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Current Developments in the People's Republic of China: Has China Changed

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Recent Development

Current Developments in the People’s Republic of China: Has China Changed?

The People’s Republic of China (PRC or China) has attracted the world’s attention because of the recent, dramatic changes in China’s political and economic structure, pursuant to its “Open Door” Policy. This article explores the trends in the development of foreign

1. In 1978, the Third Plenary Session of the 11th Party’s Central Committee of the People’s Republic of China adopted a policy of reform and opening up to the outside world—the “Open Door” Policy. In 1979, the provinces of Guang Dong and Fu Jian of the People’s Republic of China (hereinafter PRC, or China) were opened to foreign investment. The special economic zones of Shan Tou, Shen Zhen, Xia Men, and Zhu Hai were permitted to receive foreign investment and technology in 1980. In 1984, the Chinese allowed foreign investors to develop enterprises with or without a Chinese participant in fourteen of its coastal cities, one being Shanghai. Symposium by Shanghai Foreign Investment Commission, Opportunities for Foreign Investment and the Process in Shanghai (September 9, 1988) [hereinafter Symposium].

Since 1978, not only has the national government enacted laws and practices to encourage foreigners to invest money, capital, and technology in China, but the municipalities of the provinces and cities have also promulgated laws and regulations to promote the “Open Door” Policy. For example, the municipality of Shanghai has established two economic and technological development zones and an industrial park to improve its investment environment. Additionally, the Shanghai Foreign Investment Commission was established on June 10, 1988, to facilitate foreign investment and reduce bureaucratic red tape by providing foreign investors with administrative services. These services include matching up Chinese and foreign investment partners and providing information on laws, policies, and regulations to the foreign investor.

The Commission also assists the foreign investor with problems encountered during the establishment and management of the enterprise. Shanghai’s new policies have been very effective. Since 1979, Shanghai has attracted 19 countries to establish 363 equity joint ventures, co-operative joint ventures, and wholly foreign-owned enterprises. Of these enterprises, 219 are industrial production enterprises. The failure rate of foreign enterprises in the Shanghai Municipality remains at an incredibly low rate of three-percent. The total value of investment in Shanghai from 1979 to 1987 has gone from nothing to $4.16 billion and is rising at an increasing rate. From January to July of 1988 the export value reached $2.71 billion, a 14.75 percent increase from January to July of 1987. Id.
investment and industrial and intellectual property rights laws in the People's Republic of China. In the first section this article surveys the political and economic background of the PRC. The next section examines foreign investment in the PRC. Section three analyzes recent changes in China's foreign exchange laws as they relate to foreign investment. Developments in industrial and intellectual property right laws such as the Trademark Law, the Patent Law, and the proposed Copyright Law will be explained and discussed in the fourth section of this paper. Finally, the fifth section concludes the analysis of the recent developments in the People's Republic of China by evaluating these changes in relation to China's political, social, and economic past and future.

I. THE POLITICAL AND ECONOMIC BACKGROUND OF THE PEOPLE'S REPUBLIC OF CHINA

China is an ancient civilization with a history of over 8000 years. For thousands of years, China has had an advanced economic, political, and social structure. Yet, for most of those years China has remained isolated from the rest of the world, steeped in what may be a sense of self-assured cultural superiority. China saw no need to interact with the rest of the world. As late as 1790, when the British sailed to China with goods to sell, China chose to remain in its isolated state, looking inward. Evidence of China's isolationist attitude is the anecdote of how China told King George's men that "the Celestial Empire [possessed] all things in abundance and has no need of the manufactures of outside barbarians."²

The Chinese were content to exist in a world that valued confucian traditionalism and believed that the outside world offered nothing to the Chinese culture. Studying other cultures and trading goods with other states, however, might have enhanced China's economic and political growth. The Chinese did not seem to conceive of welfare in terms of economic growth, but rather of satisfying the basic minimum and subsistence needs of the Chinese people.³ The Chinese perceived the function of the state as maintaining the harmonious relations among members of society by ensuring law and order, providing

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minimal public services, and, most importantly, protecting China from barbarian invasions.  

China's protection of her borders from foreign invasion has been a constant political goal for centuries. This policy of isolationism, reinforced by a deep-seated commitment to traditionalism, prevented any meaningful and peaceful foreign impact on China. Resistance to foreign intervention appears to have persisted in China into modern times. Notably, the national government was not the principal catalyst of economic growth during the nineteenth century. Instead, foreigners and foreign enterprises, attempting to establish political as well as economic control over parts of China, developed economic pockets in the PRC. The discrepancy between these pockets and areas not developed by foreigners still exists to some extent today. The foreigners and foreign enterprises built factories and railroads and established businesses in occupied territories. The areas occupied by the foreigners were not governed by Chinese law, but were governed by the laws of other nations through extraterritorial treaties forced upon China. The Chinese government lost political and economic control over such areas as Hong Kong, Manchuria, and other shipping ports to the British, Japanese, Russians, Americans, and other imperialistic states. During this period of imperialism China, which had survived in isolation for over 8000 years, fought to survive as a nation against foreign governments and businessmen who exploited China through the use of their superior military power.

Thus, China's economic development has been delayed for two primary reasons. First, the Chinese people resisted economic modernization in part because they associated modernization with "foreignism." Second, they were committed to their beliefs in traditionalism and isolationism. Until recently, modern economic growth in the People's Republic of China had remained confined to the peripheral areas of China which foreigners and foreign enterprises had occupied and developed.

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5. See generally L. Chang, China's Boundary Treaties and Frontier Disputes (1982) [hereinafter Chang].
6. Japan, the Soviet Union, Great Britain, and the United States all occupied parts of China as late as 1940. See Id. at 1-6.
7. Parts of China were occupied by governments of foreign countries who used their military strength to "persuade" the Chinese that their presence in China was acceptable. The foreigners built trading and manufacturing empires through their occupation of the great ports of China.
8. See generally Chang, supra note 5.
9. Id.
10. Eckstein, supra note 3, at 126.
It was against this backdrop of foreign exploitation and fragmentation of the Chinese state that the Chinese Communist Party took control of China in 1949. At the time, the state lacked any substantial foreign economic contact and technological development in the production processes of agricultural goods and industry. China was nothing more than an agrarian state lacking those fundamental conditions needed for economic growth.

In 1949, Mao Tse-tung and the Chinese Communist Party took control of China and expelled all foreigners and foreign influence from the state. The Chinese Communist Party promised the people a better life by modernizing the country and rescuing the nation from invasion by imperialistic states. The Chinese adopted the Marxist theory of the Soviet Union to set China free from her economic backwardness. The Chinese did not, however, simply accept the Marxist model in its totality. Instead, under the leadership of Mao Tse-tung the Chinese molded the Soviet/Marxist economic and political theory into a uniquely Chinese system of political and economic thought. Thus, the Chinese took advantage of certain aspects of the Soviet theory which were applicable to China's agrarian culture, without inheriting the problems that the Soviets experienced.

The Maoist/Communist system did not fulfill its dual promises of prosperity through economic modernization and security from barbarian invasion made to the Chinese people. By 1976, China faced a faltering economy, a society divided by partisanship, and fragmented leadership in the Chinese Communist Party. The Maoist approach to the centralized management of the economy had led to an ineffective and unproductive bureaucratic system dominated by

11. Id. at 132.
13. Id. To implement the Marxist theory, an advanced capitalist and industrialized economic state of development is required. "The laboring masses of the cities will struggle to free themselves from the oppressive conditions of their labor as well as the repressive and austere values that accompany that condition." Id. The Chinese Communist Party undertook their revolutionary struggle in a pre-capitalist, agrarian state with little industry. Instead of relying on the industrial working class as the tool of the revolution, the Chinese Communists relied upon the agrarian peasantry. The Chinese Communists did not take part in the international communist movement, but appealed to the Chinese through patriotism and xenophobia. The Communist revolution in China was more a movement of national independence than a struggle for social class freedom. Id. See also LAMPTON, supra note 3 at 87; ECKSTEIN, supra note 3; MEISNER, supra note 12.
heavy industry. Instead of producing a better life for the Chinese people, the Chinese economy produced unneeded goods while the demands of the Chinese consumers remained unfulfilled. After Mao's death in 1976, Deng Xiaoping and his allies, the leaders of the Chinese Communist Party today, formed an economic development plan termed "The Four Modernizations." The goals of this economic plan include: reforming aspects of the political and policy-making system; revitalizing and reforming the educational system; changing China's orientation toward, and role in, the global economy; and altering the nation's demographic trajectory.

The new Communist leaders of China believe that the modernization of science and technology in industrial and agricultural development depends upon strategies adopted in the sphere of economic policy. Deng Xiaoping and his comrades have attempted to facilitate domestic research by importing large quantities of foreign technology, encouraging the use of foreign experts, and sending Chinese students and scholars abroad for technical training. The theory behind these changes rests on the belief that without increased application of modern technology to all sectors of the Chinese economy, China will not reach a state of economic development equal to that of the Western states. By achieving economic and technological equality, China will at last be freed from the fear of invasion from economically and militarily superior "barbarian" powers.

The recent strategies undertaken by the Chinese Communist leadership to attract foreign participation in China's economic development appear to be the antithesis of China's previous policies of isolation and exclusion of all foreign intervention. The current policies

15. Id. at 26.
16. Id. at 25-27.
17. D. Simon, Implementing China's S & T Modernization Program in LAMPTON, supra note 3, at 356-60 [hereinafter Simon].
20. Simon, supra note 17, at 355-379. In 1980, five new principles were proclaimed to guide science and technology in the PRC:
   (1) Science and technology will be coordinated with the growth of the economy;
   (2) Production technologies and their application will be the focus of research;
   (3) Enterprises will be encouraged to expand their research efforts and share with other enterprises their research findings;
   (4) The Chinese will continue to study foreign science and technology; and
   (5) Basic research will no longer take the preeminent role, but will grow at a steady yet gradual pace.

   Id. at 366.
also appear contradictory to Mao's policies of modernizing China's economy to prevent imperialism. At this time, the impact of these policy changes to the future goals of Communist China is unclear. Do the changes in the laws of foreign and economic policy signal a definite reversal of century-old policies? Might these policies and changes constitute yet another example of China using foreign economic and political theories to revise and develop an altered form of traditional China? Assuming that the Chinese have not really decided to "open up", but are merely accepting certain internationally accepted principles of economic and political theory, will the powerful presence and influence of foreign states and entrepreneurs become more than the Chinese government can control? Will "foreignism" once again, and perhaps permanently transform China? These tantalizing questions have been raised by the recent developments in China. The remainder of this article will examine the changes in the Chinese political and economic system undertaken since 1978 within the context of this background.

