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# Doing Business with the People's Republic of China: The Role of Foreign Lawyers

Jamie P. Horsley\*

Since the People's Republic of China (P.R.C.) opened its doors in 1979, welcoming private foreign investment for the first time since the country's establishment in 1949, foreign businesspeople from all over the world have flocked there to engage in joint ventures, co-production, compensation trade, processing and assembly, licensing, leasing and lending, as well as export and import trade. These entrepreneurs represent interests ranging from multinational corporations to family-run businesses to individual proprietorships. As a result of this influx of capital, foreign investment in the P.R.C. has increased dramatically. As of the end of 1984 total foreign investment was estimated at over \$17.3 billion.<sup>1</sup> Overall bilateral trade in 1984 was valued at nearly \$47.97 billion.<sup>2</sup> By the end of June 1984, roughly 1,800 foreign firms and Chinese-foreign ventures had registered in the P.R.C.<sup>3</sup> and more than 700 foreign companies had established representative offices in the P.R.C.<sup>4</sup> As part of its seventh five-year plan covering the years 1986 through 1990, the P.R.C. has announced its intention to attract \$30 billion in

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1. Ling, *1984 Foreign Trade Deficit Adds Up to \$1.1 Billion*, China Daily (Beijing), Jan. 23, 1985, at 1.

2. *Id.*

3. This number includes 362 Chinese-foreign equity joint ventures, 1,372 Chinese foreign cooperative business ventures, 53 wholly foreign-owned enterprises, and 31 joint ventures for offshore oil exploration. See *Foreign Investment Update*, China Econ. News (Hong Kong), Nov. 12, 1984, at 2. In 1984 alone, 700 new equity joint ventures contracts were signed and 26 wholly foreign-owned enterprises were established. There were a total of 74 wholly foreign-owned joint ventures by the end of the year. *China's Foreign Trade Peaks at US \$49.9 Bn. Trade Deficit also a Record at US \$ 1.1 Bn.* China Econ. News (Hong Kong), Jan. 28, 1985, at 1, 2.

4. *1,800 Foreign Firms Register in China*, Xinhua Gen. Overseas Service (Beijing), Aug. 18, 1984, item no. 081848 (available on LEXIS).

foreign funds,<sup>5</sup> nearly double the amount of foreign capital absorbed between early 1979 and mid-1984.

Where business goes, lawyers are sure to follow. Many foreign law firms have sent lawyers to the P.R.C. to represent clients making investments there. Other foreign lawyers handle significant amounts of foreign investment in the P.R.C. from their home offices.<sup>6</sup>

The P.R.C. presents the normal range of difficulties of international practice to foreign lawyers: an unfamiliar legal system, culture, and language. These difficulties are exacerbated by the fact that the country's economic system is undergoing vast changes that affect what is possible and permissible when doing business in the P.R.C. Difficulties also arise because the P.R.C.'s legal system is young, developing, and still unable to keep up with the rapid changes taking place in the business environment.

This article describes the nature of a legal practice involving business transactions with entities in the P.R.C. and the role of the foreign, or non-national, lawyer in such transactions. Part I focuses on the increasing volume of Chinese legislation and international agreements affecting foreign trade and investment in the P.R.C., and the difficulties of keeping abreast of and interpreting this recent legislation. Part II examines the role of foreign lawyers in Chinese business transactions. It also discusses the need for competence in the Chinese language, practical problems encountered in practicing in the P.R.C., and the use of local Chinese counsel. Finally, in part III, this article examines the working relationship that has developed between foreign and Chinese lawyers.

## I. CHINESE LAW

For many years following the establishment of the People's Republic of China, observers claimed that there was no law in the P.R.C.<sup>7</sup> This claim was not entirely unwarranted. While the P.R.C. did in fact have a considerable body of criminal and administrative law, much of it was either not formally promulgated or not publicly available to foreigners. Little legislation governing civil and commercial matters was enacted during the first 30 years of the P.R.C.'s existence. Moreover, the P.R.C. eschewed private foreign investment and therefore had no need for legislation governing this area.

In late 1978, after the Chinese Communist Party endorsed the so-called "open-

5. Fung, *China is Seeking to Double Foreign Loans, Investment*, Asian Wall St. J., Nov. 19, 1984, at 8 (weekly ed.).

6. See *China Fever*, Nat'l L.J., Dec. 17, 1984, at 1.

7. See Cohen, *The Criminal Process in the People's Republic of China: An Introduction*, 74 HARV. L. REV. 469 (1966); *Law and Disorder Around the World: Other People's Problems*, 9 COLUM. J.L. & SOC. PROBS., 63, 76 (1972) (statement of Victor Li).

door policy," this situation changed rapidly. The Party welcomed foreign investment as an integral part of a new economic program to foster modernization and Chinese legislators began building a comprehensive legal system to support and assist the P.R.C.'s economic development. The Chinese desire to attract foreign investment gave impetus to the development of the emerging legal system.

### *A. Proliferation of Chinese Legislation and International Agreements*

Today, a wide variety of legislation affects the activities of foreigners doing business in the P.R.C.<sup>8</sup> The seminal act is the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment (Joint Venture Law).<sup>9</sup> This law, promulgated by the Fifth National People's Congress<sup>10</sup> in July 1979, first opened the P.R.C.'s door to foreign investment. Since 1979, more than 34 laws, 260 decrees and regulations, and 530 local regulations, many of them affecting foreign business dealings in the P.R.C., have been adopted and published.<sup>11</sup> This legislation includes regulations implementing and clarifying the Joint Venture Law,<sup>12</sup> individual and corporate income tax laws,<sup>13</sup> foreign ex-

8. English translations of many Chinese commercial laws and regulations are contained in *COMMERCIAL LAWS AND BUSINESS REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA—1949–1983* (V. Sit ed. 1983) [hereinafter cited as *COMMERCIAL LAWS*] and *COMMERCIAL LAWS AND BUSINESS REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA—VOLUME II*, (W. Lo, A. Wong, L. Wong & W. Ming eds. 1984) [hereinafter cited as *II COMMERCIAL LAWS*].

