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China Law

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I. Introduction

Dynamic legal development continued throughout 1998 in China, despite the election and transition of the new National People's Congress (NPC), Government, and Supreme Court.[1] Legislative progress is notable in at least two aspects. First, the transparency of national legislation has been significantly improved. Unlike the previous congress, the new legislature has adopted the practice of publishing drafts of laws for public discussion and comment before they are officially enacted.[2] Second, the Asian financial turmoil has mandated legislative focus on the financial sector. The national campaign against judicial corruption also has generated quite a few decrees and circulars from the Central Government and the Supreme People's Court.

In contrast to extensive reviews of previous years, this year's review highlights developments in limited legal areas of significance, with some analysis and critical comment. In order to reflect both legislative and practical reality, the legal sources covered by the 1998 review include not only national legislation and government decrees, but also circulars of the Supreme People's Court and ministry regulations. Although the writer hopes that the new approach may better illustrate legal developments in China, the implications of these developments cannot be fully explored in this limited space.

II. Constitutional Legislation

The Zhu Rongji administration began with a bold reform of the government's structure through the Plan of the Departmental Reform of the State Council approved by the NPC in March 1998. The plan led to reducing from forty to twenty-nine the number of ministries

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1. The Eighth National People's Congress ended in early March 1998. The First Session of the Ninth People's Congress was held from March 5 to 19, 1998, and its Standing Committee began its session on March 16, 1998.

2. For example, the draft of the new Law on Land Administration was published on April 29, 1998, to solicit public, and particularly expert, opinions. The law was passed on August 29, 1998, with revisions. The draft of the uniform Contract Law was published on September 5, 1998, and is pending adoption as of the time of this writing.

and commissions under the State Council. The main purposes were improved efficiency by streamlining the bureaucratic structure, separation of governmental function from enterprise operation under the market discipline, and promotion of rule of law by rationalization of powers and responsibilities among the departments.

Currently, the departments of the State Council are grouped into four categories by function: macro-control organs such as the State Development Planning Commission and the People's Bank; economic regulatory departments, including the Ministry of Foreign Trade and Economic Co-operation (MOFTEC); state political administrations, including the Ministry of Foreign Affairs and Ministry of Justice; and other departments in charge of education, scientific development, and social welfare.

Although the reform surely represents support for transition to a market economy, there are still some worries. For example, many laid-off government officials with little business knowledge and experience have been sent to state-funded companies. As a result, installation of professional management and liberation of enterprises from state control or influence may be delayed. Moreover, similar structural reform has proved ineffective several times during PRC history.[3] Thus, the reform's success must be measured by its longevity.

The Organic Law of Villager Committee (Organic Law) passed by the Standing Committee of the NPC became effective on November 4, 1998, after over four months of soliciting opinions. As a result, the Organic Law (on Trial Implementation) of 1987 was repealed. On one hand, the legislation illustrates progress in rural democratic governance in the past decade; on the other hand, it tries to relieve years of building tension between the government and farmers regarding unfair distribution, excessive taxation, and abuse of powers.

According to the Organic Law, a villager committee is a rural, grass-roots organization based on self-governance, self-education, and self-service. The main functions of such a committee include handling collective affairs, mediating civil disputes, assisting with local public security, and conveying villagers' concerns and demands to the upper levels of government. It is also responsible for developing the local economy by organizing and supporting cooperative production and administrating collectively owned land and other assets.

A villager committee is composed of three to seven people chosen in an open election for a term of three years. The Organic Law requires the number of candidates to exceed the number elected. The committee reports its work at a village meeting that is attended by all villagers over eighteen years of age. Important village matters prescribed by the Organic Law must be discussed at the village meeting before implementation. The financial condition of the village must be published for all villagers at least once every six months. One-fifth of village meeting members may propose to dismiss a committee member, subject to majority approval. However, at the same time, the Organic Law provides that the grass-roots organization of the Communist Party shall play a leading and central role in autonomic rural activities.

On October 25, 1998, the State Council promulgated three regulations concerning registration of social organizations, which became effective immediately and will have a significant impact on realization of the constitutional right of free assembly and association. The Regulation on Registration of Social Organizations (Regulation on Registration) defines

3. In the PRC history, such movement to simplify the government structure took place from the 1950s through the 1980s. Each time, the size of the government became even larger than the simplification in a short period of time.

such an association as a non-profit social organization formed by citizens voluntarily to implement their common wills in accordance with its charter. In addition to strict registration procedures, under article 10, the substantive legal conditions to establish a social organization include a minimum of fifty members, a fixed location, a lawful financial resource, an activity fund of RMB 100,000 or RMB 30,000 for national or regional organization respectively, and capacity to assume civil liability.

However, article 4 requires that any social organization must abide by the Constitution, laws, regulations, and state policy; must not oppose the fundamental constitutional principles;[4] must not endanger the unification of the state, the state safety, and unity of all the nationalities; must not harm the state interest, public interest, and the lawful interest of other organizations or individuals; and must not violate social morality. Further, articles 33 and 35 stipulate that administrative or even criminal penalties may be imposed for violations, including *ultra vires* activities, raising funds or acceptance of financial aid in violation of law, preparation of social organization without approval, and conducting activities beyond the scope of registration. As such, the clear purpose of the Regulation on Registration is to restrict, rather than facilitate, formation of social organization.

Notably, the Regulation on Registration was issued after China signed the International Convention on Civil and Political Rights and coincided with a series of trials of political dissidents who applied to the government to form a democratic party.[5] The legislation demonstrates the longstanding contradiction in China between the accelerated economic reform in support of a market economy and the complete ban on political reform.[6]

The other two regulations of the State Council are applicable to administrative unit registration and registration of civil non-enterprise units.[7] These regulations are much shorter than the social organization regulation and were enacted on a provisional basis. Nevertheless, they are also subject to politically based restrictions. For example, the bans stated in article 4 of the social organization regulation must be equally applied to civil non-enterprise units.

After the return of Hong Kong, China will restore its sovereignty over Macao on December 20, 1999. In order to prepare for this historical event, a series of enactments were adopted by the Preparatory Committee of the Macao Special Administrative Region (Preparatory Committee). For instance, the Opinion Concerning Acceleration of Localization of Public Servicemen, dated July 12, 1998, urged the current Portuguese government to primarily localize departmental leaders in 1998. On May 6, 1998, the Preparatory Com-

4. The preamble of the Constitution of the PRC states that Chinese people shall adhere to people's democratic dictatorship and socialist road under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, which have long been referred to by the government as the Four Fundamental Principles.

