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PERSPECTIVE

China's Reform of Aviation: A Signal of the Significance of Competition Under Law

*Barry Kellman**

INTRODUCTION

What will China be like at the millenium's close? China may be the most changing nation on Earth, with few definite landmarks to guide analysis of political and economic developments. One's perspective is important: up too close, one sees the eddies of intrigue which occasionally topple someone in high office; too far back, one can miss the extraordinary significance of what is happening in China at this point in history.

This discussion has limited goals. Under examination is the strikingly anomalous introduction of competitive economic forces into a high-

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technology service sector: aviation. The approach of this examination is to inquire into the development of legal systems regulating that competition. Part I establishes the theoretical principles of the recent economic reforms in China. Part II describes the manifold changes in China's aviation industry. Part III offers some restrained comments regarding what these changes may, in light of the past, signify for China's future.

I. THE REGULATED COMPETITIVE ECONOMY OF MODERN CHINA

A. The Chinese Concept of Competition Under Law

According to recent pronouncements, since the founding of the People's Republic of China thirty-eight years ago, the economy has failed to meet the dreams of its leaders and the needs of its people. There are many reasons for this—historical, political, and ideological. The major economic cause recognized by the Central Committee of the Communist Party of China ("Central Committee")¹ is "a rigid economic structure that cannot meet the needs of the growing forces of production."² Specifically: 1) no clear distinction has been drawn between the functions of the government and those of the enterprise; 2) barriers exist between different departments or regions; and 3) the state has exercised excessive and rigid control over enterprises.

These problems of economic structure have deprived enterprises of necessary decision-making power with a resultant loss of vitality to the society as a whole. The legal system enforced this rigidity by imposing unreasonable restraints on economic activity. Thus, there existed a direct causal connection between the dependent legal status of enterprises and the loss of opportunity to engage in economic activity in light of specific situational attributes and the consequent failures of the Chinese economy.³ Therefore, it was thought that advanced methods of economic organization were necessary in order to bring about a radical change in the economic structure that could unimpede development and modernization.⁴

A critical issue that has been squarely faced by the Central Committee is the role of competition in the modern socialist planned economy.

¹ Decision of the Central Committee of the Communist Party of China on Reform of the Economic Structure (Adopted by the 12th Central Committee of the Communist Party of China, Third Plenary Session), Oct. 20, 1984 [hereinafter Decision].

² *Id.*

³ Huang, *On the Legal Problems in the Reforms of the Economic System*, STUDIES IN LAW (1985).

⁴ Decision, *supra* note 1.

Simply stated, enterprises are to be put to the test of direct judgment by consumers in the marketplace so that only the best survive. This policy is intended to help break the monopoly blockade hampering the growth of production and to stimulate enterprises to improve technology operation and management. Yet Chinese decisionmakers apparently realize that the advent of competition calls for regulatory law to channel competitive forces into socially productive uses and to punish anticompetitive conduct.⁵ Thus, where the law had served to impede progress by stultifying individual initiative, the law must now encourage progress by establishing just rules of competitive rivalry.

The concept of competition under law has two fundamental meanings in the context of Chinese modernization. First, and most important, it means that there will be a decoupling of state authority from entrepreneurial management. Second, it means that a plurality of economic actors will participate in the same markets and will have to rely on their skill, ingenuity, and business acumen to survive subject to the right of other competitors to do the same. These two meanings may be differentiated, but they share the mutual need for legal principles to establish the outer boundaries of acceptable economic activity.

This is an important starting point to establish. No technologically advanced society has a "free market" in the sense that private entrepreneurs have unfettered decision-making authority. Certainly in capitalist societies, entrepreneurs are restrained by state-imposed obligations to the social welfare and are limited by legal definitions of what constitutes permissible competitive conduct toward other participants in the market. Competition does not mean the absence of regulation. On the contrary, competition and regulation are literally two dimensions of the same phenomenon sharing the same goals. Competition is rivalry according to rules; regulation is the legal process of developing and enforcing those rules in a just manner.

To understand the regulated competitive economy of modern China, it is necessary to distinguish its legal underpinnings from those of an economy operated as a governmental monopoly. At root, in the competitive economy there are very strict limits as to what the government may consider a matter for its concern, and acts outside these limits are therefore redressable only in a private legal proceeding. Ironically, the key to understanding what is meant by free competition is to recognize that governmental authority, like private authority, is subject to legal limits. In contradistinction to the historical Chinese experience, a competitive

⁵ Wang, *On Legal Adjustment of Enterprise Competition*, JURISPRUDENCE (Mar. 1985).

system demands that the state forsake a position of omniscience regarding economic activity and accept a limited role as planner and regulator. This explains why the current effort toward modernization is so important: it signifies a profound recognition both of the necessity for governmental regulation of the modern economy under law as well as the necessity to draw a line of demarcation between the functions of state organs and the private enterprise's power of operations.

B. Delineating State from Private Decision-Making Authority

The Twelfth Central Committee identified that growth requires state management, inspection, and regulation of economic enterprises. More specifically, the state was instructed to: 1) use taxation and other means to concentrate in its treasury that part of enterprises' net incomes which should be used by the state in a unified way; 2) designate, appoint, and remove the leading members of the enterprises or approve their employment and election; and 3) determine the establishment of enterprises, their removal to other places, their switching to other lines of products, their merger with other enterprises, suspension of operations, and closing down.⁶ But no direct interference in enterprises' specific economic activities is to be allowed, especially in their productive management. The reason for this limitation is the realization that the complexity and changeability of social demand means that no state institution can know enough to cope with differing conditions in time. Without this limitation, the result has been "serious subjectivism and bureaucratism, with a consequent suppression of enterprise vitality."⁷

Formerly, central and local governments took responsibility for too many of the details of economic activity which rendered enterprises dependent on relationships with political authorities and increased the difficulties of management.⁸ To reform this system, the Twelfth Central Committee decided to reduce the scope of mandatory planning while extending guidance planning. Mandatory planning will be applied to major products which have a direct bearing on the national economy and the people's livelihood and which have to be allocated and distributed by the state, as well as major service sectors that affect the entire economy. Simpler and more numerous economic activities should either come under guidance planning or be left entirely to the operation of the mar-

⁶ Decision, *supra* note 1.

⁷ *Id.*

⁸ *Review of Forum on the Functions of the Government*, British Broadcasting Corp.; Summary of World Broadcasts, Aug. 16, 1986, at FE/8339/BII/1 [hereinafter *Review of Forum*](NEXIS library, BBCSWB file).

ket, as the case may require. The focus of planning will be shifted to medium- and long-term planning, and annual plans will be appropriately simplified. There should be a corresponding reform of planning methods. Full attention should be paid to economic information and forecasting so as to raise the scientific level of planning.⁹ As one Chinese commentator has observed:

The dependent legal status of enterprises weakened the proper function of state organs in managing the economy. The fundamental measures which can change this situation are to define properly the power of government departments and affirm that power in legal form. This redefinition is in line with the principle of separating the function of government and enterprises, streamlining administration, and instituting decentralization. If the economic administrative organ oversteps its authority or improperly exercises it with the result that the enterprise is injured, it should be liable for damages.¹⁰

The primary attribute of the modern Chinese economy is the replacement of the government by independent enterprises which will become the primary economic creators—that is, makers of new products, appliers of new technologies, entrants into new markets, and exploiters of new resources. To a great extent, Chinese economic reforms are premised on the raising of a new generation of entrepreneurs who are capable of breaking with the past. Chinese entrepreneurs, however, have not had sufficient independence to operate and manage their enterprises.¹¹ To remedy this impediment, the new reforms give the managers of enterprises six powers:

- 1) Production planning power to adopt flexible and diversified forms of operation, supply, and marketing;
- 2) Treasury power to keep and budget retained earnings;
- 3) Personnel power to appoint and remove employees;
- 4) Labor management power to decide how to recruit and use its work force and to determine wages and rewards;
- 5) Distribution power to determine the quantity, timing, and profits of contracts with other enterprises;
- 6) Power to set prices.