9. The Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, approved July 1, 1979, translated in *COMMERCIAL LAWS*, *supra* note 8, at 326 [hereinafter cited as *Joint Venture Law*].

10. The National People's Congress is the highest legislative body in the P.R.C. and normally meets once a year. Its deputies are elected from the provinces, autonomous regions, and special municipalities under the central government (Beijing, Shanghai, and Tianjin) and from the People's Liberation Army. Its Standing Committee acts as the permanent organ of the Congress when the Congress is not in session. See HSIEN-FA (Constitution) ch. III, § I, translated in *THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA* (1983).

11. *China Builds Up Its Legal System*, China Daily (Beijing), Oct. 15, 1984, at 4.

12. Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, promulgated Sept. 20, 1983, translated in *II COMMERCIAL LAWS*, *supra* note 8, at 239 [hereinfter cited as *Joint Venture Regulations*]; see also Cohen & Horsley, *The New Joint Venture Regulations*, *CHINA BUS. REV.*, Nov.–Dec. 1983, at 44.

13. The individual income tax law is the Individual Income Tax Law of the People's Republic of China, adopted Sept. 10, 1980, translated in *COMMERCIAL LAWS*, *supra* note 8, at 216. For analysis of this law, see Foster & Horsley, *Business Operations in the People's Republic of China*, 443 *TAX MGMT* (BNA) A-36 (1983). The major corporate tax laws of concern to foreigners are the Income Tax Law of the People's Republic of China Concerning Joint Ventures with Chinese and Foreign Investment, adopted Aug. 26, 1980, translated in *COMMERCIAL LAWS*, *supra* note 8, at 178 [hereinafter cited as *Joint Venture Tax Law*], and the Income Tax Law for Foreign Enterprises of the People's Republic of China, adopted Dec. 13, 1981, translated in *COMMERCIAL LAWS*, *supra* note 8, at 186. These corporate income tax laws are analyzed in Foster & Horsley, *supra*, at A-17, A-27.

change regulations,<sup>14</sup> import and export licensing procedures,<sup>15</sup> business registration regulations,<sup>16</sup> a revised trademark law,<sup>17</sup> a "trial" civil procedure code,<sup>18</sup> an economic contracts law (applicable only to contracts between Chinese entities),<sup>19</sup> a contract law applicable to contracts between Chinese and foreign parties,<sup>20</sup> regulations for the cooperative Chinese-foreign exploitation of the P.R.C.'s offshore oil,<sup>21</sup> environmental protection laws,<sup>22</sup> and, most recently, a patent law.<sup>23</sup>

14. *E.g.*, Provisional Regulations for Exchange Control of the People's Republic of China, *promulgated* Dec. 18, 1980, *translated in* COMMERCIAL LAWS, *supra* note 8, at 60; *see also* Horsley, *The Regulation of Foreign Exchange used by Foreign Enterprises and Chinese Foreign Joint Ventures*, E. ASIAN EXECUTIVE REP., Nov. 1983, at 8.

15. Provisional Regulations Concerning the Export License System, *issued* June 3, 1980, *translated in* COMMERCIAL LAWS, *supra* note 8, at 252; Provisional Regulations of the People's Republic of China on Import License System, *promulgated* Jan. 10, 1984, *translated in* II COMMERCIAL LAWS, *supra* note 8, at 191; *see also* Horsley, *The Regulation of China's Foreign Trade*, in FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA 6, 14-18 (M. Moser ed. 1984).

16. Regulations on the Registration of Joint Ventures Using Chinese and Foreign Investment, *approved* July 26, 1980, *translated in* COMMERCIAL LAWS, *supra* note 8, at 329; Interim Regulations of the People's Republic of China Concerning the Control of Resident Offices of Foreign Enterprises, *promulgated* Oct. 30, 1980, *translated in* COMMERCIAL LAWS, *supra* note 8, at 311 [hereinafter cited as Interim Regulations Concerning Resident Offices]; Interim Regulations of the State Council of the People's Republic of China Concerning the Control of Resident Correspondents of the Foreign News Agencies, *promulgated* Mar. 9, 1981, *translated in* COMMERCIAL LAWS, *supra* note 8, at 314; Provisional Regulations for the Establishment of Representative Offices in China by Overseas Chinese and Foreign Financial Institutions, *issued* Feb. 1, 1983, *translated in* COMMERCIAL LAWS, *supra* note 8, at 316 (regulations issued by the People's Bank of China); Procedures for the Registration and Administration of Resident Offices of Foreign Enterprises in China, *promulgated* Mar. 15, 1983, *translated in* COMMERCIAL LAWS, *supra* note 8, at 319 [hereinafter cited as Procedures for Registration of Resident Offices]; *see also* Horsley, *Shenzhen's Comprehensive Registration Requirements*, E. ASIAN EXECUTIVE REP., Dec. 1984, at 9; Horsley, *Business Registration in China*, CHINA BUS. REV., Mar.-Apr. 1984, at 24.

17. The Trademark Law of the People's Republic of China, *adopted* Aug. 23, 1982, *translated in* COMMERCIAL LAWS, *supra* note 8, at 289; *see also* Cohen & Horsley, *The Trademark Law of the People's Republic of China*, in SYMPOSIUM: PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1983, at 211 (M. Landwehr ed. 1984) (a translation of the law appears at appendix A of this article).

