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# China's New Joint Venture Law: Analysis and Economic Overview

## I. INTRODUCTION\*

In his *Report on the Work of Government* delivered on June 18, 1979,<sup>1</sup> Premier Hua Guofeng stated that the primary task of the Government of the People's Republic of China (P.R.C.) was to implement a socialist modernization policy. Hua emphatically rejected the radical politics and ideology of Lin Biao and the Gang of Four in favor of a pragmatic national reorientation.<sup>2</sup> He stated that the establishment of democratic socialism<sup>3</sup> and the limited reinstatement of free market practices<sup>4</sup> in the economy were fundamental to modernization. Pursuant to these goals, Hua articulated a comprehensive reform of the P.R.C.'s legal system<sup>5</sup> and announced substantial restructuring and readjustment of the P.R.C.'s economy.<sup>6</sup>

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\* For an exhaustive list of the various means of access to information in China, see generally F. KAPLAN, J. SOBIN & S. ANDORS, *ENCYCLOPEDIA OF CHINA TODAY* 291 (1979). Included is an inventory of Chinese-language periodicals as well as People's Republic of China (P.R.C.) materials in translation, P.R.C.-related periodicals published abroad and a list of general references and research guides. See also Shapiro, *English Sources on the Criminal Process in the People's Republic of China*, 3 B.C. INT'L & COMP. L. REV. 89 (1979).

1. Hua Guofeng, *Report on the Work of Government*, delivered at the Second Session of the Fifth National People's Congress on June 18, 1979, published unabridged in *BEIJING REVIEW*, No. 27, Jul. 6, 1979, at 5 [hereinafter cited as *Hua's Report on Government*].

2. *Id.*

3. *Id.* at 21. In addition, see *BEIJING REVIEW*, No. 20, May 18, 1979, at 18-23, for an outline of the P.R.C.'s structure of state power and *BEIJING REVIEW*, No. 2, Jan. 12, 1979, at 25-35, for an outline of the P.R.C.'s legal system and judicial structure. See also WU, *CHINA: A HANDBOOK* 221 (1973) [hereinafter cited as *WU*].

4. Hua's *Report on Government*, *supra* note 1, at 12. See an editorial published in *BEIJING REVIEW*, No. 17, Apr. 27, 1979, at 10-13, which attempts to reconcile socialist politics with the new economics. For a recent article summarizing the political and economic forces likely to influence the 1980's, see *BEIJING REVIEW*, No. 9, Mar. 3, 1980, at 23.

5. See text accompanying notes 13-29 *infra*.

6. See text accompanying notes 30-52 *infra*.

This expansive shift in policy is important from the perspective of the foreign businessman because it has resulted in the first joint venture law<sup>7</sup> in the history of the P.R.C. A foreign investor now possesses the administrative mechanism and the legal protection necessary to gain access to the resources of the world's third largest and most populous nation.<sup>8</sup>

This Comment begins with an examination of this recent political and economic reform in order to establish the background necessary for a realistic assessment of the viability of joint ventures with the P.R.C.<sup>9</sup> The author notes that while the political and legal reform reflects an environment that is receptive to foreign investment, such reform is subject to the uncertainties of a legal system in an evolutionary stage. It is observed that although the economic conditions disclose an abundant supply of natural<sup>10</sup> and human<sup>11</sup> resources, the economy is hampered by mismanagement and constrained by a central bureaucracy.

Second, this Comment provides a close analysis of the Law of the People's Republic of China on Joint Ventures using Chinese and Foreign Investment (Joint Venture Law). The author highlights the most important provisions and explicates those sections that are in need of interpretation. The analysis shows that although the Joint Venture Law is flexible and responsive to the requirements of a wide spectrum of joint ventures, it is only enabling legislation that depends for its interpretation on a commercial code that is still non-existent.

In the concluding section, the author outlines the prospects for joint ventures in the P.R.C. Based on the degree to which joint ventures can contribute to the P.R.C.'s modernization, the author projects cautious optimism for joint ventures in spite of the many uncertainties that complicate investment decisions.

7. Law of the People's Republic of China on Joint Ventures using Chinese and Foreign Investment, enacted on July 1, 1979 and promulgated on July 8, 1979 by the Second Session of the Fifth National People's Congress [hereinafter cited as Joint Venture Law]. An unofficial English translation appears in BEIJING REVIEW, No. 29, Jul. 20, 1979, at 24-26. The text translated in the BEIJING REVIEW was also distributed in press release No. 79/001 by the Embassy of the P.R.C., in Washington, D.C., and is reprinted in 18 INT'L LEGAL MATS. 1163 (1979). Article 15 of the Joint Venture Law gives the National People's Congress the power of amendment. Joint Venture Law, *supra*, art. 15.

8. J.S. AIRD, JEC (1967); C. HOWE, CHINA'S ECONOMY 2 (1978).

9. See Comment, *China, Modernization and Sino-United States Trade*, 10 CALIF. WEST. INT'L L. J. 53 (1980) [hereinafter cited as *China Modernization*], which traces the historic influences on P.R.C. development and argues that a shift in political and economic philosophy portends the P.R.C.'s future.

10. For an examination of the natural resources of the P.R.C., see generally SZUPROWICZ & SZUPROWICZ, DOING BUSINESS WITH THE PEOPLE'S REPUBLIC OF CHINA 104, 168 (1978) [hereinafter cited as SZUPROWICZ].

11. For an examination of the demography of the P.R.C., see generally F. KAPLAN, J. SOBIN & S. ANDORS, ENCYCLOPEDIA OF CHINA TODAY 12 (1979) [hereinafter cited as KAPLAN, SOBIN & ANDORS].

## II. THE POLITICAL AND ECONOMIC BACKGROUND

The primary goal of the P.R.C. is to effectuate socialist modernization.<sup>12</sup> Such a goal entails reform on every level of life in the P.R.C. Thus, the reform is both political and economic.

### A. *Political Reform: Democratic Socialism and Legal Reform*

The establishment of socialist democracy is one cornerstone of the P.R.C.'s new policy.<sup>13</sup> This political reform is viewed by the P.R.C. leadership as a means to ensure the stability that has eluded the P.R.C. throughout its history.<sup>14</sup> Additionally, it is hoped that mass participation in government will marshal the enthusiasm and initiative of the population and foster increased productivity.<sup>15</sup>

The development of a new legal system is the primary means through which the P.R.C. intends to implement the necessary reform.<sup>16</sup> Pursuant to this development, several new laws were promulgated on July 8, 1979.<sup>17</sup> These new laws form the groundwork of the new system. They include an organic law of the people's congresses and courts,<sup>18</sup> an electoral law,<sup>19</sup> a criminal law

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12. Hua's *Report on Government*, *supra* note 1, at 5.

13. *Id.* at 21. For some observations on the sociological effects of the Cultural Revolution, see Topping, *China's Long March Into the Future*, N. Y. Times, Feb. 3, 1980, § 6 (Magazine), at 29, col. 3.

14. *Hau's Report on Government*, *supra* note 1, at 6.

15. *Id.* at 22.

16. Cohen & Nee, *A Look at China's Joint Venture Law*, Asian Wall St. J., Jul. 30, 1979, at 10, col. 1 [hereinafter cited as Cohen & Nee]. Jerome Cohen is a member of Harvard University's East Asian Legal Department and Owen D. Nee is an American lawyer based in Hong Kong. The ambitious program of law reform is designed to achieve the political stability necessary for economic reform. See Willoughby, *People's Republic of China — Joint Ventures*, 76 THE LAW SOCIETY'S GAZETTE (International, ed. by Egerton-Vernon), Oct. 22, 1979, at 1014 [hereinafter cited as Willoughby]; *Strengthening the Socialist Legal System*, BEIJING REVIEW, No. 49, Dec. 7, 1979, at 3.

17. Stressing the need for a sound legal system to ensure stability, Peng Zhen, Director of the Commission for Legal Affairs of the National People's Congress (N.P.C.) Standing Committee, explained the new laws before the Second Session of the Fifth N.P.C. on June 26, 1979. The unabridged report is published in Peng, *Explanation of the Seven Laws*, BEIJING REVIEW, No. 28, Jul. 13, 1979, at 8-16 [hereinafter cited as Peng]. The new laws are being heavily publicized in the P.R.C. BEIJING REVIEW, No. 29, Jul. 20, 1979, at 3-4. The momentum generated by this liberalization will be difficult to curb. Moreover, the mass acceptance by the people of the laws is intended as the primary means of enforcement. See BEIJING REVIEW, No. 32, Aug. 10, 1979, at 4-5. See also Peng, *supra*, at 14. An article in BEIJING REVIEW, No. 9, Mar. 2, 1979, at 8-14, outlines the fundamental rights of citizens.

18. Peng, *supra* note 17, at 9.

19. See Cheng Zihua (Minister of Civil Affairs), *On China's Electoral Law*, BEIJING REVIEW, No. 37, Sept. 14, 1979, at 15-18; Tian Sansong, *Election of Deputies to a County People's Congress*, BEIJING REVIEW, No. 8, Feb. 25, 1980, at 11, for a discussion of the new electoral law. See The Detroit News, Jan. 2, 1980, § A, at 6, col. 1.

and procedure<sup>20</sup> and an economic law.<sup>21</sup> These laws provide citizens with a variety of new rights including: the right to elect deputies by secret ballot from a list of candidates,<sup>22</sup> the right to supervise and recall deputies,<sup>23</sup> the right to the protection of legitimate<sup>24</sup> private property,<sup>25</sup> and the right to counsel.<sup>26</sup>

The P.R.C. has traditionally rejected a formal legal system in favor of unwritten, internalized moral norms.<sup>27</sup> Thus, the current shift to formalism is most dramatic. The change reflects an entirely new analysis of the measures that are seen as necessary to modernize the P.R.C. Foreign investment is a major beneficiary of this new analysis, because the reform manifests an unprecedented commitment to political stability<sup>28</sup> and to the orderly resolution of legal disputes.<sup>29</sup> For the first time, an institutional framework has been established to support such a policy. Uncertainty in the investment climate will be reduced. However, to the extent that the new policy is transient or that the actual reforms are unworkable in such an undeveloped economy, investors must remain cautious.

#### B. *Economic Reform: Restructuring and Readjustment*

Economic policies will supplement the political and legal reform required for modernization in the P.R.C.<sup>30</sup> One major new economic policy of special interest to potential investors is the restructuring of management practices to

20. See *New Criminal Law and the Law of Criminal Procedure*, BEIJING REVIEW, No. 33, Aug. 17, 1979, at 16.

21. Joint Venture Law, *supra* note 7.

22. Peng, *supra* note 17, at 9.

23. *Id.*

24. "Legitimate" private property includes income, savings, houses, as well as such means of production as small plots of land and livestock. *Id.* at 11.

25. *Id.*

26. *Id.* at 13.

27. An old Chinese myth states that law exists for the Western barbarians who lack moral restraints. Birenbaum, *Doing Business with China*, Wall St. J., Aug. 31, 1979, at 6, col. 4. This aversion to formalized law has special significance with respect to the form of dispute resolution in foreign trade. See notes and text accompanying notes 223-46 *infra*. For discussion of P.R.C. law, see generally COHEN AND CHIN, *PEOPLE'S CHINA AND INTERNATIONAL LAW* 3 (1974); *China Modernization*, *supra* note 9, at 57; Shaney, *Selected Aspects of China's Conduct of Foreign Trade*, 11 INT'L LAW 641 (1977) [hereinafter cited as Shaney]; Huang, *Reflections on Law and the Economy in the People's Republic of China*, 14 HARV. INT'L L. J. 261 (1973).

28. See Hua's *Report on Government*, *supra* note 1, at 6, for an assessment by the present P.R.C. leadership of the "counter-revolutionary political force led by Lin Biao and the Gang of Four which for ten years wrought havoc and brought the nation untold misery." *Id.* The recent rehabilitation of Lin Shaogi together with the ousting of four members of the Politburo who rose to power during the Cultural Revolution constitutes further evidence of a trend away from Mao's politics and a solidification of Deng Xiaoping's power. Butterfield, *Chinese Rehabilitate Lin Shaogi, Late Mao Rival and Chief of State*, N.Y. Times, Mar. 1, 1980, at 3, col. 1.

29. See, e.g., *Strengthen the Legal System and Democracy*, BEIJING REVIEW, No. 27, Jul. 6, 1979, at 35.

30. For a history of the P.R.C.'s foreign dealings, see KAPLAN, SOBIN & ANDORS, *supra* note 11, at 202.

accommodate the objective laws of economics.<sup>31</sup> Pursuant to this reform, a meritocracy in employment practices will be adopted.<sup>32</sup> Incentives will be provided for increased productivity.<sup>33</sup> Additionally, greater autonomy will be given to local enterprises in order to curb the growth of extensive, unwieldy administrative organs.<sup>34</sup> The institution of these free market devices will be welcomed by those contemplating investment in the P.R.C. Such reforms will tend to foster an efficient work force. Moreover, such reforms may make it possible for joint ventures to avoid bureaucratic bottlenecks. For example, a joint venture may be permitted to secure its own raw materials and to market its own products and thereby eliminate the need to rely on a potentially unreliable governmental entity. However, there may be less than total commitment to the objective laws of economics. The degree to which foreign management will be free to hire and discharge employees is uncertain.<sup>35</sup> Moreover, the scarcity of vital energy resources dictates that joint ventures will not be given free rein to compete for such resources; rather, the supply of essential resources will probably be subject to an allocation by the government based on national goals. An investor must determine his probable level of priority in the allocation process before entering a joint venture.