5. Recently, several political dissidents from different regions were arrested and sentenced to imprisonment after they applied to the local governments to establish and register a political party.

6. Many distinguished scholars have argued that the economic reform has been burdened by the corrupt political system and thus may not be conducted on a basis of justice without correspondent political reform. For an excellent book on the subject, see DONG YUWEN, POLITICAL CHINA: FACING A TIME OF NEW SYSTEM (Shi Binghai ed., 1998) (in Chinese). The former paramount leader Deng Xiaoping is quoted as saying that "in a sense, the final success of our economic reform depends on the reform of the political regime." *Id.* at 7.

7. Article 2 defines a civil non-enterprise unit as a social organization that is established by an enterprise, administrative unit, other social organization, or individual with non-state capital and engages in non-profit social services.

mittee adopted its Working Procedure. Although the committee is the body in charge of the Macao's return, its members are appointed rather than elected. Moreover, the Preparatory Committee must function under the principles of collective responsibility and confidentiality. Individual members may not bring any internal debate or disagreement to public attention.

III. Legislation on the Financial Sector

Throughout 1998, the Chinese Government was under tremendous pressure to deal with the Asian financial turmoil and the continued heavy losses of state-owned enterprises (SOEs). Twice in 1998, the Standing Committee of the NPC (Standing Committee) approved a State Council application to issue additional treasury bonds as emergent measures to support the state banks and the exchange rate of Renminbi (RMB). On February 28, 1998, the Standing Committee by a special resolution authorized the State Council to issue treasury bonds of RMB 270 billion in order to increase the capital of the four state commercial banks. On August 29, the State Council was authorized to issue treasury bonds of RMB 100 billion to the state commercial banks to promote domestic growth through infrastructure investment. As the State Council admitted, the country faced a serious challenge in a complicated and unprecedented situation, and as a result of the issuing, the national budget deficit was increased from RMB 46 billion at the beginning of 1998 to RMB 96 million.[8]

The unprecedented amount of bonds issued and the approval procedure were aimed at reducing the risks of the Chinese banking system. According to the latest information, the real rate of capital adequacy of the four state commercial banks, after deduction of RMB 120 billion bad debts owed by SOEs, would be only 3.5 percent, far below the safe rate of eight percent as provided in the Basel Agreement as well as the Commercial Bank Law of PRC of 1995.[9] As such, the issuing of the treasury bonds would serve to make up for the deficit.

In order to maintain order in the financial market, a series of regulations were adopted by various state authorities. For example, the State Council promulgated the Measures to Outlaw Illegal Financial Institutions and Unlawful Financial Business Activities on July 13, 1998. Article 3 of these regulations outlawed institutions including any organization that takes deposits, grants loans, or engages in settlement, discount commercial paper, finance, trust and investment, financial leasing, provision of security, or foreign currency trading without the approval of the People's Bank. The ban is also applicable to securities, insurance, foundations, and other financial services firms established unlawfully. On August 1, 1998, the State Council issued the Notice Concerning Further Consolidation and Regulation of Futures Market. This decree annulled eleven of fourteen then existing futures markets in China and subjected the entire futures market to the regulation and supervision of the China Securities Regulatory Commission (CSRC). The CSRC is empowered to appoint the general and deputy general managers of all the markets and to approve futures brokerages. To further control market speculation, the regulation suspends trading of twenty-three of thirty-five commodity items and strictly bans exterritorial futures trading.

8. Prime Minister Zhu Rongji proposed an act concerning additional issuing of treasury bonds and adjustment of state financial budget to the Standing Committee of the NPC on August 20, 1998.

9. *See* CHINA ECON. NEWS, Nov. 9, 1998, at 1–2.

Severe penalties also have been introduced to combat financial market violations. The Standing Committee adopted its Decision on Punishment of Fraud, Dodging and Unlawful Trading of Foreign Currency on December 29, 1998. It amended the Criminal Law of 1997 by not only creating new offenses, but also subjecting violators to more severe penalties, up to life imprisonment. Moreover, under the decision, staff of the Custom, the state foreign currency authorities, financial institutions, and foreign trade companies are all subject to criminal liability if their negligence causes any serious loss for the state. In fact, on August 8, 1998, the Supreme People's Court issued a circular to strengthen the sentencing policy for financial crimes. Apparently, extensive and prevalent violations[10] forced the national legislature to change the law. Also, on January 19, 1998, the Notice Concerning Seriously Dealing with Liability of Violators of Financial Order was issued by the Ministry of Finance, the State Auditing Bureau, the Ministry of Supervision, and the Supreme People's Procuratorate. The document admitted that the laws and regulations of the financial sector were ineffective and thus required subordinate branches to intensify law enforcement efforts.

The most notable achievement in financial legislation in 1998 is the passage of the first Securities Law of PRC, which finally ended the eight-year operation of the securities market in China without an official national law and also concluded six years of drafting plagued by ideological and technical controversies. The Securities Law became effective July 1, 1999.

The adoption of the law is considered an encouraging sign of the government's firm commitment to a market economy in China and its orderly development. The law codified a centralized and uniform regulatory framework, which is similar to the FEC model in the United States, to replace co-regulation by both the central and local governments and various state authorities. As such, regulatory efficiency should be improved. Moreover, the law focuses on investor protection, with the higher standards of information disclosure and severe penalties for various violations. More market-oriented rules are also introduced into the Chinese securities market. For example, the state substantive approval for stock issuing and listing now is replaced with transparent authorization procedures, which may be a step closer to a registration system although the implementing details depend on further enactment. Rules governing acquisitions on the securities market have also been amended to promote market efficiency. According to the Securities Law, after acquiring five percent of a listed company's stock, an investor must report to the state authority and make publication of its holding fluctuation of every five percent—instead of two percent as under the old regulation—before reaching the threshold of tender offer. Thus, the cost of acquisitions on the securities market is significantly reduced.