18. (Trial) Code of Civil Procedure of the People's Republic of China, *adopted* Mar. 8, 1982 (in Chinese) (copy on file with the author). This Code took effect on a trial basis on Oct. 1, 1982.

19. The Economic Contracts Law of the People's Republic of China, *adopted* Dec. 13, 1981, *translated in* COMMERCIAL LAWS, *supra* note 8, at 300.

20. Foreign Economic Contract Law of the People's Republic of China, *adopted* Mar. 21, 1985, *translated in* China Publishes Long-awaited Foreign Economic Contract Law, China Econ. News (Hong Kong), Apr. 1, 1985, at 1 [hereinafter cited as Foreign Economic Contract Law].

21. Regulations of the People's Republic of China on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises, *adopted* Jan. 12, 1982, *translated in* COMMERCIAL LAWS, *supra* note 8, at 335.

22. *See, e.g.*, The Environmental Protection Law of the People's Republic of China (Provisional), *adopted in principle* Sept. 13, 1979, *translated in* COMMERCIAL LAWS, *supra* note 8, at 593; Law on Marine Environmental Protection of the People's Republic of China, *adopted* Aug. 23, 1982, *translated in* II COMMERCIAL LAWS, *supra* note 8, at 393.

23. Patent Law of the People's Republic of China, *adopted* March 12, 1984, *translated in* II

More legislation is currently being drafted or planned. This draft legislation includes regulations on Chinese-foreign cooperative (contractual, non-equity) ventures, regulations governing wholly foreign-owned enterprises operating in the P.R.C.,<sup>24</sup> a civil code, a technology transfer law, copyright legislation, a banking law, a company law, and a bankruptcy law.<sup>25</sup> The drafts, which are circulated internally among the relevant governmental agencies for comment, articulate current Chinese policy. For this reason, draft legislation can affect contract negotiations even though such legislation has not yet come into force and even if foreign parties are not permitted to review it.

In addition to domestic legislation, the P.R.C. has recently entered into international agreements that affects its business dealings with foreigners. Lawyers must therefore consult applicable bilateral trade agreements,<sup>26</sup> investment protection agreements,<sup>27</sup> tax treaties,<sup>28</sup> and investment insurance agreements<sup>29</sup> when planning and participating in activities involving the P.R.C.

COMMERCIAL LAWS, *supra* note 8, at 287; see also Eliasoph, *China's Patent System Emerges*, CHINA BUS. REV., Jan.-Feb. 1985, at 50.

24. See, e.g., *CITIC Official on China's Current Foreign Economic Cooperation Policies*, China Econ. News (Hong Kong), Dec. 10, 1984, at 3 [hereinafter cited as *Economic Cooperation Policies*]; *Official Spells Out Investment Laws*, BEIJING REV., Jan. 21, 1985, at 16.

25. The author's knowledge that these laws are in the planning stage is based on Chinese news reports and conversations with Chinese officials.

26. See, e.g., Agreement on Trade Relations, July 7, 1979, United States—People's Republic of China, 31 U.S.T. 4651, T.I.A.S. No. 9630 (entered into force Feb. 1, 1980); Trade Agreement, Jan. 5, 1974, Japan—People's Republic of China, 1002 U.N.T.S. 110 (entered into force June 22, 1974); Trade Agreement, Apr. 3, 1978, European Economic Community—People's Republic of China, 21 O.J. EUR. COMM. (No. L 123) 1 (1978) (concluded May 2, 1978).

27. See, e.g., Agreement on the Mutual Protection of Investments between the Kingdom of Sweden and the People's Republic of China of 29 March 1982, translated in I TAXES AND INVESTMENT IN ASIA AND THE PACIFIC (Int'l Bureau of Fiscal Documentation), P.R. of China, § C, app. 2i (Supp. No. 21, Sept. 1982). The P.R.C. has also signed agreements with Romania (2/10/83), the Federal Republic of Germany (10/7/83), France (5/30/84), the Belgium-Luxembourg Economic Union (6/4/84), Finland (9/4/84), and Norway (only initialed as of late 1984). *Investment Protection: Key to Open Policy*, China Market (Hong Kong), Nov. 1984, at 9-10; *Economic Cooperation Policies*, *supra* note 24, at 3.

28. See, e.g., Tax Agreement with the People's Republic of China, S. Treaty Doc. 30, 98th Cong., 2d Sess. (1984) (signed on Apr. 30, 1984, but not yet ratified) [hereinafter cited as U.S.-P.R.C. Tax Agreement]; Agreement between the Government of Japan and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Sept. 6, 1983 (effective June 26, 1984) (the official languages of this agreement are Chinese, Japanese, and English) (copy on file with the author); Accord entre le Gouvernement de la République française et le Gouvernement de la République populaire de Chine en vue d'éviter les doubles impositions et de prévenir l'évasion fiscale en matière d'impôts sur le revenu, 30 mai 1984, copy included in J. Cohen, *Approche de certains facteurs permettant l'élaboration d'une décision ou d'un conseil relatifs aux investissements en République populaire de Chine* A-65 (Feb. 1985) (unpublished doctoral dissertation, Université de Paris X-Nanterre) (copy on file, Paul, Weiss, Rifkind, Wharton & Garrison).

29. See, e.g., Investment Insurance Agreement Between the People's Republic of China and

### B. Finding the Law of the P.R.C.

When legislation, regulations, or rulings on a specific issue exist, it is often difficult to find copies of them. The Chinese do not have an official reporter that reprints all official acts of the central government, or that reports legislation adopted by the local governments. In recent years, this problem has been somewhat alleviated with the publication of an increasing number of rulings and regulations, as well as other documents and information, in specialized Chinese-language publications. These publications include the Journal of China's Legal System, the Economic Daily, and monthlies published by the Chinese Ministry of Finance entitled Finance and Chinese Taxation, the Trademark Gazette, and the China Patent Review. The Chinese Government also began in 1979 to publish the State Council Gazette, an extremely useful periodical containing selected documents adopted by the State Council, the highest executive body in the P.R.C.

