissolution and Liquidation
The term of a joint venture is dependent upon the nature of the enterprise. Ordinarily, it is 10-30 years. A joint venture involving a large investment, a long construction period and a low profit ratio or one in which advanced technology is given or is internationally competitive may extend to 50 or more years.

The term of the joint venture should be stated in the joint venture agreement as well as in the contract and articles of association. At least six months before proposed extension of the term, the parties must apply to the appropriate governmental agency for renewal.

A joint venture may be dissolved: (1) upon expiration of the term of the joint venture; (2) due to major losses in the enterprise; (3) by failure by one of the parties to fulfill its obligations; (4) due to major losses due to war, natural disaster or other force majeure; (5) by failure to achieve business objective without possibility for future development; or (6) the occurrence of a stipulated event in the joint venture contract or articles of association. Except for expiration of the term, the Board of Directors must submit an application for dissolution for approval to the examining and approving agency. If a party caused the losses sustained by the enterprise by breaching the agreement, it shall be liable to the joint venture for the losses.

Once the dissolution is announced, the Board of Directors is mandated to propose liquidation procedures and submit its proposal and nominations to the government department in charge. The liquidation committee is normally composed of members of the Board of Directors but the joint venture may invite registered attorneys or accountants to act in such capacity. The liquidation committee's obligations are to investigate the finances of the joint venture in debt, collect assets and liabilities, as well as compile an inventory, and propose a liquidation plan for approval by the Board of Directors. The committee shall initiate and defend lawsuits where appropriate.

The assets remaining are to be applied to the payment of existing indebtedness and then distributed to the parties proportionately to their investments or as provided in the joint venture agreement. The net difference between remaining property and stated capital shall be deemed a taxable profit. Once the liquidation is completed, a liquidation report, approved by the Board of Directors, is submitted to the original examining and approving agency. Procedures are then undertaken to cancel the joint venture registration at the original agency for registration and cancellation and to turn in the business license for cancellation. The original Chinese joint
venture retains all account books and documents after dissolution.  

Dispute Resolution

Disputes between the parties to a joint venture are to be resolved, when possible, by friendly consultation or mediation and, ultimately, through arbitration or by use of the courts. Arbitration may be applied for if stipulated in the joint venture agreement. It is conducted by the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade in accordance with its rules and procedures. The parties are free to determine where arbitration is to take place outside of China. If no arbitration procedures are provided for in the joint venture agreement, the matter may be determined by the People's Courts of the PRC. The parties are to continue the joint venture business while the dispute is being resolved.

Miscellaneous Provisions

Staff and Workers: The joint venture must employ, recruit, discipline, dismiss and provide salary and benefits for staff and workers in accordance with the provisions of the PRC for Labor Management in China Foreign Joint Ventures. It is responsible for the professional and technical training of staff and workers. The theory is that the joint venture shall create a cadre of skilled workers whose remuneration is based upon skill and degree of work performed. The salaries and benefits of officers are determined by the joint venture.

Trade Unions: The staff and workers are permitted to establish trade unions and conduct union activities in accordance with the trade union law of the PRC and the Constitution of China's Trade Union. The union is empowered to represent the staff and workers with respect to signing labor contracts and the implementation of the contracts. The union's duties are to protect workers; assist the joint venture in planning of use of welfare and bonus funds; organize staff and workers in political, professional, scientific and technical studies; organize cultural and sports activities; educate staff and workers, and to observe labor discipline in order to fulfill the task of the joint venture.

The union is permitted to attend, without voting, meetings of the Board of Directors with respect to the joint venture's expansion plans, worker related issues, and other important activities. The joint venture is responsible for providing facilities for the trade union for office work, meetings, cultural and sports activities and to allow 2% of total wages monthly of staff and workers to the union.

Importation of Technology: Technology imported from abroad must be appropriate and advanced so as to enable the joint venture to produce goods for export and for advancement of domestic needs. The appropriate governmental authorities must examine technology transfer agreements for submission and approval by the examining and approving agency. All fees paid for the technology must be fair and reasonable. If royalties are paid, they must be at the standard international rate. The term may not generally exceed 10 years. The agreement may not place territorial, volume or price limitations on export products. After the terms of the importing party may continue to use the technology. The transfer agreements cannot violate Chinese law and the importing party shall have the right to purchase spare parts and raw materials from whom it desires.