With power over production, enterprises may plan in view of their actual situation, revise specifications and variety, and more efficiently satisfy consumer needs. Overstocking of production, which has been a serious problem in the Chinese economy, should be alleviated by this

⁹ Decision, *supra*, note 1.

¹⁰ Huang, *supra* note 3.

¹¹ 'Renmin Ribao' Publishes the Views of 30 Entrepreneurs, British Broadcasting Corp.; Summary of World Broadcasts, Dec. 23, 1986, at FE/8449/BII/1 (NEXIS library, BBCSWB file).

transfer of planning power. With the financial power, enterprises can rely on the necessary capital for their activities without fear of unreasonable restraints imposed by administrative interference. Thus, enterprises should be able to arrange their funds according to their needs of operation. Other than exercising its power to tax, the state should not interfere with this aspect of management. The personnel power and the power to allocate the labor force do not conflict with the workers' role as masters of the economy, but are intended to ensure that workers enjoy legitimate material interest and honors in the success of the enterprise. Thus, absolute egalitarianism in the distribution of economic rewards is inappropriate. The distribution power extends the decision-making power of enterprises to contracts with other enterprises. For instance, enterprises should now be permitted to sell excess stock at reduced prices and to dispose of replaced fixed assets as necessary. Finally, the power to set prices means that, for the Chinese consumer, the marketplace will be a signal of competitive differentiation both as to efficiency of production and as to the desirability of the product.

In short, the enterprise should be truly made a relatively independent economic entity and should become a producer and operator of socialist commodity production that is independent and responsible for its own profit and loss, is capable of transforming and developing itself, and acts as a legal person with certain rights and duties. This is the way to ensure both overall unity of the growth of the national economy as a whole and the diversity and flexibility of individual enterprises in production and management as well as their desire to make progress.¹²

C. Limits of Acceptable Competitive Conduct

In the Chinese socialist system, competition is the external expression of the law of value and an objective economic measurement. Competition separates the advanced from the backward enterprises and allows the former to succeed. Competition permits enterprises whose products will not sell and enterprises with excessive debt to go bankrupt. Modern competition involves the use of new technology, exploitation of new products, and new methods of scientific management. Therefore, legal regulation of economic competition should encourage technological reform, replacement of products, and improvement of management.¹³

The antithesis of competition is monopoly. Marx cautioned that one of the preconditions of making the mutual exchange prices of commodities approximately meet their values is the absence of monopoly which could compel higher prices or lower value. Monopoly has two

¹² Decision, *supra* note 1.

¹³ Wang, *supra* note 5.

forms of expression: administrative monopoly and economic monopoly. The former refers to the prohibition of competition through command of competent legal authority. For instance, a regional blockade refers to prohibitions against entry by competitors from other parts of the country in order to protect local producers from competition. The result is market division with its concomitant anticompetitive effects.¹⁴ The State Council has strictly forbidden territorial blockades, but this prohibition is not vigorously enforced.

Economic monopoly refers to agreements among competitors which tend either to raise prices or to exclude other competitors. In the context of the Chinese marketplace, where cooperation is a strongly cherished virtue, it is difficult to distinguish between agreements which are advantageous to the development of commerce and those agreements which merely restrain competition. Thus, criteria are needed to determine what types of agreements are reasonable and what types of agreements are monopolistic. While the list of potentially anticompetitive agreements is probably infinite, Chinese observers have tended to focus on the following four practices.

1) Tying arrangements whereby the seller of a desired commodity conditions the sale of that commodity on the purchase of another undesired commodity. The cause of such arrangements lies in the inability of the planned economy to cope with goods in excess supply. Consequently, sellers of goods with limited consumer demand attempt to unload these products by tying them to faster selling products. In 1981, the Ministry of Commerce issued a regulation prohibiting product tying.¹⁵ This policy was reinforced in 1986 when the State Council issued a policy circular against tying arrangements.

¹⁴ The recent "ginseng war" in Shanghai demonstrates such restraints in action. In late 1984, the Shanghai Ministry of Industry and Commerce permitted producers of ginseng from JiLing and HeiLongJiang provinces to sell their product which was priced lower, yet reputedly of better quality, than Shanghai ginseng. Complaints from sellers of Shanghai ginseng, however, caused the ministry to suspend this permission while the ginseng's quality was verified. When a testing center in Shanghai established that the competitive product was of equal quality, the suspension was lifted. In April 1986 the Shanghai authorities ordered that all ginseng sold in the Shanghai market must be uniform in quality and price. This policy effectively foreclosed non-Shanghai producers from the market.

¹⁵ The Regulation on Strictly Forbidding Product Tying provides that: 1) every distribution and resale enterprise shall organize to avoid overstocking of products and every enterprise has the right to refuse to purchase unmarketable products or products of low quality; 2) it is strictly illegal to tie high-quality goods to lower-quality items either at the distribution or resale level. Unmarketable goods can be consigned to the reseller who then acts as a commission agent in their sale; 3) whenever a distributor or retailer confronts a tying practice the buyer may refuse to accept the goods and may report the incident to superiors; and 4) the Ministry of Commerce shall investigate all complaints of tying practices and may issue disciplinary warnings where warranted.

2) Payment of sales rebates whereby sellers promote their goods by compensating purchasers directly rather than lowering price or improving quality. Again, the problem stems from oversupply of unwanted items which congest the marketplace.

3) Interference with contractual relations whereby consumers are lured away from one enterprise, not because of the inferiority of that enterprise's products or its prices, but because the competing enterprise has disparaged the original seller or in some way coerced the purchaser to change suppliers. Also included in this category is false advertising whereby the seller attracts consumers with untrue assertions regarding the product.

4) Theft of trade secrets or trademarks in which the creative forces necessary for effective competition are rendered useless to the original seller because a competitor has either taken advantage of the goodwill inherent in the creator's trademark or has succeeded in copying the creation. Such theft can occur because the competitor gains direct access to the creative producer's facilities, because the competitor is able to take advantage of an unfair relationship with administrative authorities, or because the competitor hires away key employees of the creative producer. Regardless of the method employed, such theft is difficult to control in the absence of legal protections for trade secrets or trademarks.

The consequence of these concerns is that, in order to establish a competitive market in China, a regulatory system must be instituted which: 1) prevents administrative authorities from interfering with the free play of competitive forces throughout the national economy; and 2) channels entrepreneurial activity into competitively advantageous efforts.

D. Applications and Impacts of the Initial Reforms

In the regulated competitive economy of China, independent entrepreneurial decision-making remains subject to the guidance of state planning and administrative management. In attempting to move from a restrictive and hierarchical system of management to a more democratic system, Chinese authorities have recognized the need for a gradual introduction of major changes. Accordingly, the commodity economy has been divided into three categories.