A second major new economic policy of interest to foreign investors involves

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31. See Hua's *Report on Government*, *supra* note 1, at 12. See also BEIJING REVIEW, No. 26, Jun. 29, 1979, at 17-19. For an article applying the objective laws of economics to the P.R.C.'s planned economy, see BEIJING REVIEW, No. 14, Apr. 6, 1979, at 14-16. In explanation of the present attitude toward profit, see BEIJING REVIEW, No. 3, Jan. 21, 1980, at 24.

An advisor to the State Planning Commission, Xue Mugiao writes, in *Noted Economist on Employment*, BEIJING REVIEW, No. 33, Aug. 17, 1979, at 13-14, that state employment recruitment will be limited, i.e., people will be allowed to find jobs themselves as modernization creates a surplus labor force.

An additional means to induce economic responsibility will be to finance investments through bank loans rather than through state appropriation. BEIJING REVIEW, No. 15, Apr. 13, 1979, at 4; Kramer, *Pause in Peking*, Wall St. J., May 8, 1979, at 48, col. 1.

Another type of "restructuring" being stressed is family planning. BEIJING REVIEW, No. 15, Apr. 13, 1979, at 4-5. In Sichuan, parents who agree to have only one child are being given economic rewards on a trial basis. *Id.* Some families receive child support; others receive an increase in living space; while still others are given food supplements. *Id.* Population growth is considered a severe threat to the economy. *Id.*

For an article analyzing the background and need for changes in the P.R.C.'s economic management, see Xue, *On Reforming the Economic Management System*, BEIJING REVIEW, No. 5, Feb. 4, 1980, at 16. See generally N.Y. Times, Nov. 12, 1978, § F, at 21, col. 1; Butterfield, *Chinese Province Tests Profit Incentive in Industry*, N.Y. Times, Jan. 27, 1980, at 1, col. 2.

32. An article in BEIJING REVIEW, No. 8, Feb. 23, 1979, at 7, discusses the problem of the inefficiency and unfairness of a secure job and a guaranteed income (the "iron rice bowl"). Rewards and punishment for good and bad work, respectively, are suggested. *Id.* An article in BEIJING REVIEW, No. 16, Apr. 20, 1979, at 5-6, notes that the bonus system, tried at a number of Beijing factories, significantly increased production.

33. BEIJING REVIEW, No. 32, Aug. 10, 1979, at 6.

34. *Id.*

35. For discussion of the management of a joint venture, see notes and text accompanying notes 180-95 *infra*.

the readjustment of the priorities of domestic investment. Prior economic policy resulted in a disproportionate development of the national economy on a variety of levels. The new policy seeks to readjust these imbalances.<sup>36</sup> An analysis of this readjustment process is crucial for the foreign investor. As will be discussed,<sup>37</sup> the establishment of a joint venture is subject to the approval of the P.R.C. government. Moreover, approval will depend upon the degree to which a joint venture assists the P.R.C. in its modernization.<sup>38</sup> Thus, the readjustment of domestic investment will outline the sectors of the economy most likely to be amenable to foreign investment.

The agricultural sector forms the foundation of the P.R.C.'s national economy.<sup>39</sup> Farm produce and related products compose 85 percent of the population's means of subsistence.<sup>40</sup> In addition, agriculture provides 40 percent of the raw materials needed by heavy industry and 70 percent of the materials for light industry.<sup>41</sup> Thus, recent policy stressing development in the heavy industrial sector will be amended to give the agricultural sector first priority. It follows that foreign investment which promotes the agricultural sector will be encouraged by the P.R.C. to complement domestic investment and capital concentration in this sector.

The light industrial sector,<sup>42</sup> which is responsible for half of the nation's retail trade, will also receive augmented domestic investment.<sup>43</sup> Through such a readjusted policy, the P.R.C. intends to increase the production of consumer items such as detergents, bicycles, sewing machines, watches and cameras in order to address increasing consumer expectations.<sup>44</sup> An additional motivation for such expansion concerns the important role that light industry plays in producing items for export. The export of such goods generates foreign capital

36. See Hua's *Report on Government*, *supra* note 1, at 12-21; BEIJING REVIEW, No. 26, Jun. 29, 1979, at 13-17. See also Vice Premier and Minister in Charge of the State Planning Commission Yu Qiuli's Report on the 1979 National Economic Plan, delivered at the plenary meeting of the Second Session of the Fifth National People's Congress, published in Yu, *Arrangements for the 1979 National Economic Plan*, BEIJING REVIEW, No. 29, Jul. 20, 1979, at 7-16 [hereinafter cited as Yu].

37. See text accompanying note 100 *infra*.

38. See text accompanying note 109 *infra*.

39. See generally WU, *supra* note 3, at 45. For a series of articles on the role of agriculture in the P.R.C., see BEIJING REVIEW, No. 4, Jan. 28, 1980, at 20.

40. BEIJING REVIEW, No. 26, Jun. 29, 1979, at 15.

41. *Id.* Thus, the primary task of readjustment is the development of agriculture. Investment in agriculture accounted for 14 percent of the total 1979 state investment compared with 10.7 percent in 1978. BEIJING REVIEW, No. 2, Jan. 14, 1980, at 3. One means of achieving agricultural growth that may be of interest to outside investors is through aid by industry. The production of chemical fertilizers will be increased and tractors will be produced making these areas ripe for foreign participation. Yu, *supra* note 36, at 7-9. See text accompanying notes 260-64 *infra*.

42. For a discussion of P.R.C. industrial capabilities, see generally WU, *supra* note 3, at 553.

43. Total output value of light industry in 1979 registered an 8 percent increase over that of 1978. BEIJING REVIEW, No. 2, Jan. 14, 1980, at 3.

44. Yu, *supra* note 36, at 9.

which can be allocated toward the importation of advanced technology and equipment from abroad.<sup>45</sup> It appears that foreign investment that complements such domestic investment will be encouraged by the P.R.C.

The heavy industrial sector also requires readjustment in order to rectify an imbalance caused by mismanagement.<sup>46</sup> Previous neglect of the supply of fuel and power has strained the productive capacity of the economy.<sup>47</sup> Inadequate railway transport capacity and underdeveloped highways, harbors, and telecommunications services<sup>48</sup> have proved troublesome. Such shortcomings inhibit production at all levels of the economy. For example, it is estimated that the shortage of electrical power has reduced the country's productive capacity by as much as 20 percent.<sup>49</sup> Thus, foreign investment that compensates for these weaknesses can be expected to receive the highest level of cooperation from the P.R.C. authorities.

Certain sectors that are concerned with the general welfare of the people and which have been neglected in favor of capital construction can also be expected to favor foreign investment.<sup>50</sup> The construction of housing, public health and educational facilities has lagged behind the construction of factories.<sup>51</sup> The focus of investment will shift accordingly.<sup>52</sup>

### C. Foreign Participation: Philosophy and Practice

In addition to the restructuring and readjustment of economic policy, the P.R.C. contemplates energetic participation by foreign parties as a means to

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45. *Id.* See text accompanying notes 265-68 *infra*.

46. See Kramer, *China Begins Campaign to Explain Why It Must Cut Plans to Boost Heavy Industry*, Wall St. J., Mar. 26, 1979, at 6, col. 2.

47. Yu, *supra* note 36, at 10.

48. *Id.* See WU, *supra* note 3, at 669; BEIJING REVIEW, No. 2, Jan. 14, 1980, at 4.

49. Zhengwen, *Readjusting the National Economy*, BEIJING REVIEW, No. 26, Jun. 29, 1979, at 14 [hereinafter cited as Zhengwen]. See text accompanying notes 269-72 *infra*.

50. Zhengwen, *supra* note 49, at 14-16. An attempt will be made to increase the production of consumer goods to meet the rise in purchasing power that is expected to accompany modernization. *Id.* at 17. However, this attempt will be only a gradual process. As domestic investment is allocated to other areas, foreign investment may fill this gap. For an explanation of the new emphasis on consumerism and its relationship to the other factors in the P.R.C.'s economic readjustment, see Butterfield, *China Taking Heed of Its Consumers*, N.Y. Times, Feb. 3, 1980, § 12, at 61, col. 1. See Wall St. J., Apr. 25, 1979, at 34, col. 3, for an article noting the sale of cigarettes to the P.R.C. by R. J. Reynolds Tobacco International, Inc.

51. Zhengwen, *supra* note 49, at 14.

52. Two domestic policies designed to speed modernization other than 'restructuring' and 'readjustment' are 'consolidation' and 'improvement.' See Hua's *Report on Government*, *supra* note 1, at 12-13. 'Consolidation' involves a shake-up in existing enterprises. Factories will be renovated, merged and reorganized in order to upgrade productivity. *Id.* 'Improvement' involves increasing production generally by means of practicing economy, learning from abroad, strengthening leadership and improving management. *Id.* See also BEIJING REVIEW, No. 26, Jun. 29, 1979, at 19-21.



promote modernization.<sup>53</sup> Foreign investment pursuant to the new Joint Venture Law is only one of a variety of possible forms.<sup>54</sup> A trade policy designed to import advanced technology and equipment is central to the P.R.C.'s goals.<sup>55</sup>

53. Hua states that "[e]conomic exchange between countries and the import of technology are indispensable, major means by which countries develop their economy and technology." Hua's *Report on Government*, *supra* note 1, at 18. According to Minister of Foreign Trade, Li Quiang, in *Expanding China's Foreign Trade*, BEIJING REVIEW, No. 17, Apr. 27, 1979, at 15, the projects amenable to foreign cooperation are vast:

Cooperation with foreign companies may be undertaken in power industry, including the construction of power stations; the exploitation of energy resources, such as petroleum and coal; communications and transport, including the building of ports and wharfs; processing of raw and other industrial materials such as plastics, chemical fibres and building materials; precision machinery and electronics industry; iron and steel industries and exploitation of non-ferrous mineral; etc. We are interested in co-operating with foreign companies on ventures related to agricultural modernization.

*Id.* See also Gu Ming (Vice Minister in Charge of the State Planning Commission), *Plans Readjusted, Policy Unchanged*, BEIJING REVIEW, No. 30, Jul. 27, 1979, at 9-11 [hereinafter cited as Gu Ming].

Leading businessman Julian Sobin adds medical technology, business and hospital management expertise, and containerization to the list of projects which are amenable to foreign cooperation. Sobin, *Sino-U.S. Trade*, MASSWORLD, Mar. 1979, at 2-4 [hereinafter cited as Sobin]. Nevans, *China: What's In It for Investors?*, FINANCIAL WORLD, Feb. 1, 1979, at 14, suggests appropriate areas for investment, noting that LTV, Coca-Cola, Boeing and Control Data are only a few of the firms announcing new deals. See also Surrey & Soble, *Joint Venture Law and Dispute Resolution in China: A Framework for International Trade*, EAST ASIAN EXECUTIVE REPORTS, Sept. 1, 1979, at 3, 14 [hereinafter cited as Surrey & Soble 1]. The pamphlet, INDUSTRY AND TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, *DOING BUSINESS WITH CHINA*, (1979), lists the major imports and exports between the P.R.C. and the United States for 1978, including their dollar values. *Id.* at 26-40.

For a concise history of U.S.-P.R.C. trade subsequent to the Shanghai Communique 66 DEPT STATE BULL. 435 (1972), see H. R. REP. NO. 733, 96th Cong., 2nd Sess. 4 (1980). In 1978, trade reached a level of \$1.2 billion. *Id.* Agricultural commodities (primarily wheat, cotton and corn) accounted for about 70 percent of U.S. exports. *Id.* Over \$192 million of exports were manufactured goods, including machinery and equipment, of which a large part was made up of oil and gas drilling equipment. *Id.* The Department of Commerce projects that the U.S. share of P.R.C. imports will grow from its 8 percent level in 1978 to 14 percent and \$4 billion in 1985. *Id.* at 5. The United States has recently announced that it will sell military support equipment to the P.R.C. including trucks, communications gear and early-warning radar. Gwertzman, *U.S., In Rebuff to Soviets, Announces It Will Sell China Military Support Equipment*, N.Y. Times, Jan. 25, 1980, at 1, col. 6. See also Casey, *A More Realistic Approach to U.S. Trade with China*, Journal of Commerce, Aug. 17, 1979, at 4, col. 4.

See the following articles for projects presently in negotiation: Wall St. J., Sept. 2, 1979, at 2; N.Y. Times, Nov. 15, 1979, § D, at 4, col. 1 (possible joint ventures to build heavy trucks); Wall St. J., Oct. 4, 1979, at 17, col. 2 (a project concerning thermal-electric powerplants); Wall St. J., Oct. 5, 1979, at 20, col. 1 (a joint venture to build a hotel); Wall St. J., Oct. 22, 1979, at 24, col. 5 (a joint venture to build compressors and airplanes).

See Kraar, *China's Narrow Door to the West*, FORTUNE, Mar. 26, 1979, at 63, for a detailed overview of the variety of businesses presently doing business in the P.R.C. This article also provides a sober discussion of the many practical problems that exist in such business relationships. *Id.*

54. See generally Zou Siyi (a leading member of the Export Bureau of the Ministry of Foreign Trade), *Some Questions on Developing Economic and Technical Exchanges with Foreign Countries*, BEIJING REVIEW, No. 17, Apr. 27, 1979, at 17-20 [hereinafter cited as Zou Siyi], in which the author suggests an increasingly flexible policy toward foreign participation.

