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## Foreword: The Rocky Road Toward the Rule of Law in China: 1979-2000

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# ARTICLES

## FOREWORD

### The Rocky Road Toward the Rule of Law in China: 1979-2000

*James Hugo Friend\**

Just over twenty years ago, in the spring of 1979, the Inaugural Issue of the Northwestern Journal of International Law & Business appeared.<sup>1</sup> JILB, as the publication has come to be called by the law school community, became the third legal publication at the School of Law<sup>2</sup> amid great expectations. The conceptualization and realization of JILB was an arduous two-year process. Fresh from a first-year summer internship at a law firm in Paris, I was enthusiastic about the ways that the rapidly evolving world was changing modes of international law and commerce. Thus, I set out to write a detailed proposal to create an international law journal at the School of Law.<sup>3</sup> Unlike most of the international legal publications of the day,

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<sup>1</sup> See generally 1 *Nw. J. INT'L L. & BUS.* (1979).

<sup>2</sup> In addition to the *Journal of International Law and Business*, the other legal publications at the School of Law are the *Northwestern University Law Review* and the *Journal of Criminal Law and Criminology*.

<sup>3</sup> See generally Memorandum from James H. Friend to Dean David S. Ruder (The memorandum, entitled *The Establishment of the Northwestern International Law Journal*, offered

which addressed public international law, the publication I envisioned would have a different substantive focus, "the analysis of transnational and international legal problems as they affect private entities."<sup>4</sup>

After months of relentlessly lobbying a supportive Dean David S. Ruder<sup>5</sup> and sympathetic key members of the law school faculty, JILB was finally granted approval at a meeting on April 18, 1978.<sup>6</sup> As the founder and first editor-in-chief of JILB, I had to produce results. I had no editors or staff and not a single article had been solicited. We did not even have an office.<sup>7</sup> Indeed, JILB was a virtual legal publication long before the term became fashionable.

The challenge was formidable and there was no time to lose. A flurry of meetings occurred, editors and a staff were selected and we set about our task. Dozens of letters soliciting articles and "Perspectives"<sup>8</sup> for publication were sent out, in several languages, to top international legal scholars, diplomats, businesspersons and other luminaries from around the world. We savored acceptances and endured rejections. In several key instances, we even managed to convince important recalcitrant authors to reconsider their decisions.

The Inaugural Issue was a hefty 348 pages and had 17 impressive entries. It included important articles by noted professors of international law and legal practitioners. We also published a number of Perspectives by authors including Senator Frank Church, the Chairman of the Committee on Foreign Relations of the United States Senate; David Lord Hacking, an eminent member of the House of Lords of the British Parliament; and Baron Edmond de Rothschild<sup>9</sup>, whose storied family name has conjured images of international business intrigue for centuries.

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a detailed proposal for an international law journal at Northwestern (Oct. 10, 1977) (on file with author).

<sup>4</sup>James Hugo Friend, *Forward*, 1 NW. J. INT'L L. & BUS. i, iii (1979).

<sup>5</sup>The author would like to acknowledge the support of former Dean David S. Ruder, whose open mind, encouragement and faith in the law school student body helped to bring to fruition the *Journal of International Law & Business*.

<sup>6</sup>See Letter from David S. Ruder, former Dean of the Northwestern University School of Law, to students of the Law School, (announcing that the faculty voted to approve the creation of an international law journal with James H. Friend as its Editor-in-Chief) (Apr. 19, 1978) (on file with author).

<sup>7</sup>We eventually got one, a 15' by 15' room with a typewriter and a file cabinet.

<sup>8</sup>In addition to the traditional law review-style articles written by international legal scholars and practitioners, our goal was to have an interdisciplinary analysis of the international commercial, legal and economic affairs of the day from a wide range of contributors including legal scholars and practitioners. We wanted to bring in the perspectives of experienced business persons, diplomats, legislators, politicians, economists and clergymen. As a result, the editors created a new category of submissions called a "Perspective," which was designed to be shorter and less in-depth than a law review article but which would permit us to bring to our readers the important insights of other actors on the international stage.

<sup>9</sup>See 1 NW. J. INT'L L. & BUS. 1-45 (1979).