The first category consists of agricultural production, production of small articles of daily use, and enterprises engaging in service and repair. A principal contribution of the Eleventh Central Committee was to subject industrial sectors in this category to managerial independence and marketplace competition. Enterprises are permitted to raise funds

needed for expanding production by issuing shares of ownership stock. The government only assigns guidance planning to these enterprises and allows them to participate competitively in their markets. For industries in this category, production and operation can be suited to the complex and changing demand of consumers and the initiative of individual producers.¹⁶ As is widely known, this has been China's major success story. The average annual growth rate of agricultural output value since the reforms enacted by the Eleventh Central Committee has exceeded 10% with production of nearly all goods in excess of planned targets. More to the point, most localities have basically solved the problem of having enough for people to eat and wear.¹⁷

Enterprises in the second category are large-sized enterprises in metal smelting, machine building, and heavy industries. While their means of production are state-owned, they are allowed to compete on the basis of different quality and price. The government's managerial role stresses guidance rather than mandatory planning, preferring indirect to direct legal controls. The introduction of independent entrepreneurial management and competitive markets has been distinctly slower here than in the first category. However, spurred by the demands of foreign competition and the need for export trade primarily with regard to the products of industry, measures have been taken to adopt competitive reforms. The result has similarly been an increase in production in excess of planned targets with notable increases in the design of light and textile industrial products where the reforms have been most strongly felt.¹⁸

Enterprises in the third category are not considered producers of commodities; consequently, competition has no role and the distribution of the goods produced by these enterprises is not regulated by market forces but by mandatory government planning. Included in this category are mining, banking, the military industries, railway transport, posts and telecommunications, large electrical installations, as well as land and forestry. The means of production here are exclusively the province of state ownership and control.

The progress of Chinese economic reforms can be measured as the spread of entrepreneurial management and competitive market regulation from industries of the first category to industries of the second category and the simultaneous recategorization of industrial sectors from the third to second category and from the second to the first. The aviation

¹⁶ *Review of Forum*, *supra* note 8.

¹⁷ *Steady Progress in Sixth Five-Year Plan Period*, British Broadcasting Corp.; Summary of World Broadcasts, Sept. 17, 1985, at FE/8058/C1/1 (NEXIS library, BBCSWB file).

¹⁸ *Id.*

industry, for example, has long been considered in the third category. Recent reforms, however, demonstrate that many aspects of aviation are now being treated as either heavy industry (the production of planes) or as service (the air transport of people and cargo). Correspondingly, systematic and comprehensive reforms have privatized decision-making authority and introduced competition in aviation in a manner unprecedented and unequaled in the recent Chinese experience.

II. AVIATION REFORM IN CHINA

A. Need for Reform

In 1950, China had twelve airplanes, carrying less than 10,000 passengers and less than 160,000 tons per kilometer of cargo. By 1983 the situation had changed dramatically, with over 200 airplanes carrying almost 400,000 passengers and 650 million tons per kilometer of cargo. Nonetheless, the industry remained extremely backward by international standards.¹⁹ Even these higher figures represented only 2% of domestic passenger transport and only 0.01% of cargo transport. At this rate, China's aviation industry roughly equalled that of the Soviet Union in the 1950s and trailed behind India and Brazil. Whereas other nations experienced explosive growth in aviation between 1950 and 1980, China's rate of growth lagged substantially. Indeed, China's fleet in the early 1980s represented less than 2% of the world's airplanes, and most of these were vintage 1960s or before.²⁰ This state of affairs placed a substantial drag on the burgeoning and lucrative tourist industry. The regularity of long delays, poor service, slow and noisy airplanes, and the inability to purchase tickets in advance, all combined to depress foreign interest in China travel with a consequent loss of foreign currency.

The first major restructuring of the industry occurred on January 7, 1985, when the State Council approved the Report on Reforming the Management Structure of the Civil Aviation Departments ("Report"). Intended to help implement the policy of invigorating the domestic economy and opening up China to foreign tourists, the Report focused on the need to reform the decision-making structure which did not separate government from private economic spheres of responsibility. The two principles of reform are: 1) to separate government functions from enterprise functions; and 2) to simplify administration and to decentralize power to local productive units.

¹⁹ Sheng, *The Development of Our Civil Aviation Enterprise*, INTERNATIONAL TRADE (Nov. 1984).

²⁰ Yao, *The Conventional Transport Structure Should Be Reformed*, COMPREHENSIVE TRANSPORT (1984).

The Report called for the formation of independent civil aviation enterprises responsible for providing service and accounting for their own profits or losses. Enterprises would own aircraft, equipment, factories, and other fixed assets, and would be permitted to manage flights, aircraft affairs, and their use of funds. Indeed, these enterprises were given full decision-making power over production, management, use of funds, establishment of organization, personnel systems, and dispensation of rewards or punishments to workers. "It is necessary that enterprises compete reasonably with each other, ensure safety in production, improve service, and increase economic efficiency."²¹

After the transfer of these economic functions from the government to enterprises, the Civil Aviation Administration of China ("CAAC"), will no longer be in direct charge of aviation operations. CAAC will have an administrative role, but direct supervisory responsibility will be transferred to provincial, municipal, and autonomous region civil aviation bureaus. Furthermore, in order to unify and strengthen flight control, a number of aviation control centers will be established to coordinate and direct flights. By involving local departments and supporting them in running various enterprises in a planned manner, the State Council intended to tap local enthusiasm so as to accelerate growth. "It is necessary to establish, step by step, groups of aviation enterprises at multiple levels and create a dynamic situation in which backbone aviation enterprises, local aviation enterprises, and small aviation enterprises coexist."²²

CAAC will retain authority to approve the establishment of aviation enterprises but without clear guidelines governing how approval decisions may be made. All matters relating to the opening of international routes are left to negotiation between the appropriate foreign entities and CAAC—the exclusive international representative of the Chinese state regarding aviation. Only CAAC may open domestic routes following examination and in accordance with stipulations. Furthermore, local departments and enterprises may purchase aircraft for civil use upon preparation of a purchasing plan approved by CAAC. Such aircraft may be purchased only through CAAC's coordination and oversight in order to present a united front when dealing with foreign aircraft corporations.

Even without the State Council's Report, the Chinese aviation industry would have experienced substantial changes over the past two years. By 1985, transport tonnage had doubled from the 1980 rate and

²¹ *China State Council Approves and Transmits the CAAC's Report on Reform of the CAAC System*, People's Daily, Jan. 14, 1985.

²² *Id.*

eighty new domestic and international routes had been added, bringing the total to 267—an increase of approximately 60%. CAAC added nearly 100 imported jets to its fleets between 1980-1985, bringing the total number of planes to 460 and increasing passenger seats by 70%. In 1985 alone, China bought thirty jumbo jets and built or expanded sixteen civilian airports.²³ Such growth represented the beginning of an anticipated explosion in the prospects for Chinese aviation. By 1990, China expects to transport sixteen million people annually and 2,500 million tons per kilometer of cargo. Between 1985-1990, the top priority will be to develop new routes, including short-haul flights radiating from major cities to more remote areas and to increase the number of international routes and flights to Japan, the United States, and Europe.²⁴ Yet while the forces spurring on this growth existed independently of the State Council's reforms, the speed of the reforms' implementation and their wide-ranging impact on the Chinese system of economic organization are remarkable, especially in an industrial sector weighed down by historical backwardness.

