

CHINA TRADE LAW: CODE OF THE FOREIGN TRADE LAW OF THE PEOPLE'S REPUBLIC OF CHINA. Compiled, introduced, and indexed by FRANCOIS DE BAUW and BERNARD DEWIT. [Brussels/Deventer: Bruylant/Kluwer 1982. 572 pp. No price given.]

PEOPLE'S REPUBLIC OF CHINA: MODERNISATION AND LEGAL DEVELOPMENT. By PETER P.P. CHAN. [London: Oyez Longman, 1983. 299 + xvi pp. No price given.]

THE present leadership of the People's Republic of China has for the past several years displayed considerable interest in "modernizing" the country's legal system. The regime has since the late seventies devoted a great deal of attention not only to the reconstruction of those legal institutions which antedated the Cultural Revolution and were destroyed therein, such as the machinery of domestic courts, the Procuracy and the other elements of a criminal justice bureaucracy, but also to the development of an expanded and more sophisticated legal framework for China's growing economic interaction with the rest of the world. Foreign trade and investment are perceived by the leadership as essential to the success of its development strategy, and at least at the highest echelons of China's government the importance of a domestic legal framework for such activities seems to be fully appreciated. These two volumes, along with a number of similar works which have appeared in the past two years, present to foreign readers some of the fruits of China's legislative labours.

It is worthwhile to put the recent energetic modernization of the legal system into the broader context of law and politics in the history of the People's Republic. From its earliest days a debate about the role of law in a communist society has raged between groups which may be very loosely labelled the technocrats and the populists, the legal debate being part of the larger political struggle between those who wished China to follow (in its broad outlines) the Soviet political and economic model and those who sought a different and arguably more revolutionary path.¹ With the former more or less in the ascendancy during the decade after 1949, China experienced a surge of legal institution-building which in many respects foreshadowed the even greater efforts of the present regime. In fact, many of the cadres who guided that earlier period of construction are responsible for the present legalization movement.

The efforts of these socialist legalists during the middle fifties were fiercely resisted by their political opponents within the Communist Party itself and it is no exaggeration to say that those efforts were completely undone during the Cultural Revolution years of the late sixties and early seventies. In the debate about the role of law, the populist/revolutionaries had at every turn attacked the bureaucratic/professional machinery of law and justice for its alleged entrench-

¹ Those familiar with Chinese politics will find these labels very loose indeed, but, one hopes, not inexcusably misleading. For an interesting political-historical account of the struggle between "popular justice" and "bureaucratic justice" and its relation to the larger politics of the People's Republic by an American Marxist sympathetic to the former, see Brady *Justice and Politics in People's China: Legal Order or Continuing Revolution?* (London: Academic Press, 1982).

ment of elitism and even counterrevolution, must notably during the Anti-Rightist Campaign of 1957 and again during the Cultural Revolution. During those years of upheaval many of China's most prominent law-makers of today (along with a large percentage of other professionals, scientists, and university-educated technicians) were humiliated and sent to the countryside for re-education through manual labour.² Naturally, these groups are now concerned that those experiences not be repeated.

In this historical context one can speculate with some confidence about the basic reasons for the relative "explosion" of law-making after the end of the Cultural Revolution. It is not in the least surprising that the technocrats, in the wake of their virtually complete triumph over the political forces symbolized (if not actually led) by the now-infamous Gang of Four, are keen to re-establish and carry further legal institutions. Quite apart from their legitimate concerns about personal security, the technocrats hold the view that such legal machinery can serve as a bulwark against the kind of chaotic upheavals which had, among other things, seriously retarded China's economic development.³

There is little or nothing of this in *People's Republic of China: Modernisation and Legal Development*, although its author, described as a Hongkong economist and businessman, is clearly in sympathy with the modernizing legalists of the present regime. The book does not delve at all into legal history and says little or nothing about the anti-legal traditions of People's China. What is implied, although the book is not at all self-conscious about its ideological point of view, is a feeling that by 1979 it was time "politics" got out of the way of China's potentially tremendous economic development. Indeed, the chapter sketching the economic and social background to the present drive to modernize the system seems designed primarily to show how much the modernization policies are needed. For all this, no writer on China's legal development can avoid acknowledging the present regime's intention to use law and legal institutions for the reshaping of Chinese politics. Mr. Chan does this in a final chapter provocatively titled "Will China Go Capitalist?" (which question he would like to answer yes but prudently settles for a maybe), quoting with approval the ideologist Xue Yan:

"We do not need to, nor should we, launch tempestuous mass movements as of the past. We can very well solve the problems of class struggle which exist within certain limits by making full use of our state apparatus. The present struggle against serious criminal activities within the economic sphere is not waged in the way of a mass movement. The problem is being

² There are numerous accounts of the Great Proletarian Cultural Revolution (to use its full name) in print. An excellent book which provides also the broader political context—including the Soviet experience—is *Short The Dragon and the Bear: Inside China and Russia Today* (London: Abacus, 1982).

³ For an account of the legal history and future plans of the People's Republic by the Deputy Director of the Chinese Academy of Social Science's new Institute of Law see Wu, "Building China's New Legal System," 22 *Colum. J. Transnat'l L.* 1 (1983). For recent developments see also Fung, "China Launches Program to Untangle its Legal System," *The Asian Wall Street Journal* (16th January 1984).

solved through investigation of facts and according to law and judicial procedure.”⁴

This is, of course, very much the technocratic viewpoint and as such is not shared by all Chinese politicians. Yet it is accepted uncritically in a book which seems to have as a major objective the dissemination of information about the present legalization drive. With such an objective it is naturally a very broad survey, useful for all its limitations but remarkable chiefly for being one of the first efforts to put together a comprehensive account of China's new legal regime.

Modernization and Legal Development is thus a description or guidebook, drawing heavily on the bare texts of statutes and regulations and quoting extensively from the published remarks of China's present political leaders when offering explanations of the various aspects of the legalization drive. While not without value, description is often taken to extremes, as in the following few lines from the chapter on the 1982 Economic Contract Law:

“Processing contracts

“Article 19 defines the rights and liabilities of the contracting parties while Article 40 defines the obligations on breach.

“Carriage of goods contracts

“Article 20 makes provisions for carriage of goods contracts and Article 41 defines the obligations on breach.”

The limited utility of this kind of writing is obvious, particularly when the underlying statute is not reprinted, as in the present case. Not all of the book is so weak, however, and Mr. Chan is much better in his extensive section on taxation, which is supplemented by extensive quotation from the applicable statutes and regulations.

Modernisation and Legal Development also provides a basic overview of China's legal framework for trade and investment, a task which is the sole object of Messrs De Bauw and Dewit's collection *China Trade Law: Code of the Foreign Trade Law of the People's Republic of China*. The development of this area of law has been

⁴ Note also in this connection the concerns voice by Peng Zhen, then-director of the State Legal Commission (and Vice Chairman of the Chinese Communist Party Central Committee), in his 1979 speech to the Fifth National People's Congress (which confirmed and consolidated the ascendancy of the modernizers led by Deng Xiaoping):

“Since the beginning of 1970, we have shifted the focus of the work of the whole nation to socialist modernization. In line with this historic change, we must conscientiously strengthen socialist democracy and the socialist legal system. Without a sound socialist legal system, a sound socialist democracy can hardly be realized An improved legal system can effectively guarantee the people's democratic rights provided for by the [1978] Constitution and constantly develop stability and unity and a lively and vigorous political situation in the interest of socialist construction.”

(As quoted by De Bauw and Dewit at p. 16).

