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# LATERAL MOVEMENTS: LEGAL FLEXIBILITY AND FOREIGN INVESTMENT REGULATION IN CHINA

*Peter Howard Corne\**

## I. INTRODUCTION

China's legal system has developed rapidly over the past fifteen years, with lawmaking bodies at all levels issuing laws and regulations in conveyer-belt fashion, most of which have been drawn from Western legal models. China has pinned its future on adopting Western economic models within a state apparatus and a political system based on socialist ideology; and by doing this, China hopes to attract needed Western economic linkages. Thus, a legal system acceptable to Western investors has become a key factor in attracting this support. However, despite the enormous strides that have been made, certain features of China's legal structure have given investors and their legal counsel cause to complain bitterly.

Many of these complaints relate to the uncertainty that surrounds the drafting, enactment, and amendment of laws, regulations, and rules,<sup>1</sup> and the significance of "internal rules" in regulation.<sup>2</sup> Other complaints focus

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<sup>1</sup> FOREIGN INVESTMENT CONSULTANCY CORPORATION, ZHONGGUO TOUZI HUANJINGZHONG CUNZAI DE WENTI [PROBLEMS IN RESPECT TO INVESTING IN THE PRC] 25 (1991); Interview with Makoto Seki, Chief Representative of the Japan-China Investment Promotion Organisation, in Beijing (May 2, 1991) [hereinafter Seki interview]. For a detailed elucidation of the problems in the operation of China's legal system, including drafting, consistency, implementation, judicial, and administrative review and obstacles to further development, see Peter Howard Corne, *The System of Administrative Law and Its Implementation in China*, forthcoming by Hong Kong University Press.

<sup>2</sup> FOREIGN INVESTMENT CONSULTANCY CORPORATION, *supra* note 1, at 25. It should be noted that China is making an effort to publish more regulations that relate to foreign trade in response to its undertakings under the U.S.-CHINA MEMORANDUM OF UNDERSTANDING ON MARKET ACCESS (1993). With this effort, China has undertaken a dismantling of its complex system of non-tariff barriers, including import license requirements and quotas, making its trade regime more transparent, and improving its chances of becoming a founding member of the World Trade Organisation. See CHINA L. & PRAC., Jan. 23, 1992, at 4-9; CHINA L. & PRAC., April 9, 1992, at 7-12; CHINA

on the vagueness of many of the laws,<sup>3</sup> the vast discretionary power to interpret conferred on administrative authorities,<sup>4</sup> and the law's inherent changeability in China.<sup>5</sup> In particular, mention is made commonly about legal inconsistencies between central and local law and differences in legal interpretation and administrative directives issued.<sup>6</sup> Transparency and lack of predictability in administrative decision making, particularly in relation to the conferring of licenses<sup>7</sup> is another aspect that often is brought up in the literature,<sup>8</sup> as is the confusion and inefficiency caused by bureaucratic rivalry and the overlapping of departmental jurisdiction,<sup>9</sup> not to mention the associated problems of protectionism and favouritism in implementation of law,<sup>10</sup> and interference in management autonomy.<sup>11</sup>

The reason for many of these features can be found in the flexible and broad nature of law in the People's Republic of China (PRC). As a consequence, law is susceptible to interpretation and reinterpretation as it is implemented by administrative bodies.<sup>12</sup> Administrative organs and

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L. & PRAC., July 19, 1992, at 8-12; *The Australian*, October 13, 1993, at 40.

<sup>3</sup> FOREIGN INVESTMENT CONSULTANCY CORPORATION, *supra* note 1, at 13, 16.

<sup>4</sup> *Id.* at 16.

<sup>5</sup> *Id.* at 26.

<sup>6</sup> *Id.* at 4 (customs regulation), 21 (tax), 25; Seki interview, *supra*, note 1; U.S.-China Business Council, U.S. INVESTMENT IN CHINA 66 (1990).

<sup>7</sup> FOREIGN INVESTMENT CONSULTANCY CORPORATION, *supra* note 1, at 23.

<sup>8</sup> *Id.* at 26.

<sup>9</sup> *Id.* at 9.

<sup>10</sup> *Id.* at 3, 27. See generally Lee M. Zeichner, *Chinese Solutions to Legal Problems: Repatriating Business Profits from the PRC*, 19 LAW AND POL'Y INT'L BUS., 385, 394-96, 401-09 (1987) (exploring the difficulties that joint ventures have establishing business in the People's Republic of China).

<sup>11</sup> FOREIGN INVESTMENT CONSULTANCY CORPORATION, *supra* note 1, at 4.

<sup>12</sup> A case in point is the Beijing New Century Hotel. When its joint venture contract was negotiated in mid-1986, there was no hint of the new charges that would be imposed by administrative authorities. These charges were neither created by the enactment or the amendment of the law, nor even by new administrative rules or regulations—they were imposed by a round of "circulars" issued by administrative bodies in late 1986.

In October 1986 the State Council issued a circular requiring major electricity users to purchase electricity bonds, at 1000 yuan per kilowatt, in proportion to the number of kilowatts consumed per day. . . . Another State Council circular, issued the following October, stipulated that electricity users who failed to comply with the October 1986 requirement would be required to pay for their electricity at double the rate for bond buyers.

Satoshi Imai, *Case Studies of Joint Ventures in China (VI)*, 80 CHINA NEWSLETTER 18, 21 (1989). In addition, a Beijing municipality notification of November, 1986 stipulated that users of the four utilities (*siyuan*)—cold and hot water, gas, and sewerage—should

their officials can ultimately apply an altered set of norms under the guise of implementing the law enacted by the higher authority. Officials are in effect released from strictly applying new and unfamiliar legal norms — norms that may provide guarantees designed to attract foreign investment.<sup>13</sup>

Implementation in this sense takes place in two stages, the first being the issue of implementing regulations, rules, and lower normative documents; and the second being “actual implementation” that takes place at the level of the law in action. This Article discusses the operation of China’s legal system at the first level of implementation, and illustrates the systemic features the resulting scheme in the ultimate application of norms that are rather different than those expressed on the face of enacting law. An understanding of this process can contribute to the success of foreign investment enterprises in the China market.

The resulting gap between law on its face and the norms that are actually applied is substantial. A fiction is created — an illusion that these laws are the actual reference by which regulation is conducted. As a result, there exists a difference in legal expectations between government officials and foreign investors. The law is familiar enough on its face to attract investment, and loose enough to allow the continued application of another set of normative values more familiar to officials charged with actual regulation.

This Article first sets out the elements of legal flexibility built into legal enactments. It will then show how specificity is introduced into Chinese law through the issue of implementing rules, circulars, and interpretations, both at the central and at various local levels. These documents contain substantive provisions which have been altered at will by administrative bodies with little regard to the actual spirit behind their enacting law. The example of foreign investment enterprise labour autonomy provisions will be used to illustrate this process. It will be shown that administrative agencies have a broad mandate to determine the actual content of the implementing regulations, rules, and interpretations that

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shoulder the development costs. These in total added a further \$5.16 million to the New Century’s costs, upsetting targets anticipated in the initial feasibility study and depressing profitability. *Id.*

<sup>13</sup> This phenomenon was illustrated in a U.S.-China Business Council report in 1990. According to the Council, internal rules were issued in 1989 that authorised local labour offices to play a more active role determining wages that foreign investment enterprises pay to local employees, and to control “unjustified wages,” despite Article 15 of the State Council Encouragement of Foreign Investment Provisions (1986) providing for such enterprises to autonomously set wage standards. U.S.-CHINA BUSINESS COUNCIL, *supra* note 6, at 65.

they issue in the course of their regulatory activity. The result is that apparent contradictions are tolerated in the name of flexibility.

