

BUSINESS WITH THE PEOPLE'S REPUBLIC OF CHINA

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I. *Introduction.*

There has been a world-wide interest in the last few years in the new directions in the People's Republic of China (P.R.C.), whose long-range objectives were expressed as the "four modernizations" namely agricultural, industrial, military and scientific modernization by 2000 A.D.¹ This article which was completed in the summer of 1980, is concerned with the international trade and business aspects of these changes.

The generally constant long-range goals of the P.R.C. leadership seem to be (a) national independence and security, (b) modernization, (c) socialist transformation, (d) effective leadership and Party control.² The leading objective appears to be national independence and according to Deng Xiaoping: "In the final analysis, political independence and economic independence are inseparable."³ This view is understandable when one considers the domination and exploitation of China by Western Powers and Japan in the past. For example, the volume on the modern Far East in the University of Michigan History of the Modern World states: "The whole record of the white man in the East until very recent times was reprehensible enough, and if the memory of it still rankles in the minds of Eastern peoples, that is understandable. But in the whole history of East-West relations nothing was so culpable, so squalid, and so nearly unforgettable as the opium evil forced on China . . . It was, in short, a sordid episode, and it has left its mark on East-West relations ever since. Unfortunately, it is those who have transgressed whose memory is short, and those who have been transgressed against whose memory is long."⁴

Self-reliance by the P.R.C. has been said to involve control of its own economic life-lines and natural resources and the gradual shaking off of foreign capital, but "Self-reliance in no way means 'self-seclusion' and rejection of foreign aid. We have always considered it beneficial and necessary for the development of the national economy

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¹ Speech by Chou En-lai (Zhou En lai) at the Fourth National People's Congress in January 1975.

² Fingar, *The Quest for Independence* (1979), 15 *Stan. J. of Int. Stud.* 3.

³ *Ibid.*

⁴ Pfeffer, *The Far East* (1958), pp. 54-55.

that countries should carry on economic and technical exchanges on the basis of respect for state sovereignty, equality and mutual benefit, and the exchange of needed goods to make up for each other's deficiencies".⁵ The P.R.C. view is that science and technology are part of the common wealth of mankind, and that it is normal for a communist country to import foreign technology to improve and strengthen its position as a communist state.

It would be a mistake, therefore, for business in the developed countries to assume that the P.R.C. is just a big new market, hungry for their goods and services and the benefits of investment by multinationals, or that the P.R.C. is beginning to realise the superiority of capitalism over communism.

Mainland China is a poor country by North American standards. A comment on the 1930's states: "China was still a country where half the people died before reaching the age of thirty, where 75 percent of deaths were due to preventable diseases mostly filth-borne, where a peasant could be subjected to 44 different taxes—often collected years, even decades, in advance—on everything from his land to his bedding and kettle and for everything from eleven varieties of military aid to nine varieties of public expense."⁶ Observers still comment on the general poverty of mainland China.⁷

II. *Mainland China's Foreign Trade.*

The volume of P.R.C. foreign trade (total export and import values) has risen steadily in the last thirty years. The following figures for 1977-1979 (June) are given by the International Bureau of Fiscal Documentation.⁸ The figures are in billion renminbi.⁹

	1977	1978	1979 (Jan.-30 June)
China's exports	13.96	16.76	9.50
China's imports	13.28	18.74	11.80

Statistical data on the P.R.C. has been difficult to obtain and uncertain as to accuracy. There was a public release of a variety of

⁵ Speech by Deng Xiaoping at the U.N. in 1974 quoted in Fenwick, *Chinese Foreign Trade Policy and the Campaign Against Deng Xiaoping* (1979), 15 *Stan. J. of Int. Stud.* 201. See also Palay, *Legal Aspects of China's Foreign Trade Practices and Procedures* (1977), 12 *J. of Int. L. & Econ.* 105, at p. 108 to the effect that the objective of P.R.C. foreign trade is not profit oriented but the exchange of goods and services needed for P.R.C. development.

⁶ Tuchman, Stilwell and the American Experience in China, 1911-1945 (1970), p. 147. According to Mende, *The Chinese Revolution* (1961), p. 58, at the time of Hu Shih's proposal in 1917 for use of the spoken language in writing, probably 90% of the population of China was illiterate.

⁷ E.g. article: *A Country with a Long Way to Go*, in *Time*, Jan. 1st, 1979.

⁸ Preliminary Chapter on the P.R.C. (2nd ed.) from *Taxes and Investment in Asia and the Pacific*, B.1.1.2 (P.R.C. (2nd ed.)).

⁹ U.S. \$1—1.50 RMB.

statistics at the second session of the Fifth National People's Congress in June 1979, and this included some information on foreign trade figures. A survey of trends in China's foreign trade is to be found in chapter 6 of "The Japanese Perspective on China's Opening Economy", a 1979 publication of the Japan External Trade Organization.¹⁰ The J.E.T.R.O. chapter points out that Chinese foreign trade has shown considerable contrasts in the past thirty years. Pre-1959 there was steady growth and a rise in foreign trade with an average annual growth of about 15%. During the 1960's foreign trade at first diminished and then gradually increased. Between 1970 and 1978 foreign trade increased at an average rate of over 20%, due mainly to a more international outlook by the P.R.C.; imports of plants and technology; oil exports; a general rise in trade prices. P.R.C. trade with communist countries declined considerably after the break with the Soviet Union, and trade with non-communist countries assumed the major position and more than doubled.¹¹

Japan is the major trading partner of the P.R.C. as the following 1977 figures (in U.S. \$ million) indicate:¹²

	<i>Exports to (f.o.b.)</i>	<i>Imports from (c.i.f.)</i>
Japan	1500	1997
Hong Kong	1720	45
West Germany	243	574
U.S.A.	203	188
U.K.	156	126
U.S.S.R.	176	161
Canada	77	382

A central problem in P.R.C. foreign trade is the acquisition of foreign currency, and remittances from overseas Chinese have an

¹⁰ Referred to in this article as J.E.T.R.O. The survey is based on C.I.A. and J.E.T.R.O. data. Feng-Wa Mah, *Foreign Trade in Economic Trends in Communist China* (1968), p. 671, gives some pre-1968 figures.

¹¹ Li, *Ups and Downs of Trade with China* (1974), 13 Col. J. of Trans. L. 371 gives some figures for Sino-American trade: 1971 \$6 million; 1972 \$100 million; 1973 \$750 million. A note by Gilberg on the U.S.-P.R.C. Trade Agreement of 7th July, 1979, in (1979), 20 Harv. Int. L.J. 708, at p. 713 states that U.S.-P.R.C. trade in 1978 was about \$1.1 billion (of which 80% were grain exports) and that the estimated result of the Agreement is that while bilateral trade will increase significantly, exports from the P.R.C. to the United States will constitute the majority of that increase for some time to come. It is estimated that bilateral trade will double in 1979 and jump to \$5 billion by 1985.

¹² J.E.T.R.O., pp. 91-92. See also for comparative figures for 1977 in U.S. \$ million in Price Waterhouse, *Doing Business in the People's Republic of China* (1979), p. 6, and also for 1977 in U.S. \$ million in the *Economist*, 14th Oct., 1978, at p. 115 and quoted by Pavelic, *Exporting to the People's Republic of China* (1979), 11 Cas. W. Res. J. Int. L. 337, at p. 386. *China in the Encyclopaedia Britannica* (macro-paedia), Vol. 4, p. 280, gives some country-by-country figures for 1970 and 1971.

important role to play in this connection. According to Chinese reports there are eighteen million Chinese residing overseas, not including about five million Chinese in Hong Kong and Macao, many of whom have family or acquaintances in the P.R.C. to whom they make remittances. Present P.R.C. policy encourages such remittances and takes some steps to promote a feeling of association of overseas Chinese with mainland China. The following figures indicate the growth, and projected growth, of such remittances (in U.S. \$ million):¹³ 52 (1960); 134 (1970); 245 (1975); 505 (1979); 606 (1980); 727 (1981); 873 (1982).

III. *Comment on the P.R.C. Economic Organization.*

Agriculture is one of the four modernizations and this has involved recently a re-evaluation of agricultural policies.¹⁴ Most of the major agricultural activities are undertaken by people's communes, which are subdivided into production brigades and again into production teams.¹⁵ Each unit is said to own its assets and to have the power to make its own decisions and these rights are guaranteed by the Constitution of the P.R.C. Remuneration of members of a production team is based on fixed quotas and points according to the work done.¹⁶ A production team is responsible for its profits and losses, and its accounts are published.¹⁷ The commune leadership is elected by the members. Communes vary from a small one with a few thousand members cultivating a few hundred acres to a large one with 100,000 members cultivating more than 25,000 acres.¹⁸ Communes also may have associated enterprises, and these enterprises had a 28% share in the total agricultural and industrial output of the communes, and there are plans to raise this share to 50% by 1985.¹⁹

The collective enterprise, or co-operative society, is a rather similar type of organization to the people's communes, and is usually concerned with small or medium-sized enterprises in urban areas, carrying on activities such as retail stores or handicraft shops.²⁰

Most other enterprises are owned by the state, but the work-force seems to have some voice in the disposition of current assets, and

¹³ J.E.T.R.O., p. 110.

¹⁴ Discussed in J.E.T.R.O., ch. 3. See generally Rauski, *Economic Growth and Employment in China* (1979), ch. 4.

¹⁵ P.R.C. (2nd ed.), B.1.2.2., where the communes are said to form "the economic basis for some 700 million people".

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Encyclopaedia Britannica* (macro-paedia), Vol. 4, p. 277.

¹⁹ J.E.T.R.O., p. 38.

²⁰ P.R.C. (2nd ed.), B.1.2.3.

resources are allocated according to P.R.C. production plans.²¹ This raises ownership questions in regard to foreign participation in joint ventures, a topic discussed later in this article.²² Although the profit concept is absent, there are certain incentives in the system intended to encourage productivity. However, as in the Soviet system these seem to be mainly related to production and consumption quantities, and not to quality of goods and services, invention, new design, risk-taking, and the like.²³ State-owned enterprises are not taxed, except in the sense that they are usually required to transfer surplus to the state.