See also Li, “Reflections on the Drive Toward Greater legalization in China,” 10 *Go. I. Int'l & Comp. L.* 221 (1980), and Lubman, “Emerging Functions of Formal Legal Institutions in China's Modernization,” *China Under the Four Modernizations*, Part 2 (Washington: U.S. Congress Joint Economic Committee, 1982).

remarkably rapid by any standard. In the five years since the adoption of the cornerstone statute on Chinese-foreign joint ventures by Second Session of the Fifth National People's Congress, thirty major statutes and regulations have been put in place to define the legal regime for foreign investment in China. A considerable quantity of subsidiary legislation with relevance to economic activity, domestic and foreign, has also been enacted during this period, much of which has yet to be publicly promulgated.⁵ The erection of this legal edifice has, it may be supposed from the comments of the Chinese leadership and foreigners alike, played an important part in the tremendous expansion since the mid-seventies of China's economic relations with the rest of the world, particularly with the developed economies of Japan and the West.⁶

The bulk of the economic law materials in both of the books under review comes, of course, from the post-Mao era of expanding foreign contacts, although the compilers of *China Trade Law* are correct to remind readers that the paucity of foreign economic legislation prior to 1979 did not mean that the Chinese were cut off from all trade. The People's Republic was, of course, never entirely without such law, even during the Cultural Revolution years.⁷ Although the volume of trade was small in relative terms, the evidence supports the suggestion of Messrs De Bauw and Dewit that it was a deserved reputation for scrupulous observation of the terms of those agreements which they did enter into which allowed the Chinese state traders "to move around the market on the basis simply of contracts signed with their foreign partners, practically without any commercial law, except the main principles of international trade law."

The reasons for the considerable attention devoted recently to foreign economic law are not difficult to discern. Although trade practices were familiar and well-established, the legal framework required for foreign investment is quite different and its accommodation in any socialist legal system is technically complex. Moreover, the political decision taken in the late seventies to again open China to direct foreign investment was, and perhaps still is, far more controversial than the simultaneous moves to boost foreign trade. After China's bitter experience of imperialism in the century prior to Liberation, followed by the period of enforced isolation in the wake of the Korean War, significant sectors of the population as a whole and the Communist Party in particular remained antipathetic to the idea of foreign investment. This antipathy was no doubt reinforced by the fact that the chief capital-exporting countries are those which

⁵ See Lubman, "China Should Make More Laws Public," *The Asian Wall Street Journal* (5-6th August 1983).

⁶ In the years 1977 to 1982 the total value of China's foreign trade went from US\$14.67 billion to US\$40.88 billion. "China Data," *China Business Rev.* (January-February 1984).

⁷ Trade was considered a major engine of economic growth in the 1950s, despite the U.S.-led embargo following the Korean War, although it fell during the years of turmoil in the 1960s both in volume and in ideological esteem. See Li, "Ups and Downs of Trade With China," 13 *Colum. J. Transnat'l L.* 371. For a survey of Chinese trading practice prior to the advent of the present leadership, see *Law and Politics in China's Foreign Trade*, Li, ed. (Seattle: Univ. of Washington Press, 1977).

not long ago were officially vilified as the very embodiment of evil in the world.

Looking briefly at the new legal framework for foreign investment, its most notable feature is its heavy reliance on contract. In the absence of much basic commercial law it could not be otherwise. This reliance on "privately-made law" and custom, workable in the realm of foreign trade, has been less satisfactory for the purposes of capitalist investors and from the outset the Beijing government has been continually pressed to increase the scope of the statutory framework. At least two fundamental and rather obvious grounds for such pressure can be identified. The first is of a practical nature. It is a truism that no contract can provide for every eventuality. As transactions become more complex and of longer duration, contract becomes a less satisfactory way of defining with precision the rights and obligations of the parties in respect of the myriad developments which arise in the life of a business enterprise. To be sure, a well-crafted agreement will often provide for private dispute resolution mechanisms which will allow the venture to carry on in the face of all but the most fundamental breakdowns. Yet there is in many cases no substitute for a statutory framework for private relations. In the Shenzhen Special Economic Zone a situation arose quite recently which illustrates the kind of problem which cannot readily be coped with by contract: the putting into receivership of a foreign-owned factory by foreign-owned banks. In the absence of a domestic law of receivership, both foreign investors and Shenzhen authorities were for a time thrown into a state of uncertainty and confusion about the outcome.⁸