55. The total volume of imports and exports for 1979 was slated to grow 24 percent from 1978's total, Yu, *supra* note 36, at 8; but indeed, over the first half of 1979, the volume increased

Foreign bank loans<sup>56</sup> are being obtained for the first time. Other forms of foreign participation include compensatory trade,<sup>57</sup> cooperative production<sup>58</sup> and processing trade.<sup>59</sup> Scientific and academic exchanges will serve educational purposes.<sup>60</sup>

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43.2 percent over 1978 levels. BEIJING REVIEW, No. 30, Jul. 27, 1979, at 3. Imports grew 59.9 percent. *Id.*

The import of new technology, complete sets of equipment and general machinery increased by 130 percent, rolled steel and non-ferrous metals by 83 percent, chemical fertilizer by 20 percent, and cotton and synthetic fibre by 34 percent. Increases were also registered in the import of grain, edible oil and granulated sugar.

*Id.* But see Wall St. J., Apr. 6, 1979, at 20, col. 2, for a discussion that emphasizes the P.R.C.'s need for an import program that promotes balanced economic growth.

56. Zou Siyi, *supra* note 54, at 17, 19. Vice Premier Gu Mu has announced that the P.R.C. will accept loans from all friendly countries provided that the P.R.C.'s sovereign rights are protected. BEIJING REVIEW, No. 41, Oct. 12, 1979, at 3-4. He noted that, pursuant to Vice President Mondale's trip to the P.R.C. in August 1979, the United States has agreed to lend the P.R.C. \$2 billion over a five year period on the basis of Export-Import Bank Credit arrangements. *Id.* Additionally, Mr. Gu indicated that Japan might provide overseas economic cooperation funds for the construction of coal and dock projects, and that the Bank of China had signed long, short and medium-term loan agreements with non-governmental banks and corporations of the United States, France, Italy, Canada, Sweden and Japan. *Id.* He stated that the P.R.C. is also considering joining U.N. financial organizations and accepting loans from the World Bank. *Id.* Lachia & Kramer, *How Chase Group Scored Peking Victory*, Wall St. J., Apr. 10, 1979, at 16, col. 2. See generally Lenzner, *Banks Look to the East*, Boston Sunday Globe, Oct. 28, 1979, § A, at 6, col. 4, for an overview of the present market for U.S. banks. See also Kramer, *China's Banks Begin Forging Links with Those in Other Countries and Taking Bigger Domestic Role*, Wall St. J., May 8, 1979, at 48, col. 1, for an article detailing the Bank of China's new expanded role in domestic projects and describing the P.R.C.'s increasing pragmatism in financial matters. See also BEIJING REVIEW, No. 15, Apr. 13, 1979, at 4. For a general discussion of the financing of P.R.C. trade, see Pavelic, *Exporting to the People's Republic of China*, 11 CASE W. RESERVE J. INT'L L. 337, 359 (1979).

57. Compensatory trade uses foreign funds and equipment to build factories or mines designed by foreigners or jointly by the P.R.C. and foreigners. See Gu Ming, *supra* note 53, at 10-11. The funds are repaid by the products manufactured. Thus, the P.R.C.'s ability to repay these loans is enhanced. Fields such as non-ferrous metals, rare metals, petroleum, coal, and other minerals are potentially ripe for compensatory trade as the resources and labor force are abundant. *Id.* See also Zou Siyi, *supra* note 54, at 19; Cohen & Nee, *Compensation Trade, Chinese Style*, Asian Wall St. J., Jul. 9, 1979, at 10, col. 1; Cohen & Nee, *Asian Wall St. J.*, Jul. 16, 1979, at 10, col. 1.

58. Cooperative production involves production by the P.R.C., or production by cooperative labor forces, with technology or equipment, or a portion of the raw and semi-processed materials provided by the foreign party. Gu Ming, *supra* note 53, at 11. Products are then either sold to the foreign party or sold on the international market with profits divided proportionately. *Id.*

59. In processing trade,

orders are placed by foreign companies with [P.R.C.] enterprises for goods under certain conditions. [P.R.C.] enterprises may process according to the model provided and technology specified by foreign companies, or process raw materials and semi-finished goods partially or wholly provided by foreign companies and assemble the parts they provided. In this, foreign technicians [can] give guidance. This will . . . improve the quality of the export products, increase the designs and variety of products and meet market requirements.

*Id.* at 11.

60. Four professors from the Harvard Business School conducted a series of seminars in the P.R.C. designed to upgrade management skills. Among other things, the group introduced the "case method" approach. Gidwani, Harbus News, Dec. 3, 1979, at 1, col. 4; Polumbaum, *A Quest for Good Management*, Boston Sunday Globe, Oct. 28, 1979, § A, at 6, col. 1. Their observations are summarized in Harbus News, Jan. 14, 1980, at 1, col. 1.

Notwithstanding the integral role of foreign participation in the P.R.C.'s modernization, there will be important constraints on the foreign parties' freedom to transact business. These constraints will reflect the dictates of the P.R.C.'s centrally planned economy.<sup>61</sup> By definition, all foreign participation must fit within the strategy of the central planner. Ideological principles and practical, structural necessities will affect the parameters of that strategy.

The predominant ideological principle germane to foreign investment is the principle of self-reliance.<sup>62</sup> This principle stems from a background of foreign exploitation in the nineteenth century,<sup>63</sup> and is intended to address desirable political and social values. The view discourages dependence on foreign input in favor of domestic initiative.<sup>64</sup> Consequently, the P.R.C. will not import products that are capable of being produced in the P.R.C. nor will it import complete sets of equipment where more selective purchasing will suffice.<sup>65</sup> Nevertheless, the P.R.C. has become relatively pragmatic with respect to foreign participation. The new Joint Venture Law is a dramatic example. The P.R.C. understands that certain advances can be realized only through foreign participation.<sup>66</sup> However, the foreign investor should be aware that his participation in the P.R.C. precipitates an ideological conflict between the historic principle of self-reliance and the new pragmatism.

Structural requirements imposed by the P.R.C.'s planned economy also qualify the nature of foreign participation. Various administrative organs exert powerful control over the practice of each of the relevant forms of doing business.

Foreign trade is conducted as a state monopoly by established organs in accordance with a central plan.<sup>67</sup> The Ministry of Foreign Trade submits annual

61. Hua's *Report on Government*, *supra* note 1, at 18; Gu Ming, *supra* note 53, at 11; Zou Siyi, *supra* note 54, at 19; SZUPROWICZ, *supra* note 10, at 26. See text accompanying note 109 *infra*.

62. See Hua's *Report on Government*, *supra* note 1, at 18; Yu, *supra* note 36, at 14; BEIJING REVIEW, No. 22, Jun. 1, 1979, at 9-13. The policy of self-reliance is designed to avoid dependence on any other nation. Shaney, *supra* note 27, at 643. Thus, the educational aspect of imported technology is stressed in order to develop the technology itself eventually. Vice Premier Deng has stated the P.R.C.'s policy as "making foreign things serve China, and combining learning with inventing in order to increase her ability to build socialism independently, with her own initiative and relying on herself to speed up socialist construction." U.S. DEPARTMENT OF COMMERCE, CHINA FOREIGN TRADE POLICY: A CURRENT APPRAISAL (1974) 3 (Publication ¶ OBR 74-50).

See Comment, *Legal Aspects of China's Foreign Trade Practices and Procedures*, 12 J. INT'L LAW AND ECON. 105 (1977), for a brief historical explanation of the P.R.C.'s policy of self-reliance. In addition, see WU, *supra* note 3, at 281, for an outline of the evolution of foreign policy.

63. D. H. PERKINS, CHINA'S MODERN ECONOMY IN HISTORICAL PERSPECTIVE (1975).

64. Yu, *supra* note 36, at 14.

65. *Id.*

66. Shaney, *supra* note 27, at 642-44; Sobin, *supra* note 53, at 2.

67. For the institutional structure of the P.R.C.'s foreign trade, see generally Shaney, *supra* note 27, at 641; Wang, *Foreign Trade Policy and Apparatus of the People's Republic of China*, 38 CONTEMP. PROB. 182 (1973); Hsiao, *Communist China's Foreign Trade Organization*, 20 VAND. L. REV. 303 (1967); Hsiao, *The Organization of China's Foreign Trade*, 1 U.S.-CHINA BUS. REV. 9 (May/June

import and export plans to the State Council and is responsible for the implementation of approved plans.<sup>68</sup> Other responsibilities of the Ministry include the development of trade relations, supervision of the Bureaus that handle customs and commodity inspection and the negotiation of trade agreements.<sup>69</sup> Actual trading is done with the various state trading corporations under license from the Ministry.<sup>70</sup> These corporations are organized along mutually exclusive lines according to commodity.<sup>71</sup> As foreign traders must deal with these enterprises, there is extreme centralization and, accordingly, little contact with the eventual users of the product.<sup>72</sup>

More pertinent to joint ventures is the China Council for the Promotion of International Trade (CCPIT).<sup>73</sup> A nongovernmental organ similar to a chamber of commerce, the CCPIT undertakes to enhance mutual understanding and friendship between the P.R.C. and other countries and to promote economic relations according to the principles of equality and mutual benefit.<sup>74</sup> The CCPIT is composed of members of the state trading corporations and experts in the fields of economics, trade and law. It arranges trade exhibitions and organizes exploratory trade missions abroad.<sup>75</sup> The CCPIT also has responsibility for the various legal concerns of foreign businessmen. It provides for the resolution of commercial legal disputes through two arbitration committees.<sup>76</sup> In the future, the CCPIT will also provide legal counsel-

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1974). See also U.S. DEPT. OF COMMERCE, INDUSTRY AND TRADE ADMINISTRATION, *DOING BUSINESS WITH CHINA* (1979) [hereinafter cited as DEPT. OF COMMERCE PAMPHLET], which itself provides a detailed bibliography of sources concerning the institutional structure of the P.R.C.'s foreign trade.

68. Shaney, *supra* note 27, at 644-45.

69. *Id.* Comment, *Legal Aspects of China's Foreign Trade Practices and Procedures*, 12 J. INT'L LAW AND ECON. 105, 108-10 (1977).

70. Shaney, *supra* note 27, at 645.

71. *Id.*

72. The sole importers and exporters in the P.R.C. and the potential partners for joint ventures are the state trading corporations. Shaney, *supra* note 27, at 645-46. The corporations possess independent judicial personalities and can sue and be sued on their contracts. *Id.* However, their liability is limited to the capital appropriated for them by the Ministry of Foreign Trade. *Id.* The expanding list of corporations presently includes:

China National Arts and Crafts Import and Export Corporation; China National Cereals, Oils and Foodstuffs Import and Export Corporation; China National Chemicals Import and Export Corporation; China National Instruments Import and Export Corporation; China National Light Industrial Products Import and Export Corporation; China National Machinery Import and Export Corporation; China National Metals and Minerals Import and Export Corporation; China National Native Produce and Animal By-Products Import and Export Corporations; China National Technical Import Corporation; China National Complete Plant Export Corporation; and China National Machinery and Equipment Export Corporation. See DEPT. OF COMMERCE PAMPHLET, *supra* note 67, at 2, for the addresses of these corporations and for additional information concerning potential contacts.

73. BEIJING REVIEW, No. 17, Apr. 27, 1979, at 20.

74. *Id.*

75. See Shaney, *supra* note 27, at 646.

76. *Id.* On dispute resolution, see notes and text accompanying notes 223-46 *infra*.

ling<sup>77</sup> to foreigners doing business in the P.R.C. The ability of a foreign investor to obtain legal counselling is a development of importance because, previously, foreign traders have had difficulty in obtaining legal advice on economic and trade matters. Moreover, P.R.C. lawyers have exhibited reluctance to serve as advocates for non-Chinese involved in arbitration.<sup>78</sup> The CCPIT also handles trademark registration<sup>79</sup> and will be responsible for the protection of other intellectual property.<sup>80</sup>

A final function of the CCPIT is the operation of the Canton (Guangzhou) Trade Fair.<sup>81</sup> Conducted semi-annually, the Fair has been the principal forum for conducting foreign trade. In recent years, as much as half of the P.R.C.'s foreign trade has been conducted through the Fair.<sup>82</sup> However, the forum will play a lesser role as traders begin to deal directly with the state trading corporations. The Fair may provide an opportunity for potential investors to meet P.R.C. partners, or at least allow a businessman a means to assess the quality and market of P.R.C. products.