While these publications are a great boon to the foreign lawyer involved in Chinese transactions, they are generally unavailable outside of the P.R.C. and are printed only in Chinese. Only major pieces of legislation are translated into English for publication in the state-controlled, English-language Chinese newspaper, the China Daily. Major pieces of legislation may also be available in foreign publications such as China Economic News and Business China, both of which are published in Hong Kong. These translations, while useful, are not official and are often imprecise, since they are not prepared by legal specialists.

Court decisions are practically impossible to obtain. The P.R.C. has established a network of specialized economic courts to handle commercial disputes.<sup>30</sup> The decisions of these courts are not published except in general newspaper reports. While foreigners may sue and be sued in these courts, Chinese and foreign parties resolve most disputes extra-judicially through mediation or arbitration. The awards usually remain confidential. This situation prevents foreign lawyers from relying on case law precedent when interpreting Chinese law.

### C. Interpreting the Law of the P.R.C.

When planning a transaction, it is often difficult for the foreign lawyer to ascertain the applicable law. Although much law has been promulgated in the

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Canada, Jan. 18, 1984, translated in *Sino-Canadian Investment Insurance Agreement Signed*, China Econ. News (Hong Kong), July 16, 1984, at 1, 2; Sino-U.S. Investment Insurance Agreement, Oct. 30, 1980, translated in *Sino-U.S. Investment Insurance Agreement (Full Text)*, China Econ. News (Hong Kong), Aug. 20, 1984, at 2.

30. Chinese courts operate on a four-tier system: the Supreme People's Court, the High People's Courts, the Intermediate People's Courts and the Basic-Level People's Courts. See generally Rhyne, *China and the Law: Internally and Internationally*, 44 N.Y. Sr. B.J. 449, 551 (1972). The economic courts are subdivisions of the lower level courts.

past five years, there continue to be many areas where no legislation exists or where the existing legislation is ambiguous. In other instances, it is difficult or even impossible for the foreign lawyer to obtain accurate information as to the current status of the law.

The challenge presented to the foreign lawyer in the absence of relevant legislation is typified by the problems surrounding the operation of Chinese-foreign cooperative ventures. Although over a thousand such cooperative ventures are in operation, their precise legal status and tax situation are ambiguous. Some ventures are structured as equity joint ventures and are thought of as "legal persons" with an economic and legal identity distinct from that of the venture partners. In the event of economic difficulties, it is unclear whether these ventures will be treated as limited liability companies in the same manner as equity joint ventures, or as partnerships with unlimited liability. Similarly, it is unclear whether a venture itself will pay taxes and bear business expenses, or whether the venture partners will bear their proportionate liability. To date, cooperative ventures have been structured and taxed in many different ways, their terms and treatment the result of bargaining between the parties and negotiations with the Chinese authorities.

National legislation clarifying the status of cooperative ventures is planned but it is not yet clear what the legislation will provide. In the meantime, lawyers and their clients must structure cooperative ventures in a legal vacuum. They must rely on assurances from the Chinese investment authorities and article 40 of the Foreign Economic Contract Law<sup>31</sup> that a contract, once approved by the relevant governmental entity, will be enforced in accordance with its terms, even in the event that conflicting legislation is eventually passed.

When relevant published Chinese laws are available, they usually enunciate only important principles and guidelines and tend to be extremely general.<sup>32</sup> Detailed provisions concerning application and interpretation of the laws normally are left to implementing regulations, which may not appear for some time after promulgation of the basic law.

The Joint Venture Law typifies the problems in interpreting Chinese legislation. The law is very general and implementing regulations were not promulgated until four years after the law itself was adopted.<sup>33</sup> Such delays are understandable. Lacking prior experience on which to draw, Chinese legislators often prefer

31. *Supra* note 20.

32. For example, the Joint Venture Law specifies that joint ventures are to take the form of a limited liability company, but does not define what a limited liability company is under Chinese law. *See* Joint Venture Law, *supra* note 9, at art. 4. Similarly, the Joint Venture Tax Law provides that taxable income is the excess of gross income less deductible costs, expenses and losses, but does not specify what costs, expenses and losses are deductible. *See* Joint Venture Tax Law, *supra* note 13, at art. 2.

33. *See* Joint Venture Regulations, *supra* note 12.



to handle issues on a case-by-case basis. This permits them to gain the experience necessary to formulate appropriate regulations. In the interim, practice may diverge substantially from the strict letter of the law, and inconsistency in interpretation and implementation as between localities, Chinese organizations, and transactions is a common complaint of foreign lawyers and businesspeople operating in the P.R.C. For example, while a law may grant tax benefits to certain projects requiring a relatively large amount of foreign investment or involving advanced technology or "urgently needed" products, the availability of such benefits is often based on a subjective determination by the authorities concerned. It may depend as much upon the clout of the Chinese partner as upon the nature of the project itself.

The inexperience of Chinese nationals involved in business transactions also increases the difficulty of ascertaining the relevant law. As economic responsibility and contractual authority are increasingly dispersed to local governments and individual enterprises, foreign lawyers may find that they cannot rely on their Chinese partners to know the rules. Given the newness of much legislation and the inexperience of the increasing number of Chinese negotiators, questions arising in business discussions often have to be referred for clarification to the relevant provincial or central governmental bodies, such as those responsible for foreign exchange control, taxation, price control, customs, or technology transfer. Foreign lawyers and their clients rarely receive a written response to these questions. Many regulations are still deemed to be *neibu* (for internal governmental use only) and are not made available even to the private parties that they affect. A foreign lawyer's Chinese counterpart may inform the foreign lawyer that rulings exist but will typically be reluctant to produce them for verification, let alone part with a copy.

