

Law and China's "Open Policy": A Foreigner Present at the Creation

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Abstract:

This is an account of my experiences in China during the years 1979-81 when I had the opportunity to participate in the re-establishment of a largely Soviet-style legal system following the end of the Cultural Revolution. It describes my two years of teaching foreign direct investment law and international business law generally, including dispute resolution processes, to Beijing city officials charged with the responsibility of negotiating trade, licensing and joint venture investment contracts with multinational corporations. I also discuss my early experiences actually negotiating such contracts with Chinese officials on behalf of American and other companies and conducting special training programs for legislative draftsmen and administrators in the fields of taxation and investment law. In addition, I mention my related efforts involving translation and publication of emerging legislation into English, selecting the first Chinese officials to study law in the United States and giving occasional lectures in cities beyond Beijing.

In recent years, scholars have vigorously debated whether, after more than three decades of relatively consistent reforms, there has been "a turn against law" in the People's Republic of China (PRC).¹ This has stimulated me to recall the earliest days of Deng Xiaoping's "Open Policy" – 1978-81 - when the Chinese Communist Party decisively took "a turn towards law" by introducing a post-Cultural Revolution legal system. A comprehensive account of those efforts would require a substantial book. Here I merely offer a brief memoir of my own good luck in having had the opportunity to participate in that exciting era.

THE ORIGINS OF ADVENTURE

I had long actively sought that opportunity. Following the advice of Confucius to "establish yourself at thirty", as a young law professor at the University of California at Berkeley, I started to study the Chinese language on August 15, 1960 at 9 am. It didn't take me long to conclude that I would learn the language much more quickly if I could live in China. Of course, at that time both the Chinese and American governments maintained barriers to nationals of the other country who

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¹ See, e.g., Carl Minzner, "China's Turn Against Law", American Journal of Comparative Law (2011) <https://ssrn.com/abstract=1767455>; and Randall Peerenboom, "The Battle Over Legal Reforms in China: Has There Been a Turn Against Law?" (2014) <https://ssrn.com/abstract=2479716>

wished to come for a visit, not to mention a period of study. Nevertheless, I wrote letters to both Chairman Mao Zedong and Prime Minister Zhou Enlai in the hope they might make an exception and invite me to Beijing. Not surprisingly, that attempt, like others I later made, proved unsuccessful until President Nixon's famous pathbreaking trip to "the Central Realm" in February 1972. Three months later, thanks to the Chinese Academy of Sciences, several colleagues, including my wife Joan Lebold Cohen – a student of Chinese art, and I spent a month in China.

That was a spectacular breakthrough, the highlight being my four-hour dinner conversation with Zhou Enlai, seated next to the Premier himself. Yet, except for a morning discussion of foreign trade contract disputes with three members of the Legal Department of the China Council for the Promotion of International Trade (CCPIT), there was little chance to learn about Chinese law. Since the Cultural Revolution had not yet run its course, the Premier seemed understandably bemused that any foreigner would want to study his country's legal system and implied that perhaps my publications had made more of the country's legal system than China had! There were, of course, no lawyers or law professors to be met on that first trip, because the legal profession had ceased to operate since the "anti-rightist" campaign fifteen years earlier and the ongoing Cultural Revolution had shuttered the nation's law schools and even abolished the Ministry of Justice!

I made several other visits to China during the '70s, including one, in 1977-78, as adviser to U.S. Senator Edward Kennedy, then the new chairman of the Senate Judiciary Committee. We had a memorable 90-minute talk with Deng Xiaoping, who was in the process of returning to power following the end of the Cultural Revolution in 1976. Yet these visits were relatively brief, spasmodic and understandably not focused on the as yet rather sparse legal developments, but on political obstacles to establishing formal diplomatic relations between the PRC and the US.

