

TRADE BETWEEN THE UNITED STATES AND THE PEOPLE'S REPUBLIC OF CHINA: PRACTICE, POLICY, AND LAW

STANLEY B. LUBMAN*

The author examines trade with the People's Republic of China, stressing Chinese commercial practice. He analyzes in detail aspects of negotiations, contracts and dispute-settlement which may be important to potential U.S. purchasers and sellers. The Article concludes with a survey of current problems of law and policy in Sino-U.S. trade.

INTRODUCTION

The Sino-U.S. rapprochement expressed in the Shanghai Communiqué¹ signed by Premier Chou En-lai and President Nixon in February, 1972, was tentative, partial and fragile, but Sino-U.S. trade has developed with unexpected speed.² Revival of "the China

* A.B. 1955, LL.B. 1958, LL.M. 1959, J.S.D. 1969, Columbia University, and member of the Bars of New York, California and the District of Columbia. The author was trained during 1963-1967 at Columbia University and in Hong Kong to specialize in Chinese affairs, under grants from the Rockefeller Foundation, Columbia, and the Foreign Area Fellowship Program. From 1967 to 1974, he was a member of the faculty of the University of California School of Law (Berkeley), where he taught and did research on Chinese law and foreign trade. From 1969 to 1972, he studied China's international commercial practice. In 1972, the author returned to private practice, specializing in Chinese trade matters. He has attended the last eight Canton Trade Fairs and has also visited Peking twice for discussions on trade and legal matters. The author practices law in Washington, D.C.

¹ For a brief discussion of the Shanghai Communiqué, see U.S. DEP'T OF COMMERCE, OVERSEAS BUS. REP., OBR No. 73-16, TRADING WITH THE PEOPLE'S REPUBLIC OF CHINA 1-2 (1973); 66 DEP'T STATE BULL. 419-40 (1972).

² Overall U.S.-China trade figures, in millions of U.S. dollars, are as follows:

	Total Trade	U.S. Exports	U.S. Imports	Imbalance
1971	5.0	—	5.0	5.0
1972	95.9	63.5	32.4	31.1
1973	805.1	740.2	64.9	675.3
1974	933.8	819.1	114.7	704.4

Clarke & Avery, *The Sino-American Commercial Relationship*, in CHINA: A REASSESSMENT OF THE ECONOMY, JOINT ECONOMIC COMM., 94TH CONG., 1ST SESS., A COMPENDIUM OF PAPERS 500, 512 (Comm. Print 1975) [hereinafter cited as JEC PAPERS]. In 1975, according to raw data supplied by the U.S. Department of Commerce, U.S. exports to China were \$303.6 million and U.S. imports were \$158.3 million, leaving a trade imbalance of \$145.3 million.

trade" has inspired considerable interest, stimulated some euphoria and revealed considerable ignorance on the part of Americans about their Eastern trading partner. Trade institutions and practices of the People's Republic of China (P.R.C.) require close study by those whose professional or business interests may prompt them to consider the P.R.C. as a prospective trading partner.

This Article is intended as a general guide to trade with the P.R.C. Chinese agencies have made little specific guidance on Chinese commercial practice available in Western languages. Chinese language sources are unsystematized, relatively inaccessible, and incomplete. But U.S. newcomers to trade with the P.R.C. need not lack completely for guidance. Patterns in Chinese practice can be discerned in the experience of the P.R.C.'s principal trading partners in Western Europe and Japan during the years before Sino-U.S. trade was re-established. This experience supplies the basis for some useful generalizations. Similar insights already can be extracted from the experience of Americans, including the author, who have been involved since 1972 with trade with the P.R.C.

PROBLEMS OF PERSPECTIVE

Although this Article has three express themes—practice, policy, and law—Chinese law is the least significant. Chinese practice is stressed in this Article, since it particularly requires elucidation for U.S. parties whose familiarity with it is necessarily limited. Chinese law is discussed very little simply because it is not very important. Trade with the P.R.C. is conducted with few explicit references to Chinese legal institutions of any kind. The official acts of Chinese trade officials are conducted within a framework defined by statutes and regulations more readily available to Western scrutiny than is often imagined.³ Chinese law, however, is not normally referred to in contract negotiations with foreigners or in the settlement of disputes arising out of foreign trade contracts.

The lack of concern with formal law is not surprising in light of the highly circumscribed role of legal rules and institutions in the P.R.C.'s domestic affairs. It is difficult to impart to Westerners, especially Americans accustomed to the importance of legal rules

³ See, e.g., Li, *State Control of Foreign Trade, 1949-1954*, in *LEGAL ASPECTS OF CHINA'S FOREIGN TRADE* (V. Li ed. in press 1976).

and lawyers in the United States, the limited application and great ambiguities of the P.R.C.'s domestic law. Neither formally promulgated rules intended to define prospectively the rights and obligations of the state and private individuals nor courts have been much used in the P.R.C. since the late 1950's.⁴ Moreover, rules enforced in the P.R.C. by nonjudicial agencies also have been kept extremely flexible. At the core of domestic Chinese policy toward law is the view that rules enforced by any bureaucracy, whether or not denominated as "legal," may be unwelcome restraints on revolutionary politics. Law usually has been regarded as an instrument of secondary importance, useful in expressing flexible and mutable policies.⁵

Contemporary Chinese attitudes toward law cannot be isolated from China's long lack of any tradition of an independent legal system during the thousands of years of Chinese history which preceded the establishment of the P.R.C.⁶ Moreover, Chinese distrust of using law to define international relations with the West is rooted in unfortunate experiences which China suffered at the hands of the West in the past. When Westerners first sought to establish trade with China on terms of commerce familiar in Europe, Chinese emperors and their officials, long accustomed to dealing with foreigners who brought tribute to Peking as the center of the world, found them overly intrusive and made them feel most unwelcome.⁷ Westerners often invoked legal rules to justify their positions, which appeared both strange and hypocritical to the

⁴ See, e.g., J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963*, at 9-53 (1968); Cohen, *Chinese Law at the Crossroads*, CHINA Q., Jan.-Mar. 1973, at 138, 142; Lubman, *Form and Function in the Chinese Criminal Process*, 69 COLUM. L. REV. 535, 552-57 (1969).

⁵ See Brown, *Present-Day Law in the People's Republic of China*, 61 A.B.A.J. 474 (1975) (a transcript of an interview by two American lawyers with three representatives of the law faculty of Peking University in October, 1974). For a recent expression of Chinese views on rules in economic administration, see *Socialist Management in China*, 9 CHINESE ECONOMIC STUDIES, Fall 1975, at 350.

⁶ See, e.g., D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* 3-51 (1967); S. VAN DER SPRENKEL, *LEGAL INSTITUTIONS IN MANCHU CHINA* (1962).

⁷ See, e.g., I. HSÜ, *THE RISE OF MODERN CHINA* 174-213 (1970). In a famous document, the Ch'ien-lung Emperor, to whom George III had dispatched an English envoy to request concessions that would facilitate trade and allow English merchants to live in Canton, issued a mandate refusing to comply with any of the requests, noting that China "possess[es] all things in prolific abundance and lacks no product within its own borders. There was therefore no need to import the manufactures of outside barbarians in exchange for our own produce." F. SCHURMANN, *THE CHINA READER, IMPERIAL CHINA* 108-09 (1967).

Chinese, especially after the Westerners went to war to force China to trade with them.⁸

The behavior of the Western powers after the Opium Wars also suggested to the Chinese that Western law, including Western-based international law, was an instrument of deceit used to victimize and exploit China. The major Western powers used China's lack of a Western legal system as a justification for their insistence on extraterritoriality.⁹ Doctrines of international law were manipulated by the Western powers and Japan to China's embarrassment.¹⁰ China's nineteenth-century leaders realized that appeal to rules of international law in disputes was not a substitute for effective national power¹¹ and that the supposedly neutral rules invoked by the imperialist powers were part of their effort to reduce China to semi-colonial status.¹² The memories of China's humiliation, especially during the hundred-odd years between the Opium War and the establishment of the People's Republic, are bitter. The P.R.C. views of Western domestic and international law, shaped as they have been by many unfortunate experiences, are an inextricable part of the legacy of distrust that endures today.¹³

Contemporary Chinese international commercial practice is not based on any body of law, but centers on standard contracts which become the "law" for the parties. These contracts contain no references to Chinese "law" as such, although allusions are made to Chinese organizations with responsibilities for insurance, inspection of commodities, and trade arbitration. A limited but notable exception occurs when the Chinese agree on third-country arbitration of trade disputes.¹⁴ The absence of references to other rules, legal or otherwise, however, does not mean either that transactions are concluded in a void, or that the foreign trader is at the mercy of arbitrary Chinese trade officials unchecked by rules.

As will be seen below, the P.R.C.'s foreign trade organizations

⁸ For an historical discussion of the Opium War, see Hsü, *supra* note 7, at 214-420.

⁹ For an illustration of how the principal Western powers evaluated China's progress (or lack of it) in meeting the desired standard, see REPORT OF THE COMMISSION ON EXTRATERRITORIALITY IN CHINA (1926); see also E. KEATON, THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA (1952); J. VINCENT, THE EXTRATERRITORIAL SYSTEM IN CHINA: FINAL PHASE (1970).

¹⁰ See J. COHEN & H. CHIU, 1 PEOPLE'S CHINA AND INTERNATIONAL LAW 9 (1974).

¹¹ See *id.* at 10.

¹² See *id.* at 11.

¹³ See *id.* at 129-46.

¹⁴ See *infra* at 45-46.

have developed commercial practices which, although difficult to ascertain, provide general guidance to U.S. traders seeking to devise solutions to particular problems. These practices are often imprecise, vague and flexible, but these very defects permit U.S. businessmen to press for solutions satisfactory to them and to influence evolving customs in the China trade.

An analogy from the past may help U.S. businessmen to understand the present situation, in which formal legal rules are unimportant and trade practice is vital. During the days of the so-called Canton trade, 1759–1842, Chinese emperors refused to permit trade with the West to be conducted anywhere in China except in Canton.¹⁵ The emperors regarded trade not as a right, but as a privilege, and foreigners were allowed to conduct it only under severe constraints: Foreign traders could only do business in Canton, their movements outside of their “factories,” or agencies, were severely limited, and they were allowed no direct contact with Chinese officials and could deal only with thirteen commercial firms known as “hongs”.¹⁶

Some superficial similarities exist between the Canton trade and trade with the P.R.C. today. Once again, Canton is the principal point of contact between foreign businessmen and their Chinese counterparts, who meet at the semi-annual trade fairs to negotiate contracts for many of China's exports and some imports. Once again, foreign businessmen who visit Canton rarely are permitted to travel to other places. Even when travel outside Canton is arranged, it is only to major cities under close supervision. Wherever foreigners go in the P.R.C. today, spontaneous contacts with the general population are extremely rare.

Comparisons with Sino-Western relations of the past, however, should not overshadow the importance of post-1949 circumstances and events. Today's China has, in addition to its unique cultural traditions, a revolutionary past that influences attitudes toward the West. The Chinese revolution succeeded in 1949 despite West-

¹⁵ During the last part of the seventeenth century and until 1757, Western ships were able to call at certain other ports, particularly Ningpo, Amoy, and Shanghai. But from 1757 until the Opium War, trade at ports other than Canton was effectively prohibited. See Hsü, *supra* note 7 at 185–86. On the Canton trade, see *id.* at 186–212; M. GREENBERG, *BRITISH TRADE AND THE OPENING OF CHINA 1800–42*, at 41–103 (1951); H. MORSE, *THE CHRONICLES OF THE EAST INDIA COMPANY TRADING TO CHINA 1635–1854* (1926–29); H. MORSE, *THE INTERNATIONAL RELATIONS OF THE CHINESE EMPIRE* (1910).

¹⁶ For an excellent discussion of devices used to facilitate the Canton trade, see Edwards, *The Old Canton System of Foreign Trade*, in *LEGAL ASPECTS OF FOREIGN TRADE*, *supra* note 3.

ern—particularly U.S.—hostility and opposition. Many events and circumstances since 1949, including the Cold War, the Korean War, a U.S.-led embargo on exports to the P.R.C., exclusion of the P.R.C. from the United Nations, and the U.S. military presence in Vietnam, have contributed to Chinese distrust of the United States in particular and of the West in general. The ideological differences which underlie the history of the last two decades suggest to Chinese trade negotiators that foreigners across the table may be exploitative, hostile, and untrustworthy.¹⁷ At the same time, the very products and processes which the West wishes to sell inspire ambivalence in China. The Chinese are justly proud of the self-reliance they have achieved over the past decades. Although conscious of their technological underdevelopment, some Chinese leaders fear that the introduction of Western technology may threaten the purity of revolutionary values.¹⁸

Another modern note may be the behavior of Chinese trade officials. The P.R.C.'s trade bureaucracy has certain characteristics of government bureaucracies all over the world—and not just those in Communist countries. Requiring very strict compliance with contract specifications, for instance, is not unique to Chinese trade officials, but is commonly found in all bureaucracies whose officials wish to avoid being blamed for purchasing or accepting defective foreign goods. Also, the striking uncommunicativeness of Chinese bureaucrats with foreigners reflects as much conventional bureau-

¹⁷ See J. DINGLE, *TECHNICAL SELLING IN CHINA* 3-4 (1974). Dingle observes that:

To my mind, more important are differences of style. You grow sensitive, as seemingly slow negotiations continue, to the apparent disjunction between the "friendship, equality and mutual benefit" which, in the Chinese view, should govern business relationships (and which the Chinese negotiators exemplify in their personal dealings with you) and—for example—their presumption of immaculate commercial morality on the Buyer's side, while the Seller's must be, as inevitably, spotty.

Id.

¹⁸ See, e.g., Li Hsin, *Self-Reliance is a Question of Line*, HUNG-CH'I [RED FLAG], April 1975, in U.S. CONSULATE, HONG KONG, B.C.C., *SELECTIONS FROM PEOPLE'S REPUBLIC OF CHINA MAGAZINES*, No. 92, Apr. 28-May 5, 1975, at 97. Li Hsin states:

Our self-reliance does not mean closing the doors to the outside world. It is necessary to import some equipment and introduce some techniques from abroad according to the needs in socialist construction with the purpose of increasing our country's ability to rely on herself Learning from foreign countries must be combined with a spirit of independent creation. It is wrong to imagine that foreign technology is flawless. There has never been anything in the world that is perfect in every sense. Conditioned by the profit motive of the capitalist class and bound by its idealistic and metaphysical world outlook, technology in capital-imperialist countries inevitably has its backward side. If we do not analyze it and discard its dross while learning or borrowing from its strong points and fail to rest on our independent creation, we will go astray and cause harm to our construction.

Id.

cratic behavior as reticence with foreigners; Chinese bureaucrats are accustomed to maintaining secrecy within their own bureaucratic hierarchies.¹⁹

Although the points of continuity between 18th-century and present day limits on Westerners' contacts with Chinese society and between their relations with Chinese officials should not be over-emphasized, the Canton trade suggests another analogy. The basis for this second analogy lies in Chinese avoidance of codified rules to regulate international commercial transactions, in favor of customary practices. At Canton, trade customs evolved which, coupled with the reliance of the parties on the personal integrity of their trading partners, sufficed to maintain trade profitably for both sides.

The annals of the Canton trade show that simple written contracts often were employed. In the tea trade, the East India Company eventually abandoned written agreements altogether because of disputes over their interpretation.²⁰ Because no adjudication of disputes by local officials was possible,²¹ disputes were settled through *ad hoc* negotiations within the context of long-established relationships which both sides wanted to maintain.²² One observer has said that the relations of the foreigners with the Chinese "were like what lawyers call 'state of nature.'" ²³ Some observers at the time were troubled because the Western traders had little choice but to adhere to Chinese practice.²⁴ Others, looking to the personal relations between traders and Chinese merchants (themselves intermediaries between the foreigners and Chinese officials), stressed the role of custom and personal trust in making life bearable for

¹⁹ See Oksenberg, *Communications Within the Chinese Bureaucracy*, in *CHINA IN THE SEVENTIES* 87, 104-05, 119 (1973).

²⁰ 4 EAST INDIA CO., *supra* note 15, at 224.

²¹ For an account of an unsuccessful attempt by the East India Company to invoke a clause in a contract for the purchase of silk that provided for settlement of disputes over weight, color or quality by the local "mandarins," see 1 EAST INDIA CO., *supra* note 15, at 226-27.

²² For many years the Chinese merchants relied on the word of the East India Company when tea was returned from Europe as being inferior. 2 EAST INDIA CO., *supra* note 15, at 88. By the early nineteenth century both the company and the Chinese merchants maintained expert tea-tasters at Canton to reduce disputes. *Id.* at 89. For a description of negotiations of a claim for inferior tea in 1807, see 3 EAST INDIA CO., *supra* note 15, at 28.

²³ 2 S. WILLIAMS, *THE MIDDLE KINGDOM* 453 (1883).

²⁴ For example, in 1785 Edmund Burke said, "As the Chinese monopoly is at home, and supported by the country Magistrates, it is plain it is the Chinese Company, not the English, which must prescribe the terms." 2 EAST INDIA CO., *supra* note 15, at 82.

both sides.²⁵ Ultimately, the Canton trade collapsed, for reasons not relevant here.²⁶ But the mode by which trade between extremely disparate societies was conducted may suggest a lesson for U.S. traders today.

The contemporary U.S. trader need not be distressed at the absence of formal legal rules to regulate commercial relationships with the Chinese state trading corporations that are his trading partners. Trade in an earlier time prospered although the foreigners had only custom and personal relationships on which to rely as checks on Chinese arbitrariness; today, practice buttressed by Chinese pride in honest dealing can help to clarify the expectations of parties to Sino-Western trade transactions. Considerable Chinese acceptance of standard international commercial practice also occurs. Furthermore, as relationships between foreign firms and the Chinese state corporations are established and maintained over the years, these relationships also will influence the mode in which contracts are carried out and difficulties adjusted. In short, current trade practice can be regarded as a modest, albeit incomplete, substitute for the custom of a former time in aiding the stability of trade transactions.

U.S. businessmen and their lawyers often expect to draft detailed contracts and to ascertain in advance the legal rules that may apply to their transactions with foreigners. These businessmen are sometimes understandably made uncomfortable by the present uncertainties of trade with the P.R.C. Their European and Japanese counterparts, however, have dealt with the Chinese according to workable practices that have been developed over the years. Some U.S. lawyers have suggested that the Chinese consider changing their usual contract clauses and adopting new clauses that would be standard in Sino-U.S. trade. In the Chinese view, however, standard clauses that differ from those ordinarily used are particularly appropriate in transactions with "old friends," companies long ac-

²⁵ See, e.g., W. HUNTER, *THE 'FAN KWAE' AT CANTON BEFORE TREATY DAYS 1825-1844*, 42-44 (1882); I. A. MICHIE, *THE ENGLISHMAN IN CHINA DURING THE VICTORIAN ERA* 264-67 (1890).

²⁶ Among the reasons for the collapse of the Canton trade are: The East India Company's monopoly was ended and the British Crown began to negotiate with Chinese officials in its place, although unsuccessfully and with mounting frustration; the British, particularly the East India Company, promoted the opium trade over Chinese objections; and the British were dissatisfied over the Chinese assertion of jurisdiction to punish foreigners for crimes committed in China. See Hsü *supra* note 7, at 199-242; I. INTERNATIONAL RELATIONS, *supra* note 15, at 95-342; A. WALEY, *THE OPIUM WAR THROUGH CHINESE EYES* (1958).

tive in the trade. Special clauses indeed often have been used to codify practices that have arisen in relationships with particular foreign companies. The Chinese have had only limited experience in contracting with U.S. companies, and are unfamiliar with the U.S. legal system. Although U.S. negotiators should certainly be firm on points of economic significance, insistence on highly formal and abstract solutions would be too rigid, might call into question the neutrality of the rules and solutions urged by their U.S. proponents, and seems premature.

The history of Western trade with China suggests that U.S. businessmen should proceed slowly in their attempts to use law to bring certainty and stability to transactions with the P.R.C. First should come understanding, and there is no greater obstacle to expanded trade than mutual ignorance of the values, institutions, and practices that shape each country's participation in trade with the other. U.S. businessmen must probe for clearer identification and understanding of Chinese trade practices before they take firm positions on the rules which both sides should agree to employ.

BACKGROUND TO NEGOTIATIONS: THE P.R.C.'S FOREIGN TRADE AND ECONOMIC DEVELOPMENT POLICIES

The behavior and activities of Chinese foreign trade officials necessarily reflect general Chinese policies on trade and economic development. Competing and coexisting policies are clearly discernible: The P.R.C.'s leaders and spokesmen have long stressed Chinese "self-reliance" and have minimized foreign trade; they also have perceived the need for foreign equipment, technology, and plants, and for exports to generate the foreign exchange with which to purchase the imports.

"Self-reliance" is anchored in the political philosophy of Chairman Mao Tse-tung, who has long called on the Chinese people to build a new collectivist society and a strong nation.²⁷ Chairman Mao and his colleagues have repeatedly attempted to mobilize the P.R.C.'s masses to carry out political and economic policies.²⁸ In the cultural revolution of 1966-1969, Mao attacked the Party bureau-

²⁷ See S. SCHRAM, *THE POLITICAL THOUGHT OF MAO TSE-TUNG*, 99-100 (rev. ed. 1969).