II. DEVELOPMENT OF FOREIGN INVESTMENT LAW IN THE PRC

Before 1979, the PRC allowed very little foreign investment. In 1979, the PRC published the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment (Joint Venture Law). The Joint Venture Law was the beginning of the PRC's attempt to implement internationally accepted legal and economic principles that are designed to promote foreign investment. After the enactment of the 1979 Joint Venture Law, the PRC refined its approach to joint ventures. Applying the new Joint Venture Law, the Chinese government immediately approved six equity joint

21. CHINA INTERNATIONAL ECONOMIC CONSULTANTS, INC., THE CHINA INVESTMENT GUIDE 1986 at 137-239 (1985) [hereinafter 1986 GUIDE]. China has about 27 major provinces, municipalities, and autonomous regions. In the Beijing Municipality alone, over 400 contracts and treaties of cooperation with foreign firms for about US $560 million have been signed. Id. at 139. The Hebei Province between 1979 and 1984 undertook 198 projects utilizing foreign investment and imported advanced technology. The combined value of the projects was US $170.3 million. Fourteen of the projects were joint ventures and seven were cooperative enterprises. Id. at 141. In 1984, the Shanxi Province exported (RMB440 millions) of goods and had a total value of contract cooperatives of US $51.89 million. Id. at 143. The Inner Mongolia Autonomous Region negotiated 77 contracts worth US $35.83 million for the import of foreign technology and equipment. Id. at 145.
24. Id.
ventures.\(^2\) Presently, the PRC recognizes three main types of foreign investment: equity joint ventures, contractual joint ventures, and wholly foreign-owned enterprises (foreign enterprises).\(^2\) Each of these forms of foreign investment will be examined more thoroughly below.

A. Equity Joint Ventures

Chinese law requires both the foreign and the Chinese participant to invest capital in the equity joint venture.\(^2\) The foreign investor, however, must contribute at least twenty-five percent of the registered capital.\(^2\) The parties to the venture will share the profits and losses in proportion to their capital contributions.\(^2\) Every joint venture must have a board of directors, but only the Chinese participant can appoint the chairman of the board.\(^3\) Equity joint ventures attract significant numbers of foreign investors for several reasons.\(^3\) First, the tax rate is much more favorable for equity joint ventures than for foreign enterprises or contractual joint ventures.\(^3\) The law taxes equity joint ventures as separate legal entities and only computes the tax liability on the revenue of the venture and not the Chinese or foreign participants' total income.\(^3\) Equity joint ventures are taxed at a rate of thirty-three percent plus an additional ten percent for all profits remitted abroad.\(^3\)

Although the equity joint venture seems to be a viable option for foreign investment, the equity joint venture law may be considered too restrictive at times. First, the law limits the duration of an equity

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26. Lee & Ness, Investment Approval, The China Bus. Rev., May-Jun. 1986 at 18. Several modifications of these three main forms of investment exist, such as processing and assembly deals, export platforms, or technology transfer projects. Id.

27. JVL, supra note 22, art. 4, at 449.

28. Id. art. 4, at 449. Registered capital is the capital that the parties to the venture must agree to invest before the venture is formed. Id.

29. Id.

30. Id. art. 6, at 449.

31. 1986 GUR, supra note 21, at 366-417. By 1986, 2517 equity joint ventures had been formed in the PRC. Id.


33. JVITL, supra note 32, art. 2, at 510.

34. Id. art. 3, at 510.
joint venture between ten and thirty years. Moreover, the law requires the foreign investor to contribute a specified amount of capital and technology. If the foreign participant capitalizes the required machinery, equipment, or other raw material, then the investor must prove that the noncurrency capital is indispensable to the production of the manufactured product. In addition, the foreign investor must prove that the amount charged against the capital account represents the fair market value of the item and not an inflated price.

The importation of the technology to be used by the joint venture must meet certain requirements as well. The industrial property rights or proprietary technology contributed by foreign participants must enable the production of new products that China needs or products suitable for exports, the making of marked improvements in the function and quality of existing products and the raising of productivity; or marked conservation of raw materials, fuel, or power. Once the enterprise is established, the investor does not have a commanding role in the direction of the venture because the law guarantees the Chinese participant a dominant position of power on the board of directors.

After the promulgation of the Joint Venture Law, the government enacted additional legislation concerning finance, labor, foreign exchange of currency, and the taxation of equity joint ventures. In 1983, the government enacted the Joint Venture Law Implementing Regulations (Implementing Regulations of the JVL). The Implementing Regulations of the JVL were designed to refine the Joint Venture Law to accommodate the influx of foreign investment and to make foreign investment in the PRC more attractive. The Impl-

35. JVL, supra note 22, art. 100, at 464.
36. JVL, supra note 22, art. 4, at 449.
37. JVL, supra note 22, arts. 27, 28, at 455. The regulations do not define "indispensable." Indispensable probably means other materials necessary to build the factory or start production, such as raw material or know how. However, technology alone does not suffice for the capital contribution of the foreigner. Additionally, the machinery, equipment, or other materials contributed by the foreign participant can only be items that China produces at a cost considerably higher than the world market rate or that China does not produce at all. Id.
38. Id. art. 27, at 455.
39. Id. art. 28, at 455.
40. Id. art. 34, at 456.
41. 1985 GtDE, supra note 25, at 397-405.
43. The year after the enactment of the Implementing Regulations of the JVL, almost four times as many equity joint ventures (471) were formed than the number formed between 1979 and 1983. 1986 GtDE, supra note 21, at 365-417.
implementing Regulations of the JVL require the joint ventures to promote the development of China's economy and to improve China's technical and scientific technology. Furthermore, the Implementing Regulations of the JVL require the capitalized technology of foreign participants to facilitate the manufacturing of products for domestic or foreign consumption, to improve existing Chinese products, or to conserve raw materials.

The Implementing Regulations of the JVL, however, do exempt joint ventures from customs duties and industrial and commercial consolidated taxes on the importation of "critical materials". Additionally, the joint venture importations of raw materials are not subject to the customs duty or the consolidated tax. Furthermore, newly established joint ventures that manufacture products for domestic consumption receive a reduction of, or exemption from, the consolidated tax.

Although the Chinese designed the Implementing Regulations of the JVL to induce foreigners to invest in China, the Chinese did not allow foreigners to dictate the terms of investment. China maintains control over foreigners and foreign ventures in various ways. One form of control is to require the joint ventures to open foreign exchange deposit accounts and Renminbi (Chinese currency) deposit accounts with the Bank of China. In this way China retains control over foreign currency and is able to keep a check over the flow of foreign currency into and out of China. The Chinese now permit joint ventures to receive foreign exchange loans and Renminbi loans from the Bank of China or from foreign banks.

B. **Contractual Joint Ventures**

Contractual joint ventures arise from private negotiations between Chinese nationals and foreigners to engage in a business together.

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44. Implementing Regulations of the JVL, art. 4, at 456.  
45. Id. art. 28, at 456.  
46. Id. art. 71, at 461. Critical materials include machinery, equipment, and parts required for the construction of a factory and for installation and reinforcement of machinery that was part of the capital contribution. Id.  
47. Id.  
48. Id. art. 72, at 461.  
49. Implementing Regulations of the JVL, supra note 42, at 461.  
50. Id. art. 78, at 462.  
51. The government has regulated more extensively the exploration of offshore oil. Foreign Economic Contract Law of the People's Republic of China (1985), *trans. in 3 CHINA L. REP. 207* [hereinafter Foreign Economic Contract Law].
The Chinese government permits the participants to negotiate their own terms; however, the participants do not receive the preferential government treatment that equity joint ventures receive. Since the government has been slow to regulate this area, many foreign investors find contractual joint ventures more advantageous because of increased investment freedom. For example, the law does not restrict the amount of the foreign investor’s capital contribution. The participants retain sole discretion over the distribution of profits and losses. With regard to taxes, contractual joint ventures pay a progressive tax rate from twenty to forty percent, plus the ten percent local tax. Additionally, the Foreign Economic Contract Law governing contractual joint ventures permits the parties to determine the management structure of the venture, rather than prescribing a certain number of directors. Moreover, the participants in a contractual joint venture also determine who will manage the venture.

Since 1985, the amended regulations permit the parties to be bound by the terms of their contract, if they so agree, regardless of any newly enacted Chinese law. This increases the attractive nature of contractual joint ventures, since the security of the foreign participants capital and technology will not depend upon legislative whims. Furthermore, the law does not limit the duration of contractual joint ventures.

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52. Id. art. 5, at 207.
54. Foreign Economic Contract Law, supra note 51, art. 12, at 208.
55. Id.

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<th>Range of Income</th>
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<td>250,000 AND UP TO 500,000 Yuan</td>
<td>25</td>
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<td>500,000 AND UP TO 750,000 Yuan</td>
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<td>750,000 AND UP TO 1,000,000 Yuan</td>
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<td>more than 1,000,000 Yuan</td>
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Id.
57. FOREIGN ECONOMIC CONTRACT LAW, supra note 51, art. 40, at 211.
58. Id.
59. Id.
60. Compare JVITL, supra note 22, art. 100, at 464 with Foreign Economic Contract Law, supra note 51, art. 14, at 208.
Comparing the number of contractual joint ventures to the number of equity joint ventures and foreign enterprises illustrates the popularity of the contractual joint venture form of investment. By 1985, the number of contractual joint ventures operating in China was more than one-and-one-half times the number of equity joint ventures and at least thirty times the number of foreign enterprises. Hence, an investor needs to evaluate the changes in the laws governing foreign enterprises and equity joint ventures as they relate to his circumstances previously perceived in order to determine if the changes overcome the disadvantages previously perceived in those forms of investment.

C. Foreign Enterprises

The third form of investment in the PRC is the foreign enterprise. This form of investment occurs when a foreigner decides to operate and own a business within the PRC, absent a Chinese participant. Foreign enterprises are the least regulated form of foreign investment in the PRC. It was not until 1986 that the government promulgated legislation to provide specific guidelines to form such an enterprise. Due to the high risk arising out of the foreigner’s unfamiliarity with the market and the lack of assistance from local participants with a financial interest at stake, very few foreign enterprises operate in China.

Most of the foreign enterprises operate in the Special Economic Zones in the PRC. Within these zones, a foreign enterprise receives

62. Id.
64. Id. and accompanying text.
65. Id. and accompanying text.
66. Id. at 173. Interim Regulations of the State Council on the Reduction and Exemption of Income Tax and Consolidated Industrial and Commercial Tax in the Special Economic Zones and 14 Coastal Cities, *trans. in Econ. Rep. (Nov. 26, 1984)* [hereinafter Interim Regulations]. The Chinese government has established several special economic zones. Within these zones foreigners must follow the Interim Regulations in order to be able to invest. The Interim Regulations provide safeguards for foreign traders and ensure that the PRC benefits

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preferential tax treatment to induce the investor to contribute capital within the geographical areas determined by the government.\textsuperscript{68} This suggests that although most foreign investors find equity joint venture laws too restraining, the majority of the investors prefer some form of regulation to insure the protection by the Chinese government of their capital and technology. China has had difficulty in attracting foreign investors after the Cultural Revolution\textsuperscript{69} due to the lack of confidence by foreigners in the stability of the Chinese legal structure.\textsuperscript{70} Presumably, if more laws are promulgated in this area, then the foreign entrepreneur will feel more secure investing in a foreign enterprise in China.

A foreign enterprise located outside of the Special Economic Zones does not receive preferential tax treatment. This may explain the low number of foreign-owned enterprises as a form of investment. For example, the tax holiday, whereby the business entity does not have to pay taxes on its income for a specified time period, is significantly shorter than that for the equity joint venture.\textsuperscript{71} Furthermore, Chinese law taxes a foreign enterprise at a higher rate than equity or con-

\textsuperscript{68} Id.