The Inaugural Issue also had a timely and prescient symposium on China entitled "Questions of Law Arising From the Recognition of the People's Republic." The symposium had articles by three top scholars of Chinese law and U.S.-China relations, Jerome Alan Cohen, the Director of East Asian Legal Studies at Harvard Law School; Victor Li, Shelton Professor of International Legal Studies at Stanford Law School; and Stanley Lubman, a prominent practicing attorney widely recognized as an expert on law in the People's Republic of China ("PRC").<sup>10</sup> The China Symposium was inspired by the United States' recognition, just a few months earlier, of the PRC as the sole legal representative of the nearly one billion people living in China and by Deng Xiaoping's "Open Door" policy, which promised to open Chinese society and its immense markets to the world. In retrospect, the year 1979 was a watershed in the history of Chinese commercial relations and the development of the rule of law in China.

This Twentieth Anniversary Issue of JILB again has a symposium on law in China entitled *China Revisited: Examining the Rule of Law After Twenty Years*.<sup>11</sup> The impetus for the 2000 China Symposium is the unprecedented integration of China into the world economic community, evidenced by China's imminent entry into the World Trade Organization ("WTO").<sup>12</sup> The road to China's integration into the WTO was paved by the U. S. Senate's recent vote, "the most significant advance in U.S.-China relations since President Nixon's 1972 visit,"<sup>13</sup> which grants China permanent normalized trade relations without annual Congressional review.<sup>14</sup> Although the Senate approval was expected, the overwhelming margin of

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<sup>10</sup>Jerome Alan Cohen, *China's Changing Constitution*, 1 NW. J. INT'L L. & BUS. 57-121 (1979); Stanley B. Lubman, *New Developments in Law in the People's Republic of China*, 1 NW. J. INT'L L. & BUS. 122-133 (1979); Victor H. Li, *The Law of Non-Recognition: The Case of Taiwan*, 1 NW. J. INT'L L. & BUS. 134-162 (1979).

<sup>11</sup>We are indeed fortunate to have a timely and insightful article in this issue on Chinese law reform from Stanley B. Lubman, a contributor to the Inaugural Issue's China Symposium in 1979. Professor Lubman is a Consulting Professor of Law at Stanford Law School and a recognized authority on law and legal institutions in the P.R.C. Professor Lubman's article *Bird in a Cage: Chinese Law Reform After Twenty Years* begins on page 383.

<sup>12</sup>It once appeared that China would be admitted to the WTO in the year 2000. See Helene Cooper and David Rogers, *Senate Passes Bill to Normalize U. S. Trade Relations with China*, WALL ST. J., Sept. 20, 2000, at A2. However, it now appears that the range and complexity of the issues related to China's admission, including China's granting sufficient access to its markets and making the necessary judicial reforms, are too great to overcome this year. See *WTO Talks End in Disagreement*, S. China Morning Post Internet Edition, Sept. 29, 2000 (visited Oct. 6, 2000) <<http://special.scmp.com/Template/PrintArticle.asp>>.

<sup>13</sup>See Cooper and Rogers, *supra* note 12.

<sup>14</sup>See Eric Schmitt, *Senate Votes to Lift Curbs on U. S. Trade with Beijing: Strong Bipartisan Support*, N.Y. TIMES, Sept. 20, 2000, at A1; David E. Sanger, *Opening to China: News Analysis; New Realism Wins the Day*, N.Y. TIMES, Sept. 20, 2000, at A1; see also Cooper and Rogers, *supra* note 12; Helene Cooper and David Rogers, *China Passes Final Test: Senate*, WALL ST. J., Sept. 20, 2000, at A2.

83 to 15 was not, highlighting the fact that a strong majority of legislators and Americans support normal and mutually productive commercial relations with the PRC. With China still at the forefront of vital issues relating to international law and commerce, no topic is more pressing and appropriate to mark JILB's twenty years of publication than a second symposium addressing the evolution of the rule of law in China and its impact on commercial transactions with China.

A traveler to China in 1979 found a very different country than the China of the year 2000. On my first visit to China that year, most men and women in the street wore the ubiquitous Mao suits and travel to most parts of China and even within the major cities was severely restricted. The Chinese students and other citizens whom I met were wary of expressing themselves in the wake of the Cultural Revolution and the notorious Gang of Four excesses.<sup>15</sup> Hanging over the Tiananmen Gate, which leads to the Forbidden City, was a larger-than-life picture of Chairman Mao, who most Chinese still revered like a modern day emperor or father figure.<sup>16</sup> In 1979, trade and business with China were nearly unheard of and few Chinese ever imagined that they would be permitted to engage in capitalist endeavors.