²⁸ For a discussion of Chinese techniques of mass mobilization, see J. LEWIS, *LEADERSHIP IN COMMUNIST CHINA* (1963); J. STARR, *IDEOLOGY AND CULTURE: AN INTRODUCTION TO THE DIALECTIC OF CONTEMPORARY CHINESE POLITICS* 155-67 (1973); J. TOWNSEND, *POLITICAL PARTICIPATION IN COMMUNIST CHINA* (1967).

cracy itself in an attempt to maintain the anti-bureaucratic, revolutionary style which had successfully inspired the Chinese people two decades before.²⁹ Although the continued relevance of the techniques that were used to gain power has been questioned by some foreign observers,³⁰ these techniques have been applied repeatedly to economic activity.

The Maoist approach has emphasized implementation of economic policy by voluntaristic mass action,³¹ and encouraged organizational and technical innovation in local economic units. The virtues of self-reliance are popularized and illustrated in practice by emphasizing decentralization³² and the development of economic capabilities in local units which might formerly have been unthinkable. Chinese planners have adopted a deliberate policy of encouraging the growth of industry along two different lines: the simultaneous promotion of large factories located in major industrial centers, and of small-scale local units.³³ In the production of chemical fertilizer, for example, small plants have incorporated standardized design features that are the product of long experimentation. These plants produce half of the P.R.C.'s nitrogenous and 75 percent of its phosphate fertilizer.³⁴

Self-reliance is also a keystone of the P.R.C.'s foreign economic policy, which has maximized domestic efforts and minimized trade and foreign aid, at least since the late 1950's. The abrupt with-

²⁹ Useful discussions of the Cultural Revolution include A. BARNETT, *UNCERTAIN PASSAGE: CHINA'S TRANSITION TO THE POST-MAO ERA 1-66* (1974); STARR, *supra* note 28, at 161-67; Tsou, *Revolution, Reintegration and Crisis in Communist China: A Framework for Analysis*, in *1 CHINA IN CRISIS; CHINA'S HERITAGE AND THE COMMUNIST POLITICAL SYSTEM 277-347* (P. Ho & T. Tsou eds. 1968).

³⁰ The periodic political campaigns have disrupted bureaucratic procedures of government agencies. See A. BARNETT, *CADRES, BUREAUCRACY AND POLITICAL POWER IN COMMUNIST CHINA 69-70* (1967). The campaigns have been seen by Mao as means of carrying out continuous revolutions aimed at creating a new socialist man. See, e.g., *Advance Along the Road Opened Up by the October Socialist Revolution*, PEKING REV., Nov. 10, 1967, at 9.

³¹ On the participatory and voluntaristic characteristics of the Chinese system, see Vogel, *Voluntarism and Social Control*, in *CHINESE COMMUNISM, SIMILARITIES AND DIFFERENCES*, 168-84 (Treadgold ed. 1967).

³² On Chinese economic policies and decentralization, see Donnithorne, *China's Cellular Economy: Some Economic Trends Since the Cultural Revolution*, CHINA Q., Oct.-Dec. 1972, at 605; see also Gray, *The Economics of Maosim*, in *CHINA AFTER THE CULTURAL REVOLUTION* (1970); Lardy, *Economic Planning in the People's Republic of China: Central-Provincial Fiscal Relations*, in *JEC PAPERS*, *supra* note 2, at 94-115.

³³ See generally Sigurdson, *Rural Industrialization in China*, in *JEC PAPERS*, *supra* note 2, at 411-35.

³⁴ CENTRAL INTELLIGENCE AGENCY, *RESEARCH AID, CHINA: ROLE OF SMALL PLANTS IN ECONOMIC DEVELOPMENT A [ER] 74-60* (1974).

drawal of Soviet technicians and advisers in 1960 dramatized the danger of reliance on foreign assistance in developing the country's economy.³⁵ After Soviet loans were repaid, the Chinese rigorously avoided foreign debt; most purchases were on cash terms. Although the pursuit of a policy of self-reliance may mean that economic development will occur more slowly than it otherwise might, most Chinese leaders have apparently believed that it produces other important social and political gains. Devotion to self-reliance prevents the revolutionary spirit from eroding into materialism and a concern for individual welfare that would conflict with dedication to the collective. Also, the lingering association between foreign trade and foreign exploitation remains, and was strengthened by what the Chinese regard as the Soviet betrayal in 1960. In the interest of political development and independence, the Chinese have been extremely cautious in expanding the role of foreign trade in economic development.

Chinese economic policy has passed through identifiable stages.³⁶ During 1949–1952, the Chinese Communists reconstructed an economy that had been shattered by Japanese invasion and civil war. During 1952–1957, under the first Five-Year Plan, the P.R.C. placed highest priority on developing heavy industry and accepted massive Soviet aid, much of it in the form of complete plants. During the mid-1950's, however, Chairman Mao became concerned with the bureaucratization, centralization, and neglect of the countryside that this policy entailed. During the Great Leap Forward of 1958–1960, the Maoist emphasis on mass mobilization and small-scale local industry represented a shift away from the Soviet model. When the Soviets withdrew their assistance in 1960 and the Chinese were simultaneously faced with natural disasters and dislocations caused by the Great Leap, they decided to place priority on agricultural development and rural industrialization and to slow expansion of heavy industry. The Cultural Revolution of 1966–1969 involved an even greater withdrawal, not only from heavy industrialization, but also from the use of technical expertise and professional planning. Since 1970, however, the P.R.C.'s planners, while maintaining their dedication to agricultural development, once again have accelerated expansion of heavy industry.³⁷

³⁵ See Eckstein, *Economic Growth and Change in China: A 20-Year Perspective*, CHINA Q., Apr.–June 1973, at 211.

³⁶ See generally *id.*; UNCERTAIN PASSAGE, *supra* note 29, at 118–29.

³⁷ The most notable recent affirmation of China's commitment to intensive industrializa-

Foreign trade has closely reflected these changing domestic emphases. Until 1960, the P.R.C. traded mostly with the Soviet Union and other Socialist countries, from which it imported a great deal of machinery, whole plants, and technology. During the period of readjustment after the Great Leap, 1961–1965, the P.R.C. increased trade with non-Socialist countries.³⁸ Because of the de-emphasis of heavy industrial development and the emphasis on self-reliance, however, only a small number of industrial plants were imported. During the Cultural Revolution, the P.R.C. practically ceased importing foreign plants and technology. After the withdrawal of Soviet assistance, the Chinese limited foreign trade as much as possible. They promoted exports only to the extent needed to earn foreign exchange for their limited imports.

Since 1971, although its leaders have continued to invoke the importance of “self-reliance,” the P.R.C.’s trade has grown markedly, and is far greater than at any time since 1949.³⁹ Official statements of policy insist that the P.R.C. never has sought complete self-sufficiency and that foreign trade always has been regarded as useful.⁴⁰ Important quantitative and qualitative changes in the P.R.C.’s foreign trade suggest that by 1970, pursuant to a change in economic development policy, the Chinese decided to increase both imports and exports. In 1970, the P.R.C.’s overall foreign trade amounted to less than \$4.5 billion, hardly more than

tion is in a speech by Premier Chou En-lai at the Fourth National People’s Congress. Chou said:

On Chairman Mao’s instructions, it was suggested in the report on the work of the government to the Third National People’s Congress that we might envisage the development of our national economy in two stages beginning from the Third Five-Year Plan: The first stage is to build an independent and relatively comprehensive industrial and economic system in 15 years, that is before 1980; the second stage is to accomplish the comprehensive modernization of agriculture, industry, national defence and science and technology before the end of the century, so that our national economy will be advancing in the front ranks of the world.

Chou En-lai, *Report on the Work of the Government*, PEKING REV., Jan. 24, 1975, at 21, 23.

³⁸ See Chen, *China’s Foreign Trade, 1950–1974*, in JEC PAPERS, *supra* note 2, at 617, 628–31, 648–49.

³⁹ See *id.* at 645.

⁴⁰ See, e.g., LI CHIANG, *New Developments*, in CHINA’S FOREIGN TRADE, NO. 1, at 2–4 (1974). Li Chiang, Chinese Minister of Foreign Trade, observed that in trade, China can learn from other countries’ merits and obtain necessary materials, equipment and techniques through exchange. This is an implementation of the principle of making foreign things serve China, and combining learning with inventing in order to add to our ability to build socialism independently and with the initiative in our hands through self-reliance to speed up the pace of our socialist construction. Facts prove that foreign trade is necessary to the development of our national economy.

Id.

the total in 1959. By 1973, however, it had grown to over \$9.5 billion.⁴¹

Most dramatically, the P.R.C. has begun to import foreign capital goods on a much larger scale than before. In 1973, the P.R.C. imported \$855 million in machinery and equipment, and signed contracts for the purchase of whole plants, machinery, and equipment worth about \$2.5 billion.⁴² In 1974, the Chinese signed contracts for an additional \$800 million for plants.⁴³ The majority of these purchases have been from Japan and Western Europe; ten Boeing 707s and eight ammonia plants from the M. W. Kellogg Company were the principal capital goods imported from the United States. Although the P.R.C.'s total imports from the United States reached \$740 million in 1973 and \$820 million in 1974, they were mostly wheat, cotton, soybeans and corn.⁴⁴

While increasing their imports, the Chinese have also begun to increase their foreign exchange earnings through exports. Like all developing countries, the P.R.C.'s principal exports have been agricultural products. The P.R.C.'s arable land, however, is limited and no great increases in agricultural output have been possible. As a result, the P.R.C.'s economic planners have evidently decided to increase exports of manufactured goods, a policy reflected in Chinese attitudes toward exports to the West. Formerly, the Chinese made only minimal efforts to penetrate Western markets. They sold many of their products to Southeast Asia, and generally did not try to aim for sales in sophisticated European markets. A number of Americans who first visited the P.R.C. in 1972 found discouraging signs of incompatibility between the Chinese and the U.S. markets, because of different concepts of design, packaging, and labeling.

Recently, however, representatives of China's foreign trade have shown increasing willingness to design, package, and label Chinese products in accordance with the requirements of the U.S. market. Additionally, they have tried to make Chinese production units generally more responsive to the requirements of foreign markets.

⁴¹ See Chen, *supra* note 38, at 645.

⁴² CENTRAL INTELLIGENCE AGENCY, RESEARCH AID, PEOPLE'S REPUBLIC OF CHINA: INTERNATIONAL TRADE HANDBOOK 5 (1974).

⁴³ CENTRAL INTELLIGENCE AGENCY, RESEARCH AID, PEOPLE'S REPUBLIC OF CHINA: INTERNATIONAL TRADE HANDBOOK 3 (1975).

⁴⁴ See JEC PAPERS, *supra* note 2, at 513.

Commercial officials in the Chinese Liaison Office in Washington have been most interested in studying the U.S. market for Chinese goods, and Chinese delegations have begun to visit the United States. During 1975 and the first quarter of 1976, five Chinese delegations made lengthy visits to the United States to study the U.S. market for piece-goods and garments, arts and crafts, animal by-products, metals and minerals, and certain other commodities.

Despite the new export drive, the P.R.C. has not been able to adjust quickly to the market requirements of sophisticated foreign markets such as the United States. Unlike exporters in Japan, Taiwan, Hong Kong and South Korea, Chinese planners usually have not been very responsive to foreign market preferences, and are cautious in employing their limited resources to redesign export commodities.⁴⁵ Some of the Chinese enterprises which manufacture goods for export are decentralized units in rural communes and urban neighborhoods, for which changing design and materials and retraining unskilled or semiskilled labor are time-consuming tasks. Also, the policy of "self-reliance" continues to inhibit the very great involvement in foreign trade that an export drive would imply. The P.R.C. clearly has a commitment to expand exports—even though this commitment is mixed with some reluctance—and has increasingly demonstrated this by aiming production at particular markets. These recent Chinese activities, in the wake of earlier changes in domestic development policy, suggest that the P.R.C. is a more accommodating exporter and a more interested trade partner generally than at any time since the establishment of the People's Republic.

FOREIGN TRADE INSTITUTIONS AND PRACTICE OF THE P.R.C.

The Chinese foreign trade apparatus is headed by the Ministry of Foreign Trade, which coordinates overall policy including yearly export-import plans, negotiates some intergovernmental trade agreements and directs the activities of the eight foreign trade corporations which are the P.R.C.'s principal negotiating agencies. It also supervises the Customs Bureau, which administers the P.R.C.'s customs regulations, and the Commodities Inspection Bureau,

⁴⁵ For a good analysis of planning decisions related to China's increasing exportation of manufactured products, see Perkins, *Forecasting China's Trade Over the Long Term*, U.S.-CHINA Bus. Rev., Mar.-Apr. 1975, at 41-47.

which inspects both imports and exports.⁴⁶ The Ministry is divided geographically and also has functional bureaus for import, export, and planning. It supervises the activities of foreign trade bureaus in each province, many major cities, and, increasingly, smaller foreign trade units in counties and districts.⁴⁷

The P.R.C.'s state trading corporations, like the Soviet ones on which they were apparently modeled,⁴⁸ conduct the P.R.C.'s foreign trade. They are constituted as independent legal entities, and in foreign trade represent the P.R.C.'s production units and "end-users," as the Chinese refer to economic enterprises which are the ultimate consignees of imports. The personnel of these corporations usually negotiate contracts for the export of Chinese goods or for the import of foreign goods. In many export transactions, representatives of the producing organizations are totally absent, while in others the production units' technical personnel may be present. Sometimes foreign buyers can visit factories and discuss product specifications and packaging, but the contracts still are signed by the foreign trade corporation. Representatives of the end-user participate directly in negotiations for the purchase of a whole plant or complicated machinery, but commercial aspects of the transaction are handled by the appropriate foreign trade corporation.

The most important corporations divide responsibility functionally for machinery; chemicals; metals and minerals; textiles, cereals, oils and foodstuffs; light industrial products; native produce and animal by-products; and the purchase of whole plants and licensing of foreign technology.⁴⁹ Although the corporations often appear to

⁴⁶ See Hsiao, *The Organization of China's Foreign Trade*, U.S.-CHINA BUS. REV., May-June 1974, at 9; Hsiao, *Communist China's Foreign Trade Organization*, 20 VAND. L. REV. 303, 305-06 (1967).

⁴⁷ For illustrative reports on expanding activities of lower-level foreign trade units promoting production of export commodities, see *Heilungkiang Expands Trade with Foreign Countries*, in FOREIGN BROADCAST INFORMATION SERVICE, PEOPLE'S REPUBLIC OF CHINA, (1975).

FBIS-CHI-74-122, 24 June, 1974, vol. 1, no. 122, at L1; *Tsinghai Overfulfills Export Commodities Plan*, in FOREIGN BROADCAST INFORMATION SERVICE, PEOPLE'S REPUBLIC OF CHINA, FBIS-CHI-75-237, 9 Dec. 1975, vol. 1, no. 237, at M3, 4.

⁴⁸ See Berman & Bustin, *The Soviet System of Foreign Trade*, 7 LAW & POL. INT'L BUS. 987 (1975).

⁴⁹ For a general description of the products handled by each corporation and their addresses, see TRADING WITH THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 1. Although further guidance may be obtained from *What China Has to Sell: Chinese Export Catalogues*, published by the National Council for United States-China Trade in January, 1974, new catalogues appear constantly. The prospective purchaser is best advised to try to obtain

foreigners as undifferentiated entities, they are divided into "branches," which are located in various cities in the P.R.C. The branches apparently possess varying and often discernible degrees of autonomy and initiative. Export contracts may be signed directly with branches, and payment is made directly to branches. Although the corporations do not have offices outside the P.R.C., Chinese diplomatic establishments normally have officials who are exclusively responsible for commercial matters. In major Chinese diplomatic missions, such as the Liaison Office in Washington, D.C., the affairs of each corporation may be represented by particular diplomats. Their duties sometimes extend to negotiations, although not necessarily to signing contracts. In Hong Kong, Chinese foreign trade corporations are represented by three separate corporations—China Resources, Ng Fung Hong, and Teck Soon Hong.

Two important Chinese foreign trade organizations are the China National Ship Chartering Corporation and the China National Trade Transportation Corporation. The former arranges for chartering of foreign-flag vessels; the latter, as agent for the state trading corporations, arranges transportation for cargoes. Another major entity with foreign trade responsibilities is the Bank of China,⁵⁰ which is technically a state-private joint corporation whose general manager is a deputy director of the P.R.C.'s central bank, the People's Bank of China. The Bank of China is an international bank with branches in London, Singapore, and Hong Kong, and acts as an agent for the People's Bank. It buys and sells foreign exchange, extends short-term loans for exports and imports, and handles remittances from overseas Chinese firms. It is the bank with which foreign businessmen deal exclusively. The Bank of China also appears to control the People's Insurance Company of China which insures Chinese hulls, cargoes, and airplanes, and which also participates in insurance business with foreign companies.⁵¹

current information from the Chinese Liaison Office in Washington, D.C. or from the head office of the appropriate Chinese corporation.

⁵⁰ See Dicks, *The People's Republic of China*, in *EAST-WEST BUSINESS TRANSACTIONS* 397, 398-99 (R. Starr ed. 1974); *China's Foreign Trade Organization*, *supra* note 46, at 311-12; Wilson, *The Bank of China's Expanding Role in International Finance*, *U.S.-CHINA BUS. REV.*, Nov.-Dec. 1974, at 21.

⁵¹ The People's Insurance Company has been known to reinsure some of the risks it insures through brokers, but it also conducts reinsurance business bilaterally with foreign companies. In late 1975, American International Group, a prominent U.S. insurer, became

The China Committee for the Promotion of International Trade (CCPIT), although nominally a nongovernmental organization, is an essential arm of the P.R.C.'s foreign trade apparatus. The CCPIT is divided into various departments with different responsibilities. Through its Liaison Department it sends trade missions to, and enters into trade agreements with, countries with which the P.R.C. has no formal diplomatic relations. For example, a CCPIT delegation visited the U.S. in September, 1975. Two other departments organize Chinese trade exhibitions abroad and foreign trade exhibitions in Peking. Two commissions under the CCPIT have formal responsibility for arbitrating trade and maritime disputes.⁵² Its Legal Affairs Department, in addition to possessing responsibility for the registration of foreign trademarks, is also charged with following relevant foreign legal developments. An Average Adjustment Department administers rules for general average adjustment recently promulgated by the CCPIT.

Finally, there are the Chinese commercial offices in various Chinese embassies, and the Chinese purchasing and trade missions which often visit Japan and Europe, and which already have begun to visit the United States.⁵³ The Chinese Liaison Office in Washington has an active commercial office whose staff members analyze the export and import interests of U.S. businessmen and study means of developing trade between the P.R.C. and the United States.

Negotiating Purchases from the P.R.C.

1. *The Canton Fair*

The manner in which the P.R.C. conducts foreign trade is most visible at the semi-annual Canton Export Commodities Fair, at which at least a third of the P.R.C.'s export transactions, as well as some important commodity import transactions, are negotiated and concluded. Each April 15–May 15 and October 15–November 15 more than twenty thousand foreign businessmen come to Canton

the first U.S. insurance company to enter into a bilateral agreement with the People's Insurance Company.

⁵² See *China's Foreign Trade Organization*, *supra* note 46, at 313–14; Jen Tsien-hsin, *Foreign Trade and Maritime Arbitration in China*, CHINA'S FOREIGN TRADE, No. 3, at 50 (1975).

⁵³ For instance, Chinese groups have already visited U.S. color television tube manufacturing facilities, manufacturers of large gas turbines and compressors, and suppliers of airplane spare parts.

to deal with the Chinese corporations. At the Spring 1976 Fair, about 300 U.S. firms were represented with 600 Americans attending. U.S. businessmen have now begun to outnumber the representatives of the European countries that have traded with the P.R.C. longer than the United States. The country most heavily represented is Japan, which sends several thousand people to attend the Fair. The number of visitors from a country, however, does not reflect the volume of Chinese trade with that country. Perhaps a majority of the visitors are overseas Chinese, chiefly from Southeast Asia, but the P.R.C. does the largest volume of its business with Japan and Western Europe.

Attendance at the Fair is only by invitation, and without an invitation an entry visa will not be issued. When U.S. businessmen first began to attend the Fair in the spring of 1972, only forty were present because invitations were difficult to obtain. Now it appears relatively easy for experienced importers to obtain invitations, especially if they can demonstrate to the Chinese their experience in importing and distributing foreign products either by correspondence with the corporations from which they wish to buy, or by discussions at the Chinese Liaison Office in Washington, or preferably both. Specialists seem particularly welcome, and the Chinese also have welcomed relatively small but dedicated firms that are willing to make a strong commitment to importing Chinese goods. It is essential, however, for the prospective Fair-goer to write repeatedly to the relevant corporation, the Chinese Liaison Office in Washington, and the Canton Fair Authorities; describing in detail the size and scope of the company's activity, its annual sales volume, and its experience in importing and distributing goods of the type it seeks to purchase from the P.R.C.

The importer who goes to Canton must remember that negotiations at the Fair reflect the impact of a variety of Chinese circumstances and policies. The P.R.C.'s production of goods for export is limited and is increasing only slowly. As a result, despite its recently increased emphasis on foreign trade and on broadened contacts with the United States as well as with many other nations, the supply of available goods often cannot meet the demand. In recent years, the Fair has been a gigantic exercise in which the Chinese negotiators allocate the output of many products, particularly agricultural products and textiles, among an ever-increasing number of potential buyers.