There are few private enterprises operating in the P.R.C., except foreign enterprises, but there are some enterprises that are partly state-owned and partly privately owned, and the outstanding example is the Bank of China.²⁴

The pricing of goods and services in the P.R.C. is, of course, different from the market system in capitalist countries.²⁵ The forces are political rather than economic and market, and a basic objective is the maintenance of consumer prices at a low, stable level—one of the campaign promises made by the Communists before they took over. The promise has been substantially kept, with key grains and other foodstuffs, cotton cloth, pharmaceuticals, rents, utilities, transportation, medical care, education, and other essential goods and services costing fairly much the same as in 1952. The Chinese have even managed to lower the price of some items, such as industrial goods relevant to the people's livelihood, by improving productivity.²⁶ But there have been some recent changes. In November 1979, the consumer price of food was raised an average of 25% (reflecting increases in the prices of agricultural produce payable to the communes). In consideration of these changes, a small monthly subsidy is paid to urban workers. Also farmers may now market at their own prices any produce beyond the quota they must sell to the state.

IV. *Administration of Foreign Trade.*

Foreign trade in the P.R.C. is a government monopoly, controlled by the Ministry of Foreign Trade. The Ministry is assisted by the China Council for the Promotion of International Trade (C.C.P.I.T.) "a

²¹ *Ibid.*, B.1.2.1.

²² Section 11, *infra*.

²³ But quality and variety seem to be two of the eight major economic requirements which the government requires an enterprise to meet: P.R.C. (2nd ed.), B.1.2.1.

²⁴ See section VII, *infra*.

²⁵ A high proportion of bilateral trade between Canada and the U.S. is between constituent units of multinationals.

²⁶ J.E.T.R.O., p. 5.

non-government organization, performing duties similar to those of a chamber of commerce".²⁷ The actual conduct of foreign trade is through China National Foreign Trade Corporations (F.T.C.) covering (a) cereals, oils and foodstuffs; (b) native produce and animal by-products; (c) textiles; (d) light industrial products; (e) chemicals; (f) machinery; (g) metals and minerals; (h) machinery and equipment (export); (i) technical (import); (j) instruments; (k) foreign trade transportation; (l) chartering.²⁸ Foreign trade negotiations take place with the staff of the appropriate F.T.C. and any resulting contract is executed by the F.T.C.

Trade fairs in China are important contact points for foreign trade and the twice annual Chinese Export Commodities Fair at Canton (Guangzhou) [Canton Fair] is particularly important. Negotiations are between the foreign representative (who can only attend by invitation) and an F.T.C., and once the foreigner has located the appropriate branch of the correct F.T.C. and made an appointment, negotiations begin. The process has been described as follows by an American lawyer resident in Taiwan:²⁹ The negotiations "sometimes are conducted behind partitions but more often in the corridors of the vast, cavernous exhibition halls of the huge fair building within the view and earshot of anyone wandering by. The foreign buyer sits at a card table and negotiates with the foreign trade representatives, usually a team of three or four persons, one of whom does most of the negotiating. At least another one or two of the Chinese is, like the negotiator, a foreign trade expert or accountant. Finally there is a Chinese interpreter". The pace of activities at the fair is said to be relaxed so that "a newcomer must expect to spend several days, probably a week, just to conclude a few sales contracts".³⁰ Foreign trade, of course, is not all conducted at the Canton Fair, and import negotiations are often conducted in Peking.

²⁷ Fishburne, *Trade with the P.R.C.*, in *A Lawyer's Guide to International Business Transactions* (2nd ed. by Surrey and Wallace, 1977), Part 1, s. 1-6B.2. The departments of C.C.P.I.T. are: law; average adjustment; liaison with other countries; foreign exhibitions in China; overseas exhibitions; publicity.

²⁸ P.R.C. (2nd ed.), appendix 4.

²⁹ Torbert, *The American Lawyer's Role in Trade with China* (1977), 63 A.B.A.J. 1117, at p. 1118. The article states that more American lawyers are taking part in trade negotiations in the P.R.C., but the Chinese consider that the presence of lawyers is unnecessary—tending to raise prices.

³⁰ *Ibid.* An interesting description of the operation of the Canton Fair is given by Lubman, *Trade Between the United States and the People's Republic of China: Practice, Policy, and Law* (1976), 8 Law & Pol. Int. Bus. 1, at p. 17. See also: J.E.T.R.O., p. 75; Lubman, *Sino-American Trade: Legal and Practical Problems in Current Legal Aspects of Doing Business with Sino-Soviet Nations*, [1973] A.B.A. 67 (critical comments); Fishburne, *op. cit.*, footnote 27. Part 1, 1-6B.3(b).

There is an increasing number of trade agreements between the P.R.C. and western countries. An agreement was signed with Canada in 1973, which has resulted in the practical equivalent of most favoured nation treatment.³¹ The agreement provides, *inter alia*, for the establishment of a joint trade committee. A protocol sets out areas for the encouragement of economic co-operation, and related financing. Trade agreements were signed in 1978 with Japan and the European Economic Community (E.E.C.).³² The Japanese agreement is short and general and apparently it was negotiated through business rather than diplomatic channels—and has been described as something less than a treaty but more than a private contract. The E.E.C. agreement gives most favoured nation treatment reference taxes, customs duties, export and import licences, and establishes a joint committee for trade.

Trade relations between the P.R.C. and the United States have presented some special problems. In 1950, because of the Korean war, the United States froze over \$76 million of P.R.C. assets in America and the P.R.C. seized American assets in China.³³ While this problem remained unresolved, potential claimants in the United States might attempt to attach P.R.C. assets coming within American jurisdiction. This impeded the possibility of direct transactions between the P.R.C. and the United States, such as—banking and financial arrangements; trade exhibitions; P.R.C. flag vessels and aircraft entering the United States; title passing to the P.R.C. of goods within United States jurisdiction.³⁴ Agreement in principle was reached in 1973, and an agreement was signed in May, 1979, providing for partial compensation for American claims and release of frozen P.R.C. assets—although there will no doubt be difficulties in tracing and identifying these assets. This agreement made possible the United States-P.R.C. trade agreement signed in July, 1979.³⁵ Up to this time Chinese goods imported into the United States did not have most favoured nation treatment. Such treatment means that each party accords to the other as low a tariff level as it gives to other trading

³¹ Tung-pi Chen, *Legal Aspects of Canadian Trade with the People's Republic of China* (1974), 38 *Law & Contemp. Probs* 201.

³² Note in (1978), 19 *Harv. Int. L.J.* 1045. There had been trade discussions and agreements with Japan from 1960: J.E.T.R.O., p. 180; Masaya Tsuchiya, *Recent Developments in Sino-Japanese Trade* (1974), 38 *Law & Contemp. Probs* 240.

³³ See Fishburne, *op. cit.*, footnote 27, Part 1, 1-6B.1(b). The Foreign Claims Settlement Commission of the United States certified about \$197 million of U.S. private claims.

³⁴ There is a substantial amount of writing on the subject of the blocked assets, for example, Notes in: (1979), 20 *Harv. Int. L.J.* 681; (1976), 15 *Col. J. of Transnat. L.* 254; (1975), 15 *Va. J. of Int. L.* 959; Pavelic, *op. cit.*, footnote 11, at p. 344.

³⁵ Note in (1979), 20 *Harv. Int. L.J.* 708, which gives details of the main articles in the agreement.

partners and it can mean a substantial reduction in customs duties and taxes on goods. It can also affect export-import regulations and licences.³⁶ The 1979 agreement grants mutual most favoured nation status.

A voluntary restraint agreement (V.R.A.) is one which holds exports to agreed levels, and is, therefore, protectionist and a device to shield markets from low cost imports. Canada made such an agreement with P.R.C. in 1978, relating to textiles. The agreement was subsequently modified.³⁷

V. *Export—Import Transactions.*³⁸

As already mentioned, a contract is usually made with one of the Foreign Trade Corporations. These Corporations use standardized form contracts (printed in Chinese and English—and apparently both languages are equally valid),³⁹ and these contracts are short and straightforward.⁴⁰ The F.T.C. may agree to an alteration in the standard contract (at any rate if the F.T.C. is importing). It appears that F.T.C. purchasing contracts are likely to be more detailed with stricter obligations on the seller, than is the case in Chinese sale contracts. Of course, this tends to depend on relative bargaining strength, and thus may change in the future, or in relation to particular kinds of goods and services.

China normally sells c.i.f. and buys f.o.b., so that P.R.C. shipping and insurance enterprises can be employed.⁴¹ The enterprises are the China Ocean Shipping Company, the China National Chartering Corporation, and People's Insurance Company of China. F.T.C. normally insures up to 110% of the invoice value. One purpose, of course, of the arrangements is to conserve foreign exchange. The China Council for the Promotion of International Trade issues certificates of origin and certifies documents as necessary.⁴² Ordinary commercial documents such as bills of lading, invoices, insurance policies and certificates, certificates of packing, weight and measure-

³⁶ As to G.A.T.T. and most favoured nation status, see Jackson, *The General Agreement on Tariffs and Trade*, in Surrey & Wallace, *op. cit.*, footnote 27, Part 1, 1-2.4(b).

³⁷ For details, see Orr, *International and Canadian Quantitative Restrictions on World Textile Trade* (1980), 38 U. of T. Fac. L. Rev. 77.

³⁸ Pavelic, *op. cit.*, footnote 12, is a substantial article on this topic.

³⁹ Price Waterhouse, *op. cit.*, footnote 12, p. 14; Palay, *op. cit.*, footnote 5, at pp. 113-117.

⁴⁰ See Fishburne, *op. cit.*, footnote 27, Part 1, appendix (Exhibits 1 & 2) and Lubman, *op. cit.*, footnote 30, (appendices) for specimen contracts.

⁴¹ Eastern European countries tend to operate in the same way.

⁴² Price Waterhouse, *op. cit.*, footnote 12, p. 15.

ment lists, sanitary specifications, quality certificates are used and issued in the P.R.C. (usually with facsimile signatures).⁴³

The Chinese seem to have acquired a reputation for strict adherence to contract requirements (especially when they are buyers) and standard contracts may contain penalty clauses, and penalties are usually assessed as percentages of the contract price. Provision for inspection of the goods in China is normal, generally by the China Commodities Inspection Bureau, and inspections can be detailed and quite stringent.⁴⁴ According to Lubman (an American lawyer specializing in Chinese affairs and international trade): "One characteristic Chinese practice is to use to the fullest the contractual right to inspect the goods. The meticulousness of Chinese inspection is proverbial. Where other purchasers test steel pipe by random X-rays, the Chinese test every inch and complain about the hairline cracks that other purchasers would ignore. When sellers of vehicles sell piston rings by volume, the Chinese count them individually."⁴⁵

The P.R.C. has been rather rapidly increasing its flag-carrying merchant fleet.⁴⁶ "While the shipping fleets of traditional maritime nations are static or decreasing in size, China's fleet, taking advantage of current bargain buys, is growing rapidly. According to Lloyd's statistics, a total of 228 foreign vessels were purchased in the three years from 1976 to 1978, for a gross tonnage of 3.8 million. China's merchant fleet has thus grown to over 1,000 vessels, including 680 ships in its deep sea fleet and coastal tonnage.