However, the legislation fails to reach the goals many expected it to achieve. As more than half of the provisions are connected with the CSRC, the law is restrictive instead of enabling. The CSRC has extensive powers, but not subject to sufficient checks and supervision. Also, some serious problems with the development of the Chinese securities market have not been solved. The Securities Law lacks a definition for securities; the domestic and foreign investor markets are still separated; stocks held by state and state-controlled legal persons are still prohibited from entering the market; securities trading on credit is pro-

10. For example, according to the results of a recent investigation, in the period from 1996 to the first half of 1998 alone, 5,000 false custom forms involving $8.5 billion (U.S.) were discovered. The sum involved in other illegal transactions is described as "alarming." *See* CHINA ECON. NEWS, Nov. 16, 1998, at 1.

hibited; securities firms are forbidden to finance client trading or lend securities to their clients; and an over-the-counter market is still banned. As the securities market continues to be treated as a state-controlled business, civil remedies cannot be addressed properly.

In 1997, the World Bank found that corporate debenture is the least developed sector of the Chinese capital market.[11] In order to improve the situation, the People's Bank enacted Provisions Concerning Administration of Enterprise Bond Issuing and Trading on April 8, 1998. The legislation has seventy-eight articles in nine chapters, covering general principles, issuing, underwriting, guarantee, registration, transfer, information disclosure, and legal liabilities. The most interesting part is the requirement that all issuers of enterprise bonds must provide guarantee. The provisions require a guarantor to be an enterprise-legal person with net assets valued at more than the proposed bond issuing and its interest; no reorganizations, dissolutions, or major litigation; and other conditions prescribed by the People's Bank. The rules reflect the government's deep caution in opening the bond market in China.

The legal effect of the legislation, however, is not uncertain after the adoption of the Securities Law in December 1998. First, the CSRC has now taken over the People's Bank jurisdiction over corporation bond regulation. Second, the national law may supersede the previous departmental regulation. Finally, the CSRC is taking action to overhaul the existing securities regulations and thus revision and updating may be inevitable.

The State Administration of Foreign Exchange (SAFE) promulgated the Detailed Implementation Rules Concerning Provision of Security by Domestic Institutions Inside China to Foreign Institutions, which became effective January 1, 1998. The rules are applicable to provision of security by domestic firms to foreign institutions, including foreign financial entities inside China, for foreign loans, other financial services, finance lease, compensation trade, project contract outside China, or other debts.

Article 2 names the SAFE and its local branch as the state organ in charge of foreign security provision with the powers of approval, supervision, and direction of cost control. Article 8 further specifies the division of jurisdiction among SAFE and its local branches. Generally, provision of security for less than one year only needs to be approved by the local SAFE office concerned; security for one year or longer must first be examined by the local SAFE offices concerned, subject to the final approval of SAFE. If the guarantor is a national financial institution, an enterprise under the direct control of the Central Government, or a joint venture directly approved by the Central Government, both the examination and approval must be made by SAFE. However, security provided by a foreign wholly-owned enterprise established in China may be exempt from SAFE approval.

The rules also provide detailed procedures for guarantor applications and SAFE approval. The local SAFE must enter its decision with thirty days of receipt of all required documents and transfer the file to the upper-level SAFE, if necessary. SAFE's approval may only be valid for six months. A new approval is necessary if the guarantor fails to provide security within six months. In order to protect domestic institutions, article 17 also sets out the legal conditions for a foreign guarantee, including the minimum ratio between its net assets and total capital as well as its profitability.

In addition to general provisions of the Security Law of 1995, some further rules are articulated on foreign guarantee, foreign mortgage, and foreign pledge. For example, the sum of foreign currency security provided by a domestic financial institution and its own

11. *See* THE WORLD BANK, CHINA 2020: DEVELOPMENT CHALLENGES IN THE NEW CENTURY 35 (1997).

foreign currency debts shall not be more than twenty times its own foreign capital. Further registration, application to and approval by SAFE is necessary before a domestic institution carries out its security obligation, otherwise the foreign currency may not be remitted to the foreign guarantee.

IV. Land Law

The Law on Land Administration of 1986 was amended by the Standing Committee on August 29, 1998, and became effective on January 1, 1999. This was overdue, since the opening of the real estate market in 1988[12] made a few provisions obsolete. The amendment's purpose is to rationalize land use and to tighten up land use administration.

Under the law of 1986, the power to approve land use was shared by different levels of government, depending on the size of the land concerned. The "gold rush" after the opening of the real estate market, however, has caused many local governments to circumvent the law through piecemeal or delegated approval. As a result, 4.67 million hectares of cultivated land were lost between 1986 and 1995 and a large quantity of unsold commercial buildings and units are idle. The situation has seriously threatened the nation's development.[13]

Under the new law, regulation based on the purpose of land use replaces the administration based on the size of the land concerned. All national land is designated as agricultural land, constructive for industrial or urban development, or idle land. The Central Government formulates the national master plan of land use. The local governments must adopt their master plans of land use according to their own needs while abiding by the central government plan. Moreover, land use plans of provinces, their capitals, any cities with more than one million population, and other designated cities must be reported to the State Council for approval.

The law affords agricultural land special protection. In making land use plans, governments of all levels are required to strictly control agricultural land being converted for other uses. Any conversion of agricultural land to constructive land must be reported to the provincial government concerned. Any development of tract agricultural land by capital cities or provincial infrastructure projects must be approved by the State Council. Further, article 45 stipulates that conversion to state ownership of land collectively owned by rural farmers must be approved by the State Council if the land concerned is basic cultivated land, other agricultural land over thirty-five hectares, or other land over seventy hectares. Article 65 provides that one rural household is entitled to only one piece of housing land within the size limit prescribed by the provincial government. A farmer cannot receive another piece of housing land after he sells or leases his house.

As part of the protection, the compensation for using agricultural land has also been increased significantly. For example, the standard compensation for using cultivated land is six- to ten-times the land's average production in the past three years, increased from three- to six-times average production. Meanwhile, the state land authority has more supervisory and enforcement powers, and penalties for violation have increased.

12. Although some land transactions were conducted before 1988, the opening of the market was officially marked by the Amendment to the Constitution of 1982 on April 12, 1988, to liberate rights of land use from strict public ownership.

13. *See* Minister of National Land Resource, Legislative Note to the Standing Committee (Apr. 26, 1998).