Chinese pricing policies may be difficult for the newcomer to understand. Until 1973, many export items were priced very attractively, but in early 1973 the prices suddenly increased. Many observers assumed that the large volume of whole plant import contracts which had been signed in 1971–1972 forced Chinese planners to require an increase in the foreign exchange earned by Chinese exports. Indeed, Chinese foreign trade officials at that time frequently cited the high cost of imports as a principal justification for the increased prices. At the time, the combination of high prices and limited quantities of goods appeared to many Western buyers to give the negotiations an unwelcome take-it-or-leave-it atmosphere. The prices on many items subsequently dropped in response to buyer reluctance and to generally poor economic conditions in the developed countries. Recently, the Chinese export corporations have been very anxious to increase their sales, and have shown some price flexibility.

A newcomer to the Canton Fair may require some time to become accustomed to unfamiliar circumstances before he begins to negotiate. The Fair building itself is an enormous four-story complex. The first and most of the second floors contain exhibits devoted both to Chinese products and to Chinese accomplishments in agriculture and industry. Most business is done on the third and fourth floors, with each corporation occupying designated areas. Negotiations take place either at tables set in rows in the broad corridors—in full view of one's competition—or in rooms off the corridors, separated from each other and from the corridors by partitions that do not reach the ceiling. Sometimes the raised voice of an exasperated “foreign friend” may be heard by other “foreign friends” awaiting their turn outside.

To all visitors to the Fair, and especially to newcomers, the pace of negotiations may seem slow. Meetings usually are by appointment and a foreign businessman may wait a day or more between appointments. Usually, however, meetings can be expeditiously arranged. The new visitor will be expected to introduce himself and his company at some length; he should not assume that the foreign trade officials he meets in Canton have read his previous correspondence with the corporation. The foreign buyer, in addition to indicating what he wishes to buy, would do well to demonstrate any expertise he may have—for example, by discussing world market trends in the commodities he wishes to purchase. A

buyer of Chinese commodities is expected to be knowledgeable about current quotations on the relevant world markets. Often Chinese negotiators will not even discuss market information provided by the buyer, but will simply receive and note it. Buyers also are expected to state how they plan to use or distribute the Chinese goods they purchase. Although businessmen not forewarned may resent the extra time and effort involved, these exercises contribute to creating an atmosphere of trust and confidence.

Most Western businessmen are quizzed on market conditions, but Chinese negotiators at Canton have had particularly detailed conversations with U.S. businessmen. Trade between the two countries has only recently resumed, of course, and the mass of laws and regulations which affect imports into the United States is unfamiliar and confusing to the Chinese. Moreover, some U.S. newcomers to the Fair have misled the Chinese, sometimes intentionally, as to the knowledge or authority they possessed, or have falsely represented that U.S. law required changes in design, labeling, or specifications that these businessmen wanted. U.S. traders have been asked to discuss many aspects of the U.S. economy, such as banking and tariffs, and sometimes have been asked to write "reports" on certain matters. The Chinese believe that these probes help them to gauge the sincerity of the U.S. party. The state trading corporations lack long experience in dealing with U.S. companies and have difficulty in choosing how and with whom to establish new relationships. The manner and thoroughness with which U.S. businessmen respond to their queries helps the Chinese form perceptions of their reliability.

The experience of Chinese negotiators varies considerably, as does their communicativeness. The businessman who seeks to inform himself about the organization of Chinese foreign trade institutions and about matters such as pricing frequently will find that when he raises these matters the focus of conversation will shift, or that the Chinese will respond to his inquiries by saying that they are "not too clear" about the subject of the discussion. But the P.R.C.'s increased interest in expanding exports has caused communication to improve between foreign buyers and Chinese sellers.

After the preliminaries are concluded, the Chinese negotiator normally will inform the buyer of the selling price and the quantity that is available. Sometimes, however, a negotiator, rather than stating a price, may ask the buyer to make a bid. Further, the buyer

who wishes to purchase large amounts may discover that the Chinese negotiator can only offer a fraction of the amount desired. The buyer of essential oils, for example, who wants 20 tons of a particular oil may be told that the Chinese can sell him only a drum or two. Some buyers may wait for the duration of the entire Fair in the hope of persuading negotiators to increase the amount they are willing to sell them. Throughout these negotiations, U.S. businessmen can have the dubious consolation of knowing that their European competitors encounter similar difficulties. The U.S. "new friend" is told he cannot buy larger quantities because the Chinese must be loyal to their "old friends." The "old friends" meanwhile are being told that many "new friends" must be accommodated. Both sets of "friends" usually come away with less than they want. Another possible problem is that the Chinese agency may have "minimum requirements" which inhibit the filling of small sample orders.⁵⁴ On the other hand, some U.S. buyers have been unable to sign the contracts they wanted because their orders were so large that the Chinese could not fill them.

Negotiations for the purchase of Chinese exports which involve important details of design, labeling and packaging may be particularly tedious. As has already been noted, Chinese interest in meeting the needs of particular markets and customers has not been intense in the past. Moreover, the P.R.C.'s ability to make and implement changes in product design is often limited, although both capacity and willingness may vary from corporation to corporation, and, within corporations, from branch to branch. In the past, the Chinese sometimes agreed to make changes and later discovered that their delay in meeting their customers' requirements caused their products to be out of fashion after they had made the change. During the Cultural Revolution, Chinese accommodations to Western markets were criticized as too bourgeois, and they ceased altogether.

The growing Chinese willingness to adjust to the needs of foreign markets has been very apparent in trade between U.S. companies and Chinese textile and native produce corporations. These state trading corporations have agreed to permit U.S. purchasers of garments and bamboo baskets to print labels in the United States and send them to the P.R.C. to be affixed to the

⁵⁴ See, e.g., Markus, *Marcus Polo at China Trade Fair: Adventures of a Dallas Executive in Canton*, N.Y. Times, June 4, 1972, § 3, at 5, col. 4.

products next to the Chinese labels. Labeling has been a sensitive area of discussion in Sino-U.S. trade. The Chinese have been reluctant to allow an importer's label to replace their own. U.S. importers have argued that brand identification is a marketing concept that can be used to expand sales of Chinese products which otherwise would bear unfamiliar and sometimes even inappropriate Chinese brand names. The Chinese have resisted these blandishments, for a variety of understandable reasons: They resent foreign purchase of cheap Chinese labor; removal of a Chinese brand name offends national pride; resources are scarce enough to give the Chinese pause before they make allocation decisions that will commit manufacturing capacity and raw materials to production for designated markets; and even if a foreign trade corporation is willing to make changes desired by a foreign customer, it may have to persuade and induce a reluctant producing unit to make the desired change.

U.S. Food and Drug Administration (FDA) regulations also have caused particularly difficult problems during negotiations at the Fair. These regulations already have caused rejection, relabeling, or resale abroad of some Chinese shipments of foodstuffs to the United States.⁵⁵ The Chinese so far have refused to accept responsibility for FDA rejection of Chinese goods, and the importer of Chinese foodstuffs or Chinese porcelain may have to protect himself by insuring against that contingency. FDA rejection of Chinese frozen shrimp has caused insurance to become more expensive. For the moment, discussions at the Fair of labeling and food and drug standards can be protracted and unsatisfactory.

In 1973, Chinese officials sometimes stated that the reluctance of the trading corporations to adjust faster to the needs of the U.S. market stemmed partly from the existence of stocks produced before these adjustments were necessary, and they predicted greater responsiveness in the future. Chinese caution, however, is based on other reasons as well. Not only have the applicable U.S. regulations and their enforcement been difficult to understand, but also U.S. buyers have given conflicting advice, thereby causing some confusion. In addition, the basic problem of resource allocation mentioned above is influential. Adjusting to U.S. regulations standards may be too much of a burden for Chinese producing units at

⁵⁵ For examples of recent detentions of Chinese products, see FOOD AND DRUG ADMIN., COMMERCIAL IMPORT DETENTIONS, No. 75-11, at 2, 5, 8, 16, 24 (1975).

the present time, especially when the demand and volume of U.S. sales remains uncertain.

Not all areas of negotiation have been as difficult as labeling. Chinese negotiators have shown willingness to copy samples brought to them by importers. Some have been willing to guarantee a buyer who has brought a new design to them that for a specified period of time they will not sell items embodying that design to other buyers. The Chinese also are beginning to offer exclusive U.S. distributorships on some items, as they have long done in Europe. The term of these arrangements has been limited, and the Chinese corporations have moved more slowly to create these arrangements than many U.S. buyers have wished. Further, often the corporations will insist that the buyer agree to purchase minimum quantities which soon exceed the maximum a buyer wants to buy.

The prospects at the moment indicate that the Chinese are continuing to increase slowly their willingness to meet the needs of the U.S. market. U.S. buyers must be very patient, and must realize that their requests may require substantial and difficult shifts in resource allocation by the Chinese. Also, ideological considerations are important and accommodations to foreign markets could be slowed by a shift in policy toward greater "self-reliance."

The Canton Fair may present the purchaser with some trying moments. The Chinese negotiators may hint to him that his competitors are buying without complaining about the inappropriateness of design or packaging, inadequate quantities, high prices, distant delivery dates, or other problems. He may find that, after *protracted negotiations*, the Chinese will announce that they can increase the quantity they will sell him, but in return will expect him to make a concession on the price. This give and take, however, has resulted in transactions of considerable size, so clearly some U.S. buyers have adapted to the ways of the Canton Fair, especially those who have grasped the importance of patience.

2. *Negotiating Purchases Elsewhere in the P.R.C.*

U.S. companies that specialize in importing products which are either traditional Chinese exports or relatively new exports which the Chinese are keen to sell may be able to do their business in *other Chinese cities between Fairs rather than at the Fair*. U.S. importers of carpets, bristles, shoes, cotton piece goods, garments, resin, and giftware, to cite some recent examples, increasingly have been able to negotiate in Peking, Shanghai, Tientsin, and Canton.

These buying visits afford considerably greater opportunities than the Fair for the importer. A purchaser generally is permitted to visit factories and discuss design, packaging and labeling directly, instead of having to deal solely with a foreign trade negotiator. The Fair gives the prospective buyer a useful overview by bringing together exhibits (unfortunately never complete) of products available for sale by all branches of each corporation. However, if a buyer knows that a particular product he wishes to import is offered by one or two branches, he may be better able to obtain the product if he can visit the branch at its home office and do business there. Businessmen who have made such trips usually prefer to concentrate their business in this fashion. Even though the total time spent in the P.R.C. may be as long as or longer than time consumed attending the Fair, buyers appear to come away more satisfied.

Specialized fairs presented by individual Chinese trade corporations for several weeks at a time to display particular products create other opportunities for importers to make purchases between Canton Fairs. The use of these more limited exhibitions is apparently increasing; some of these small fairs were held in 1975 by the China National Native Produce and Animal By-Products Import and Export Corporation to promote the sale of carpets, forest products, and furs. Others were held by the China National Textiles Import and Export Corporation to promote the sale of garments. In the spring of 1976, the China National Chemicals Import and Export Corporation held an exhibit in Shanghai to promote the sale of Chinese pharmaceutical products.

3. *Contract Terms*

Just as the setting and the pace of negotiations in the P.R.C. are unfamiliar to U.S. buyers, so also are some of the contract clauses which they may be asked to accept. A survey of certain standard clauses and the problems that have arisen under them can provide U.S. traders with insights into Chinese commercial practice and guidance.

The Chinese state trading corporations use two standard types of contract forms for sales of their goods, although the particular forms within each class vary somewhat. The one-page "sales confirmation" contains only the bare essentials of the transaction.⁵⁶

⁵⁶ A typical "sales confirmation" is reproduced in Appendix A. This discussion of stan-

It names the buyer, the seller, and the commodity which is the object of the transaction, briefly describes its specifications and quality, and adds the unit price, total value, packing, shipment date, loading port and destination, insurance (Chinese sales to the United States are usually "CIF" or "C&F"),⁵⁷ terms of payment and shipping mark. Some "sales confirmations" also include a standard clause providing for the finality of Chinese inspections of quantity, weight, and quality of the goods. The other common form, the standard "sales contract",⁵⁸ contains all of the above clauses as well as clauses dealing with force majeure and arbitration, and a variety of other clauses, sometimes required because of the specific commodity involved, and sometimes addressed to more general matters such as claims. This section of the Article focuses on Chinese practice under standard clauses for payment, claims, inspection, dispute settlement and force majeure.

a. *Payment*⁵⁹

The standard payment clause provides for payment for Chinese goods by confirmed, irrevocable, transferrable and divisible letters of credit which are payable at sight. The clause specifically requires that the letter of credit must allow transshipments and partial shipments, must reach the seller at a specified date, often 30 days or more before the date of shipment (which is usually stated simply

ard Chinese contract clauses, in addition to drawing on the author's own research and experience, has benefitted from Hsiao, *Communist China's Foreign Trade Contracts and Means of Settling Disputes*, 23 VAND. L. REV. 503 (1969); Reghizzi, *Legal Aspects of Trade with China: the Italian Experience*, 9 HARV. INT'L L. J. 85 (1968); Smith, *Standard Form Contracts in the International Commercial Transactions of the People's Republic of China*, 21 INT'L & COMP. L. QUART. 13 (1972).

Standard Chinese contract forms have recently been collected and published in NATIONAL COUNCIL FOR U.S.-CHINA TRADE, SPECIAL REPORT NO. 13, STANDARD FORM CONTRACTS OF THE PEOPLE'S REPUBLIC OF CHINA (1975).

⁵⁷ Under a CIF (cost, insurance, freight) contract the seller must ship at the agreed port of shipment the goods specified in the contract, charter the vessel or contract for the freight space and pay the cost of freight to the destination, and arrange for insurance of the cargo for the benefit of the buyer. Under C&F (cost and freight) terms the seller bears responsibility as stated above except for insurance, which is arranged by the buyer. See C. SCHMITT-HOFF, EXPORT TRADE 24-25 (5th ed. 1969).

⁵⁸ A standard "sales contract" used by the China National Light Industrial Products Import & Export Corporation is reproduced in Appendix B *infra* [hereinafter cited as Sales Contract].

⁵⁹ For an authoritative discussion of practice under Chinese payment clauses, see Schwerling, *Financing Imports From China*, U.S.-CHINA BUS. REV., Sept.-Oct. 1974, at 36.

in terms of a two-month period, e.g., "September-October"), and must remain valid 15 days after expiration of the shipment period.

Direct Sino-U.S. banking relationships do not yet exist, and cannot exist until the settlement of U.S. private claims against the Chinese for seizure of property in the early 1950's, and Chinese claims to assets frozen in U.S. banks at the beginning of the Korean War.⁶⁰ At the time of this writing, letters of credit may be opened only through about 20 third-country banks with offices in the United States, such as the Hong Kong and Shanghai Bank or the Chartered Bank. At least one or two Chinese corporations have extended other terms, such as cash payment against documents and credit terms for 30 or 60 days to European buyers, particularly old customers, but these terms still are uncommon in U.S. purchases of Chinese goods.

Until the Spring 1975 Canton Fair, payment clauses in Chinese sales contracts normally specified Chinese currency, the *Renminbi* (RMB) (People's Currency), as the medium of payment. This meant that the buyer, or more precisely his bank, had to purchase the currency from the Bank of China in order to pay his seller. A buyer who signs a contract containing this clause cannot know the precise amount of his obligation, because the Bank of China constantly revalues foreign currency against the *Renminbi*. A foreign buyer's obligation becomes fixed only when his credit is drawn on, at the rate applicable on that particular day.

European traders have long been able to protect themselves somewhat against currency fluctuations by purchasing RMB up to 6 months in advance. The Bank of China will permit this upon proof that the purchaser has a valid contract for the purchase of Chinese goods. In August 1975, the Bank of China began to provide 1 to 6 months' forward cover on U.S. dollars against RMB at interest rates ranging from 0.6 percent for 1 month to 3 percent for 6 months. Also, in 1975 for the first time, the Textiles and Native Produce corporations began to sign contracts based on U.S. dollars, thereby shifting the foreign exchange risk away from U.S. buyers. The trend appears to be toward using major foreign currencies as the media of payment, although practice is not uniform.

In banking as in other areas of activity in which they did not participate in the codification of international practice, the Chinese are unwilling to commit themselves to the use of standard docu-

⁶⁰ See text accompanying notes 58-67 *infra*.

ments. For example, they do not formally adhere to the widely-used Uniform Customs and Practices for Documentary Credits. According to a recent statement, however, the Bank of China is "ready to adopt or take into consideration international customs and practices, provided they do not contradict the policy of independence and the principle of equality and mutual benefit."⁶¹ No published sources, Chinese or otherwise, are available to identify Chinese departures from the Uniform Customs, although they arise periodically and may surprise U.S. importers and their bankers.⁶²

b. *Inspection, Claims, and Dispute Settlement*

The standard Chinese export contract provides that Chinese inspection of the goods is final.⁶³ Normally, the inspecting agency is the Chinese Commodities Inspection Bureau (CCIB), which maintains offices in the P.R.C.'s major ports and industrial centers. According to the Bureau, Chinese law requires it to inspect only certain categories of Chinese products.⁶⁴ Some contracts, such as

⁶¹ Bank of China, Head Office, *The Bank of China and the Settlement of China's International Payments*, CHINA'S FOREIGN TRADE No. 4, 1975, at 8, 9.

⁶² For instance, the Uniform Customs provide that a telegraphic pre-advise of the opening of a documentary credit is effective even before the credit instrument reaches the beneficiaries. Nevertheless, U.S. customers of the Chartered Bank, one of the leading foreign banks in the United States through which letters of credit can be opened in favor of Chinese trade corporations in payment of goods purchased by U.S. importers, were recently advised by the Bank that Chinese beneficiaries do not consider telegraphic pre-advices to be effective "until the actual credit instrument is in their hands." The Chartered Bank retains an office in China located in Shanghai. It advises Chinese beneficiaries in Shanghai directly by mail or messenger, and notifies other beneficiaries by mailing the advice to the Bank of China in those cities. Letter from the Chartered Bank, New York, to Stanley B. Lubman, Dec. 23, 1975 (on file with the author).

⁶³ The contracts used by the Chinese corporations responsible for sales of minerals, metals, and chemicals vary by providing for third-party inspection. The clause used in the standard contracts for the sale of minerals and metals provides:

Quality/Quantity Discrepancy and Claim: In case the quality and/or quantity/weight are found by the Buyers to be not in conformity with the Contract after arrival of the goods at the port of destination, the Buyers may lodge claim with the Sellers supported by survey report issued by an inspection organisation agreed upon by both parties, with the exception, however, of those claims for which the insurance company and/or the shipping company are to be held responsible. Claim for quality discrepancy should be filed by the Buyers within 30 days after arrival of the goods at the port of destination, while for quantity/weight discrepancy claim should be filed by the Buyers within 15 days after arrival of the goods at the port of destination. The Sellers shall, within 30 days after receipt of the notification of the claim, send reply to the Buyers.

Minerals and Metals Sales Contract, cl. 12, in STANDARD FORM CONTRACTS, *supra* note 56, at 50.

⁶⁴ Conversation with officials of the Commodities Inspection Bureau, in Canton, October 1974.

those of the China National Textiles Import and Export Corporation for the export of garments and piece-goods, apparently do not as a rule contain an inspection clause.

The U.S. importer may well wonder what recourse he has if he believes that the goods he has received are defective. The experience of European buyers suggests that the Chinese corporations will insist, at least initially, on the finality of the Commodities Inspection Bureau's certificate. In practice, settlement of a buyer's claim is usually accomplished by bilateral negotiations with the corporation which sold the goods. Often settlement is difficult to accomplish by correspondence. West European veterans and U.S. newcomers alike have noted the Chinese preference for negotiating the claims in the context of discussions of future business.

Negotiation of claims may be time-consuming, and especially difficult if the buyer does not intend to place new orders. Also, buyers have found the corporations reluctant to make cash payments, preferring instead to offer the customer some concession of future purchases. As a result, a claimant may receive a discount or a Chinese negotiator will suddenly exhibit willingness to modify the design or packaging of a product along lines that the buyer had previously urged unsuccessfully. There may be bureaucratic reasons for the Chinese corporations' reluctance to make direct payments. They may have to explain to financial authorities the claims that resulted in the necessity of making the payment. Future concessions, on the other hand, probably are within the discretion of the corporation to make without any need to consult financial authorities. At any rate, prompt cash payments for claims also are sometimes made by Chinese corporations. The Chinese have been known to reimburse buyers for large costs incurred by Chinese failure to properly label goods "Made in the People's Republic of China", or for shipping dyed cotton cloth of the wrong color; they also have been willing to offer price reductions on outstanding contracts as well as on future business.

Disputes over the quality of goods sometimes arise because the contract did not specify the standards by which the quality of the goods was to be measured. Problems will inevitably arise in the future as a result of U.S. buyers' allegations that the goods they purchased from the Chinese did not meet contract specifications. However, to minimize these disputes, extreme care must be taken where contracts are negotiated to spell out not only mutually ac-

ceptable specification and performance standards, but also the method by which the conformity of the goods to contract specifications will be ascertained. As some U.S. importers of garments have already discovered, it does not help to specify in the contract that garments must not shrink more than 5 percent, if the method of washing to be used in testing the garments for shrinkage is not also specified. The U.S. importers assumed that the garments would be washed in washing machines, but the Chinese did not. Nor did the parties specify the water temperature. Unfortunately, neither the Commodities Inspection Bureau nor the State trading corporations have made available the text of the standards used by the Bureau.