\textsuperscript{69} \textit{East Asian Exec. Rep.}, April 15, 1987, at 7. The Cultural Revolution occurred from 1966 to 1976. The Revolution threw out all Western influences. The purpose behind the Revolution was to adhere to the ideological purity of Marxist-Leninist Communism and denounce all bourgeois and intelligentsia as being anti-communist and against the good of the party. \textit{Id.}

\textsuperscript{70} Id. The Cultural Revolution denounced all Western philosophies. The only sources of law permitted to exist were the directives from the party. No codified rules were established. No foreigners or foreign investment was permitted within China. \textit{Id.}

\textsuperscript{71} JVITL, \textit{supra} note 32, art. 5, at 510-511. A newly formed joint venture licensed to do business for 10 years or more may be relieved from income taxation in the first and second profit-making year and allowed a 50 percent reduction from the third to the fifth year. A wholly foreign-owned enterprise with at least a ten year duration, engaged in the activities of farming, forestry, animal husbandry and other low profit making activities, does not pay income tax in the first profit-making year and is then allowed a fifty percent exemption in the second and third years. FEITL, \textit{supra} note 56, at 521-23. The Chinese government grants a tax holiday by exempting business entities from paying taxes that they would otherwise be required to pay. Tax holidays are in effect a subsidy from the government to new business enterprises. \textit{Id.}
tractual joint ventures. With an additional ten percent local tax, a foreign enterprise must pay at least a thirty percent tax on its income and up to fifty percent tax on any amount earned over 1,000,000 yuan a year. A foreign enterprise and a contractual joint venture, unlike an equity joint venture, do not have to pay the additional ten percent tax on profits remitted abroad.

D. Current Developments

1. Foreign Enterprises

The Law of the People's Republic of China on Foreign Enterprises (1986) (LFE) establishes the regulatory framework for foreign enterprises. The LFE allows the government to enact implementing legislation to refine and define the new law. The Chinese government designed the LFE to attract further foreign investment for China's economic development. The effect of the new law is to protect foreign investments in the PRC.

To establish a foreign enterprise, the LFE requires the proposed enterprise to advance the economic development of the PRC. The enterprise can do this by using sophisticated equipment and technology in the manufacture of its products or by exporting a substantial quantity of its production output. Besides meeting the requirements of the LFE, the proposed foreign enterprise must secure the approval of the State Council and its auspices. After the State Council approves the application, the foreign investor must obtain a business license.

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72. Id.
73. Id.
74. Zaiguong Hezi He Hezuo Jingying Qiye De Younguan Wenti (Several Questions Concerning Equity and Contractual Joint Ventures in China), trans. in ECON. REP., Apr. 8, 1985, at 36.
76. Id.
77. Id. art. 1, at 26.
78. Id.
79. Id. art. 3, at 26. These requirements restrict a wholly foreign-owned enterprise more than a joint venture. A joint venture can train technicians or managerial personnel or pursue other activities that modernize and reform business practices in the venture or increase the export of products from the PRC. JVL, supra note 20, arts. 3, 4, at 451.
80. LFE, supra note 75, art. 6, at 26. The government unit must approve or deny the foreign investor's application for a wholly foreign-owned enterprise within ninety days. Id. The time limit suggests that the PRC has taken important steps to rectify problems in its legal process that hinder foreign investors. Id.
license.\textsuperscript{81} When the enterprise meets the requirements, the enterprise becomes a legal entity under Chinese law.

Upon the commencement of operations, a foreign investor must notify the Chinese authorities of the proposed duration of the enterprise.\textsuperscript{82} The regulation does not indicate what will happen if the duration of the enterprise surpasses the stated period.\textsuperscript{83} The regulation does indicate that Chinese lawmakers will refine the LFE to insure that foreign investors operating foreign enterprises engage only in certain types of business activities desired by the government.\textsuperscript{84} The Chinese government will refine the provisions of the LFE encouraging investments and requiring sophisticated technology and exportable or "needed products," to maintain control over the technology and the type of products that foreign enterprises will import.\textsuperscript{85} The LFE does, however, permit the approved enterprise to be autonomous in the management of its affairs.\textsuperscript{86} The LFE offers several other benefits to foreign enterprises in order to attract foreign capital. For example, foreign enterprises receive preferential tax treatment.\textsuperscript{87} Additionally, the LFE permits foreign enterprises to purchase raw material abroad if the Chinese domestic market price is higher than the world market price or the material is unavailable.\textsuperscript{88} Again, China shows her determination to keep firm control over what foreign investors are permitted to do, based on the needs of China and not on the demands of the foreigners.

The LFE restricts the foreign participant in some ways.\textsuperscript{89} For instance, a foreign investor in a foreign enterprise must transact with a designated Chinese bank.\textsuperscript{90} This restriction allows the government to regulate the finances and foreign exchange of the enterprise because

\begin{footnotes}
\item[81] \textit{Id.} art. 7, at 26. The Administration of Industry and Commerce has the power to approve or disapprove the business license. In order to obtain a license, a foreign enterprise must demonstrate that it has been lawfully established, that it has sufficient funds to do business, and that it will be responsible for any wrongs it commits in the PRC. \textit{Id.}
\item[82] \textit{Id.}
\item[83] LFE, \textit{supra} note 75, art. 7, at 26.
\item[84] \textit{Id.}
\item[85] \textit{Id.} Although the LFE does not provide a definition of "needed products," the term was subsequently defined as a product which uses sophisticated technology or is internationally competitive because of its superior quality. \textit{See infra} note 135 and accompanying text.
\item[86] \textit{Id.}
\item[87] \textit{Id.} Under the old taxing schedule the enterprise had to pay at least thirty to fifty percent on its earnings. The enterprise will be able to take advantage of the fifteen percent income tax rate, among other things. \textit{Id.}
\item[88] LFE, \textit{supra} note 75, art 50, at 27.
\item[89] \textit{Id.} art 18, at 26.
\item[90] \textit{Id.} art. 18, at 26.
\end{footnotes}
the government will know when the enterprise buys or borrows Chinese currency. To obtain a loan from a bank, the enterprise must also agree to leave the foreign exchange in a designated bank for a specified period of time. Likewise, the government may restrict the enterprise from freely selling products in the PRC. The regulation does not expressly prohibit the enterprise from selling products substituted for imports or items in high demand; yet, similar restrictions have been placed on equity joint ventures and will probably apply to foreign enterprises as well. The law controls some management aspects of the enterprise. For example, the government must approve any significant change in the management structure of the enterprise.

2. New Equity Contribution Regulations

On December 30, 1987, China’s State Council promulgated the Certain Provisions on Contributions by the Parties to Chinese-Foreign Equity Joint Ventures (Equity Provisions). The Council enacted the Equity Provisions because of the nearly $20 billion promised in foreign investment only $6.75 billion has actually been received in the PRC as of 1988. The Equity Provisions set May 1, 1988 as the deadline for parties to all existing joint ventures to contribute the promised capital. The Equity Provisions allow for the parties to make a supplementary agreement to establish a new time limit for the contribution, but only if the supplemental agreement was reached by May 1, 1988. Additionally, the Equity Provisions may require already approved ventures to amend the contractual agree-

91. Id.
92. Id.
93. LFE, supra note 75, art. 18, at 26. The investor must receive approval from the government to sell its product and the amount to be sold in the PRC. Id.
95. LFE, supra note 75, art. 10, at 26. For example, foreign investors cannot dispose of any assets of the enterprise until the liquidation of the enterprise is completed. Id. art. 21, at 26.
97. Id. at 9.
98. Id. art. 2, at 20.
99. Id. If the venture contract calls for installment contributions, the Provisions require that the first installment of capital must be at least fifteen percent of the total contributed capital. Id.
ments’ provisions concerning capital contributions. This may be disconcerting to foreign investors because they are accustomed to contracts with the Chinese being safe from modifications. The Equity Provisions include a proviso to penalize foreigners who fail to meet the contribution deadlines for their promised foreign investment. Clearly, the purpose behind the Equity Provisions was to give the Chinese leverage in forcing foreigners to pay the promised capital.

3. **New Cooperative Joint Venture Law**

The National People’s Congress promulgated the Law of the People’s Republic of China on Chinese-Foreign Cooperative Joint Ventures (New Cooperative Law) on April 13, 1988. This law constitutes the third leg of the legislative tripod for the three types of foreign investment enterprises in the PRC. Since 1979, more than 5000 cooperative ventures have been established in China pursuant to the “Open Door” policy encouraging foreign investment. Most importantly, the New Cooperative Law appears to grant legal status to cooperative ventures and codifies the difference between cooperative ventures and equity ventures.

Under the New Cooperative Law, parties to a cooperative venture are explicitly permitted to determine the distribution of the earnings of the venture, the percentage of profits and losses to be shared by the participants, and the final disposition of the venture’s property upon dissolution. Additionally, the New Cooperative Law requires the government to approve or disapprove the cooperative venture’s application within forty-five days. This suggests that the Chinese leadership recognizes and intends to alleviate the problem of bureau-

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100. *Id.* at 12.
101. *Id.*
102. *Id.* arts. 7, 8, at 20-21. The penalties provided for include: kicking out the delinquent party, voiding the joint venture application and business license, or dissolution of the venture. *Id.*
103. Law on Chinese-Foreign Cooperative Joint Ventures *trans. in* EASt AsIAN ExEc. REP., May 15, 1988, at 27 [hereinafter New Cooperative Law].
104. The two other legs are the laws on equity joint ventures and wholly foreign-owned enterprises.
106. *Id.* art. 2, at 27.
107. *Id.* Participants to equity ventures must share profits, losses, risks, and disposition of the property pursuant to the proportional investments of the parties. *See supra* note 96.
108. *Id.* art. 5, at 28. Equity joint venture applications have a waiting period of 90 days before the governing body must approve or deny the application. *See supra* note 80 and accompanying text.
cratic delay involved in establishing a foreign investment enterprise.

The New Cooperative Law offers a foreign investor an opportunity to maintain greater control over the enterprise. For example, the New Cooperative Law does not require the foreign participant to contribute a minimum percentage of capital. Additionally, the foreign investor is permitted to recover the investment without any time delay. The New Cooperative Law, read in conjunction with the General Principles of the Civil Law, however, fails to clarify whether a cooperative venture qualifies as a limited liability entity. Therefore, some foreign investors may be hesitant to invest in this form of direct foreign investment until implementing regulations alleviate these concerns.

The Chinese have not given up complete control over the conditions and activities of cooperative ventures. For instance, the New Cooperative Law includes a provision encouraging cooperatives which produce and manufacture products that are "export oriented or technologically advanced." The government, while appearing to give up much control over cooperative ventures to the participants, still has the power to interpret and implement this New Cooperative Law to ensure that China maintains firm control over direct foreign investment. Another proviso supports this contention: Article 22 of the New Cooperative Law requires approval by financial and tax authorities before a foreign participant can recoup the investment prior to the payment of income tax. Hence, foreign participants are not free to remove profits before the government believes the venture can survive without the foreign capital.

The New Cooperative Law ensures that the Chinese still maintain ultimate control over the enterprise in several other ways. For instance, if the parties to the venture decide to continue their operations past the time limit agreed upon in the contract, the parties must

109. New Cooperative Law, supra note 103, art. 2, at 27. A foreign participant of an equity venture is required by law to contribute at least 25% of the total capital expenditure of the venture. See supra note 28, and accompanying text.
110. Id. art. 22, at 29.
111. New Cooperative Law, supra note 103, at 8. Under Article 2 of the New Cooperative Law, a cooperative venture may apply for the status of a legal person. Id. at 7. However, the New Cooperative Law does not specify if the participants have to include the limited liability proviso in the agreement and if the government will permit them to do so. Id at 8. If the venture does not attain legal person status then the venture does not appear to be protected as a limited liability enterprise. Id.
112. Id. art. 4, at 28. This is similar to language included in the laws on equity ventures and on foreign-owned enterprises.
113. Id. art. 22, at 29.
apply for an extension six months before the expiration date. Also, the New Cooperative Law leaves open the question of who will manage the enterprise if the parties form a partnership-like cooperative venture. A foreign investor must be aware of this concern because if the Chinese partner is considered the legal representative of the enterprise, then the foreign participant may be subject to limitless liability while the Chinese participant enjoys limited liability.