Following the same trend, the Forest Law of 1984 was amended on April 29, 1998, by the Standing Committee of the NPC and became effective July 1, 1998. The major changes include documentation of forest ownership, protection of forests, reestablishment of public forest security organs, and imposition of more stringent legal liability.

The State Council promulgated the Regulation Concerning Urban Real Development and Operation Administration on July 20, 1998, which became effective immediately. This regulation is applicable to developer activity in urban infrastructure or commercial housing construction, transfer of development projects, and sale or lease of commercial housing. The minimum legal conditions for establishment of an urban real development enterprise include registered capital of over RMB 1 million, four qualified realtors or constructors, and two qualified accountants. A development enterprise with foreign investment must meet the conditions for a real enterprise in addition to those for a foreign investment enterprise under other regulations.

Land for urban development must be transferred for compensation, except where the law or the State Council provides otherwise. A development project must not only meet state approval procedures, but also must have its own capital equal to twenty percent or more of the total investment. A one-year delay of the development project may subject the developer to a penalty of up to twenty percent of the transfer compensation, and a two-year delay may entitle the government to recover the land without compensation.

To prevent market fraud, the regulation sets out the procedures and required documents for real estate transactions. Government approval is necessary where commercial housing units are offered for sale before completion. The regulation holds developers responsible for repair costs and losses during the guaranteed period. A purchaser may apply to the state quality control authority to examine the framework of the building and is entitled to rescind the purchase if the quality of the unit proves below the applicable standards. A purchase should be closed within ninety days after the delivery of the unit sold prior to completion or the conclusion of the contract on spot transaction. Various legal liabilities were established to deter violations.

In the course of reforming SOEs in recent years, many of the legal issues were dealt with by local regulations. The State Land Administration promulgated the Interim Provisions Concerning Allocated Right of Land Use in State Owned Enterprise Reform on February 17, 1998. The general principle emphasized in these provisions is that the right to land use now enjoyed by SOEs, which in most cases was allocated free of charge before the opening of the real market in China, must eventually be converted to a market system. As such, depending on the situation, allocated SOE land use rights may be assigned, leased, used as capital contribution, or reserved in the reform.

In particular, the provisions stipulated that allocated rights of land use must be assigned or leased if the SOE concerned is transformed into a limited liability company, joint stock company, share co-operative enterprise, or is merged by any non-state-owned enterprise. As a result, if a foreign investment enterprise tries to purchase a SOE or establish a joint venture with a SOE, the cost of land use rights must be considered. Article 6 further provides that in certain cities designated by the State Council under a pilot program of rationalization of capital structure, the proceeds from assignment of land use rights must be used first to settle with employees if the SOE is declared bankrupt. The provision triggers two legal concerns. First, the provisions as lower level enactments contradict the provision of the Bankruptcy Law of State Owned Enterprise of 1986 that recognizes the priority of secured creditors over others. Second, the application of the rule may lead to unequal treatment of employees and creditors in the designated cities and other regions.

V. Foreign Trade and Investment Law

In light of the government's efforts to prevent financial crisis in China, foreign investment has also experienced tighter restrictions. For example, relay-sale activities were eliminated by a sudden State Council decree dated April 18, 1998, which outlawed all forms of relay sales and ordered all such enterprises to either transfer or terminate before the end of October 1998. The decree caused a great shock since the State Administration of Industry and Commerce (SAIC) just issued its provision on relay-sale in 1997 to streamline the business. To enforce the state order, the MOFTEC, the SAIC and the State Domestic Trade Bureau jointly issued the Notice Concerning Transformation of Sales Methods of Relay-sale Foreign Investment Enterprises on June 18, 1998. The notice ordered all such enterprises to conduct their sales in stores and business transformations under the supervision of the appropriate authorities.

Following suit, the General Office of the State Council issued the Notice on Clearing and Consolidating Foreign Commercial Investment Enterprises Without Permission. According to this notice, forty-two foreign commercial enterprises were allowed to continue operations; 199 had to be consolidated to meet the legal requirement that foreign investment comprises more than fifty percent of the joint venture and its terms do not exceed thirty years; and business licenses of thirty-six foreign commercial enterprises were revoked on different grounds. Some local governments were openly criticized for their *ultra vires* approval of such enterprises.

In November 1998, the MOFTEC and the SAIC jointly issued Certain Provisions Concerning Capital Contribution to Sino-foreign Joint Ventures by the Parties. Under these provisions, if a joint venture is established through acquisition of assets of shares of a domestic enterprise, the foreign investor must pay the purchase price in full within three months of issue of the joint venture's business license. Extension up to one year may be allowed by approval from the state authority. However, the majority party under the joint venture contract may not be entitled to controlling power before the purchase or contribution amount is paid in full. Moreover, the parties to a joint venture are required to make their capital contributions at the same time in accordance with the ratio and time provisions of the contract. Where parties' contributions cannot be made at the same time, the approval of the state authority is necessary and the joint venture's profits must be divided according to the ratio of the actual contribution made by the parties. The direct implication of this enactment is that the rights and liabilities of the parties to a joint venture must be established by the amounts of their actual capital contributions, rather than the provisions of the contract.

The Supreme People's Court, in its Reply to the High Court of Shandong Province Concerning Winding-up of Foreign Joint Ventures effective on January 15, 1998, held that if one party to foreign joint venture filed a legal action for dissolution of the firm due to the other party's breach, the people's court may only limit its ruling to validity of the contract, its continuation, and any liability. The court shall have no authority to organize liquidation. As such, the restraint here illustrates the different judicial attitudes between common law jurisdiction and civil law jurisdiction, which lacks equitable remedies.

The Ministry of Finance promulgated the Provisional Measures Concerning Examination and Approval of Registration of Foreign Accountants in China on September 28, 1998. According to the regulation, a foreign member of China CPA Association who has not begun his practice in China may apply for registration in China. The conditions set out in

the regulation include the following: becoming a China CPA member for more than a year and passing the annual examination; practicing in an accounting firm in China and being recommended by the firm; having experience of over two years; and having resided in China for more than one year. A foreign accountant, once registered in China, must abide by Chinese law and be subject to supervision by Chinese regulatory organs. Moreover, a foreign accountant must practice more than half a year in China, or his registration will be revoked.