A 1979 Lloyd's survey revealed that over 10 million dwt. of ships, not including coastal tonnage, are either registered in China or under China's direct control. These consist of approximately 4.8 million dwt. of dry cargo vessels, 3.5 million dwt. of bulk carriers, and 2 million dwt. of tankers. These figures include approximately 1.7 million dwt. belonging to China's two Hong Kong based companies, Ocean Tramping (Panamanian Flag) and Yick Fung Shipping (British Flag)."⁴⁷

Payment arrangements are normally by documentary credit, and the P.R.C., although not a party to the Uniform Customs and Practices of the International Chamber of Commerce, follows them officially. The usual provision is for an irrevocable credit providing

⁴³ *Ibid.*

⁴⁴ See Fishburne, *op. cit.*, footnote 27, Part 1-6B.5(c); Palay, *op. cit.*, footnote 5, at pp. 119-121.

⁴⁵ *Op. cit.*, footnote 30.

⁴⁶ In contradistinction Canada has virtually no flag-carrying (ocean-going) merchant fleet and Canadian goods are ocean-carried by ships of other nations.

⁴⁷ J.E.T.R.O., p. 116 (footnote references omitted). See also Financial Post article: China Chasing Shipping Business, 17th May, 1980.

for payment against a sight draft and commercial documents. Documentary credits are processed by the Bank of China and its branches, and the Chinese have a very good reputation for correct, good faith dealing in these matters.⁴⁸

The P.R.C. currency—the Renminbi—is not traded on foreign exchange markets and is not a convertible currency.⁴⁹ The Bank of China determines bid and offer rates for the renminbi and renminbi deposits can be maintained with the Bank of China. Although the renminbi can be purchased forward from the Bank of China, the preference seems to be to use other currencies, and so the renminbi is essentially a unit of account, and not a money of payment, at the present time.

Obviously the acquisition of relevant and good quality technology is a key factor in P.R.C. plans for modernization, and the sale or licensing of technology is likewise an important factor in plans by developed countries to increase their trade with China. As might be expected, therefore, although the P.R.C. has not joined the Paris Convention for the Protection of Industrial Property or similar international initiatives to protect industrial property rights, it is showing a willingness to recognize the importance of protecting industrial property rights.⁵⁰

The communist view of industrial and intellectual property is to regard it as social property rather than the subject of individual rights, and the Chinese dilemma seems to be to square this with the pragmatic need to encourage invention and the growth of domestic contribution to modern technology and the usefulness to state policy of foreign technology.⁵¹ How can the P.R.C. import non-communist technology without also importing non-communist concepts?

P.R.C. patent regulations of 1950 contained some protections for Chinese patentees and provided for certificates of invention related to national defence, pharmaceuticals, agriculture, items produc-

⁴⁸ Price Waterhouse, *op. cit.*, footnote 12, p. 15; see also P.R.C. (2nd ed.), B.1.1.2; Lubman, *op. cit.*, footnote 30, at p. 68. According to Fishburne, *op. cit.*, footnote 27, Part 1, 1-6B.5(b), the currency of U.S./P.R.C. trade until 1975 was almost exclusively renminbi but since 1975 the Chinese have been willing to accept letters of credit in dollars.

⁴⁹ Price Waterhouse, *op. cit.*, footnote 12, pp. 6-7.

⁵⁰ See, for example, the U.S./P.R.C. trade agreement of July 1979, article VI, reproduced in P.R.C. (2nd ed.), Appendix 2. For a comparison with Taiwan see Huang, *Foreign Enterprise and Chinese Trademark and Patent Laws—A Digest-Commentary on Some Important Cases* (1978), 12 Int. L. 397.

⁵¹ For a general discussion of industrial and intellectual property and the P.R.C., see Hsia and Haun, *Laws of the People's Republic of China on Industrial and Intellectual Property* (1973), 5 L. & Pol. Int. Bus. 743; Reghizzi, *Legal Aspects of Trade with China: the Italian Experience* (1968), 9 Harv. Int. L.J. 125.

ing social welfare. But the government reserved the right to resume control of the patent. The 1954 regulations introduced state monetary rewards for holders of certificates of invention. The 1963 regulations abolished the certificate of invention and replaced it by a system of money awards, but also provided that all inventions are the property of the state and that no person may claim a monopoly over them. There has been rather minimal recognition of trademarks—for example, in regulations in 1950 and 1963—but general trademarks, such as “made in China” are used in P.R.C. exports. Foreigners may make application under the 1963 regulations for recognition of an invention or technical improvement. Legislative developments are expected in the future in regard to industrial property.⁵² A certain protection for foreign patents can be obtained by contractual clauses, and bilateral trade agreements may contain general articles on the protection of industrial property, and the Chinese have a good reputation for abiding by their contracts.

A trademark can be registered in the P.R.C., for the first applicant, if the trademark has a fixed name and is simple, clear, and easily recognizable and distinguishable.⁵³ Registration gives the right to exclusive use in the P.R.C. An application for registration of a trademark can be made by a foreign enterprise if there is reciprocity of trademark recognition with the foreign country, and if the trademark is already registered in the foreign country.⁵⁴

Due to the Chinese shortage of foreign exchange to pay for their massive needs for foreign goods and services and technology, and their unwillingness to over-extend their foreign debt commitments, there has been an interest taken in various forms of trading involving co-operation between Chinese and foreigners, which may be classified as (i) compensation trade, (ii) processing trade, (iii) co-operative production.⁵⁵ These can be roughly described as follows:

(i) The Chairman of the State Planning Commission told the Chinese National Conference on Finance and Trade in 1978 that where the P.R.C. needs technology and equipment, compensation trading can be used, introducing the needed technology and equip-

⁵² P.R.C. (2nd ed.), B.4.1.

⁵³ *Ibid.*

⁵⁴ *Ibid.* Applications are made to the Trade Mark Registration Agency of the China Council for the Promotion of International Trade.

⁵⁵ Co-operation under the Joint Venture Law is not included here because it is discussed in the next section of this article. The classification and descriptions are based on P.R.C. (2nd ed.), B.I.3.1-4. Tsurumi, Sogoshosha [Trading Companies] Institute for Research on Public Policy (1980), p. 74 states: “American manufacturing firms will soon discover that China’s ability to balance her imports through barter-trade exports will require sogoshosha-like internal exchanges of diverse commodities and services.”

ment and paying for it with the products obtained.⁵⁶ Such an arrangement might continue for a period of about five years; and it might be used, for example, for building or equipping a factory, or a mining operation. The foreign partner would be paid in installments by products of the factory or mine, or other commodities, at agreed prices, and would normally export the products or commodities. This kind of barter-type trading (otherwise described as "creative financing") has also been used in trade with Eastern Europe, where shortages of foreign currency were also encountered.⁵⁷

(ii) In "processing trade" the foreign partner contributes technology and equipment, and places orders with the Chinese partner who contributes labour and premises. The Chinese partner receives fees for his processing and assembly contribution (from which there may be deductions related to the foreign partner's contribution). The foreign partner receives the finished goods.⁵⁸

(iii) Co-operative production is similar to processing trade, and in it the foreign partner may provide equipment, technology, raw materials, semi-processed goods, parts, fittings, whereas the Chinese partner may provide labour. The commodities produced may be dealt with in different ways, for example, sold back to one or both of the partners, or sold directly in world markets. Profits will be shared, or used to repay the contribution of the foreign partner.

Understandably, these classifications are flexible and open-ended, and subject to *ad hoc* variations and innovations to suit individual circumstances. To date, Hong Kong firms seem to have shown most interest in co-operative trading with the P.R.C., and it has been said that, as of mid-1979, there were an estimated fifty trade contracts in this category between Hong Kong and the P.R.C. mostly in the textiles and electronics fields "where low Chinese labor rates are expected to permit significant savings in production costs".⁵⁹ As of February 1979, Japanese firms are reported to be involved in over a dozen projects of a co-operative type.⁶⁰

⁵⁶ J.E.T.R.O., p. 156.

⁵⁷ "But, because of shortage of hard currency, the East Europeans would rather pay for these package deals through off-take arrangements. Under these arrangements, the Western company not only provides technology and machinery to build or re-equip a plant in the respective East European country, but also takes over part of the production in repayment." : Reece, *Creative Financing of Trade with Eastern Europe*, in *Current Legal Aspects of Doing Business with Sino-Soviet Nations*, [1973] A.B.A. 60.

⁵⁸ See J.E.T.R.O., pp. 157-158 for a description of a deal of this kind between a Japanese trading company and the China National Textile Import and Export Corporation, resulting in a higher quality pyjamas being produced—the Japanese firm is involved in an expansion of the Chinese operation which is expected to result in the import into Japan annually of one million pairs of pyjamas.

⁵⁹ J.E.T.R.O., p. 157.

⁶⁰ *Ibid.* A table of details is given at p. 161 (Table 10.1).