A close examination of these initial aviation reforms reveals four critical aspects of Chinese economic reform which, when understood, can help illuminate the direction of Chinese policy.

1) Competition among airlines—Twenty-three airlines provide more service to more markets, thereby demonstrating the benefits of competition in the Chinese aviation marketplace.

2) Domestic production of aircraft—There has been a significant shift away from the purchase of foreign-made airplanes to the domestic production of planes by Chinese companies unaffiliated with the airlines.

3) Civilianization of aviation—The role of the military in aviation has changed from one of absolute control to a mere supporting role.

4) Sharpened focus of CAAC—Formerly the supervisor of all aspects of Chinese civil aviation, CAAC is now primarily responsible for route allocation, airports, and air traffic control.

B. Creation and Operation of Competitive Airlines

Within months after the issuance of the State Council's reforms, eleven regional aviation enterprises were established to provide transport

²³ *Statement by CAAC Director-General Hu Yi Zhou*, Xinhua Gen. Overseas Serv., Feb. 19, 1986, item no. 021931 (NEXIS library, Xinhua file).

²⁴ *Growth of Civil Aviation in the PRC*, Interavia Air Letter, Apr. 3, 1986, at 3 (quoting Hu Yi Zhou)(NEXIS library, AIRLTR file).

services. In the isolated province of Xinjiang, the Xinjiang Civil Aviation Company, jointly owned by the province and by CAAC, provides passenger and cargo transport, mail transport, and professional aviation services with twenty airplanes. This enterprise performs a service as an extension of CAAC in an area where CAAC had not provided significant service. Similarly, the Yunnan Aviation Corporation and the Heilongjiang Aviation Corporation are each a joint venture between the provincial authorities and CAAC and will provide local service which previously had not been adequately provided.

By contrast, the remaining eight regional airlines essentially replaced CAAC management by providing passenger and cargo transport to and from nearby provinces. The Xiamen Aviation Ltd. Company, formed in March 1984, is the oldest of the regional airlines.²⁵ The largest and most competitively important regional airline is Shanghai Airlines which from its inception has attempted to replace CAAC service from China's most populous and centrally located metropolis. A similar pattern is reflected in the formation of regional airlines based in Beijing, Guangzhou, Shenyang, Chengdu, Xi'an, and Lanzhou-Dalian.

Shanghai Airlines has provided the most competition to CAAC and calls itself the "first independent airline in China."²⁶ The airline is owned in part by a consortium of Shanghai's leading hotels. As Shanghai is the center of the civilian aircraft manufacturing industry in China, Shanghai Airlines serves the fastest growing aviation hub in China. With these advantages have also come strong impediments. CAAC dictated aircraft purchases until Shanghai Airlines purchased five used Boeing 707s from the United States in cash. In response, CAAC prevented Shanghai Airlines from flying the planes for months. Other problems have involved allocation of profits between international and domestic routes (as profits from international routes go to CAAC exclusively). Profit allocation is compounded by CAAC's establishment of fixed rates for all airlines. With these limitations on its ability to compete, Shanghai Airlines has devoted considerable attention to the selection and training of flight crews and attendants. The airline has established a training center for employees to learn Western standards of appearance, flight knowledge, and foreign languages. With regulated air fares, the main arena of competition will be in-flight service, where Shanghai Airlines

²⁵ *Xiamen Aviation Ltd. Company Set Up*, Xinhua Gen. Overseas News Serv., Mar. 4, 1984, item no. 030449 (NEXIS library, Xinhua file).

²⁶ *Shanghai Airlines Plans to Lure Passengers from National Carrier*, AV. WEEK & SPACE TECH., Mar. 3, 1986, at 34.

could provide an attractive alternative to the state-owned carrier.²⁷

Chinese aviation enterprises have not been limited to regional airlines providing general passenger and cargo transport services. Six enterprises have been established to provide specialized services. The Industrial Aviation Services Corporation is the largest aviation enterprise providing air photography, geological exploration (for minerals and oil), and fire and forest protection. Based at the Wushu airport in Taiyuan, this enterprise has established subsidiaries for service to other regions. Similarly, three helicopter businesses have been established recently to service the needs of industry—particularly the oil industry. These companies are the Guangzhou Helicopter Corporation, the China Ocean Helicopter Corporation (located in the Shenzhen Economic Zone), and the China Capital Helicopter Corporation (headquartered in Beijing).

A third group of enterprises established within a year of the initial reforms are two joint ventures with colorful names. The Flying Dragon Professional Aviation Corporation was jointly formed by the Ministry of Aviation Industry and the Ministry of Geology and Mines. Its scope is geological investigation, mine exploration, and chemical spraying. The Rising Dragon Goods-Transport Corporation is a joint venture based in Beijing between the China Bank and the Beijing Trust and Advisory Company. Each of these six companies represents a corporate venture unimaginable only a few years ago and each provides a particular service to both public and private entities which previously had not been provided.

The formation of these seventeen companies demonstrates a fundamental principle of enhanced market coverage as a monopolized industry opens to new participants. CAAC—entrenched in Beijing, facing dilapidated technology and untrained personnel—had attempted to build a national infrastructure for a fledgling aviation industry. Not surprisingly, these attempts concentrated on the high-volume core functions of airline service between China's major cities. Compared to the need for service between Beijing-Shanghai-Guangzhou, the needs of more remote provinces received less attention. By establishing provincial airlines with the sole priority of developing aviation locally, resources could be efficiently allocated to respond to immediate needs and opportunities, thereby making aviation more available to areas previously without service. Market coverage has similarly been enhanced by the establishment of particularized helicopter corporations which concentrate their efforts on discrete functions which may have been lower priorities for CAAC.

²⁷ *Id.*

These are noteworthy developments for traders and travellers, but, strictly speaking, this increased market coverage suggests only a limited aspect of competition. Rather than providing head-to-head competition, these enterprises provide what economists term “yardstick” competition because they enable consumers and regulators to compare quality of service and efficiency among a variety of enterprises. Where a monopolist’s higher than necessary costs or less than appropriate service might not be recognized, the existence of seventeen different airline companies permits comparison. However, competition typically implies not only that performance may be compared but that real benefits will go to those exercising advantageous skill, ingenuity, or effort. As long as air fares were set uniformly by CAAC and as long as China’s aviation enterprises refrain from providing the competitive service over identical routes, Chinese aviation reforms displayed only a limited acceptance of the principles of market economics.