## II. LAWMAKING AND DISCRETION

As a rule, a more precise law is likely to be more effectively implemented. Precision minimizes wrongdoing at the level of the law in action. In China, however, laws are broadly drafted with much discretion left to implementing authorities. The laws are expressed in terms of general standards which fail to deal with obvious problems of implementation. Real clarity exists only at the level of administrative rules and circulars. These documents are issued by the implementing authority. Such documents are not necessarily published and are inherently changeable, subject as they are to the whims of agency officials.

In the drafting of law, the PRC is wrestling with a contradiction of sorts. Amplification of law with greater detail and more deftly tailored regulations would assist the PRC's economic development in the long run as it increases certainty, thus further encouraging market rational behaviour on the part of entrepreneurs.<sup>14</sup> However, in the short run, detailed law limits the flexibility that the Chinese Communist Party (CCP) currently enjoys in its ability to respond (by means of policy directives) to rapid political and economic change. The current attitude towards lawmaking favours short-term flexibility and the advantages of vagueness over long-term considerations.<sup>15</sup> This is particularly true in the case of regulatory law for which adaptability is upheld as a meritorious feature.<sup>16</sup> Consequently, most economic law in China is meant only to brush stroke basic policy, allowing any problems that arise to be solved on a case-by-case basis by the government.

The Chinese have adopted a rationale that lends itself to the creation of law that is inherently flexible so that it may be adjusted according to the vagaries of human behaviour. Such laws allow for wide variation in

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<sup>14</sup> MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT* [LAW IN ECONOMY AND SOCIETY] (Max Rheinstein ed., Max Rheinstein & Edward Shils trans., Harvard University Press, 1966) (1925).

<sup>15</sup> David Zweig et al., *Law, Contracts and Economic Modernisation: Lessons from Recent Chinese Rural Reforms*, 23 *STAN. J. INT'L L.* 319, 326-27 (1987).

<sup>16</sup> XINGZHENG JIGUAN XINGZHENG ZHIFA YU YINGSU ZHISHI DAQUAN, [ENCYCLOPAEDIA OF ADMINISTRATIVE IMPLEMENTATION AND LAWSUITS CONCERNING ADMINISTRATIVE AUTHORITIES] 7 (Luo Yu Zhen ed., China University of Politics and Law Press, 1990) [hereinafter Luo]. An example of a codified administrative law is Germany's *Verwaltungsverfahrensgesetz* [Federal Administrative Procedural Act, 1976] 1976 *Bundesgesetzblatt*, Teil I [BGBl. I] 1253. See, e.g., NIGEL FOSTER, *GERMAN LAW & LEGAL SYSTEM* 128 (1993).

application as they are customarily expressed as general principles (*yuanze*). Chinese jurists such as Chen Shouyi take this understanding of law as consistent with socialism which considers law as part of the superstructure of society. When economic relations change, law should change as well:

Socialist law must develop and change in accordance with the development and change of economical, political, cultural and other conditions. This kind of change is embodied in the legislative process, where, in order to adapt to the objective needs of development, the process of enactment, revision and abrogation of laws and regulations is *continuously undertaken* (italics added).<sup>17</sup>

This provides a rationale for vaguely written, broad laws that allow wide variation in application—a rationale reflected in the statements of government leaders. For example, Wang Hanbin, when he was Director of the Law Committee to the National People's Congress (NPC) in 1985, said that "law should not be too specific lest it tie our hands and feet in the face of the rapidly changing situation."<sup>18</sup>

China has opted for a legal system that is in essence as fluid and changeable as the economy and society which it is supposed to regulate. Consequently, the informal aspects of regulatory rules change as rapidly as the government's economic policy. A corollary is that laws are intentionally made ambiguous to enable flexibility in interpretation and implementation. No obstacles impede such practices—there is no concept, as exists in some Western legal systems, that law or delegated legislation can be struck down on the basis of uncertainty.

#### A. *Hierarchy of Legislative Authority*

The PRC is a unitary, not federated, state power. All major legislation comes from the central power organs. In a unitary system, the authority of local governments comes entirely from the central government and this authority may be, in theory, changed or withdrawn by the central government. In contrast, the central and local governments in a federal system have their respective authorities well-defined in a constitution which cannot be amended without the consent of the majority of

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<sup>17</sup> FAXUE JICHU LLUN [Basic Theory of Jurisprudence] 350 (1984), cited in Yu Xingzhong, *Legal Pragmatism in the P.R.C.*, 3 J. CHINESE L. 29, 43 (1989). See also Tao-tai Hsia & Constance A. Johnson, *Lawmaking in China - Part III*, E. ASIAN EXEC. REP., June 1987, at 10.

<sup>18</sup> Gao Xi-Ching, *Today's Legal Thinking and its Economic Impact in China in the Emerging Framework of Chinese Civil Law*, 52 L. & CONTEMP. PROBS. 89, 113 (1989).

the constituent units of the federation. Because of China's size and diversity, local legislation is, however, permitted although it is officially (but not necessarily always in practice) limited in scope.

There are two types of organs in China that are empowered to make legislative enactments. The first are referred to as state power organs (*guojia qianli jiguan*) — China's legislatures — which take their form as the National People's Congress (NPC), its standing committee, and local people's congresses and their standing committees of provinces, municipalities,<sup>19</sup> and "quite big cities"<sup>20</sup> designated by the State Council. Certain administrative organs (*xingzheng jiguan*), that is, the State Council, its departments, and commissions, and local people's governments at the same level as the local people's congresses mentioned above, also have the power to make rules.

The NPC and its standing committee issues various enactments that can loosely be categorized as "law." The supreme administrative organ, the State Council, issues a variety of documents known as "administrative regulations" (*xingzheng fagui*). The organs under the State Council, on the other hand, issue what are known as administrative rules (*xingzheng guizhang*). Local people's congresses issue local administrative regulations (*difang xingzheng fagui*) and local people's governments of provinces, municipalities, and "quite big cities"<sup>21</sup> may issue local administrative rules (*difang xingzheng guizhang*). According to the Administrative Litigation Law,<sup>22</sup> all the above enactments, with the exception of admin-

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<sup>19</sup> The three autonomous municipalities are Beijing, Tianjin, and Shanghai. ADMINISTRATIVE DIVISIONS OF THE PEOPLE'S REPUBLIC OF CHINA 2 (1980).

<sup>20</sup> In 1984, the State Council approved 26 "quite big cities" (*jiaoda de shi*), all of which had populations of between 500,000 and one million. See Epstein, *China and Hong Kong: Law, Ideology and the Future Interaction of the Legal Systems*, in THE FUTURE OF THE LAW IN HONG KONG 37, at 58 (R. Wacks ed., 1989) (citing SIMPLIFIED HANDBOOK OF PRC ADMINISTRATIVE DIVISIONS [ZHONGHUA RENMIN GONGHEGUO XINGZHENG QUHUA JIANCE] 149 (Beijing Cartographic Press, 1985)). The power to approve new administrative divisions was in 1985 devolved to provincial government. *Id.*

<sup>21</sup> There is no formal definition of "quite big city." *Id.*

<sup>22</sup> Administrative Litigation Law of the PRC, art. 53 (promulgated April 4, 1989) [hereinafter Administrative Litigation Law]. An English translation is available in 5 CHINA L. & PRACTICE 37 (1989).