Arbitration of disputes may appear to be an obvious alternative to this fluid process in which the Chinese sellers' discretion may seem uncomfortably broad to importers. In fact, some Chinese sales contracts contain clauses providing for arbitration by the Chinese Foreign Trade Arbitration Commission (FTAC) in Peking. The FTAC was established in 1954 and rules of procedures and a list of its members were published in 1956.⁶⁵ A full list recently has been published in the P.R.C.⁶⁶ Despite some signs of increasing Chinese interest in arbitral methods of settling trade disputes,⁶⁷ however, it is doubtful that the Chinese will soon resort often to arbitration of disputes with importers, in the P.R.C. or elsewhere.

Officials of the Legal Affairs Department of CCPIT with whom the author has discussed trade dispute settlement have indicated that for years, particularly since the Cultural Revolution, the FTAC has not been a standing body with regular members. Rather, when CCPIT receives a complaint, whether or not accompanied by a formal demand for arbitration, it selects one or more "foreign trade experts" who are not always FTAC members, to investigate the matter and propose a settlement.⁶⁸

⁶⁵ See NATIONAL COUNCIL FOR U.S.-CHINA TRADE, SPECIAL REPORT NO. 4, ARBITRATION AND DISPUTE SETTLEMENT IN TRADE WITH CHINA 48 (1974).

⁶⁶ *List of Members of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade*, CHINA'S FOREIGN TRADE NO. 3, at 51 (1975).

⁶⁷ Publication of the membership of the FTAC is one indication of interest. See note 66 *supra*. Another is the publication of an article on foreign trade arbitration. Jen Tsieng-hsin, *supra* note 52, at 56. A third is the invitation extended in 1975 to the American Arbitration Association to send two representatives to Peking, where they held discussions with the Legal Affairs Department. See Holtzmann, *Resolving Disputes in U.S.-China Trade*, in LEGAL ASPECTS OF U.S.-CHINA TRADE (H. Holtzmann ed. 1975).

⁶⁸ One such compromise settlement was described to the author by officials of the Legal Affairs Department of CCPIT and of the Foreign Trade Arbitration Committee in Peking,

c. *Delivery*

A not uncommon cause of disputes in international commerce is loss to a buyer caused by the seller's delay in delivery. The P.R.C. corporations usually are unwilling to pay claims for these losses, although a number of the corporations employ form clauses calling for stiff penalties when they are the purchasers. Late deliveries have been a common problem in Sino-U.S. trade, although the Chinese sellers are becoming more prompt.⁶⁹ The Chinese often have to contract to deliver their goods further in advance than other sellers of the same type of goods.

Chinese contracts usually will be no more specific about delivery than a reference to a two-month period, such as "August-September" delivery. This means that the goods may be loaded at any time between August 1 and September 30. An additional potential cause of delay is transshipment, which the standard Chinese sales terms usually expressly permit and which may occur twice, once each in Hong Kong and Japan. Since the contracts are almost always on CIF or C&F terms, the Chinese shippers control the choice of shipping line and so far have resisted the buyers' attempts to specify carriers. An even greater problem is that the corporations that sell Chinese exports do not themselves arrange shipment and have no control over the routes and vessels.

Quite apart from the problems of uncertainty created by the language of the clause, the Chinese often may not be able to ship the goods before the expiration of the period specified in the contract. Chinese sellers not only expect a buyer to keep his letter of credit valid until they are able to ship the goods, but also are unwilling to pay a buyer for any losses caused by the delay. Sometimes a tardy Chinese seller will agree to change the payment terms by cabling willingness to accept payment against documents presented in the U.S., thereby obviating the need for the buyer to extend his letter of credit. Also, a buyer who claims to have been

April, 1973: A European buyer of plush complained that the fabric had been pressed down so hard during shipment that it could not be restored to its required texture. CCPIT appointed a textiles expert who recommended that the fabric be steamed. Several officials of CCPIT then visited a factory where steaming and its effects were demonstrated, and they decided to accept the recommendation of the expert and so notified the buyer, who then withdrew his claim.

⁶⁹ See Green, *When Will Your Ship Come In?*, U.S.-CHINA BUS. REV., Nov.-Dec. 1975, at 14, 19. Green notes that the number of vessels chartered by the China National Ship Chartering Corporation for direct voyages from Chinese ports to U.S. ports increased in 1975 by comparison to the previous year. *Id.*

severely injured by delay in delivery may persuade the seller subsequently to adjust the price or specifications of the product in a later transaction, thereby increasing the buyer's profit on a subsequent transaction and in part making up his prior loss. A buyer's cancellation of a contract for lateness is most unwelcome and provokes vigorous opposition from the Chinese. The most well-known exception to this Chinese attitude is a very special one, namely Western European purchases of walnuts. Contracts with European buyers for the purchase of nuts, which are most in demand for the Christmas season, provide that if the vessel does not arrive by an agreed date, the buyers may cancel. Indeed, in 1973 the vessel carrying the walnuts broke down en route and many contracts were cancelled.⁷⁰ If U.S. buyers with seasonal needs contract to purchase Chinese goods, perhaps the walnut exception may provide a useful analogy.

d. *Force Majeure*

Chinese standard contracts employ a variety of force majeure clauses. One skeletal version simply states:

The Sellers shall not be held responsible for non-delivery or late delivery resulting from natural calamities and/or causes beyond their control. However, the Sellers shall undertake to notify the Buyers to this effect accordingly.⁷¹

Another version refers to "natural disasters or other force majeure causes,"⁷² while another enumerates "war, flood, fire, storm, heavy showers" and adds "any other causes beyond [seller's] control" as justification for extending the time of shipment or cancelling all or part of the contract.⁷³

⁷⁰ The situation was described as follows:

Despite intense efforts by the tugs towing her after her break-down off South Africa, the boat bringing Chinese walnuts in shell for the U.K. Christmas trade reached Avonmouth 9¼ hours after the guaranteed deadline; midnight on 30th November. Many traders thereupon took advantage of the clause in the contracts which allowed cancellation in the event of late arrival. Several of the regular traders in this commodity with China, however, ignored the slightly late arrival and proceeded to take up their tonnages, despite the losses they would inevitably suffer through the drop in prices since the purchases were made.

CHINA TRADE AND ECONOMIC NEWSLETTER, Dec. 1973, at 7.

⁷¹ See Sales Contract, cl. 6, at App. B *infra*.

⁷² See Chemicals Sales Contract, cl. 8, in STANDARD FORM CONTRACTS, *supra* note 56, at 23.

⁷³ See Cereals, Oils, and Foodstuffs Sales Contract, "General Terms and Conditions," No. 4, in *id.* at 16.

Western experience with these clauses is scanty. As noted above, the Chinese expect buyers to extend their letters of credit for many months until delivery can be made. This expectation may exist even to commodities subject to severe price fluctuations. Many buyers are reluctant not to extend the credit, for fear of being considered "unfriendly".

The foregoing discussion of Chinese sales terms should suggest that purchases on standard Chinese terms may present difficulties to buyers, who normally have little or no ability to vary the terms on which the P.R.C. sells to them. As trade grows, however, and certain buyers emerge as committed and reliable, they may be able to bargain for greater protection against damages from late delivery, or the failure of Chinese goods to pass FDA inspection, or quality deficiencies. Other practical difficulties cannot be dealt with easily by contracts, such as the frequent unresponsiveness of Chinese corporations to communications from U.S. customers and the lack of continuity in supply. The accretion of commercial practice and the growth of commercial relationships may lead to greater explicit recognition of trade interdependence in the clauses governing relationships between Chinese sellers and U.S. buyers.

Negotiating Sales to the P.R.C.

When Chinese corporations purchase abroad, they prefer to use their standard form contracts. But considerably greater variation from the standard clause is possible, at least in the sale of high-technology products which the Chinese are particularly anxious to buy and in turnkey contracts, of which the Chinese have concluded an increasing number in recent years. Most of the discussion which follows concerns contract clauses in sales of machinery and plants to the P.R.C. The prospective seller also should be aware, however, of the difficulty of getting to meet with the appropriate Chinese representatives. The prospective seller must invest considerable time and effort in pre-negotiation attempts to introduce his company and his products to the Chinese importers.

1. Getting to the P.R.C.

a. A Note on the Canton Fair

The Canton Fair is only marginally relevant to sellers of whole plants and high technology equipment. Contract negotiations for

purchases of such items are complex and protracted, and usually are conducted in Peking, not at the Fair. Foreign sellers at the Fair usually sell highly standardized products such as chemicals, metals, and machinery spare parts. Even for these sellers, the Fair presents frustrations because of the slowness with which the P.R.C.'s economic planning system works and the length of time which the Chinese require to decide on purchases. Moreover, the Chinese negotiators come to Canton with their own shopping list which they do not reveal to exporters. The foreigner who seeks to introduce a product not on the list will get nowhere in his attempts. He cannot sell his products until the appropriate decisions are made by the various Chinese economic institutions.⁷⁴

The seller of capital goods is also limited in Canton, especially on the first visit, to making presentations and distributing technical literature to Chinese trade officials who can only promise to relay the information to the ultimate end-users. Sales will not immediately result from these efforts, but the discussions may indicate to the U.S. sellers the types of products and technology which the Chinese expect to purchase in the near future. Further, the discussions may lead to an invitation to Peking or requests to provide additional information that can serve as the basis for future negotiations. Sometimes a Chinese corporation may call in technically qualified personnel from end-users to listen to technical presentations and ask questions of the representatives of foreign sellers. Representatives of CCPIT also have expressed interest in having more foreign companies engage in "exchanges of technical experience" at the Fair. This raises the possibility that for companies with products of particularly great interest, arrangements may be made prior to the Fair for the sellers to meet with technical personnel from the relevant enterprises. These discussions have been held in Canton, but they remain the exception rather than the rule.

⁷⁴ The possibility of advertising in the P.R.C. should be noted. The China National Machinery Import and Export Corporation has reportedly told U.S. diplomats in Peking that end-users "appreciate translated material and extra copies of all relevant product information." *U.S.-CHINA BUS. REV.*, Mar.-Apr. 1975, at 52. Many European companies have long used special printing companies, of which the best-known is China Translation and Printing Services, Ltd., of Hong Kong, to translate into Chinese and print technically oriented sales literature and product specifications and mail the Chinese-language versions to CCPIT for further distribution, or directly to Chinese libraries, research institutions and end-users.

b. *Technical Presentations*

Within the last four years an organization known as the Technical Exchange Department of the CCPIT has been formed to facilitate the arrangement of technical presentations by foreign companies. These meetings are held in Peking by invitation and are primarily for technical discussions and not for the transaction of business. A number of U.S. and foreign companies have sent representatives to Peking for such discussions, in the hope that this introduction of their products might stimulate interest among Chinese buyers and end-users.⁷⁵

c. *Some General Characteristics of Negotiations*

The exporter to the P.R.C. would be wise to anticipate the setting in which negotiations in Peking are conducted. He may feel isolated and alone because communications systems are inadequate (telex facilities are not yet available for foreign businessmen in Peking). The negotiations very likely will be slow and painstaking. Western businessmen often feel suspended in a very alien setting despite the politeness and hospitality of the Chinese hosts.

The seller should be aware that the prospective Chinese buyer may have definite opinions on the persons who should represent the seller at negotiations. The Chinese normally emphasize the need for representatives who can discuss all technical details of the products involved, and obviously they prefer the presence of a commercial representative with authority to make a final decision. In addition, however, they can be expected to try to exclude all others who they regard as third parties not directly affiliated with the seller's company, including agents, outside legal counsel and consultants. Exclusion can be accomplished simply by not authorizing issuance of a visa to the person deemed unnecessary. Sellers who are absolutely firm on their choice of representatives can usually persevere, especially if the "outsider" in question is acting as an adviser rather than as an agent.

Negotiations move slowly for a number of reasons. Chinese buyers will try to learn as much as possible about the technology involved in the seller's product before they decide to purchase it. They often request particularly detailed price breakdowns so that they can determine weak points in the seller's offer and also seek

⁷⁵ For an account of such a presentation, see Auten, *A Scientific Mission to Peking and Shanghai*, U.S.-CHINA BUS. REV., May-June 1975, at 16.

out opportunities to substitute foreign or domestically manufactured components cheaper than those proposed by the seller. The buyers also may be reluctant to answer questions about the place and manner in which the seller's product will be used, probably not wishing to disclose what they consider to be economic intelligence. The answers to these questions can be very important. Chinese reluctance to be forthcoming can lead to later misunderstandings. The product may not perform exactly according to contract specifications due to temperature variations or other conditions affecting performance to which the seller was not alerted during the negotiations.

The seller also must be aware that Chinese negotiators often seem to lack the authority to make quick decisions on the most important price aspects of negotiations.⁷⁶ The Chinese negotiators may request an adjournment when an important price issue must be decided, and the seller may wait for days until the Chinese are prepared to resume negotiations.

Some U.S. sellers, aware of these problems and the opportunity cost represented by long negotiations in Peking which may occupy top executives for long periods of time, have tried to save time and money by engaging trading companies or other agents to represent them. The U.S. seller should be aware, however, of the Chinese dislike for these intermediaries; they do not want the commissions reflected in the price of the equipment they purchase. Also, a general preference for purchasing high technology equipment from the source impels the Chinese state trading corporations to deal directly with the manufacturer. The Chinese also seem reluctant to have sellers represented by third-country companies or individuals, apparently preferring to compartmentalize transactions so that all the foreigners with whom they negotiate about a particular contract are readily identifiable with a single country.

2. *Standard Clauses and Problems Arising Under Them*

Standard clauses in Chinese purchase contracts should be

⁷⁶ Dingle has described these negotiations as follows:

Negotiations in China take more time than is usual anywhere else. They take time partly because the Buyer is meticulous, especially over understanding technical details; partly because of semantic (language and philosophy) problems, and partly because the Buyer's decision-making process makes it necessary to refer any significant idea upwards to a level in the hierarchy which is not available on a day-to-day basis during negotiations.

DINGLE, *supra* note 17, at 11.

examined closely by foreign sellers.⁷⁷ A review of Chinese practice under these clauses, whenever known, may clarify the sellers' expectations, and also may indicate Chinese attitudes about international commerce.

a. *Shipment*

Chinese purchases from abroad usually are on F.O.B. or F.A.S. terms.⁷⁸ Although certain standard contract forms do not use the term "F.O.B.," the clauses on these forms spell out the responsibilities of the parties in a manner consistent with the common understanding of the term. For instance, these contracts clearly specify the documents, including a "clean on board ocean bill of lading marked freight to collect," which the seller must present to the Bank of China when he wishes to negotiate a draft drawn on the letter of credit opened by the Bank. Another common clause states that the risk passes when the goods have "passed over the vessel's rail and been released from the tackle."⁷⁹

Standard forms used by the Chemicals, Minerals and Metals, and Machinery Corporations contain clauses clearly identified as F.O.B. terms. These require the Chinese shipping agent, the China National Ship Chartering Corporation, to notify the seller of arrival of the vessel a fixed number of days before the arrival date.⁸⁰ The Machinery and Minerals and Metals Corporations require the seller to notify them 30 days before the agreed time of shipment, together with details of the shipment that will allow the Chartering Corporation to book shipping space accurately.

F.O.B. clauses may vary as to the calculation of liability for storage expenses in the event a seller has delivered cargo to the port of shipment as agreed but the Chinese vessel arrives late. The

⁷⁷ A Standard Machinery Purchase Contract is reproduced in Appendix C [hereinafter cited as Machinery Contract].

⁷⁸ Under an f.o.b. (free on board) contract the seller is required to make available at the port of loading the goods specified in the contract, and to pay all handling and transport charges for the goods up to the time of their passing over the ship's rail. *See* SCHMITTNOFF, *supra* note 57, 14-15. Under f.a.s. (free alongside ship) terms the seller is not responsible for loading, and his responsibility ends when the goods are landed alongside the vessel so that they can be loaded. *Id.* at 12-13.

⁷⁹ Reghizzi, *supra* note 56, at 101 n.54. Reghizzi comments that "[s]ome Italian businessmen have expressed their perplexity and difficulty in reconciling this clause with the subsequent right of the Chinese to inspect the goods and present claims after so many days have passed from the shipping of the commodities." *Id.*

⁸⁰ The machinery contract included in Appendix C specifies 10 days notice. Machinery Contract, cl. 12(1)(c), at App. C *infra*. Contracts used by other corporations vary slightly.

standard Chemicals Corporation form states that such losses are to be calculated "from the 16th day after expiry of the free storage time at the port,"⁸¹ while the standard Machinery Corporation clause simply states that if the Chinese vessel "fails to arrive at the port of loading within 30 days after the arrival date advised by the Buyer, the Buyer shall bear the storage and insurance expenses incurred from the 31st day."⁸²

Demurrage is an item to which the seller should be particularly attentive. When the Chinese purchase on F.O.B. terms they provide clearly that the seller is liable for demurrage if the goods are not ready when the vessel arrives at the port on time. However, the CIF terms are silent on demurrage, and sellers under these terms who have not insisted on demurrage clauses have suffered considerable losses when unloading of their vessels was delayed at congested Chinese ports.

b. *Payment*

1. *Standard Terms*

The standard Chinese payment clauses provide that upon receipt of the shipping advice which the seller is required to send the Chinese buyer, the buyer will open an irrevocable letter of credit with the Bank of China, which is payable against presentation of a draft drawn on the Bank and the shipping documents described elsewhere in the contract. The letter of credit normally is valid until 15 days after shipment, and the documents are negotiated at a *Bank of China branch in the P.R.C.* The Chinese usually insist upon confirmed letters of credit in payment for their exports. When they are the buyers, however, they are well known for their reluctance to allow letters of credit to be confirmed. If during contract negotiations the seller asks for a confirmed letter of credit, the Chinese negotiator likely will say that there is no need to obtain confirmation. Insistence on it may be taken as an insult to the credit of the People's Republic of China.

⁸¹ Chemicals Purchase Contract, "Terms of Delivery," cl. 1, in STANDARD FORM CONTRACTS, *supra* note 56, at 25.

⁸² Machinery Contract, cl. 12(1)(c), at App. C *infra*. Normally, title to the goods remains with the seller, who cannot be paid until the bill of lading has been transferred. It may be possible, however, to obtain Chinese agreement not only to pay for warehousing and insurance expenses after the 31st day, but also to pay for the goods themselves "against a warehouse receipt." DINGLE, *supra* note 17, at 36.

The combined effect of the practices described above is that the seller who has shipped the goods and presented the documents lacks control over both for a brief period of time.⁸³ Chinese letters of credit reportedly have contained clauses allowing inspection of the goods after they have arrived. These clauses theoretically would transform the letters of credit from irrevocable obligations into conditional promises to pay. This potentially troublesome practice has caused little difficulty, although delays in payment and deductions for alleged imperfections found on inspection have been known to occur.⁸⁴ Chinese practice apparently is not uniform, since other letters of credit clearly indicate that the transaction is a documentary one as is customary in international trade, and that the Bank of China will pay by airmail transfer provided that the "detailed name of the commodity, specifications, quantity, price, manufacturer and packing shown in the documents are found, upon presentation, to be in conformity with [the contract]."⁸⁵

Considerable variation has occurred in the currency of payment employed. As in the case of Chinese exports, in recent years the Chinese have insisted on the use of their own currency as the medium of payment for their purchases. Recent contracts with foreign companies, however, have provided for payment in foreign currency, including U.S. dollars.

2. *Payment Under Turnkey Contracts*

The Chinese normally discharge their obligations under turnkey contracts by payment in cash. A typical contract may provide for payment of a total of 20 to 30 percent of the contract price at two stages prior to the first shipment of equipment, one at the signing of the contract, the other at an agreed-upon date some months thereafter. Most of the balance of the contract price would be paid as agreed upon percentages of the invoice value of each shipment of equipment. The last two payments, often 5 percent each, would be paid respectively upon acceptance and expiration of the guaranty period. Another point at which payments might be made is upon the buyer's receipt of notification from the seller that the plant is ready for start-up.

⁸³ Smith, *supra* note 56, at 141.

⁸⁴ Smith, for example, has "been told by British businessmen that in some cases of sales to the P.R.C. the letters of credit received only amount to 90 percent of the purchase price, and that the balance is sometimes used as a negotiating counter." *Id.* at 140.

⁸⁵ Bank of China Letter of Credit (on file with the author).