VI. Joint Ventures.

The People's Republic has provided a legislative framework for foreign investment, through the medium of Chinese-foreign joint ventures. The Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment was promulgated on 8th July 1979, having been adopted by the Fifth National People's Congress on 1st July 1979.⁶¹ The purpose of the law was stated officially to be to absorb foreign investments and expand international economic co-operation and technological exchange on the basis of equality and mutual benefit. The China International Trust Investment Corporation, having its headquarters in Peking (Beijing), deals with co-ordination and advice; enters into joint venture agreements and related contracts under commission from foreign participants; accepts funds from foreign participants or raises funds abroad for investment in China by issuing its own debentures or by serving as agents for the issue of shares; acts as agents for foreign manufacturers in relation to advanced technology and equipment; engages in joint ventures and makes investments itself.⁶²

Apparently the Chinese had been thinking about making provision for joint-ventures for at least a year previously. For example, there was an article in the Chinese press on 18th August 1978 entitled: "How did Lenin handle importation of advanced technology and foreign capital?"⁶³ A Hong Kong lawyer, Miss Liu Yiu-chu, advised the P.R.C. on the joint venture law and she participated in a conference on the legislation on 12th July 1979.⁶⁴

⁶¹ For the text see P.R.C. (2nd ed.), B. 1.4.; J.E.T.R.O., ch. 9. Price Waterhouse, *op. cit.*, footnote 12, appendix 3. Kyle, China: Joint Venture Law (1979), 20 Harv. Int. L.J. 675. There were co-operation agreements between Hong Kong companies and the mainland Chinese before the Joint Venture Law: Pavelic, *op. cit.*, footnote 34, at p. 375. Actually, the joint venture has quite a long history in China (e.g. in regard to civil aviation): Young, Joint Venture and Licensing in Civil Aviation: A Sino-American Perspective (1979), 15 Stan. J. of Int. Stud. 247. Various Eastern European countries have made provision for joint ventures with Western partners (e.g. Yugoslavia, Romania, Hungary and Poland) and interesting comparisons can be made with the P.R.C. Law: see Stein, East-West Trade, Surrey & Wallace, *op. cit.*, footnote 27, Part 1, 1-6A.3(b)(iv); Werajski, The New Policies and Legislation Concerning Joint Ventures in Poland (1980), 28 Eur. Tax 99. As to Yugoslav enterprises, see also Conner and Vukmir, Legal Anatomy of a Yugoslav "Enterprise" (1976), 32 Bus. L. 99; Chloros, Yugoslav Civil Law (1970), pp. 186-191. As to Bulgarian joint ventures, see (1980), 20 European Taxation 293.

⁶² P.R.C. (2nd ed.) B. 1.4. A translation of the Corporation's statute is reproduced as P.R.C. (2nd ed.), Appendix 13.

⁶³ J.E.T.R.O., p. 139. Japanese specialists were apparently consulted about the framing of a law.

⁶⁴ *Ibid.*, p. 148.

The law has fifteen articles and some of them are formal or "machinery" articles, and it has been criticized as being vague and as leaving many unanswered questions. But substantially this is to be expected. It is common in Western developed countries to use foreign investment legislation mainly to create an institutional structure and to delineate powers, but to leave the processing of individual cases to the discretion of governmental bodies operating at a political—administrative level.⁶⁵ But while this seems to be the P.R.C. approach also, there are difficulties with the interpretation of the text of the law itself. Also it must be remembered that, so far, the P.R.C. has little or no general legislation on business organizations or commercial transactions to form a conceptual reservoir for the joint venture law. This lack of general legal framework may be at least minimized in the near future, and various new laws appear to be contemplated, for instance, commercial, patent, maritime law.⁶⁶

The first article of the Joint Venture Law contains a statement of objectives: "With a view to expanding international economic co-operation and technological exchange" the P.R.C. permits foreign participants "to incorporate themselves" within P.R.C. territory, into joint ventures with Chinese participants "on the principle of equality and mutual benefit and subject to the authorization of the Chinese Government".⁶⁷ A Chinese participant cannot be an individual (in accordance with the P.R.C. system of collective ownership) but the foreign participant can be an individual.

Article 2 provides that all the "activities of a joint venture" will be governed by "the laws, decrees and pertinent rules and regulations of the People's Republic of China". This would appear to exclude the application of Western-style rules of conflict of laws, and choice of law clauses selecting foreign law, in joint venture agreements. The same article provides that the "Chinese Government protects, by the legislation in force, the resources invested by a foreign participant in a joint venture and the profits due him pursuant to the agreements, contracts and articles of association authorized by the Chinese Government as well as his other lawful rights and interests". The immediate reaction of a North American lawyer to this article will be to ask:

⁶⁵ Compare The Foreign Investment Review Act, S.C., 1973-4, c. 46, which established the Foreign Investment Review Agency (F.I.R.A.), and decisions are made by the Cabinet after administrative investigation by the Agency. See Stikeman and Elliott, *Doing Business in Canada* (1979), Vol. 1, s. 3.04.

⁶⁶ King, *Mission to China of the Section of International Law of the American Bar Association* (1979), 11 *Cas. W. Res. J. of Int. L.* 237, J.E.T.R.O., p. 145 on the weakness created by the "absence of laws, legal institutions and detailed regulatory provisions for its implementation, necessary to clarify and complement the foreign investment law . . .".

⁶⁷ The quotations from the Law are taken from P.R.C. (2nd ed.), Appendix 1(a).

where are the laws and reported court decisions by which I can estimate the value and authority of this? Professor Jerome Cohen of the Harvard Law School has said that article 2 will only have meaning if the Chinese are successful in their overall programme of law reform.⁶⁸ But in this connection, and generally in regard to trade with the P.R.C. (and to a lesser extent with Japan), it seems that the approach of the modern North American lawyer—that business must be anchored to a legal framework supported by a battery of litigation remedies, does not pertain in some other regions which contain a large proportion of the world's population. This may seem disappointing and even perverse to a Canadian business lawyer, but it may be one of the facts of life in the international business of the future. Prevailing commercial custom and practice is more important in the Far East than dependence on legal rules and litigation skills for their enforcement.⁶⁹ A North American lawyer may have difficulty in categorizing an agreement (declared to be subject to P.R.C. law) but in regard to which there does not seem to be a set of enforcement rules by Chinese law, and where the accepted mode of solving a dispute is not litigation but a "friendly discussion" (with officials of a P.R.C. foreign trade agency). But the literature on the subject indicates that the Chinese have a good reputation for maintaining their obligations, and that "friendly discussion" can be a useful settlement mechanism (at least between parties who are more concerned with getting on with the business of trading than with legal confrontation).

A joint venture must be authorized by the P.R.C. government, and the related agreements, contracts and "articles of association" have to be approved by the Foreign Investment Commission (F.I.C.), which is required to make a decision within three months. When authorized the joint venture must register with the General Administration for Industry and Commerce (G.A.I.C.) of the P.R.C.⁷⁰ A business and production programme for the joint venture must also be filed.

Article 4 provides that the joint venture shall take the form of a "limited liability company". Types of limited liability company exist in other countries of the Far East, for example, Japan (Yugen

⁶⁸ Cohen and Nee, Joint Venture behind the Headlines, *Asian Wall Street Journal*, July 1979.

⁶⁹ This is repeatedly emphasized in articles by American lawyers with experience of business negotiations in these parts of the world, e.g. Guittard, *Negotiating and Administering and International Sales Contract with the Japanese* (1974), 8 *Int. Lawyer* 822; Lubman, *supra*, footnote 30, at pp. 1-3.

⁷⁰ The F.I.C. and the G.A.I.C. are located in Peking (Beijing) and their main functions appear to be those stated in relation to joint ventures.

Kaisha); South Korea (Yuhan Hoesa);⁷¹ Taiwan; Vietnam.⁷² The limited liability company in these countries suggests the influence of the Civil Law.⁷³ What does this mean in the context of a socialist economy such as the People's Republic? It may not mean more than that the joint venture has an identity as a business enterprise and that the liabilities of the Chinese and foreign participants are limited to their respective capital contributions. The contribution of the foreign participant(s) "shall in general not be less than 25%", and the profits, risks and losses are to be shared by the participants "in proportion to their contributions to the registered capital".⁷⁴ This would appear to be wide enough to permit a wholly-owned subsidiary of a foreign multi-national, but the reality would depend on whether the Chinese bureaucracy would be willing to authorize such an enterprise (or indeed more than a 49% foreign share). Also there might be practical advantages at the present time in having a Chinese co-participant.

Various kinds of contribution are contemplated: "cash, capital goods, industrial property rights, *etc.*"⁷⁵ "The investment contributed by a Chinese participant may include the rights to the use of a site provided for the joint venture during the period of its operation. In case such a contribution does not constitute a part of the investment from the Chinese participant, the joint venture shall pay the Chinese government for its use." Ownership, in the Western sense, of land, buildings, equipment or the like by a joint venture would seem inconsistent with the state ownership system in the P.R.C. So probably what is meant is that such items would be appropriated to the authorized use of the joint venture. What would be the position if the foreign participant's contribution included machinery and technology? Would the P.R.C. take the position that these items then belonged to the joint venture and hence to the Chinese state (since Chinese law applies to the joint venture)? The question of valuation of non-cash contributions is dealt with in a rather cavalier fashion: ". . . the value of each contribution (excluding that of the site) shall be ascertained by the parties to the venture through joint assessment."⁷⁶

The Joint Venture Law provides for the management structure of the enterprise in article 6. The "contracts and the articles of association" shall stipulate the composition of the board of directors, and

⁷¹ Yoon, *Legal Aspects of Foreign Investment in the Republic of Korea* (1976), 10 *Int. Lawyer* 729.

⁷² Tang Thi Le, *Foreign Investment Code of the Socialist Republic of Vietnam* (1979), 13 *Int. Lawyer* 329.

⁷³ Perhaps the French *société à responsabilité limitée*.

⁷⁴ Art. 4. Probably "registered" capital means contributed capital.

⁷⁵ Art. 6.

⁷⁶ Apparently foreign requests have been made for clarification.

"each director shall be appointed or removed by his own side".⁷⁷ The board shall have a chairman appointed by the Chinese participant and one or two vice-chairmen appointed by the foreign participant(s). Important decisions of the board are to be reached "on the principle of equality and mutual benefit".⁷⁸ The board is clearly intended to be the governing body of the joint venture with wide general powers of administration, including the appointment of senior officers, who are listed as: "the president, the vice-president(s), the chief engineer, the treasurer and the auditors as well as their functions and powers and their remuneration, etc." Article 6 also provides that: "Procedures covering the employment and discharges of the workers and staff members of a joint venture shall be stipulated according to law in the agreement or contract concluded between the parties to the venture."

The Joint Venture Law gives some insight into the P.R.C. attitudes to the acquisition of technology. Article 5 provides that the "technology or equipment contributed by any foreign participant as investment shall be truly advanced and appropriate to China's needs. In cases of losses caused by deception through the intentional provision of outdated equipment or technology, compensation shall be paid for the losses". Again in article 7 we find: "A joint venture equipped with up-to-date technology by world standards may apply for a reduction of or exemption from income tax for the first two or three profit making years." These provisions, of course, relate to direct investment (on a joint venture basis), and one can understand the desire of the Chinese that foreign direct investors should operate with a high standard of technology and methods. The Chinese have announced the following project areas as suitable for "co-operative production": energy resource development including electric power, oil and coal; communications and transportation; metals, iron and steel; precision machinery and electronics; modernization of agriculture; raw material industries.⁷⁹ However, where a foreign participant is not contributing the technology, and the P.R.C. is importing it and, in some form, paying for it, the Chinese may be less insistent on obtaining the most advanced forms of Western technology. Mainland China is not yet, in general, at all a developed industrial country, and cheaper, less advanced forms of technology may be more appropriate for their needs and payment capacity.⁸⁰ The President of China International Trust Investment Corporation⁸¹ has indicated that the stress on for-

⁷⁷ Art. 6.