Administrative Litigation Law, art. 53 (1989), provides:

People's Courts hearing administrative cases shall refer to rules enacted and promulgated by ministries and commissions under the State Council . . . and rules enacted and promulgated by the people's governments of the provinces, autonomous regions and centrally administered cities, the people's governments of the municipalities wherein are located the provincial or autonomous region people's governments, and the people's governments of relatively large municipalities approved by the State Council.

istrative rules, are legally enforceable if published. The court has discretion whether or not to apply administrative rules issued by local or national administrative organs. Other normative documents (*qita de guifangxing wenjian*) formulated by national or local administrative organs for the purpose of regulation are not enforceable as law.

### B. Characteristics of Legal Drafting

Legal flexibility can be illustrated by an examination of the characteristics of legal drafting in Chinese law. In China, legal drafting is characterised by the following:

- Principle-like pronouncements
- Vagueness and ambiguity
- Broadly worded discretions
- Undefined terms
- Omissions
- General catch-all clauses

At the level of basic law and statutes, legislation is customarily written in an ambiguous fashion in the form of principle-like pronouncements, intended, to provide only a thumbnail sketch of the parameters of regulation.

### C. Lateral Movements

Legislation issued by administrative organs is in theory subordinate and complimentary to that issued by state power organs.<sup>23</sup> All enactments of administrative organs must not conflict with the Constitution or law and the supreme power organs (except local *difang quanli jiguan*) can annul them if they do so. Inappropriate (*bushidang*) administrative rules (*guizhang*) issued by administrative bodies can be revoked by supreme power organs at the same or higher level, and administrative organs that are superior to the enacting authority in the same administrative jurisdiction (*xitong*).<sup>24</sup> Local people's governments also must ensure that their enactments comply with those issued by the State Council and

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In cases where a People's Court considers a set of rules enacted and promulgated by a local people's government to be inconsistent with a set of rules enacted and promulgated by the State Council or there is an inconsistency among rules enacted and promulgated by the ministries and commissions under the State Council. The Supreme People's Court shall submit such rules to the State Council for a ruling.

Luo, *supra* note 16, at 71.

<sup>23</sup> *Id.* at 68.

<sup>24</sup> *Id.*



its subordinate departments, as well as with the Constitution. Concepts of legislative consistency in the PRC are not strict,<sup>25</sup> and courts do not have the power to declare inconsistent rules invalid, although they reserve the power to refrain from applying administrative rules (*guizhang*) that conflict with other enactments.<sup>26</sup>

Regulations (*xingzheng fagui*) that are issued to implement statutes and basic law are enacted to add some detail to many of the matters left outstanding by the higher law. However, they too almost invariably exhibit the features listed above, especially in controversial areas.

*Xingzheng fagui* that are issued by the State Council pursuant to its general authorization from the NPC to make legislation concerning regulation of the economy also tend to exhibit the above features, as do lower-level rules (*guizhang*) enacted by State Council departments and local governments. Although it has been pointed out that the style of lawmaking in the economic area, particularly in the foreign economic area, is less ideological and more concrete than other types of laws. This is only a matter of degree and has by no means precluded foreign economic legislation from exhibiting the features listed.

### 1. Principle-like Pronouncements

China legal specialist Timothy A. Gelatt wrote in 1989 of the "now almost ten year tradition of PRC foreign economic statutes [of] painting a broad outline and leaving many issues unanswered."<sup>27</sup> The Cooperative Joint Venture Law<sup>28</sup> illustrates this tradition at work.

The Cooperative Joint Venture Law, described as "a vague broad statute that leaves many questions unanswered,"<sup>29</sup> clearly exhibits a principle-like nature. For example, Article 5 refers to application proce-

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<sup>25</sup> See, e.g., Ying Songnian & Dong Hao, *A Study of the Applicable Laws in Administrative Reconsideration*, in THE ADMINISTRATIVE LITIGATION LAW OF THE PRC: CHANGING RELATIONSHIP BETWEEN THE COURTS AND ADMINISTRATIVE AGENCIES IN CHINA (Pittman B. Potter ed., 1991).

<sup>26</sup> Administrative Litigation Law, *supra* note 22.

<sup>27</sup> Timothy A. Gelatt, *China's New Co-operative Joint Venture Law*, 15 SYRACUSE J. INT'L L. & COM., 187, 200-01.

<sup>28</sup> Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures, art. 20 (promulgated Apr. 13, 1988). An English translation appears in 1 LAWS AND REGULATIONS OF THE PEOPLES' REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 509 (Bureau of Legislative Affairs of the State Council of the People's Republic of China eds., 1991) [hereinafter Cooperative Joint Venture Law].

<sup>29</sup> Jerome A. Cohen, *The Long Awaited Co-operative Joint Venture Law*, in LAW IN THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARY, READINGS AND MATERIALS, 777 (Ralph H. Folsom and John H. Minan eds., 1989).

dures and approval of contracts by an approval authority, but does not specify who the authority is and whether there is more than one authority. Another example is the vague article that originally appeared in the Wholly Foreign Owned Enterprise Law (1986) that provides for the possibility of assistance in the case of foreign exchange imbalance is repeated.<sup>30</sup> The taxation code "is a model of vagueness,"<sup>31</sup> providing that "a contractual joint venture shall, in accordance with state provisions on tax, pay taxes and may enjoy the preferential treatment of tax reduction or exemption."<sup>32</sup>

The law tacitly confirms that cooperative joint ventures may take two different forms by providing that "a contractual joint venture which meets the conditions for being considered a legal person under Chinese law, shall acquire the status of a Chinese legal person in accordance with the law,"<sup>33</sup> but provides no guidance on how the parties to a cooperative venture will be treated as a separate entity. It also does not address, and therefore leaves open, the question of limited liability of investors.<sup>34</sup> Similar gaps exist in the area of early recovery of investment from the cooperative venture.<sup>35</sup>

Article 24, which provides for expiration or termination of a joint venture contract, is vague on what sort of legal procedures should be followed. Article 22, though it attempts to protect creditors of the joint venture by providing that "the Chinese and foreign cooperative venturers shall, in accordance with the provision of relevant laws and agreements in the joint venture contract, assume responsibility for the liabilities of the cooperative venture," offers no clue as to how the drafters intend for this problem to be solved.<sup>36</sup> Moreover, like the Law on Wholly Owned Foreign Enterprises before it, the Cooperative Joint Venture Law indicates that ventures are expected to have a fixed term without providing any guidelines on what are acceptable periods.<sup>37</sup>

Examples of other features of Chinese legal drafting mentioned above are drawn from statutes, regulations, and rules and are categorized below.

## 2. Vagueness and Ambiguity

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<sup>30</sup> Cooperative Joint Venture Law, *supra* note 28.

<sup>31</sup> Gelatt, *supra* note 27, at 196.

<sup>32</sup> Cooperative Joint Venture Law, *supra* note 30, at art 21.