Visitors to the major cities of China today see young people dressed in colorful and individualistic outfits, much like their contemporaries in Japan, Europe, and the U. S. Women wear make-up and sport modern hairstyles, short skirts, and high heels. Men wear neckties and western suits, t-shirts with the names of American sports teams, Nike sneakers, and baseball caps. Chinese Children in Beijing eat Happy Meals at McDonalds and read about the adventures of Harry Potter. Adolescent Chinese girls swoon over Chinese-American tennis player Michael Chang and young Chinese boys want to be like Michael Jordan. Western films are popular and widely accessible. Tens of millions of Chinese people receive entertainment and information via radio and television. The picture of Mao Zedong remains, but his legacy and deified status have been severely reduced. Capitalism and making money, once scorned, have become acts of patriotism. Today, graduating Chinese students at top technical universities take lucrative jobs with multinational companies like Intel, Microsoft, IBM, Oracle, Hewlett Packard and Compaq. Every day Chinese businessmen and women send millions of emails and faxes to their counterparts around the world. Cell phones abound throughout China. In an era of electronic commerce, micro-

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<sup>15</sup>The wariness was well founded. See JONATHAN D. SPENCE, *THE GATE OF HEAVENLY PEACE* 408-413 (1981) (the case of democracy activist Wei Jingsheng). Regarding the Cultural Revolution and The Gang of Four, see generally JOHN KING FAIRBANK AND MERLE GOLDMAN, *CHINA: A NEW HISTORY* 383-405 (enlarged ed., 1998) and JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 565-586 (1999).

<sup>16</sup>By 1979, Mao's veneration was beginning to crack and criticism of him and his introspective and provincial policies and outlook was commonplace. See Spence, *supra* note 15, at 359-363; see also Fairbank and Goldman, *supra* note 15, at 406.

technology and the Internet, information flows quite freely and the Chinese leadership seems to have accepted the fact, however grudgingly, that the genie is out of the bottle and cannot be put back.

Although a considerable volume of legislation was promulgated during the Mao period, the legislation was actually Chinese Communist Party ("CCP") policy masquerading as law. A discussion of *fazhi*, or the rule of law, in modern China really begins in 1979, the year that Deng Xiaoping initiated his Open Door policy. The policy opened China's doors to foreign trade, technology and investment.<sup>17</sup> The economic changes that occurred in the ensuing 20 years constitute the greatest economic transformation of a nation in history, during which China "was transformed from an isolated, poor, rural, and politically turbulent country into a relatively open, stable, urbanizing, and modernizing country."<sup>18</sup> For Deng, the implementation of a program of economic reforms was among the highest priorities of the CCP. He and the Chinese leadership knew that China could not attract large amounts of foreign capital from abroad without at least creating the impression that China had endeavored to establish a predictable legal framework to accompany its economic reforms. Although much progress has been made, the dramatically different notions of the role of law in society between China and the West have made that goal far more elusive than some might have expected.

The concept of law in China is quite different from the West and raises fundamental questions of whether China can establish a legal system based on the independent and autonomous rule of law.<sup>19</sup> In Western societies, law is an end in itself, above and separate from government. The law protects the rights of citizens and permits those citizens to shape their conduct in the knowledge that the law will be applied fairly, consistently and predictably. However, in China law is considered a tool of the omniscient CCP to achieve its goals, such as economic reform. In China, law follows policy rather than having an independent status. In fact, one scholar notes that the notion of a law that is supreme, even over those who exercise power, "would be inconsistent with the hegemony and charismatic prestige on which the legitimacy of the Chinese Communist Party leadership is based."<sup>20</sup>

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<sup>17</sup> See Fairbank and Goldman, *supra* note 15, at 413; JOHN KING FAIRBANK, *THE GREAT CHINESE REVOLUTION* 342-360 (1986).

<sup>18</sup> Fairbank and Goldman, *supra* note 15, at 406. See generally James Fewsmith, *Reaction, Resurgence, and Succession: Chinese Politics since Tiananmen*, in *THE POLITICS OF CHINA: THE ERAS OF MAO AND DENG* 472, 529-530 (Roderick MacFarquhar, editor, 2d ed., 1998), for more discussion on this point.

<sup>19</sup> Robert C. Berring discusses the history and future of law in China in his article *Chinese Law, Trade and the New Century*, beginning on page 425.

<sup>20</sup> See Yuanyuan Shen, *Conceptions and Receptions of Legality, Understanding the Complexity of Law Reform in Modern China*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 20, 30 (Karen Turner, James V. Feinerman, and R. Kent Guy eds., 2000).