77. See Clark, *China's Changing Views on Project Contracts*, MAGAZINE, WORLDWIDE PROJECTS, Feb./Mar. 1979, at 37 [hereinafter cited as Clark], for an article that discusses the need for and intent to develop such a service. Ren Jian-xin, Director of the Legal Affairs Department, China Council for the Promotion of International Trade (CCPIT), in a pamphlet provided by the CCPIT, notes that attorneys will be available at the CCPIT for legal problems encountered in the P.R.C. or in other countries in order to provide legal advice on economic, trade and maritime matters in the P.R.C. and other countries. REN JIAN-XIN, SOME ASPECTS OF CHINA'S WORK IN ECONOMY, TRADE AND LAW, a transcript of a speech entitled *Selling Technology to China*, delivered at the National Council for U.S.-China Trade, Washington, D.C., [hereinafter cited as REN JIAN-XIN]. Copies may be obtained from the National Council, Suite 350, 1050 17th Street, N.W., Washington, D.C. 20036. He also states that a law governing lawyers is being drafted. *Id.* A lawyer's association has been established and is headed by Professor Chen Shouyi of Beijing University. According to BEIJING REVIEW, No. 21, May 25, 1979, at 7:

three or four legal advisory offices will be set up under the association, staffed by about a hundred full or part-time lawyers. The overwhelming majority of the full-time legal advisers today are experienced lawyers who practiced the law before 1956. The main task of the lawyer's association is to guide the work of the legal advisory office which will answer legal inquiries, draft legal papers on request, handle lawsuits, arrange for defence counsel in criminal cases and act as representatives in civil cases as well as cases involving foreign interests such as maritime accidents and foreign trade matters.

*Id.*

78. See Clark, *supra* note 77, at 37.

79. See Regulations Governing Trademarks, promulgated by the State Council on April 10, 1963.

80. REN JIAN-XIN, *supra* note 78, at 8.

81. See DEPT. OF COMMERCE PAMPHLET, *supra* note 67, at 11, for a thorough discussion of the Fair, including directions from Hong Kong and relevant advice. The Canton (Guangzhou) Trade Fair is heavily export-oriented, but it does afford foreign exporters and investors a chance to approach the foreign trade corporations. Although admittance to the Fair is by invitation only, the numbers invited have increased, and invitations may often be secured by request. *Id.* The Fall Fair in 1978 generated approximately \$140 million worth of business for the United States. *Id.* See also Lubman, *The Canton Fair Still Plays a Big Role*, Boston Sunday Globe, Oct. 28, 1979, § A, at 2, col. 1 [hereinafter cited as Lubman 1], for an overview of the Fair. Shaney, *supra* note 27, at 646-47.

82. Lubman 1, *supra* note 81, at 2, col. 1.

The newly formed China International Trust and Investment Corporation (CITIC)<sup>83</sup> is of special interest to foreign investors. A state-owned socialist enterprise, the CITIC's function is to absorb foreign investment and to import advanced technology and equipment in order to expedite the P.R.C.'s development. Specifically, the CITIC will undertake to (1) negotiate and enter into joint ventures with local administrations and departments in the P.R.C. pursuant to commissions from foreign parties; (2) negotiate and enter into joint ventures with foreign parties pursuant to commissions from P.R.C. enterprises; (3) accept funds from foreign corporations for investment by issuing debentures or by acting as agents in issuance of shares related to investment in the P.R.C.; (4) act as agents for foreign parties; and (5) participate in joint ventures inside and outside the P.R.C.<sup>84</sup>

Thus, the joint venture, along with the other forms of foreign participation in the P.R.C., is part of an elaborate organizational network necessitated by the P.R.C.'s centrally planned economy. Investors should familiarize themselves with the economy's intricacies in order to minimize the potentially adverse impact of the bureaucratic process. The services provided by the CCPIT and CITIC will be instrumental in the success or failure of a joint venture.

### III. LAW ON JOINT VENTURES: PURPOSES AND DESCRIPTION

#### A. Purposes

From the perspective of the P.R.C., the purposes of the Joint Venture Law are fourfold: (1) to attract advanced foreign capital and equipment needed in the P.R.C.'s modernization; (2) to assist the P.R.C. in meeting its goal of a balance between exports and imports by generating export items; (3) to save the P.R.C. capital for its own capital investments, thereby freeing funds for further importation; and (4) to provide needed training in management skills.<sup>85</sup>

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83. See BEIJING REVIEW, No. 42, Oct. 19, 1979, at 4-5, for an outline of the function of the China International Trust and Investment Corporation (CITIC). Headed by Rong Yiren, a millionaire/former industrialist, the CITIC will not be a required contact for a foreign investor, but it will ease the confusion. *Id.* Rong's presence as head of the company is symbolic of the P.R.C.'s new posture regarding foreign trade. An ex-capitalist, his presence is calculated to attract foreign capitalists. See Ching, *Chinese Millionaire Tries to Win the West*, Boston Globe, Nov. 15, 1979, at 38, col. 5.

84. BEIJING REVIEW, No. 42, Oct. 19, 1979, at 4-5.

85. Willoughby, *supra* note 16, at 1014. See generally Comment, *Foreign Investment: Joint Venture Law*, 20 HARV. INT'L L. J. 675 (1979). This is the first joint venture law enacted by the P.R.C. and marks a departure from the traditional P.R.C. approach to dealing with foreign businesses. *Id.* at 679; Lubman, *Trade Between the United States and the People's Republic of China; Practice Policy and Law*, 8 L. & POL'Y IN INT'L BUS. 1 (1976). See also Zhuang, *The Positive Role of the Law on Joint Ventures Using Chinese and Foreign Investment*, RENMIN RIBAO, Jul. 24, 1979, at 4, translated in PRC NATIONAL AFFAIRS, Aug. 8, 1979, at L8. Note that Article 1 'permits' foreign investment, con-

From the foreign perspective, the Joint Venture Law facilitates investment in a market rich in natural resources and provides the legal protection requisite to such investments. Together with the still-evolving commercial legal system, the Joint Venture Law will enable foreign investors to assess their standing with regard to potential investments. Their capital, profits and right to engage in policy decisions will not be subject to the uncertainty of earlier P.R.C. law, but will benefit from the protection of a stable legal framework.

## B. Description

### 1. Scope of the Governing Law

It must be stressed that the Joint Venture Law is no more than enabling legislation. In delineating broad parameters from structuring business relationships, the statute does not represent a comprehensive commercial code. Rather, it is a statute that must be read in the context of the P.R.C.'s emerging legal system for its proper appreciation.<sup>86</sup> Moreover, many uncertainties still exist which must be resolved by additional legislation and regulation.<sup>87</sup> Investors should employ detailed negotiations<sup>88</sup> to resolve persistent ambiguities.

The most important piece of complementary legislation, from the standpoint of the U.S. investor, is the Agreement on Trade Relations Between the United States and the People's Republic of China (U.S.-P.R.C. Trade Agreement), signed by the P.R.C. on July 7, 1979, and passed in the U.S. Congress on January 24, 1980.<sup>89</sup> This Agreement<sup>90</sup> not only extends reciprocal Most

trary to the language of most Asian countries' foreign investment statutes, which 'welcome' such investment. Joint Venture Law, *supra* note 7, art. 1. This language reflects a concern about exploitation that permeates the code. Rowley, FAR EASTERN ECONOMIC REVIEW, Jul. 20, 1979, at 50. See notes 93-96 *infra*.

86. Surrey & Soble 1, *supra* note 53, at 3; Cohen & Nee, *supra* note 16, at 10.

87. Examples of additional laws and regulations include those for taxes, see notes and text accompanying notes 160-67 *infra*; exchange rates, see notes and text accompanying notes 154-55 *infra*; dispute resolution, see notes and text accompanying notes 223-46 *infra*; and copyright and patent rights, see notes and texts accompanying notes 127-37 *infra*. The fact that so much is left unsaid may indicate a studied vagueness rather than a lack of foresight or ability. Liu, *Toning Down the Spirit*, FAR EASTERN ECONOMIC REVIEW, Jul. 27, 1979, at 83. The implication is that the P.R.C. wants to examine the development of business practice before promulgating restrictive regulations. Thus, early venturers will help determine the course that future regulation will follow. See Rowley, *Cracking the Cryptic Code*, FAR EASTERN ECONOMIC REVIEW, Jul. 20, 1979, at 49. Compare text accompanying notes 96, 107 & 198 *infra*.

88. See Sobin, *Negotiation is the Key to Success*, Boston Sunday Globe, Oct. 28, 1979, § A, at 1, col. 1, for a discussion of P.R.C. practices concerning negotiations.

89. Presidential Proclamation No. 4697, 3 C.F.R. 77 (1980), reprinted in 19 U.S.C. § 2434 (1980) [hereinafter cited as U.S.-P.R.C. Trade Agreement].

90. Surrey & Soble 1, *supra* note 53, at 15-16. In passing the U.S.-P.R.C. Trade Agreement, the U.S. Government reciprocates the encouragement to trade reflected in present P.R.C. policy. Passed by an overwhelming margin, the Agreement extends to the P.R.C. a status not

Favored Nation (MFN) trading rights to the P.R.C., but it also defines the dispute resolution mechanism amenable to each country<sup>91</sup> and provides for the protection of industrial property rights.<sup>92</sup> Each of these latter provisions narrows the Joint Venture Law as it applies to U.S. investors.

Despite the gaps and ambiguities of the Joint Venture Law, however, it is clear that P.R.C. law governs all aspects of a joint venture's operations. Article 2 states that "[a]ll the activities of a joint venture shall be governed by the laws, decrees and pertinent rules and regulations of the People's Republic of China."<sup>93</sup> Domestic concern that joint ventures threaten P.R.C. sovereignty is considered misplaced.<sup>94</sup> Yet, there is sensitivity to those foreign investors who might seek to subject the activities of a joint venture to the jurisdiction of a foreign court.<sup>95</sup> Such an approach is considered to demonstrate a lack of respect for P.R.C. law and to evidence an interference with its proper development and application.<sup>96</sup> Thus, a demonstration of respect for the P.R.C. legal system is, at the very least, good business judgment.

Conversely, the possibility of nationalization is of concern to foreign investors. Ren Jian-xin, Director of the Legal Affairs Department of the CCPIT, stresses that the Joint Venture Law permits and protects joint ventures, noting that the legal apparatus would be superfluous if nationalization were a serious concern.<sup>97</sup> He states that, in the unlikely event of nationalization, reasonable compensation would be provided.<sup>98</sup>

The scope of the Joint Venture Law is broad and open-ended. Such flexibility reflects the fact that the P.R.C. requires modernization in all the sectors of the economy. Thus, the Joint Venture Law does not confine investment to capital construction; rather, it permits investment in all areas including agriculture and light industry.<sup>99</sup>

possessed by the Soviet Union. See Felton, *Congress Approves Trade Agreement with Peking*, CONGRESSIONAL QUARTERLY INC. 309 (Feb. 2, 1980). The Agreement not only prohibits discriminatory trade arrangements between the two countries, it is a formal statement of commitment between the nations to develop bilateral trade. See text accompanying note 253 *infra*.

91. See text accompanying note 227 *infra*.

92. See text accompanying note 133 *infra*.

93. Joint Venture Law, *supra* note 7, art. 2. Article 2 also states that the "Chinese Government protects, by the legislation in force, . . . lawful rights and interests." *Id*.

94. Zou Siyi, *supra* note 54, at 17.

95. For the history of extraterritoriality in the P.R.C., see generally R. FISHEL, *THE END OF EXTRATERRITORIALITY IN CHINA* (1952); G.W. KEETON, *THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA* (1928).

96. Liu and Chan, *BUSINESS PRC* 3 (4th Quarter, 1979) [hereinafter cited as *BUSINESS PRC*].

97. See REN JIAN-XIN, *supra* note 78, at 4, for a discussion of the problem of nationalization.

98. *Id.* See Gordon, *Observations on the Nature of Joint Ventures in Mexico: Are They Involuntary and Transitory Institutions?* 2 *B.C. INT'L AND COMP. L. REV.* 337 (1979).

99. REN JIAN-XIN, *supra* note 78. See Surrey & Soble, *Chinese Removing Joint Ventures Barriers*, *Legal Times of Washington*, Oct. 2, 1979, at 2 [hereinafter cited as *Surrey & Soble 2*].



## 2. Procedural Requirements

Each prospective joint venture must submit a proposal to the newly formed Foreign Investment Corporation (FIC) for authorization of the "agreements and contracts concluded between the parties to the venture and the articles of association of the venture formulated by them."<sup>100</sup> The statute imposes a three month limitation on the FIC to either accept or reject a joint venture's application.<sup>101</sup>

This limitation may signify a variety of things. On the one hand, foreign investors may find their P.R.C. partners reluctant to file the application unless it is likely to receive approval.<sup>102</sup> Such reluctance might tend to foster lengthy, costly negotiations. On the other hand, the provision may indicate a willingness to accept a less than finalized proposal at the outset in order to demonstrate good faith.<sup>103</sup> Alternatively, the limitation may indicate a willingness on the part of the P.R.C. to avoid bureaucratic delays.<sup>104</sup>

Until detailed regulations are promulgated, the articles of association will receive close scrutiny by the FIC.<sup>105</sup> According to Premier Hua, such approval will give the joint venture legal authority in lieu of express authority by the pertinent regulation.<sup>106</sup> The articles of early joint ventures will attain added significance in that they may influence the form of the regulations to follow if they are appropriate to the P.R.C.'s needs.<sup>107</sup> Importantly, approval will be a virtual guarantee of success as it is unlikely that the P.R.C. Government would approve a venture that might waste precious investment capital.<sup>108</sup> Thus, care in the drafting of the articles has immediate practical consequences.

Priority in the establishment of joint ventures will be given to those firms which complement the P.R.C.'s plan for modernization. Approval will not be automatic. Firms are likely to receive approval if they: (1) attract advanced

100. Joint Venture Law, *supra* note 7, art. 3.

101. *Id.*

102. Surrey & Soble 1, *supra* note 53, at 14.

103. DiFederico, *China Marks New Policy With Joint Venture Law to Encourage Investment*, BUSINESS AMERICA, Aug. 27, 1979, at 19 [hereinafter cited as DiFederico].