<sup>33</sup> *Id.* at art. 2.

<sup>34</sup> Gelatt, *supra* note 27, at 193.

<sup>35</sup> Cooperative Joint Venture Law, *supra* note 28, at art. 22.

<sup>36</sup> Gelatt, *supra* note 27, at 199.

<sup>37</sup> Cooperative Joint Venture Law, *supra* note 28, at art. 25; Gelatt, *supra* note 27, at 200.

This is a feature that effectively grants the implementing authority the power to determine legal meaning itself through subservient enactments, formal legislative interpretation, or in *ad hoc* case-by-case interpretations. For example, the Certain Provisions on Contributions by the Parties to Chinese Foreign Equity Joint Ventures,<sup>38</sup> although requiring all joint venture contracts to state clearly the time limits for the parties to make contributions to registered capital, leaves the term "time limits" unexplained, failing to provide even some modification with words such as "reasonable" or "limited to cash contributions."

Another example is the unclear meaning of "limited liability" under the Equity Joint Venture Law<sup>39</sup> which provides that parties must bear risks and losses in proportion to their contribution of registered capital without providing any limit on the actual liability of each party.

The Administration of Enterprise Legal Person Regulations (1988) provides in Article 6 that the authorities in charge of registration shall develop, in a planned way, the service of providing information on enterprise legal person registration. The breadth of Article 6 has meant that it does not constitute sufficient legal basis for an interested party to demand that information be produced, thus effectively leaving the availability of information dependent on the state of the local State Administration of Industry and Commerce files and the mood of the official to whom the request is made.<sup>40</sup>

Similarly, the Foreign Income Tax Law Implementing Rules<sup>41</sup> provide that a new venture's preparatory and start-up expenses are deductible from the time it has been approved to prepare to start up

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<sup>38</sup> Capital Contributions by Parties to Sino-Foreign Equity Joint Ventures Provisions (promulgated by Ministry of Foreign Relations and Trade (MOFERT) Mar. 1, 1988), reprinted in 2 CHINA L. & PRAC. 43 (1988).

<sup>39</sup> THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON JOINT VENTURES USING CHINESE AND FOREIGN INVESTMENT, art. 4 (1979). An English translation is available in COMMERCIAL, BUSINESS AND TRADE LAWS 51-52 (Owen D. Nee, Jr. et al. eds., 1989).

<sup>40</sup> Denny F. Wong & Christopher G. Oechsli, *Getting a Binding Contract: Legal Status and Authority of Chinese Enterprises and their Representatives: How Foreigners Can Determine Who They are Dealing With*, E. ASIAN EXEC. REP., Jan. 15, 1989, at 10-11.

<sup>41</sup> Income Tax Law Concerning Enterprises with Foreign Investment and Foreign Enterprises Implementing Rules, art. 80 (promulgated Apr. 16, 1991) reprinted in 7 CHINA L. & PRAC. 16 (1991).

(*lixiangshu*)<sup>42</sup> to the time a business license is issued,<sup>43</sup> depending on the whim of the implementing authority.

The State Council Regulations concerning the Balance of Foreign Exchange Measures and Expenditures by Sino-Foreign Joint Equity Ventures (1986) — to the extent that their vagueness permits accurate understanding<sup>44</sup> — offered the possibility of relief to foreign investment enterprises suffering foreign exchange imbalances, but did not promise any early resolution to the problem. Article 5, for example, offered the possibility of import substitution without casting any new light on how it was to proceed, “other than to indicate that the foreign exchange required for the purchase was to be authorised by the approved foreign exchange plans of the end users.”<sup>45</sup>

### 3. Undefined Terms

Chinese lawmakers also tend to leave crucial terms undefined which produces a great amount of discretion for implementing authorities to interpret these terms as they see fit. For example, in the Ministry of Foreign Relations and Trade (MOFERT, as it then was known) Measures for Foreign Investment Enterprises Purchasing Domestic Products for Export to Achieve a Balance of Foreign Exchange Income and Expenditure (1987), Article 2 provides that the use of *renminbi* profits should be restricted to enterprises that have run into temporary difficulties in this regard to be applied within “a certain period of time.” The measures do not define what is meant by temporary difficulties or what is an allowable period of time.

Article 5 of the Provisional Measures for Control of Foreign Exchange Guarantees by Organisations Within China (1986), now superseded by Administrative Measures on the Issue of Foreign Exchange Guarantees to Foreign Parties by Domestic Institutions (1991), was a classic example. It stated that guarantees shall not be provided for foreign organisations or enterprises with foreign investment unless foreign exchange assets are equal in value to the amount of the loan provided as collateral. “Chinese enterprises established abroad,” “foreign organisations,” “enterprises with

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<sup>42</sup> The *lixiangshu* is the “preliminary project approval that sets the stage for detailed negotiations on an investment deal . . . .” Timothy A. Gelatt, *Foreign Business Tax Law: New Implementing Rules*, E. ASIAN EXEC. REP., Sept. 15, 1991, at 9, 11.

<sup>43</sup> *Id.* at 11.

<sup>44</sup> Jerome Alan Cohen & Stuart J. Valentine, *Recent Chinese Legislation Assisting Foreign Investors to Solve Their Hard Currency Problem: Import Substitution and Other Options*, 3 B.Y.U. L. REV. 519, 533 (1988).

<sup>45</sup> *Id.* at 535.

foreign investment," and "foreign exchange assets" are not defined anywhere. The term "foreign exchange assets" raised the issue as to whether it "refers only to foreign currency securities and assets which can be readily converted into foreign exchange (for example, equipment or a physical asset in the form of a building), thereby excluding intangible interests or choses in action."<sup>46</sup> This decision rested with the State Administration of Exchange Control (SAEC), the authority charged with implementation and interpretation of the Measures.

More recent legislation also exhibits this feature. The PRC Enterprise with Foreign Investment Income Tax Law Implementing Rules provide that profits must be invested in a new enterprise "directly" after being distributed in order to qualify for a tax refund. The concept of "directly" is left undefined, therefore, rendering it uncertain how long an investor must wait before a tax refund can be issued.<sup>47</sup>

One can cite an endless list of other examples of undefined terms, some of which are: "leading cadres" in the Strict Control of Leading Cadre Provisions; "advanced technology" in regard to the stipulation that imported technology must be advanced and appropriate under the Technology Import Regulations; "major and complex cases" that must be decided by higher people's courts under the Administrative Litigation Law; "sophisticated products," "advanced or key technology," and "internationally competitive" as prerequisites for preferential treatment under the Foreign Exchange Balancing Regulations; the "quite big cities" that are invested with lawmaking power under the Local Organic Law; "administrative organs" under the Administrative Litigation Law; and the term "especially serious cases" under the Criminal Code.

#### 4. Broadly Worded Discretions

Discretion is an integral part of Chinese administrative law, as one would expect in a situation in which administrative authorities have such an important role in drafting the rules that they are going to implement. Even fairly detailed rules are subject to considerable uncertainty because they are often subject to overriding ministerial or departmental discretion. This is particularly evident in the laws relating to foreign investment, where according to the Ministry of Foreign Trade and Economic Cooperation (MOFTEC), the establishment of a foreign investment enterprise is subject to the approval of MOFERT or a local foreign trade bureau, the

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<sup>46</sup> Jack C. Young, *Foreign Exchange Guarantee: A Chinese Puzzle*, INT'L FIN. L. REV. 26, 28 (1988).