At the same time, the totalitarian regime that Mao created, which was a significant obstacle to the rule of law, has steadily declined.<sup>21</sup> An equally important development has been the decline in the power and role of the central government in the creation, implementation and enforcement of law and policy. Whereas during the Mao era all authority was vested in the central government and provincial or local governments had little decision-making authority, today a much more decentralized decision making process exists. Due to China's immense size and economic diversity, the central government no longer has a stranglehold on the provinces. For example, the inhabitants of Shenzhen identify far more with Hong Kong than they do with Beijing, and the CCP has chosen to cede significant local authority to the provinces in order to effectuate its economic reform goals. In the 1990's, and particularly since Deng's death in 1997, the absence of a leader with the authority and prestige of a Mao Zedong or a Deng Xiaoping has hastened these developments. The new leadership, faced with the option of a return to the politics of fear and repression or the continuation of the policies of economic reform that have produced unprecedented economic well being in China, fortunately has chosen the latter.<sup>22</sup> Whether this development will lead to a stronger, more predictable legal system is unclear, but the reality of a decentralized Chinese political and legal model is undeniable.

Although law in China today continues to have little independent reality outside of the political directives of the CCP, important changes have occurred in the period since 1979. The large volume of legislation that was passed was necessary to allow the economy to evolve from a planned economy to a marketizing economy. Since China passed its first law governing foreign investment and foreign joint ventures in 1979,<sup>23</sup> the range and breadth of new civil and commercial legislation has been quite remarkable, including major substantive legislation governing companies,<sup>24</sup> contracts, tax, bankruptcy, banking, labor, and intellectual property.<sup>25</sup>

To be sure, the volume of legislation passed in China in recent years does not in and of itself mean that the courts and the legal system are any stronger or that the rule of law has taken hold. During the Cultural Revolution, the Chinese court system was decimated and became effectively non-functional. Although the courts were reconstituted under Deng, the judicial

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<sup>21</sup> See STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 2 (1999); see also ANDREW J. NATHAN, *CHINA'S TRANSITION* 231-245 (1997).

<sup>22</sup> See JOANNA WALEY-COHEN, *THE SEXTANTS OF BEIJING* 279 (1999).

<sup>23</sup> See *Access China, Law of the People's Republic of China: Sino-Foreign Joint Venture Law* (April 4, 1990) (visited Sept. 3, 1999) <<http://www.accesschina.com/sinoeq.htm>>.

<sup>24</sup> Anyuan Yuan discusses this issue in depth in his article *Foreign Direct Investments in China—Practical Problems of Complying with China's Company Law and Laws for Foreign-Invested Enterprises*, beginning on page 475.

<sup>25</sup> See generally Lubman, *supra* note 21, on this point.

system continues to have serious flaws. Judges frequently use “ideological discretion” to achieve a “correct” ideological result which is consistent with CCP policy. This is not only legal in China but is actually mandated by the 1982 PRC Constitution.<sup>26</sup> In addition, uniformity of result is uncommon and does not seem to be a goal of Chinese judges. Indeed, Chinese courts have become more “law-applying” institutions than “law-making” institutions and “have been more concerned with substantive justice than with ensuring uniformity of results or with developing general rules of application with each adjudication.”<sup>27</sup> While the number of lawyers and legal personnel in China has increased dramatically, and the number of civil cases heard by Chinese courts nearly tripled to six million between 1990 and 1997,<sup>28</sup> the quality of legal education for lawyers and especially judges<sup>29</sup> is severely lacking. Moreover, the courts are overburdened, corruption remains rampant, notions of legal and judicial ethics are primitive and bribery to effect judicial outcomes is commonplace.<sup>30</sup>

Most observers agree that while progress has been made in the civil law in China, the criminal law and the criminal justice system have been least affected by the economic reforms.<sup>31</sup> Notwithstanding the willingness of the CCP to relinquish control in other areas, criminal law and procedure continue to be highly politicized. This all stems from a paranoid fear, carried over from the Mao period, of any challenges to the political authority of the CCP and the state. Whereas during the Mao era perceived political enemies were labeled “counter-revolutionary,” today the leadership has invented a new, equally insidious vocabulary to vilify and ostracize feared groups such as the Falung Gong religious sect. The corruption of the Chinese criminal justice system extends far beyond political crime. Innocent citizens often find themselves the victims of heinous criminal acts with no legal recourse whatsoever. The harrowing account of a recent vicious attack by local thugs on Wu Fang, a village woman from Fenghuo village in northwestern Shaanxi province, and her unsuccessful attempts to seek justice in a corrupt Chinese judicial and political world, is but one sad example.<sup>32</sup> The pervasive corruption throughout the Chinese criminal justice

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<sup>26</sup> See Margaret Y. K. Woo, *Law and Discretion in Contemporary Chinese Courts*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 163, 170 (Karen Turner, James V. Feinerman, and R. Kent Guy eds., 2000).