Taxation questions also have been raised by the ambiguity of the New Cooperative Law. Under Article 21, a cooperative venture is required to pay taxes pursuant to state provisions and may be eligible for preferential tax treatment. The New Cooperative Law does not specify which tax provisions will apply.

Although cooperative ventures permit the participants to determine the distribution of profits and losses and property division upon dissolution, a cooperative venture must still comply with other applicable laws and regulations in addition to its own contractual agreement. One such law venture is the Interim Provisions of the State Administration For Industry and Commerce Concerning the Ratio between Registered Capital and Total Amount of Investment of Chinese-Foreign Equity Joint Ventures (Debt and Equity Law). The Debt and Equity Law establishes the amount of required capital contribution for both equity and cooperative ventures, especially concerning the foreign participant.

Additionally, cooperative joint ventures may be required to comply with the newly enacted law: Certain Provisions on Contributions by the Parties to Chinese-Foreign Equity Joint Ventures (Contribution Law). The Contribution Law requires all capital to be contributed within six months of the establishment of the joint venture where the parties have agreed to pay the capital in one payment and not by the installment method.

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114. Id. art. 25, at 30.
116. Id. art. 21, at 21-22.
117. Id. art. 3, at 27.
119. Id. at 22.
120. Certain Provisions on Contributions by the Parties to Chinese-Foreign Equity Joint Ventures, trans. in EAST ASIAN EXEC. REP., April 15, 1988, at 20 [hereinafter Contribution Law].
121. Id.

The Supreme People's Court of China issued a notice interpreting the Foreign Economic Contract Law of the People's Republic of China entitled "Responses to Certain Questions Concerning the Application of the Foreign Economic Contract Law." (Notice) The Notice appears to resolve some questions concerning the implementation of the 1985 Foreign Economic Contract Law of the People's Republic of China. Although it is uncertain what force the Notice will carry, the Supreme People's Court did order all the lower courts in the PRC to use the Notice when adjudicating issues concerning Foreign Economic Contract Law.

The Notice performs a significant function in defining what an economic contract includes. Most importantly, the Notice determines that contracts between any equity joint ventures, cooperative joint ventures, or foreign-owned enterprises are not considered contracts governed by the Foreign Economic Contract Law. Instead, such contracts have been determined to be governed by the Chinese Economic Contract Law. This may be an important consideration for the foreign investor when choosing the type of enterprise in which to invest.

The Notice performs an important service in specifying what law courts should apply where the parties to the contract have not so indicated. Another significant aspect of the Notice is the section

123. Id. at 10-11.
124. Id. at 11. According to the Notice, economic contracts include:
   (1) the purchase and sale of goods;
   (2) equity and cooperative joint ventures;
   (3) cooperative exploration and the exploitation of natural resources;
   (4) credit, leasing, and technology transfer;
   (5) contracted engineering;
   (6) supply of equipment sets;
   (7) processing and labor;
   (8) compensation trade;
   (9) technology consultation and design;
   (10) guarantees, insurance, storage;
   (11) agency and others.

Id.
125. Id.
126. Id.
127. Id. at 12.
(1) Contracts for the international sale of goods: Generally, the law of the seller's
which lists the nine types of contracts declared void under Chinese law. The law of the buyer's jurisdiction should be applied, however, if the contract (i) is negotiated and signed in the buyer's place of business; or (ii) relies principally on terms proposed by the buyer and is executed on the basis of a bid issued by the buyer; or (iii) clearly stipulates that the seller must perform its obligation to tender goods at buyer's place of business.

(2) Bank loans or guarantee contracts: The law of the lender's or guarantor's place of business.

(3) Contracts of insurance: The law of the insurer's place of business.

(4) Processing contractors' contracts: The law of the processing contractor's place of business.

(5) Technology transfer contracts: The law of the place of business of the recipient enterprise.

(6) Contracted project contracts: The law of the location of the project.

(7) Technical consulting or design contracts: The law of the place of business of the client.

(8) Labor contracts: The law of the place where the labor is to be performed.

(9) Contracts for the supply of complete sets of equipment: The law of the place where the equipment is to be operated.

(10) Agency contracts: The law of the agent's place of business.

(11) Contracts for the lease, purchase, sale, or mortgage of real estate: The law of the situs of the real estate.

(12) Contracts for leases of moveable property: The law of the place of business of the lessor.

(13) Storage contracts: The law of the place of business of the bailee enterprise.

The types of contracts which are considered void:

(1) If one of the parties there to did not have the "status of a legal subject" (hefa zhuti zige) at the time of contracting;

(2) If the Chinese party was not granted "foreign trade authority": (duiweijingyiqingquan) by the relevant approval authority in China;

(3) If the Chinese party thereto exceeded its scope of business;

(4) If it is signed by a party holding itself out as an agent but who does not have actual authority to sign on someone else's behalf. Similarly, a contract is void if it is signed by a party who exceeds the scope of its authority to sign on someone else's behalf, or whose authority to sign on someone else's behalf has terminated before it signs such contract. However, a contract may be ratified by the principal in any of these three situations. Furthermore, the three types of contracts described above are not void if the principal knows that the signatory is holding itself out as the principal's agent and does not take timely action to deny the contract. In such cases, the Notice implies that the principal would be estopped from using the purported agent's lack of authority as a defense to the contract;

(5) If it is not in written form;

(6) If, in accordance with PRC law or administrative rules, it should have been submitted for approval to the Chinese authority in charge and it did not receive such approval. Furthermore, an approved contract becomes void if significant modifications are made, or significant rights and liabilities are transferred without obtaining approval from the original approved authorities;

(7) If one of the parties thereto uses trickery, deceit or fraudulent means to induce another party to sign a contract which gives rise to economic losses or other serious injuries, or if one party takes advantage of the economic crisis of another to extract unequal terms from it against its will, the resulting contract will be void;

(8) If the parties thereto conspire or collude to harm the interest of the state, a collective or a third party. Similarly, contracts are void which contrive to achieve
which is later voided, a foreign investor must determine the legal status of the Chinese entity before contracting with it. A foreign participant whom a court finds at fault in causing the contract to be breached will be liable for damages to the other party resulting from the voided contract.\textsuperscript{129} Under the auspices of the Notice, parties to a foreign economic contract are able to rescind the contract.\textsuperscript{130} To rescind a contract, the parties must prove to the court that when the parties entered the contract one of the parties significantly misunderstood the terms of the contract or that the contract is "manifestly inequitable."\textsuperscript{131}

III. FOREIGN EXCHANGE LAWS IN THE PEOPLE'S REPUBLIC OF CHINA

An area of concern for all forms of foreign investment lies in foreign exchange regulations. Such regulations affect the kinds of materials that the entity can purchase in the international market and also the amount and form of the profits the entity will be able to repatriate.

A. Background

In the past, the Chinese government permitted foreign investment entities to monitor and control their own foreign exchange balance.\textsuperscript{132} Foreign enterprise has difficulty in maintaining a foreign exchange balance if it only sells its product domestically. Moreover, now that foreign investors are allowed to repatriate profits, the lack of foreign exchange available in the PRC has become a critical issue in determining whether a foreigner will decide to invest in the PRC.\textsuperscript{133}

\textsuperscript{129} Id. at 13.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} China Must Stop Scaring Off Investors, Asian Wall St. J. Weekly (Nov. 11, 1985) at 16. The foreign exchange balance refers to the amount of foreign currency the enterprise owns in relation to the amount of Chinese currency. An enterprise that sells only to the Chinese will accrue large quantities of Chinese currency. If the enterprise needs to import raw materials or equipment of production then it will not have any foreign currency with which to purchase the needed items. Id.
\textsuperscript{133} Gelatt, The Foreign Exchange Quandary, 13 China Bus. Rev. (May-June 1986) at 28. The number of newly formed equity joint ventures decreased forty percent as compared to the number formed in 1985, 304 and 500 respectively. The number of new wholly foreign-owned enterprises decreased by fifty percent as 10 new enterprises were approved in 1986, while 20 were approved in 1985. Symposium, supra note 1.
Chinese government has tried to rectify this problem by enacting new legislation addressing the foreign exchange difficulties.\textsuperscript{134}

B. Current Developments

The Provisions of the State Council on the Question of the Balancing of Foreign Exchange Receipts and Expenditures of Chinese-Foreign Joint Ventures (PFE) define the "needed" products that a foreign investment entity will be permitted to sell in the PRC.\textsuperscript{135} The Implementing Regulations of the Joint Venture Law defined "needed" products (as required under Article 5 of the Joint Venture Law) as products manufactured with sophisticated technology that would be exported and not sold domestically, or products that would be an import substitute.\textsuperscript{136} These requirements insure that China's limited foreign exchange reserves will be used only for critical materials which are not available in the PRC. The PFE guides the foreign investor in the balancing of foreign exchange reserves by permitting the investor to sell goods or services to Chinese firms willing to pay in foreign currency.\textsuperscript{137} Also, the venture is permitted to purchase Chinese products and then sell the products overseas.\textsuperscript{138} If a foreign investor has multiple investments within the PRC, the investor can also collectively balance his foreign exchange of investments rather than individually balancing each enterprise.\textsuperscript{139} The PFE also permits a foreign investor to invest its Chinese currency in Chinese enterprises.\textsuperscript{140}

The Chinese government has enacted other legislation to encourage greater foreign investment in the PRC.\textsuperscript{141} The Provisions on Encouragement of Foreign Investments (PEFI) focus on alleviating the problems occurring in the administration of foreign ventures, thereby indicating China's willingness to reform its legal structure to make

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\textsuperscript{134} PFE, supra note 94.
\textsuperscript{135} PFE, supra note 94, arts. 4, 5, at 31-32. The new regulation defines a "needed product" as one which use sophisticated technology or is internationally competitive because of its superior quality. \textit{Id.}
\textsuperscript{136} Implementing Regulations of the JVL, supra note 42, art. 3, at 451.
\textsuperscript{137} \textit{Making It All Legal}, FAR E. Econ. Rev. (Feb. 6, 1986) at 70.
\textsuperscript{138} PFE, supra note 94, art. 6, at 32.
\textsuperscript{139} \textit{Id.} art. 9, at 32.
\textsuperscript{140} \textit{Id.} art. 10, at 32.
\textsuperscript{141} Provisions on Encouragement of Foreign Investments (1986) \textit{trans. in EAST ASIAN EXEC. REP.} (November 1986), at 22-23 [hereinafter PEFI].
it conducive to foreign investment.\textsuperscript{142} The PEFI also grants the foreign investor greater autonomy in management decisions of the enterprise.\textsuperscript{143} Since the new legislation applies to all forms of foreign investment in the PRC,\textsuperscript{144} it suggests that the Chinese government no longer singles out equity joint ventures for special foreign investment incentive regulations.