<sup>47</sup> See *supra* note 41, art. 80; Gelatt, *Foreign Business Tax Law*, *supra* note 42, at 10.

main criteria for approval being drawn from the priorities of the current state plan. Certain phrases build into the law a discretionary authority for determining which foreign investment enterprises may take advantage of the provisions.

It is hardly surprising where the administration occupies a singular or dominant role in initiating and drafting that there is a pronounced tendency to grant powers to the same agency in extremely wide terms. It is in the interests of an implementing authority for discretionary powers to be drafted as broadly as possible, especially, as is the case in China, where the implementing body is also entitled to issue secondary rules pursuant to its inherent law-making power (*zhiquan*),<sup>48</sup> and where it has the power to issue its own official interpretations of the law. However, broad discretionary powers by nature create uncertainty, as those for whom a legislative command is addressed may not know what is expected of them. They also violate the legal ideal of equality as a standard applied to one may not be applied to others in similar circumstances. Moreover, they violate the principle of legislative purpose, as they permit agencies to substitute different goals than those originally contemplated as long as it is a possible interpretation of the legislation.<sup>49</sup>

Discretionary powers are normally expressed in broad terms and are unenumerated. The inclusion of a clause such as that which appears in Article 18 of the Provisional Regulations of Shanghai Municipal People's government on *Reminbi* Loans Secured by Mortgages (1988), that a loan contract is to be notarized "if necessary," is not at all uncommon. Other provisions implicitly grant a discretionary license to a government authority for administrative interference, as demonstrated by Article 19 of the Shanghai Liquidation Provisions which give the approval authority the right to have its officers participate in liquidation meetings or adopt other

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<sup>48</sup> Two forms of lawmaking power exercisable by administrative authorities are recognized in the PRC. Legislative power which is vested in an administrative body by virtue of either the Constitution or an organic law is known in China as *zhiquan lifa*. This can be described as legislative power within a specific mandate that arises from a body's natural or inherent powers of office. The second form of lawmaking power is *shouquan lifa* which is a power to enact legislation that has been specifically conferred on a body, usually an administrative body, by a higher legislative authority.

Lawmaking pursuant to *zhiquan* is considered an intrinsic function of administrative bodies. One example of such a power is Article 89 of the Constitution which vests in the State Council the power to enact administrative regulations (*xingzheng fagui*) in accordance with the Constitution and laws. Article 89 empowers the State Council in effect to enact any regulation necessary to implement law and to direct administrative work. All such enactments are made pursuant to the State Council's inherent powers of office. Luo, *supra* note 16, at 69-70.

<sup>49</sup> ROSS CRANSTON, LAW, GOVERNMENT AND PUBLIC POLICY, 23 (1987).

necessary measures to supervise liquidation procedures.

Corporate taxes is an example of an area in which discretionary treatment is entrenched. This is because Chinese tax legislation expressly gives a broad measure of discretion to local tax authorities, especially in regard to the granting of exemptions and privileges<sup>50</sup> or to the authorizing of alternate methods of computing profits<sup>51</sup> and depreciation of fixed assets.<sup>52</sup> As a result, there is a tendency to regard the legislation as a flexible guideline to be used by local tax authorities in negotiating a dispute,<sup>53</sup> or even to negotiate tax packages before a project has commenced.<sup>54</sup> Needless to say, this has resulted in great disparities in tax rulings from one province to another.

### 5. Omissions

Glaring omissions in regard to, for example, time periods, indicate a lack of consensus which will be settled in the interim by the implementing authority. Other omissions, such as lack of specification of other applicable or relevant law, often are an admission that some aspect of the area may be regulated by merely internal directives and that formal legal regulation does not as yet exist.

Article 3 of the Sino-Foreign Equity Joint Venture Terms Tentative Provisions,<sup>55</sup> which refers to "any other state law or regulation which requires that joint venture terms be fixed," was probably included to give flexibility to limit particular industries in the future.<sup>56</sup> Similarly, the Wholly Foreign Owned Enterprise (WFOE) Law Implementing Provisions, in regard to financial affairs and accounting, only refers to "relevant Chinese laws and regulations" even though no set of regulations in this area applying to WFOEs existed at the time. Exactly the same approach is taken in the same regulations toward employees and trade unions even

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<sup>50</sup> Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises, art. 11 (1991). An English translation is available at 2 REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS, 946-48 (Bureau of Legislative Affairs of the State Council of the People's Republic of China ed., 1991).

<sup>51</sup> Income Tax Law of the PRC Concerning Foreign Investment Enterprises and Foreign Enterprises Implementing Rules, *supra* note 41, art. 16.

<sup>52</sup> *Id.* at art. 31-34; JINYAN LI, TAXATION IN THE PEOPLE'S REPUBLIC OF CHINA 35, 40-41.

<sup>53</sup> LI, *supra* note 52, at 25.

<sup>54</sup> *Practice Notes: Taxation*, CHINA L. & PRAC., Jan. 18, 1988, at 19.

<sup>55</sup> Sino-Foreign Equity Joint Venture Terms Tentative Provisions (1990).

<sup>56</sup> *Joint Venture Terms - Deregulation Specified*, ASIAN L. & PRAC., Feb. 4, 1991, at 28 [hereinafter *Joint Venture Terms*].

though they made no provision as far as new rules were concerned, and there was no other relevant legislation dealing with this point in respect to WFOEs.<sup>57</sup>

The same feature is illustrated by the State Council Interim Regulations of the PRC on the Grant and Transfer of the Right to Use Urban State Owned Land (issued May, 1990), which fail to give guidance on pledges of land-use rights, merely providing in Articles 34 and 35 that pledges may not violate unspecified state laws and regulations and must be registered in accordance with unspecified provisions.<sup>58</sup> Such ambiguous references to unspecified legal requirements or to lawful activities only serve to increase uncertainty and increase the discretion of the implementing authority.

As far as non-specification of terms is concerned, the State Council Interim Administrative Measures for Investment and Management of Large Tracts of Land by Foreign Business (1990), which is silent on the term of a development enterprise's land-use rights, is a typical example. Article 5 merely stipulates that development enterprises obtain their land-use rights "in accordance with the law." The Measures are also silent on the question of financial parcel development.<sup>59</sup>

Another common omission is the non-specification of which authorities have the power to grant approvals, as exemplified by the State Council Regulations Concerning the Balance of Foreign Exchange Income and Expenditure by Sino-Foreign Joint Equity Ventures (1986) which do not specify which authorities within the complex Chinese bureaucratic apparatus have the authority to grant approvals for a foreign investment enterprise to avail itself of the methods provided for overcoming a foreign exchange imbalance. By requiring the enterprise to seek approval at several layers of authority, the drafters leave room for bureaucratic maneuvering.<sup>60</sup>

## 6. Catchall Phrases

This has been identified as one of the most typical features of Chinese law in both imperial times<sup>61</sup> and in the modern era.<sup>62</sup> A

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<sup>57</sup> Hu Yuanxiang, *Tightening Controls on the Foreign Wholly Owned Enterprises in the PRC: The Implementing Regulations of the 1986 Foreign Wholly Owned Enterprise Law*, 19 INT'L BUS. LAW. 344, 348 (1991).