The Chinese had long been known for their reluctance to purchase on credit terms except in the case of contracts for the purchase of agriculture commodities, which often provide for commercial credit up to 24 months. Since 1972, concurrently with the general increase in imports mentioned above, the Chinese have expressed a willingness to purchase whole plants on deferred payment terms. Most notably, the Chinese have purchased petrochemical plants from Japan on these terms. Several deferred payment contracts reportedly have provided for a down payment of 20 percent, with the remainder payable at 6 percent over a 5-year period beginning with the completion of the plant. The Japanese Export-Import Bank, reversing a policy established in 1963, has begun to provide financing to manufacturers of goods exported to the P.R.C. to guarantee 80 percent of the annual obligation. Some purchases of plants from Western Europe also have been on a deferred payment basis, with equal guarantees furnished by Government export assistance programs in some cases.⁸⁶

c. *Barter*

Barter and other arrangements for reducing cash obligations such as counter-purchase and payback in product have been employed only rarely in Sino-Western trade in recent years.⁸⁷ In one barter transaction in 1973, the Chinese purchased five sets of electrical generating equipment from a British company, and reportedly paid for one with an assortment of products which included chemicals, foodstuffs and handicrafts. Generally, however, the Chinese have not favored barter because the products exchanged could be exported by foreigners to markets in which the bartered goods would compete with identical products sold by the P.R.C., usually at prices higher than the value assigned to them in a contract under which they were exchanged for goods.

There has been speculation that the Chinese attitude toward barter, at least with respect to one export product, crude oil, may

⁸⁶ For a summarized table of the terms of Chinese purchases of industrial plants and major components on a deferred payments basis during the period 1963 to September 1974, see Heymann, *Acquisition and Diffusion of Technology in China*, in JEC PAPERS, *supra* note 2, at 678, 714-29. For a discussion of the technical but important question of calculation of the interest on deferred payments, see DINGLE, *supra* note 17, at 30-31. Dingle indicates that the Chinese sometimes insist on paying interest on the face value of each payment rather than on the outstanding balances. *Id.*

⁸⁷ On barter in Sino-Italian trade, see Reghizzi, *supra* note 56, at 111-12.

change. The P.R.C. has established a petroleum industry where none existed before, and has become not only self sufficient but also an exporter of crude oil. In 1975, the P.R.C. sold 8,000,000 tons to Japan, 250,000 tons to the Philippines, and smaller amounts of diesel fuel and other products to Hong Kong and Thailand.⁸⁸ Chinese crude oil production has been increasing at an annual rate of at least 20 percent. Pipelines have been built from the major Taching oil field in northeastern China to the coast, and northeastern harbors are being enlarged to accommodate large tankers. These activities suggest that the P.R.C. might increase crude oil exports, particularly to Japan. As a result perhaps crude oil could be bartered for Western and Japanese capital goods.⁸⁹

d. *Delivery*

In contrast to the studied ambiguity of delivery dates in Chinese sale contracts, Chinese purchase contracts are quite exigent. A standard machinery import clause provides a penalty for late delivery which is fixed at a percentage of the contract price for each seven days up to a stated maximum, with a right given to the buyer to cancel the contract if delivery is delayed beyond 10 weeks.⁹⁰ The maximum varies, but is usually no higher than 5 percent. Contracts for whole plants also contain stiff penalty provisions. Under the standard clauses, the Chinese seem to have the right to cancel the contract for any late delivery (unless the force majeure clause applies) and to exact the penalty was well.⁹¹ Sellers to the P.R.C. have had varying experiences under these clauses. Some, particularly steel sellers, have reported the Chinese to be unrelenting in their insistence that the penalty be paid. In other cases, the Chinese have agreed to extend the delivery time without a penalty, even though the clause did not specify a grace period. The difference may depend upon the need for the particular imports and also may be affected by the parties' prior relationship and the care with which the seller has documented the reason for the delay. In one case recounted to the author, the seller was also a buyer of Chinese

⁸⁸ Williams, *The Chinese Petroleum Industry: Growth and Prospects*, in JEC PAPERS, *supra* note 2, at 225, 239-40.

⁸⁹ For an excellent discussion of the Chinese petroleum industry, see *id.* The Chinese recently have been reported to be willing to sell crude oil while purchasing steel. Munro, *As Trade Deficit Mounts, China Must Decide Which Imports Are Vital and Which She Can Do Without*, N.Y. Times, Oct. 5, 1975, § 1, at 22, col. 4. *But see* note 177 *infra*.

⁹⁰ See, e.g., Machinery Contract, cl. 17, at App. C *infra*.

⁹¹ See Smith, *supra* note 56, at 149.

exports who could point to frequently delayed Chinese deliveries which had caused him economic loss.

e. Force Majeure

Sellers frequently attempt to limit their liability for delayed delivery or non-delivery caused by acts over which they have no control, while buyers are equally resistant to the efforts. The P.R.C. has a history of highly stubborn and successful buyer resistance; for example, the Chinese are reluctant to define in detail the circumstances that constitute force majeure. A standard machinery clause states that the seller is not liable for delay for non-delivery due to force majeure, but the term is not defined in the contract.⁹² The clause further requires the seller to notify the buyer immediately and follow that notification with "a certificate of the accident issued by the competent Government Authorities where the accident occurs."⁹³ If the force majeure cause lasts for more than 10 weeks, the Chinese buyers have the right to cancel the contract.

Chinese corporations occasionally have agreed to specify some of the events which can be considered as instances of force majeure, such as "wars, or severe natural disasters."⁹⁴ Other force majeure clauses have been even more specific, such as one which includes "war, earthquake, flood, fire, explosion and other force majeure circumstances agreed upon by both parties or approved by arbitration in the case of disagreement by both parties."⁹⁵ For ideological reasons the Chinese usually have been unwilling to specify "acts of God," labor unrest, or strikes as instances of force majeure.

Regardless of the language of the force majeure clause, in practice the Chinese appear willing to recognize the principle that an intervening act beyond the seller's control may excuse him from a penalty for late delivery. They may include a statement that the seller's liability for delay is to be limited as a result of "other unavoidable circumstances" agreed to by the parties *after* the seller has invoked the clause.⁹⁶ Western European sellers who have had

⁹² Machinery Contract, cl. 16, at App. C *infra*.

⁹³ *Id.*

⁹⁴ Reghizzi, *supra* note 56, at 110. This clause is drawn from a contract for the purchase of Italian goods, printed and completed in Peking. *Id.*

⁹⁵ *Id.* at 109.

⁹⁶ For a general discussion of the vagueness of the force majeure clauses, see *id.* at 110. Reghizzi concludes that, "So far no problems . . . seem to have arisen, and the Chinese have

to invoke force majeure have stated that the Chinese generally have accepted the delay even though the actual cause was not specified in the contract.

f. *Sellers' Guarantees: Inspection*

Chinese insistence on purchasing the highest quality goods and holding sellers to the absolute letter of their agreement is partly reflected in a standard machinery import clause which requires that the seller:

[G]uarantee that the commodity is made of the best materials, with first class workmanship, brand new, unused and complies in all respects with the quality specifications and performance as stipulated in this Contract. The Sellers shall guarantee that the goods; when correctly mounted and properly operated and maintained, shall give satisfactory performance for a period of . . . months counting from the date on which the commodity arrives at the port of destination.⁹⁷

The guarantee period often extends to 12 or 18 months. Some negotiation is possible on the duration of the period and on when it begins to run (*i.e.*, from unloading at the port of destination or from arrival at the site).

Standard machinery clauses require the manufacturer to present a certificate of inspection regarding quality, specifications, performance and quantity, although the certificate is not considered final on those matters. The contract requires an additional inspection by the Commodity Inspection Bureau when the goods arrive. The standard clause provides that a claim may be asserted "on the strength of the Inspection Certificate" issued by the Bureau, "should the quality, specification or quantity be found not in conformity with the stipulations of the [c]ontract" within 90 days after arrival of the goods at the destination.⁹⁸ A claim also may be filed if the "damages occur in the course of operation by reason of inferior quality, bad workmanship or the use of inferior materials."⁹⁹

recognized at least two cases of *force majeure* confirmed by a declaration of the Chamber of Commerce of Milan." *Id.*

⁹⁷ Contract on file with the author. The clause in the machinery contract in Appendix C omits the conditions of correct mounting and proper operation and maintenance. Machinery Contract, cl. 14, at App. C *infra*.

⁹⁸ Machinery Contract, cl. 15, at App. C *infra*.

⁹⁹ *Id.*

Other clauses are worded slightly differently and include "improper design, inferior quality, bad workmanship and the use of bad materials" as the basis for claims.¹⁰⁰ The sellers are responsible for "the immediate elimination of the defects[,] complete or partial replacement of the commodity" or for a partial refund of the contract price.¹⁰¹

Even when contracts involve sales of whole plants or highly complex equipment, the Commodity Inspection Bureau also may be given a prominent role by the contract, although special tests out of the ordinary scope of the Bureau's activities may be involved. In such transactions, the standards which the plant or equipment must attain usually are derived from industrial standards common in the seller's business and are specified in detailed technical attachments to the contract. In contracts for the sale of whole plants, performance tests usually are carried out jointly under the instructions of the seller's personnel. Regardless of the standards used, inspections by the Chinese are rigorous.

Chinese practice has caused some annoyance to Western European and Japanese sellers, and can be expected to create difficulties in Sino-U.S. trade as well. So strict is Chinese insistence on adherence to the contract that several European manufacturers have been known to encounter Chinese complaints or even refusal to accept the goods when they shipped at no extra cost pieces of machinery that were newer models than those actually specified in the contract. Some European sellers have complained that sometimes the tests used by Chinese differ from the tests normally used in Europe. This difficulty perhaps may be prevented by specifying in the contract the relevant tests and standards which the Chinese will employ when the goods are delivered. In other cases the equipment may be so advanced that the Chinese lack the requisite technical expertise or highly sophisticated testing equipment. Compromise has been possible in these cases, but sometimes only with difficulty.

Additional contractual protection for the seller cannot be given by providing for joint inspection by representatives of the seller and buyer. Some turnkey contracts have specified that the Chinese may send their personnel to the seller's plant during delivery of the machinery. Clauses of this type, however, customarily state that the

¹⁰⁰ Smith, *supra* note 56, at 147.

¹⁰¹ Machinery Contract, cl. 15, at App. C *infra*.

Chinese inspectors lack authority to countersign the certificates of quality which the seller is obligated to supply. The clauses also explicitly state that the attendance of Chinese inspectors does not affect the seller's guarantee. Turnkey contracts also provide for the seller to send his own representatives to the plant site to inspect machinery and equipment at their delivery, although, again, his guarantee remains unaffected. Regardless of the inspection arrangements agreed to by the parties, it is most unlikely that the Chinese will give up their practice of subjecting imported machinery and equipment to precise inspection.¹⁰²

The experience of sellers under these clauses has lead many to marvel at the meticulousness of Chinese inspections and the particularity of Chinese claims. Where other buyers of vehicles are content to purchase small spare parts by volume, such as a kilogram of piston rings, the Chinese count them one by one; where other buyers of steel pipe X-ray the pipe at random for cracks, the Chinese may X-ray every inch and make claims for hairline cracks which most buyers will ignore. The seller must be prepared for extraordinarily detailed inspections and for some uncommon, perhaps minor, claims. U.S. sellers of machinery often state that this care is in principle no greater than that exercised by inspectors in sales to the U.S. Government and to many other governments.

Unfortunately, the present imperfect framework of Sino-Western trade rarely provides an easy opportunity for quick, face-to-face contact between representatives of buyers and sellers and for informal claims settlement. Sending the seller's personnel to the site to engage in joint inspection with the Chinese personnel can at least help in this respect, although Chinese rigor in these matters apparently has not abated when arrangements have been made with European sellers. Bureaucratic considerations may significantly stimulate Chinese readiness to assert claims and reluctance to settle them: Chinese officials presumably are not eager to bear the responsibility for ordering or accepting delivery of defective goods from abroad, nor do they wish to be responsible for failing to assert

¹⁰² In contracts for the sale of whole plants, the parties will have agreed on the performance tests that must be run, as well as on payment of penalties by the seller according to a scale "reflecting the importance of the failed parameter(s)." DINGLE, *supra* note 17, at 45. The contracts usually allow the seller to repeat the test. But it has been observed that "[i]n practice, since the penalty scales representing payment as liquidated damages apply only to relatively small failures, significant discrepancies from guaranteed parameters such as output, product quality, and consumption of raw materials and utilities, will involve the Seller in making modifications theoretically without limit." *Id.* at 49.

a claim based on defects or for wrongly settling such a claim. As a result, negotiations by Western sellers who have dealt with the Chinese over a period of years sometimes are conducted against a background of unresolved claims previously asserted by the Chinese which may serve as bargaining counters during negotiations on other contracts.

g. *Dispute Settlement*

Consistent with the tenacity with which Chinese assert and resist settlement of claims is their practice in settling foreign trade disputes. The Chinese have a record of energetically avoiding not only litigation but any third-party participation having overtones of adjudication. A standard clause provides that, "[a]ll disputes in connection with this Contract or the execution thereof shall be settled [amicably] through negotiations."¹⁰³ In the event that the negotiations fail, the parties are limited by this clause to arbitration before the Foreign Trade Arbitration Committee (FTAC) in Peking. Some sellers have been able to obtain Chinese consent to arbitration in Sweden or in Switzerland, and a recent contract with a U.S. seller reportedly has specified Canada as the arbitral forum. Sometimes the contract will simply provide that arbitration will be held in an unnamed third country to be agreed upon by the parties.¹⁰⁴ In recent years the Chinese have become more willing to specify a third country as the arbitral forum, and to specify the arbitral body and the rules applicable to the arbitration proceeding.¹⁰⁵

The Chinese long have expressed antipathy to choice-of-law clauses that designate a foreign legal system, whether it is the seller's or that of a third country. Presumably, no legal system can be neutral, since the Chinese view law as an instrument by which ruling social classes maintain their dominance.¹⁰⁶ In at least one

¹⁰³ Machinery Contract, cl. 18, at App. C *infra*.

¹⁰⁴ Machinery Contract, cl. 20, in STANDARD FORM CONTRACTS, *supra* note 56, at 41.

¹⁰⁵ This opinion is based on contracts which have been shown to the author and on conversations with Western businessmen and officials of the Legal Affairs Department of CCPIT.

¹⁰⁶ See, e.g., INSTITUTE OF CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA, CENTRAL POLITICAL-LEGAL CADRES SCHOOL, BASIC PROBLEMS IN THE CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA 8 (CHUNG-HUA JEN-MIN KUNG-HO KUO MIN-FA CHI-PEN WEN-T'I transl. 1958), U.S. Joint Publications Research Service 4879 (1961): "Marxism-Leninism has always maintained that both law and jurisprudence possess a very intensive class character and can only serve the ruling class of a given period."

recent transaction, however, a Chinese corporation not only agreed to arbitration before a named third-country body under International Chamber of Commerce rules, but also agreed that the contract would be governed by the law of that country. Nonetheless, no matter what the clauses on dispute settlement and the applicable law in the contract provide, the most important aspect of Chinese practice on these matters is their determination to avoid any arbitration at all.

To date it has been impossible to obtain a detailed account of any trade arbitration involving a Chinese corporation.¹⁰⁷ Some traders say that they will never ask for arbitration because they believe that the Chinese would consider the request to be "unfriendly," and that the request would endanger future business.¹⁰⁸ Other traders have said in private conversations that by either formally requesting or informally hinting that they were about to request arbitration, they have brought about a prompt settlement. In other instances, however, the Chinese have been known not to respond at all. In one such case they are reported to have ignored the formal invocation of an arbitration clause while continuing to correspond with the European seller involved on all matters other than arbitration; eventually the claim was compromised. Moreover, some sel-

¹⁰⁷ Representatives of the American Arbitration Association were told that in 1974 over 100 cases that were brought to the attention of the FTAC were settled by "friendly negotiations," while 12 were settled on the basis of "non-binding recommendations" made by the FTAC, and only two cases in 1974 were settled by formal FTAC arbitration. Holtzmann, *Resolving Disputes in U.S.-China Trade*, in *LEGAL ASPECTS OF U.S.-CHINA TRADE* 77 (H. Holtzmann, ed. 1975). The Holtzmann account offers a fascinating recapitulation of the Chinese emphasis on avoiding arbitration and on maintaining fluid and informal devices for dispute settlement.

For a recent Chinese view, see *Primer on International Trade* (translation of Writers Group of the Foreign Trade Department of the Liaoning Fiscal Institute, *Primer on International Trade*), 8 *CHINESE ECONOMIC STUDIES*, Winter 1974-75, at 32-33:

Cases conducted within the arbitration systems of capitalist countries are usually not public, and the written rulings more than half the time do not give reasons for the decisions made. Our nation's foreign trade arbitration system operates in accordance with the "Temporary Rules of the Foreign Trade Arbitration Committee of the Chinese Council for the Promotion of International Trade." Unless the parties involved in the dispute demand otherwise, the cases are heard publicly. Reasons are always given for the rulings. Moreover, our country's foreign trade arbitration system relies on a spirit of cooperation between arbitration and mediation. We try whenever possible to solve disputes through mediation, doing everything we can to help the two sides reach an agreement through the principles of negotiation and voluntarism and, by reaching an amiable settlement, promote the development of mutual trade.

Id.

¹⁰⁸ Reghizzi indicates that "[e]ven the suggestion that a dispute be submitted to arbitration in Peking is met with disfavor." Reghizzi, *Law and Sino-Italian Trade*, in *LEGAL ASPECTS OF CHINA'S FOREIGN TRADE* 17 (V. Li ed. 1975).

lers who have negotiated a Chinese claim feel that in order to preserve the air of compromise they were forced to yield to some extent even when they were convinced that the claim was groundless or exaggerated.¹⁰⁹

In summary, it appears likely that U.S. sellers seeking to negotiate arbitration clauses will have to tolerate considerable ambiguities in their relationship with their Chinese buyers. The Chinese will most likely be reluctant to choose any place but Peking, although persistence may lead to Chinese agreement to name a third country as the place of arbitration. More importantly, regardless of the forum chosen, the seller who becomes involved in a dispute can expect the Chinese to insist politely but firmly on "amicable negotiations," and to seek a compromise solution rather than an arbitrated one.

In the light of the long-established Chinese practices described here, quick adjustment by the Chinese to the desires of U.S. sellers seems unlikely. Only after Chinese buyers and U.S. sellers have dealt with each other over a period of time may the possibility of negotiating more definitive dispute settlement clauses increase, at least if the experience of European sellers is any guide. It is unrealistic to argue, as some have, that model contract clauses should be agreed upon in the near future by the CCPIT and U.S. trade bodies.¹¹⁰ In the past, the Chinese have agreed to modify their standard clauses and substitute clauses intended to apply to a particular class of transactions only when they are dealing with specific foreign companies with which they have had long experience. Also, quite apart from the flexibility which the Chinese have preferred in domestic and international institutions alike, it is important to remember that slowly evolving custom historically has played an important role in the growth of international commercial law.¹¹¹ Given the unfamiliarity of each side with the other's commercial practice, it seems desirable to postpone insistence on standardization until both have accumulated additional experience.

¹⁰⁹ *Id.*

¹¹⁰ See Theroux, *Legal and Practical Problems in the China Trade*, JEC PAPERS, *supra* note 2, at 535, 588.

¹¹¹ For a discussion of the absorption of customary commercial law by the common law, see E. FARNSWORTH & J. HONNOLD, *COMMERCIAL LAW, CASES AND MATERIALS* 4 (2d ed. 1968); Holdsworth, *The Development of the Law Merchant*, 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 289 (1907).

The recent suggestion that the United States and the P.R.C. should agree that "legal and natural persons ought to have access to the domestic courts of the two countries,"¹¹² also is unrealistic. Not only do U.S. corporate counsel not know enough about the Chinese legal system to decide whether they would want to seek remedies in Chinese courts, but the considerable amount of general information available on the Chinese legal system suggests that the basic assumptions underlying the system are too different, and its rules too indefinite and too difficult to ascertain, for U.S. sellers realistically to prefer Chinese domestic courts to Chinese trade arbitration.¹¹³ The most recent known involvement of a Chinese court in an international commercial matter is not encouraging.¹¹⁴

¹¹² Theroux, *supra* note 110, at 588.

¹¹³ Chinese Communist insistence on using law as a political tool should be adequately appreciated before any serious consideration is given to submitting controversies to Chinese courts. The roots of the Chinese Communist policies toward law lie in the history of the Chinese Revolution itself. See, e.g., S. LENG, *JUSTICE IN COMMUNIST CHINA 1-76* (1967). For a broad interpretation of Chinese Communist attitudes toward law, see Li, *The Role of Law in Communist China*, CHINA Q., Oct.-Dec. 1970, at 66.

On criminal law, the pioneering work is J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963* (1968), which contains many translations of Chinese materials and a useful chronological discussion and an analysis of developments in the Chinese legal system to the mid-1960's. For other work on Chinese criminal law, see Li, *The Evolution and Development of the Chinese Legal System*, in CHINA: MANAGEMENT OF A REVOLUTIONARY SOCIETY 221 (J. Lindbeck, ed. 1971); Lubman, *Form and Function in the Chinese Criminal Process*, 69 COLUM. L. REV. 535 (1969).

No general Western language text or collection of materials on civil law has yet been published. For selected civil law topics, see Lubman, *Methodological Problems in Studying Chinese Communist "Civil Law"*, in CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 230 (J. Cohen ed. 1970); Huang, *Reflections on Law and the Economy in the People's Republic of China*, 14 HARV. INT'L L.J. 261, 285-89 (1973); Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284 (1967); Pfeffer, *Contracts in China Revisited, With a Focus on Agriculture, 1949-63*, 28 CHINA Q. 106 (1966).