Recognizing that comparison does not mean competition and that the formation of localized or specialized enterprises is only the first stage of a lengthy reform process, CAAC has recently announced the establishment of six major airlines to operate international and domestic services along with the seventeen existing enterprises.²⁸ China International Airways (Beijing) will operate mainly international routes, service to Hong Kong, and some domestic routes. China Eastern Airways (Shanghai) will operate air service to Japan and Hong Kong and will also fly some domestic air routes. China Southern Airways (Guangzhou) will operate domestic air routes and service Hong Kong and southeast Asian countries. China Southwest Airways (Chengdu) will mainly fly domestic routes and provide service to Tibet, Burma, and Thailand. China Northwest Airways (Xi’an) will provide domestic service focusing on cargo carriage. China Northern Airways (Shenyang) will operate primarily domestic service. According to the announced plan, CAAC will no longer provide air service, and the six national airlines will “push China’s air service to a new stage of competition and development.”²⁹ The new airlines are authorized to negotiate and sign contracts directly with foreign airline companies, tourist agencies, cargo agents, and other organizations. Most important, the airlines will have control over their fares, leading a CAAC official to predict that “fare wars” are likely to occur.³⁰

²⁸ *China To Establish Six Airline Companies*, Xinhua Gen. Overseas News Serv., Feb. 13, 1987, item no. 0213173 (NEXIS library, Xinhua file).

²⁹ *Reform To Improve China’s Air Service*, Xinhua Gen. Overseas News Serv., Feb. 21, 1987, item no. 0221123 (NEXIS library, Xinhua file).

³⁰ *Id.*

It is premature to predict the effects of the establishment of six national airlines in China. Yet it is inescapable that, within less than two-and-one-half years, the Chinese aviation industry has gone from a state-owned monopoly operated by national regulators, to an industry of specialized and regional airlines with prospects of competitive fares and routes.³¹ Indeed, in no other sector of the Chinese socialist economy is the commitment to introduce market forces as manifestly dynamic as in aviation.

Yet, difficult questions remain. What incentives are there for better performance? If rates are fixed and routes assigned by CAAC, will the multiplicity of enterprises be competitively dynamic, or will the firms lapse into collusion? Who will have real authority to resolve competitive conflicts such as when the performance of an aggressive competitor infringes on the territory of a weaker competitor? However, China has made profound structural changes, the importance of which should not be minimized. However, for all the market interaction, there is scarce contemplation of anticompetitive contact. Will China's aviation enterprises fix prices, divide markets, exclude upstarts and aggressive competitors, restrain technological creativity, and extract exorbitant fares from consumers? Chinese pronouncements on such matters suggest that since such conduct should not occur, it will not occur. This belief is based either upon an understanding that the system remains authoritative at the top through CAAC and, ultimately, the Communist Party, or a naivete regarding the tendency of unregulated competition to create unforeseen costs as well as benefits. From the perspective of an observer adhering to the tenets of Western liberalism, it is hoped that the latter is true and that reason and experience will lead to the enactment of a refined legal foundation upon which dynamic competition may take place.

C. Domestication of Aircraft Production

A critical reason why reforms in aviation are important for China is that the demands that aviation makes on related industrial sectors. At minimum, of course, aviation requires aircraft. These could be purchased from foreign manufacturers and, traditionally, the Chinese have done exactly that. However, a guiding principle of Chinese market economics is to meet demand with nationally available technology; to be subject to the caprice of foreign producers can be destabilizing, particularly for a developing nation such as China. Consequently, the Chinese have begun to produce domestic aircraft.

³¹ *Let a Thousand Airlines Sprout*, THE ECONOMIST, Nov. 22, 1986, at 68.

Foreign aircraft producers have historically dominated the Chinese aviation industry, a fact of considerable importance to Chinese industrial leaders. Most of the passenger planes used by CAAC during the 1950s and 1960s came from the Soviet Union. During the 1970s, China bought thirty-five Trident aircraft from Great Britain and more than thirty jets from the United States Boeing Company and McDonnell Douglas Corporation.³² These purchases were among the first and most important commercial transactions between the People's Republic and the West. Indeed, aircraft technology was the first choice of technological and trade cooperation with the United States. Chinese officials have stressed the need to import Western aircraft technology as well as to encourage aircraft technology transfer and joint development with United States and European plane manufacturers.³³

With CAAC reforms announced in January 1985, China's inadequate fleet was viewed as an impediment to the likely acceleration of China's civil aviation business. It was not surprising that, within weeks of the announcement of the reforms, China concluded the largest aircraft contract in its history, purchasing nineteen late model passenger aircraft from foreign manufacturers.³⁴ Indeed, this purchase launched a series of extensive foreign aircraft purchases as CAAC expanded services with projections of expending nearly \$1 billion dollars in 1985 on imported jetliners.³⁵ Within months, international competition for large-scale civil aircraft orders intensified as purchases of more and better aircraft failed to satisfy the surge in aviation demand. In the first half of 1985, CAAC purchased three Airbus Industrie A310-200s, ten Soviet Tupolov Tu-154s, eight Short Brothers SD360s, two Boeing 737-300 twinjets, eight Boeing transports, and signed a letter of understanding for ten British Aerospace 146-100s.³⁶ Simultaneously, CAAC reached an agreement with McDonnell Douglas to coproduce up to forty MD-82 aircraft by 1992 in its Shanghai facility.³⁷

[T]he next few years will see a big development in China's civil aviation, thanks to the current policy of opening to the outside world and enlivening

³² *China Buys New Planes to Modernize Civil Air Fleet*, Xinhua Gen. Overseas News Serv., Jan. 29, 1985, item no. 012924 [hereinafter *New Planes*](NEXIS library, Xinhua file).

³³ *Chinese and U.S. Officials Hold Talks on Aviation and Aerospace*, Xinhua Gen. Overseas News Serv., July 23, 1984, item no. 072343 (NEXIS library, Xinhua file).

³⁴ *New Planes*, *supra* note 32.

³⁵ *China Plans to Buy Aircraft from British Aerospace*, Reuters News Serv., Apr. 25, 1985 (NEXIS library, Reuter file).

³⁶ *China's Economic Reform Spurs Civil Aircraft Demand*, A.V. WEEK & SPACE TECH., June 3, 1985, at 73-74.

³⁷ *China Buys Eight New Boeing Jetliners*, Associated Press, May 22, 1985 (NEXIS library, AP file).

the domestic economy. . . .China will buy even more modern airplanes in the next few years in order to modernize its civil air fleet. The aircraft market is a large one, and foreign aircraft manufacturers all over the world. . . .are welcome to compete for orders in China. . . .³⁸

These purchases, however, have placed an enormous strain on Chinese finances and have drained a considerable amount of foreign currency. Chinese aviation was caught between the need for aircraft to service the lucrative and surging tourist demand and the need to retain currency for domestic development. The only viable long-term solution was to develop a domestic aircraft manufacturing industry. In November 1985, Vice Premier Wan Li declared that China should not import aircraft that could be made by domestic manufacturers and announced the introduction of two new passenger aircraft to complement China's existing aircraft servicing industrial, agricultural, and oil prospecting needs.³⁹ Six months later, at the United States Aerospace Industry Exhibition in Beijing, China's Minister of Aviation, Mo WenXi'ang, announced that foreign aircraft manufacturers wishing to deal in China will have to do so through cooperative programs that transfer advanced technology to Chinese partner companies so that China will have the capability to participate in international aerospace projects starting with research, development, and design phases.⁴⁰

In the year following this announcement, China has carefully pursued parallel development policies: relying on competitive purchasing from foreign manufacturers to meet the ever increasing demand for service while simultaneously requiring technology transfer and cooperation with which to establish rapidly a domestic infrastructure capable of obviating the reliance on foreigners. One noteworthy aspect of this parallel policy has been the implementation of competitive bidding whenever foreign involvement is required. For example, this competition recently led to a switch from Pratt and Whitney engines which powered newly acquired Boeing aircraft to engines built by General Electric.⁴¹

The effort to replace foreign purchases with domestic production is receiving ever greater emphasis. Of the thirty airplanes scheduled to be

³⁸ *Statement of Hu Yi Zhou, Director-General of CAAC, Xinhua Gen. Overseas News Serv.*, May 23, 1985, item no. 052388 (NEXIS library, Xinhua file).