<sup>58</sup> Jaime P. Horsley, *After Heated Debate, China Allows Foreigners to Develop, Manage Land*, E. ASIAN EXEC. REP., Sept. 15, 1990, at 12.

<sup>59</sup> *Id.*

<sup>60</sup> Zeichner, *supra* note 10, at 392.

<sup>61</sup> The Qing Code was characterised by three primary "catchalls." The most well-



"catchall phrase" serves to invest an implementing authority with the option of extending the scope of regulation without the necessity for legislative amendment. For example, both the Provisional Regulations of Shanghai Municipal People's Government on Foreign Exchange Loans Secured by Mortgages (1988) and the Provisional Regulations of Shanghai Municipal People's Government on *Reminbi* Loans Secured by Mortgages (1988) contain the same catchall provision whereby "properties otherwise not legally mortgageable" cannot be used as collateral, having the effect of "leaving in limbo the question of what property may be deemed mortgageable until negotiations are near completion and security documents are reviewed by the relevant approval authorities."<sup>63</sup>

Similarly, the State Council Sino-Foreign Equity Joint Venture Terms Tentative Provisions (1990) provide in Article 3 for two catchall categories that may be used to limit the terms of categories of joint ventures other than those included. These categories are "ventures for which any other state law or regulation requires that a joint venture term be fixed" and "ventures engaged in projects in which the state restricts investment."<sup>64</sup> Another example is found in the Foreign Wholly Owned Enterprise Law Implementing Regulations (1990) which provides, as a fourth area in which WFOEs are forbidden or restricted: "other industries in which the Chinese government has prohibited the establishment of WFOEs."

### III. BRINGING LAW DOWN TO REALITY - SPECIFICATION AND ADMINISTRATIVE INTERPRETATION

The rationale of flexibility which underlies the Chinese legal system is allowed to operate by the relative vagueness and principle-like nature (*yuanzexing*) of legal pronouncements of the NPC and the State Council. The legal system which is presently in the process of construction in China has been to a large extent drawn from Western legal norms. These have been superimposed over indigenous normative frameworks of behaviour which have over time been weakened significantly in many areas because of the operation of Communist ideology (now largely discredited) and the process of rapid modernization. The effective applica-

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known made it an offence to "do what ought not to be done," indicating the traditional place of such catchall clauses in Chinese law. Clive Ansley, *Chinese Criminal Law Under Manchus and Marxists*, 20 U. BRIT. COLUM. L. REV. 165, 180 (1986).

<sup>62</sup> Christopher G. Oechsli, *Financing China's Development: Shanghai's New Mortgage Laws: Part 2, Forex Mortgage Loan Regulations*, E. ASIAN EXEC. REP., Sept. 15, 1988, at 12.

<sup>63</sup> *Id.*

<sup>64</sup> *Joint Venture Terms*, *supra* note 56, at 28.

tion of law at the level of the law in action and its acceptance by an unfamiliar and suspicious population is bound to be a difficult and lengthy process.

The adoption of the philosophy of flexibility in legal drafting and implementation has, however, allowed the current regime to maintain the appearance of a viable legal system while retaining within its actual operation many facets of policy implementation, namely, changeability and adaptation to local normative structures and conditions. The main contribution that the new legal system promises to make is to increase certainty by reducing the scope of executive arbitrariness to the extent that it is within the general bounds of a flexible law. However, the scope of executive discretion is still deliberately left relatively wide.

China has a rich tradition of legal flexibility from which to draw. From ancient times China has possessed laws and regulations. Laws, which were essentially criminal in nature, provided for strict relationships between legal acts and legal responsibility to the extent that the administrator/judges were left with little discretion in implementation. Criminal law was dispensed objectively and automatically and such features are still in evidence today. Apart from "law" however, there existed areas of regulation subject to "extraordinary decisions" under flexible and fluid rules called *tiaoli* and *duanlie* which were applied to complex social situations in more of a civil context.<sup>65</sup>

Today, the application of this latter philosophy in administrative regulation can be clearly exhibited by examining "legal interpretation" (*falu de jieshi*) and a phenomenon known as administrative specification of law (*falu de jutihua*). Administrative specification is the process by which law and regulations are interpreted at one level by State Council departments, and at another level, by local people's congresses and administrative bodies which apply them to local reality. Law is in effect brought down or adjusted to local normative reality. Apart from administrative rules (*guizhang*), this is often carried out by the formulation of normative documents (*guifangxing wenjian*), many of which are created and applied by local governments at the county level and below in the form of administrative measures (*xingzheng cuoshi*).

Higher administrative bodies also practice specification by issuing internal normative documents to regulate certain technical areas under

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<sup>65</sup> Ji Wei Dong et al., *Tai Chugoku Toshi Sokushin to Chugoku no Showaiho Seibi: Chugokujin no Ho Kannen to "Chugoku Toshi no Jitsumu"* [Promotion of Investment into China and the Preparation of Foreign Related Law: The Concept of Law of the Chinese and "The Practice of Investment into China"], 206 NICCHU KEIZAI KYOKAI KAIHO [JAPAN-CHINA ECONOMIC COUNCIL BULLETIN] 7, 18 (1990).

their jurisdiction. These documents, which normally are revealed to a very limited segment of the Chinese bureaucracy,<sup>66</sup> reflect prevailing policy and provide much of the detail missing in higher statutes or regulations. Many of these internal directives are, in effect, interpretations of statutory law, in some instances, contradicting the letter of the relevant statutes. History has shown how these have been issued to redefine statutes in the face of temporary changes in China's economic climate.<sup>67</sup>

Higher administrative authorities also possess another device through which they can construe law and regulations in a way that may reflect departmental policy and/or the social reality of the regulated. This device is known as "administrative interpretation" (*falu de jieshi*). Below, the process of specification is analyzed through an examination of the role and nature of *guifangxing wenjian*, following which, administrative interpretation will be examined.

#### A. Normative Documents (*Guifangxing Wenjian*)

##### 1. Normative Documents as issued by organs that lack lawmaking power

Administrative specification is the process by which principle-like laws are narrowed down through a succession of enactments so that they can be applied to local reality. The formulation of *difangxing guizhang* (local rules) by governments at the provincial, municipal, and "quite big city" level is but one step in this process. However, the lowest level of government in a particular locality (note that municipalities and "quite big cities" are the lowest level of authority in their own areas, and they can issue *guizhang*) is where the final level of specification takes place. These are difficult to define in terms of law. In fact, enactments made by these authorities, namely, at the county level or below, do not qualify as legislation in the Chinese legal system. They are normative documents that lack legal effect before the relevant tribunal under either the Administrative Litigation Law<sup>68</sup> or the Administrative Reconsideration Regulations,<sup>69</sup> considered, as they are, as merely instruments of legal implemen-

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<sup>66</sup> Jamie P. Horsley, *Foreign Investment Provisions: Measures on Debt and Equity Rules, Foreign Guarantees*, E. ASIAN EXEC. REP., Sept. 15, 1987, at 7-8.

<sup>67</sup> "For example, during the foreign exchange crisis of 1984 and 1985, policy makers in China began to curtail certain imports in order to tighten up foreign exchange expenditures" by issuing the Notice on the Levying of Import Adjustment Tax on Several Commodities (1985, State Council). Zeichner, *supra* note 10, at 403.