Recent visitors' reports include Cohen, *Chinese Law: At the Crossroads*, CHINA Q., Jan.-Mar. 1973, at 139; Lubman, *A Divorce Trial—Peking Style*, Wall Street Journal, June 5, 1973, at 22, col. 4; Ruge, *An Interview with Chinese Legal Officials*, CHINA Q., Mar.-Apr. 1975, at 118.

¹¹⁴ See Cohen, *Chinese Law and Sino-American Trade*, in CHINA TRADE PROSPECTS AND UNITED STATES POLICY (A. Eckstein ed. 1971) 127, 168-69. Cohen discusses a dispute arising out of a contract between the China National Technical Import Corporation and the British firm of Vickers-Zimmer Ltd. for erection of a petrochemical plant in Lanchou:

"... Although a knowledgeable source has claimed that the contract provided for the arbitration of any disputes in Stockholm, in July, 1968, the Peking Municipal Intermediate People's Court annulled the contract and ordered defendant Vickers-Zimmer to pay an indemnity of £650,000 to the Chinese corporation 'for economic losses suffered by the latter.' According to the judgement,

In the course of more than three years while the contract was under execution, abundant facts showed that the defendant had no intention to fulfill the contract and had been deliberately perpetrating a fraud. Among the so-called technical

The Chinese have avoided using courts to settle trade disputes, a preference that helps to explain the creation of Chinese trade arbitration bodies. Moreover, it is highly unlikely that the Chinese corporations would want access to U.S. courts; lawsuits initiated by Chinese commercial entities in any foreign court since 1949 are extremely rare. U.S. sellers and their advisers, rather than seeking to devise novel methods of bilateral dispute settlement, are better advised to continue probes and general discussions and, like European veterans of trade with the P.R.C., to press for third-country arbitration.

3. *Industrial Property*

a. *Patents and Know-How*

Contract clauses on protection of foreign patents and know-how in the P.R.C. are particularly important since there is no Chinese statutory scheme for their protection. A P.R.C. statute permits P.R.C. citizens or foreign individuals or groups to register inventions and receive cash awards,¹¹⁵ but all inventions, apparently including those unregistered, become the property of the P.R.C. Accordingly, the only way a foreign seller can protect his rights in his industrial property is by bargaining for a contract clause that will afford him protection.

The China National Technical Import Corporation, which negotiates for the purchase of whole plants, is likely to be involved in

personnel it had sent to China, some are incompetent while others were spies disguised as technical personnel. . .

It was stipulated in the contract that the defendant Vickers-Zimmer Ltd. undertook to supply the China National Technical Import Corporation with the most-up-to-date design and techniques concerning the contracted plant and had repeatedly resorted to chicanery. In addition, with regard to delivery of technical documents, the supply of equipment and materials, and arrangements for trainees and other matters, the defendant had always defrauded by resorting to such tricks as *procrastination, shirking responsibility, and flat denials.*

. . . The criminal activities of the defendant Vickers-Zimmer Ltd. were deliberate political and economic sabotage and fraud, under the camouflage of trade, against the People's Republic of China, in an attempt to endanger China's security and undermine its socialist construction.

"Because, until very recently, one of its employees, George Watt, was still serving a prison sentence in China in connection with the case, and because Anglo-Chinese tensions have been moderating only gradually, Vickers-Zimmer has maintained a low posture in seeking relief from this judgement." *Id.*

¹¹⁵ Regulations of Nov. 3, 1963, Concerning Awards for Inventions, [1964] 13 CHUNG-HUA JEN-MIN KUNG-HO-KUO FA-KUEI HUI-PIEN [FKHP] (compilation of Laws and Regulations of the People's Republic of China) 241. For English translation, see U.S. CONSULATE, HONG KONG, SURVEY OF THE CHINA MAINLAND PRESS, No. 3117, Dec. 11, 1963, at 6.

negotiating the clause. In a few rare occurrences, the Technical Import Corporation has purchased technology without also buying equipment, as when it negotiated with the Berliet Company of Paris for licenses to manufacture trucks. Generally, however, purchases of technology occur in the context of a whole-plant purchase. Practice apparently varies on whether the license has a specified portion of the contract price assigned to it, or whether it is included in that price,¹¹⁶ but there apparently are never any payments of royalties. The provisions covering patents and know-how make the agreement a lump-sum sale. The actual payments may be completed at the time the plant begins operations or may be included in the installments paid under deferred payment terms.

The foreign seller of technology must rely on the contract to protect him against use of his industrial property in ways extending beyond the scope of the contract, either by Chinese duplication of it or by Chinese disclosure or subsequent unlicensed transfer. Officials of the CCPIT Legal Affairs Department with whom this question has been discussed have acknowledged that the Chinese side must be willing to provide the protection, and the Technical Import Corporation, which has negotiated licenses with foreign licensors, has concurred. In some contracts, the Technical Import Corporation has agreed never to disclose the licensed technology; in other contracts nondisclosure has been limited to a period of years. The original license usually assumes a fixed periodic output at a disclosed number of plants, but the Chinese sometimes wish to use the licensed process in other plants. In varying language the Technical Import Corporation has agreed not to duplicate a plant utilizing the process covered by a license, subject to a Chinese right to improve the plant or plants covered by the license and to increase production at those plants without any obligation to the seller. The Technical Import Corporation at times has sought to obtain the licensor's approval of unlimited use of the licensed technology. One licensor retained the technology for production of a vital catalyst, and can measure Chinese production by their purchases of the catalyst from the licensor.

¹¹⁶ This variation has been described to the author in private conversation with representatives of European and American companies who have discussed licensing with the Technical Import Corporation. It has also been reported in *How China Buys Foreign Technology*, *BUS. INT'L*, Dec. 5, 1972, at 396.

Consistent with its preference for lump-sum purchases, the Technical Import Corporation often has been willing to forego the right to make use of future improvements of a process by the licensor if further payments would be required. Certain licensing agreements, however, require the licensor to continue to inform the Chinese licensee of improvements for a stated period of time, often as a minimum until the plant begins operations. On the other hand, the Technical Import Corporation has been unwilling to agree to disclose subsequent Chinese improvements.

Two problems related to the issue of licensing agreements deserve brief mention. Foreign sellers often seek to prohibit the P.R.C. from exporting products manufactured by the plants. It is difficult to determine how readily the Technical Import Corporation will agree to this restriction. The author has been informed that in at least one agreement with a Japanese licensor, the Corporation has agreed that the products would not be exported.

Information also is scarce on the treatment of personnel sent to the P.R.C. to help in the construction and start-up of a plant. Currently, U.S. technicians are in the P.R.C. to assist in the installation of eight fertilizer plants sold by the M.W. Kellogg Company of Houston, Texas. There also are many Europeans working on the construction of a large steel complex in Wuhan, and a petrochemical complex in north China. It is known that the movements of these foreigners beyond their living areas and the plants where they work are highly restricted.

b. *Trademarks*

Although no known contract has involved the use of a foreign trademark in the P.R.C., Chinese policy toward trademarks reflects their general attitudes toward industrial property.¹¹⁷ A Chinese statute specifically permits a foreign enterprise to register marks to which it has rights in its own country,¹¹⁸ if that country has reached an agreement with the P.R.C. on the reciprocal recognition of trademarks.¹¹⁹ Nationality of the applicant appears to be the gov-

¹¹⁷ For a discussion of China's application of trademark laws and regulations, see Randt, *Trademark Law in the PRC: Case Fables with Morals for Western Traders*, U.S.-CHINA BUS. REV., May-June 1974, at 3.

¹¹⁸ Regulations of Apr. 10, 1963, Concerning the Control of Trademarks, [1964] 13 FKHP 162 [hereinafter cited as *Regulations on Control of Trademarks*]; Rules of Apr. 25, 1963, Concerning the Implementation of the Regulations Governing the Control of Trademarks, [1964] 13 FKHP 164 [hereinafter cited as *Implementing Regulations*].

¹¹⁹ Regulations on Control of Trademarks, § 12(1).

erning criterion of belonging to a foreign country.¹²⁰ The precise language of the statute suggests that it may be possible for protection to be given to an applicant from a country that has not formally concluded an agreement, but that protects Chinese trademarks by virtue of its own laws, as is the case with the United States.¹²¹ Members of the Legal Affairs Section of the CCPIT with whom this possibility was discussed have insisted that no protection can be given to a foreign trademark unless the applicant's country has concluded an agreement with the P.R.C. on reciprocal protection.¹²²

There seems to be little need at the moment for U.S. manufacturers to be concerned about registration of their marks in the P.R.C., since consumer goods bearing such marks are not imported by the Chinese. Actually, since U.S. law does not require this reciprocal protection as a prerequisite to registration in the United States, Chinese marks could now be registered if they otherwise meet the applicable statutory criteria. The fact should interest Chinese corporations, particularly those that export products bearing brand names used in China before 1949, and that now are being used by the former owners doing business from Taiwan.

PROBLEMS OF LAW AND POLICY IN SINO-U.S. TRADE

The future of Sino-U.S. trade depends in considerable part on whether solutions are devised to many substantial problems of U.S. law and policy. Many of the problems created by Chinese practices, such as the difficulty of gaining access to Chinese producing enterprises or end-users, have been mentioned already. The following pages survey problems which require attention in Washington, not Peking, and speculate on some possible solutions.

¹²⁰ See Implementing Regulations, §§ 16, 20. These regulations make specific reference to the "certificate of nationality" which foreign enterprises must file. *Id.*

¹²¹ At least one Chinese trademark has been registered in the United States by an American distributor of the trademarked product. See Sobin, *Good Health: The First Chinese Mark Registered in the U.S.*, U.S.-CHINA BUS. REV., Nov.-Dec. 1975, at 3.

¹²² Some American companies have attempted to register their marks through a subsidiary incorporated in a country which has entered into an agreement on reciprocity with the People's Republic of China. These countries include Canada, Denmark, Finland, Norway, Sweden, Switzerland, and the United Kingdom.

It should be noted that the registration process is simple and inexpensive, consisting of filing a single application with the Legal Affairs Department of CCPIT, which must be given a power of attorney by a notarized document. The fee for regulation is a nominal RMB 20, approximately \$36.00 at the rate of exchange prevailing in late August, 1975.

*Unequal Tariff Treatment and Some
Possible Remedies*

The United States has not yet extended most-favored-nation (MFN) treatment to the P.R.C. As a result, the U.S. customs duty on Chinese goods is uniformly higher than that applied to goods from countries that receive MFN treatment. Often the differential is so great as to totally inhibit particular imports from the P.R.C.¹²³

The lack of MFN treatment for Chinese imports is a major obstacle to the expansion of Sino-U.S. trade, not only because it inhibits Chinese exports to the United States, but also because it affects the overall trade relationship between the two countries. Indeed, Chinese trade officials have informed many U.S. businessmen, including the author, that this discrimination against Chinese exports deters their purchase of U.S. exports.¹²⁴

The situation will get worse before it gets better. The tariff duties applicable to Chinese goods at the time of this writing are the highest under U.S. law. They are set by the Smoot-Hawley Tariff of 1931, and fail to reflect bilateral tariff reduction agreements signed by the United States since 1950 and multilateral reductions concluded under the auspices of GATT. As further

¹²³ In determining the duty on woven silk fabrics, for example, the rate applicable to products originating in countries that receive MFN treatment is in the column headed "1," and the non-MFN rate applicable, *inter alia*, to products originating in China, is in the column headed "2":

Item	1	Rates of Duty	2
Woven fabric of silk:			
Wholly of silk:			
Not jacquard-figured:			
Not degummed, not bleached, and not colored	15% ad valorem		60% ad valorem.
Degummed, bleached, or colored	11% ad valorem		60% ad valorem
Jacquard-figured:			
Not degummed, not bleached, and not colored	13.5% ad valorem		65% ad valorem
Degummed, bleached, or colored	10.5% ad valorem.		65% ad valorem

19 U.S.C.A. § 1202, items 337.10-.40 (Supp. 1976).

¹²⁴ Other arguments have been made in support of ending discriminatory tariff treatment of Chinese goods. It has been said, for instance, that China does not impose discriminatory tariffs on U.S. goods, so the U.S. tariff structure should be altered as a matter of reciprocity. See Theroux, *supra* note 110, at 553. This argument, however, completely overlooks the differences between market and non-market economies, since government purchasing and other policies can be and are used in non-market economies to accomplish the goals of high tariffs in market economies.

tariff reductions become effective as a result of other multilateral trade negotiations, the gap will widen between the rates of duty applicable to goods from countries accorded MFN treatment and those applicable to goods from countries such as the P.R.C., which are denied such treatment. The Generalized System of Preferences, which went into effect on January 1, 1976, has increased the competitive disadvantages of certain Chinese products relative to similar products which can now enter the United States duty-free.¹²⁵

The P.R.C. is not likely to receive MFN treatment soon, because of standards which Congress requires any bilateral agreement on such tariff treatment to meet. The greatest problem is congressional insistence that the emigration policy of a country is material to the granting of MFN treatment. Under the Trade Reform Act of 1974,¹²⁶ presidential authority to negotiate an agreement extending MFN to products of non-market countries such as the P.R.C. is strictly circumscribed. Under the Jackson-Vanik Amendment,¹²⁷ the President may deny MFN treatment to any country which denies or impedes its citizens' efforts to secure the right or opportunity to emigrate. This amendment, intended to influence the Soviet Union's policy toward emigration of Jews, is sufficiently broad to apply to the P.R.C. The President may waive the emigration requirement and grant non-discriminatory treatment for 18 months,¹²⁸ subject to congressional review, but this provisional solution would hardly give either Chinese sellers or U.S. buyers the predictability of tariffs which they need in order to do business. Obviously, too, U.S. inquiry into Chinese emigration policy would be most offensive to Peking.

Some sentiment has been expressed inside and outside Congress calling for repeal of the Jackson-Vanik provision, or at least for

¹²⁵ For example, tariff duty will no longer be imposed on bamboo baskets from Taiwan, which were assessed at 25 percent ad valorem before GSP came into effect; the duty on similar items from China is 50 percent. TSUSA § 222.40 (1976); 19 U.S.C.A. § 1202, Item 222.40 (Supp. 1976).

¹²⁶ Trade Act of 1974, Pub. L. No. 93-618 (Jan. 3, 1975), 88 Stat. 1978 (codified in scattered sections of 19 U.S.C.) [hereinafter cited as Trade Act].

¹²⁷ *Id.* § 402, adding 19 U.S.C. § 2432. For a thorough discussion of the Jackson-Vanik Amendment, see Note, *An Interim Analysis of the Effects of the Jackson-Vanik Amendment on Trade and Human Rights: The Romanian Example*, *infra* at 193.

¹²⁸ Trade Act, § 402(c), (d)(2), adding 19 U.S.C. §§ 2432(c), (d)(2). This time limit applies only until July 3, 1976. After that date the waiver may be granted for 12-month periods. *Id.* § 402(d)(5), adding 19 U.S.C. § 2432(d)(5).

modification of the statute so that it does not apply to the P.R.C.¹²⁹ No significant support for this view, however, presently seems to exist. Another alternative that perhaps ought to be considered is congressional action to lower the tariff on specific items which the P.R.C. exports, and which do not compete significantly with U.S. products. If Congress adjusted the tariff on these products it might encourage certain Chinese exports substantially without damage to U.S. industry. Moreover, the reduction would symbolize the continued U.S. commitment to the expansion of trade with the P.R.C.

Opponents of this possible compromise may argue that piecemeal tariff making by Congress is disorderly and that a useful bargaining chip in negotiating an overall agreement with the P.R.C. would be removed. Some also may contend that a policy of evenhandedness in détente would be violated by facilitating the import of Chinese products without taking corresponding action for Soviet imports, but this argument disregards the fact that the amendment which creates the problem seemed to be aimed particularly at the Soviet Union. On balance, the alternative of specific tariff reductions should receive serious consideration, especially since negotiation in the near future of a bilateral Sino-U.S. trade agreement seems unlikely.

Non-tariff Problems

1. *Financial*

Approximately \$76.5 million of P.R.C. assets presently are frozen in the United States under regulations issued by the Secretary of the Treasury in December 1950, after the Chinese intervention in the Korean War.¹³⁰ At the same time, approximately \$197 mil-

¹²⁹ A resolution adopted by the Asian-Pacific Council of American Chambers of Commerce at Manila, during meetings held April 4-7, 1975, recommends elimination of the Jackson-Vanik emigration provisions in the Trade Act of 1974. *The National Council Urges Sino-U.S. Trade Pact*, U.S.-CHINA BUS. REV., May-June 1975, at 10, 11. The Executive Committee of the National Council for U.S.-China Trade adopted a resolution urging Congress and the Administration to take "whatever steps may be necessary" with respect to the Amendment in order to enhance prospects for an eventual Sino-American Trade Agreement. *Id.* at 10.

¹³⁰ This authority was conferred on the Secretary by the Trading with the Enemy Act. 50 U.S.C. App. § 6 (1970). Section 500.201 of the Foreign Assets Control Regulations provides the basic blocking provision. 31 C.F.R. § 500.201 (1975). For a full discussion of Chinese frozen assets and the applicable laws, see Note, *The Blocked Chinese Assets: Present Status and Future Disposition*, 15 VA. J. INT'L L. 959 (1975).

lion of claims by U.S. nationals have been adjudicated by the Foreign Claims Settlement Commission.¹³¹ These decisions theoretically are based on substantive law,¹³² but they are not judgments that can be executed upon in federal court.¹³³ They are intended "to be useful in future negotiations of claims settlement agreements" when normal diplomatic relations are resumed.¹³⁴

These financial problems impede the expansion of Sino-U.S. trade, because they prevent the establishment of direct financial relations between the two countries.¹³⁵ It has been suggested that these problems could be settled simultaneously in the manner in

¹³¹ See Redick, *The Jurisprudence of the Foreign Claims Settlement Commission: Chinese Claims*, 67 AM. J. INT'L L. 728, 729 (1973). The Foreign Claims Settlement Commission has been granted authority to determine the amount and validity of claims from property losses and injury suffered by U.S. nationals through acts in violation of international law by the "Chinese Communist regime" since October 1, 1949. China Claims Act of 1966, 22 U.S.C. § 1643 (1970).

¹³² 22 U.S.C. § 1643(b) (1970).

¹³³ Certification of claims and awards will be made by the Commission to the Secretary of the Treasury and to the Secretary of State. 22 U.S.C. § 1624 (1970). Payments for awards will be made upon settlement of the claims dispute from special Treasury funds. *Id.* § 1627 (1970).

¹³⁴ 1971 FOREIGN CLAIMS SETTLEMENT COMM'N ANN. REP. 5.

¹³⁵ American visitors to Peking have been repeatedly told by Bank of China officials that settlement of the frozen assets problem is the only bar to establishment of direct banking relations between the Bank of China and American banks. This position was stated to the author in November, 1972.

That there are relationships among the several major problems is clear: The United States position is that settlement of the private claims of U.S. nationals must be linked with a solution to the frozen assets problem. Furthermore, in the words of Secretary Kissinger, "We have taken the position with the Chinese that once a claims settlement agreement has been concluded we will be prepared to enter into discussions leading to the extension of MFN in return for comparable concessions by the PRC." *Hearings on H.R. 10710 Before the Senate Comm. on Finance*, 93d Cong., 2d Sess., pt. 2, at 519 (1974).

Another distinguishable problem is presented by the fact that the People's Republic of China is considered by the Export-Import Bank to be the party in default on loans made by the Export-Import Bank totaling approximately \$26 million to the Republic of China before 1947. EXPORT-IMPORT BANK OF THE UNITED STATES, CUMULATIVE RECORD BY COUNTRY, FEB. 12, 1934 TO JUNE 30, 1974, at 44-45. Under the Johnson Act of 1934, loans to nationals and corporations of countries whose governments are in default on debts owed to the U.S. government are prohibited, and as a result, loans to the People's Republic of China would seem to be prohibited. 18 U.S.C. § 955 (1970).

As recently as a few years ago, Chinese borrowing from non-Communist countries was unknown, but Chinese purchases of plants on medium-term credit and acceptance of fixed term deposits from European and Japanese banks accomplish the same result as direct and unambiguously characterized loans. The Johnson Act has been interpreted by the Attorney General to not apply to private credits to finance commercial export sales of products or services. 42 OP. ATT'Y GEN. No. 15 (Oct. 9, 1963) (Attorney General Robert F. Kennedy); 42 OP. ATT'Y GEN. No. 27 (May 9, 1967) (Attorney General Ramsey Clark).

which similar U.S.-Soviet problems were handled in 1933. Under the Litvinov Assignment,¹³⁶ claims due to the Soviet Union were released and conveyed to the United States in settlement of claims and counterclaims between the governments and nationals of each. This may be the type of agreement which reportedly was reached "in principle" with the P.R.C. in early 1973, but which has not been implemented.¹³⁷

Delay in resolving the financial issues may be due not only to the complex legal issues,¹³⁸ but also to Chinese domestic political issues. The P.R.C. has not entered into any agreements to compensate foreign nationals for the appropriation of property after 1949.¹³⁹

¹³⁶ Redick, *supra* note 131, at 740. For the text of the Litvinov Assignment, see FCSC, DECISIONS AND ANNOTATIONS 755 (1968). See also D. BISHOP, THE ROOSEVELT-LITVINOV AGREEMENTS, THE AMERICAN VIEW (1965).