104. Willoughby, *supra* note 16, at 1015. A reduction of bureaucratic red tape would be consonant with the implementation of the objective laws of economics as perceived by the P.R.C. See text accompanying note 31 *supra*.

105. Willoughby, *supra* note 16, at 1015.

106. BEIJING REVIEW, No. 41, Oct. 12, 1979, at 10.

107. Willoughby, *supra* note 16, at 1015. See text accompanying note 251 *infra*.

108. Surrey & Soble 2, *supra* note 99, at 22. BUSINESS PRC, *supra* note 96. The authors write that approval presupposes a favorable result, since analysis of the investment proposal against knowledge of the local business climate and conditions, including the availability of raw materials and skilled workers, will be possible. *Id.* Thus, approval is in the foreign investor's best interests also.

technology and equipment; (2) produce export items; (3) are competitive in world markets; and (4) are appropriate to the P.R.C.'s "readjustment."<sup>109</sup>

Once approval is secured, the joint venture must register with the General Administration for Industry and Commerce of the People's Republic of China, which will issue a license for operation.<sup>110</sup> The Joint Venture Law does not limit the length of time during which a joint venture may continue in operation. The duration is subject to negotiation between the parties and may be extended upon expiration by agreement, subject to authorization by the FIC.<sup>111</sup> The primary area of business of the enterprise will be a determining factor of the duration agreed to by the parties. Ren Jian-xin believes that international practice will be followed, allotting approximately ten years for the tourist industry, up to fifteen years for the light industrial sector and as much as twenty-five years for the heavy industrial sector.<sup>112</sup> Joint ventures with the most attractive qualifications, *e.g.*, those ventures that manufacture entirely for export, may be allowed to operate for an indefinite term.<sup>113</sup>

Either party may terminate a joint venture prior to the expiration of the contract period, but only through consultation and agreement with the other party.<sup>114</sup> In addition, termination is contingent upon authorization by the FIC and registration with the General Administration for Industry and Commerce.<sup>115</sup> Termination may follow heavy operating losses or the failure to execute obligations under contracts or under the articles of association.<sup>116</sup> It is provided that losses caused by a failure to fulfill legal obligations will be borne by the offending party.<sup>117</sup> The alienation of one party's share may be effected only with the consent of the other parties to the joint venture.<sup>118</sup>

### 3. Ownership, Profits and Taxation

The Joint Venture Law stipulates that the contribution to the equity capital of a joint venture by the foreign investor must not be less than 25 percent.<sup>119</sup>

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109. Willoughby, *supra* note 16, at 1014. On "readjustment," *see* notes and text accompanying notes 30-52 *supra*.

110. Joint Venture Law, *supra* note 7, art. 3.

111. *Id.* art. 12.

112. REN JIAN-XIN, *supra* note 78, at 5.

113. *Id.*

114. Joint Venture Law, *supra* note 7, art. 13.

115. *Id.* The Code offers no guidance, however, as to whether one party must take over his partner's assets if the latter liquidates. Rowley, *Cracking the Cryptic Code*, FAR EASTERN ECONOMIC REVIEW, Jul. 20, 1979, at 50.

116. Joint Venture Law, *supra* note 7, art. 13.

117. *Id.* For this Comment's discussion of dispute resolution, *see* text accompanying notes 223-46 *infra*.

118. Joint Venture Law, *supra* note 7, art. 4.

119. *Id.* Article 4 also stipulates that "a joint venture shall take the form of a limited liability company." *Id.* This provision anticipates the promulgation of a new company law.

No ceiling is established for the maximum percentage of equity ownership allowed for foreigners. Thus, theoretically, the venture could be owned entirely by non-Chinese. However, the typical ratio of equity ownership will find the P.R.C. partner with 51 percent of the equity and the foreign partner with 49 percent.<sup>120</sup> Nevertheless, the P.R.C. has indicated that foreigners may be allowed a majority equity position under certain circumstances.<sup>121</sup> For example, if the venture is capital-intensive and profits are likely to be slow in coming, foreign majority ownership may be allowed.<sup>122</sup> Similarly, ventures in new "export zones" may be 100 percent foreign owned.<sup>123</sup> But generally, the P.R.C. intends to maintain some substantial interest.<sup>124</sup>

The parties may make their respective contributions in a variety of forms. Cash, capital goods, site value and industrial property rights<sup>125</sup> are all listed as possible contributions to equity.<sup>126</sup>

120. DiFederico, *supra* note 103, at 19. The first formally announced joint venture, a \$72 million hotel project, will have this 51/49 percent split in ownership. Wall St. J., Dec. 13, 1979, at 7, col. 1. See also *Joint Venture and Investment Code*, THE CHINA TRADER (1978), at 66, a transcript of a series of 24 one-half hour interviews with Sino-U.S. trade experts, including bankers, government officials, academics and American businessmen at all levels, prepared by Julian Sobin and marketed by the American Management Association [hereinafter cited as CHINA TRADER].

121. Lubman, *China Looks for Partners to Boost Output*, Boston Sunday Globe, Oct. 28, 1979, § A, at 4, col. 1 [hereinafter cited as Lubman 2]. The P.R.C. has entered into a joint venture agreement with a Japanese firm in Japan in which the Japanese partner owns 51 percent of the equity. BUSINESS CHINA, Sept. 12, 1979, at 127. Although the venture is governed by Japanese law and not by the Joint Venture Law, it may be indicative of a willingness to permit such a percentage ownership in the P.R.C. The management of a joint venture is discussed in the text accompanying note 187 *infra*.

122. Lubman 2, *supra* note 121, at 4, col. 1.

123. BUSINESS CHINA, Sept. 20, 1979, at 127. Gu Mu maintains that 100 percent foreign-owned operations do not threaten P.R.C. sovereignty. He states that such concerns will be permitted in the special industrial zones now being set up. *Id.*

124. Wall St. J., Aug. 1, 1979, at 6, col. 3. A venture would no longer be "joint" if owned completely by the foreign party. However, the P.R.C. would retain control, even under these circumstances, as Article 6 of the Joint Venture Law provides that the company shall be managed by a board of directors headed by a P.R.C. chairman. Joint Venture Law, *supra* note 7, art. 6. See text accompanying note 184 *infra*.

125. Joint Venture Law, *supra* note 7, art. 5. To the extent possible, the respective contributions to equity will be structured so that each party contributes what the other lacks. Thus, it is likely that the foreign party will make a substantial contribution to equity in the form of capital goods while the P.R.C. will contribute the site value.

126. An interesting problem related to equity contribution is the P.R.C.'s lack of experience in Western accounting principles. For example, the P.R.C. currently has no means of accounting for industrial property rights. Hayes, *China to Learn Accounting U.S. Style*, N.Y. Times, Oct. 25, 1979, § D, at 8, col. 3. To rectify this deficiency, an agreement has been signed with Coopers & Lybrand to provide the necessary training. *Id.* Such computation is crucial for the proper distribution of profits. Joint Venture Law, *supra* note 7, art. 4. See text accompanying note 149 *infra*. See also Rowley, *Cracking the Cryptic Code*, FAR EASTERN ECONOMIC REVIEW, Jul. 20, 1979, at 49, 52. It is questionable whether research and development or advertising costs will be allocable against the joint venture as a whole.

The inclusion of industrial property rights is noteworthy. This form of contribution reflects a decision that a flexible policy is required for modernization. The P.R.C. lacks and needs many forms of know-how.<sup>127</sup> Presently, it has no system for the protection of copyrights or patent rights.<sup>128</sup> Additionally, the nation is not a member of the Universal Copyright Convention,<sup>129</sup> the Paris Convention for Protection of Industrial Property,<sup>130</sup> or any other such convention.<sup>131</sup> Thus, the inclusion of such rights as a contribution to equity is an indication that an industrial property law will be promulgated. In fact, such a law is now under study by the CCPIT.<sup>132</sup>

The U.S.-P.R.C. Trade Agreement<sup>133</sup> provides that:

Both Contracting Parties shall permit and facilitate enforcement of provisions concerning protection of industrial property in contracts between firms, companies and corporations, and trading organizations of their respective countries, and shall provide means in accordance with their respective laws, to restrict unfair competition involving unauthorized use of such rights.<sup>134</sup>

More specifically, the Agreement stipulates that the P.R.C. must afford the U.S. companies the same protection presently extended in the United States to P.R.C. and other foreign companies.<sup>135</sup> This reciprocity mitigates the problem of lack of membership in the international conventions.<sup>136</sup> Presumably, the Agreement will augment the bargaining power of the U.S. participant in negotiating his percentage of ownership. Similarly, this Agreement will provide a standard by which disputes can be resolved, namely, the U.S. industrial property laws. However, investors should be wary. Although the P.R.C. "ac-

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127. Willoughby, *supra* note 16, at 1016. Minister Li Qiang suggests that the purchase of patents would itself be a valuable type of importation. Li Qiang, *Expanding China's Foreign Trade*, BEIJING REVIEW, No. 17, Apr. 27, 1979, at 15, 16. See BEIJING REVIEW, No. 22, Jun. 1, 1979, at 12.

128. Willoughby, *supra* note 16, at 1016.

129. The Universal Copyright Convention, [1952] 6 U.S.T. 2731, T.I.A.S. No. 3324, 150 U.N.T.S. 67 (effective Sept. 15, 1955), revised, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868. See generally, Hsia & Haun, *Laws of the People's Republic of China on Industrial and Intellectual Property*, 38 L. & CONTEMP. PROB. 274 (1973-74).

130. The Paris Convention for the Protection of Industrial Property, [1970] 21 U.S.T. 1583, T.I.A.S. No. 6923.

131. 1 W.S. SURREY & D. WALLACE, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 236 (1977); Surrey & Soble 2, *supra* note 99, at 2.

132. REN JIAN-XIN, *supra* note 78, at 9. Acknowledgment of industrial property rights might be considered complementary to the protection of personal property given in the new criminal law. According to Rong Yiren, president of the CITIC, the P.R.C. will shortly publish new corporate and individual tax regulations, a customs law and a patent law. Butterfield, *Peking Promises Profits on Foreign Investments*, N.Y. Times, Oct. 2, 1979, § D, at 1, col. 4.

133. U.S.-P.R.C. Trade Agreement, *supra* note 89, art. VI(4).

134. *Id.*

135. *Id.* art. VI(2).

136. H.R. REP. NO. 733, 96th Cong., 2nd Sess. 5 (1980).

cepts” the policy of U.S. industrial law through the Trade Agreement, such acceptance does not mean that the P.R.C. is not firm in its conviction to avoid the dictates of foreign law.<sup>137</sup> Rather, the acceptance only signifies that the P.R.C. finds the respective U.S. laws reasonable. That the P.R.C. finds the U.S. industrial property laws reasonable may be an indication that the new P.R.C. industrial property laws under study will approximate the U.S. laws.

A second noteworthy form of contribution to equity allows the P.R.C. to contribute the value of the right to use the site provided for the joint venture.<sup>138</sup> The “site” probably includes both the land and the buildings.<sup>139</sup> Where such a contribution does not constitute a part of the investment from the P.R.C. participant, the joint venture must pay the P.R.C. Government rent for its use.<sup>140</sup>

Although the value of each contribution is subject to joint assessment, the value of the site is an exception.<sup>141</sup> Ren Jian-xin writes that the valuation of the rental fee will be made by the local people’s government, taking into consideration such factors as the purpose of the joint venture and the fees charged to neighboring joint ventures.<sup>142</sup> Hence, the valuation of the site, whether as a contribution to equity or for determination of rental fees, may be determined unilaterally. Abuse of this unilateral valuation would have significant ramifications as the profits, risks and losses of a joint venture are shared according to percentage ownership.<sup>143</sup> However, despite the provisions to the contrary, most writers predict that such valuation will be subject to negotiation.<sup>144</sup>

A final point related to the contribution to equity concerns the inclusion of capital goods. In deference to overall economic policy, the Joint Venture Law stipulates that technology and equipment must be “truly advanced and appropriate to [the P.R.C.’s] needs.”<sup>145</sup> The Joint Venture Law states, moreover, that losses “caused by deception through the intentional provision of outdated equipment or technology” constitute compensable injuries.<sup>146</sup> This provision is designed to prevent foreign companies from forcing used and outdated equipment on the P.R.C.<sup>147</sup> It is also probably a reflection of past exploitation

137. See text accompanying note 95 *supra*.

138. Joint Venture Law, *supra* note 7, art. 5.

139. Surrey & Soble 1, *supra* note 53, at 15.

140. Joint Venture Law, *supra* note 7, art. 5. See Surrey & Soble 1, *supra* note 53, at 15. The title to the site, however, will be non-transferrable. REN JIAN-XIN, *supra* note 78, at 6.

141. Joint Venture Law, *supra* note 7, art. 5.

142. REN JIAN-XIN, *supra* note 78, at 6.

143. DiFederico, *supra* note 103, at 20.

144. See Surrey & Soble 1, *supra* note 53, at 15; Willoughby, *supra* note 16.

145. Joint Venture Law, *supra* note 7, art. 5.

146. *Id.* This stipulation should be read in conjunction with the last paragraph of Article 13 of the Joint Venture Law. See the material on dispute resolution, notes 223-46 *infra*.

147. Article 7 provides tax incentives for joint ventures “equipped with up-to-date technology by world standards.” Joint Venture Law, *supra* note 7, art. 7. See text accompanying note 169 *infra*.

by foreigners of the P.R.C. through foreign trade.<sup>148</sup> The Joint Venture Law fails to provide guidelines for the computation of losses or for the determination of causation.

The determination of the percentage of ownership is crucial. Article 4 of the Joint Venture Law states that "[t]he profits, risks and losses of a joint venture shall be shared by the parties to the venture in proportion to their contributions to the registered capital."<sup>149</sup> The actual distribution of net profits is subject to certain deductions from gross profit.<sup>150</sup> Taxes, reserve funds, bonus and welfare funds for workers and staff members, and expansion funds of the joint venture are deducted according to pertinent regulations and the articles of association.<sup>151</sup> The appearance of these provisions in the Joint Venture Law is probably another indication of anxiety over possible exploitation by the foreign parties.

Of fundamental concern to the foreign participant is the question of the repatriation of profits. The Joint Venture Law provides that personal earnings after tax,<sup>152</sup> distributed profits, funds received upon termination of the venture, plus any other authorized funds, "may be remitted abroad through the Bank of China in accordance with the foreign exchange regulations."<sup>153</sup> By so providing, the Joint Venture Law anticipates the promulgation of banking and foreign exchange legislation.<sup>154</sup> Although exchange control rules are a potential source of mischief, the regulations will probably not prove problematic as a great deal of emphasis has been placed on the right of repatriation.<sup>155</sup> However, in spite of this emphasis, foreign participants will be encouraged, through preferential interest rates, to deposit any foreign exchange entitled to remittance in the Bank of China.<sup>156</sup> Significantly for foreign investors, Gu Mu and Rong Yiren have announced that the P.R.C. will guarantee a profit for

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148. See text accompanying note 95 *supra*.

149. Joint Venture Law, *supra* note 7, art. 4.

150. *Id.* art. 7.

151. *Id.*

152. *Id.* art. 11. See this Comment's section on taxation, text accompanying notes 160-76 *infra*.

153. Joint Venture Law, *supra* note 7, art. 10.

154. Willoughby, *supra* note 16, at 1016.

155. See, e.g., BEIJING REVIEW, No. 29, Jul. 27, 1979, at 27; Gu Ming, *supra* note 53, at 11. Banking is a state monopoly in the P.R.C. and is operated by the Ministry of Finance. SZUPROWICZ, *supra* note 10, at 74. Through special agencies of the State Council, the Ministry controls all banking and foreign exchange practices. Policies are set to complement requirements set by the economic planners. The currency in the P.R.C. is the *renminbi* [hereinafter cited as RMB], which is inconvertible and cannot be brought in or taken out of the P.R.C. The basic unit of the currency is the *yaun*, and its exchange rate is set at roughly 1.8 yaun = \$1.00 U.S. *Id.* The rate fluctuates as much as 0.5 percent to reflect world monetary conditions. *Id.* Western financial specialists have difficulty in determining the principle underlying the proper valuation of the RMB. It is uncertain what basket of foreign currencies or commodities in the open market would be related to the price of the RMB. The exchange rate is crucial for the joint venture because the profit remitted will be determined thereby. *Id.*

156. Joint Venture Law, *supra* note 7, art. 10.

foreign companies investing in joint venture enterprises.<sup>157</sup> Although it is unlikely that the P.R.C. will fix a guaranteed rate of return for foreign investors, the P.R.C. has stressed that it would compare favorably with other countries for investment purposes.<sup>158</sup> According to Mr. Gu, "China will ensure more rights, give more convenience and be more generous" to joint ventures than is true elsewhere.<sup>159</sup> The guarantee of profits illustrates the comprehensive P.R.C. commitment to joint ventures. Business conditions will be made as favorable as possible.

A final issue within the context of ownership and profits concerns the taxes which will be imposed upon the joint ventures and their workers. Traditionally, the P.R.C. has not imposed any tax on personal income.<sup>160</sup> Henceforth, not only will the income of foreign workers be subject to a tax,<sup>161</sup> but so will the income of all of the P.R.C.'s 960 million people.<sup>162</sup> The rate has not yet been announced, but the particulars of the taxation program will be announced sometime in the near future.<sup>163</sup>

The joint venture itself will also be taxed on its gross profits.<sup>164</sup> According to Rong Yiren, the prime objective in setting the rate is to attract foreign investors.<sup>165</sup> Thus, the rate will be competitive in the world market.<sup>166</sup> Ren Jianxin speculates that the P.R.C. tax rate will be comparable to that imposed by

157. Butterfield, *Peking Promises Profit On Foreign Investments*, N.Y. Times, Oct. 2, 1979, § D, at 1, col. 4.

158. *Id.*

159. *Id.* The "guarantee" will not take the form of a guaranteed fixed return despite the efforts of foreign firms to so persuade the P.R.C. Cohen & Nee, *China's Incentives for Joint Ventures*, Asian Wall St. J., Aug. 6, 1979, at 10, col. 1. The Joint Venture Law requires losses as well as profits to be shared. Joint Venture Law, *supra* note 7, art. 4. Rather, it is probably through special incentives that the profit will be "guaranteed." Cohen & Nee, *China's Incentives for Joint Ventures*, Asian Wall St. J., Aug. 6, 1979, at 10, col. 1. For discussion of the incentives, see text accompanying notes 168-73 *infra*.

160. C. HOWE, CHINA'S ECONOMY 57 (1978) [hereinafter cited as HOWE].

161. Joint Venture Law, *supra* note 7, art. 11.

162. Roderick, *China to Impose Income Tax*, The State Journal, Jan. 1, 1980, § A, at 9, col. 1 [hereinafter cited as Roderick].

163. *Id.* According to Rong Yiren, the rate for P.R.C. workers will be set high initially, so that ordinary wage earners will not be affected. *Id.* P.R.C. workers' salaries range from approximately \$20 a month to \$267 a month. *Id.* However, the 760 million peasants probably will have no taxable income under the new law. *Id.* No speculation was made concerning the tax rate for foreign workers. Rong also stated that families may be given tax incentives to have only one child. *Id.* See note 31 *supra*. For general information regarding personal income in the P.R.C., see HOWE, *supra* note 160, at 187.

164. Joint Venture Law, *supra* note 7, art. 7. See Roderick, *supra* note 162, at 9, col. 1.

165. Roderick, *supra* note 162, at 9, col. 3.

166. *Id.* Although, previously, personal income had not been taxed, the same has not been true for commercial enterprises. Willoughby, *supra* note 16, at 1016. The Industrial and Commercial Income Tax Rules date from 1950. *Id.* Amended a number of times in the 1950's, this legislation provides for a tax on profits at rates that range from 5.75 percent to 34.50 percent. *Id.* Although still in force, the tax is thought not to have been applied for some years. *Id.*

other developing countries, averaging 30 to 40 percent, rather than the 50 percent rate generally imposed by developed countries.<sup>167</sup>

Certain tax incentives are provided by the law. A refund is available for the foreign participant who "reinvests any part of his share of the net profit within Chinese territory."<sup>168</sup> Additionally, joint ventures "equipped with up-to-date technology by world standards may apply for a reduction of or exemption from income tax for the first two to three profit making years."<sup>169</sup> The provision does not clarify the distinction, if any, between technology "truly advanced and appropriate to China's needs,"<sup>170</sup> required for contribution to equity, and technology "up-to-date . . . by world standards,"<sup>171</sup> required for tax relief. It is possible that "up-to-date" technology would be "inappropriate to China's needs."<sup>172</sup> Thus, what might qualify as a legitimate contribution to capital might not qualify for tax relief.<sup>173</sup> The incentive would thereby be vitiated. This ambiguity will be resolved through application of the new law.

Besides the income tax, it is also possible that the joint ventures will be subject to China's Industrial and Commercial Consolidated Tax.<sup>174</sup> Similar to a turnover tax, if applicable, it would be applied at each stage of production.<sup>175</sup> As no credit mechanism exists, the tax could have a serious cumulative effect wherever production requires a series of independent industrial processes as an additional tax would be levied at each stage.<sup>176</sup> However, to the extent that such a tax would discourage foreign investment, it is unlikely it will be applied.

#### 4. Financing and Management of the Joint Venture; Foreign Affiliates

Each joint venture must open an account with the Bank of China or with a domestic bank approved by the Bank of China.<sup>177</sup> Loans may be obtained either from the Bank of China or through foreign banks.<sup>178</sup> By allowing joint ventures to borrow from foreign banks, the P.R.C. is able to reserve foreign exchange for other economic development.<sup>179</sup>

167. REN JIAN-XIN, *supra* note 78, at 5. See Willoughby, *supra* note 16, at 1016.

168. Joint Venture Law, *supra* note 7, art. 7.

169. *Id.* Note that the tax break may be delayed until the venture begins to show a profit.

170. Joint Venture Law, *supra* note 7, art. 5.

171. *Id.* art. 7.

172. Surrey & Soble 2, *supra* note 99, at 2.

173. *Id.*

174. Surrey & Soble 1, *supra* note 53, at 15; Willoughby, *supra* note 16, at 1016.

175. Surrey & Soble 1, *supra* note 53, at 15.

176. *Id.*; Willoughby, *supra* note 16, at 1016.

177. Joint Venture Law, *supra* note 7, art. 8. This article also anticipates a banking and foreign exchange law. *Id.*

178. *Id.*

179. Willoughby, *supra* note 16, at 1016. As previously noted, the policy allowing foreign bank loans is a new one. See note 56 *supra*.



The Joint Venture Law stipulates that joint ventures are to be managed by a board of directors.<sup>180</sup> The composition of the board is subject to agreement in the articles of association, with certain limitations.<sup>181</sup> Although each side may appoint its respective representatives, the P.R.C. controls the selection of the chairman.<sup>182</sup> The foreign participants appoint one or two vice-chairmen.<sup>183</sup> The P.R.C. prerogative in the appointment of the chairman ensures some degree of control even over a venture in which the foreign participant has majority or complete ownership.<sup>184</sup> Whether this potential divorce of ownership from control ever results in a situation in which important policy decisions do not reflect the respective equity interests of the parties is a matter that must be resolved through practice.

The board is empowered by the statute to direct all fundamental matters concerning the venture.<sup>185</sup> The list of such issues includes:

expansion projects, production and business programs, the budget, distribution of profits, plans concerning manpower and pay scales, the termination of business, the appointment or hiring of the president, vice president(s), the chief engineer, the treasurer and the auditors as well as their functions and powers and their remuneration.<sup>186</sup>

Decisions are to be reached by the board members through "consultation . . . on the principle of equality and mutual benefit."<sup>187</sup> This provision ensures the participation of foreign members on major problems. The provision also means that the P.R.C. expects a joint venture to be conducted as a partnership in the sense that the parties will attempt to reach a consensus on all board decisions.<sup>188</sup> Ren Jian-xin notes, however, that should negotiations fail, problems may be resolved by a majority or two-thirds vote as provided by the articles.<sup>189</sup>

The Joint Venture Law also provides that procedures concerning the em-

180. Joint Venture Law, *supra* note 7, art. 6.

181. *Id.*

182. *Id.*

183. *Id.*

184. See text accompanying note 121 *supra*. Ren Jian-xin posits that an additional reason for the requirement of a P.R.C. chairman is that of convenience. REN JIAN-XIN, *supra* note 78, at 4. Theoretically, a P.R.C. chairman would have the unique advantage of easy access to people both vertically and horizontally. *Id.*

185. Joint Venture Law, *supra* note 7, art. 6.

186. *Id.*

187. *Id.*

188. Lubman, *China Looks for Partners to Boost Output*, Boston Sunday Globe, Oct. 28, 1979, § A, at 4, col. 1. The P.R.C. does not subscribe to the practice that a board chairman may exercise a veto. BUSINESS CHINA, Sept. 12, 1979, at 126. Nor does the P.R.C. believe that the majority should have the greater voice. *Id.* Consultation on the principle of equality and mutual benefit is the key. *Id.*

189. REN JIAN-XIN, *supra* note 78, at 5.

ployment and discharge of workers and staff members are to be stipulated in the articles or by contract.<sup>190</sup> This is an issue of importance to foreign investors who want to maintain a level of control over daily plant operations. Vice Premier Gu Mu has said that the P.R.C. will "create favorable conditions so that foreign management experience and technical expertise will be brought into full play."<sup>191</sup> However, while the P.R.C. wants to import management skill,<sup>192</sup> it also intends to retain control over the labor force. Liu Yiu-chu, a Hong Kong lawyer who helped draft the Joint Venture Law, states that such a limitation is dictated by P.R.C. society.<sup>193</sup> This conclusion follows from the proposition that only Chinese can effectively understand the situation and mentality of the workers. Ms. Liu suggests that the best means to ensure harmony between foreign management and domestic workers is to enlist the foreman of any given joint venture as an intermediary.<sup>194</sup> She notes that an alternative course would lead to unnecessary animosity and possible confrontations. Such control by the P.R.C. does not mean that the foreign partner's influence will be minimal. Through his participation on the board, and through the strategic use of intermediaries, the foreign partner will be able to exert considerable influence over the organization of the labor force.<sup>195</sup> However, it is clear that such issues should be the subject of detailed negotiations at the formation stage.