<sup>68</sup> Administrative Litigation Law, *supra* note 22.

<sup>69</sup> Regulations on Administrative Reconsideration, art. 41 (promulgated Dec. 24, 1990). An English translation is available in 1 LAWS AND REGULATIONS OF THE

tation.

Local governments and congresses at the county level and below are, however, empowered under both the Constitution and the Local Organic Law<sup>70</sup> to issue such documents, referred to as administrative measures (*xingzheng cuoshi*). Article 89(1) of the Constitution<sup>71</sup> provides:

The State Council can adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and statutes.

Article 9(2) of the Local Organic Law provides:

The people's congresses of townships, nationality townships, and towns shall adopt and promulgate resolutions within the scope of their functions and powers.

Article 51(1) of the Local Organic Law provides that all governments at or above the county level shall:

Implement the resolutions of the people's congress and its standing committee at the corresponding level as well as the decisions and orders of state administrative organs at higher levels, formulate administrative measures and issue decisions and orders.

Article 52(1) provides:

The people's government of a township, nationality township, or town shall implement the resolutions of the people's congress at the corresponding level and the decisions and orders of state administrative organs at higher levels and issue decisions and orders.

These documents are therefore issued as an exercise of a local government's inherent power as granted by the Constitution and the Local Organic Law and are filed with and recorded (in theory) by the enacting organ's supervisory body, namely, the people's congress at the same level, or the administrative body at the level immediately superior.

The reason why the Constitution and laws empower all people's

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PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN RELATED MATTERS 398 (Bureau of Legislative Affairs of the State Council of the People's Republic of China ed., 1991).

<sup>70</sup> The Organic Law of the Local People's Congresses and Local People's Governments of the PRC, arts. 9(2), 51(1), 52(2) (1979). An English translation is available in CHINA LAW YEARBOOK, 1987, at 138, 144-45 (Publishing House of Law, Beijing, 1989).

<sup>71</sup> XIANFA (1990).

governments under the provincial government level to make administrative measures (*xingzheng cuoshi*), thereby granting such documents a certain anomalous legal status not recognized by the Administrative Litigation Law and Administrative Reconsideration Regulations, is explained by Zhuang Wei Lin in his article *The Legality and Determination of Administrative Measures*.<sup>72</sup> Indicating their role in bridging the gap between law and reality, Zhuang states that as the Chinese legal system is not systematic, administrative measures are needed at the local level to set up value systems acceptable to people residing in each locality.

*Guifangxing wenjian* or administrative measures cannot easily be identified by way of name only. Many titles that are used in *xingzheng fagui* and *guizhang* are also readily utilized by local governments in their own enactments, thereby making identification difficult. One must be sure to identify the issuing authority when seeking to ascertain the status of a certain document. If the formulating body is a local government at the county level or below, or if it is a local level functional department of the State Council which has issued a document itself instead of through the local government or people's congress, any document, no matter what its title, can be categorized as *guifangxing wenjian*.

An example of such a document is the Property Regulation Administration Rules issued by the Mangzhang Township Level Government to implement the provincial level implementing measures of the same name and the national level Property Regulation Law.<sup>73</sup> Rules are normally associated with enactments at the level of *guizhang*, but in this case, as they are issued by a township level government which lacks lawmaking power, the document is *guifangxing wenjian*.

A further example are provisions entitled Provisions Concerning the Opening of Deposit Accounts by Enterprises with Foreign Investment, the Control of Receipts and Payments and the Control of Statements, issued jointly by the Shanghai Branch of the People's Bank of China, and the Shanghai Sub-Bureau of the State Administration of Foreign Exchange Control. Ostensibly, these also appear to be *guizhang*. However, to be valid as *guizhang* they must be issued or at least approved by the Shanghai Municipal People's Government, not merely by local functional

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<sup>72</sup> Zhuang Wei Lin, *Xingzheng Cuoshi de Hefaxing Jiqi Panding* [The Legality and Assessment of an Administrative Measure], 11 FAXUE [LEG. SCI.] 9 (1990).

<sup>73</sup> Administrative Division of the Intermediate Civil Court, Xingyang District, *Qiantan Xingzheng Susongzhong de Falu Shiyong: Shiyong Xingzheng Susongfa di 52, 53 tiao Diandi Tihui* (A Discussion of the Application of Law in Administrative Suits: Some Experiences in Respect to the Application of Articles 52 and 53 of the Administrative Litigation Law), 29 FA DE XINXI [LEG. INFO.] 8, 11 (1990) [hereinafter Administrative Division].

departments. As they have not been issued by the municipal government, they have no official legal status before a court of law and can only be considered as *guifangxing wenjian*. Other provisions formulated by functional departments in Shanghai such as the Preferential Provisions Concerning Taxation of Foreign Investment Enterprises (1988),<sup>74</sup> issued by the Taxation Office of Shanghai Customs, share this feature.

## 2. Normative documents as Issued by Organs with Lawmaking Power

A second category of *guifangxing wenjian* are documents apart from rules (*guizhang*) issued by departments of the State Council and other law-making organs. These are formulated either to make higher legislation expressed in general terms workable or to provide normative guidance in areas that as yet lack legislation.<sup>75</sup> The process of specification is the former process and by implication entails an exercise of discretion, something which State Council departments have in abundance by virtue of the principle-like nature of higher law. *Guifangxing wenjian* are not subject to any enactment procedures and therefore import great flexibility into the legal system, so much so that their essential changeability can engender the very thing that the creation of the legal system was supposed to alleviate — uncertainty.

As has been already noted, the distinction between *guizhang* and *guifangxing wenjian* at this level is very unclear as only a small proportion of the regulatory documents formulated are actually issued to the public. Because these have not been issued, their status as *guizhang* and their legal status before the courts is uncertain.

There are as many opinions as there are legal scholars as to where to draw the line between *guizhang* and *guifangxing wenjian* formulated by State Council departments or people's governments with lawmaking power. Some scholars categorise all documents, including circulars, as *guizhang* as long as they have been drawn to the attention of affected

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<sup>74</sup> 4 SHANGHAISHI WAISHANG TOUZI QIYE XIEHUI HUIKAN [SHANGHAI FOREIGN INVESTMENT ENTERPRISE ASS'N J.] 13 (1988).