<sup>27</sup> *Id.*, at 163-164.

<sup>28</sup> See Lubman, *supra* note 11, for an examination of this subject. For an earlier view of law and the legal profession in China, see generally VICTOR H. LI, *LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES* (1978).

<sup>29</sup> See Margaret Y. K. Woo, *Law and Discretion in Contemporary Chinese Courts*, in *THE LIMITS OF THE RULE OF LAW IN CHINA*, *supra* note 26, at 167.

<sup>30</sup> See *id.*, at 169.

<sup>31</sup> See generally Lubman, *supra* note 21, for elaboration on this point.

<sup>32</sup> See Terry McCarthy Xian, *Taking on the System*, *TIME* (visited Oct. 9, 2000) <<http://www.cnn.com/ASIANOW/time/magazine/2000/1009/cover1.html>>.



system is a serious problem, with significant human rights implications. Unfortunately, there seems to be little likelihood of improvement any time soon.

The Internet age is changing China in profound ways, although exactly how is hard to monitor or predict. Centralized authority and an ironclad control over the flow of information have characterized China's modern history. The current leadership is having a hard time coping with a world in which economic reform and development are inextricably linked to the Internet. There has been much speculation about how the Chinese leadership—and indeed all totalitarian regimes—will deal with the nearly impossible task of balancing economic reform, which requires the use of information technology, with the desire to stifle political dissent. The Chinese leadership knows well that the Internet has the potential to become a kind of Democracy Wall in cyberspace. However, the leadership also seems to understand the grievous economic consequences of restricting Internet and e-commerce access. The schizophrenia of the leadership regarding the flow of information and the Internet makes determining the government's position on these issues confusing. For example, in August of 2000, Chinese President Jiang Zemin, speaking at an international conference in Beijing, strongly endorsed the Internet and its possibilities for China's future, saying that e-mail, e-commerce, distance learning and medicine would transform China. "Indeed, Jiang appeared to accept the inevitability of free information flows," and made only passing references to political concerns that have affected the Internet's development in China.<sup>33</sup> But less than 60 days later, China issued strict, bureaucratic and draconian rules holding Internet companies liable for any content that appears on their sites that "damages the reputation of China" or discusses "cults."<sup>34</sup> The enforcement of this edict in a modernizing China where only one percent of the population has access to the Internet is daunting. Enforcement in an ever more prosperous behemoth with a population approaching 1.5 billion inhabitants, whose widespread use of the Internet seems inevitable, is hard to imagine.

Enforcement of the laws is another serious problem in China. One example is the well-publicized controversy over the widespread violation of intellectual property laws in China. Despite government promises to police the sale of pirated copies of DVD's, videos, and computer software, which are sold openly throughout China with impunity, no meaningful progress has been made.<sup>35</sup> The extent of the problem took a comical turn recently

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<sup>33</sup> See *Jiang Endorses Internet, With Some Limitations*, CHICAGO TRIBUNE, Oct. 22, 2000, at 6.

<sup>34</sup> See Matt Forney, *Net Firms in China Wait For Impact of New Rules, Regulations May Affect Foreign Web Investment*, ASIAN WALL ST. J., Oct. 4, 2000, at 3.

<sup>35</sup> See generally Janelle Brown, *Can a Petition Silence China's MP3 Pirates?* (visited Oct. 10 2000) <[http://www.salon.com/tech/log/1999/08/02/China\\_mp3/index.html](http://www.salon.com/tech/log/1999/08/02/China_mp3/index.html)> (dis-

when pirated copies of an anti-corruption film called "Life-and-Death Choice," which was made by the CCP to fight corruption, were shown illegally in state-run cinemas in many provinces.<sup>36</sup> Toughest working for the cinema owners beat up police officials sent to enforce the law. Another timely example of the failure to enforce copyright law is the rush to market by the publishers of the Harry Potter children's books to beat pirates who were "making a killing."<sup>37</sup> These examples and hundreds of others raise real and serious questions about the enforcement of intellectual property law in China.<sup>38</sup> If the Chinese government cannot enforce the law to protect its own intellectual property, how will it ever do so for third parties? Moreover, if China is admitted to the WTO, how will it be able to comply with the comprehensive WTO standards that are required of WTO members?