³⁹ *Xinhua Gen. Overseas News Serv.*, Nov. 22, 1985, item no. 112251 (NEXIS library, Xinhua file).

⁴⁰ Fink, *China's Technology Leap*, *AV. WEEK & SPACE TECH.*, May 26, 1986, at 11.

⁴¹ *Airline Observer*, *AV. WEEK & SPACE TECH.*, Jan. 19, 1987, at 35. Demonstrating the same spirit of competition, the Ministry of Aviation Industry has called for the submission of competitive proposals from Boeing Co., McDonnell Douglas Corp., and Messerschmitt-Bolkow-Blohm, GmbH, for development and production of a 150-seat civilian airplane. See *PRC to Participate in New Aircraft Development*, *Interavia Air Letter*, Mar. 6, 1987, at 7 (NEXIS library, AIRLTR file).

added to the fleet in 1987, eighteen will be foreign-made and twelve will be built in China.⁴² This is only the beginning as China plans to manufacture more than 200 aircraft by 1990, augmented by a government allocation of 1.2 billion yuan (\$500 million) for research into new types of aircraft and for upgrading domestic aircraft.⁴³ “China Aviation ‘86”—China’s premier display of its best aviation machinery and technology held in Shanghai in December 1986—and China’s participation in the Hanover Fair in April 1987, symbolize the entry of China into the international market of high-technology aviation manufacturing.⁴⁴

D. Civilianization of Aviation

Until recently, aviation in China was strictly a function of the military. Civil aviation was long nonexistent and was only introduced as a minor adjunct to military service for the benefit of bureaucratic and commercial cadres. In light of this history and the emphasis placed by the Four Modernizations on strengthening national security, a dedication of available aviation resources to military purposes would not have been surprising. That the opposite appears to be true is a significant statement about future Chinese goals and policies.

Chinese civilianization is especially significant because, in contrast to many Western nations, there was little civilian industrial infrastructure to take advantage of the high technology developed by or for the military. That many nations have developed an aviation industry independent of the military is, of course, considerable tribute to those regimes which recognized the benefits of civil commerce. In most cases, however, there were entrepreneurs in related civilian industries who could assume responsibility and there was a prior established legal foundation applicable to entrants in the fledgling aviation industry. In China, the dominant organizational reference has been the military, and no commercial law statutes existed before 1977. China certainly perceives hostile foreign powers against which an effective air force could provide deterrence. China would not have been the only nation to militarize aviation development and, in light of its domestic and international position, such action would not have been surprising. Yet, without jeopardizing its real security, China eschewed militarization of the civilian sector

⁴² *China’s Civil Air Fleet to Get 30 New Aircraft*, Xinhua Gen. Overseas News Serv., Feb. 6, 1987, item no. 02061032 (NEXIS library, Xinhua file).

⁴³ *Increased R&D Expenditure in PRC*, Interavia Air Letter, Mar. 6, 1987, at 8 (NEXIS library, AIRLTR file).

⁴⁴ *In Shanghai: Civil Aviation ‘86*, INTERAVIA AEROSPACE REV., Feb. 1987, at 109-10.

while using military resources for civilian benefit. This policy choice has made a difference.

In the early 1980s, the output of goods produced by civilian enterprises under the direct control of the ministries of nuclear, astronautics, ordnance, and aviation industries was 18% of total gross national product. By 1985, that percentage had more than doubled to 40%. It was hardly coincidental that at the same time that Chinese officials called for the development of a domestic aircraft manufacturing industry, Vice Premier Li Peng, in a closing address at a national conference on the technological transformation of defense industry enterprises, called upon the defense industry to provide nonmilitary sectors with technology and equipment for the purpose of producing scientific research and civilian goods.⁴⁵ It appears that the military accepted this responsibility. In 1985, the Air Force opened thirteen airports for civilian use, bringing the total number of civilian airports to fifty and transferred twenty-four additional planes to civil aviation departments.⁴⁶ Perhaps the best demonstration of national support for aviation growth was the willingness of senior military leaders to commit the power and prestige of the armed forces to modernizing the aviation industry and adapting it to civilian needs.⁴⁷ This emphasis on civilianization and its rapid success may be unparalleled by any other nation in this decade.

There are at least two conclusions which may be drawn from these public pronouncements and recent trends. First, they strongly support the proposition that China is serious about developing its domestic civilian aircraft industry. So serious are Chinese officials that they are willing to enlist the military to aid in the endeavor. Second, they imply that China may be serious about reducing the size and expense of the military sector as indicated by decreasing the armed forces by one million personnel. It is difficult to know if those in power in China will continue to pursue a policy of demilitarization and civilianization of industrial production. Developments in the aviation sector suggest that the policy is more than mere rhetoric. Thus, the Ministry of Aviation Industry is gradually shifting personnel toward a goal of having 60% of all personnel involved in civil projects and 40% in military programs and is also considering diversifying into nonaerospace civilian products such as

⁴⁵ Xinhua Gen. Overseas News Serv., Nov. 21, 1985, item no. 112187 (NEXIS library, Xinhua file).

⁴⁶ Xinhua Gen. Overseas News Serv., Dec. 24, 1985, item no. 122427 (NEXIS library, Xinhua file).

⁴⁷ *Statement of Defense Minister Zhang Aiping, quoted in China Looks Abroad for Help in Developing Plane Industry*, Reuters News Serv., Jan. 12, 1985 (NEXIS library, Reuter file). A similar statement was made by Zhang Ting Fa, Commander of the Air Force, *Worker's Daily*, Feb. 4, 1985.

heavy machinery and automobiles. At a minimum, these developments permit Chinese officials to claim that they are making a significant contribution to world peace. As Aviation Minister Mo WenXi'ang recently proclaimed: "Many countries talk of disarmament, but do not do anything. China is doing something."⁴⁸

E. Refined Delineation of CAAC's Role

Before the recent reforms, CAAC had the undifferentiated task of promoting and regulating aviation in China. All decisions—which aircraft to employ, what routes to serve, what prices to charge, how to safeguard against accidents, how to impose liability in the event of cargo damage or personal injury—were within CAAC's authority. For most of its history, CAAC decisions were made without the benefit of established or codified rules, but were ad hoc responses to general policy pronouncements. Notably absent was any provision allowing for the appeal of a decision to any legally authorized reviewer. CAAC was empowered to control aviation; any limitation on that power came in the form of direct supervision by higher governmental agents.

This bureaucratic structure created inconsistent determinations, infighting, and inefficiency, all of which combined to interfere with the modernization of aviation. Recognition of these problems was a major cause for the aviation reforms which decentralized CAAC authority and established competitive airlines. Yet these reforms would have been form without substance if CAAC had retained omnipotence over the industry. It was necessary, therefore, to carve out certain tasks which must be undertaken by a national regulatory body, to delegate performance of these tasks to CAAC, and to limit CAAC to accomplishment of only these tasks. So far, the strong rhetorical commitment to delineating CAAC's role has brought some progressive restructuring of the bureaucracy. Nonetheless, questions remain as to the actual implementation of a legal system capable of differentiating authority, assigning responsibility, and providing appropriate review.