Things began to change, however, very soon after, culminating in the third plenary session of the eleventh Communist Party Central Committee in December 1978. I remember how excited I was while visiting Hong Kong at that time and reading in the People's Daily, the Party's principal voice, the communiques confirming that, in lieu of continuing "class struggle", the Party had decided to re-establish a formal legal system. Then, after the normalization of Sino-American relations on January 1, 1979, I suddenly had many chances for short visits during the winter/spring of 1979 as Chinese government agencies demonstrated new-found eagerness to cooperate with Western legal specialists and law schools. The Ministry of Finance, the Ministry of Foreign Affairs, Beijing Municipality and the CCPIT all asked me to Beijing to give lectures and negotiate exchanges. Fortunately, I had planned to spend my one-semester sabbatical leave from the Harvard Law School, where by then I had been teaching for fifteen years, in Hong Kong during the first half of 1979. This made it possible for me to comply with all those requests. Having waited almost twenty years for such substantial contacts, I found this a gratifying time.

Not only was I beginning to learn about the country's gradually developing plans to enact legislation and revive legal institutions and legal education, but I was also being asked to assist in this meaningful process. For example, because the Ministry of Finance was under enormous government pressure to create a tax system on which eager foreign investors might rely, China's National Tax Bureau and the

International Tax Program of the Harvard Law School agreed to collaborate in an historic four-week summer training program, in the pleasant northeast seacoast city of Dalian, for 125 Chinese tax officials and teachers. They spent six days a week, eight hours a day, listening to intense lectures designed to facilitate the drafting of urgently needed legislation.

Similarly, the CCPIT, assigned the task of quickly helping legislators to produce China's first foreign direct investment law, asked me to organize a full week of lectures in Beijing by American international lawyers introducing another very large group of economic officials and academics to the variety of investment vehicles that foreign companies might expect to establish in China. This, like our tax efforts, soon led to legislation that made possible the first Chinese-foreign investment projects. When on July 1, 1979, the Chinese government promulgated the first seven laws enacted by the National People's Congress in many years, among them was the Sino-Foreign Equity Joint Venture Law, which attracted worldwide interest and made me feel happy on my birthday! Unfortunately, the next day a New York Times front-page story erroneously claimed that I had drafted the new investment law. The reporter had failed to distinguish between my merely arranging lectures on international experience with joint ventures and drafting national legislation!

All this exciting activity whetted my appetite! Many trips to the Mainland from my base in Hong Kong had demonstrated how inconvenient and frustrating it was to come and go instead of residing in China. Constant travel interruptions inhibited learning, teaching and friendships. I wanted to live and work in China at long last. Yet this proved difficult. All the national agencies that were eager to cooperate with me on an ad hoc, short-term basis became extremely cautious when I raised the prospect of inviting me to do more than make short-term visits. Deng Xiaoping's "Open Policy" was too recent. No one knew how long it might last. Until 1979, PRC government policies had demonstrated frequent swings of the pendulum. Having been badly affected in previous political campaigns, no responsible central government official seemed willing to run the risk of inviting a foreign law professor, especially one from the world's leading bourgeois country, to remain in residence.

Fortunately, my Chinese language tutor at Harvard sympathized with my situation and offered to help. She was kind enough to introduce me to a friend named Xiao Yang, then head of the Beijing Economic Development Corporation (BEDC), which had just been created by the Beijing Municipal Government's Economic Commission as a vehicle for doing business with foreigners. Xiao, an extremely intelligent and nice Sichuan man who had studied engineering in Leipzig in East Germany, was unafraid to be an innovator and eager to make a mark as one of the new generation of reformers who were determined to transform the PRC economy. He saw the relevance of law to economic development and had already felt the need to train BEDC and other city officials for the foreign business negotiations that were daily being thrust upon them. We quickly made a "win-win" deal.