The PEFI promotes foreign investment by providing special benefits to ventures that engage in activities requiring advanced technology or products primarily exported.\textsuperscript{145} The special benefits include site development, land use fees, and preferential tax treatment.\textsuperscript{146} The PEFI extends the tax holiday for foreign ventures by granting a fifty percent exemption for an additional three years.\textsuperscript{147} If a foreign venture invests in a Chinese enterprise that establishes or expands high technology or exports for five years, then the foreign venture receives a refund of one hundred percent of the income tax paid on the amount invested.\textsuperscript{148} In addition, access to public utility services will be granted to export or advanced technology producing enterprises.\textsuperscript{149}

\section*{IV. INDUSTRIAL AND INTELLECTUAL PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA}

China's patent and trademark laws also reflect the changing economic policy of the nation, from a system based on societal ownership of wealth to a system encouraging property rights and individual wealth. In order to facilitate foreign investment and the importation of foreign technology, China has had to create a legal framework

\textsuperscript{142} Id. art. 17, at 22. PEFI requires departments of the State Council to render foreign investment management decisions within three months of proper application. Also, the foreign investment enterprises do not have to meet licensing requirements for importing raw materials, equipment, and components for imported products if the product to be completed has already been purchased. \textit{Id.} art. 13, at 22.

\textsuperscript{143} Id. art. 15, at 22. The enterprise may determine purchases, sales, credit, and management control over Chinese employees. The PEFI, because of problems in getting qualified Chinese personnel, now requires domestic business to aid foreign investment enterprises in recruiting employees. \textit{Id.}

\textsuperscript{144} Id. art. 2, at 22.

\textsuperscript{145} Id. art. 2, at 22. The regulation defines a "high technology" enterprise as an enterprise developing export products or improving the production of existing products to make them more internationally competitive. The enterprise must be in the manufacturing sector and not the service sector of the Chinese economy and must have a foreign exchange surplus. \textit{Id.}

\textsuperscript{146} PEFI, \textit{supra} note 141, at 22. A land use fee is a rental fee for the use of the Chinese land. A foreign venture pays a substantially lower fee under the PEFI. \textit{Id.}

\textsuperscript{147} Id. art. 9, at 22.

\textsuperscript{148} Id. art. 10, at 22.

\textsuperscript{149} Id. art. 5, at 22. Due to China's lack of adequate service in this area, this constitutes an important benefit.
for the protection of intellectual property rights.\textsuperscript{150} The Patent Law and Trademark Law\textsuperscript{151} represent a departure from the socialist philosophy belief that the benefits of mental activity belong to an entire society and not to an individual.\textsuperscript{152}

A. Trademark Law of the People’s Republic of China

1. Background

Domestic trademark protection has existed in the PRC since 1904.\textsuperscript{153} China passed the Provisional Regulations Governing Trademark Registration (Trademark Provisions) in 1950.\textsuperscript{154} The Trademark Provisions protected the rights of the trademark owners to not have their work duplicated by counterfeiters.\textsuperscript{155} During the Cultural Revolution, the government registered over fifty thousand trademarks.\textsuperscript{156} In 1963, China passed the Regulations Governing the Control of Trademarks (Control Regulations).\textsuperscript{157} The Control Regulations required the registration of all trademarks.\textsuperscript{158} Administrative control over the trademarks would ensure the quality of the products.\textsuperscript{159} The Control Regulations permitted a foreign entity to register its trademark if China was a party to a trademark reciprocity agreement with the foreigner’s country and the foreigner had registered the trademark in his own country.\textsuperscript{160}

The 1982 Trademark Law invalidated these early regulations.\textsuperscript{161} The Chinese government was compelled to meet the demands of


\textsuperscript{151} Trademark Law of the People’s Republic of China, trans. in 1986 GUIDE, supra note 21, at 649-59 [hereinafter Trademark Law].

\textsuperscript{152} P. GLADWIN, GUIDE TO THE PATENT LAW OF THE PEOPLE’S REPUBLIC OF CHINA, at 3 (1985).


\textsuperscript{156} Id.

\textsuperscript{157} Id.

\textsuperscript{158} Id.

\textsuperscript{159} Leung, supra note 153.

\textsuperscript{160} Id.

\textsuperscript{161} Id.
foreign investors who wanted industrial and intellectual property right protection.\textsuperscript{162} The government was also intent on guaranteeing the quality and consistency of Chinese products.\textsuperscript{163} Thus, the Trademark Law requires every trademark user to protect the quality of goods.\textsuperscript{164} The Trademark Office of the State Administration for Industry and Commerce administers the quality of goods.\textsuperscript{165}

China began to change its policy towards intellectual property rights at the same time it began to encourage foreign investment.\textsuperscript{166} During 1979, the United States and China signed a reciprocity agreement with respect to industrial and intellectual property rights protection.\textsuperscript{167} The agreement required China to enforce contractual provisions to restrict counterfeiting.\textsuperscript{168} In 1982, the PRC enacted the Trademark Law of the People’s Republic of China (Trademark Law).\textsuperscript{169}

The purpose of the Trademark Law is to protect the exclusive rights of a trademark owner, facilitate the administration of trademarks, encourage producers to maintain and improve the quality of products, and to develop the socialist commodity economy.\textsuperscript{170} One may doubt China’s sincerity in enforcing the trademark law because the existence and purpose of the law seems to contradict a basic premise necessary to communist society.\textsuperscript{171}

Chinese legislatures, however, have been known to promulgate broad sweeping laws with no substance, but with plenty of ideological rhetoric.\textsuperscript{172} Therefore, the significance of the trademark law lies in

\begin{footnotes}
\item[162] Goossen, supra note 154, at 38.
\item[163] Id. at 29, citing Xu, Daole, Deputy Director of the Trademark Office, Trademark System in China, Beijing Symposium, in Cao, Policy and Practice of Technology Importation in China. Paper presented at Beijing Symposium on Intellectual and Industrial Property in the People’s Republic of China (Nov. 1985).
\item[164] Trademark Law, supra note 151, art. 6, at 22.
\item[165] Id.
\item[166] JVL, supra note 22. The Joint Venture Law was one of the first laws enacted pursuant to the “Open Door” Policy. Id. In 1979, China and the United States signed an agreement on trade relations. Under the agreement, the PRC assured the United States that it would provide the same protection available in the United States of patents, trademarks, and copyrights. Horsley, Protecting Intellectual Property, The China Bus. Rev. (Nov.-Dec. 1986) at 17.
\item[167] Horsley, supra note 166, at 17.
\item[168] Patent Law, supra note 150.
\item[169] Trademark Law, supra note 151.
\item[170] Id. art. 1, at 649.
\item[172] Lueng, supra note 153, at 4. Furthermore, internal directives passed by bureaucrats also affect the interpretation and effectuation of a law. Hence, what may appear as a radical change in Chinese economic policy may, in practice, really only be moderate change at best. Id.
\end{footnotes}
China's interpretation and application of the law.\textsuperscript{173} In 1982, when the government enacted the Trademark Law, the question of whether the Chinese truly wished to grant protection to intellectual property rights or whether China was only superficially responding to the pressures of trading partners, such as the United States,\textsuperscript{174} remained unanswered. This is still a factor that the owner of technology or product must consider when deciding to do business in the PRC.

The Trademark Law establishes procedures for a foreigner to register a trademark. To apply for a Chinese trademark, the foreign applicant must submit the application to the Trademark Registration Agency of the China Council for International Trade (CCPIT) or the China Patent Agent in Hong Kong.\textsuperscript{175} Upon receipt of such application, the Trade Mark [sic] Review and Adjudication Board (Board) will schedule a hearing.\textsuperscript{176} Once the Board approves the application, the mark becomes a registered trademark.\textsuperscript{177} The trademark registration grants the registrant two important rights: the right to use the mark and the right to prevent unauthorized persons from using the right.\textsuperscript{178}

Under the 1982 Trademark Law the procedures for filing a trademark are not complicated.\textsuperscript{179} As a signatory to the Paris Convention for the Protection of Industrial Property\textsuperscript{180} (Paris Convention), China

\begin{center}
\textbf{CHINA'S TRADE WITH THE UNITED STATES IN MILLIONS OF DOLLARS}
\end{center}

\begin{tabular}{|c|c|c|c|c|c|c|}
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Value & 1,148 & 2,309 & 4,807 & 5,494 & 5,188 & 4,390 & 5,500 & 6,220 \\ 
\hline
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\textit{Id.}


\textsuperscript{174} The United States, in response to lobbying efforts by businesses, has attempted to persuade its trading partners to grant greater protection to intellectual property rights. China, at an increasing rate, is trading with the United States. \textit{See} J. Stuermet, \textit{The Way Ahead}, \textit{The China Bus. Rep.} (Jan.-Feb. 1984) at 37.

\textsuperscript{175} Horsley, \textit{supra} note 166, at 18. In 1986, the registration fees were $275.00 in the P.R.C. and $280.00 in Hong Kong for each class of goods using the same trademark. \textit{Id.} An opposition claim to the registration of a trademark can be filed within three months from the date of publication of the trademark or within one year from the date of registration. \textit{Trademark Law, supra} note 151, arts. 19, 27, at 651.

\textsuperscript{176} \textit{Id.} The Trademark Law permits the revocation of a trademark registration in the event that the applicant does not use the trademark for three years or more. Horsley, \textit{supra} note 166. The interpretation of "use" by the Chinese bureaucrats has included advertising or displaying in catalogs or even distributing samples. \textit{Id.} at 17.

\textsuperscript{177} Trademark Law, \textit{supra} note 151, art. 21, at 656.

\textsuperscript{178} Leung, \textit{supra} note 153, at 4, 5.

\textsuperscript{179} Horsley, \textit{supra} note 166, at 17.

\textsuperscript{180} The PRC signed the Paris Convention in 1984. Eliasoph, \textit{supra} note 173, at 50.
has agreed to follow the Paris Convention with regard to trademark protection.\textsuperscript{181} Under the Trademark Law, the first applicant is not required to prove ownership or prior use of the mark, even if another person or business has registered the mark outside of the PRC.\textsuperscript{182} As required by the Paris Convention, however, China must allow foreigners of signatory countries a priority claim right to a registered trademark.\textsuperscript{183} The priority claim gives the foreigner a six-month time period in which to register the trademark in China from the date of overseas registration.\textsuperscript{184} The grace period permits the owner of a trademark to be assured that the trademark will be protected in China.

The Trademark Law promotes liberal practices in establishing, renewing, and insuring that a granted trademark will be used.\textsuperscript{185} In fact, China does not require trademark registration; it is voluntary.\textsuperscript{186} For instance, the law permits "any word and or design to qualify as a registerable trademark, except state names or emblems."\textsuperscript{187} The Trademark Law does not permit service trademarks\textsuperscript{188} to be registered, and only recently granted business names some protection with the Promulgation of the Interim Regulations on the Registration of

\textsuperscript{181} Horsley, supra note 166, at 17. Within the last decade China has made considerable strides in providing a legal structure for the protection of intellectual property rights. A strong foundation has been laid by the Chinese willingness to join international organizations which promote the protection of industrial and intellectual property rights and provide international guidelines to achieve this goal. China is a signatory to the 1979 Agreement on Trade Relations between the United States and the PRC, World Intellectual Property Organization (1983), and the Paris Convention for the Protection of Industrial Property. Eliasoph, supra note 173, at 50.