On January 8, 1986, one year after the announcement of the reforms of the management structure of aviation, the State Council issued provisional regulations on the role of CAAC regarding other airlines and regarding aviation safety. The regulations stipulate that CAAC has plenary authority over all civil aviation in China. Any enterprise seeking to operate an aviation business must apply for a license which will be reviewed by CAAC. If the application is accepted, the license will be

⁴⁸ *China's Aviation Minister Mo Welcomes Western Collaboration*, AV. WEEK & SPACE TECH., May 26, 1986, at 20-21.

granted. This procedure is identical to past procedure, the major change is the identification of conditions required for licensing approval. The conditions now require registration of all aircraft and proof of airworthiness, the presentation of the licenses of flight and aircraft maintenance crews and flight dispatchers, and demonstration that airfields and conditions for mechanical maintenance will ensure normal flight and operation.

Only after receiving a business license may enterprises begin operations. Once a license is obtained, enterprises may engage in general aviation business even outside China. The regulations also call for the adoption of effective measures to protect the environment and govern basic ticketing matters and procedures for allocating air routes.⁴⁹ These regulations did not significantly alter previous practices, but, by codifying those practices, the regulations put all interested parties on notice as to what standards they must meet and what will be the likely consequences of noncompliance. In that sense, the regulations go a long way toward removing caprice from the administration of Chinese aviation.

Despite these codifications, there is still concern that CAAC will use its position of authority to promote its institutional interests or to disadvantage unfavored competitive airlines. Chinese officials have attempted to dispel these concerns by proclaiming that all civil aviation enterprises will be treated on a nondiscriminatory basis and that all airports will be open to all enterprises.⁵⁰ As of yet, there is no statutory requirement that CAAC be fair and objective, nor is there any system of legal review for any enterprise which might believe that it was treated unjustly. Indeed, the competitive relationships among the airlines and CAAC have not been officially addressed. This is significant especially with regard to route allocation and rate-making—the two primary aspects of competition among the airlines. CAAC appears to retain authority over these matters by proclaiming the virtues of competition but without mandating lawful competition or even defining the permissible conditions of entry, pricing, or service competition.

The area in which CAAC has acted most affirmatively as a regulator in promoting the interests of all aviation enterprises is in the establishment of an independent system for supervising air traffic control. On February 10, 1987, simultaneous with the announcement that six re-

⁴⁹ *The CAAC Takes Over all Responsibility for Civilian "Flight Activities,"* British Broadcasting Corp.; Summary of World Broadcasts, Jan. 31, 1986, at FE/8171/BII/1 (NEXIS library, BBCSWB file).

⁵⁰ *National Conference on Civil Aviation: Role of the CAAC,* British Broadcasting Corp.; Summary of World Broadcasts, Aug. 9, 1986, at FE/8333/BII/15 (NEXIS library, BBCSWB file).

gional air carriers would be established, Chinese officials announced the establishment of the Air Traffic Control Commission ("Commission"). The Commission will establish a nationwide air traffic control network and take responsibility for the air traffic control towers around the country.⁵¹ Significantly, the Commission will be controlled by the State Council instead of the Air Force. The newly appointed Director is a civilian, Guo Yunzhong, former Deputy Director of CAAC. The Air Force will officially turn over air traffic control power to the new Commission later in 1987.

In the 1950s, China's air traffic control was under exclusively military control. With the development of civil aviation, a divided administrative system, based on the Soviet Union's model, allocated authority over military aircraft to the military, civilian aircraft to CAAC, and industrial aircraft to the Ministry of Aeronautics Industry. In the event that an aircraft of one department used an air lane under the control of another department, the first aircraft would have to delay its flight to give way to aircraft affiliated with the second department. In the event of an emergency within an area controlled by a different department, the imperiled plane would have to ask for approval to alter its flight plan from authorities at many levels. Now with over 10,000 military and civil aircraft in China, this antedated and arguably irrational system is no longer suited to handle the fast pace and large volume of air traffic contemplated by recent aviation reforms. The Chinese have recognized the need for a single authority under civilian control, one which is expressly empowered to provide essential safety and health regulations to all airlines on a nondiscriminatory basis.

The new Commission is also significant because it intentionally imitates the United States Federal Aviation Administration and its organizational responsibilities. Thus, the Commission is the child of the State Council and the Central Military Commission which, in 1985, established a committee to control air traffic. The Commission is the executive organ of that committee with initial responsibility to: 1) divide jurisdiction over the country's air space between regional authorities; 2) codify regulations for the nation's air traffic control; and 3) coordinate the work of aviation departments regarding traffic control. To accomplish these tasks, new radar and computer data processing systems will soon be installed along with modern communications equipment.⁵²

⁵¹ *China to Reform Air Traffic Control System*, Xinhua Gen. Overseas News Serv., Feb. 10, 1987, item no. 0210083 (NEXIS library, Xinhua file).

⁵² *Hongkong Paper on Setting Up Air Traffic Control Bureau*, British Broadcasting Corp.; Summary of World Broadcasts, Feb. 11, 1987, at FE/8489/BII/1 (NEXIS library, BBCSWB file).

Immediately after the announcement of the new Commission, the Director-General of CAAC announced that civilian airports will become an independent unit coordinated by a service administration yet to be formed which would handle aerial information, telecommunications, navigation, and weather reports. While the designation of international airports will continue to require CAAC action, local airports will now be able to make direct contacts with foreign airlines and import advanced technology and equipment.⁵³

With this recent flurry of bureaucratic restructuring, China is demonstrating some appreciation of the principles of market regulation under law. First, most industrialized nations have authority over aviation safety (licensing of airlines, planes, personnel, and control over air traffic) vested in a national authority. As a general proposition, safety regulation is not left to market forces but is considered an aspect of police power belonging to the state. China's willingness to separate safety issues from economic issues is, therefore, a significant initial step toward modern industrial organization. Second, the administrative systems of many industrialized nations have attempted to carve out discrete safety issues and assign them to bureaus staffed with experts who can be free from bias in enforcing the public's need for safety. Third, most industrialized nations have a well-defined organizational hierarchy which connects the supreme levels of the government with administrative agencies authorized to execute safety regulations. These agencies, in turn, have licensing authority over the numerous competing private enterprises and provide, by law, the required minimum of safety protection. Fourth, the guidelines and rules of this entire system are on notice to all interested parties and should be applied equally to all.

III. THE REFORMS IN PERSPECTIVE

In *Reliance on Law*, written during the Warring States period (475-221 B.C.), Guan Zhong instructed that a good monarch would rely on law and not on wisdom—otherwise the state would be in disorder. Nearly a millenium and a half later, China had a dynamic economy characterized by a strong central government built upon a bureaucratic delegation of authority outward both across geographic regions and through commercial sectors. That economy was perhaps the closest model to competitive private enterprise that appeared anywhere on Earth before the eighteenth century. Certainly, Chinese culture has long believed that society is well-served by individuals exercising initiative and providing

⁵³ *China's Civil Airports Open to All Airlines*, Xinhua Gen. Overseas News Serv., Feb. 13, 1987, item no. 0213162 (NEXIS library, Xinhua file).

needed goods and services for the people in return for compensation commensurate with that entrepreneurial effort. For centuries, however, these fundamental values, which could support and stabilize a productive economy, have tended to be demonstrated off the mainland.