⁷⁸ *Ibid.*

⁷⁹ J.E.T.R.O., pp. 145-146 referring to announcement by Li Qiang, Minister of Foreign Trade: Beijing Review, May 1979.

⁸⁰ Some countries (such as India) appear to have done useful business in selling less advanced technology to developing and under-developed countries.

⁸¹ See *supra*, footnote 62.

eign investment may be on light industry, textiles, nonferrous metals, coal, machinery manufacturing, hotels. There have been various statements about objectives, Chinese and foreign, for example, that electronic instruments and components, computers, and domestic appliances are most suitable for joint ventures.⁸² Essentially the joint venture is a vehicle which might have the capacity for bringing greater amounts of much needed capital to the P.R.C. than can be done by export-import, co-operative trading, and the like, and, more important even, much needed technology for development of natural resources, the establishment of modern industries able to export competitively and earn foreign exchange, as well as providing for the ultimate modernization and proposed "independence and self-reliance" of the economy.

Repatriation of profits is important in any direct foreign investment. By article 7 the net profit of a joint venture is to be distributed between the participants in proportion to their capital contributions after payment of (i) a P.R.C. "joint venture income tax" on the "gross profit",⁸³ and (ii) deductions "... as stipulated in the articles of association of the venture for the reserve funds, the bonus and welfare funds for the workers and staff members and the expansion funds of the venture". The article also provides that a foreign participant who re-invests any part of his share of the net profit "within Chinese territory" may obtain a tax rebate. According to article 10, a foreign participant's share of net profit, or share of surplus on winding-up "and his other funds may be remitted abroad through the Bank of China in accordance with the foreign exchange regulations and in the currency or currencies specified in the contracts concerning the joint venture". But a foreign participant is to "receive encouragements for depositing in the Bank of China any part of the foreign exchange which he is entitled to remit abroad", and this is, of course, due to the P.R.C.'s great need for foreign currency. One incentive may be an attractive interest rate for such a foreign currency deposit with the Bank of China.⁸⁴ Similarly, the earnings of foreign employees may be remitted through the Bank of China in accordance with the foreign exchange regulations.⁸⁵ There is a general personal income tax and joint venture income tax⁸⁶ in the P.R.C.

A frequent question in relation to subsidiaries of a foreign multinational (for example, a Canadian subsidiary of a United States

⁸² J.E.T.R.O., p. 146.

⁸³ Income taxation is discussed later in this article.

⁸⁴ If this is successful, there may be a Sino-dollar market in the future.

⁸⁵ Art. 11.

⁸⁶ See later in this article reference to income taxation.

multinational) is whether the subsidiary is allowed to export, and if so on what terms vis-à-vis its foreign parent. Article 9 of the Joint Venture Law deals with this topic and states that a joint venture is encouraged to market its products outside China, through direct channels, its associated agencies, or China's foreign trade establishments. A joint venture should give first priority to Chinese sources in purchasing materials, fuels, equipment, and so on, but it may also purchase them directly on the world market with its own foreign exchange funds. One possible source of such world market purchases might be from the foreign parent corporation of the foreign participant and this could raise questions of transfer pricing, given an opportunity to distribute profits and fiscal incidence advantageously as between the foreign parent and the joint venture, especially where there is not a well-defined market price for the item in question, for example, computer parts or soft-ware, specialised mining machinery, know-how, management services.

A joint venture may "in its business operations", obtain funds from foreign banks directly.⁸⁷ However, the insurances appropriate to a joint venture must be furnished by "Chinese insurance companies".⁸⁸ Insurance in the P.R.C. is a state enterprise and the lead entity is the People's Insurance Company of China.⁸⁹

Article 13 deals with termination of the joint venture agreement due to heavy losses, failure of a participant to execute its joint venture obligations, force majeure, and so on. An extension of the joint venture period may be authorized by the Foreign Investment Commission. The Chinese interpretation of force majeure seems to exclude Acts of God, strikes, governmental intervention, and in general trading, as well as in joint ventures, the concept requires clarification.⁹⁰

Disputes which cannot be settled internally by the board of directors of a joint venture may be settled "through conciliation or arbitration by an arbitral body of China or through arbitration by an arbitral body agreed upon by the parties".⁹¹ This provision must, however, be considered against the general attitude of the mainland Chinese to dispute settlement—their strong preference for compromise solutions obtained through friendly negotiations; their distaste for litigation and the rarity in practice of settlement by third party arbitration.⁹²

⁸⁷ Art. 8.

⁸⁸ *Ibid.*

⁸⁹ P.R.C. (2nd ed.), B. 3.5. Related insurance entities are the Tai Ping Insurance Company and the China Insurance Company.

⁹⁰ Fishburne, *op. cit.*, footnote 27, Vol. 1, pp. 242-243.

⁹¹ Art. 14.

⁹² Dispute Settlement is discussed more generally later in this article. The P.R.C.

The Joint Venture Law has received some foreign criticism on the ground of lack of clarity and detail. But to a considerable extent this is due to the current fragmentary nature of P.R.C. general commercial law and the rather radical differences in many respects between mainland Chinese and Western thinking on the legal regulation of business. Of course this is likely to be modified in time. Each may adapt somewhat and learn from the other (and it is to be hoped that North American lawyers will not assume that only the Chinese have something to learn).

A Japanese view on the Joint Venture Law is that "in spite of its general nature and many undefined points the law does appear to provide a solid basis for the formation of joint venture agreements" and that "the creation of the Foreign Investment Commission . . . provided a basic administrative framework for both investment approval and regulation".⁹³ The announcement of the Joint Venture Law produced a great deal of interest in international business circles and the news media, and there have been a variety of seminars, meetings, publications, and so on, with a view to exploring the possibilities of the law and obtaining clarification on how it will be administered.⁹⁴ Exporting to the P.R.C. by North American or Western European firms has considerable difficulties, especially since the Chinese have a shortage of foreign currency so that special financing or a form of co-operative trading may be needed to make a workable export deal possible. They have also to meet competition from business in other Far Eastern locations (especially Japan and Hong Kong) having an advantageous geographical position with reference to mainland China. So in general principle, the possibility of est-

has a Foreign Trade Arbitration Commission established in 1954 within the China Council for the Promotion of International Trade.

⁹³ J.E.T.R.O., p. 141 (citing an article by Owen in the Financial Times of 10th July, 1979). See also Topp, Joint Ventures in the PRC (1979), 14 J. of Int. L. and Econ. 133.

⁹⁴ *Ibid.*, pp. 148-149. The Chairman of the China International Trust Investment Corporation stated in June 1980 that the administrative rules for the Joint Venture Law were being drafted. He also was reported to have said that worries about the risk of nationalization of a Chinese investment are groundless: Chinese law protects the interests of the foreign investor and profits and principal can be remitted. If nationalization becomes necessary, such as in the event of a major war, the investor will be compensated (Financial Post, 5th July 1980). The China International Trust Investment Corporation have stated that at present China is only interested in joint ventures that can redeem themselves in foreign exchange: Tax News Service, 31st Jan. 1980. A spokesman for China's foreign investment commission stated on 12th December 1980 that China had signed over 300 joint venture agreements with foreign firms, covering machinery, light and textile industries, and tourist facilities. These include a joint venture involving the First National Bank of Chicago (30%), Bank of China (30%), Industrial Bank of Japan (30%), China Resources Company (10%); and a shipping and investment joint venture apparently based in Bermuda.

ablišing an enterprise inside the P.R.C. may suggest a way of avoiding some of the export difficulties and superior competition. In addition, some kinds of business—important to P.R.C. development—will require some form of permanent operation in China (for example mining, oil and gas development, major construction projects). However, the view has been expressed that “. . . considering the importance of foreign investment in China's economic constitution, China is expected to continue taking very positive steps to encourage foreign investment. As for foreign enterprises, few, if any, can afford to ignore a potential market of one billion consumers. Probably, investment will be led by Hong Kong, Macao, and overseas Chinese putting funds back into their mother country, followed by Western Europe, the United States and Japan, assuming, of course, political stability in Beijing”.⁹⁵

Other countries of the Far East have taken steps to encourage direct foreign investment and some have joint venture laws. Examples are: joint ventures in Japan,⁹⁶ Taiwan,⁹⁷ South Korea⁹⁸ and Vietnam.⁹⁹

VII. Banking.

The functions of the Bank of China include the management of P.R.C. international trade, operations in international money markets, exchange control, and the maintenance of relations with foreign correspondent banks where foreign currency accounts are established.¹⁰⁰ This bank is unusual for a bank in a communist country, because it is a corporation owned as to two-thirds by the P.R.C. and the rest by shareholders, some of them being foreign residents.¹⁰¹

The People's Bank of China is the state-owned central bank and it also conducts commercial banking and branch deposit banking, and controls the payment of business enterprise taxes.

⁹⁵ J.E.T.R.O., p. 150.

⁹⁶ Hildebrand, *Establishing a Joint Venture Company in Japan* (1978), 10 Case W. Res. J. of Int. L. 199; note on *Doing Business in Japan* (1974), 6 Cas. W. Res. J. of Int. L. 178.

⁹⁷ Statute for Investment by Foreign Nationals, art. 4; Schreiber, *U.S. Corporate Investment in Taiwan* (1970).

⁹⁸ Yoon, *op. cit.*, footnote 71.

⁹⁹ Tang Thi Le, *op. cit.*, footnote 72. This vague code is hardly likely to attract foreign investment.

¹⁰⁰ P.R.C. (2nd ed.), B. 3.1, where it is stated that the Bank of China has 828 foreign correspondent banks in 139 countries. The Bank has branches in London, Hong Kong, Luxembourg, and Singapore, and (in 1979) new branches were being considered in New York and Tokyo, and a representative office in Paris.

¹⁰¹ According to P.R.C. (2nd ed.), B. 3.1 the Bank pays a fixed annual dividend of 5%.