Right to Use Site and Site Use Fees: A joint venture needing a site for its operations must apply to the local land administration for permission to use it (the Chinese venture normally contributes it to the venture). The agreement with the government shall specify the area, location and use of site, fee to be paid, the rights and obligations of the parties and the penalties for breach of same. If the Chinese venture contributes the site, a monetary value equivalent to the site use fee is credited to it. The fee rate is based upon obvious factors of location, expenses for demolishing existing structures, if any, and environmental conditions. The joint venture is to be advised of the site use fee assessed. Fees may vary greatly; for example, the rate may be considerable lower in special economic zones. The rate charged is fixed for the first five years and is adjusted in intervals of 3 or more years.

Planning, Purchasing, and Selling: The capital construction plan of the joint venture is based upon the feasibility study and includes details of utilities needed and construction materials. The construction funds are managed by the bank having the account of the joint venture. The production and operating plan is determined by the Board of Directors. It alone decides what machinery, materials, equipment and means of transport to purchase and utilize. The regulations emphasize strongly that priority of purchases or materials should be within China. Goods produced should be directed to export trade unless they are urgently needed within China. A joint venture has the right to export its products, except interference, except in limited circumstances, either on its own or through Chinese foreign trade corporations.

Goods imported from abroad require import licenses and are to be based upon an annual plan setting forth the materials required. Similarly, goods sold within China also require a distribution plan filed with appropriate governmental departments. Materials and services purchased within China are to be priced in accordance with international market prices for certain raw materials and existing price control sums for other materials.
Cooperative Joint Ventures

The fastest growing form of foreign investment is the cooperative joint venture. As of 1985, there were 2300 joint cooperative ventures and 120 wholly foreign-owned enterprises. Foreign hotel chains operating within China almost always use cooperative joint ventures to conduct business therein.

A cooperative joint venture is similar to equity-joint ventures with a number of exceptions. For example, it can negotiate a 70-30 profit distribution ratio. Thus, if there is a 60-40 capital ratio with the Chinese joint venture, it can contract out the management to a third party management company (very common in hotels which tend to be operated by Philippine managers). Such delegation is very difficult to accomplish with a Chinese party. Another advantage is that the foreign party can retrieve its capital before the end of the term. The tax incentives, management and other aspects of the venture are the same as the equity joint venture.

Wholly Foreign-Owned Enterprises

A foreign company may establish a wholly-owned limited liability (to capital investment) subsidiary within the PRC. Generally, it may also invest more than 50% of its product. The latter percentage appears to be 50%. However, changing downward at present or in the near future. Also, the hi-tech requirement poses a few problems in currently negotiating such an enterprise. The requirements of the Chinese joint venture are similar with respect to a foreign company. Feasibility study, taxation, etc. The advantage of such an enterprise is that it is a Chinese party, but the disadvantage is the lack of contacts, assets and experience. The Chinese partner may provide. The venture or longer term for large properties or businesses may extend to 70 years for large properties or businesses.

The statute specifically provides that such enterprises are protected by Chinese law. Unlike its philosophical and legal position of the past wherein the PRC, like other states, it states that a state may nationalize property within its territory without "prompt, effective compensation," the statute states:

"Article 5. The state will not nationalize or requisition any enterprise with foreign capital. Under special circumstances, when public interest requires, enterprises with foreign capital may be requisitioned by legal procedures and appropriate compensation shall be made." The procedure for setting up such an enterprise is similar to joint ventures. Application is made to the appropriate department under the state council, which has 90 days to examine and decide whether to permit the enterprise. The foreign investor has to apply for a business license from the industry and commerce administration authorities for registration.

Upon registration, the enterprise becomes a Chinese legal person. Investments within China must be made as previously stated in the application and approval. Major changes must be reported to the appropriate governmental agency.