\textsuperscript{182} Trademark Law, supra note 151, arts. 4, 16, 18, at 649-50.

\textsuperscript{183} Horsley, supra note 166, at 17. Trademark Law, supra note 151, art. 9, at 650. A foreigner must file the trademark application according to any applicable agreement between the PRC and the foreigner's country. Trademark Law, supra note 151, art. 9, at 650.

\textsuperscript{184} Trademark Law, supra note 151, art. 9, at 650.

\textsuperscript{185} Trademark Law, supra note 151, art. 18, at 650.

\textsuperscript{186} Horsely, supra note 166, at 17.

\textsuperscript{187} Trademark Law, supra note 151, arts. 7, 8, at 649. For a discussion of how to translate a foreign trademark into Chinese see Seligman, \textit{Translating Your Trademark into Chinese}, in \textit{China Bus. Rev.} (Nov.-Dec. 1986) at 14-16. Although almost any symbol is acceptable as a trademark, the trademark must be distinguishable. To determine if the trademark is distinguishable, ask whether it identically resembles any other registered trademark and when comparing it to the trademark of similar goods, the trademarks differ sufficiently. Trademark Law, supra note 151, art. 7, at 649.

\textsuperscript{188} Trademark Law, supra note 151, art. 1, at 649. Article 1 only addresses the trademarks of goods, not services. \textit{Id}. Since service entities cannot apply for registered trademarks, international hotel, restaurant and banking chains' names have no guarantee that their names will not be used by others. Pendleton, \textit{The Relevance of Chinese Intellectual Property Law for the Practitioner in Hong Kong}, 173, in \textit{Law Lectures for Practitioners 1983}, HONG KONG LAW JOURNAL LIMITED (1985) at 186.
Names of Industrial and Commercial Enterprises.\textsuperscript{189} The Trademark Law protects the owner of a trademark in the future as well. Where the registrant continues to use the trademark after the ten year validity period, the registrant must apply for a renewal of the registration six months before the expiration date.\textsuperscript{190}

The Trademark Law subjects an infringer of a registered trademark to a fine or a notice of criticism and/or reparation of any damages caused by the infringement.\textsuperscript{191} An infringement occurs when an identical trademark or one similar to a registered trademark is used without the authorization of the owner.\textsuperscript{192} Infringement also occurs when an infringer sells or makes a trademark without authorization or causes prejudice to the exclusive right to use another person’s registered trademark.\textsuperscript{193} The foreign trademark owner has several alternatives if the trademark rights are violated even if the trademark is not yet formally registered in China.

First, the owner can file suit against the infringer in a Chinese court of law.\textsuperscript{194} Alternatively, the registered owner can use the CCPIT’s arbitration commission to resolve the dispute.\textsuperscript{195} Resolving trademark disputes, however, is a difficult and trying process.\textsuperscript{196} Foreigners find it difficult to prove an infringement claim because of bias against

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\textsuperscript{189}. Interim Regulations on the Registration of Names of Industrial and Commercial Enterprises \textit{trans.} in China Econ. News. (Jul. 15, 1985) at 4, 5. The Interim Regulations were promulgated by the State Administration for Industry and Commerce on June 15, 1985. \textit{Id.} Foreigners must register their business names pursuant to the Interim Regulations. Unfortunately, names including numbers, names of foreign states, or names of regions cannot be registered in China at this time. \textit{Id.} art. 6, at 7.
The Interim Regulations do not provide the owner of a business name trademark with any means of recouping losses resulting from an infringement on the registered trademark. Furthermore, the owner cannot sell or give a use license of the registered business name trademark. The owner can, however, transfer the right through a contract. \textit{Id.} arts. 2, 6, 7, at 4, 5.
\textsuperscript{190}. Trademark Law, \textit{supra} note 151, arts. 23, 24, at 651.
\textsuperscript{191}. \textit{Id.} art. 34, at 652. Maximum fine is 5000 \textit{Renminbi}. The counterfeited items are subject to confiscation and the registrant is entitled to collect damages. Horsley. \textit{supra} note 166, at 19.
\textsuperscript{192}. Trademark Law, \textit{supra} note 151.
\textsuperscript{193}. \textit{Id.} art. 38, at 653.
\textsuperscript{194}. Horsley, \textit{supra} note 166, at 18. Foreign trademark owners generally do not pursue infringement claims in Chinese courts or at arbitration commissions. Claims are not pursued because foreigners do not believe that their rights will be vindicated. Chinese courts and arbitration committees tend to reach compromises instead of a straightforward vindication of the injured party’s legal rights. The procedure seems only an attempt to placate foreigners by providing the illusion that the infringement will not be ignored. \textit{Id.}
\textsuperscript{195}. Horsley, \textit{supra} note 166, at 18. The CCPIT has been successful in convincing manufacturers in China not to use a Coca Cola bottle look-a-like, the name Eveready on batteries, and the name Viasoy on a soybean product, even though none of these trademarks have been successfully registered in China. Leung, \textit{supra} note 153, at 5. The CCPIT resolution of the infringement, however, generally takes at least two years. \textit{Id.}
\textsuperscript{196}. \textit{Id.}
\end{flushleft}
the foreigner in the proceeding.\footnote{197} Also, since the Chinese do not recognize post facto licensing as a solution to trademark infringement, the foreign registrant does not always recoup losses suffered to sales or reputation from an infringement.\footnote{198} A foreign business person operating in the PRC must be alert to the problem of economic crime in the PRC.\footnote{199} Economic crime has been on the rise since the early 1980s, despite harsh penalties.\footnote{200} Trademark counterfeiting has resulted in large losses to domestic and foreign manufacturers.\footnote{201}

Instead of relying on the judicial system for compensation, the foreign importer can protect against economic loss by requiring both documentation from the seller and government certification showing that the seller has actually complied with all legal requirements.\footnote{202} Foreign exporters can make governmental inquiries as to whether the Chinese buyer has the authority to import the items.\footnote{203} Since the Chinese severely punish uncooperative persons, a foreign investor must use prudent judgment when questioned by Chinese authorities about business transactions.\footnote{204} All Chinese citizens have an affirmative duty to cooperate with tax and other authorities to report on business activities of foreigners. Therefore, foreign entrepreneur should use extreme caution when discussing their business transactions in the presence of any Chinese citizens.\footnote{205}

2. Amendments to the Trademark Law

In 1983, the Chinese government promulgated the Detailed Implementing Regulations of the Trademark Law of the People's Republic of China (Implementing Regulations of the Trademark Law).\footnote{206} One new important provision requires all pharmaceutical products to have

\begin{itemize}
  \item \footnote{198} \textit{Id.} A post facto licensing agreement requires the trademark infringer to pay a licensing fee to the registrant or owner of the trademark. \textit{Id.}
  \item \footnote{199} \textit{Id.} at 26. Economic crime is crime disrupting the economy. Silk, \textit{supra} note 194, at 26.
  \item \footnote{200} \textit{Id.} at 25. Penalties include imprisonment and fines. \textit{Id.}
  \item \footnote{201} \textit{Id.} at 27.
  \item \footnote{202} Silk, \textit{supra} note 197, at 26. The seller must have title to the property being sold and have the right to sell it. \textit{Id.}
  \item \footnote{203} \textit{Id.}
  \item \footnote{204} \textit{Id.}
  \item \footnote{205} \textit{Id.}
  \item \footnote{206} Detailed Implementing Regulations of the Trademark Law of the People's Republic of China [hereinafter Implementing Regulations of the Trademark Law], \textit{trans. in 1986 GUIDE}, \textit{supra} note 21, at 654-657.
\end{itemize}
registered trademarks. The Implementing Regulations of the Trademark Law specify exactly what form and what procedure a registrant must use in order to effectively utilize the Trademark Office. The Implementing Regulations of the Trademark Law also establish the China Council for the Promotion of International Trade for Foreigners or Foreign Enterprises Applying for Trademark Registration in the People's Republic of China (Council). The regulations permit the Trademark Agency of the Council to apply to the Trademark Officer for the registration, renewal, assignment, modification, adjudication of dispute, and any other matter concerning a trademark. 

The Implementing Regulations of the Trademark Law apply directly to foreigners with trademark concerns, including registration. The Regulations specify which documents are required for registering a trademark. If a foreigner demands the review of a trademark dispute or of a cancellation adjudication, the foreigner must submit to the Trademark Agency all of the reasons as well as the necessary evidence.

In 1985, the Chinese promulgated more legislation regarding the priority of applications for registration of trademarks in the PRC. These provisional stipulations were promulgated in accordance with Article 9 of the Trademark Law of the People's Republic of China, and Article 4 of the Paris Convention for the Protection of Industrial Property. The stipulations indicate China's intention of upholding the rules and regulations of the Paris Convention. If China follows...
through with the enforcement of the spirit and intent of these laws, then China's protection of industrial and intellectual property rights will approximate the internationally prescribed level of protection. Thus, the risk associated with technology transfer to the PRC will diminish and foreign investment and trade should increase as a result.\footnote{216}

The most recent effort to protect intellectual property rights in the PRC is the Detailed Implementing Rules of Trademark Law (New Trademark Rules). The New Trademark Rules exemplify the importance China has placed on the protection of property rights in its efforts to modernize.\footnote{217} The New Trademark Rules exemplify the importance China has placed on the protection of property rights in its efforts to modernize. The New Trademark Rules attempt to provide ways to stop infringements and improper registrations of trademarks.\footnote{218}

The New Trademark Rules offer a more efficient and faster method of registration. First, instead of requiring application to the China Council for the Promotion of International Trade (CCPIT), the law permits foreigners or foreign enterprises to be governed by an agency designated by the State Administration for Industry and Commerce.\footnote{219} As China operates under the “first-to-file” method of registration, this will ensure the owner of an internationally known trademark that the trademark will not be stolen by a Chinese applicant who files the trademark before the foreigner or foreign company is able to do so.\footnote{220}

Greater protection of trademarks appears to exist under the New Trademark Law. The New Trademark Law grants owners of trademarks outside of China judicial standing to contest an improper trademark registration.\footnote{221} Additionally, the protections against infringement and counterfeiting have been strengthened under the New Trademark Law. The elements of an infringement had not been defined previously.\footnote{222} Article 41 of the New Trademark Law provides

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\begin{itemize}
  \item \footnote{216} Theroux, \textit{Transfer of Technology To China: New Laws and Old Problems}, 14 \textit{J. Int'l. L. & Econ.} 185 (1980).
  \item \footnote{217} \textit{East Asian Exec. Rep.} (June 15, 1988) at 8.
  \item \footnote{218} \textit{Id.}
  \item \footnote{219} \textit{Id.}
  \item \footnote{220} \textit{Id.} at 11.
  \item \footnote{221} \textit{Id.} at 12. Previously, only the owner of the Chinese registered trademark could challenge a trademark. \textit{Id.}
  \item \footnote{222} Trademark Law, \textit{supra} note 151, art. 38, at 653.
\end{itemize}
an expanded definition of what constitutes an infringement.223

The New Trademark Law provides greater remedies and penalties for infringement, as compared to the first Trademark Law. New remedies and penalties include: “self-criticism of the offender, cancellation of the trademark, fines of up to 20 percent of the illegal turnover or up to twice the amount of the illegal profits gained, seizure of the false marks, and compensation.”224 However, because the fines are based on the bookkeeping of the infringer, the fine may not be a sufficient economic deterrent if the infringer does not accurately record the sales of the infringed items. Furthermore, the civil remedies may not compensate the foreign owner of a trademark. The damages are based on the illegal profits recorded by the infringer, and not by the economic loss to the infringed upon trademark owner.225

Despite these improvements in trademark protection, China’s legislative infrastructure still presents problems for the foreign trademark owner. The foreign trademark owner is still not adequately represented by the agents who register the foreigner’s trademark.226 These agents do not always give the foreign trademark owner their undivided loyalty.227 Furthermore, if the foreigner has to go to court to pursue a claim for infringement or to protect a trademark property right, the foreigner must rely on a Chinese lawyer whose first allegiance lies with the Chinese state and not with the foreign client. If the foreign trademark owner tries to collect money from a Chinese enterprise, the Chinese lawyer may put the interests of the state before the interests of the foreigner.228 Thus, the foreign trademark owner’s economic interests may not be represented adequately by Chinese counsel.