For at least the past century, within China itself, a succession of foreign invaders and inner turmoil substantially undermined China's economic base and prevented the development of stable legal systems. Rules governing civil matters were treated as part of the criminal law with criminal sanctions for violations—a fact hardly conducive to entrepreneurial risk taking. Sporadic attempts by the Kuomintang prior to 1949 and even by the People's Republic in the early 1950s to draft a civil code governing commercial relations failed to establish a system for developing an economy subject to consistent and fair legal regulation. With the advent of the Great Leap Forward, measures devised to develop a commodity economy were rejected in favor of rigid state control over the economy. Subsequently, the Cultural Revolution encouraged a nihilistic rejection of both law and commerce and especially of liberal ideas favoring a system of competitive rivalry according to rules.

This rejection can be seen as deriving, albeit radically, from well-springs deep within Chinese culture. The Chinese interpretation of competition more nearly approximates the West's conception of strife. This interpretation is reflected in the way that many Chinese tend to view the West: excessively aggressive and competitive to the point that individuals are quarrelsome and nations are saber rattling. Chinese philosophy stresses the value of individual patience through integration into the social fabric and the necessary submersion of greed and ambition in favor of the general well-being.⁵⁴ Thus, as in most things human, there are contradictory motifs in the Chinese experience which have received varying emphasis during different periods of time. The twenty years between the advent of the Great Leap Forward and the trial of the Gang of Four witnessed an adoption of extreme principles favoring a strong central authority and the dominance of the individual by the group. However, extremism is not a favored value of the Chinese, despite the extraordinary turbulence of the last century.

The hallmark of Chinese tradition and culture that is the Confucian legacy from 2,500 years ago asserts the ideal of moderation and balance. It is this ideal which must be the cornerstone of a progressive regime. The economic modernizations of this decade appear to be sensitive to that ideal because they call for the development of legal systems capable

⁵⁴ H. CREEL, *CHINESE THOUGHT FROM CONFUCIUS TO MAO TSE-TUNG* 258-60 (1953).

of adjusting complex commercial relations. That codified rules applicable to all should regulate the multilayered relations between the State and private enterprises and between private enterprises and individuals is not a new idea in China. It is simply an idea that was buried alive until the last few years.

An important early act of the Deng XiaoPing regime called for the codification of regulations guiding proprietary relations between individuals and enterprises. This ultimately led to the Economic Contract Law which was enacted in 1981. Efforts to draft a complete civil code, however, have been handicapped by a primitive economic infrastructure and a lack of experience with disputes generated by market activity. Nevertheless, laws governing patents, inheritance, and economic contracts with foreigners were enacted in the early 1980s. Perhaps of greatest importance is the Draft Common Rules of Civil Law which set forth regulations on most issues common in civilian and commercial life. The draft law grants legal status to domestic, foreign, and joint economic ventures and entitles these entities to stipulated civil rights including the right to own property, collect debts, and retain title to proprietary rights including inventions. Furthermore, the draft law allocates the burden of legal liabilities and specifies basic principles of ethical participation in the social economic order.⁵⁵ These legislative efforts, which produced over fifty statutes since 1979, generally should be viewed as steps toward moderation—as indications that the Confucian ideal of balance is gradually being revived by the development of regulatory law.

Confucius, however, never had to cope with developing and controlling a modern aviation system. Indeed, it is the very nature of aviation as the product of twentieth century high technology, closely affiliated with military and national security efforts, which makes reform in this area so worthy of comment. More than reform in the fields of agriculture or textiles, reform of aviation compels those in authority to make difficult policy choices which test and define the current Chinese commitment to a “market economy with Chinese characteristics.” Evidence as of early 1987 suggests grounds for cautious encouragement.

The establishment of twenty-three airlines in recent years demonstrates more than a rhetorical commitment to the idea that competition tends to be economically beneficial. Even a mere rhetorical commitment to the virtues of competition would be significant compared to the Chinese attitude only a decade ago. By multiplying the number of market participants so rapidly, and by giving them independent legal status, the

⁵⁵ *China's Civil Laws to Enter a New Stage*, China Daily, Mar. 12, 1986, at 4.

Chinese have forced themselves to witness the consequences of competition in a highly visible and economically crucial industrial sector.

The separation of government from economic functions in a sector dominated by government personnel and demanding of government regulation signifies a demonstrable commitment to restraining state authority. This raises what may be the most important political question facing China at present: to what extent is this powerful nation, historically ruled by the Emperor, going to impose limitations on the exercise of real power by those in command? It is difficult to know—current events may be temporary fads or the precursors of profound developments. It would be fatuous to point to reforms in aviation and suggest that China is demonstrably adopting the principles of government under law as proclaimed by Western constitutional democracies. However, it would be unduly cynical to view the march of common principles through agricultural reform to aviation reform without acknowledging that serious efforts are being made to decentralize economic authority.

By focusing on the structural relationships between administrative units and private enterprise, the Chinese have necessarily compelled the development of legal systems capable of shaping and solidifying these relationships over time and in response to a myriad of unforeseen contingencies. Whether this compulsion was intentional is a matter of opinion, but its geopolitical significance is clearer. The Chinese construction of legal systems to regulate market competition strictly limiting state authority has, at this point, sufficient momentum that it can be derailed only by a deliberate effort having catastrophic consequences for economic progress.

This does not ignore the fragility of new legal systems, nor should there be naivete regarding the power of central government authorities to entrench their dominant position. It may be noted, however, that many nations face the risk that their regulated competitive economies may be undermined or even rejected by authoritarian regimes. China today faces this risk perhaps more than others because of its recent history. It is pointless to predict the unknown, but it may be pertinent to ask: to what extent will the principles of aviation reform spread to other industrial sectors, especially sectors involving high technology? Furthermore, a watchful eye might examine the subtle details of these developing legal systems to determine if they succeed in implementing the policies of reform while advancing elementary principles of justice and due process of law.

Mention should be made of what has not been accomplished regarding aviation reform and what this foretells. The system for allocating

routes provides no systematic method of maximizing competition among the airlines. The competitive implications of granting a new route to one corporation rather than another do not even have to be considered. While the most recent reforms call for competition over fares, there is ambiguity over the extent and nature of such competition. Furthermore, there do not appear to be codified prohibitions against anticompetitive restraints which inevitably occur in competitive markets: price fixing or market division agreements among private enterprises, exclusionary treatment of especially aggressive or successful competitors, or predatory interference with a competitor's business. How will mergers or joint ventures among airlines be evaluated? Similarly, what protections against restraints affecting consumers—such as tying arrangements—will be enacted and who will be responsible for enforcing those protections?

China's long march into the next millenium has as yet taken only a few short steps. While the distance this nation must cover to become a world leader is prodigious, China has impressive strengths, including the advantage of not being tied down to the technologies and organizational systems of an industrial past—much of China's progress may be built on essentially a *tabula rasa*. The pace and direction of China's development are not for a United States law professor to forecast, but perhaps the recent aviation reforms suggest that there exists a principled commitment to economic and social progress grounded in a strong appreciation of the role of law as regulator of economic conduct. If so, it is to be commended.