The requirements concerning operation, labor agreements, unions, account and reporting taxes, banking, purchase of materials, and remission of profits abroad, termination and liquidation are like that of joint ventures. Insurance coverage is to be applied for with Chinese insurance companies.

CONCLUSION

The above discussion is designed to afford an understanding of the present legal developments affecting business within China. The door is open to a massive influx of Western technology and to an opening of the potentially lucrative market for goods and services. The PRC is a new frontier in the global market.

Many American entrepreneurs presently doing business within China are astonished at the incredible demands for foreign goods. Consumerism is now prevalent throughout the country, especially in the major cities. On any given day, there are three million shoppers in a 1-2 mile commercial area in Shanghai. Contrary to most reports that the average salary of a worker is $75 per month, a representative of the American Embassy advised a group of professors, including this writer, that the per capita annual income is $6,000 when housing, medical and other expenditures are calculated within the equation.

American companies have a vast market of 1.2 billion people, many of whom can afford significant consumer purchases. Industries are commencing and expanding rapidly. The senior representative of Mitsui, in a speech to these professors in January 1993, expressed his bewilderment and delight that the U.S. has demurred in expanding its trade with China because of human rights violations. Japan, according to the representative, was happy to fill the gap of opportunity left by the Americans.
It is incumbent upon U.S. companies to play a major role within China. In so doing, both China and the U.S. will prosper. As China becomes increasingly reliant upon U.S. trade, it will more readily attend to demands for humane treatment for all its inhabitants.

ENDNOTES


3. Ibid., Ch.2.


10. Ibid., Article 3, and Regulations, supra, Article 8.

11. Regulations, supra, Article 8.

12. Ibid., Article 10.

13. Ibid., Article 11.


15. Ibid., Article 13.

16. Ibid., Article 14.

17. Ibid., Article 15.

18. Ibid., Article 16.

19. Ibid., Article 12.

20. Law, supra, Article 14 and Regulations, supra, Article 19.


22. Regulations, supra, Article 21.

23. Ibid., Articles 22, 24.

24. Ibid., Article 23.

25. Ibid., Article 42.

26. Ibid, Article 25 and Law, supra, Article 5.


28. Law, supra, Article 5.

29. Regulations, supra, Article 27.

30. Ibid., Article 28.

31. Ibid., Articles 29-30.

32. Ibid., Article 33.

33. Ibid., Article 34 and Law, supra, Article 6.
41. Ibid., Article 78 and Interim Procedures for the Handling of Loans by the Bank of China to Chinese-Foreign Joint Ventures, promulgated by the State Council, eff. 7/26/80.
42. Regulations, supra, Article 78.
43. Ibid., Article 79 and Law, supra, Article 10.
44. Regulations, ibid., Articles 80-83.
45. Ibid., Articles 87-89.
46. Ibid., Article 90.
47. Ibid., Article 100 as revised by the State Council on January 15, 1989.
48. Ibid., Articles 105-101.
49. Ibid., Article 102 and Law, supra, Articles 12-13.
50. Regulations, Article 102.
51. Ibid., Article 101.
52. Ibid., Articles 100-105.
53. Ibid., Articles 106-108.
54. Ibid.
55. Ibid., Articles 109-112 and Law, supra, Article 14.
56. Regulations, Articles 91-93.
57. Ibid.
58. Ibid., Articles 95-96.
59. Ibid., Article 97.
60. Ibid., Articles 97-98.
61. Ibid., Articles 43-46.
62. Ibid., Article 47.
63. Ibid., Articles 48-51.
64. Ibid., Articles 58-62.
65. Ibid., Articles 63-64.
66. Ibid., Articles 65-66.
67. Law of The People's Republic of China on Foreign-Capital Enterprises, adopted at the Fourth Session of the Sixth National People's Congress, promulgated by Order No. 39 of the President of The People's Republic of China, eff. April 12, 1986. "Foreign" enterprises are established within China by foreign investors using their capital exclusively. Hong Kong and Macao are considered "foreign" for purposes of this statute.
68. Regulations, Article 3.
69. Ibid., Article 4.
70. Ibid., Articles 6-7.
71. Ibid., Articles 8-19.
72. Ibid., Articles 11-23.