TEACHING BUSINESS OFFICIALS IN BEIJING, 1979-81

I agreed to take a one-year leave from Harvard in order to offer a course nine hours per week for an academic year, introducing international business law and dispute resolution to thirty local government officials. These cadres, aged twenty-five

to fifty, had already been dealing with foreign business people interested in concluding the customary range of commercial contracts – sales, purchases, licensing of technology, joint ventures, foreign wholly-owned subsidiaries and other arrangements. Since very few of the Chinese officials selected, who were released from any work obligations, knew English well, the course had to be taught in Chinese. This presented a double challenge. I and my two able associates – Owen Nee and Stephen Orlins, from the then leading international law firm Coudert Brothers with which I was a consultant - had never taught a law course in Chinese before. Moreover, we often had to use ingenuity in translating the English language legal vocabulary with which we were familiar into contemporary Chinese at a time when the PRC was merely beginning to enact relevant legislation and regulations that eventually enabled us to develop equivalent Chinese terms.

Of course, Chiang Kaishek's pre-1949 Republic of China government, which had taken refuge in Taiwan after losing the civil war to the Communists, had a well-developed Chinese-English commercial law vocabulary. But not all of its terms had endured on the Mainland under the new regime, which had come heavily under the influence of Soviet law in the 1950s and which had only conducted limited business transactions with non-Communist countries before 1979. For example, even the pre-1949 Chinese term for contract – "qiyue" - had fallen into disuse on the Mainland, which substituted in its stead the term "hetong". Moreover, we could not expect much assistance from local interpreters. To be sure, there were highly knowledgeable bilingual experts among some Chinese law professors, especially the more senior ones who had been trained, often abroad, prior to 1949. But in 1979 formal legal education was only in the process of being restored in China and, although we were preparing to teach officials, we were not permitted access to law professors, who would have been delighted to help us. Instead, we had to make do with the aid of a very nice general interpreter who had no legal training and little knowledge of English legal terms. During our lectures he sat by our side, learning together with the other officials who were our "students" and occasionally helping as we sought to clarify the meaning of our poorly-expressed attempts to convey complex legal concepts.

We were assisted to some degree by the Peking University Press. In response to my suggestion and Beijing city's request, it had quickly translated and published an English language book on contracts and related subjects that was used in some American business schools and that I thought could provide useful explanations of law for laymen. As supplemental teaching materials, we also provided some actual Chinese language contracts whose provisions we reviewed in class clause by clause.

Although it took some time for Owen, Steve and me to realize it, our lectures went beyond the makeshift class room in the Beijing Glass Factory that the city government had allocated to our program. Copies of the notes taken down by some of the participants were distributed to senior economic officials, who later told me that they regularly studied them so that they too could learn more about business law. Because our 1979-80 course was thought to be successful, we were asked to spend another year training a second group of city cadres, and I managed to persuade Harvard to extend my leave of absence in order to do so.

It is difficult to exaggerate the hunger for legal learning among Chinese economic officials who in that era suddenly had to deal with foreign companies and

governments eager to do business. I vividly recall asking one dynamic and humorous Shanghai employee of the First Ministry of Machine Building who wanted to go to Harvard why he was so ambitious to study law. He said: "I work in my ministry's Law and Contract Division, and every day now we have to negotiate with the giants of the world's automobile industry, especially Volkswagon. We in the Law and Contract Division have only one problem," he said. "We don't know anything about law or contracts!"

Of course, many bright and eager Chinese officials were learning about law through actual negotiations. I witnessed that because, apart from teaching, I took part, almost daily, in negotiations between would-be foreign investors and Chinese state-owned enterprises from various industries. My arrangement with Xiao Yang and the BEDC facilitated this process. My two Coudert Brothers colleagues and I volunteered our teaching services in Beijing without charge, even for expenses. In return, however, the city government arranged for us to have three permanent two-room suites in the Peking Hotel at our expense. In those days one of the hardest jobs in Beijing was to be that hotel's general manager since, at least from the viewpoint of foreign visitors and their Chinese hosts, the Peking Hotel was then by far the best hotel in the capital, where every foreign delegation wanted to stay. Furthermore, since Beijing lacked modern office buildings in 1979, that was also where the large number of foreign corporations that were establishing representative offices wanted to set up shop, and even some United Nations officials and foreign diplomats wanted to live there. Thus rooms were at a premium and, by assuring us three suites, the BEDC put us in the center of Beijing's growing international life, a comfortable place not only to live but also to work. My wife and I shared one suite, Steve Orlins and his new bride shared the second one, and we used the third, where Owen sometimes stayed during visits from Hong Kong, as an office for the legal work representing foreign clients that paid for our expenses.