In sum, foreign lawyers assisting their clients in business dealings with the P.R.C. must be prepared to draft contracts that fill in the interstices of the incomplete Chinese legal system. They must be cognizant not only of an increasing array of relevant Chinese legislation, but also of current policies and divergent practices that may affect the interpretation and application of existing legislation or serve as a substitute for non-existent law. This task is not easy to fulfill without in-depth knowledge of the Chinese legal system and current legal, political, and economic developments.

## II. THE ROLE OF THE FOREIGN LAWYER IN BUSINESS TRANSACTIONS

In view of the current lack of experienced Chinese lawyers and the Western tradition of relying on known counsel as "transaction facilitators," foreign businesspeople often turn to foreign lawyers for legal assistance in their dealings with the P.R.C. Some foreign lawyers, especially those who speak and read Chinese, have begun to specialize in matters of Chinese law to meet this growing demand. Foreign lawyers engaged in transactions with the P.R.C. often find themselves

asked to educate the Chinese side on matters of foreign law and international practice and may also, based on the lawyers' experience in other transactions with the P.R.C. or by requiring answers to certain issues they raise, help to educate the Chinese side on matters of Chinese law.

#### *A. Restrictions on the Practice of Law in the P.R.C.*

Most foreign lawyers representing foreign clients in transactions with the P.R.C. accompany their clients on trips to P.R.C. or in negotiating sessions held at home. The Chinese are increasingly accustomed to having their foreign partners invite in-house or outside counsel to participate in negotiations and prepare legal documents for the transaction. Few law firms, however, have established any permanent presence in the P.R.C., since foreign lawyers are not officially permitted to open offices and practice law in the P.R.C. Chinese law provides that only Chinese citizens are qualified to become lawyers in P.R.C.<sup>34</sup>

The Chinese Ministry of Justice is considering whether and under what circumstances to allow foreign lawyers to register offices in the P.R.C. Since the business registration regulations of the P.R.C. do not specifically prohibit law firms and lawyers from registering offices in the P.R.C.,<sup>35</sup> the policy on foreign lawyers could be changed by a decision of the Ministry of Justice, which must approve any application for a lawyer or law firm to establish an office in China. The Ministry of Justice appears to be concerned, as a matter of sovereignty, with foreigners purporting to be "experts" on Chinese law, and wishes to protect the fledgling Chinese bar against outside competition.

A variety of interested groups are lobbying for a change in this policy. Various foreign lawyers' associations, such as the Legal Committee of the National Council for U.S.-China Trade, have submitted to the Ministry materials describing the regulation of foreign lawyers in other countries. The United States Government, through the auspices of the U.S.-P.R.C. Joint Commission on Commerce and Trade, has raised with the Chinese Government the issue of permitting American attorneys to open offices in the same manner as foreign accounting firms.<sup>36</sup> These groups appear to be making some progress. Chinese lawyers have told their foreign counterparts informally that they expect the Ministry of Justice eventually to approve the establishment of foreign lawyers' of-

34. See Provisional Regulations on Lawyers of the People's Republic of China art. 8, promulgated Aug. 26, 1980 (effective Jan. 1, 1982), translated in *COMMERCIAL LAWS*, *supra* note 8, at 457 [hereinafter referred to as *Lawyers Regulations*].

35. See Interim Regulations Concerning Resident Offices, *supra* note 16; Procedures for Registration of Resident Offices, *supra* note 16.

36. Several U.S. accounting firms have been registered with the approval of the Ministry of Finance and have opened resident representative offices in Beijing, Shanghai, and elsewhere to represent their foreign clients.

fices. The State Administration for Industry and Commerce, which supervises the registration of foreign business activity in the P.R.C., is sending a delegation abroad early in 1985 to investigate first-hand how other countries regulate foreign lawyers.

In the meantime, as a matter of policy, foreign lawyers are not permitted to appear in Chinese courts on behalf of clients or to open formal offices in the P.R.C. They are welcome, however, to accompany their foreign clients on business trips to the P.R.C. They also generally avoid giving formal legal opinions on matters of Chinese law. The Legal Advisory Office of the China Council for the Promotion of International Trade (CCPIT) takes the position that a foreign lawyer can represent his or her foreign clients as an agent (but not in the capacity of a lawyer) in arbitration proceedings in the P.R.C. in accordance with the 1956 Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the CCPIT.<sup>37</sup> Foreign lawyers have in fact represented foreign clients in informal, ad hoc dispute settlements held in China. The extent to which foreign lawyers are permitted to give advice on matters of foreign or international law to Chinese clients remains unclear.<sup>38</sup>

A few foreign law firms have been or are currently being represented in the P.R.C. on a relatively long-term basis. Most of these firms are represented in Beijing by individual attorneys registered as teachers or "foreign experts" employed by Chinese organizations to lecture on aspects of international and foreign law, or as resident representatives of one or more of their clients. The Ministry of Justice and the Chinese registration authorities are fully aware of such arrangements and have tolerated this restricted presence so long as the lawyers do not hang out their shingles, distribute name cards, use letterhead indicating that their firms have official offices in the P.R.C., or otherwise act indiscreetly.