A related question concerns the consonance of motives of the P.R.C. and foreign participants. Generally, foreign investors will question whether the P.R.C. side will share their profit motive.<sup>196</sup> Included in this concern is the question of efficiency. The P.R.C. response to such inquires is framed in terms of the new commitment to the objective principles of economics.<sup>197</sup> P.R.C. officials note that "profit" is in their self-interest in that the greater

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190. Joint Venture Law, *supra* note 7, art. 6.

191. See BEIJING REVIEW, No. 41, Oct. 12, 1979, at 4. See also DiFederico, *supra* note 103, at 20. Vice Premier Deng Xiaoping has assured former Secretary Kreps that foreign partners would have the right to fire workers. *Id.* Rong Yiren anticipates an amendment to the Joint Venture Law that will expressly stipulate that foreign partners may nominate general managers and plant managers. BUSINESS CHINA, Sept. 12, 1979, at 126. Such an amendment will not only assure foreign parties that they will be able to maintain control over operations, but it will also provide a means of management training. *Id.*

192. See note 60 *supra*.

193. THE CHINA TRADER, *supra* note 120, at 67. One medium-sized joint venture with a Hong Kong firm has been successful in firing or transferring unsatisfactory personnel. Rowley, *Cracking the Cryptic Code*, FAR EASTERN ECONOMIC REVIEW, Jul. 20, 1979, at 51. To the extent that the objective laws of economics are successfully implemented in the P.R.C. economy itself, the fears of foreign partners that the P.R.C. work force will be ineffective and incompetent will be assuaged. See note 31 *supra*.

194. THE CHINA TRADER, *supra* note 120, at 67.

195. *Id.*

196. See note 31 *supra*.

197. *Id.*

the profit, the greater the foreign exchange production.<sup>198</sup> It follows that the degree to which joint ventures serve this self-interest is the degree to which the profit motive will be honored. Nevertheless, the foreign businessman should allow a healthy skepticism to influence his business decisions. One may legitimately question the capitalistic instincts of the nation that produced the extreme socialism of the Cultural Revolution.

Although the P.R.C. presently allows workers to seek employment independently,<sup>199</sup> there is virtually no labor market in the country.<sup>200</sup> Therefore, a joint venture seeking a work force must solicit recommendations from the departments in charge of joint ventures or from local labor authorities.<sup>201</sup> Qualification exams may be administered by the joint venture and priority in employment may be given to those with high marks.<sup>202</sup>

It is stipulated by the law that the remuneration of the president, vice presidents, chief engineers, chief accountant and auditors is to be determined by the board of directors.<sup>203</sup> The remuneration for ordinary workers is not so stipulated. Ren Jian-xin suggests that the wages for ordinary workers should be above those paid to comparable workers employed by state enterprises.<sup>204</sup> This suggestion reflects the fact that state workers receive additional remuneration in the form of low rent,<sup>205</sup> children's educational allowance,<sup>206</sup> and family medicine<sup>207</sup> that joint venture workers will not receive. But due to the depressed level of the P.R.C. wage scale, the wage scale adopted for joint ventures will be lower than that prevailing in neighboring countries.<sup>208</sup> Thus,

198. See text accompanying note 85 *supra*.

199. See Xue, *Noted Economist on Employment*, BEIJING REVIEW, No. 33, Aug. 17, 1979, at 13-14.

200. *Id.*

201. REN JIAN-XIN, *supra* note 78, at 5.

202. *Id.* Qualification exams are evidence of adherence to the objective laws of economics. Such exams are presently being given to the P.R.C. labor force to promote excellence for domestic projects as well as for joint ventures. *Id.* See the publication of an interview of Hua Guofeng conducted by Felix Greene, BEIJING REVIEW, No. 42, Oct. 19, 1979, at 11.

203. Joint Venture Law, *supra* note 7, art. 5.

204. REN JIAN-XIN, *supra* note 78, at 6. An overview of the wage structure of urban workers in the P.R.C. appears in HOWE, *supra* note 160, at 175-80. The majority of wage earners receive between 40 and 100 yuan per month. *Id.* at 180.

205. The working conditions and welfare benefits of workers in industries that employ more than 100 people are prescribed in detail. HOWE, *supra* note 160, at 184. Regulations, for example, cover hours of work, medical benefits and poverty assistance. *Id.* For a table that lists the average monthly expenditures of P.R.C. urban families as a percentage of their monthly income, see *id.* at 184. Among the items included are housing, fuel, medical costs, school fees, food and clothing. *Id.* For a general overview of housing, see *id.* at 172.

206. For a discussion of the P.R.C. educational system, including its theory, history and current practices, see KAPLAN, SOBLE & ANDORS, *supra* note 11, at 217-32. See also BEIJING REVIEW, No. 1, Jan. 17, 1980, at 17.

207. For a discussion of medical and social services in the P.R.C., see KAPLAN, SOBLE & ANDORS, *supra* note 11, at 233-46.

208. REN JIAN-XIN, *supra* note 78, at 6.

payroll expenditures will be comparatively lower for joint ventures in the P.R.C. than for joint ventures elsewhere.

One general policy matter in which the board does not have complete discretion is in the purchase of certain types of items. The Joint Venture Law stipulates that, in the purchase of raw and semi-processed materials, fuels and auxiliary equipment, joint ventures must give first priority to P.R.C. sources.<sup>209</sup> It is also provided that such materials may be acquired on the world market with the venture's own foreign exchange funds in exceptional circumstances.<sup>210</sup> This "Buy-P.R.C." requirement puts into question the desirability of the P.R.C. as a locus for foreign investment.<sup>211</sup> To the extent that a joint venture is required to depend on the P.R.C. economy, it will also be subject to its shortcomings. Thus, a joint venture will be negatively affected by an insufficient supply of power and by inadequate transportation and communications systems.<sup>212</sup> The vulnerability of such reliance is mitigated to some extent by the opportunity to purchase materials on the world market. The initial approval required by the FIC<sup>213</sup> will also serve as some guarantee of the sufficiency of materials and power supplies. However, effort and co-operation on behalf of the P.R.C. authorities will be required for smooth, efficient operation.

According to Ren Jian-xin, the price structure for materials purchased in the P.R.C. will approximate the following outline.<sup>214</sup> Miscellaneous goods for general use will be priced according to the domestic market.<sup>215</sup> In contrast, equipment, raw materials, semi-finished products, fuels, auxiliary parts and accessories purchased in large quantities will be set at current world market prices.<sup>216</sup> Mr. Ren also projects that those materials supplied to a joint venture which are listed on the P.R.C.'s export category, or are imported by the P.R.C., must be paid for in foreign currency.<sup>217</sup> This requirement complements the provision that encourages a joint venture to market its product outside of the P.R.C.<sup>218</sup> Much emphasis is placed on the joint venture's role in the generation of foreign currency. However, products may be distributed in the P.R.C. market.<sup>219</sup>

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209. Joint Venture Law, *supra* note 7, art. 9.

210. *Id.*

211. See DiFederico, *supra* note 103, at 20.

212. See text accompanying notes 46-49 *supra*.

213. Joint Venture Law, *supra* note 7, art. 3.

214. REN JIAN-XIN, *supra* note 78, at 6.

215. *Id.*

216. *Id.*

217. *Id.* at 16.

218. Joint Venture Law, *supra* note 7, art. 9.

219. *Id.* Distribution on foreign markets may be achieved through direct channels, associated agencies or the P.R.C.'s foreign trade establishments. *Id.*

According to Article 9 of the Joint Venture Law, joint ventures may establish "affiliated agencies" outside the P.R.C.<sup>220</sup> The reference to "affiliated agencies" might be better translated as "affiliated companies" or "branches."<sup>221</sup> One role of such affiliates might be to distribute the joint venture's export products on foreign markets.<sup>222</sup>

### 5. Dispute Resolution

The mechanism for dispute resolution<sup>223</sup> provided in the Joint Venture Law contemplates settlement through "conciliation or arbitration by an arbitral body of the P.R.C. or through arbitration by an arbitral body agreed upon by the parties."<sup>224</sup> To the extent that settlement is encouraged through "conciliation," the provision reflects the traditionally preferred means of resolution.<sup>225</sup> To the extent that the Joint Venture Law allows arbitration outside the P.R.C., it demonstrates new liberalism. A recent trend permits arbitration in a third country, frequently Sweden.<sup>226</sup> It is significant that priority is not accorded to settlement through consultation or conciliation; equal weight is given to arbitration.

The broad language of the Joint Venture Law is narrowed by the U.S.-P.R.C. Trade Agreement.<sup>227</sup> This agreement calls for the use of various

220. *Id.*

221. Willoughby, *supra* note 16, at 1016.

222. Yao Zhuang, *The Positive Role of the Law on Joint Ventures Using Chinese and Foreign Investment*, Beijing Renmin Ribao, Jul. 24, 1979, at 4, translated in PRC NATIONAL AFFAIRS, Aug. 8, 1979, at L8, L9.

223. The traditional means of dispute resolution in foreign trade is an instance of the P.R.C.'s historical aversion to formalized law. See note and text accompanying note 27 *supra*. The P.R.C. has tried to rely totally on "amicable negotiations" for the resolution of such conflicts. Comment, *Legal Aspects of China's Foreign Trade Practices and Procedures*, 12 J. INT'L TRADE AND ECON. 105, 123 (1977). Only when such negotiations have failed have third-party conciliators from the Chinese Foreign Trade Arbitration Commission of the CCPIT been enlisted to search for a solution within the terms of the contract and within the laws and normal trade practices. *Id.* An optional third step allowed the third-party to make a non-binding recommendation. *Id.* Arbitration had always been a last resort. *Id.* A recent trend allows arbitration to be conducted in third countries. Article 14 allows arbitration through an arbitral body agreed upon by the parties. Joint Venture Law, *supra* note 7, art. 14. For further discussion of arbitration practices in the P.R.C., see generally, Clark, *China's Changing Views on Projects Contracts — A Lawyer's Appraisal*, MAGAZINE, WORLDWIDE PROJECTS 37, 44-45 (1979); Huang, *Reflections on Law and the Economy in the People's Republic of China*, 14 HARV. INT'L L. REV. 261, 276-80 (1973); Li, *Legal Aspects of Trade with Communist China*, 13 COLUM. J. TRANS. LAW 57, 63-71 (1964); Hsiao, *Contracts and Means of Settling Disputes*, 22 VAND. L. REV. 503, 511-20 (1969); McCobb, *Foreign Trade Arbitration in the People's Republic of China*, 5 INT'L L. & POL. 205 (1972); HSIAO, *THE FOREIGN TRADE OF CHINA* (1977); 1 W. S. SURREY & D. WALLACE, *A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS* (1977).

224. Joint Venture Law, *supra* note 7, art. 14.

225. For a discussion of the traditional mechanism for dispute settlement, see note 223 *supra*.

226. Surrey & Soble 1, *supra* note 53, at 16.

227. U.S.-P.R.C. Trade Agreement, *supra* note 89.

mechanisms in the resolution of disputes between U.S. and P.R.C. enterprises.<sup>228</sup> "Prompt and equitable settlement"<sup>229</sup> is sought, initially through "friendly consultations, conciliation or other mutually accepted means."<sup>230</sup> Thus, the first step conforms to traditional P.R.C. practice.<sup>231</sup> Should the parties be unable to resolve the dispute through these means, arbitration is permitted.<sup>232</sup> The agreement not only allows arbitration in the P.R.C. or in a third country, it also allows the procedure to be conducted in the United States.<sup>233</sup> Although this provision does not require the P.R.C. to consent to arbitration in the United States, it does enhance the bargaining position of an American firm.<sup>234</sup>

The two countries have taken a similarly liberal position with respect to the governing rules of the arbitration procedure.<sup>235</sup> The Chinese Rules of Arbitration<sup>236</sup> are no longer mandatory.<sup>237</sup> Rather, the subject is open to negotiation.<sup>238</sup> The relevant provision states:

The arbitration rules of procedure of the relevant arbitration institution are applicable, and the arbitration rules of the United Nations' Commission on International Trade Law<sup>239</sup> recommended by the United Nations, or other international arbitration rules, may also be used where acceptable to the parties to the dispute and to the arbitration institution.<sup>240</sup>

The U.S.-P.R.C. Trade Agreement also seeks to ensure the prompt enforcement of arbitral awards.<sup>241</sup> However, no enforcement mechanism is provided. As the P.R.C. is not a member of the United Nations Convention on the Recognition and Enforcement of Arbitral Awards,<sup>242</sup> enforcement may be subject to some uncertainty. Additionally, present P.R.C. law does not provide for judicial enforcement.<sup>243</sup> Nevertheless, the P.R.C. has a reputation for

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228. *Id.* art. VIII(1).

229. *Id.*

230. *Id.*

231. *See* note 223 *supra*.

232. U.S.-P.R.C. Trade Agreement, *supra* note 89, art. VIII(2).

233. *Id.*

234. Surrey & Soble 1, *supra* note 53, at 16.

235. U.S.-P.R.C. Trade Agreement, *supra* note 89, art. VIII(2).

236. Provisional Rules of Procedures of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade, adopted on March 31, 1956, at the Fourth Session of the CCPIT.

237. U.S.-P.R.C. Trade Agreement, *supra* note 89, art. VIII(2).

238. *Id.*

239. [1968-1970] Y.B. U.N. COMM'N INT'L TRADE LAW, vol. 1 (U.N. Pub., Sales No. E. 71.U.1).