EDUCATION THROUGH NEGOTIATION

No Chinese lawyers appeared in any of the negotiations in which I took part during the 1979-81 period. During those years there were no licensed PRC lawyers, since the legal profession, which had fallen afoul of the 1957-58 "anti-rightist" campaign, was not yet formally restored. Even after its re-establishment on January 1, 1982, it took several years before licensed lawyers began to regularly take part in commercial negotiations. Until then, Chinese companies, which were invariably newly-minted state-owned enterprises – there were virtually no private companies at the time, coped as well as possible by designating some staff members not formally trained in law to function as their legal advisors, as my BEDC "students" had been doing.

This lack of formal legal representation sometimes seemed to embarrass PRC negotiators. Recognizing their plight, I had originally offered to forgo representing the foreign side and instead serve as counsel to the BEDC and its many companies. But, after some hesitation, my friend Xiao Yang said he could not accept my offer. Nor was he authorized to accept the services of the other foreign lawyers who were gradually getting acquainted with Beijing.. The "Open Policy" was too new, the work was too sensitive and we did not have enough experience cooperating together on which to build trust.

I felt that the absence of lawyers on the Chinese side added to the challenges I confronted in this work. I had to be sure to explain to the Chinese side what the relevant legal provisions of their own slowly emerging legislative environment were, how foreign and international law and practice dealt with the issues we faced, what were the legal implications of those issues for each side and the pros and cons of the possible choices. As both a fair-minded lawyer representing foreign companies eager to gain China's trust and cooperation and an American law professor wanting to help China develop a satisfactory legal system, I felt acute responsibility for carrying out this difficult task. I also had to monitor the quality of the translation of legal terms and frequently supplemented the regular interpreters' translation and sometimes even took over the job myself.

Chinese negotiators were quick learners. They carefully studied the English and Chinese language draft contracts that our side prepared for the negotiations and gradually began to piece together from various foreign draft contracts their own versions, in Chinese and soon in English, of negotiation drafts more favorable to them than were initial foreign drafts. Before long, the PRC officials, local as well as national, who were responsible for approving contracts that were agreed upon by the negotiators began to provide Chinese companies with model contract drafts for initiating discussion of the various types of transactions. A model equity joint venture contract draft soon appeared, together with instructions and advice to Chinese negotiators about whether, when and how to yield to foreign demands to alter its provisions. At one point, before Chinese law required all equity joint venture contracts to provide for arbitration of disputes in China, the PRC side was told to hold out as long as possible against foreign insistence that disputes be arbitrated outside of China, but not to regard the issue as a "deal breaker" that would preclude agreeing on the contract.

I recall certain distinctive aspects of those early negotiations. There was an understandable sense of insecurity on both sides of the negotiating table. For the Chinese, establishing joint venture investment projects with Western firms was a new experience, and they were concerned about making mistakes of omission or commission as well as possibly even being tricked by the highly experienced foreign parties whom they had met only recently. This was well-expressed by then Vice-Premier Li Xiannian during an interview I had with him in April 1979. In response to my questions about the content of the equity joint venture law that was being drafted behind closed doors, he said: "You foreigners have nothing to worry about. You have been doing joint ventures all over the world for many years. We Chinese, on the other hand, have no experience in such matters."