In the foreign trade field in 1998, China issued its first antidumping decision against foreign imports.[14] After a seven-month investigation, on July 9, 1998, the MOFTEC and the State Commission of Economy and Trade entered a joint preliminary ruling to take antidumping measures against imported newsprint produced in Canada, South Korea, and the United States. As a result, any firm importing newsprint from the three countries must pay cash deposits corresponding to the extent of dumping discovered by the authorities. The decision was based on the Regulations of Anti-dumping and Anti-subsidy of 1997 and highlighted the investigation procedure, the similarity of the domestic and foreign products, the method for calculating the extent of dumping, the damages to the domestic industry, and causation. The importance of the decision, however, lies not only in the legal standards applied in China for the first time, but also in China's willingness to participate in international trade with legal arms and fight back from its historical defendant position in many countries' antidumping proceedings.

The MOFTEC issued the Detailed Implementing Rules Concerning Administration of International Shipping Agency (ISA) (on Trial Implementation) on January 26, 1998, which is applicable to ISAs with foreign investment. In order to establish an ISA, the enterprise must have stable clients and sufficient goods for shipping; must be a Chinese legal person in the form of either limited liability or joint stock company; and must have at least five qualified business staff with experience of more than three years. Where an ISA engages in a multi-means shipping business, a domestic and international agency network is a condition. In addition to government approval and staff qualifications, an ISA is also subject to annual examination by the MOFTEC and renewal of its business approval every three years.

Under the rules, an ISA may receive both fees and commission from the goods owner and the carrier if its acts as an agent, but it may not take any commission from the carrier if it is an independent operator. Further, a representative office of an ISA in China is prohibited from engaging in any direct money-making activities. Its business is limited to business liaison, service introduction, market investigation, and technology exchange. The rules also allow ISAs to form trade associations on a voluntary basis.

VI. Criminal Law and Procedure

The most interesting development in this area in 1998 was the continuation of the battle among different state organs concerning application of the Criminal Procedure Law of 1996. After the law was adopted, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of State Safety each issued internal circulars to their subordinate branches with detailed rules for implementing the

14. The full decision was reprinted in 19 GAZETTE MINISTRY FOREIGN TRADE & ECON. COOPERATION P.R.C. 1998, at 3–7 (in Chinese).

law. As such, the law of 225 articles was supplemented by the Supreme Court interpretation of 342 articles and the Supreme People's Procuratorate's 414 articles. In the course of self-defining functions and powers, conflicts are inevitable. For example, article 137 of the law stipulates that the People's Procuratorate, in examining a case, must verify, inter alia, the facts and circumstances of the crime, including reliable and sufficient evidence. The Supreme People's Procuratorate tries to adopt somewhat relaxed standards in this regard in its circular. Under article 245 of its circular, for example, the facts of the crime are ascertained if the facts concerning conviction and sentence are verified but other facts cannot be verified, or the major parts of the witness testimony, the suspects' confession, and the victim's statement are consistent despite inconsistency in certain individual parts that may not affect the conviction. It seems that such standards are not accepted by the Supreme People's Court. According to article 117 of the Supreme People's Court circular, the judge must examine, inter alia, the clarity and certainty of all facts of the crime, including the identity, time, place, purpose, methods, results, and other elements. Article 118 of its circular further states that if the materials from the People's Procuratorate fail to meet the standards, the Court will ask it for supplementary submission within five days; the continued failure to meet these standards will justify the Court's refusal to take the case.

Against this background, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Safety, the Ministry of Justice, and the Legal Affairs Commission of the Standing Committee of the NPC sat down together and adopted the Provisions on Certain Issues Concerning Implementation of Criminal Procedure Law on January 19, 1998, with forty-eight articles to solve some conflicts among their interpretations. Upon promulgation, the previous conflict interpretations by different organs will be superseded by the provisions. Although, given existing conditions, the coordinated work is urgently needed, its legal status is not clear because the law only grants the Supreme People's Court the power to interpret law.[15]

The joint provisions clarify some issues. For example, under article 131 of the Supreme People's Procuratorate interpretation, the People's Procuratorate should decide whether to monitor a suspect's meeting with his lawyer. The joint provisions provide, on the other hand, that in the stage of investigation, the state organ concerned may monitor a suspect's meeting with his lawyer. However, once the investigation is over, it may no longer monitor suspect-attorney meetings.

Some solutions appear questionable. For instance, article 36 states that what constitutes "principal evidence" in a particular case to justify prosecution on sufficient grounds will be decided by the People's Procuratorate. Article 37 further provides that the People's Court must accept all cases filed by the People's Procuratorate. As long as the crime is sufficiently charged with evidence, a trial must be conducted and the People's Court may not refuse to try the case on the ground of insufficient evidence. As such, the People's Procuratorate will further increase its power over the suspect by taking advantage of adopting the standard for itself and forcing a trial using its financial resources.

However, the harmony seems short-lived. On June 29, 1998, the Supreme People's Court started its second round of interpretation by issuing a very long circular to local courts with 367 articles, which became effective on September 8, 1998. In addition to setting out de-

15. According to Article 33 of the Organic Law of the People's Court of 1979 as amended in 1983, the Supreme People's Court may interpret laws and decrees on issues of their concrete application in the trial.

tailed rules to streamline the implementation of the lower courts, in some aspects the circular apparently tries to regain control from the joint provisions. For example, article 12 of the joint provisions stipulates that during trial, a defense lawyer may go to the People's Court to examine, read, extract, and copy materials to be used as evidence. But article 40 of the Supreme Court circular reads: "the people's court shall make it convenient for defense lawyers to examine, read, extract and copy the materials concerning the charge and assure sufficient time. However, the materials shall not include those as clues of other cases." Significantly, the Supreme Court's circular also sets out detailed trial procedure rules concerning criminal cases with foreign elements. These rules cover jurisdiction, service, trial, defense, mandatory measures, and judicial assistance.

In recent years smuggling has become an extensive crime in China, involving government branches and even military units, and has substantially affected the economy. Several campaigns against the crime had little effect. In July 1998, a national conference was held by the Central Committee of the Communist Party and the State Council to start a new national campaign against the offense. As a result, some high-profile cases against high-level officials were published and an independent anti-smuggling armed force was established under the direct control of the Central Government in order to avoid local protectionism and corrupt intervention by other officials.