Until the claims issue is resolved, certain Chinese assets within the jurisdiction of U.S. courts could at least theoretically be subject to attachment by American claimants. Under the doctrine of limited sovereign immunity followed by the Department of State since 1952, a foreign state is immune from suit in United States courts only as to its governmental or public acts, but not as to its "commercial and private acts." See "Tate Letter," 26 STATE DEP'T BULL. 984 (1952). It is unnecessary here to discuss the extent to which property owned by the Chinese government would be vulnerable to attachment as a result of the applicability of the doctrine, since the threat of attachment has been enough to prompt the Chinese to avoid holding title or acquiring title within the United States to any property used in trade with the United States. Title to goods purchased from American sellers passes at the time of delivery in China; no Chinese-flag cargo vessels call at American ports; and as already indicated, no direct banking relationships have been established.

¹³⁷ Henry Kissinger announced in February 1973, that the United States and China were preparing to negotiate settlement of the claims "on a global basis in the immediate future." N.Y. Times, Feb. 23, 1973, at 1, col. 8. Secretary of State Rogers and Chinese Foreign Minister Chi Peng-fei began settlement discussions in Paris. N.Y. Times, Feb. 25, 1973, at 1, col. 3. The Director for People's Republic of China Affairs of the Bureau of East-West Trade of the U.S. Department of Commerce has stated that "the two sides agreed in principle . . . Further technical discussions have been held but a settlement has not been reached." Clarke & Avery, *supra* note 2, at 522.

¹³⁸ Some legal questions that might arise include: What effect an assignment would have on claims asserted by the Republic of China (Taiwan); which of the Chinese governments, Taiwan or the P.R.C., could sue in U.S. courts; what effect an assignment would have on the claims of foreign creditors; whether all of the frozen assets, including those originally the property of private individuals, should be used for settlement of claims against the P.R.C.; whether banks which have held the assets since 1950 should pay interest on them; how the settlement fund should be apportioned to claimants. This is hardly an exhaustive list of the foreseeable problems, but it is sufficient to suggest that thorny, complex and potentially embarrassing litigation might well follow a Sino-U.S. agreement on the bilateral financial problems.

¹³⁹ In 1974, however, the People's Republic of China and Canada concluded an agreement by exchange of diplomatic notes, under which the P.R.C. repaid \$14,469,183.06 on a loan by three Canadian banks to the Ming Sung Industrial Company in 1946, and mortgages on seven Chinese vessels. Agreement Between Canada and the People's Republic of China,

If an agreement were concluded to award U.S. nationals even partial compensation for their claims against the P.R.C., such an act of accommodation might provoke debate among the P.R.C.'s leaders. The Chinese leadership may be waiting to conclude an agreement on claims in the context of a Sino-U.S. accord on broader political issues, such as the establishment of diplomatic relations. An agreement on claims might be more palatable as part of such a package.

2. *Specific Problems Relating to Imports*

a. *Labeling and Quality Standards*

Chinese corporations wishing to export to the United States encounter many problems of U.S. law. The Chinese must manufacture and sell to the United States goods that conform to the standards set by U.S. law that apply to exports from all other countries. These include country-of-origin labeling¹⁴⁰ and other special labeling requirements applicable to particular commodities,¹⁴¹ and the need to maintain quality standards for products such as foodstuffs which are subject to inspection by officials of the Food and Drug Administration and the Agricultural Inspection Service.¹⁴² As noted above, the Chinese have been slow to adapt their manufactured products for particular markets and they have been sensitive to possible discrimination against Chinese products. The only course of action open to the Chinese is to acquaint themselves thoroughly with the requirements imposed by U.S. law, and to plan their exports to this country in conformity with the requirements. The visits of Chinese delegations to the United States should assist the Chinese in this regard, but only slow progress can be expected.

b. *Textile Quotas*

Currently, the United States has an extensive program of bilateral and multilateral agreements to limit certain textile imports into this country. Because the P.R.C. is not a party to these agreements,

Concerning Settlement of Canadian Bank Loans to Ming Sung Industrial Co., June 4, 1974, in 13 INT'L LEGAL MAT'LS 870 (1974).

¹⁴⁰ 19 U.S.C. § 1304 (1970).

¹⁴¹ *E.g.*, 16 C.F.R. §§ 300.1-300.35 (1975) (wool products labeling); 16 C.F.R. §§ 303.1-303.11 (1975) (textile products labeling).

¹⁴² For example, the United States has established standards concerning canned mushrooms, which China has been exporting to Western Europe. 7 C.F.R. §§ 52.1481-95 (1975) (sets standards as to styles and grades, minimum drained weight, capacity and color, and uniformity of size and shape); 21 C.F.R. § 51.303 (1975) (sets standards as to fill and weight).

no quotas presently apply to Chinese textiles. However, the rapidly increasing volume of Chinese cotton textiles entering the United States,¹⁴³ and the agitation for quotas which has begun to be heard from U.S. textile manufacturers, may cause quotas on Chinese textiles to emerge as an important issue between the two countries in the future.

3. *Antidumping and Market Disruption*

Certain provisions of U.S. law, some added and some strengthened in force by the Trade Reform Act of 1974, also may present problems in the future for Sino-U.S. trade. The amendments to the Antidumping Act¹⁴⁴ codified the Treasury practice of establishing the foreign market value of goods by reference to the price at which such or similar goods of a market economy are sold in the domestic market of that country, or to other countries, or by reference to the constructed value of such or similar merchandise in a planned economy.¹⁴⁵ This amendment likely will ease the application of antidumping legislation to products from all communist countries, including the P.R.C.

Broader legislation aimed at countries with planned economies is contained in new provisions on market disruption.¹⁴⁶ In the words of the Senate Finance Committee's report, there was concern that "a Communist country, through control of its distribution process and the price at which articles are sold, could disrupt the domestic markets of its trading partners and thereby injure producers in those countries."¹⁴⁷ The new legislation authorizes the International Trade Commission to investigate and report to the President whether the importation of an article from a communist country is disrupting the market in a domestic industry. The Commission may recommend an increase in or imposition of duties, or other import restrictions. The Act also authorizes the President to take

¹⁴³ In 1974, the leading U.S. import by value from China was cotton shirting (over \$11 million), and the seventh most important was cotton sheeting (over \$4 million). NATIONAL COUNCIL FOR U.S.-CHINA TRADE, SPECIAL REPORT NO. 12, SINO-U.S. TRADE STATISTICS 1974, at 15 (1975). Unbleached cotton fabric, valued at over \$27 million, was the second largest import from China in 1975, according to raw data furnished by the U.S. Dept of Commerce.

¹⁴⁴ Trade Act, § 321, amending 19 U.S.C. §§ 160, 162-64, 170(a) (1970), adding 19 U.S.C. §§ 164(b)-(d).

¹⁴⁵ *Id.* § 321(d), adding 19 U.S.C. § 164(c).

¹⁴⁶ *Id.* § 406, adding 19 U.S.C. § 2436.

¹⁴⁷ S. REP. NO. 1298, 93d Cong., 2d Sess. 210 (1974).

emergency action. The test for the applicability of import restrictions is whether the article in question is being, or is likely to be, imported in such increased quantity as to be a "significant cause" of "material injury."¹⁴⁸ This test was deliberately made less strict than the test ordinarily applicable to the invocation of remedies for injury caused by import competition.¹⁴⁹

4. *The Impact of Export Control Regulations on U.S. Exports to the P.R.C.*

The United States, as the world's most industrialized country, has technology and advanced products to sell to the P.R.C. A sometimes significant constraint on exports to the P.R.C., however, is imposed by the reluctance of the Departments of Commerce and Defense to grant U.S. exporters licenses which are required for the transfer of certain types of technology and the sale of certain products. Under the Export Administration Act¹⁵⁰ and the Export Control Regulations¹⁵¹ issued under the Act by the Department of Commerce, goods or data deemed to have strategic significance cannot be exported to the P.R.C., the Soviet Union, or Eastern Europe without a "validated license."¹⁵² Yugoslavia, Romania, and Poland are treated more favorably than other planned economies;¹⁵³ the P.R.C. is treated equally with the Soviet Union and the remaining countries of Eastern Europe.

In addition to U.S. export controls, other restrictions are maintained by the Coordinating Committee, COCOM, a multilateral organization founded in 1949.¹⁵⁴ The COCOM member countries embargo items which they have agreed are of strategic significance.

¹⁴⁸ Trade Act, § 406(e)(2), adding 19 U.S.C. § 2436(e)(2).

¹⁴⁹ S. REP. NO. 1298 *supra* note 147, at 212.

¹⁵⁰ 50 U.S.C. App. 2401-13 (1970), as amended, Export Administration Amendments of 1974, Pub. L. No. 93-500, 88 Stat. 1552 (1974).

¹⁵¹ 15 C.F.R. §§ 368-99 (1975). See generally Denny & Stein, *Recent Developments in Trade Between the U.S. and the P.R.C.: A Legal and Economic Perspective*, 38 LAW & CONTEMP. PROB. 260, 261-66 (1973); Hoya, *The Changing U.S. Regulation of East-West Trade*, 12 COLUM. J. TRANSNAT'L L. 1, 4-28 (1973).

¹⁵² 15 C.F.R. §§ 372.1(b), 385.2 (1975).

¹⁵³ These three countries are accorded MFN treatment. See Note, Jackson-Vanik Amendment, *infra* at 193.

¹⁵⁴ U.S. participation in COCOM is authorized by the Mutual Defense Assistance Control Act of 1951, § 301, 22 U.S.C. §§ 1611-13(d) (1970). The members of COCOM are Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, and the United States. McQuade, *U.S. Trade with Eastern Europe: Its Prospects and Parameters*, 3 LAW & POL. INT'L BUS. 42, 52 (1971).

Although the list of items embargoed by COCOM is secret, COCOM apparently restricts the exports of fewer products than does the United States. Although a number of observers have urged that the longer U.S. list is an unnecessary relic of the Cold War and that therefore the United States should not control the export of goods not on the COCOM list, the United States continues to maintain more restrictions than does COCOM.

The federal agencies that administer or influence the administration of U.S. export controls are not always in agreement. In a number of cases reported in the press, the Department of Defense in recent years has been more insistent than the Departments of State and Commerce on denying applications for validating licenses on grounds that the products in question were strategic.¹⁵⁵ Pentagon influence over the license-granting procedure very recently has been formalized and strengthened by a 1974 amendment to the Export Administration Act, which specifically authorizes the Secretary of Defense to

review any proposed export of goods or technology to a country for which a validated license is required by law and, whenever he determines that the export of such goods or technology will significantly increase the military capability of such country, to recommend to the President that such export be disapproved.¹⁵⁶

As a result of this legislation, each application for a license to export goods or technology to the P.R.C., the Soviet Union, or Eastern Europe must be reviewed by the Department of Defense; previously, it reviewed only half of such applications.¹⁵⁷ If the past attitude expressed by the Pentagon toward license applications is any guide to the future, its reluctance may inhibit the sale of goods and technology to both the P.R.C. and the Soviet Union.

Also important is the discretion available to the agencies that review applications for licenses to export goods or technology. The

¹⁵⁵ See, e.g., Kwitny, *The China Trade: U.S. Concerns Export Mainland-Bound Goods as Embargo Loosens*, Wall Street Journal, Mar. 11, 1971, at 1, col. 6; Scheibla, *Arsenal of Communism? Bridge-Builders Channel Strategic Materials, Equipment to the Reds*, Barron's, Jan. 4, 1971, at 5, col. 1. See also Lubman, Book Review, 59 CALIF. L. REV. 861, 863 (1971).

¹⁵⁶ Export Administration Amendments of 1974, Pub. L. No. 93-500, § 9, 88 Stat. 1552, adding 50 U.S.C. App. § 2403(h). See generally 7 LAW & POL. INT'L BUS. 925, 933-34 (1975).

¹⁵⁷ UNITED STATES DEP'T OF COMMERCE, EXPORT ADMIN. REP., 4TH QUARTER 1974, at 19 (1974).

Export Administration Regulations require the ultimate consignee or purchaser of goods or technology for which a validated export has been requested to file a statement on the intended end use of the goods or technology.¹⁵⁸ It has been reported that the Chinese are less forthcoming than the Soviets in these statements.¹⁵⁹ If this is true, then presumably sellers to the P.R.C. will encounter greater difficulties in obtaining validated licenses than if they intend to sell to the Soviet Union—unless current U.S. foreign policy is to favor support of the P.R.C.'s efforts to build up its capability to resist Soviet military threats.¹⁶⁰

Extensive analysis of the administration of U.S. export controls is beyond the scope of this Article, but all of the issues described in the preceding paragraphs raise important questions of policy and suggest areas in which restrictions on exports to the P.R.C. may be reduced.

Some Problems Related to a Sino-U.S. Commercial Agreement

1. *The Substantive Standards to Which an Agreement Must Conform*

Presidential negotiation of a trade agreement with the P.R.C. must, according to the Trade Act, meet certain standards set by Congress.¹⁶¹ These standards vary in their specificity. For instance, the Act dictates that a bilateral commercial agreement entered into by the United States must

provide arrangements for the promotion of trade, which may include those for the establishment or expansion of trade and tourist promotion offices, for facilitation of activities of governmental commercial offices, participation in trade fairs and exhibits, and the sending of trade missions, and for facilitation of entry, establishment, and travel of commercial representatives.¹⁶²

¹⁵⁸ 15 C.F.R. § 375.2 (1975).

¹⁵⁹ See N.Y. Times, Oct. 4, 1975, at 3, col. 4. Although refusing to complete the forms which consigners or end-users must supply under U.S. law in order to enable a seller to obtain a validated license, the Chinese corporations have been supplying the necessary information in letter form, which has been accepted by the U.S. Department of Commerce Office of Export Control.

¹⁶⁰ See *id.*

¹⁶¹ There is some question as to whether congressional attempts to set guidelines for the President are unconstitutional legislative infringements on the President's power to conduct foreign relations. See Feller & Wilson, *United States Tariff and Trade Law: Constitutional Sources and Constraints*, *infra* at 105.

¹⁶² Trade Act, § 405(b)(1), adding 19 U.S.C. § 2435(b)(8).

The Act does not require that all of the trade facilitation measures enumerated be included in an agreement. Some of the arrangements would be extremely difficult to negotiate with the P.R.C., if past Chinese practice is any guide. The Chinese would be unlikely, for instance, to permit the opening of a U.S. tourist promotion office, since they have not authorized any remotely similar foreign presence. As long as Chinese interest in expanding trade remains as keen as it has been recently, however, it should be possible to obtain Chinese assent to enough specific methods for facilitating Sino-U.S. trade to satisfy the President and Congress. A Chinese trade fair in the United States is presently impossible because of the threat that a claimant against the P.R.C. might try to attach its property. If that bar were removed, a Chinese trade exhibition in the United States would be likely to follow. The Chinese are eager to increase their exports and, in fact, several Chinese trade delegations have recently exhibited samples in the United States.¹⁶³ The United States presumably would and should insist on Chinese consent to U.S. exhibition in the P.R.C. as a precondition to U.S. consent to a Chinese exhibition.

The Act also requires an acceptable bilateral commercial agreement to "provide arrangements for the settlement of commercial differences and disputes."¹⁶⁴ Chinese contracts have provided for third-country arbitration of disputes and congressional intent was not to require a detailed bilateral arbitration agreement, but rather "an endorsement by both governments of the principle of independent dispute-settlement mechanisms and the inclusion of undertaking to facilitate such mechanisms."¹⁶⁵

Other requirements of the Trade Act are both explicit and strict. Congress has provided that an acceptable bilateral commercial agreement must contain provisions for extension of no fewer rights to United States nationals than those established by the Paris Convention for the Protection of Industrial Property and the Universal Copyright Convention.¹⁶⁶ The P.R.C. has not signed either Convention and, as mentioned above, possesses neither a patent nor a copyright system. Because of the P.R.C.'s traditional reluctance to

¹⁶³ A delegation from the China National Light Industrial Import and Export Corporation visited the U.S. for 7 weeks in September-October 1975, bringing over 3,000 samples. U.S.-CHINA BUS. REV., Nov.-Dec. 1975, at 57.

¹⁶⁴ Trade Act, § 405(b)(7), *adding* 19 U.S.C. § 2435(b)(7).

¹⁶⁵ S. REP. NO. 1298, *supra* note 147, at 209.

¹⁶⁶ Trade Act, §§ 405(b)(4)-(5), *adding* 19 U.S.C. §§ 2435(b)(4)-(5).

adhere to multilateral international agreements it has not helped to draft,¹⁶⁷ whether it will adhere to the two Conventions in the future is problematical. A Sino-U.S. trade agreement could, of course, provide for protection of U.S. industrial and literary property in the P.R.C. in a manner consistent with the two Conventions. Nevertheless, these provisions of the Act may create negotiating problems for both sides.

2. *The Parties to an Agreement*

Obviously, the governments of the United States and the P.R.C. are the appropriate parties to conclude an agreement on trade between the two countries. But in the absence of formal diplomatic relations between the two governments caused in part by the continued U.S. recognition of the government of the Republic of China on Taiwan, the P.R.C. has seemed reluctant to negotiate directly and publicly with the U.S. Government. An informal agreement between the China Council for the Promotion of International Trade (CCPIT) and the National Council for United States-China Trade has been suggested as a possible interim solution.¹⁶⁸ As superficially attractive as this proposal may seem, it should probably be rejected as unsound for legal and policy reasons.

CCPIT, as has been stated above, is regarded by the Chinese as a private body. In the past it has at least nominally handled formal trade relations with nations that do not have diplomatic relations with the P.R.C. In 1957, for instance, it entered into a one-year agreement with a West German trade promotion group that was strongly backed by the West German government, which at that time had not established relations with Peking.¹⁶⁹ The agreement contained detailed clauses dealing with substantive issues of con-

¹⁶⁷ As of July 1973, the People's Republic of China has "adhered to only one multilateral treaty, the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, and . . . 'accepted' only the 1948 International Regulations for Preventing Collisions at Sea." 2 COHEN & CHIU, *supra* note 10, at 1202-03.

¹⁶⁸ A resolution passed by the Asian Pacific Council of American Chambers of Commerce (APCAC) stated:

APCAC urges the National Council for U.S.-China Trade to initiate discussions with the China Council for the Promotion of International Trade on the desirability of establishing a non-governmental trade agreement between the United States and the People's Republic of China.

The National Council Urges Sino-U.S. Trade Pact, U.S.-CHINA BUS. REV., May-June 1975, at 11.

¹⁶⁹ See Stahnke, *Aspects of Sino-West German Trade*, in LEGAL ASPECTS OF CHINA'S FOREIGN TRADE, *supra* note 3.

cern to German-P.R.C. traders, including inspection, force majeure and third-country arbitration of trade disputes. CCPIT was also the Chinese body that entered into "non-governmental," "memorandum" trade agreements with Japan before diplomatic relations were established between the two countries.¹⁷⁰

The putative U.S. party to a non-governmental agreement, the National Council for United States-China Trade, was established in 1972 by a group of business leaders representing some of the nation's largest corporations. The National Council is a private non-profit membership organization that receives no funds from the federal government, and whose work has been consistently supported by the Departments of State and Commerce.¹⁷¹ The National Council has performed impressively in demystifying trade with the P.R.C. for U.S. businessmen, serving as a reliable source of information on that trade, and acting as a point of contact with CCPIT. It has maintained a useful presence at the Canton Fairs and has facilitated the visits of a series of Chinese trade delegations to the United States. Despite these accomplishments, the National Council is not the proper body to negotiate or sign a commercial agreement with the CCPIT. A bilateral Sino-U.S. commercial agreement should be negotiated and signed only by representatives of the two governments concerned.

A basic problem stems from the fact that the CCPIT is as much a creation of the Chinese government as the Ministry of Foreign Trade to which it is subordinate. The structure of the Chinese state apparatus is such that no Chinese organization which engages in permitted contact with foreigners can realistically be considered "non-governmental." CCPIT signs international trade agreements which plainly are intended to bind to the P.R.C. It exercises functions, such as trademark registration, which are governmental, and its personnel are government officials. The legality and advisability of a private U.S. organization entering into an agreement with the CCPIT must as a consequence be measured by the governmental character of the CCPIT.

The Logan Act of 1799¹⁷² prohibits citizens of the United States

¹⁷⁰ See Henderson & Matsuo, *Japan's Trade Experience With the People's Republic of China*, in LEGAL ASPECTS OF FOREIGN TRADE, *supra* note 3.

¹⁷¹ See UNITED STATES DEP'T OF STATE, CURRENT INFORMATION SUPP., TRADE WITH THE PEOPLE'S REPUBLIC OF CHINA 2 (1974); UNITED STATES DEP'T OF COMMERCE, OVERSEAS BUS. REP., OBR No. 74-49, DOING BUSINESS WITH CHINA 5 (1974).