Actually, we foreigners were also anxious, since China's evolving legal and economic systems were a work in progress, and transparency was minimal. I recall trying to negotiate a joint venture contract to build Beijing's first modern hotel. My client needed to know about the financial situation and the governance of its potential Chinese partner, a recently organized Beijing city government company. Yet when I asked for copies of its balance sheet and its articles of association, I was told that these were "state secrets" and could not be made known to outsiders. I said that I hoped the Chinese government would reconsider this policy since no foreigner would want to blindly invest in a black box and that I would have to go back to Harvard since not much business cooperation could take place amid such secrecy. Fortunately,

the policy of extreme secrecy did begin to change soon afterward, although in some cases the Chinese side still refused to make available "internal" regulations that they claimed supported their negotiating positions.

Not surprisingly, our discussions were also occasionally marked by misunderstandings linked to the difficulties of translating legal language. During our early hotel contract negotiations, for example, I said that our American company client would have to ask its board of directors to "approve" (pizhun) the document we were negotiating. The chief PRC negotiator, showing some nationalist emotion, said that it was for the official PRC investment authority to "approve" contracts, not for the foreign side, which could only "agree" (tongyi) or not to the contract terms.

Some months later, an offshore oil project negotiation offered another illustration. Because of other commitments I had to arrive a day after discussions had begun for what my American client thought was to be an equity joint venture project. On arrival, I was told that the discussions had got off to a bad start for reasons no one could explain. When discussions resumed on the second day, I quickly saw the reason for the lack of progress. CNOOC, the Chinese National Offshore Oil Corporation, believed that my client had wanted to establish not an equity joint venture but a cooperative joint venture, a different type of transaction for which no law had yet been enacted. The confusion had arisen because the Chinese names for the two different contract structures were very similar ("hezi jingying qiye" for equity joint ventures and "hezuo jingying qiye" for cooperative ones), and Chinese pronunciation and accents frequently varied. The entire first day had been wasted because of mutual mistake!

Some misunderstandings were not due to language but to the lack of detailed rules to guide the parties. Not only was there no cooperative joint venture law yet promulgated but the 1979 Equity Joint Venture Law was short and simple. It stated only basic principles and obviously contemplated the subsequent announcement of administrative implementing regulations to give it concrete meaning. Those regulations, however, did not appear until September 1983, over four years later. They provided a good deal of necessary guidance, reduced the likelihood of disputes and spurred foreign investors to enter transactions about which they had previously been reluctant, making the equity joint venture their preferred investment choice for the initial period of Sino-Western cooperation.

OTHER EDUCATIONAL PURSUITS

Although teaching and negotiating were more than enough to keep me very busy, I also made time for other professional pursuits. The most prominent was the launching of cooperation with China's Foreign Languages Press in the publication of a series of volumes containing English language translations by several of my law firm colleagues and me of much of the PRC's new legislation, which was inaccessible to most of the international community in the original Chinese language versions. The first fruit of our collective efforts – volume one of three volumes on China's Foreign Economic Legislation – appeared in 1982 and was followed shortly thereafter by our translations of the new Criminal Law and Criminal Procedure Law. These tasks proved to be a valuable public service that also did a great deal to expand my contemporary Chinese legal vocabulary.

I also managed to give occasional lectures to a number of national and local agencies in Beijing, and I traveled to Shanghai and Tianjin to speak to large groups of local officials responsible for foreign direct investments in those major cities. Wherever and whenever possible, I met with law professors, who had begun to emerge from the shadows of the Cultural Revolution. I also met with a few relatively senior former lawyers who were waiting for the government to reestablish their profession after over twenty years of inactivity. The Beijing Foreign Economic Law Office was already functioning unofficially. I remember visiting its frigid premises on November 13, 1979, which was the coldest day I had ever experienced because, in accordance with local custom, the heat was not turned on until two days later. A German businessman residing near me in the Peking Hotel had been detained by the police for sleeping with his Chinese girlfriend. I had been asked to try to obtain his release and had been told that one of the legal experts at the Foreign Economic Law Office was familiar with criminal justice and had good connections with the Public Security Bureau. He proved to be receptive, knowledgeable and helpful in securing the businessman's release.