The Supreme People's Court promulgated its Interpretation on Certain Issues Concerning Law Application in Criminal Trials of Illegal Publication on December 17, 1998. Its eighteen articles focus on political publication against the government, copyright violation, and obscene publication. For example, Article 1 provides that one who knowingly publishes, prints, duplicates, or distributes materials with contents to stir up splittism, subversion of the government, or overthrowing the socialist system shall be punished as committed crime of incitement of splitting the country or of incitement of subversion of the government. With respect to copyright violation and obscene publication, the interpretation sets out the criterion for determining minimum, serious and specially serious criminal activities in order to facilitate lower courts to fix punishment accordingly. For these two offenses, the penalty may be upgraded by either a quantity of or profit from illegal publication above the Supreme Court's criterion.

Perhaps the most important criminal case heard by the Supreme People's Court in 1998 was the trial of Chen Xitong, former Beijing Mayor and a member of the Political Bureau of the Central Communist Party Committee. The trial began after he was detained for two years, although relatively simple offenses were charged. The case has been considered to have greater political implications than the criminal conviction itself. Chen Xitong was found guilty of corruption and neglect of his duty and sentenced to imprisonment for sixteen years. His appeal was dismissed by the Supreme People's Court in August 1998.[16]

VII. Civil Procedure Law

Since the 1991 amendment of the Civil Procedure Law of the PRC, extensive exploration of civil trial reform has been conducted nationwide, focusing on the introduction of an adversarial system, shifting the primary burden of proof from the court to the litigants, and promotion of professionalism. In recent years, several provincial high courts adopted the reformed procedures.[17] However, some conflicts emerge as by-products. Thus, the Supreme

16. 3 Sup. People's Ct. Bull. 1998, at 106 (Supreme People's Court, Aug. 1998) (in Chinese).

17. For example, a recently published book includes civil procedural rules adopted by high courts of Shanxi, Shanghai and Yunnan. RESEARCH OFFICE OF THE SUPREME PEOPLE'S COURT, TOWARDS COURTROOM (1997).

People's Court promulgated Certain Provisions on Issues Concerning Civil and Economic Trial Reform on June 19, 1998, aiming at solving the conflicts and endorsing the achievements of recent years. The provisions, with thirty-nine articles in five sections, became effective on July 11, 1998.

Under the Civil Procedure Law as Amended in 1991, the parties to litigation must bear the major burden of proof. The People's Court no longer has a duty to collect evidence unless certain objective reasons prevent production of the evidence. However, the law does not spell out the test for such a division of collective duties between the parties and the court or the legal effect of the failure to offer proof. Some lower courts still considered that the assignment of burden of proof to the parties should only be enforced to the extent the substantive justice of the case is not affected. The Supreme Court, however, seems to be taking a different approach by developing a concept of independent procedural justice.

According to the Supreme Court, a People's Court only has a duty to investigate and collect the following evidence: evidence that the parties are not able to collect by themselves for objective reasons and that they submitted the requests and basis for such collection; evidence that will be examined and appraised by the court; major evidence produced by the parties that is contradictory; and other evidence that the court finds necessary to investigate and collect to handle the case. Where the court is unable to collect the aforementioned evidence, the consequences are borne by the party who must or should produce the evidence.

With respect to trial preparation, the most important change made by the provisions is that no member of a collegial bench or single judge bench may meet privately with any party or his attorneys before trial. The rule is designed to promote fair play and transparency and to prevent corrupt dealing between the judge and any party.

Trial procedures have been reformed significantly with an adversarial mechanism. Unlike the previous inquisitorial system controlled by the court, trials currently focus on parties' statement of the facts, production of evidence and presentation of arguments. As a result, the function of judges in a trial is transformed into guiding parties through procedure, helping parties to identify and focus on the issues, and chairing mediation. In particular, point 19 stipulates that members of the bench cannot opine on the nature of the case and the responsibilities of the parties or debate with the parties during the courtroom debate.

The provisions include some new rules of evidence. For example, evidence will be recognized against the party who proves it on cross-examination but later disproves it without introducing new evidence. The bench is required to examine a single piece of evidence from the means of its collection, its source, its form, the conditions of its producer and his relation with the case, and its originality. For the first time, the distinct legal authority of different evidence is recognized by the Supreme Court. Point 27 states that object evidence, historic record, appraisal conclusion, reconnaissance record, and notarized or registered documentary evidence will have more weight of proof than other documentary documents, audio or video materials, and witness testimony. Also, testimony in favor of a party provided by a witness who is a relative or has a close relationship with the party has less weight than other testimony. If a party holds evidence but fails to produce it without reasonable justification and the other side claims the evidence against the holding party, the content of the evidence will be deemed established.

Historically, collegiate and single judge benches had very limited discretion and independence. Most cases were actually decided by the trial committee of the court, the leaders of the court, or the division concerned. The provisions enable judges or benches to enjoy more freedom in civil and economic trials. Point 31 provides that members of a collegiate

bench must participate collectively in trial and be responsible for application of law and the result of the case. Where the facts are clear, the legal relations between parties are definite, the parties' responsibilities are sharply contoured, and the bench reaches an unanimous opinion, the judgment may be signed and issued by the presiding judge or a single judge alone. Judicial independence has been expanded. At the same time, the provisions hold the collegiate bench or single judge bench responsible for material errors in fact-finding or application of law that cause serious consequences.

The provisions also give parties more control over their cases. Point 35 explicitly states that the hearing of the second instance will be limited to the scope of the appeal; the appellate court may not examine issues that are not appealed by the party, except the judgment violating law, public interest, or third party interests. The respondent is entitled to compensation, including additional travel expenses and loss of working time, if the appellate court orders a new trial of the case due to new evidence introduced by the appellant.

Another perpetual problem in civil and economic litigation is the large number of effective judgments that cannot be executed because of local protectionism, judicial corruption, and lack of resources. By the end of the first season of 1998, unexecuted judgments accumulated to more than 580,000.[18] To deal with the tough situation, the Supreme People's Court promulgated the Provisions on Certain Issues Concerning Execution of People's Court on June 11, 1998, which included 137 articles in sixteen sections and became effective the same day.

According to the provisions, People's Courts may establish special branches in charge of execution. The upper-level court must supervise, direct, and coordinate execution of the lower courts. The provisions also set out detailed rules concerning execution jurisdiction. Where an application for execution of a judgment is filed with a People's Court, it must decide within seven days whether to accept the case based on its examination of the necessary conditions, including jurisdiction, effectiveness of the judgment, and the statutory limitation. Upon accepting the application, the court must notify the party subject to the execution within three days. Where the executee fails to carry out his legal obligation in time, the court may take compulsory actions. In addition to the traditional means such as sealing up, taking custody, and auction, some new rules specifically deal with the new property forms that emerge in the course of building up a market economy. For example, the court may order the entity concerned to deliver the dividend of the executee directly to the applying party. The executee's securities or investment equity may also be frozen or even transferred to the applying party. In foreign joint venture cases, the compulsory transfer may be made, subject to the consent of the other partner to the joint venture and the approval of the state authority concerned.

Under the provisions, execution may also reach a third party. For example, article 61 states that when the executee is unable to repay a debt, but has credit against a third party, the People's Court may, upon the request of either the applying party or the executee, issue the execution notice to the third party. The third party may be held liable if he repays the debt to the executee by disregarding the court's notice. A third party may also raise an independent claim against the object under the execution.

18. *See* Xiao Yang as the President of the Supreme People's Court, Speech Made at the National Conference of High Court Presidents (July 2, 1998) *in* 3 SELECTED READING MATERIALS OF ECON. TRIALS 1998, at 17 (in Chinese).

The provisions contain rules concerning change or addition of the executee. An owner of a private enterprise without legal person status, for instance, may be forced to use his own property to satisfy the legal obligation under the judgment if the enterprise is unable to do so. The same rule is applicable to partners of a partnership. Particularly, the doctrine of "piercing the corporate veil" is introduced against the abuse of corporate entity. Article 80 provides that the promoting institution is liable if the executee is found to have no assets available for execution and is under-capitalized or fraudulently transferred its capital. In such a case, the promoter will be added as an executee.

More detailed rules cover provision of security, settlement, execution with multiple creditors, and compulsory means of execution. Article 107 provides that generally execution must be completed within six months of application if accepted. However, certain special conditions may extend the term, subject to the approval of the president of the court. The provisions allow People's Courts to entrust, assist, and coordinate with each other on executive work. Article 136 imposes liability on responsible judicial staff if the court violates the executive decision of the upper-level court and causes serious consequences.

VIII. Campaign Against Judicial Corruption

The transition from a planned economy to a market economy in China has caused a money-rush in all walks of life. The judicial branch is no exception. According to Jiang Zemin, the President of the PRC and the General Secretary of the Communist Party, "the problem has seriously affected the image of our judicial team and damaged the reputation of the Communist Party and the Government."[19] As such, a national campaign against judicial corruption was conducted in 1998. In the first half of 1998, a survey of fifteen provinces found 10,340 wrongly decided cases, 261 in the judicial circle were penalized with administrative or Communist Party's disciplines, and thirty-three were convicted for criminal offenses.[20] In 1998 in the People's Procuratorate circle, 1,215 were disciplined and 113 were convicted.[21]

As a result of the movement, a series of decrees were adopted to subject courts and judges to tightened supervision and discipline. The Supreme People's Court promulgated Measures of Investigating and Affixing the Responsibility for Trial in Violation of Law by Judicial Personnel of People's Court's (on Trial Implementation)[22] on September 4, 1998. The disciplinary measures apply to intentional violation in trial with serious results.

More specifically, chapter 2 of the measures defines the scope of investigation, including refusal of accepting cases or accepting cases in violation of law; intentional failure to withdraw from interested cases; intervention with trial of lower courts; intentional refusal to collect principal evidence requested by the party concerned; distortion, forgery, or destruction of evidence or trial record, or insertion of false material into the file; intentionally concealing principal evidence or facts while reporting to the collegiate bench or the trial

19. Jiang Zemin, Speech Made in the National Conference on Political and Legal Affairs in Beijing, (Dec. 26, 1997) *in* PEOPLE'S DAILY, Dec. 26, 1997 (in Chinese). For a short discussion, see Xian Chu Zhang, *A Law Unto Themselves*, H.K. LAW., Mar. 1998, at 28–30.

20. *See* Xiao Yang, *supra* note 18, at 2.

21. *See* MIN PAO, Jan. 30, 1999, at A19 (in Chinese).

22. According to Article 34, the measures apply to all judges and assistant judges. However, other personnel of People's Courts including staff in charge of execution, clerks, court policemen, and judicial appraisers may also be covered by the principles of the document.

committee of the court; or intentionally entering a decision in violation of fact or law. However, a judge may not be held responsible for any error made through his incorrect understanding of law, regulation, facts, or evidence.

Liability may be imposed on either the responsible individual, the collegiate bench, or even the trial committee of the court, which is usually chaired by the president. Procedurally, any responsibility will be determined primarily by the court on which the responsible judge or bench sits, although the president of the higher court may order the lower court to investigate, or may deal with the case himself if necessary. The penalties provided in the measures include self-criticism, public criticism, judicial disciplines, and criminal liability.

As the first internal decree of such serious nature, the measures represent a timely move in the right direction to eradicate extensive corrupt practices in the judicial circle by explicit imposition of personal liability. However, there are uncertainties concerning the effectiveness of the measures in practice. First, in cases of intentional violations of the law through abuse of judicial powers, there is no doubt that both criminal and professional liabilities should be triggered. In this sense, it seems the promulgation is too late and does not add much to what should be demanded by fundamental justice. Second, the basis of liability is limited to intentional offenses. As such, many negligent violations are ignored. Errors caused by the judge's incorrect understanding of law, facts, and evidence are entirely exempted from any liability. Given the fact that most of the judges in China have never received formal legal education, the decree apparently tries to allow some breathing room. Third, investigating and affixing responsibility under the measures is an internal proceeding, rather than an independent determination.

To further enhance supervision of the judicial process, the Supreme People's Court issued its Certain Opinions Concerning Acceptance by People's Courts of Supervision of People's Congress and Its Standing Committee on December 24, 1998. In addition to reaffirming the normal checks by the People's Congress, including working reports, compliance with congressional decisions, acceptance of inquiries by members of congress, and solicitations for opinions and criticism, these opinions specify some new measures. For example, the People's Court is required to invite members of the same level of the People's Congress to visit the court individually or in a group, to invite congress members to audit important trial proceedings, and to appoint congress members as supervisors or special consultants.

Moreover, public supervision of judicial proceedings is also strengthened. In July 1998, an intellectual property case was tried in Beijing with unprecedented live TV coverage. Soon after, fifty high or intermediate People's Courts in twenty-two provinces followed suit.[23] As such, the main function of public trial is changing from a method to educate people to abide by law to a means of public supervision of judicial performance.

On October 6 and 7, 1998, a national joint conference was held by the Central Committee of the Communist Party, the State Council, and the Central Military Committee to outlaw business activities by military units, armed police forces, People's Courts, People's Procuratorate, and public security branches. The conference ordered these organs to disconnect themselves from the business firms that they established and to hand them over to the governments of the same level by the end of 1998. By the end of November, it was reported that the separation was complete in the judicial sector.[24]

23. *See* LEGAL DAILY, Nov. 7, 1998 (in Chinese).
24. *See* LEGAL DAILY, Dec. 9, 1998 (in Chinese).

Other important national legislation in 1998 includes the Law on Higher Education and the Law on Practicing Doctors. Also, the Law of Adoption of 1993 and the Law of Military Service of 1984 were amended.

IX. International Law

The Standing Committee of the NPC adopted the Law of Exclusive Economic Zones and Continental Shelf on June 26, 1998, which became effective upon promulgation. The law stipulates China's sovereignty over 200 nautical miles of exclusive economic zones and the continental shelf. Given the longstanding territory dispute between China and the Philippines, Japan and other countries, the law represents China's determination to protect her lawful interest.

In addition to several bilateral agreements ratified in 1998, the Standing Committee of the NPC ratified the International Convention on Protection of New Plan Species (1978 version), the Protocol on Prohibition of Illegal Acts of Violence in International Civil Airport in Supplement to the Convention formulated on September 23, 1971 in Montreal on Prohibition of Illegal Acts Which Jeopardize Civil Aviation Safety, the Revised Protocol on Banning or Restricting the Use of Land Mines, Tapping and Killing Installation and Other Devices Appended to the Convention on Banning of Restricting the Use of the Conventional Weapons Which May Be Considered of Excessive Antipersonnel Power or Excessive Killing or Wounding Power (the Second Protocol) and the Additional Protocol of the Convention on Banning or Restricting the Use of the Conventional Weapons Which May Be Considered of Excessive Antipersonnel Power or Excessive Killing or Wounding Power (the Fourth Protocol), and Convention on Minimum Age of Permitted Employment.

The most important international move by the Chinese Government was signing the International Convention on Civil and Political Rights on October 5, 1998. However, it seems more like a posture than substantive progress because the Standing Committee is not likely to ratify the signature anytime soon. The recent series of trials of political dissidents, the potential social instability caused by the high unemployment rate, the tenth anniversary of the Tiananmen Event, and the fiftieth anniversary of establishment of the PRC suggest that the government may not relax its political control in 1999. China will need substantial time to prepare to join the convention since much of the current legislation may have to be amended to comply with international standards.[25]

X. Legal Development Trend in 1999

In early 1999, a resolution to amend the current Constitution during the March 1999 plenary session of the NPC was adopted by the Standing Committee of the Communist Party and will include six important additions. First, Deng Xiaoping theory and development of a socialist market economy will be added to the preamble. Second, governance by rule of law will be in the Constitution for the first time. Third, the replacement of counter-revolutionary crimes that have been the subject of longstanding controversy with crimes to endanger state safety. The other changes focus on development of a private economy. For

25. For example, 3(g) of Article 14 of the Convention prohibits forcing the defendant into self-incrimination. But under Article 93 of the Criminal Procedure Law of 1996, the suspect is under legal duty to answer questions strictly according to the facts.

example, family contracting is the basis of a rural economy. A private sector will be recognized as an important component of the socialist market economy and protected by the state. However, the state will continue to guide, supervise, and regulate it.[26] The amendments, if adopted, will have deep impacts in furthering both political and economic reform.

Another important legal development for 1999 is the promulgation of the first uniform Contract Law in the PRC history. Since the 1980s, contract law in China has developed in a complex structure. Currently, domestic contracts, foreign contracts, and technology contracts are governed by three different national laws. Although the efforts to unify multiple contract rules were initiated in as early as 1993, the complexity of many issues including particularly, the reallocation of contract regulatory powers among the state authorities, harmonization of domestic and international practice, and compatibility of China's civil law tradition and certain common law doctrines, has prevented an earlier adoption of the draft. On September 5, 1998, the Draft Contract Law with 441 articles in twenty-three chapters was published for public comments. By the end of 1998, the published draft had been revised four times with 432 articles left.

Financial legislation will continue to be a national focus in 1999. With securities, insurance, and banking sectors being established under national laws as three independent pillars of the new financial system in China, more detailed rules will be enacted to streamline their practice and to continue to fight the negative impact of the Asia financial crisis. In this regard, some high-profile cases have attracted international attention. For example, in October 1998, the Central Government decided to shut down Guangdong International Trust and Investment Company (GITIC), the second largest foreign debenture issuer in China with unpaid debts of $4.39 billion (U.S.), which threw Hong Kong and other markets into a panic. In early 1999, the Guangdong People's High Court agreed to proceed with the bankruptcy of GITIC as the first bankruptcy case of a financial firm in PRC since 1949, involving the largest sum of money and foreign debts.[27]

The legislation concerning SOE reform may continue in two major areas. First, the social insurance and welfare enactment is necessary to contend with unprecedented unemployment.[28] Second, in-depth SOE reform will further improve the environment for privatization. As a result, it is expected that the Sole Proprietary Law will be adopted in 1999.

26. *See* S. CHINA MORNING POST, Jan. 26, 1999, at A7.

27. *See* H. K. STANDARD, Jan. 17, 1999, at A1.

28. According to Mr. Yang Yiyong, the Director of Macro-Economic Institute under the State Planning Commission, the unemployed population will reach 24 million in urban areas. *See* CAAC J., Jan. 29, 1999.