Other domestic banks in the P.R.C. are: the Agricultural Bank of China (the probable functions of which are financial, accounting and fiscal advice and regulation for communes operating in agriculture, and borrowings by municipalities and the Reconstruction Bank (financing for special development projects)), and the P.R.C. more or less controls twelve banks in Hong Kong.¹⁰² There is no private enterprise capital market in the P.R.C.

There are one or two foreign banks with offices in the P.R.C. and no doubt the number will increase quite rapidly if the P.R.C. is prepared to grant authorizations. The establishment of foreign banking operations in countries of the Far East is a topic of general interest and importance. Hong Kong and Singapore are, of course, very important financial centres, but they are in a rather special situation. Hong Kong is the third largest banking centre after New York and London and, as at 1979, ninety-five banks were in Hong Kong licensed by the Governor-in-Council (on the recommendation of the Commissioner of Banking), and in addition there were 102 representative offices of foreign banks. Indeed so popular had Hong Kong become for foreign banks that there was a twelve year moratorium on the issue of new banking licenses—a moratorium which began to be relaxed in 1978. Japan, however, has been conservative in its authorization of foreign banks, and in 1968 there were only sixteen foreign banks operating branch services in Japan.¹⁰³ By 1979 there were sixty-one foreign banks in Japan, and their range of business is regulated by the Bank of Japan.¹⁰⁴ There have been some North American complaints about a lack of banking reciprocity vis-à-vis Japan.¹⁰⁵

VIII. *Financing.*

Possibly due to the P.R.C. decision in 1960 to make early repayment of large U.S.S.R. loans, the Chinese had a policy of “no foreign loans, no foreign investments and no foreign aid”, as part of a general

¹⁰² *Ibid.*, B.3.1. Also the China Development Finance Corporation is incorporated in Hong Kong and is owned by the Bank of China, 12 controlled banks, and 3 P.R.C. controlled insurance companies. See also generally J.E.T.R.O., pp. 6-10; Liu, Monetary System of Communist China, in Economic and Social Problems of the Far East, ed. by Szczepanik.

¹⁰³ McFarlane, *The Role of the Foreign Bank in Japan* (Socio-Economic Institute of Sophia University, Tokyo, 1976), p. 8; (generally) Presnell and Nishimura, *Money and Banking in Japan* (1973), p. 192.

¹⁰⁴ Financial Times, World Business Weekly, 5th Feb., 1979.

¹⁰⁵ For example, an article in the Japan Economic Journal of 17th April 1979 in which it was stated that 23 Japanese banks were operating 62 banking facilities in the U.S.A. with an increase of assets from about 9 billion dollars in 1972 to about 30 billion dollars in 1978.

policy of "self-reliance".¹⁰⁶ An article in China's Foreign Trade in 1974 stated: "Another important sign of the unprecedented excellence in China's financial and monetary affairs is that we are completely free of domestic and foreign debt."¹⁰⁷ But since the 1960's the P.R.C. has used trade credit for grain imports on the ground that this was not foreign borrowing but was standard international practice in making such payments. The Chinese also accepted financing for the purchase of complete plants.¹⁰⁸ But clearly a relatively poor country such as the P.R.C., with very limited foreign exchange resources (mainly from coal and oil exports) could not undertake the enormous development programme proposed by its government, without foreign credit. From 1978 the P.R.C. began to change its attitude on foreign loans and also to seek various ways of increasing foreign exchange (such as remittances from overseas Chinese and tourism). Relaxation on foreign borrowing was, however, restricted to borrowing from banks and financial institutions, and (in 1978) the Chinese Minister of Foreign Trade stated that China would not accept governmental loans or assistance or joint venture investment. But the picture in regard to financing of business in the P.R.C. seems to keep changing and to indicate a government that modifies its principles (even radically) if they hinder the pragmatic requirements of a general policy of rapid modernization. It may also indicate an increased bureaucratic confidence and sophistication in dealing with the Western financial environment, and a moderation of China's understandable fear of a recurrence of Western and Japanese power-play and dominance from which China suffered from the mid-19th century until the second world war. However (as mentioned earlier in this article) the P.R.C. made trade agreements with various countries in the 1970's.

There has been a big expansion in the last year or two of foreign credit facilities for the P.R.C., and in the development of innovative financing techniques.¹⁰⁹ In Canada the Export Development Corporation has extended a credit of over two billion dollars to the P.R.C. (the

¹⁰⁶ J.E.T.R.O., p. 121.

¹⁰⁷ Quoted in J.E.T.R.O., p. 122.

¹⁰⁸ For example, 27 from Japan in 1972/73 and 22 from Western Europe in 1971/1973: J.E.T.R.O., p. 123.

¹⁰⁹ Leng, *Sino-Japanese Trade in the Post-Normalization Era* (1979), 11 *Cas. W. Res. J. of Int. L.* 267, at pp. 324-331 on P.R.C.'s financing techniques; *Japan Economic Journal*, articles: Commercial banks reach understanding with China (13th Mar. 1979) and: China's foreign currency borrowings reach 17 billion dollars (29th May 1979); *Toronto Globe and Mail* article: China's financial dealings reach across the globe (16th Jan. 1980); J.E.T.R.O., pp. 124-138 (on financing of business in the P.R.C.). According to the *Wall Street Journal*, 17th March, 1981, the Chairman of the China International Trust and Investment Corporation announced the P.R.C. plans to offer the equivalent of between U.S. \$48 million and U.S. \$72 million yen-denominated debentures in Japan.

largest loan of the kind ever made by the E.D.C.), and one or two chartered banks have been involved in major credit extensions to mainland China. From around the beginning of 1979 to June of that year, the P.R.C. obtained over 20 billion dollars of foreign credits:¹¹⁰ France, 30 billion Fr. F.; United Kingdom, five billion U.S. dollars; Italy, one billion U.S. dollars; Japan, 420 billion Yen; Australia, 45 million U.S. dollars; Canada, (approximately) 2.3 billion U.S. dollars; Sweden, 350 million U.S. dollars; Argentina, 300 million U.S. dollars; private sectors (banks in Canada, United Kingdom, United States, West Germany, Chile, Japan) about three and a half billion U.S. dollars (of which the credit extended by the Bank of Tokyo and others in a twenty-two bank private consortium amounted to two billion U.S. dollars, and the credit extended by U.K. banks amounted to 675 million U.S. dollars).

Prior to 1972 Sino-Japanese trade was conducted in British sterling, but thereafter (by an agreement in August of that year) the importer was given the option of choosing the currency of payment and in practice the Renminbi became the standard for "all of Japan's exports to China and for eighty to ninety percent of its imports from the P.R.C."¹¹¹ Another financial technique used in Sino-Japanese trade was to make back-to-back deposits of Renminbi and Yen or back-to-back deposits of third nation currencies in Japanese banks and in overseas branches of the Bank of China. The Japanese third nation deposits exceeded those of the Bank of China and the Bank of China would borrow the surplus against import liabilities.¹¹²

There have been various other financing plans offered by the Japanese to the P.R.C., for example,¹¹³ (a) loans by Japanese financial institutions below O.E.C.D. standards for a developing country such as the P.R.C.;¹¹⁴ (b) a Japanese importer would receive a loan at low interest from the Japan Export-Import Bank and would then make an advance payment to the Chinese exporter; (c) Japanese foreign reserves would be deposited either directly or through financial institutions with Chinese banks to become available for import financing at low interest rates. But by 1978 the P.R.C. had adhered to the O.E.C.D. interest rate restrictions, and appeared to become less rigid (but indecisive) about acceptance of direct foreign government financing.¹¹⁵

¹¹⁰ J.E.T.R.O., pp. 130-131.

¹¹¹ Leng, *op. cit.*, footnote 109, at p. 326.

¹¹² Leng, *ibid.*, at p. 326.

¹¹³ Details from Leng, *ibid.*, at p. 328.

¹¹⁴ O.E.C.D. voluntary guidelines: 7.25% for loans of 2-5 years and 7.5% for loans of 6-10 years.

¹¹⁵ See Leng, *op. cit.*, footnote 109, at pp. 329-330 for some details.

All this raises very important questions about the P.R.C.'s capacity to support foreign finance of the magnitude indicated. Indeed the Chinese appear to have been asking themselves the same questions, and in April 1979 a three year period of readjustment, restructuring consolidation, and improvement was announced and new priorities were set for the many capital development projects, on the wings of which China was to become an industrialized nation by the year 2000. In some cases the brakes were applied somewhat abruptly.¹¹⁶ Now things appear to be moving in the same general direction but at a more moderate pace.

The Chinese have not provided comprehensive data on their modernization and import plans and their intentions as to financing (and no doubt these are, in any event, under frequent review). It has been said that the modernization plan will require expenditures of 600 billion dollars by 1985, and the United States Department of Commerce has projected ten billion dollars in sales to the P.R.C. in the same period.¹¹⁷

"The P.R.C.'s payment commitments will exceed revenues by almost \$300 million in 1979 to 1981, based on a five year deferred payment formula, the current prices of Chinese exports, and the ordering of eight billion dollars worth of plant imports between 1978 and 1980. This situation would improve in 1982, when China would enjoy a surplus of over \$150 million, and this favorable trade balance would continue into 1983 through 1985 . . .".¹¹⁸

The heart of the problem is the projected future hard currency shortage against the massive programme of development imports. The publication of the Japan External Trade Organization, *The Japanese Perspective on China's Opening Economy* estimates the P.R.C.'s shortage of funds as follows: "First, the portion of China's total customs-cleared imports from noncommunist countries was estimated. Then the portion of imports which will have to be paid for within the year in question was calculated by subtracting imports of plants and grains purchased on credit from total noncommunist countries' customs-cleared imports. From this amount, China's estimated revenue from exports to noncommunist countries was subtracted, and the debt repayment amount falling due during that year was added. This amount is considered China's fund shortage for that year."¹¹⁹

¹¹⁶ For example, reference Japan—Japan Economic Journal, article: Chinese action cause shock (6th March 1979).

¹¹⁷ Pattison, *Transactional Guide to China Trade* (1979), 25 *Prac. Law* 77.

¹¹⁸ Leng, *op. cit.*, footnote 109, at p. 327. See also a more detailed discussion in J.E.T.R.O., pp. 130-138.

¹¹⁹ J.E.T.R.O., p. 137.