In addition, I devoted some time to selecting the first PRC candidates to study at Harvard Law School. The Ministry of Finance was the first Chinese agency to show interest. In December 1978 the director of the State Taxation Bureau, Mr. Liu Zhicheng, who later became my good friend, responded positively to the annual invitation that the Harvard International Tax Program (ITP) sent to the finance ministries of the world's leading countries asking whether they wished to send someone to Cambridge for advanced tax training. This was the PRC's first response in the twenty-five years since the ITP began issuing such invitations! We replied that, beginning early January 1979, I would be spending the semester in Hong Kong, and that led the State Taxation Bureau to invite me to Beijing for discussions. I opened our talk by asking Mr. Liu how many people the State Taxation Bureau employed and how many spoke English. He told me that nationwide it employed about 200,000 people but that not one of them spoke English. We then agreed that, in addition to convening the large above-mentioned summer group in Dalian to lay the groundwork for immediate legislation, it would be desirable for the State Taxation Bureau to initiate an intensive English language training program for a select group of young officials who would become international tax specialists and suitable candidates for the Harvard ITP. That was done promptly and in due course some of those officials did indeed attend the Harvard program.

Other PRC departments soon indicated their hope to send young legal officials to Harvard. The Academy of Social Sciences asked me to interview two candidates for a possible opportunity in our LL.M. program. One was the most perfect candidate imaginable, since he had wonderful English, was very bright and lively, had an excellent academic record and showed a clear idea of what he wanted to study – public international law – and why. The other was remarkably unimpressive, and I thought perhaps he was some influential person's nephew! In any event I did the obvious and selected the first candidate, Mr. Zhou Xiaolin, who has subsequently had a distinguished career as an international commercial lawyer.

The Ministry of Foreign Affairs (MOFA) proved even more ambitious and called me not long after to inquire about sending someone to enter Harvard's full three-year J.D. program, so that person could become the ministry's expert on

American law. Moreover, MOFA wanted me not only to arrange Harvard's acceptance of the very competent English language interpreter it recommended – Ms. Zhao Jia, but also to procure the financial support for her entire American legal education. It may be hard for people today to understand that in 1979 China's treasury had very little foreign exchange to spend. Fortunately, I was able to persuade Alexis Coudert, the very wise senior partner of Coudert Brothers law firm and the trustee of a modest charitable foundation for the promotion of Polish-American law, to liberally interpret the terms of the foundation's charter in order to find the funds required!

Perhaps my most vivid memory of this exciting period was of something that I had witnessed only on television – the trial of the "Gang of Four". When that highly-publicized trial began in November 1980, I had hopes that it might be a useful instrument of public legal education. The Criminal Law and the Criminal Procedure Law had both just gone into effect on January 1, 1980, and the trial, despite the enormous ballyhoo it had generated, seemed to be a possible vehicle for illustrating how the new laws should be applied. Unfortunately, the main defendant, Chairman Mao's widow, Jiang Qing, after listening to the Chief Judge's explanation of the role that defense counsel could play on her behalf, refused to exercise her right to counsel. Once she angrily insisted on defending herself, public attention shifted away from legal procedures and was quickly overcome by the extraordinarily intense political drama that unfolded.

Much more educational was a Chinese feature film that I was surprised to see on television some months later. Called "In and Out of Court" (fating neiwai), it told the story of a woman appellate judge who resists heavy political pressures seeking to persuade her to reverse the criminal conviction of an important official's son. Instead, she courageously vindicates the principle of judicial independence of government authority. I was amazed to see the prominence accorded this critical principle in a popular movie made so early in the new law reform era. It reinforced my hopes for the future of the rule of law in China.

When in August 1981 my wife, whose lectures and publications had played an active role in introducing the works of Chinese and Western artists to each other, and I returned to the United States, we felt privileged to have observed and taken part in a new chapter in China's modern history, and we were both eager to return to China soon again.

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