Law, politics, and business are inextricably linked in China. Due to the pervasive role of the State and the Party in economic affairs, doing business in China entails, on some level, doing business with the Chinese State. This interdependence of government and business has been a controlling factor in doing business with the PRC since 1979 and continues to be so today.<sup>39</sup> Through the People's Liberation Army ("PLA"), the People's Armed Police ("PAP"), and other governmental and quasi-governmental agencies, the Chinese government owns thousands of commercial companies that manufacture, distribute, and sell products ranging from toys, clothing, shoes, textiles, and household electrical appliances to computers, image processing equipment, and navigational devices. PLA subsidiaries own a civilian airline and operate a sideline commercial shipping fleet.<sup>40</sup> Although the

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cussing music piracy in China); Jonah Greenberg, *Linux in China: Not Ready for Prime Time, Why Should the Masses Bother with Free Software When Stealing from Microsoft is Practically Patriotic?* (visited Oct. 10, 2000) <[http://www.salon.com/tech/feature/2000/08/09/linux\\_China/index.html](http://www.salon.com/tech/feature/2000/08/09/linux_China/index.html)> (discussing software piracy in China).

<sup>36</sup> See Craig S. Smith, *Piracy a Concern as the China Trade Opens Up: Ability to Protect Copyrights in Doubt*, N. Y. TIMES, Oct. 5, 2000, at W1.

<sup>37</sup> See *Potter Dispels Qualms on Political Correctness*, S. China Morning Post Internet Edition, Oct. 7 2000 (visited Oct. 7, 2000) <<http://www.scmp.com/news/China/Article/FullText.asp?ArticleID=20001007034346300.asp>>.

<sup>38</sup> Daniel C.K. Chow discusses this issue in depth in his article *Enforcement Against Counterfeiting in the People's Republic of China*, beginning on page 447.

<sup>39</sup> The role of governments in commercial activities was an important theme at the time of the publication of the Inaugural Issue. In my Forward to the Inaugural Issue, I noted that: Today, the interdependence of government and business is greater than at any time in history. Each must coordinate its policies with the other because their decisions affect one another. So vital is the economic, trade and business component in present day international affairs that many foreign states, in the West as well as within the socialist bloc, are engaged actively in traditionally private and commercial matters such as the production and marketing of products.

Friend, *supra* note 4, at iii.

<sup>40</sup> See Kevin Platt, *Chinese Army's "Private" Business*, Christian Science Monitor, June 3, 1998 (visited Oct. 10, 2000) <<http://www.csmonitor.com/durable/1998/06/03/pls2.htm>>;

Communist Party announced in 1997 that state-owned industries were to be privatized and massive amounts of assets were precipitously removed from state control,<sup>41</sup> the effort to place those assets into the hands of private commercial entities has not been rapid, smooth or complete. The State continues to play an outsized role in the commercial affairs of the country. This widespread role of the Chinese State and the CCP in economic affairs has strongly affected the rule of law in China.

Another important factor affecting economic and legal reform in China is the role of overseas Chinese in the Post-Mao Chinese economy. For centuries, large numbers of Chinese sojourners, or *huaqiao* as they came to be called, had been leaving China's port cities to find a better life in Hong Kong, Taiwan, countries throughout Southeast Asia and, more recently, in Australia and North and South America. These overseas Chinese, predominantly from the Guandong and Fujian provinces in southern China, settled in diverse areas of the world, built businesses, and went into the professions, establishing lives for themselves and their families.<sup>42</sup> In some cases, overseas Chinese businessmen made large fortunes.<sup>43</sup> As China opened itself to commerce with the West under Deng, many overseas Chinese, due to their strong emotional and cultural ties to their ancestral homeland, as well as to their linguistic and cultural familiarity with China, desired to make investments in China. In the 1980's and 1990's, Deng Xiaoping recognized the value of this educated, skilled, experienced and well-capitalized Chinese Diaspora and encouraged them to invest in China.<sup>44</sup> With Deng's encouragement, many prominent and not-so-prominent overseas Chinese responded enthusiastically, investing literally billions of dollars of capital in China and accounting for 80% of the investments in post-Mao China.<sup>45</sup> This savvy population, whose fortunes had been made in places with sophisticated and predictable legal systems like Hong Kong, Singapore, Taiwan, and the United States, had expectations not

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Kathryn Culley, *How China's Army Stocked American Shelves*, Christian Science Monitor, June 3, 1998 (visited Oct. 10, 2000) <<http://www.csmonitor.com/durable/1998/06/03/p8s1.htm>>.

<sup>41</sup> See Fairbank and Goldman, *supra* note 15, at 415.

<sup>42</sup> See generally WANG GUNGWU, *THE CHINESE OVERSEAS, FROM EARTHBOUND CHINA TO THE QUEST FOR AUTONOMY* (2000) and FRANCIS L. K. HSU & HENDRICK SERRIE, *THE OVERSEAS CHINESE: ETHNICITY IN NATIONAL CONTEXT* (1998), for more discussion on overseas Chinese.

<sup>43</sup> The long list of successful multinational companies founded and owned by overseas Chinese includes Acer Computers, Creative Technology, Shangri-La Hotels, Formosa Plastics and Singapore Airlines. See GEORGE T. HALEY, CHIN TIONG TAN, & USHA C.V. HALEY, *NEW ASIAN EMPERORS: THE OVERSEAS CHINESE: THEIR STRATEGIES AND COMPETITIVE ADVANTAGES* 24 (1998).

<sup>44</sup> Mao had earlier rejected offers in the 1950's by prominent overseas Chinese to make investments in the P.R.C. See Fairbank and Goldman, *supra* note 15, at 413.

<sup>45</sup> See Fairbank and Goldman, *supra* note 15, at 413-414.

only of profitability but also of legal protections for their significant investments. The demands placed on the Chinese leadership by this powerful population to improve the rule of law in China may be hard to quantify, but no doubt has been an important factor in the ongoing evolution of the Chinese legal system.

How do foreign investors and multinational corporations doing business in China view the Chinese legal system and the general business environment? Many multinational corporations, which have committed significant capital and human resources to China, have had generally positive experiences. An example is Coca-Cola, which has begun to realize impressive profits after years of patience and perseverance.<sup>46</sup> Scores of others, however, have little or no profitability to show after years of effort and are coming under increasing pressure from their home offices to produce profits.<sup>47</sup> Their ability to do so relates directly to the viability of the capital markets and the ability of the Chinese leadership to make good on promises of economic and legal reform that will be mandated by the WTO.

Opinions are mixed among foreign investors about the potential of new Chinese debt and equity issues. On the one hand, in the first nine months of 2000, China raised more than \$9 billion in international equity issues<sup>48</sup> and foreign investment has averaged more than \$40 billion a year for the past five years.<sup>49</sup> At the same time, however, many seasoned China market watchers, who saw the high flying 1996 and 1997 “red chip” H-share issues traded on Hong Kong exchanges plummet to 20% to 25% of their value, question the wisdom of investing in Chinese companies seeking to raise debt and equity capital in the international public markets. They cite poor and inexperienced management and a failure to maximize profitability and shareholder value as reasons for caution. “Why would you buy a piece of paper from some country when the entity issuing it is not for profit, run by a bunch of bureaucrats with no prior experience—no one you would hire—with no rule of law, or representation on the board?” questions one pessimistic hedge fund manager.<sup>50</sup>

Many foreign investors and multinational corporations share this pessimistic viewpoint. After experiencing the Chinese judicial system firsthand, they are appalled by the pervasive influence of *guanxi*, or local relationships, the lack of fair treatment received by outside litigants, and the arbitrariness and unpredictability of the system. There are numerous exam-

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<sup>46</sup> See *Coca-Cola's Net Income Jumps 36%: Growth in China Helps Boost Revenue*, Wall St. J., Oct. 20, 2000 (visited Oct. 20, 2000) <www.wsj.com>.

<sup>47</sup> See Ian Johnson, *Beijing Needs to Complete Promised Reform Slate If Money Is To Be Made*, WALL ST. J., May 25, 2000, at A21.

<sup>48</sup> See Joe Leahy and Richard McGregor, *Sinopec Joins List of Giant Chinese Privatizations: Launch Comes Amid Optimism on Economy*, FINANCIAL TIMES, Oct. 19, 2000, at 20.

<sup>49</sup> See Johnson, *supra* note 47.

<sup>50</sup> See Leahy and McGregor, *supra* note 48.

ples of parties that have fallen victim to a system that systematically favors local, Chinese litigants over outsiders. These litigants not only find the procedural process fundamentally unfair to foreign parties but also complain that the substantive law is so unclear that a fair and predictable interpretation of the law is nearly impossible. Moreover, if a foreign litigant does achieve a judgment in its favor, the enforceability of that judgment by a local Chinese court is extremely difficult, unnecessarily time consuming, and often ultimately unsuccessful.<sup>51</sup> So widespread is this enforceability of judgments issue that local courts often pursue a policy of mediation between parties rather than litigation in order to increase the likelihood of enforceability of judgments.<sup>52</sup> Some multinationals, relying on high-priced legal advice and naively believing that the Chinese legal system was far better developed than it is, have suffered to their significant economic detriment. Some have even pulled out of China altogether.<sup>53</sup> Despite the huge markets and enormous potential, if multinational corporations are not making acceptable profits with a sufficient degree of legal protection for their current and contemplated capital investments, they may reassess their willingness to invest capital and human resources in China.

An important question is whether the evolving Chinese legal system will benefit Chinese citizens and Chinese companies. To be sure, the booming Chinese economy has not only benefited foreign investors and the wealthy. From 1979 to 1999, per capita income in China quadrupled, albeit from an extremely low base in 1978 of about 132 Yuan, or \$66.<sup>54</sup> In the 1990's peasants were permitted for the first time since the Communist Revolution to leave their villages in search of economic opportunity in urban areas and the Special Economic Zones.<sup>55</sup> Moreover, Deng's declaration that "to get rich is glorious" validated capitalist endeavors and unleashed a torrent of entrepreneurial enthusiasm. This created a flourishing private sector at the local level that has changed the face of China. As these burgeoning entrepreneurs grow their businesses and re-invest their equity capital in the Chinese economy, they too will require a reliable legal system, based increasingly on the rule of law, which addresses the commercial rights and needs of this new mercantile class.

So what have we learned about Chinese legal institutions and the rule of law in twenty years? Has the Open Door policy lived up to its promise?

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<sup>51</sup> See Lubman, *supra* note 11.

<sup>52</sup> See *id.*

<sup>53</sup> Leontine D. Chuang's article *Foreign Investment in China's Telecommunications Market: Reflections on the Rule of Law and Foreign Investment in China*, beginning on page 509 looks at this issue in depth.

<sup>54</sup> See James Fewsmith, *Reaction, Resurgence, and Succession: Chinese Politics Since Tiananmen*, in *THE POLITICS OF CHINA: THE ERAS OF MAO AND DENG*, *supra* note 18, at 529-530; Fairbank and Goldman, *supra* note 15, at 406.

<sup>55</sup> See Fairbank and Goldman, *supra* note 15, at 414.

Can the Chinese legal system keep pace with the growing Chinese economy as China enters the 21st century and joins the WTO? Will Chinese citizens benefit from the economic and legal reforms that are promised by the CCP? Will multinational corporations come to regard the Chinese legal system as one characterized by the rule of law or the rule of man? Will criminal defendants ever receive justice free of arbitrary political intervention? Of course, only time will tell. But pressure on the legal system to grow and improve at all levels continues and the trend is encouraging. In fact, while infrequent, a small number of cases have been decided in favor of private litigants and against the state or the Party.<sup>56</sup> Although primitive by western standards, "law has gained more importance than it has ever possessed in Chinese history."<sup>57</sup> As Stanley Lubman observes in his article herein, "when I wrote [in the *Journal of International Law & Business*] in 1979, it was easy to summarize the state of Chinese legal institutions because they were so sparse."<sup>58</sup> In the intervening 20 years, the legal framework in China has undergone an extraordinary degree of growth and the future promises continued expansion. During the same period China has transformed itself into a world economic power that cannot be ignored. And many thoughtful observers believe that in the not too distant future China will become a powerful military presence and possibly a menace to Western interests. We can only hope that as China grows economically and militarily, it will attain a genuine rule of law, separate from government influence, and that the China Symposium in the 2020 edition of *JILB* will report many positive developments.

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<sup>56</sup> See William P. Alford, *Law, Law, What Law? Why Western Scholars of China Have Not Had More to Say about its Law*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 45, 53 (Karen Turner, James V. Feinerman, and R. Kent Guy eds., 2000).

<sup>57</sup> See Lubman, *supra* note 21.

<sup>58</sup> See Lubman, *supra* note 11.