### *B. Services Provided by Foreign Lawyers in the P.R.C.*

Foreign lawyers in the P.R.C. provide their clients with a variety of services. On one level, resident lawyers in the P.R.C. function similarly to lawyers located

37. Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade art. 18, adopted Mar. 31, 1956, translated in COMMERCIAL LAWS, *supra* note 8, at 447. The editor of COMMERCIAL LAWS *supra* note 8, translates the Chinese term *dailiren* used in article 18 in the broad sense as "attorney," but the Chinese Government states that foreigners can represent clients in arbitration proceedings only as agents or "attorneys-in-fact," not as lawyers or "attorneys-at-law."

38. Several U.S. law firms now represent Chinese enterprises and governmental agencies in the United States in connection with regulatory or litigation matters pertaining to trade with or business in the United States. Some firms have been invited to give advice to Chinese agencies regarding draft Chinese legislation and to assist Chinese entities in negotiating major contracts, such as those between the China National Offshore Oil Corporation and foreign oil companies for the Chinese-foreign cooperative exploitation of the P.R.C.'s offshore oil.

in a Washington, D.C. or state capitol office of law firms based elsewhere. The lawyers seek to become acquainted with high-level Chinese officials who can offer explanations and advice on legal and administrative matters, and monitor legislation and the legislative process. They review Chinese publications for information on relevant rules, regulations, and administrative notices that may not be mentioned in the general press; lobby informally on behalf of their clients for the passage of needed legislation; and generally keep their fingers on the governmental pulse.

Resident foreign lawyers also perform normal types of legal services for their clients. They draft legal documents, research legal questions, participate in negotiations, and prepare client memoranda on relevant legal developments. In addition, resident foreign lawyers serve a liaison function for non-resident foreign clients by maintaining contacts and dialogue with their clients' Chinese counterparts and by trouble-shooting when problems or questions arise.

### *C. Practical Problems of Operating in the P.R.C.*

A variety of practical problems complicate the work of foreign lawyers in the P.R.C. Foreign lawyers often have difficulty finding suitable support services, and securing privacy and confidentiality. Communication with the West is sometimes cumbersome.

To meet the needs of the influx of foreigners doing business in the P.R.C., the Chinese have begun to train clerical and administrative staff to provide support services to foreign businesspeople through designated foreign service corporations. Temporary secretarial help is, however, still difficult to find. Typewriters, duplicating machines, word processors, and other business amenities are also often unavailable. Even if available, Chinese business machines are often antiquated and break down easily. Modern imports cannot always be serviced adequately or may require spare parts that must be shipped from abroad. Many Chinese hotels now provide some services but are unable to keep up with the growing demand.

Communications facilities, while vastly improved in recent years, are still inadequate. Hotels generally provide telex services for their guests and other foreigners. Telecopy machines have recently been authorized and installed in the offices of some foreign businesses and a few Chinese organizations in the major cities of the P.R.C., such as Beijing, Shanghai, and Guangzhou. Many Chinese organizations, however, do not have telex machines. Cables and telephone calls must be relied on to maintain long-distance communications.

Foreign lawyers and their clients may also encounter difficulties in keeping their conversations and communications in the P.R.C. confidential. Hotel and conference rooms are easily bugged; hotel rooms are routinely searched by hotel security personnel; telephones are regularly tapped; telexes sent and received may be duplicated; and mail is sometimes opened by customs officials. Because

of the lack of confidentiality, businesspeople have been known to interrupt a negotiation and fly to Tokyo or Hong Kong to telephone their home office to discuss a sensitive matter. Alternatively, they may send messages in code. To cope with these intrusions on their privacy, foreigners learn to keep confidential information under lock or in their presence at all times. They take outdoor walks when holding confidential business discussions and word their written communications carefully. Such problems are not insurmountable, but they often call for a good deal of patience and ingenuity.

#### *D. The Language Barrier*

Proficiency in Chinese is a strong asset to an effective practice involving transactions in the P.R.C. The Chinese texts of legislation need to be consulted for an accurate reading of the law. The meaning of Chinese legal terms, which may appear to approximate Western legal terms that have a definite interpretive history, may require clarification in the Chinese context. In addition, many of the laws, regulations, and administrative rulings that must be surveyed on a regular basis are published only in Chinese language sources.<sup>39</sup>

The language obstacle is also a problem when legal instruments, such as contracts, are required, as a matter of Chinese policy or law, to be executed in Chinese. For example, investment contracts are generally executed in two official versions, Chinese and a foreign language (usually English), with each language version being equally valid. A local law on Chinese-foreign contracts made in the Shenzhen Special Economic Zone in Guangdong Province provides, however, that the Chinese text governs when a contract is executed in both Chinese and a foreign language.<sup>40</sup> It is consequently critical that both language texts say substantially the same thing. Translators without legal training and a current knowledge of the newly developing legal vocabulary in the P.R.C. simply cannot provide accurate translations.

Chinese-speaking foreign attorneys can assist in correcting defective interpretations and preventing misunderstandings during contract negotiations. As is the case in any international practice, fluency in a foreign language enhances a lawyer's ability to act as a transaction facilitator. Given the difficulty of their language, the Chinese are especially appreciative of foreigners who make the effort to learn Chinese.

39. See *supra* p.68.

40. Provisions of the Shenzhen Special Economic Zone on Economic Contracts Involving Foreign Interests, approved Jan. 11, 1984, translated in CHINA BUS. REV., Sept.-Oct. 1984, at 17 (Paul, Weiss, Rifkind, Wharton & Garrison trans.); see also Cohen, *Shenzhen's New Contract Law*, CHINA BUS. REV., Sept.-Oct. 1984, at 16. The Foreign Economic Contract Law, *supra* note 20, contains no similar provision and states only that contracts should provide for the language or languages to be used and their effectiveness. *Id.* at art. 12.