This calculation produced the following estimates of shortages of hard currency (in millions of dollars):

1979	— 4,024
1980	— 4,493
1981	— 4,427
1982	— 6,438
Total 1979-1980	— <u>19,372</u>

Of the figure of over twenty billion dollars mentioned above of foreign loans to the P.R.C. about half is trade credit and not available to reduce the hard currency shortage.¹²⁰

Clearly this "cash flow" problem will have to be solved in some fashion, if China's industrialization projects are to be carried out as conceived. Will the P.R.C. abandon even more the "no foreign loans" maxim (mentioned above) and make more substantial foreign borrowings to finance the big (and growing) shortfall in cash? This would involve a gamble of considerable magnitude, namely, hoping to build up an industrial infrastructure to create enough exports to bring the foreign loans under control and curb a disastrous continuity of foreign debt expansion. For a poor, developing country with a present hard currency shortage of twenty billion dollars this would be surely a high-risk policy. It is perhaps more likely, therefore, that China will modify its self-reliance policy and not only abandon "no foreign loans, no foreign investments" but also "no foreign aid". Indeed some current financing schemes seem rather like under-cover foreign aid. No doubt the P.R.C. will attempt to boost direct investment through the Joint Venture Law and various forms of co-operative trading.¹²¹ But there is no assurance that either of these will achieve enough foreign popularity to make a big contribution to solving China's cash flow problems. This leaves foreign aid—international, or national or a combination scheme. Mainland China was exploited by foreign countries for many years and it has been ravaged by war with Japan and civil war. It has a huge population and wishes to build itself from a poor country into an industrial state in about three decades. On these facts the P.R.C. would seem to qualify for the equivalent of "Marshall Plan" assistance. But, of course, the P.R.C. is a communist country, and it also has an anxiety about dependence on foreign countries, especially those very countries who attempted to control it in the past. Clearly, therefore, the problems are not just in the areas of international trade and business, but are essentially political and governmental. Not only the government of the P.R.C., but also the governments of the developed countries, are faced with hard political deci-

¹²⁰ *Ibid.*, p. 138.

¹²¹ Discussed in section V of this article, *supra*.

sions in this connection, decisions that may radically affect international relations and trade in the year 2000 and beyond, since, in addition to other factors both political and economic, the P.R.C. and surrounding countries such as Japan, Taiwan, Korea, have something approaching a third of the world's population.

IX. *Taxation.*¹²²

The public revenue of the P.R.C. has been derived from taxes and the profits of state-owned enterprises. "During the early 1960's, taxes accounted for 60 to 65 percent of the total; but in the early 1970's reports suggested that this had shrunk to only about 30 percent and that the share of enterprise profits had expanded to nearly 70 percent. One reason for this appeared to have been a change in the enterprises' financial obligations to the state. In the mid-1960's most of these were allowed to retain a small share—probably averaging about 5 percent—of their profits; but by the early 1970's it seemed that they were required to pass on the whole of their net earnings to the authorities."¹²³

The Industrial and Commercial Income Tax is levied on permanent and temporary industrial and commercial enterprises which are not state controlled. The tax seems to apply to co-operative societies (small or medium-sized collected enterprises); mixed enterprises (combination of state ownership and private ownership, for example, non-resident ownership, as in the case of the Bank of China); private enterprises (such as a foreign bank operating in China); enterprises connected with people's communes.

The tax is a progressive income tax on net revenue and the rates vary from 5.75% to 34.5%.¹²⁴ In addition there is a local surcharge of between 10% and 100% of the principal tax. Apparently the current surcharge is 60% so that the maximum combined rate is 55.2%.

The accrual method is used for the calculation of income, so that capital gains are included in taxable income. There is no separate capital gains tax. Normal business expenses seem to be deductible and straight—line depreciation. There are a variety of special exemptions.¹²⁵

The Industrial and Commercial Income Tax will affect foreign corporations doing business in the P.R.C.

¹²² The principal source is P.R.C. (2nd ed.), section C. See also note on U.S. Taxation of Trade with China (1974), 8 Vand. J. of Trans. L. 189.

¹²³ Encycl. Brit. (macropaedia), Vol. 4, p. 281. The ratio of tax revenue to total national revenue is said to be 40%.

¹²⁴ For the rate table see P.R.C. (2nd ed.), C.13.1.

¹²⁵ See P.R.C. (2nd ed.), C. 2.1.3 for details.

The Industrial and Commercial Consolidated Tax is levied at each stage of processing, delivery, and so on.¹²⁶ It is not a value added tax since no credit is given for tax already paid on prior taxable events in the production chain. The rates vary from 1.5% to 69%. Delivery on import is a taxable event and also the payment of interest, royalties, and the like. The allocation of these taxes between buyer and seller should be covered by agreement. The status of this tax seems doubtful at present.

In September 1980 the P.R.C. adopted new tax laws, namely, a tax on individuals with graduated rates up to 45% (for \$96,000.00 U.S.) and tax rules for foreign investment joint ventures (at a rate of about 33%).¹²⁷

A meeting on tax problems between Chinese and Japanese delegations took place in September 1979 and discussed various aspects of Chinese tax reform and the development of a modern tax system in the P.R.C. (including the study of European value added tax).¹²⁸

The P.R.C. has plans for some tax free export zones, particularly related to import of goods for export production, and also special industrial zones which may include tax concessions.

X. *Dispute Settlement.*

An American lawyer who specializes in Chinese affairs and international trade and who has had substantial experience of negotiating in the P.R.C. has stated (in a 1973 publication) that "the Chinese seem to want to avoid any dispute settlement that smacks of adjudication, whether it is arbitration in a third country or in China. They strongly prefer a negotiated compromise settlement. Sellers who have insisted on arbitration have sometimes found their request ignored; others have found a Chinese willingness to compromise. There are no reliable accounts of any trade arbitrations conducted in Peking".¹²⁹ Apparently, the Chinese preference in regard to settlements has been to give concessions to foreign buyers on later transactions or purchases.¹³⁰

¹²⁶ *Ibid.*, C.9.1.

¹²⁷ For details see Price Waterhouse, *International Tax News*, February 1981; and for the text of the Regulations of the Individual Income Tax Law and the Tax Law on Joint Ventures, Foreign Investments, see *Beijing Xinhua in English*, 17th December, 1980.

¹²⁸ *Tax News Service*, 15th Jan. 1980, 31st May 1980.

¹²⁹ Lubman, *op. cit.*, footnote 30, at p. 66. Lubman, *Trade between the United States and the People's Republic of China op. cit.*, footnote 30, pp. 45-49; Palay, *op. cit.*, footnote 5, at pp. 122-128.

¹³⁰ Fishburne, *op. cit.*, footnote 27, at pp. 243-247.

There is machinery for arbitration in the P.R.C., but it seems to be regarded as a last resort, and court litigation of trade disputes is so far unknown. The usual process is for face-to-face talk with officials of the appropriate Foreign Trade Corporation or sometimes a third party Chinese conciliator. "They do not entail any formal procedures and are based upon the belief that virtually every dispute is amenable to resolution through rational dialogue in the spirit of compromise. Westerners have found that, although friendly negotiations commonly result in agreement, the process is often excruciatingly slow."¹³¹

Export-import agreements may contain an arbitration clause, to be applied, for example, only after the failure of efforts to solve the dispute "by friendly negotiations on the principles of seeking truth from facts and of fairness and reasonableness".¹³² The named arbitration bodies will be the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade (C.C.P.I.T.) for trade disputes and the Maritime Arbitration Commission of the C.C.P.I.T. for maritime disputes. It is unlikely that the Chinese would agree to a clause selecting a foreign proper law. However, there seems to be some flexibility in regard to the form of arbitration clauses, and also selection of conciliators and arbitrators.¹³³

The Foreign Trade Arbitration Commission was established in 1954 to deal with disputes under international trade contracts, and it consists of a chairman, a secretary-general, a deputy secretary-general and twenty members. Each party to the dispute selects one arbitrator from the members of the F.T.A.C. and the two arbitrators select a third member, who functions as president and umpire. Alternatively, the parties may agree on a single arbitrator. The arbitration process begins with a written application and statement of claim, naming an arbitrator, and accompanied by relevant documentation, together with a deposit of one-half percent of the value of the claim.¹³⁴

Undoubtedly, however, the whole topic of the settlement of P.R.C.-foreign disputes is in a developing state, and its future will

¹³¹ Fishburne, *ibid.*, p. 243.

¹³² P.R.C. (2nd ed.), B.1.6.

¹³³ Fishburne, *op. cit.*, footnote 27, p. 244, where it is stated that "Foreign Trade Corporations have agreed in a number of instances to clauses calling for arbitration in such countries as Sweden, Holland, and Switzerland, and, on occasion, Canada. Arbitration clauses sometimes list three countries and state that arbitration will be held in one of them." Another possible variation is arbitration in the defendant's country, under the arbitration law of that country.

¹³⁴ See Fishburne, *op. cit.*, footnote 27, pp. 245-246, and Palay, *op. cit.*, footnote 5, for further details. The P.R.C. is not a party to the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1959), 330 U.N.T.S. 2.

depend on political as well as business considerations, bargaining strength, how much China needs Western technology, and so on. But it must be remembered that the Chinese have a dislike for third party adjudication of disputes.¹³⁵ The Chinese approach is that reasonable people should settle their differences between themselves, and that to have to resort to legal confrontation before a judge involves a loss of face, and a possible indication that one is anti-social and unable to get along with one's neighbours. North Americans, being, perhaps, more addicted to lawyers and court actions than people in any other part of the world, may find it difficult to accommodate themselves to the Chinese view, but some cooling of North American litigiousness in favour of "friendly discussion" would be a useful by-product of trading with East Asia.

XI. *Commercial Law.*

The indications are that the opening up of the P.R.C. to trade with the West, including joint ventures, is giving rise to plans for a Chinese structure of commercial law and institutions to facilitate international business. No doubt new laws in this area will be announced from time to time. But, because of the communist system in the P.R.C., it may be that many matters will be left to administrative decision and negotiation with governmental departments and agencies, rather than be spelled out in promulgated laws. Apparently the Chinese have shown an interest in the Yugoslav legal system which has a system of worker-management of enterprises, and also admits joint venture arrangements with foreign business entities.¹³⁶

But there is still a wide gap between attitudes in North America and the P.R.C. in regard to law and lawyers. A Chicago lawyer, who has had experience of negotiating with the P.R.C. and who resides in Taiwan, has stated that the Chinese "believe that lawyers are trouble-makers, pettifoggers, shysters, and—this is perhaps the most damning of all—that they are utterly superfluous",¹³⁷ at least in the domain of business negotiations and contracts.