The second ground for foreign investors' concern has to do with perceived political risk. Naturally, domestic legislation cannot provide a complete bulwark against the kind of political risk which follows a dramatic change of policies of the sort which have occurred in China's recent past. Nonetheless, after their initial euphoric rush to China, foreign investors have passed for more formal recognition by treaty and municipal law of their rights to compensation for expropriation or regulation amounting to a taking of property. That the regime is receptive to such concerns and is willing to make accommodation is evidenced by the numerous reassurances given to foreign investors by the top leadership as well as by the sheer volume of economic legislation which has emerged.⁹ The 1982 Constitution, at Article 18, even goes so far as to enshrine in the supreme law the present regime's foreign investment policy. Of course, this constitutional provision for foreign investment refers to "the law of the People's Republic of China" both for the definition and the protection of rights. It could not be otherwise in the political con-

⁸ See Fung, "Receiver Named for Foreign Firm in China," *The Asian Wall Street Journal* (5th October 1983), and Fung, "Progress Made in China Receivership Case," *The Asian Wall Street Journal* (13th October 1983).

⁹ Premier Zhao Ziyang, expressing perhaps a trace of impatience with the repeated raising of foreign investors' worries about the paucity of legislation, recently stated that "[t]his concern is unnecessary. In China, the contract has the same legal effect as the law. Besides, China's economic legislation is being perfected step by step." *Beijing Review* (19th December 1983).

text, but the result is predictable: investors press for treaty recognition of their status.¹⁰

Foreign investors are not seeking such guarantees without reason. Even if one could be persuaded that the volatility of the Cultural Revolution is a thing of the past never to be repeated, Messrs De Bauw and Dewit are correct in observing that "the Chinese opening towards foreign trade is not, as one could be led to believe, a step towards liberalism: the economy of the country remains socialist and planned, foreign trade being a tool among others at the leader's [sic] disposal to help carry out a fixed programme." Capitalism is eventually to be exterminated, as the economist Xue Muqiao has said, though perhaps not just yet.¹¹

In any event, the opening of socialist China to foreign investment and the legal developments which have accompanied and facilitated that opening have been of considerable interest to foreign investors and their legal advisers. These are attracted by China and the new policies but the paucity of basic texts and of secondary legal literature has hampered efforts to learn more about even the bare bones of China's foreign economic legislation, if not the actual practice thereunder. As was noted at the outset, however, recently a number of scholars and practising lawyers have done much to alleviate this problem by providing translations of the basic texts. Most of these have appeared piecemeal in a variety of periodicals, and the publication of *China Trade Law*, assembling a multiplicity of related texts in a single volume, is for that if no other reason to be welcomed.

The compilers have from a variety of previously published English translations assembled nearly fifty texts relating to China's foreign trade and investment law. The collected documents include statutes and regulations, six bilateral trade and economic cooperation agreements entered into by China between 1974 and 1979, and two agreements underlying a 1980 Chinese-foreign joint venture project for the manufacture of elevators and escalators.¹² From the standpoint of the prospective purchaser, perhaps the most meaningful way to assess Messrs De Bauw and Dewit's selection to texts is to make a comparison with the first volume of *China's Foreign Economic Legislation*, a contemporary publication of the semi-official Foreign Languages Press (hereinafter "FLP").¹³

There is naturally considerable overlap in the contents of the two collections and most of the basic materials can be found in

¹⁰ With some success, although the proposed investment treaty with the United States has run into considerable difficulties. See "Sino-U.S. Talks on Investment Pact Said to Collapse Without an Accord," *The Asian Wall Street Journal* (9th April 1984).

¹¹ Quoted in Short, *supra* note 3.

¹² A rosy picture of this particular venture three years into its life can be found in Wang, "Equality, Mutual Benefit and Progress—An Introduction to the China-Schindler Elevator Co. Ltd.," *China's Foreign Trade* (No. 3, 1984).