223. Id. Article 41 of the New Trademark law defines infringement as the following acts pursuant to Article 38 of the Trademark Law:

(1) selling or distributing goods bearing the exclusive trademark of another person;
or

(2) using any words(s) or design as the name or on the packaging of goods if (i) such words(s) or design bears a strong likeness to a registered trademark of another, and (ii) such use is likely to cause confusion; or

(3) aiding in the storage, transport, mailing or concealment of goods bearing infringing trademarks.

224. Id.

225. Id.


227. Id.

228. Id.
The foreign trademark owner also faces difficulty in court when trying to prove an infringement or counterfeiting claim. To make such a claim, the foreigner often must examine records which are in the exclusive possession of the government. If the government so desires, it can prevent the documents from being viewed by the public.\textsuperscript{229} If the foreigner inadvertently discloses the documents to others, the foreigner could be subject to criminal penalties for revealing state secrets.\textsuperscript{230} Overall, the Chinese have made substantial improvements in protecting foreign-owned trademarks from infringement in the PRC. By continuing to respect intellectual property rights through legislation, China will certainly experience greater foreign investment. However, the owner of a foreign trademark still cannot expect the full range of protection available in other states.

B. Patent Law

1. Background

China enacted patent protection laws during the 1950s.\textsuperscript{231} These early laws merely recognized that the creator of an invention had a right to be protected against duplication.\textsuperscript{232} During the next ten years, the Chinese government promulgated legislation on the Provisional Regulations on Awards for Inventions, Technical Improvements and Rationalization Proposals Relating to Production\textsuperscript{233} and The Regulations on Awards for Inventions.\textsuperscript{234} Such legislation granted rewards to the artist for the work.\textsuperscript{235} In 1978, however, the government passed the New Invention Award Regulations,\textsuperscript{236} the essence of which was to place ownership of all patents in the hands of the government.\textsuperscript{237} The Invention Regulations defined inventions as all new scientific and technological achievements that had not existed before, were

\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Leung, supra note 153, at 5. Provisional Regulations on the Protection of the Invention Right and Patent Right (1950). Id.
\textsuperscript{232} Id.
\textsuperscript{234} Id. at 231.
\textsuperscript{235} Horsley, supra note 166, at 19.
\textsuperscript{236} New Invention Award Regulations. trans. in THE CHINA BUS. REV. (Jan.-Feb. 1979) at 60.
\textsuperscript{237} Id. art. 9, at 60.
technologically advanced, and had practical application. Creators of inventions received medals, money, or a certificate of achievement, but never acquired ownership of the invention. The Invention Regulations permitted foreigners to apply for approval of inventions and receive awards based on the type of invention discovered. Since this system of patent protection did not facilitate technology transfer from foreign states, China, in accordance with its commitment to the expansion of foreign trade and investment, developed a new patent law.

2. New Patent Law

The New Patent Law exemplifies China's willingness to accept certain aspects of capitalism. The law recognizes the proprietary interest of inventors in their discoveries. Previous laws did not recognize proprietary rights. The New Patent Law, however, still does not grant patents to inventions patented elsewhere or to the types of technology China has deemed to be unpatentable, despite internationally accepted practices. The New Patent Law has already impacted on foreign investment in China. From April of 1985 to March of 1986, over 19,000 applications were filed, and of those, thirty-five percent were filed by foreigners. The Patent Law corresponds to internationally prevailing patent law procedures.

The China Patent Office evaluates and approves patent applications. The Patent Office also establishes guidelines for the administration of patent offices in the PRC. China established the China Patent Office and began implementing regulations for the administration of patents in the PRC. The New Patent Law has already impacted on foreign investment in China. From April of 1985 to March of 1986, over 19,000 applications were filed, and of those, thirty-five percent were filed by foreigners. The Patent Law corresponds to internationally prevailing patent law procedures.

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Council for the Promotion of International Trade (CCPIT) to deal exclusively with foreign-related patent applications, renewals, and disputes. The New Patent Law calls for the CCPIT and its auspices to manage all foreign-related patent issues. Just like the Trademark Law, the Patent Law provides that the first person to file with the Patent Office receives the rights to the patent. An exception to this general rule exists where a foreigner has a priority claim to the patent application. A foreign applicant will be permitted to use the date the product was patented in the foreigner's country to determine proprietary rights. Once the Patent Office grants a patent, the patent owner has a duty to manufacture or use its patented product.

The Patent Law expands protection to designs, utility models, and inventions. An invention or utility model can only be granted a patent if it possesses the characteristics of novelty, inventiveness, and practical applicability. Foreigners, foreign ventures, or other foreign entities not domiciled or without a business office in the PRC, are permitted to apply for a patent as long as the foreigner agrees to appoint a state patent agency to act in the capacity of an agent.

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250. Eliasoph, supra note 173, at 51. The CCPIT has a satellite office in Hong Kong, the China Patent Agency, for foreigners wishing to patent a product in the PRC while in Hong Kong. A second patent organization for foreign-related patents opened in Shanghai. Id.
252. Trademark Law, supra note 151.
253. Id. art. 9, at 650. When two or more applicants file for a patent, the patent right is given to the first applicant. Id.
254. Patent Law, supra note 150, art. 29, at 632. A foreign applicant only receives a priority claim where the foreigner's country and the PRC have a bilateral agreement for the mutual recognition of property rights. Eliasoph, supra note 173, at 52.
255. Patent Law, supra note 150, art. 29, at 632.
256. Patent Law, supra note 150, art. 51, at 634. If the patentee fails to use the patent within the duration of the granted time period then the Patent Office has the power to give anyone who applies a compulsory license to practice the patent. Id. art. 52, at 634. The recipient of the compulsory license must pay the patentee a reasonable use fee for the patent. Id. art. 57, at 634. Before the Patent Office will grant the compulsory license, the applicant must prove that there was a good faith effort to contract with the patentee for a license. Id. art 54.
257. Patent Law, supra note 150. A design refers to any new design of the color, shape, pattern, or combination of a product with practical applicability for industrial use. Implementing Regulations, supra note 245, art. 2, at 636.
260. Id. art. 22, at 631. The law interprets "novelty" as meaning that no identical invention or utility model has been publicly disclosed in the PRC or abroad. (No previous application may have been filed with the Patent Office.) "Inventiveness" has been defined as representing progress. "Practical applicability" means that the invention has to be good for some use. Id.
261. Id. art. 19, at 630.
The Patent Law does not grant patent rights to scientific discoveries, food, beverages, flavorings, mental activities, methods of diagnosis, pharmaceutical products and substances obtained by chemical process, animals and plants, or substances obtained by nuclear transformation. The Patent Law does permit patents for the processes used in producing food, beverages, flavorings, pharmaceutical products, chemically processed substances, and animal and plant varieties. China’s refusal to grant patents for pharmaceutical products is not unusual practice among developing countries. China does not patent chemical substances because it does not want to discourage creators of inventions from inventing new chemicals. In the near future, however, China probably will grant protection to chemical substances and uses of chemicals.

Upon infringement of a patent right, the Patent Law furnishes two methods by which to contest the infringement. The patentee can either sue the infringer in court or apply to the Patent Office for adjudication. Neither the Patent Law nor the New Patent Implementing Regulations expressly define what constitutes an infringement of a patent.

The future of the Patent Law seems promising. Not only has China enacted a legal structure to facilitate foreign investment and trade by encouraging foreigners to transfer technology, China has also joined international patent protection organizations. Of course, as with the New Trademark Law, only the interpretation of the New Patent Law will determine whether the Chinese are really committed

262. Patent Law, supra note 150, art. 25, at 631.
263. Id.
264. Eliasoph, supra note 173, at 50. Many developing countries feel that pharmaceutical and food items cannot be patented because of the increase in the cost of these essential items to mankind. Any additional cost, such as patent royalties, will increase the cost of the items and make them less available to the people who can least afford them. Id.
265. Id.
266. Id.
267. Patent Law, supra note 150, art 60, at 635.
268. Id. The statute of limitations on an infringement suit is two years from the time that the patentee or successor in interest knew or should have know of the infringement. Id. at art. 61, at 635. The Patent Law places the burden of proof on the defendant to show the infringement of a process. This increases the protection of patent rights given by the Patent Law. Id. art. 60, at 635.
270. China has also enacted the Interim Provisions of the State Council on Technology Transfer and Regulations of the People’s Republic of China for the Administration of Technology Regulations (Technology Regulations). The Technology Regulations prohibit a licensee from disclosing any information on classified technology information. Horsley, supra note 166, at 20.
to providing effective protection to industrial and intellectual property, or whether the Chinese are only mouthing what foreign investors and traders want to hear in order to attract investment and technology.\textsuperscript{271} Reaction to China's legislation protecting industrial and intellectual property rights has been favorable.\textsuperscript{272} The consensus of foreign commentators seems to be that Chinese officers in the government agencies have presented a flexible attitude in interpreting the legislation.\textsuperscript{273} Soon, China will be adding to its arsenal of industrial and intellectual property rights protection a law protecting copyrights.

C. Copyright Law

1. Background

At this time, China has not completed a comprehensive copyright law.\textsuperscript{274} Furthermore, China has not joined any international copyright conventions.\textsuperscript{275} China does compensate an author or publisher for the right to publish the work;\textsuperscript{276} but, unlike the resolutions enacted in the 1950s, the present laws do not protect the artist from others changing it.\textsuperscript{277} Foreign publications have never received protection in

\begin{itemize}
\item \textsuperscript{271} Eliasoph, \textit{supra} note 173, at 50.
\item \textsuperscript{272} Stuermer, \textit{Foreign Exchange Update} in \textit{THE CHINA BUS. REV.} (Sept.-Oct. 1987) at 16. Direct foreign investment in the PRC has remained about $1 billion during the past several years. In 1983, China had direct investment of $0.5 billion. In 1984, direct investment increased dramatically to $1.1 billion and has remained approximately at that level. \textit{Id.} at 15.
\item \textsuperscript{273} Eliasoph, \textit{supra} note 173, at 54. In 1980, China established the Trade and Development Program [hereinafter TDP] to provide foreign investors and exporters with feasibility studies of major industrial projects with large export potentials. The TDP has become successful in planning the modernization of existing PRC facilities and new construction projects. China has backed the TDP by quadrupling its budget since 1981 to $21 million dollars in 1985 for funds used to help U.S. firms export goods and services to developing nations. China's share of the budget in 1985 will be $4 million. Holmes, \textit{TDP in the PRC}, in \textit{THE CHINA BUS. REV.} (Sept.-Oct. 1985) at 8.
\item \textsuperscript{274} Goossen, \textit{supra} note 154, at 38. Ideological restraints prevent the copyrighting of literature works. Leung, \textit{supra} note 153.
\item \textsuperscript{275} Horsley, \textit{supra} note 166, at 22. China has not applied for membership to the Universal Copyright Convention nor to the Berne Convention for the Protection of Literary and Artistic Works. \textit{Id.}
\item \textsuperscript{276} \textit{Id.} 1980 Provisional Regulations for Remuneration for Book Writing. \textit{See also} Goossen, \textit{supra} note 154, at 38, citing Guiguo Wang of Johnson, Stokes & Master, Solicitors & Notaries, Hong Kong, July 9, 1986.
\end{itemize}
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the PRC. A Chinese writer has no legal right to protection for his literary work; a writer is only entitled to a salary, the same as any other worker in the PRC. The state owns any right to the work under the socialist system.