240. U.S.-P.R.C. Trade Agreement, *supra* note 89, art. VIII(2).

241. *Id.* art. VIII(3).

242. United Nations Convention on the Recognition and Enforcement of Arbitral Awards, [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

243. Surrey & Soble 1, *supra* note 53, at 16.

strict adherence to contractual obligations.<sup>244</sup> It is hoped that the P.R.C. will sign the United Nations Convention in its modernization process.<sup>245</sup> Until such time, however, negotiating parties probably should include the matter of enforcement in their contracts.<sup>246</sup>

## 6. The Need for Negotiation; U.S. Support

The Joint Venture Law should be viewed as a framework that must be filled by an evolving commercial code. Until such a code is promulgated, detailed negotiation is the investor's best protection.<sup>247</sup> Yet, paradoxically, the detail desired by non-Chinese parties has presented problems for the P.R.C.<sup>248</sup> At present, a practice has emerged in which each foreign businessman is accompanied by his own experts.<sup>249</sup> As a consequence, the documents submitted by the various foreign investors lack uniformity. This lack of uniformity creates an increased workload for the commercially inexperienced P.R.C., which in turn creates inefficiency. Liu Yiu Chu and Chan Chi Kwan, two lawyers closely connected with P.R.C. developments, recommend the adoption of standard forms at the earliest possible time.<sup>250</sup> Because the P.R.C. Government is presently overburdened with work, these authors suggest that the burden in the quest for uniformity rests on the shoulders of participating attorneys.<sup>251</sup> They note that cooperation and organization would benefit not only the foreign investors through increased efficiency, but also would contribute to development of the P.R.C.'s legal system.<sup>252</sup>

The U.S. Government is also in a position to further the P.R.C.'s goals. In addition to the support that accompanies passage of the U.S.-P.R.C. Trade

244. *Id.* Note the principle of "honoring the contract and keeping one's word." Sobin, *Negotiation Is the Key to Success*, Boston Sunday Globe, Oct. 28, 1979, § A, at 6, col. 2.

245. Surrey & Soble 1, *supra* note 53, at 16.

246. *Id.*

247. See Sobin, *Negotiation Is the Key to Success*, Boston Sunday Globe, Oct. 28, 1979, § A, at 1, col. 1, for a discussion of P.R.C. negotiating practices. See also DEPT. OF COMMERCE PAMPHLET, *supra* note 67, at 13.

248. As an example of what might be considered an aversion to technical language (an aversion complementary to the disdain for formalized law), the P.R.C. initially expressed reluctance to the U.S.-P.R.C. Trade Agreement, *supra* note 89, due to language that the P.R.C. considered overly technical. The Detroit News, Jan. 2, 1980, § A, at 6, col. 1.

249. Liu & Chan, *Questions and Viewpoints Relating to China's Law on Joint Ventures*, BUSINESS PRC (4th Quarter, 1979).

250. *Id.*

251. *Id.*

252. *Id.* A group of Hong Kong lawyers has set up an organization under the name of "The Association of Experts for Modernization." *Id.* Composed of members of the legal profession as well as experts from other fields, the Association was set up to promote the modernization of the P.R.C. through an organized effort. *Id.* One objective is to set up their own uniform system of practice. *Id.*

Agreement,<sup>253</sup> there are other areas in which the U.S. Government has manifested support. One is the extension of U.S. Export-Import Bank<sup>254</sup> credit arrangements of up to \$2 billion over five years.<sup>255</sup> Additionally, an agreement between the two countries may be reached with respect to the development of hydroelectric energy in the P.R.C.<sup>256</sup> An important incentive to investment is being considered through the guarantees and insurance of the Overseas Private Investment Corporation (OPIC).<sup>257</sup>

#### IV. ANALYSIS-PROSPECTS

##### A. *External Variables*

Many variables surround the Joint Venture Law that threaten its success in assisting modernization. Comprehensive political and economic reform extends to every level of life in the P.R.C. Such a volatile climate breeds uncertainty and functions as a disincentive to investment. Nevertheless, it must be remembered that the Joint Venture Law is more than a reaction to new ideological developments; rather, it is a reflection of a broad ideological commitment. The Joint Venture Law is an integral part of a new perspective of the appropriate means to a modern P.R.C. Thus, as the reform causes uncertainty, it also imparts strength.

Neither the establishment of democratic socialism nor the institution of free market practices must produce political and economic institutions according to Western standards in order to provide a favorable climate for investment. Successful investment will be fostered by a relatively modest reorientation. Moreover, the institutional framework that will emerge as a result of such a reorientation will add stability to the investment climate. The most dramatic example of such an institutional structure is the U.S.-P.R.C. Trade Agreement. Deviation from its provisions would threaten more than any single investment; it would threaten relations between the two countries.

Legal reform in the P.R.C. will take years to accomplish. Not only does such a reform involve the promulgation of an expansive system of laws, it also involves a comprehensive re-education of the public. Nevertheless, joint ventures can rely on a relatively favorable legal environment as the P.R.C. is relying on foreign investment to assist in modernization. Thus, the tax structure for joint ventures will probably be set at a favorable rate. Similarly, the ex-

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253. See note 89 *supra*.

254. 12 U.S.C. § 635 (1980).

255. MASSWORLD, Oct. 1979, at 5.

256. *Id.*

257. 22 U.S.C. § 2191 (1970). See MASSWORLD, Oct. 1979, at 5. See also Wall St. J., Oct. 24, 1979, at 3, col. 2; BEIJING REVIEW, No. 41, Oct. 12, 1979, at 3; BEIJING REVIEW, No. 36, Sept. 7, 1979, at 3.



change laws will probably be adjusted so that they will not deter investment. Otherwise, the very purpose of the Joint Venture Law would be undermined. However, because the legal system is still developing, it may be expected to cause delay and frustration in its early stages. Even routine commercial disputes may cause undue concern. Joint venture investors should be prepared to deal with inconveniences.

Similarly, the institution of the objective laws of economics will not be as pervasive as the foreign investor might desire. However, many of the reforms can be instituted and many of the uncertainties resolved for individual joint ventures through the articles of association. Careful negotiation should accompany the organization of every level of a joint venture's operations. For example, potential employment problems may be avoided at the formation stage. The parties may stipulate in the articles the policy regarding the hiring and discharge of the workers. Similarly, a work incentive program can be agreed to in the articles. Nevertheless, discretion should dictate compromise. Articles that are too one-sided or inflexible will be unacceptable to the P.R.C. partners, not to mention the FIC.

A related problem concerns the imbalances of the P.R.C. economy. A scarcity of domestic supplies of essential resources threatens optimal production, as do underdeveloped roads, railways and harbors. To guard against scarce domestic resources, the Joint Venture Law provides for the purchase of materials from abroad. Hence, if the supply of oil is limited, a joint venture may turn to the world market. The role of the FIC also mitigates uncertainty. Initial approval by this administrative body presupposes a favorable result as analysis of the investment proposal against knowledge of the local business conditions is required. The function of the CITIC also helps to assure success. Pursuant to commissions to negotiate and enter into joint ventures, the CITIC performs a screening process. Thus, structural features of the Joint Venture Law, the FIC and the CITIC serve to mitigate uncertainty.

In addition to the various uncertainties which influence investment decisions there are a variety of positive factors. The major tenets of the P.R.C.'s foreign economic relations, namely, mutual benefit and cooperation, augur success. Additionally, the P.R.C. presents a huge market in need of much assistance. Tax incentives enhance the possibility of success. The U.S.-P.R.C. Trade Agreement provides for the protection of copyright and patent rights according to U.S. standards and allows arbitration to take place in the United States. If approved by the U.S. Congress, the guarantees and insurance of OPIC would constitute important encouragements to investors from the United States.

There is no question that these variables will affect the success of the Joint Venture Law. While no single uncertainty is incapable of resolution, the aggregate of uncertainties is of concern to the foreign investor. Generally, success for any given joint structure will depend on the degree to which it fulfills

the stated purposes of the Joint Venture Law. The P.R.C. Government will give priority to those joint ventures that successfully attract advanced technology and generate foreign capital. Thus, a foreign investor must realistically assess his contribution to the P.R.C.'s modernization from the P.R.C. perspective. To the extent that he supplies advanced technology and generates foreign capital, and to the extent that he demonstrates compromise and patience, he can be confident of at least limited success.

### B. *Appropriate Investments*

The P.R.C.'s economic readjustment plan, discussed above,<sup>258</sup> outlines the general areas in which investment will be encouraged. The agricultural and industrial sectors will receive emphasis. One means for a potential investor to narrow the focus within these sectors is to examine those items that have constituted the major U.S. sales to the P.R.C. over the last several years.<sup>259</sup>

Agriculture is the foundation of the P.R.C.'s economy.<sup>260</sup> Accordingly, the export of both fertilizer and insecticides were among the top fifteen U.S. exports to the P.R.C. in 1978.<sup>261</sup> Complete plants to manufacture chemicals for fertilizer production have been exported.<sup>262</sup> Agricultural machinery has also been heavily exported.<sup>263</sup> The need for modernization in agriculture is highlighted by the fact that the top three U.S. exports to the P.R.C. in 1978 were wheat, cotton and corn.<sup>264</sup> Thus, joint ventures which address deficiencies in the agricultural sector will probably be encouraged. Such ventures will not only improve food production in the P.R.C.; they will also help to conserve foreign capital by reducing the P.R.C.'s trade deficit.

Within the light industrial sector, the P.R.C. has imported a wide variety of computer and electronic technology.<sup>265</sup> Scientific instruments such as medical instruments<sup>266</sup> have been imported. Significantly, there has been little importation of finished textiles<sup>267</sup> which are the major P.R.C. exports to the United States.<sup>268</sup>

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258. See text accompanying notes 30-52 *supra*.

259. The statistics for the following information on the levels of U.S.-P.R.C. trade are taken from *Agreement on Trade Relations Between the United States and the People's Republic of China: Hearing Before the Subcomm. on Int'l Trade of the Comm. on Finance, 96th Cong., 1st Sess. 109 (1979)* [hereinafter cited as *Hearing*].

260. See text accompanying notes 39-41 *supra*.

261. *Hearing, supra* note 259, at 109. Fertilizer alone totalled 2.4 percent while insecticides totalled 0.5 percent. *Id.* Together they totalled \$23,567,490 in sales for 1978. *Id.*

262. *Id.* at 111. Three area plants were sold at \$34 million. *Id.*

263. *Id.* Over \$3 million in tractors and irrigation equipment were sold. *Id.*

264. *Id.* at 109. The three items together constituted 61 percent of U.S. sales to the P.R.C. in 1978. *Id.*

265. *Id.* at 114. Among a variety of purchases of computer and electronic technology were 12 CDC Cyber computers for geophysical exploration at \$69 million. *Id.* See text accompanying notes 42-45 *supra*.

266. *Hearing, supra* note 259, at 121.

267. *Id.* at 122.

268. *Id.* at 110.

The heavy industrial sector has placed an emphasis on the importation of oil and gas drilling machinery.<sup>269</sup> Other imported items include construction<sup>270</sup> and mining equipment.<sup>271</sup> The importation of heavy-duty trucks and jet airliners<sup>272</sup> as well as equipment to dredge harbors<sup>273</sup> in order to improve the inadequate transportation system has been undertaken.

Thus, the economic sectors most likely to achieve success pursuant to the Joint Venture Law are those that further the P.R.C.'s readjustment. The foreign investor should study the available data and formulate his proposal in such a way so as to emphasize the appropriateness of his joint venture to the P.R.C.'s modernization process.

#### V. CONCLUSION

This Comment has examined the recent political and economic reform in the P.R.C. The author has concluded that this reform is rooted in a new perception of the best means to modernize the P.R.C. Ideology, once paramount, will in the future be accompanied by pragmatism. One manifestation of this new pragmatism is the Joint Venture Law. For the first time, this form of doing business will receive the endorsement of the leadership of the P.R.C.

The author projects a cautious success for joint ventures in the P.R.C. However, success will turn on many factors. The overriding consideration is the depth of the new pragmatism and the firmness of the commitment to include foreign investment as a means to promote modernization. The extent to which a joint venture figures in the P.R.C.'s self-interest is the extent to which success can be anticipated.

In addition, because the Joint Venture Law is a product of a legal reform, it lacks the certainty of an analogous law in an established legal system. Although the provisions are emphatically controlled by the laws of the P.R.C., many such laws are still in draft form. Thus, the Joint Venture Law must be read in the context of a developing system.

Finally, success will turn on sociological insight. Until such time as the skeletal framework becomes a mature body of law, detailed negotiation, careful research, and patience are the best ingredients for success. The P.R.C. is embarking on an intensive campaign to modernize its economy. Foreign investors, as well as the P.R.C.'s population, can hope to take advantage of the financial rewards.

*Peter R. Brown*

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269. *Id.* at 109. This category was the fifth largest P.R.C. import from the United States at \$34,449,897 in 1978. See text accompanying notes 46-49 *supra*.

270. *Hearing, supra* note 259, at 113. Such equipment included explosives, pipes, dump trucks and compactors. *Id.*

271. *Id.* at 116.

272. *Id.* at 122. Ford and Boeing did over \$285 million in sales in 1978. *Id.*

273. *Id.* at 120.