¹³ *China's Foreign Economic Legislation*. Volume 1. Translated and edited by the Foreign Languages Press with assistance from Jerome Cohen, Jamie Horsley, Yan Zekui, Wang Chanlun, and Anne Wang Pusey. (Beijing: Foreign Languages Press, 1982). Reviewed at (1983) 25 *Mal. L. Rev.* 449.

each, e.g., the statutes and regulations underlying Chinese-foreign joint ventures, the special economic zones, foreign exchange controls, the resident offices of foreign enterprises, and income taxation. As befits a book which by its title purports to present a "code" of foreign trade law (which, of course, does not exist as such), *China Trade Law* includes materials dealing with customs, maritime transport, insurance, arbitration, and the inspection and testing of import and export commodities. None of these can be found in the first volume of the FLP series.¹⁴ Also included are some more recent texts which will certainly be found in the second volume of the FLP collection, these being the 1982 "Regulations on Income Tax for Foreign Enterprises" and the "Regulations on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises" of the same year. De Bauw and Dewit also include the 1982 Economic Contract Law (which is not applicable to contracts with foreigners and so, strictly speaking, not foreign trade law at all),¹⁵ the 1980 "Provisional Regulations on Lawyers" (also inapplicable to foreigners), the 1963 Trademark Regulations (which have been superseded by the 1982 Trademark Law and the implementing regulations of 1983),¹⁶ and the 1978 "Regulations on Rewards for Inventions in the People's Republic of China" (now overshadowed by the 1984 Patent Law).¹⁷

Neither collection offers any analysis of the legal materials presented. *China Trade Law* does have excellent indices in both French and English, a feature which the FLP book lacks in any language. Yet there is a more substantial difference which lies in the very nature of the two books. The FLP volume is not only a collection of laws, but is also a fresh and unified attempt at English translation under the advice of Chinese and Western legal scholars, notable among the latter being former Harvard professor Jerome Cohen. Very importantly, it includes both the Chinese and the English texts of each statute or regulation and by means of a detailed glossary of legal terms offers an explanation of sorts of its underlying methodology. The volume under review, in contrast, is a compilation of the English language translations found in a variety of sources, most important being the official news agency

¹⁴ Although *China Trade Law* does not, for some reason, include: (1) the 1981 rules concerning the implementation of foreign exchange controls relating to individuals, (2) rules for the examination and approval of applications by individuals for foreign exchange, (3) the "Interim Procedures" on export licensing, nor (4) the "Interim Provisions" of the special economic zones in Guangdong dealing with the entry and exit of personnel, the registration and administration of enterprises, labour and wages, and land management. All are translated and reproduced in the FLP book. *Id.* at pp. 150, 159, 182, and 207 *et seq.*

¹⁵ A Chinese-foreign economic contract law, promised in Article 55 of the basic Economic Contract Law, has yet to appear, although recent reports suggest that such a law (applicable only in the Shenzhen special economic zone) has been adopted by the Guangdong provincial authorities. Dicks, "A Legal Opinion," *China Trade Rep.* (March 1984).

¹⁶ An English translation of the 1982 law, produced by a foreign law firm, is printed at 2 *China L. Rep.* III (1982). An English translation of the Regulations, also translated by a foreign law firm, has been published in *E. Asian Exec. Rep.* (June 1983).

¹⁷ An English translation of the 1984 Patent Law is printed in *Beijing Review* (12th March 1984).

Xinhua. A quick comparison of the translations in the FLP volume with those in the present compilation reveals many stylistic and, potentially, substantive differences. The problem with the latter is that there is no way, within the confines of the volume itself, to assess the accuracy of the English translation. And it is of course the Chinese version of any statute which is authoritative.

The compilers, and their sponsors, were aware of this, and Professor Michel Verwilghen of the University of Louvain notes somewhat defensively in his Preface that the book is "the kind of essentially documentary research which university circles are in the habit of despising a little. They are quite wrong! Such work requires strong scientific aptitudes as well as constant efforts on the part of those who do it. Such work is also the necessary preliminary to any other intellectual process, whether legal researches or concrete application of the law to individual cases." True enough, and Messrs De Bauw and Dewit do provide the non-Chinese speaking lawyer, trader or investor with a handy compendium of most of the basic texts. Yet the first volume of the FLP series (there will be others following; there is no indication of plans for future volumes of *China Trade Law*) fulfills the same function, with the tradeoff being the Chinese text of the one for the very fine French and English indices of the other. There is at least one other difference of importance: although the price of this reviewer's handsome hardback copy was not furnished, it can hardly be expected to compare favorably with the price of FLP's paperback, which is about one U.S. dollar.