### *E. Use of Local Chinese Counsel by Foreign Lawyers*

Lawyers involved in international transactions typically retain local foreign counsel for advice on foreign law, for legal opinions, and for legal assistance in the event that a dispute should arise. This general rule of practice holds true for foreign lawyers involved in business with the P.R.C. Indeed, some lawyers report that certain Chinese ministries have pressured foreign companies to retain Chinese attorneys to handle their investments.<sup>41</sup>

#### *1. Obtaining Local Counsel*

Although this situation is changing rapidly, the foreign lawyer may have some difficulty locating a qualified Chinese lawyer to provide necessary advice and legal representation in the P.R.C. The Chinese bar, like the Chinese legal system, is still evolving. At present, the P.R.C. claims to have only some 16,000 professional or part-time lawyers nationwide,<sup>42</sup> and only a small percentage of these lawyers are currently authorized by the Ministry of Justice to represent foreigners. There simply are not many lawyers in the P.R.C., especially in smaller cities and rural areas, where an increasing amount of business is transacted.

The Chinese Government, and in particular the Ministry of Justice, is well aware of the need for qualified Chinese lawyers. Many actions are currently being undertaken to train Chinese lawyers to participate in complex international transactions. The government has designated law as a priority profession and has accorded it a higher status than in the past. In addition, many Chinese organizations are sending personnel abroad to study at foreign law schools and to apprentice in foreign law firms.<sup>43</sup> Still, fulfilling the current need for local legal advice regarding Chinese-foreign transactions remains somewhat problematic. Foreign lawyers must compensate for the lack of qualified Chinese counsel by keeping abreast of current Chinese laws and practices. They must anticipate potential problems and issues that may require clarification. While Chinese lawyers are increasingly adept at responding to specific questions, they generally are not yet accustomed to providing general guidance in the structuring of transactions.

#### *2. The Loyalty of Local Chinese Counsel*

The duty of all Chinese lawyers to serve the interests of the state raises the question of whether they can effectively serve the interests of foreign clients. Although they claim to work independently of the state, most Chinese lawyers

41. See *China Fever*, *supra* note 6, at 50.

42. As of mid-1984, the P.R.C. reported some 15,471 lawyers, of which only 9,701 practiced law full time. *Expanding role for lawyers*, *China Daily* (Beijing), May 26, 1984, at 4. The scarcity of Chinese lawyers is due in large part to the fact that the practice of law in China was severely restricted from 1957 until 1979. See *id.*

43. See, e.g., Edwards, *Legal Training for China Ventures*, in *LEGAL ASPECTS OF DOING BUSINESS WITH CHINA* 295, 308 (Practicing Law Inst. 1985).

are, like most workers in a socialist state, government employees. They are bound by the Provisional Regulations on Lawyers of the People's Republic of China (Lawyers Regulations) to "serve the cause of socialism."<sup>44</sup> Moreover, the Lawyers Regulations do not mention the giving of legal advice to foreigners as one of the tasks permitted to Chinese lawyers.

This potential conflict of interest may be lessened as the Chinese lawyer system undergoes change. For example, the Ministry of Justice has authorized the establishment of collectively owned, rather than state-owned, law offices. These offices are managed by groups of individuals who are not government employees. The lawyers employed by these offices represent both Chinese and foreign clients.<sup>45</sup> In addition, the Ministry of Justice plans to submit to the National People's Congress a Lawyer's Law to replace the Lawyers Regulations.<sup>46</sup> The new Lawyer's Law will reportedly require legal advisory offices to become financially self-sufficient.<sup>47</sup> No longer financially dependent on the government, such offices (to be renamed "law firms" in line with Western practice) will perhaps become more independent of government interests when providing services to foreigners.

### 3. *Legal Opinions by Chinese Counsel*

Given the developmental stage of Chinese law and the P.R.C.'s treatment of foreign investment, many foreign businesspeople request, before agreeing to a transaction, written legal opinions from local Chinese counsel to obtain assurance as to their legal rights and obligations under Chinese law. In the P.R.C., the concept of a written legal opinion is still new, and Chinese lawyers now engaged in rendering legal opinions for foreigners have occasionally admitted to their foreign colleagues that they do not fully understand the purpose and the import of a legal opinion. Despite these conceptual difficulties, Chinese lawyers are increasingly willing to render such opinions. A few concerns need to be borne in mind, however, when requesting and relying upon legal opinions.

First, the authority of a particular Chinese lawyer or law office to issue legal opinions to foreigners needs to be ascertained. Only lawyers and law offices specifically designated by the Ministry of Justice may represent foreigners. In addition, a foreign lawyers delegation to the P.R.C. in early 1983, sponsored by the National Council for U.S.-China Trade, was told that only "national" legal organizations, such as the Legal Advisory Office of the CCPIT in Beijing,<sup>48</sup> are

44. Lawyers Regulations, *supra* note 34, at art. 3.

45. See generally *China's First Individual Run Legal Consultancy Firm Established*, Xinhua Gen. Overseas Service (Beijing), Dec. 16, 1984, item no. 121650 (available on LEXIS).

46. See *China Prepares to Formulate Lawyer's Law, Determined to Safeguard Professional Performance Without Interference*, Ta Kung Pao (Hong Kong), Nov. 26, 1984, at 1 (in Chinese).

47. *Id.*

48. Many lawyers from the Legal Advisory Office have organized and joined the China Global Law Office which is sponsored by the CCPIT. See *China Global Law Office*, China Econ. News, Dec. 17, 1984, at 10.

empowered by the Ministry of Justice to opine on questions of national law.<sup>49</sup> Legal advisory offices in Shanghai, Guangzhou, and elsewhere apparently may opine only on matters of local law. This situation may be changing, but foreign clients and their lawyers should clarify the scope of the authority of these offices with local Chinese counsel before seeking opinions.

Second, the question of accountability of Chinese lawyers and their organizations for erroneous legal advice needs to be considered. Opinions issued by authorized Chinese lawyers and legal advisory offices are said to give rise to "legal responsibility." In January 1983, at informal meetings attended by the author with Chinese lawyers from the CCPIT's Legal Advisory Office, legal responsibility was defined as meaning that such opinions will not be issued without painstaking review of relevant law and discussions with competent government officials as to matters of interpretation or of policy where no law yet exists. According to these CCPIT lawyers, "legal responsibility" does not, however, include financial responsibility. If a dispute concerning an issue covered in a legal opinion were to arise, these lawyers stated that they would assist the client in resolving the matter, but it is doubtful that local Chinese counsel could be held accountable to foreign clients for monetary damages in the event that a legal opinion was found to be inaccurate. Indeed, the idea that a legal opinion could be mistaken seemed ludicrous to the CCPIT lawyers because, they insisted, no opinion would be issued unless a lawyer had thoroughly ascertained the legal result with the governmental authorities concerned. In fact, the author was told that once issued, a local Chinese counsel's opinions would be "respected" by all relevant Chinese departments.

Although it thus seems unlikely that a Chinese lawyer could be sued successfully for erroneous legal advice under current law and practice, the seriousness with which the Chinese lawyers, as functionaries of the government, treat their opinions provides some reassurance to foreign lawyers that the matters opined on accurately reflect the current state of the law. Nevertheless, since some Chinese lawyers may be unaccustomed to rendering legal opinions, foreign lawyers should work closely with their local Chinese counsel in drafting legal opinions. They must be sure that the Chinese lawyers fully understand the concerns to be addressed so that they may respond thereto in an informed and satisfactory manner.

### III. COOPERATION WITH CHINESE LAWYERS

Many foreign lawyers and their firms have established congenial and mutually beneficial relationships with various Chinese ministries and organizations, including Chinese legal advisory bodies. Foreign lawyers provide Chinese lawyers and legislators with information on foreign law and international commercial

49. The author was a member of this delegation.



practice, hold seminars in the P.R.C. on a wide range of legal issues, sponsor Chinese personnel for study at foreign law schools, and arrange for Chinese lawyers to render legal services to their foreign clients. In return, Chinese lawyers and officials often provide informal advice and copies of relevant legislation and materials when requested, and otherwise assist their foreign colleagues in their business and study of the Chinese legal system.

### A. Foreign Lawyers as Educators

Given the incompleteness of the Chinese legal system and the relative inexperience of many Chinese lawyers and negotiators in handling complex investment transactions, Chinese lawyers and business personnel may look to foreign lawyers with whom they are negotiating for explanations of relevant international norms and practices. They may also ask for suggestions on how to interpret and apply vague Chinese legislation, based on the foreign lawyer's international experience as well as expertise gained in other Chinese transactions, and on how to structure agreements to accommodate the interests of all the parties concerned.

Foreign lawyers are also often called upon to explain relevant aspects of foreign law, such as export licensing procedures, requirements to qualify for government-subsidized financing, and tax issues. For example, many Chinese lawyers and negotiators are now aware that the United States Treasury has granted a foreign tax credit against U.S. tax liability for foreign enterprise income taxes paid in the P.R.C.<sup>50</sup> This credit will be assured to all U.S. taxpayers after the ratification of an agreement for the avoidance of double-taxation recently signed by the United States and the P.R.C.<sup>51</sup> Since all income taxes paid to the P.R.C. are or will be creditable in the United States, many Chinese lawyers believe that a United States investor should not concern itself with obtaining the various tax exemptions and reductions that are available under the Chinese income tax laws. Foreign lawyers may need to explain to their Chinese counterparts that there are limits on the amount of foreign tax that can be credited in any one year and that their clients, depending on their overall tax situation, may not be able to credit fully their Chinese taxes.

Foreign lawyers also generally need to be educated in matters of Chinese law. Chinese lawyers participate with increasing frequency in negotiations, but when they or the Chinese businesspeople involved do not know the answers to questions such as whether an environmental impact statement needs to be prepared, whether a tax exemption can be obtained, or whether a labor union can be dispensed with in a given joint venture, they must often educate themselves as

50. IRS Private Letter Ruling No. 8238037, issued to Standard Oil Company (Indiana) (June 22, 1982), reprinted in 16 TAX NOTES 151 (1982).

51. See U.S.-P.R.C. Tax Agreement, *supra* note 28.

well. In some instances, the Chinese lawyer or negotiator may not feel comfortable dealing with unfamiliar Chinese agencies. Preferring to use a foreigner as a go-between, they may even request the assistance of the foreign lawyer in obtaining from the appropriate Chinese authorities answers to questions raised during negotiations.

#### IV. CONCLUSION

The Chinese have proven in recent years to be quick studies in developing a modern legal system. They have legislated new laws with broad implications, interpreted legislation affecting foreigners in a manner generally consistent with international practice, and set about training Chinese lawyers to serve in the drive to modernize the P.R.C. The P.R.C.'s method of handling foreign investment and its legal system are still developing, however, and this situation presents professional and practical challenges to foreign lawyers assisting clients with business in the P.R.C.

Overall, lawyers engaged in a practice involving the P.R.C. find it extremely rewarding. From an academic viewpoint, it is fascinating to observe and participate in the emergence of a new legal order. From a practical viewpoint, while the occasional vagueness or absence of relevant law may be somewhat frustrating, the practice requires a high degree of creative lawyering. As is true of any practice involving foreign countries, the interplay between one's own legal training and expectations and the foreign culture and legal environment affords the potential for both personal and professional growth.