¹⁷² 18 U.S.C. § 953 (1970).

from engaging in "correspondence or intercourse" with a foreign government or its agents, "with intent to influence the measures of conduct of any foreign government . . . in relation to any disputes or controversies with the United States."¹⁷³ The statute was intended to "guard by law against the interference of individuals in the negotiation of our Executive with the Governments of foreign countries."¹⁷⁴ It is unnecessary to advocate that the statute should be invoked if a private trade agreement is signed; the policy expressed by the statute appears to apply to negotiation of a commercial treaty with a powerful nation with which U.S. relations are of such great importance. Matters such as the industrial and literary property rights of U.S. nationals in the P.R.C. should fall within the realm of Sino-U.S. diplomatic relations. These are matters for the two governments to negotiate between themselves.¹⁷⁵

The Trade Reform Act itself raises very clear problems of policy, since it specifically contemplates that bilateral commercial agreements shall be entered into by the President, subject to strict criteria and to ultimate congressional approval. An agreement between the National Council and the CCPIT on matters of trade policy, which could otherwise be regulated by an agreement contemplated by the Act, would seem to violate both the letter and the policy of the Trade Act. It should be clear, for instance, that Congress intended that a bilateral commercial agreement reflect mutual concessions by the United States and each planned economy with which it enters into such an agreement. A U.S. party

¹⁷³ *Id.*

¹⁷⁴ 9 ANNALS OF THE CONGRESS OF THE UNITED STATES 2,494 (1798) (remarks of Mr. Griswold).

¹⁷⁵ Characterization of a trade agreement entered into by the two organizations as "private" would hardly suffice to escape the problems such an agreement would create. Even if the agreement only purported to apply to members of the National Council, the Chinese might want to apply the terms of the agreement to non-members' transactions in the China trade. If this occurred, then the acts of a private body would have been used to affect the rights of U.S. nationals in their trade with China, although neither they nor the U.S. Government had agreed to the treatment in question. Furthermore, if the agreement applied only to members of the National Council, and non-members were not able to negotiate equally good terms, the agreement might violate the Sherman Act as an "unfair method of competition."

The Webb-Pomerene exception for certain export trade associations would not save the agreement, since the National Council is not an organization "entered into for the sole purpose of engaging in export trade." 15 U.S.C. § 62 (1970). More fundamentally, the Webb-Pomerene exception does not apply to acts which are "in restraint of the export trade of any domestic competitor" of an export trade association. See *United States v. United States Alkali Export Association, Inc.*, 86 F. Supp. 59 (S.D.N.Y. 1949).

to a "non-governmental" agreement would have few or no concessions with which to bargain, and conceivably could adopt positions prejudicial to U.S. bargaining positions during subsequent negotiation of a formal agreement.

Finally, some strong policy reasons can be advanced to justify the conclusion argued here. It may be possible for some of the outstanding ambiguities and problems in Sino-U.S. trade to be solved by a "private" agreement, but the question is whether the need is so urgent that the authority to speak for the United States on commercial questions relating to the P.R.C. should be delegated, in whole or in part, to a private member organization. Furthermore, in these days of justified sensitivity to the influence of large corporations on U.S. foreign policy and foreign economic policy, there seems to be no compelling reason to delegate power to deal with the P.R.C. to a body whose most important members are among the largest and most powerful corporations in the United States.

CONCLUSION

Generalizations are difficult to make about Chinese practice and the problems discussed in this Article, but a few concluding observations seem appropriate. The experience of U.S. businessmen seems consistent with that of their predecessors—and competitors—from Western Europe and Japan. At the same time, although U.S. businessmen suffer from some disadvantages because of their unfamiliarity with the background of the P.R.C.'s foreign trade since 1949, patterns in that trade are not frozen, and U.S. businessmen can both help to influence, and benefit from, some changes.

The resumption of Sino-U.S. trade came just as the P.R.C., expanding its trade, adopted a new flexibility on some matters. Quite apart from this development, the importance of the United States as a market for Chinese products and as a source of Chinese imports of advanced products and technology should affect the terms of transactions between the two countries. It may hardly be necessary to observe that a well-defined institutional framework does not yet exist to channel trade between the two countries; their formal relations are still subdiplomatic. Both the volume of Sino-U.S. trade and progress toward establishing institutional cooperation will of course depend heavily on the future course of overall Sino-U.S. political relations. The rapid development of trade since

1972, however, despite ambiguities and problems, testifies to the considerable interest that has existed in each country in developing a mutually beneficial commercial relationship. However, the recent slowing of momentum in Sino-U.S. rapprochement and inevitable policy fluctuations on both sides of the Pacific raise questions.

Progress toward "normalization," or establishment of full diplomatic relations, was stalled by Watergate, the U.S. military withdrawal from Southeast Asia, and most recently by the preoccupation of the Ford administration with domestic election politics.¹⁷⁶ Also, some basic policies remain open to review both in China and in the United States, as the spring of 1976 illustrated: After a leadership change in China, foreign trade policy was once again debated in Peking;¹⁷⁷ while in the United States, the policy of detente that had led to the Shanghai Communique was questioned sharply during the Presidential primaries.

At best, Sino-U.S. trade will evolve only tentatively, and the problems described in this Article will not disappear. Marked changes in U.S. trade policies as they affect the P.R.C. seem improbable, although relaxation of U.S. export controls and repeal or modification of the extreme features of the Trade Act seem desirable. Chinese practices are unlikely to change radically, especially if Chinese trade does not continue to expand because of a reasserted commitment to "self-reliance."

The U.S. businessman interested in trading with the P.R.C. faces uncertainties in the three elements of practice, policy, and law, and can only strive to glean as much as possible about Chinese practice. Although his knowledge can add security to his expectations, unfortunately the subject will remain elusive. We might recall that a China trader observed over a century ago that "the most minute description could scarcely suffice to give you anything like an accurate idea of a market singular and different in many respects from all others."¹⁷⁸

¹⁷⁶ See Lelyveld, *The U.S. Opening to China: Not Enough Went Through*, N.Y. Times, April 11, 1976, § 4, at 1, col. 4.

¹⁷⁷ In April 1976, an article was published in the theoretical journal of the Chinese Communist Party criticizing recent foreign trade policies, including export of China's natural resources. Fang Hai, *Criticize the Slavish Comprador Policy*, HUNG-CH'I [RED FLAG], April 1976, at 21.

¹⁷⁸ Letter from John Matheson, a Canton trader, Feb. 7, 1821, *quoted in* M. Greenberg, *BRITISH TRADE AND THE OPENING OF CHINA 1800-42*, at 75 (1951).

成交确認書

SALES CONFIRMATION

字第 No. CAK-75A-077

日期 Date: Nov. 10, 1975.

卖方 Sellers: China National Native Produce & Animal By-Products Imp. & Exp. Corp.,

签约地点: Signed At: Kwangchow

地址 Address: 82, Tung An Men Street, Peking, China

电报挂号 Cable Address: Chinatuhsu Peking

买方 Buyers: Messrs.

地址 Address: U.S.A.

电报挂号 Cable Address:

根据卖方月日信/电及买方月日信/电
经买卖双方同意成交下列商品订立条款如下:

As per Seller's letter/telegram of _____ and Buyers' of _____
the undersigned Sellers and Buyers have agreed to close the following transactions according to the terms and conditions stipulated below:

商 品 Articles:	规 格 Specifications:	数 量 Quantity:	单 价 Unit Price:	
CN005 20,000 pieces per cartons, 25 cm./200 pcs	<u>Bamboo Wares</u>		<u>C&F NEW YORK AMOUNT</u>	
		300 sets	US\$3.31	US\$993.—
		100,000 pcs.	10.34	103.40
			<u>per set</u>	
			<u>per 10000 pcs.</u>	<u>US\$1096.40</u>

数量及总值均得有 % 的增减, 由卖方决定。
with % more or less both in amount and quantity allowed at the Seller's option.

总 值
Total Value: US\$1096.40 (Say U.S. dollars One Thousand & Ninety Six and Cents Forty Only).

包 装
Packing: In cartons or rush mats at the Sellers' option.

装 运 期
Time of Shipment: During Jan./Feb., 1976 with partial shipment allowed.

装 运 口 岸 和 目 的 地
Loading Port & Destination: From Kwangchow/Whampoa to New York with transshipment allowed.

保 险
Insurance: To be effected by the Buyers.

付 款 条 件
Terms of Payment: 买方须于 197 年 月 日前将保兑的、不可撤销的、可转让可分割的即期信用证开到 信用证议付有效期延至上列装运期后 天在 到期。

By Confirmed, Irrevocable, Transferable and Divisible Letter of Credit to be available by sight draft, to reach the sellers before 15th Dec. 1975 and to remain valid for negotiation until the 15th day after the aforesaid Time of Shipment

装 箱 标 记
Shipping Mark:

品质、数量、重量, 以中国商品检验局检验证或卖方所出之证明书为依据。 NEW YORK
Quality, quantity and weight are subject to the certificates issued by the China Commodity Inspection Bureau or the Sellers.

Remarks: The credit should be opened by a bank of the third country in U.S.A., which is acceptable to both sides, and in favour of China National Native Produce & Animal By-Products Imp. & Exp. Corp., Kwangtung Branch.
Address: No. 486, 623, Road, Kwanchow, China.

卖 方
THE SELLERS

买 方
THE BUYERS

APPENDIX B

CONTRACT

No.

Date: April , 1972

China National Light Industrial Products Import & Export Corporation (Address: 82, Tung An Men Street, Peking. Cable Address: INDUSTRY PEKING, hereinafter called the Sellers) and [the buyer] (hereinafter called the Buyers) hereby agree to sign this Contract on the terms and conditions stipulated below:

- 1) Commodity Name, Specification, Unit Price, Total Value, Packing, Shipping Mark, etc. are as per the attached list, which constitutes an integral part of this Contract.
- 2) Terms of Payment: The Buyers shall open through Hong Kong & Shanghai Banking Corporation In U.S.A. an irrevocable, transferable, divisible Letter of Credit payable at sight with TT reimbursement clause, allowing transshipment and partial shipment in favor of China National Light Industrial Products Import & Export Corporation, Shanghai Arts & Crafts Branch, reaching 25 days before the stipulated time of shipment, valid in China till 15 days after the stipulated time of shipment, with 5% more or less in value permissible.
- 3) Shipping Terms:
 - a) Port of Shipment: China port
 - b) Port of Destination: San Francisco, U.S.A.
 - c) Time of Shipment: During November/December, 1972.
 - d) Transshipment and Partial Shipment are allowed. The Buyers shall not stipulate names of Shipping Company and Carrying Vessel in their covering Letter of Credit.
- 4) Shipping Advice: After the shipment is made, the Sellers shall notify the Buyers by cable the Contract Number, Commodity Name, Quantity, Value, Name of Carrying Vessel and the Shipping Date. The Sellers shall have the right to ship 5% more or less in quantity of the lot for shipment. The above quantity difference is to be settled at the Contract price hereof.

5) Documents:	<u>original(s)</u>	<u>copies</u>
Invoice	1	3
Clean on Board B/L	1	1
Packing List	1	2

- 6) Force Majeure: The Sellers shall not be held responsible for non-delivery or late delivery resulting from natural calamities and/or causes

beyond their control. However, the Sellers shall undertake to notify the Buyers to this effect accordingly.

- 7) Disputes and Arbitration: Disputes if any arising from the execution of this Contract shall be settled through negotiation and consultation between the Buyers and the Sellers. If no settlement can be reached therefrom, the case under dispute may then be referred to the Foreign Trade Arbitration Committee of the China Council for the Promotion of International Trade, or a competent Arbitration Committee in a third country approved by the two Contractual Parties for arbitration. Arbitration Fees are to be borne by the losing party.
- 8) Insurance: To be covered by the Buyer.

This Contract is made in two originals in Chinese and English. The two versions are of equal validity.

BUYERS:

SELLERS:

China National Light Industrial Products Import & Export Corporation.

APPENDIX C

CONTRACT

No.

Peking. Date:

The Buyers:

CHINA NATIONAL MACHINERY IMPORT AND EXPORT CORPORATION, Erh-Li-Kou, Hsi Chiao, Peking, China. (Cable Address: "MACHIMPEX" PEKING)

The Sellers:

This Contract is made by and between the Buyers and the Sellers; whereby the Buyers agree to buy and the Sellers agree to sell the under-mentioned commodity according to the terms and conditions stipulated below:

1. COMMODITY, SPECIFICATIONS, QUANTITY AND UNIT PRICE:

2. TOTAL VALUE:

3. COUNTRY OF ORIGIN AND MANUFACTURERS:

4. **PACKING:** To be packed in strong wooden case(s) or in carton(s), suitable for long distance ocean parcel post air freight transportation and to change of climate, well protected against moisture and shocks. The Sellers shall be liable for any damage of the commodity and expenses incurred on account of improper packing and for any rust attributable to inadequate or improper protective measures taken by the Sellers in regard to the packing. One full set of service instructions for each instrument shall be enclosed in the case(s).
5. **SHIPPING MARK:** The Sellers shall mark on each package with fadeless paint the package number, gross weight, net weight measurement and the wordings: "KEEP AWAY FROM MOISTURE", "HANDLE WITH CARE", "THIS SIDE UP" etc., and the shipping mark:
6. **TIME OF SHIPMENT:**
7. **PORT OF SHIPMENT:**
8. **PORT OF DESTINATION:**
9. **INSURANCE:** To be covered by the Buyers after shipment.
10. **PAYMENT: for/by**
 - (1) In case by L/C: The Buyers, upon receipt from the Sellers of the delivery advice specified in Clause 12 (1)(a) hereof, shall 15–20 days prior to the date of delivery, open an irrevocable Letter of Credit with the Bank of China, Peking, in favour of the Sellers, for an amount equivalent to the total value of the shipment. The Credit shall be payable against the presentation of the draft drawn on the opening bank and the shipping documents specified in Clause 11 hereof. The Letter of Credit shall be valid until the 15th day after the shipment is effected.
 - (2) In case by Collection: After delivery is made, the Sellers shall send the shipping documents specified in Clause 11 hereof, from the Sellers' Bank through Bank of China, to the Buyers for collection.
 - (3) In case by M/T or T/T: Payment to be effected by the Buyers within seven days after receipt of the shipping documents specified in Clause 11 of this contract.
11. **DOCUMENTS:** The Sellers shall present to the paying bank the following documents for negotiation:
 - (1) In case by freight:
 - 3 Negotiable copies of clean on broad ocean Bill of Lading marked "FREIGHT TO COLLECT" / "FREIGHT PREPAID", made out to order, blank endorsed, and notifying the China National Foreign Trade Transportation Corporation at the port of destination.

In case by air freight:

One copy of Airway Bill marked "FREIGHT PREPAID" and consigned to the Buyers.

In case by post:

One copy of Parcel Post Receipt addressed to the Buyers.

(2) 5 copies of Invoice with the insertion of Contract No. and the Shipping Mark. (in case of more than one shipping mark, the invoice shall be issued separately).

(3) 2 copies of Packing List issued by the Manufacturers.

(4) 1 copy of Certificate of Quantity and Quality issued by the Manufacturers.

(5) Certified copy of cable/letter to the Buyers, advising shipment immediately after shipment is made.

(6) The Sellers shall, within 10 days after the shipment is effected, send by air-mail two sets of the abovementioned documents (except Item 5)-One set to the Buyers and the other set to the China National Foreign Trade Transportation Corporation at the port of destination.

12. SHIPMENT:

(1) In case of FOB Terms:

a. The Sellers shall, 30 days before the date of shipment stipulated in the Contract, advise the Buyers by cable/letter of the Contract No., commodity, quantity, value, number of package, gross weight and date of readiness at the port of shipment for the Buyers to book shipping space.

b. Booking of shipping space shall be attended to by the Buyers' Shipping Agents Messrs. China National Chartering Corporation, Peking, China. (Cable address: Zhongzu Peking)

c. China National Chartering Corporation, Peking, China, or its Port Agents, (or Liners' Agents) shall send to the Sellers 10 days before the estimated date of arrival of the vessel at the port of shipment, a preliminary notice indicating the name of vessel, estimated date of loading, Contract No. for the Sellers to arrange shipment. The Sellers are requested to get in close contact with the shipping agents. When it becomes necessary to change the carrying vessel or in the event of her arrival having to be advanced or delayed the Buyers or the Shipping Agent shall advise the Sellers in time. Should the vessel fail to arrive at the port of loading within 30 days after the arrival date advised by the Buyers, the Buyers shall bear the storage and insurance expenses incurred from the 31st day.

d. The Sellers shall be liable for any dead freight or demurrage, should it happen that they have failed to have the commodity ready for loading after the carrying vessel has arrived at the port of shipment on time.

e. The Sellers shall bear all expenses, risks of the commodity before it passes over the vessel's rail and is released from the tackle. After it has passed over the vessel's rail and been released from the tackle, all expenses of the commodity shall be for the Buyers' account.

(2) In case of C&F Terms:

a. The Sellers shall ship the goods within the shipment time from the port of shipment to the port of destination. Transshipment is not allowed. The contracted goods shall not be carried by a vessel flying the flag of the country which the Buyers can not accept. The carrying vessel shall not call or stop over at the port/ports of Taiwan and/or the port/ports in the vicinities of Taiwan prior to her arrival at the port of destination as stipulated in Clause 8 of this Contract.

b. In case the goods are to be despatched by parcel post/air-freight, the Sellers shall, 30 days before the time of delivery as stipulated in Clause 6, inform the Buyers by cable/letter of the estimated date of delivery, Contract No., commodity, invoiced value, etc. The sellers shall, immediately after despatch of the goods, advise the Buyers by cable/letter of the Contract No., commodity, invoiced value and date of despatch for the Buyers to arrange insurance in time.

13. SHIPPING ADVICE:

The Sellers shall, immediately upon the completion of the loading of the goods, advise by cable/letter the Buyers of the Contract No., commodity, quantity, invoiced value, gross weight, name of vessel and date of sailing etc. In case the Buyers fail to arrange insurance in time due to the Sellers not having cabled in time, all losses shall be borne by the Sellers.

14. GUARANTEE OF QUALITY:

The Sellers guarantee that the commodity hereof is made of the best materials with first class workmanship, brand new and unused, and complies in all respects with the quality and specification stipulated in this Contract. The guarantee period shall be 12 months counting from the date on which the commodity arrives at the port of destination.

15. CLAIMS:

Within 90 days after the arrival of the goods at destination, should the quality, specification, or quantity be found not in conformity with the stipulations of the Contract except those claims for which the insurance company or the owners of the vessel are liable, the Buyers shall, on the strength of the Inspection Certificate issued by the China Commodity Inspection Bureau, have the right to claim for replace-

ment with new goods, or for compensation, and all the expenses (such as inspection charges, freight for returning the goods and for sending the replacement, insurance premium, storage and loading and unloading charges etc.) shall be borne by the Sellers. As regards quality, the Sellers shall guarantee that if, within 12 months from the date of arrival of the goods at destination, damages occur in the course of operation by reason of inferior quality, bad workmanship or the use of inferior materials, the Buyers shall immediately notify the Sellers in writing and put forward a claim supported by Inspection Certificate issued by the China Commodity Inspection Bureau. The Certificate so issued shall be accepted as the base of a claim. The Sellers, in accordance with the Buyers' claim shall be responsible for the immediate elimination of the defect(s), complete or partial replacement of the commodity or shall devalue the commodity according to the state of defect(s). Where necessary, the Buyers shall be at liberty to eliminate the defect(s) themselves at the Sellers' expenses. If the Sellers fail to answer the Buyers within one month after receipt of the aforesaid claim the claim shall be reckoned as having been accepted by the Sellers.

16. FORCE MAJEURE:

The Sellers shall not be held responsible for the delay in shipment or non-delivery of the goods due to the Force Majeure, which might occur during the process of manufacturing or in the course of loading or transit. The Sellers shall advise the Buyers immediately of the occurrence mentioned above and within fourteen days thereafter, the Sellers shall send by airmail to the Buyers for their acceptance a certificate of the accident issued by the Competent Government Authorities where the accident occurs as evidence thereof.

Under such circumstances the Sellers, however, are still under the obligation to take all necessary measures to hasten the delivery of the goods. In case the accident lasts for more than 10 weeks, the Buyers shall have the right to cancel the Contract.

17. LATE DELIVERY AND PENALTY:

Should the Sellers fail to make delivery on time as stipulated in the Contract, with exception of Force Majeure causes specified in Clause 16 of this Contract, the Buyers shall agree to postpone the delivery on condition that the Sellers agree to pay a penalty which shall be deducted by the paying bank from the payment under negotiation. The penalty, however, shall not exceed 5% of the total value of the goods involved in the late delivery. The rate of penalty is charged at 0.5% for every seven days, odd days less than seven days should be counted as seven days. In case the Sellers fail to make delivery ten weeks later than the time of shipment stipulated in the Contract, the Buyers shall have the right to cancel the contract and the Sellers, in spite of the cancellation, shall still pay the aforesaid penalty to the Buyers without delay.

18. ARBITRATION:

All disputes in connection with this Contract or the execution thereof shall be settled friendly through negotiations. In case no settlement can be reached, the case may then be submitted for arbitration to the Arbitration Committee of the China Council for the Promotion of International Trade in accordance with the Provisional Rules of Procedures promulgated by the said Arbitration Committee. The Arbitration shall take place in Peking and the decision of the Arbitration Committee shall be final and binding upon both parties; neither party shall seek recourse to a law court or other authorities to appeal for revision of the decision. Arbitration fee shall be borne by the losing party. Or the Arbitration may be settled in the third country mutually agreed upon by both parties.

19. SPECIAL PROVISIONS:

IN WITNESS THEREOF, this Contract is signed by both parties in two original copies; each party holds one copy.

THE BUYERS:

CHINA NATIONAL MACHINERY IMPORT
AND EXPORT CORPORATION

THE SELLERS: