

9-1-1988

Foreword: Current Perspectives on Law and Business in China

Stephen G. Wood

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [International Law Commons](#), and the [Law of the Sea Commons](#)

Recommended Citation

Stephen G. Wood, *Foreword: Current Perspectives on Law and Business in China*, 1988 BYU L. Rev. 477 (1988).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1988/iss3/1>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Foreword: Current Perspectives on Law and Business in China

*Stephen G. Wood**

The Chinese calendar, supposedly invented by the Emperor Huang-Ti in 2637 B.C., designates years in cycles of 60. The years in each cycle are designated by a word combination formed from two series of terms. One of these terms is the name of one of twelve animals. Most of what we know as 1988 is the year of the dragon. The dragon is an auspicious, lucky sign. This year certainly has lived up to its designation for Brigham Young University's J. Reuben Clark Law School in terms of our contacts with China.

The J. Reuben Clark Law School has always had at least one contact with China: Chinese speaking students. Something that sets the law school at Brigham Young University apart from other law schools in the United States is the fact that approximately two-thirds of our students are bilingual. Chinese — either Mandarin or Cantonese — is one of the many languages spoken here at the law school, and approximately twenty students in any given year speak Chinese. It is the mother tongue for some of our students; other students have acquired Chinese ability by spending eighteen months to two-years as missionaries of the Church of Jesus Christ of Latter-day Saints in Hong Kong, Taiwan, or elsewhere. These Chinese-speaking students quite understandably have an interest in China.

In addition to having Chinese-speaking students enrolled, five events occurred during 1988 that made it an especially auspicious, lucky year for the law school. These events significantly increased our contacts with China to the delight of not only our Chinese-speaking students, but also the non-Chinese-speaking faculty and students of the law school.

* Professor at Law, Brigham Young University; B.A., 1966, J.D., 1969, University of Utah; J.S.D., 1980, Columbia University.

I. THE JANUARY CONFERENCE

The first event was a conference held in Provo, Utah on January 4-5, 1988. This issue of the J. Reuben Clark International and Comparative Law Annual, an issue of the Brigham Young University Law Review, contains seven articles, including six that were originally presented at the conference, and a seventh that was prepared as a response to discussions generated at the Conference. The theme of the conference was "Current Perspectives on Law and Business in China."

The conference was interdisciplinary, both in terms of sponsors and participants. The sponsors included three schools at Brigham Young University — the J. Reuben Clark Law School, the David M. Kennedy Center for International Studies (the Kennedy Center), and the J. Willard and Alice S. Marriott School of Management (the School of Management) — and the Intermountain Program in Pacific Rim Relations at the University of Utah. Thanks are in order to Ray C. Hillam, Director, the Kennedy Center, and Lee Radebaugh, Associate Dean, the School of Management, for their assistance and the assistance of their schools in making the conference a success. Special thanks are in order to W. Cole Durham, Jr., my friend and colleague at the law school, who conceived the idea of the conference and without whose tireless efforts and enthusiasm, the conference could not have been successful.

The participants in the conference also were interdisciplinary. Some of those who took part represented either the business community or law firms that provide legal services to the business community; others were academics; one was a career diplomat.

These seven articles in this issue can be divided into three groups. The first group, composed of two articles, sets the stage for a discussion of law and business in China by providing the reader with the necessary historical background. Ambassador Arthur Hummel's article, "China's Reforms and Her External Relations," provides us with a short-range view. He focuses on events since the People's Republic of China and the United States decided to resume normal diplomatic relations. In his article, Ambassador Hummel reminds us that China's reforms are taking place in a world where major changes are occurring. One of those changes is a shift from a bi-polar or tri-polar world to multi-polar world, a world in which a number of countries and country-groups do have and will have "substantial roles" to play.

The character of the China-U.S. relationship is another change described by Ambassador Hummel. In his view, that relationship has changed from one based on "romanticism" and "unreal expectations" to one that is "better rooted and more stable," a relationship in which "we see each other more clearly and realistically." Ambassador Hummel maintains that we need to be conscious of these changes because they both impact and are impacted by the reforms taking place in the People's Republic of China. With regard to these reforms, Ambassador Hummel's article contends that economic and political reforms are distinguishable, based on the reception they have received. He argues that there is "astonishing unanimity" about economic reform. There may be disagreement about the content, the pace, and the method of handling problems and mistakes that occur, but there are no opponents to economic reform itself. There, however, is "no such unanimity about political reform." Moreover, his "reluctant view" is that "there is little reason to expect that China's leaders will permit the Chinese Communist Party (CCP) in any way to share power with other political forces."

Stephen G. Young's article, "Observations on the Importance of Law in China," prepared as a response to discussions generated by the Conference, provides us with a long-range view. In his article, Professor Young suggests that the Western notion that Chinese social interactions are governed by personal virtue rather than regulation and punishment is a stereotype that "misleads more than it enlightens." He argues that personal virtue, on one hand, and regulation and punishment, on the other hand, enjoy "a symbiotic relationship" and that a more balanced view of their roles in Chinese life is achieved if we realize that the moralist preference for personal virtue and the legalist preference for regulation and punishment arose contemporaneously in China. He argues that they were united in the *yin/yang* theory of cosmic influence in the Han Dynasty, with *yin* representing the legalist preference for regulation and punishment and *yang* representing the moralist preference for personal virtue, but that they subsequently were separated, particularly in the Neo-Confucian period, so as to emphasize personal virtue.

The second group of articles, consisting of three articles, examines contemporary business and legal issues in the People's Republic of China. Jerome Cohen and Stuart Valentine's article, "Recent Chinese Legislation Assisting Foreign Investors to Solve Their Hard Currency Problem: Import Substitution and Other

Options," explores the options available to the foreign investor who wishes to repatriate hard currency earned from his investment in the People's Republic of China. There are at least eight options: 1) currency swaps; 2) export of products sourced in China; 3) reinvestment in foreign exchange earning enterprises; 4) short-term loans; 5) allocation of foreign exchange by government authorities; 6) flexible pricing; 7) evidence accounts; and 8) import substitution. Both national law, represented by the Exchange Control Implementation Rules (1983), the Foreign Exchange Balancing provisions (1986), and the Import Substitution Measures (1987), and provincial law in Guangdong Province, represented by the Guangdong Procedures (1986), authorize import substitution. Cohen and Valentine take the position that

[f]oreign investment enterprises . . . [that] contribute to the development of China's industrial sector by producing substitutes for products that China is otherwise required to import . . . raise a strong argument that . . . they should be entitled to receive at least some foreign exchange that would otherwise be spent on importing equivalent products.

Stanley B. Lubman's article, "Investment and Export Contracts in the People's Republic of China: Perspectives on Evolving Patterns," examines two patterns. The evolving pattern in investment contracts is "frequent renegotiation." Given the fact that the Chinese do not place a high value on contractual stability and given the role that "secondary parties" play in contractual relationships in China, this pattern, while disquieting, could be expected. With respect to this pattern, Mr. Lubman argues that "the investor must be prepared for instability in his contractual relationships, and for the need to engage in renegotiation with his Chinese partner and with a variety of Chinese agencies." He sees the inclusion of renegotiation clauses in investment contracts with the Chinese as "a necessary ancillary to encouraging Chinese parties and officials to adhere to contracts without interfering with the autonomy of contracts." The evolving pattern in export contracts is that the "Chinese seller's attitudes toward contracts have become more opportunistic." Given the present state of the Chinese economy, "[an economy] with a dangerously unstable mixture of bureaucratic and market forces," this pattern, likewise, could be expected. The result may "involve delivery of inferior-quality goods" but is more likely to involve "non-delivery . . . because the goods . . . were sold to a third party in violation of an existing contract." With respect to

this pattern, Mr. Lubman concludes that "if economic reform continues to provoke dislocations that lead to increased contract violations, some traders are going to seek vindication of their rights formally protected under Chinese law by bringing suit in Chinese courts."

Cole R. Capener's article, "An American in Beijing: Perspectives on the Rule of Law in China," contains his impressions, drawn from his time spent as an associate in a law firm's Beijing office, on the rule of law in China. Mr. Capener notes that the "Chinese leadership has consistently called for the 'perfecting of the legal system'" since 1978. Has this call resulted in tangible results? No empirical data exist to answer this question. In place of such empirical data, Mr. Capener identifies five measuring tools and then examines the treatment each of these measuring tools has received in the last ten years. The measuring tools he uses are 1) legislation; 2) legal education; 3) attitudes towards law; 4) the role of lawyers; and 5) dispute resolution in China. These measuring tools are "legal concepts that may be indicia of the acceptance of law." Mr. Capener's conclusion is that "China's path to the rule of law yields mixed results." Why? In part, because:

New laws are not enough. The concept must sink into the mass consciousness. A body of law without the accompanying concept of law is mere windowdressing. Only when the masses believe that their rights can be protected and enforced will the rule of law prevail

The third group of articles, consisting of two articles, examines contemporary business and legal issues in Taiwan. William F. Atkin's article, "The Recent Liberalization of Exchange Controls and Its Legal Impact on Doing Business in Taiwan," highlights recent changes governing exchange controls. Three sets of rules were affected by actions taken by the government on July 15, 1987: Inward Remittance Rules; Outward Remittance Rules; and External Debt Registration Rules. Mr. Atkin provides the reader not only with a detailed analysis of these three sets of rules in the article itself, but also with English translations of these three rules in appendices to the article. How significant are these changes? According to Mr. Atkin, this package of changes, particularly the changes with respect to outward remittances, is "perhaps the single most dramatic legal development affecting the way foreign companies do business in Taiwan, since the [Re-

public of China] government moved to Taiwan in the late 1940's."

Paul C.B. Liu's article, "A Review of the Intellectual Property Laws in Taiwan: Proposals to Curb Piracy and Counterfeiting in a Developing Country," describes Taiwan's attempts to grapple with the thorny problem of counterfeiting and piracy of intellectual property. Several factors contribute to this problem: lack of research and development in science and technology; the lack of comparative study of intellectual property law; a weak copyright and patent system; the conflict of interest between interested groups; and faults and omissions in the current law. Professor Liu is hopeful that progress is now possible. In part, his optimism rests on the fact that the situation the Taiwanese now face has changed: "before [the Taiwanese] copied others, now others copy them." The solution to the problem, however, is complex, involving issues of both primary and secondary importance. From Professor Liu's perspective the issues of primary importance include research and development in science and technology and research and training in intellectual property law. A weak administration, faults and omissions in the current law, and conflicts of interest are issues of secondary importance.

II. THE JANUARY VISIT OF THE CHINESE DELEGATION

The second event was a visit by a Chinese delegation to Brigham Young University and the J. Reuben Clark Law School on January 14-17, 1988. Part of the delegation consisted of representatives from eight of the leading law schools in the People's Republic of China: Zhang Guohua, Professor of History of Chinese Legal Thought, Peking University; Wang Chenguang, Vice-Dean, Department of Law, Peking University; Zhang Jinfan, Professor of History of the Chinese Legal System, China University of Political Science and Law; Gu Chunde, Dean, Department of Law, Chinese People's University; Ma Kechang, Vice-Dean, Department of Law, Wuhan University; Shi Huanzhang, President, East China Institute of Political Science and Law; Liu Fuqi, Dean, Department of Law, Jilin University; Lai Pengcheng, Vice Dean, Department of Law, Fudan University; and Zhong Mingzhao, President, Southwest Institute of Political Science and Law. Accompanying these legal educators and completing the delegation were Wang Zenong, Division Director, State Education Commission, and Zhang Shengli, Division Director, Ministry of Justice.

The itinerary for the delegation's visit in Utah was jointly planned by our Chinese-speaking students and myself. Special thanks are in order to two third-year law students, Zhou Ji Zhou, a citizen of the People's Republic of China, Marshall Witt, and a second-year law student, David Phelps, for their efforts and enthusiasm not only in planning the visit, but also in being available throughout the visit to insure its success.

The delegation's four-day visit in Utah was a busy one. Their activities included tours, an outing, visits, a presentation on "Law in China," and two dinners. There were four tours: a tour of the Brigham Young University; a tour of the law school library; a tour of the Genealogical library of the Church of Jesus Christ of Latter-day Saints; and a tour of the Waterford School, an experimental school in Provo, Utah, that combines liberal arts education with the use of computers. The outing was a visit to Park City, a mining town, that is now one of Utah's famous winter resorts. There were eight visits: a visit with Jeffrey Holland, President, Brigham Young University; visits to either an administrative law class or a torts class at the law school; a visit to the Department of Asian and Near Eastern Languages, hosted by Dr. Richard Chi; a visit to the Kennedy Center, hosted by Ray C. Hillam and Paul Hyer; a visit to the School of Management, hosted by Lee Radebaugh; a visit to a local district court, hosted by Judge George Ballif; a visit to Utah Legal Services; and a visit to Temple Square in Salt Lake City on the morning of their departure to listen to the Sunday morning Mormon Tabernacle Choir Broadcast.

Two of the highlights of the delegation's visit for me occurred on Saturday, January 16th. The first occurred on Saturday morning when the members of the delegation made a series of presentations on "Law in China" in the Moot Court Room of the law school. Several of the speakers spoke about the reforms that were taking place in China. In speaking of the political reforms, these speakers emphasized that the intent of the political reforms was to end the system that had existed in which there were two sets of decision-makers, one set in the government, and another set in the Chinese Communist Party, making the same decision, and to substitute in its place a system where government decision-makers were free to make governmental decisions and party decision-makers were free to make party decisions. I am not a China scholar, but I am a reasonably well-read individual who has followed developments in the People's Republic of

China with interest. Nevertheless, I was stunned to hear these statements, and they made me aware in a way I had not been before the presentation of the magnitude of the reforms that the People's Republic of China is attempting to achieve. If someone would have said to me as recently as five years ago that I would hear such statements in 1988, I would have scoffed and said, "impossible."

The second highlight occurred that evening when my wife and I hosted a dinner for the Chinese delegation in our home. At the end of the evening, after much pleasant conversation among those who had been invited, my wife and I prevailed upon our daughter, Emily, to sing for our guests. Emily sang. When she finished, Ms. Zhang, the representative from the Ministry of Justice, asked if she could sing for us. We replied, "Certainly." She then sang "Edelweiss" for all of us, beautifully and in English!

III. THE VISIT OF JIA CHANGCUN

The third event was the visit of Jia Changcun, a Senior Official, Bureau of Legislative Affairs, State Council, People's Republic of China, in July. Jia was particularly interested in three topics: federalism; separation of powers; and joint ventures.

Fortunately, members of the faculty who could make presentations on these topics were in residence at the law school during the summer. Professor Carl S. Hawkins made the presentation on federalism. Professors Rex E. Lee and Robert E. Riggs made the presentation on separation of powers. Professor W. Cole Durham, Jr., and I made the presentation on joint ventures.

IV. VISIT TO THE PEOPLE'S REPUBLIC OF CHINA

The fourth event was a visit to the People's Republic of China in November by Zhou Ji Zhou, an April J.D. graduate of the law school who is practicing law in Phoenix, Arizona, and who played an instrumental role in the visit of the Chinese delegation in January, Professor Mary Anne Q. Wood, my wife and colleague at the law school, and myself. We were guests of the East China Institute of Politics and Law in Shanghai and Peking University and the Chinese People's University in Beijing.

Mary Anne lectured on bankruptcy law; Zhou and I lectured on administrative law and international business transactions.

We also met with faculty and graduate students at all three of the institutions that acted as our hosts.

The topic of China's reforms came up repeatedly throughout the visit. The reforms were a topic of spirited discussion at the banquet for foreign visitors hosted by Zhao Zhen Jiang, Dean, Department of Law, Peking University. Our Chinese hosts expressed the view that the reforms had to succeed because the alternative was chaos. An American law professor, who had visited Moscow before coming to Beijing, drew the following contrast between the progress of the Soviet and Chinese economic reforms: "People have money, but nothing to buy in the Soviet Union. In the People's Republic of China, people have money, there is something to buy, and they are buying." An overseas Chinese law professor sounded a more cautionary note. She acknowledged that the economic reforms had had a significant impact on improving life in the People's Republic of China, but she also argued that these same forces had set free other factors, specifically greed and "official corruption," within Chinese society that she found disturbing. The question for her was whether political reform could proceed while keeping greed and "official corruption" under control.

The reforms also came up in a conversation I had with a Canadian national while he and I were waiting for our planes to depart at the Beijing airport. He had been stationed for the past six years in a major city in the western part of the People's Republic of China. He, like the overseas Chinese law professor, was cautious about the ultimate success of the reforms. He indicated that many of the Chinese in the city where he was stationed had adopted a wait-and-see attitude about the reforms. Given the political and economic turmoil China has experienced in this century, he added that such an attitude made sense to him.

Another conversation I had about the reforms was with a Chinese who now holds a responsible position in one of the special economic zones in the southern part of the People's Republic of China. He was imprisoned in 1957 because of his political beliefs and spent the next twenty years in prison. Since his release, he has married, he and his wife have a son, and he now finds himself working to insure the success of the economic and political reforms. He is a wise man, a realist, who chooses his words with care. He also possesses the capacity, which I have observed in many Chinese and which I, as an American, view with a combination of awe and admiration, to forgive and forget

past oppression and to work for a better day. If he can be hopeful that the reforms will succeed, who am I to doubt their success?

V. VISIT OF CHEN AN

The fifth and final event was a visit to the law school by Chen An, Dean, School of Politics and Law, Xiamen University on November 13-14, 1988. The J. Reuben Clark Law School already has one contact with Xiamen University, Zhou Ji Zhou, our April J.D. graduate, who is also a graduate of Xiamen University. During Dean Chen's visit, additional opportunities for exchanges between Xiamen's School of Politics and Law and the J. Reuben Clark Law School were explored.

Running through a number of the foregoing events is a common theme. That theme is the reforms — economic and political — that are currently taking place in the People's Republic of China. No one can doubt that the Chinese are serious about these reforms. The impact of these reforms on the People's Republic of China, its neighbors and the United States is less clear, but the reforms will have an impact on law and business with China. The following articles, then, provide us some sense of what lies in store as the reforms unfold.