In 1982, the State Council passed the Notice Approving the Circulation of the Interim Provisions on the Management of Audiovisual Manufactures by the Ministry of Radio and Television (1982 Notice). Significantly, the 1982 Notice grants an author or performer protection for the work by suggesting that copyrighting should be available. Additionally, the 1982 Notice permits an author or performer the right to receive royalty payments. Most importantly, the 1982 Notice strictly prohibits duplication or publication without permission by the writer or performer. The 1982 Notice has been suggested as the prototype for the copyright law presently being drafted in the PRC.

The Chinese have established the State Copyright Bureau (Bureau) to draft a copyright law for the PRC. The members of the Bureau have been receiving guidance on copyright protection from the World Intellectual Property Organization. The Chinese government has also enacted legislation (Civil Code General Rules) granting both nationals and foreigners the right of authorship. This Civil Code permits authors to be rewarded for their work. This latest development in China's copyright legislation history indicates that China will soon lay another cornerstone in its legal foundation for the protection of industrial and intellectual property rights.

V. CONCLUSION

With the burden of ensuring that one-fourth of the world's population has food, shelter, and a meaningful life, the Chinese
government realized in 1978 that a change in policy was required. Since 1978, China has thrown open its “door” to welcome foreign investment, the transfer of technology, and foreign trade. When opening the “door” to “foreignism” was insufficient to achieve the goal of modernization, the Chinese government rebuilt parts of its economic and political system to attract more “foreignism.” The promulgation of the Trademark Law, the Patent Law, the Foreign Investment Law, and the Copyright Law and their implementing regulations evidence China’s attempt to make itself more attractive to foreign investment by other states. Whether or not more foreigners will invest and the current investors will invest more, depends on whether China carries through with her intentions of implementing further laws and interpreting the current laws to overcome the difficulties foreign investors have faced.

China, no longer content to exist in isolation, has recognized the need to trade and receive foreign capital and technology in order to develop economically. To achieve this goal, China has extended invitations to the rest of the world to invest in China by the restructuring of its political and economic infrastructure in accordance with internationally accepted principles of the Western world. China, however, has not wholeheartedly accepted the Western system of capitalism. Instead, as demonstrated by the restrictions placed on foreigners doing business within or with China, the Chinese have again taken another theory of economic development and molded it to fit the goals and characteristics of the Chinese state. Although one could say China has "gone capitalist", it is more likely that China has taken some aspects of capitalism and incorporated them into a Chinese system. It remains to be seen if China will be able to maintain control over the system it is developing, or if the system will, in effect, develop China. The Chinese, at this time, are controlling foreign investors and foreign enterprises with whom they do business; however, as more foreigners decide to invest in China, will China still be able to limit the type of foreign capital and technology and oversee the direction of the enterprises established with the participation of foreigners? Will foreign influence take control of China once again now that China has opened her “doors” to the outside world, or will China become so economically interdependent on the Western economic system that China will not be able to shut the “door?”

291. Hillman, supra note 66, at 155.
This writer's exploration of the recent changes in the economic and political structure of China suggests at this time China, anxious to be part of the growing economic power of the Pacific Rim, will continue to invite foreign participation in her economy.  

292. The Pacific Basin is one of the fastest growing economic regions in the world. The Pacific Basin describes the area surrounding the Pacific Ocean. Accordingly, the countries included in the Pacific Basin are the United States, Japan, Australia, Hong Kong, Singapore, Taiwan, South Korea, Indonesia, Malaysia, the Philippines, the People's Republic of China, Thailand, and Brunei. R. Rosendahl, *Current Legal Aspects of Doing Business in the Pacific Basin*, xxv (1987).

The economic growth rate of the Pacific Basin has surpassed the growth rate of other regions of the world. The Pacific Basin is fast becoming a centralized world economic power. Id. The United States, for example, depends heavily on the Pacific Basin as a trading partner. Id. at xxvi. The United States trades with Pacific Basin countries more than twice as much as the European Economic Community. Id. To maintain this growth rate, the Pacific Basin countries need foreign investment to vitalize their economies. R. Herzelstein, *United States Trade and Investments Strategies in the Pacific Basin*, R. Rosendahl, *Current Legal Aspects of Doing Business in the Pacific Basin*, 11 (1987). As a result, these countries have attempted to develop new methods of attracting and keeping foreign investment. For example, some countries have passed legislation that grants greater protection to intellectual property rights of foreign investors, encourages foreign investment, and permits foreign investment in previously closed areas of its economy. Fin. Times, May 1, 1987, at 32.

The Singapore high court held that copyrights in works first published in the United Kingdom are protected notwithstanding that Singapore is now an independent sovereign state, thus granting copyright protection to works in Singapore that were published in the United Kingdom. Id. The Copyright Act was amended in December 1986, to ease the burden of proof on the owner of the copyright. The owner need only prove that the infringer ought to have reasonably have known that the copyright had been infringed upon. Fin. Times, Jan. 27, 1987, at 5 Japan. Law Letter, Feb. 1986. The Singapore government enacted legislation in 1986 permitting foreigners to hold a majority interest in Singapore stockbroking firms. Foreign banks and brokers will also be allowed to trade in stocks on the unlisted securities market it is launched. Id. *East Asian Exec. Rep.*, Feb. 1987, at 8.

The Cultural Affairs agency, the governmental body in charge of copyright law in Japan, proposed three extensions of the Copyright Law. The proposals include: enacting a fifty year copyright protection for creative data bases, registering computer programs to prevent private copying, expanding the protection to wire carrier services, computer and videos text, and providing quasi-copyright protection for cable, radio and television programs. Id. *Japan. Law Letter*, Jan. 1987, at 30.


The Indonesian government passed a bill in October 1987, strengthening control over the piracy of foreign copyrights. The penalty for infringement was increased to $5000 and 5 years imprisonment. *Id.* On September 9, 1987, the Indonesian Parliament passed an amendment to its copyright law with substantially stricter penalties for copyright infringement. An infringer could face a maximum of 7 years in jail and pay a $3000 fine. Indonesia has also begun drafting a Patent Law. *Id.* Fin. Times, May 1, 1987, at 4. The Indonesian government has simplified its investment regime. The changes enable foreign investors to form joint ventures in mining, pharmaceutical, agricultural support services, land and sea transport, and tourism. *Id.* Fin. Times, Jun. 20, 1986.

The South Korean government passed legislation protecting intellectual property rights. South Korea's recent comprehensive copyright bill will protect pharmaceutical patents and remove
as long as China prospers from her interaction with the Western states and still perceives an economic backwardness in her economy, then China will be a willing participant in the economy of the Western world. The question then becomes what level of economic development is enough? Is China already caught in the trap of progress like the rest of the world? Will China be able to say no to cars, phones, computers, freeways, televisions, VCRs, compact discs, garbage disposals, highrises, medical advancements, and labor-saving devices? Furthermore, now that the generations who experienced the indignities of foreign occupation of China are slowly moving out of political power, will resistance to "foreignism" and the strident need to limit it still exist?

Additionally, the Chinese political theory may be in jeopardy from the lack of ardent support among the Chinese people. Millions of Chinese are not believed to strongly support the Marxist ideology, but merely respect the Communist Party for having united and vitalized the Chinese nation, thereby restoring the Chinese national pride. Over 400 million Chinese have been born since 1949 (approx-


The Hong Kong Inland Revenue Ordinance was amended to include a section requiring that the expenditure incurred in purchasing patent rights or the rights to any trademark or design may be deducted for tax purposes. One limitation on the deduction is that the trademark or design must be used in the production of income. Previous deductions were limited to registration costs, not capital costs. Id. EAST ASIAN EXEC. REP., Jan. 1987, at 7.

Taiwan amended its Patent Law on December 24, 1986. The amendment enhances patent law protection. Technical revisions were made on one-quarter of the 133 articles of its patent law. The amendment expands the patentability of certain types of new inventions, enhances the remedies for patent infringement, and places additional restriction on patent protection. Id. Fin. Times, Jun. 15, 1984, at 5. Taiwan amended its Statute for the Encouragement of Investment promulgated on January 26, 1987. Id. The amendment exemplifies Taiwan's trend in liberalizing the country's economy through more flexible government policies on investment in the areas of foreign branches, venture capital investment enterprises, and high technology projects. Id.

The Malaysian government promulgated the Malaysian Promotion of Investment Act 372 of 1986. The changes in the investment law permits foreign ownership of companies that export fifty percent or more of their output and unlimited foreign participation allowed for companies employing more than 350 Malaysian workers in the enterprise. Id. Fin. Times, Jul. 18, 1987, at 3.

The Philippine government has drafted the Philippines Omnibus Investment Code. According to the draft approved by the Board of Investment, the Code encourages foreign investment, but does retain some power to limit foreign investment in areas where the government considers investment to have reached a desirable level. Fin. Times, Jun. 11, 1987, at 6. Fin. Times, May 29, 1987, at 4.
imately sixty percent of the population) and have no personal loyalty to the Communist party for the liberation from deprivations and physical insecurities of the pre-1949 Chinese society. Moreover, there may exist 40-50 million counter-revolutionaries who, because of their political activity or economic status, the government has punished by imprisoning, surveilling, or forcing them to perform labor.

Further, not all the Chinese who appear to support the Communist political system are believed to be ardent supporters. Most Chinese people are not concerned with the activities of the political party, but are more concerned with just making a living. As the Chinese population becomes accustomed to living and working within a capitalist and more prosperous society, it may come to be that these non-ardent supporters of Marxism will decide that capitalism suits them to a "Tea." The Chinese people are becoming more educated, prosperous, and have greater contact with the Western world. The impoverished society which the Chinese Communist Party emancipated no longer may be willing to be directed by a political body that does not have the ideological support of the people. Thus, the Chinese Communist Party will not only have to deal with the foreigners they invited inside who may overextend their welcome, the Chinese Communist Party will also have to convince the younger generations of the rightness of the Communist Movement and its economic system.

China's economic as well as political system may undergo uncontrollable changes in the future as it did in the 1900s when China was militarily unable to control its land. Today, China has invited in the "enemy" of the 1900s to develop in its economy. Additionally, China has established provisions in the new laws to control foreign exploitation. The "enemy" this time, however, may not be foreigners, but may be the new generations of Chinese who do not possess the same values of traditionalism and cultural superiority as the past generations. China will continue to attract the attention of the world as it attempts to deal with the effects of the political and economic changes it has wrought.

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293. See Baum, Politics and the Citizen in The China Difference (R. TERRILL, ed. 1979).