Although the P.R.C. approach has been a simplified judicial system with virtually no lawyers or legally trained judges (based on

¹³⁵ This seems to apply also (at least to some extent) in Japan (and likely elsewhere in East Asia). Guittard, *op. cit.*, footnote 69, states: "To the Western businessman, particularly an American or Englishman, a sales agreement is a definite listing of the rights and duties existing between the parties; however, his Japanese counterpart is more likely to regard the document as the charter of a relationship or an expression of it."

¹³⁶ King, *op. cit.*, footnote 66. On the Yugoslav system: Bagnall, *A Manager's Paradise where the Workers Rule*, Financial Post, June 1980. See also Ginsburg, *American Bar Association Delegation Visits the People's Republic of China (1978)*, 64 A.B.A.J. 1516.

¹³⁷ Torbert, *op. cit.*, footnote 29.

Maoist doctrine of leaving authority to the masses), there are reports of a greater interest in law and the training of lawyers.¹³⁸ The law department of Peking University has over 300 students, and there is a Law Institute of the Chinese Academy of Social Sciences.¹³⁹ But these legal institutions relate to a population of close to one billion people.¹⁴⁰ It has been stated (in an article published in 1977) that Japan has eight lawyers per 100,000 of population, whereas the United States of America has 150 lawyers per 100,000 of population.¹⁴¹

Perhaps the general comment to be made in this section is the need for greater awareness of commercial-legal practices and thinking in other countries, and this especially by lawyers and law students with aspirations towards international business. It has to be realised that the common law countries, and especially the United States and Canada, are rather unique and atypical in their emphasis on legalistic concepts and solutions and in the unusual density of lawyers and judges in the population. Canada needs a more "international" approach to the study of foreign legal systems (and commercial practices). It is quite inadequate to think of comparative studies in law as learning a little about the Quebec Civil Code, or vice versa, the common law. The pressure of international business in the 1980's will demand an international approach to comparative studies and the preparation of lawyers with interest and sophistication out beyond the confines of domestic Canadian provincial and federal law, and including investigation of the thinking and business practices of other parts of the world besides North America.¹⁴²

XII. *Japan and the People's Republic of China.*

It was, of course, to be anticipated that Japan would have a particular interest in Chinese modernization. Considering the strong emphasis by the Japanese government and business on foreign trade, Japan is

¹³⁸ Cohen, *Will China have a Formal Legal System?* (1978), 64 A.B.A.J. 1510.

¹³⁹ Cohen, *ibid.*, at p. 1519. A comment on China's Lawyers in 23 *Beijing Review* indicates that there are now about 2500 full-time lawyers and about 350 part-time lawyers in China.

¹⁴⁰ According to an article in the *Financial Post*, June 1980, Canada has more than 640 federally appointed judges. According to McLean's, 6th April 1981, the number of lawyers in Canada per head of population has almost doubled in the last ten years and is now one for every 667 people.

¹⁴¹ Johnson, *Japanese Legal Milieu and its Relationship to Business* (1976), 13 *Am. Bus. L.J.* 335, at p. 349; Von Mehren, ed., *Law in Japan* (1963), pp. 111-152.

¹⁴² Compare the plea for more lawyers specializing in U.S.-Japanese business law, due to the rising volume and difficulty of U.S.-Japanese business ("No other bilateral area approaches the challenge; no other field is less well served . . .") by Henderson, In *Modern China and Japan* (1973), 66 *L. Lib. J.* 429.

hardly likely to ignore the possibility of major economic changes and market developments in the huge population across the East China Sea. The foreword to *The Japanese Perspective on China's Opening Economy*¹⁴³ states that there is a "wealth of data on the Chinese economy in Japan, which, in its aggregate, is comparable to that of the finest research and intelligence organizations the world over. This includes meetings with high-ranking P.R.C. officials, first-hand reports of businessmen visiting local sites, and the experiences of manufacturers in actual implementation of business deals. Access to this is one of the edges the Japanese entrepreneur has over his Euro-American counterpart". The same publication stresses the experience and expertise of the Japanese trading companies and predicts that they have a special role in achieving predominance for Japan in China trade.¹⁴⁴ There are various Japanese statements referring to their special capacity for trading with China.¹⁴⁵

There are also various Japanese statements about the future importance of the Far East group of countries in world trade and politics, and Japan, of course, is the strongest and most advanced economy of that group. Japan is also playing a significant role in promoting a concept of a Pacific Economic Community.¹⁴⁶ This proposal includes (a) the reinforcement of inter-Pacific traffic and telecommunications networks; (b) educational exchanges, in which Japan will take the lead "by establishing in Japan graduate-level educational institutes in which foreign professors will account for half of the faculty (as compared to practically no foreign teachers at present), by expanding language study centres throughout the Pacific area, and by simplifying Japan's immigration control procedures"; (c) the creation of a Pacific Fund for economic assistance and co-operation between energy supplying and consuming nations; (d) free

¹⁴³ J.E.T.R.O. publication in 1979 intended, according to the foreword, to make Japanese information of the P.R.C. economic changes available to "the foreign business person" in "the belief that the expansion of world trade is to the benefit of all . . .".

¹⁴⁴ "Given these years of experience in trading with China, Japanese trading companies have acquired a level of expertise and an extensive network of business relationships and information sources which will long serve to sustain Japan's predominance in world trade with China.

The advantages and strengths of these trading companies can be made use of by non-Japanese companies seeking to engage in trade with China as well. J.E.T.R.O. believes that the mutual benefits, to the foreign company, to China, and to Japan, of involving Sogo Shosha (Japanese trading companies) in trade interactions with China, can be quite significant, and even make the difference between success and failure in some cases."

¹⁴⁵ For example, Sekiguchi, Japan is better equipped to offer assistance in China, *Japan Economic Journal*, February, 1979.

¹⁴⁶ This proposal is discussed in an article Japan Sets Sail for the Pacific Basin, *Focus Japan*, May 1980.

trade and capital transfer in the Pacific area; (e) joint research, for example, on marine resources, petroleum, coal, solar energy, nuclear power, food policy.¹⁴⁷ There have been statements by Jiro Tokuyama, Executive Vice-President of Nomura Research Institute, that the Japanese proposal for a Pacific Basin Community is not to be misunderstood as a revival of the Greater East Asia Co-prosperity Sphere campaign of World War II, and also, is not merely an attempt by Japan to acquire better access to natural resources.

But during the present century Sino-Japanese relations have often been far from harmonious and there have been periods of bitter war between the two countries. Japan, along with other countries, particularly Britain, the United States, France, and Germany, interfered aggressively in China over the last hundred years or so, and forced extraordinary concessions and privileges from the Chinese. Japan invaded China in the 1930's. By the early 1940's there were almost a million Japanese soldiers in China.

It has been stated that "as China goes so goes at least half of Asia. There is both theoretical justification and historical evidence to substantiate the truism. The struggle for the control of China has been the stuff of international politics in East Asia for a century. It was China that was the object of Occidental manoeuvres and manipulations until World War I, when Japan took precedence over all other Powers, since they were then absorbed in that first great internecine struggle of the West. And even Japan's importance and its potential menace derived, not from its own properties or powers, but from the power it would obtain from control of China. Without China it would remain a second-rate Power; with China it would become an aggregation of might that could imperil the world. Even in Japan's fleeting moment of glory China, not Japan, was the focal point of East Asia. The core of East Asia culturally, politically, economically was, is, and probably will be China".¹⁴⁸ Whether this diagnosis is, or will be so in the future, or whether the picture will be altered by the great economic changes that have involved, or seem likely to involve the Far East in general, producing new political (as well as business) goals, alignments and psychology, nevertheless, Sino-Japanese relations are certain to be of key importance in international politics and trade. In future decades the centre of gravity of political and economic power could move to the Far East.¹⁴⁹ If so the structure of that region would be of obvious importance, and, in that context, the Sino-Japanese

¹⁴⁷ *Ibid.*

¹⁴⁸ Pfeffer, *op. cit.*, footnote 4, p. 7.

¹⁴⁹ As to Roosevelt's and the American view, during World War II, of the central importance of China (as compared with Churchill's and the British view that the war in Europe was paramount) see Tuchman, *op. cit.*, footnote 6, p. 240.

relationship could be critical. Australia will likely play an important role in any such change. The Director of the Queensland Government Office has stated: "Most of us don't realize it, but we are taking part in an economic revolution that has enormous implications for distribution of the world's wealth. That revolution is taking place in this region—right on our very doorstep. The OECD has projected that in about 20 years' time, the combined G.N.P. of the countries of the Western Pacific basin area will be greater than that of North America and Europe combined."¹⁵⁰

There are some who appear to think that because Japan achieved modernization in a remarkably short time and went on to become one of the world's most powerful economies—notwithstanding defeat and industrial devastation in World War II—that the P.R.C. may also be expected to achieve fast modernization. But there are important differences.¹⁵¹ In Japan, prior to World War II, major new industrial and financial undertakings were initiated by a few prominent families, who had the ability, capital, technical resources and government support. From these evolved the *Zaibatsu* which became large groups of diversified companies under the control of family holding companies.¹⁵² The *Zaibatsu* borrowed heavily from Western corporate models and techniques. The Allied Occupation after World War II broke up the *Zaibatsu* and dissolved the holding companies. But the components were not destroyed, and rose like the Phoenix, forming themselves differently—based on co-operation and consensus instead of central control by holding companies—to form the huge modern Japanese multinational groups with their trading companies.¹⁵³

The course of modernization cannot be the same in the P.R.C. China is not a cohesive, centrally-controlled country like Japan, and a powerful group of private entrepreneurial families has not emerged, and is not likely to do so in a communist state. In such a state the main driving force must come from the central government with delegations to local governments. It will surely be one of the great questions of the remainder of this century whether the politicians and bureaucracies of the P.R.C. will be equal to the task of organizing and financing the rapid modernization of a billion people.

¹⁵⁰ Focus Japan, June 1980.

¹⁵¹ See generally on the Japanese economic and corporate development, for example, Yoshino, *Japan's Enterprises* (1976); Brookings Institution, *Asia's New Giant* (1976); Clark, *The Japanese Company* (1979).

¹⁵² E.g. *Mitsui, Mitsubishi, Sumitomo, Yasuda*.

¹⁵³ The six dominant Japanese trading companies had sales in 1973 equivalent to 20% of Japan's G.N.P.; they held stock in over 5,000 companies (by 1974); and their extensions of credit to suppliers considerably exceeded the total loans of the largest Japanese commercial bank.