<sup>75</sup> See, e.g., Ministry of Foreign Economic Relations and Trade, Foreign Investment Regulation Department, *The State Planning Commission, The State Council Investment Work Leadership Group Office Circular Circulating the Provisions Concerning the Examination and Approval Foreign Investment Feasibility Studies*, JIMAO (1987) No. 808 (for internal application), in LIYONG WAIZI WENJIAN HUIBIAN [COLLECTION OF DOCUMENTS CONCERNING THE USE OF FOREIGN INVESTMENT] 29 (2d ed. 1989) [hereinafter Foreign Economic Relations].

parties.<sup>76</sup> For example, the Ministry of Finance document, Notice Concerning the Question of the Rate for Conversion into Reminbi of Cash Foreign Currency Contributed by the Parties to Chinese-Foreign Equity Joint Ventures, [(87) *Cai Kiai Zi*, No. 102, December 29, 1987] was circulated to Baker & McKenzie who published it as a translation in 1988.<sup>77</sup> Other Chinese scholars take a more exclusive approach to *guizhang*, excluding, from this category, all documents at the circular level and equivalent, thereby designating them as *guifangxing wenjian*.<sup>78</sup> Those that adopt the latter point of view classify all orders (*mingling*), directives (*zhiling*), resolutions (*juelyi*), instructions (*zhishi*), announcements (*gongbao*), public notices (*bugao*), notices (*tongbao*), circulars (*tongzhi*), notifications (*tongbao*), reports (*baogao*), requisitions for instructions (*qingshi*), responses (*pifu*), letters (*han*) and unissued rules, measures and provisions that are formulated by organs with lawmaking power as belonging to the *guifangxing wenjian* category.<sup>79</sup>

Each of these documents performs one of three functions. They may deal with internal matters that relate to the relationship between different departments, administrative procedures, and personnel matters, an example being the Ministry of Labour and Personnel Circular Concerning How to Give Public Notification of a Job Vacancy, [*Laorengan* (1984) No. 8]. Some are primarily concerned with the regulation of social tasks, directing the regulating authority about what it can and cannot do, for example, the Circular Concerning the Printing and Distribution of the Appraised Conditions of Advanced Family Panning Villages, Townships, and Approved Hamlets [*Ejishenwei* (1989) No. 8]. Others are formulated in order to implement law, such as the Wuhan City Implementing Rules for the Regulation of the Housing Property Market, [*Wuhanfangfang* (1988) No. 67]<sup>80</sup> which implement *guizhang* entitled the Wuhan City Measures for Trial Implementation for the Regulation of the Housing Property Mar-

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<sup>76</sup> Luo, *supra* note 16, at 74.

<sup>77</sup> 5 CHINA L. REV. 161 (1989).

<sup>78</sup> Zhao Guo Lan, *Xingzheng Susong Shiyong Falu de Shinwenti (New Problems in Respect to the Application of Law in Administrative Suits)*, 29 FA DE XINXI [LEG. INFO.] 5, 6 (1990).

<sup>79</sup> Tao-tai Hsia & Constance A. Johnson, *Lawmaking in China - Part II*, E. ASIAN EXEC. REP., Apr. 15, 1987, at 10.

<sup>80</sup> Although these are entitled implementing rules and issued by a "quite big city" which is a lawmaking body, these rules may not qualify as *guizhang* as they have not been issued and are merely part of the local government document series. See A.H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 85 (1992) (citing Zhang Youyu, *Two Comments on the Law of Administrative Litigation*, 4 CHINESE LEG. SCI. 26, 29 (1989)).

ket.<sup>81</sup> It is this latter category of *guifangxing wenjian* with which we are most concerned in our discussion of specification below.

Given their undefined status under the Administrative Litigation Law and despite their important role as the basis upon which most administrative regulatory activity is initiated,<sup>82</sup> it is uncertain whether these documents can be considered as a source of administrative law<sup>83</sup> despite the fact that administrative departments under the State Council have the power to formulate them under Article 89(1) of the Constitution.<sup>84</sup> As a result, for the first time, bureaucrats are being urged by legal scholars to formulate *guifangxing wenjian* within the bounds of relevant laws, regulations, and rules.<sup>85</sup> The tendency before the promulgation of the Administrative Litigation Law was for bureaucrats, particularly those at the local level, to consider an administrative measure as a law unto itself. Even today this attitude is reported to persist in many areas of China.<sup>86</sup>

### B. Specification by State Council Departments

State council departments specify broad and sometimes ambiguous law and *xingzheng fagui* in *guizhang* and *guifangxing wenjian*. The process of specification will be illustrated with reference to several *guifangxing wenjian* formulated and applied by these departments for the purpose of regulating foreign investment.

Because of the unrelenting pace of legal change in China, some of the rules and normative documents discussed here and within the following section (Specification by Local Governments and Local Functional Departments) are likely to have been superseded by documents formulated subsequently by Chinese administrative organs. This does not, however, diminish their value as depictions of the process of specification at work.

#### 1. Example 1 - Specification of an Article in the PRC Equity Joint Venture Implementing Regulations in Respect to the Content of Registered Capital by an Internal Document

One regular commentator on Chinese law wrote in March 1992, in

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<sup>81</sup> Luo, *supra* note 16, at 11.

<sup>82</sup> Zhao, *supra* note 78, at 6.

<sup>83</sup> Luo, *supra* note 16, at 11. The opposing view is that they can be classified as law as they are formulated or approved by the nation and enforced by national power. Zhuang, *supra* note 72, at 9.

<sup>84</sup> XIANFA (1990).

<sup>85</sup> *Id.* Susan Finder, *Like Throwing an Egg Against a Stone? Administrative Litigation in the People's Republic of China*, 3 J. CHINESE L. 1, 3 (1989).

<sup>86</sup> Administrative Division, *supra* note 73, at 10; Finder, *supra* note 85, at 10.



his article on legal regulation of technology transfer into the PRC that:

Although publicly available legislation imposes no restriction on the amount of technology which may be capitalised (contributed by a foreign party to registered capital), in practice foreigners are required to limit such contributions to 15-20% of total registered capital.<sup>87</sup>

Indeed, neither the Sino-Foreign Equity Joint Venture Law nor the relevant articles of its Implementing Regulations<sup>88</sup> make any such requirement in regard to industrial property and proprietary technology contributed by a foreign party as registered capital. However, a large degree of discretion regarding whether or not to accept the content of the investment is given to MOFERT and its local functional departments by virtue of Article 30, which provides:

The machinery, equipment or other materials, industrial property rights, or proprietary technology contributed as investment by a foreign venturer shall be examined and agreed to by the department in charge of the Chinese venturer and submitted to the examining and approving agency for approval.<sup>89</sup>

As the approving agency, and the agency responsible for interpreting the Joint Venture Implementing Regulations, MOFERT (now MOFTEC) chose to specify this article in an unissued internal document entitled "MOFERT Circular in Regard to a Number of Problems About Which One Ought to be Aware when Examining and Approving Foreign Investment Enterprises" dated July 7, 1988 — approximately four years after the Regulations were issued.

The relevant section provides that:

Operating foreign investment enterprises must have funds or facility investment, the registered capital should suit the management standard and social economic responsibilities of the industry. Foreign businessmen, based on their investment in kind, should show a value estimation certificate of their registered capital issued by an accountancy office. Industrial property of foreign businessmen, as an investment of specialist

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<sup>87</sup> John T. Kuzmik, *Technology Transfer: A Vital Element in Foreign Investment*, ASIAN L. & PRAC., Mar. 12, 1992, at 33, 36.

<sup>88</sup> Regulations for the Implementation of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, arts. 25, 28, 29 & 30 (1983). An English translation is available in 1 BUREAU OF LEGISLATIVE AFFAIRS OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 521-22 (1991).

<sup>89</sup> *Id.* (Translated by the author).

technology, etc., generally must not exceed 20% of registered capital.

The document appeared on MOFERT's internal document series [(88) *Waijingmaozi zongzi* No. 173],<sup>90</sup> but, in accordance with the last sentence of section 8 of the document, which provided that the Circular "will be applied internally with some discretion by State Council departments and each locality . . . ," was never issued nor even communicated to interested individuals, enterprises, and organs outside the department. Indicating the importance placed on *guifangxing wenjian* of this nature, the introductory paragraph states that "when each locality examines and approves foreign investment enterprises (excluding wholly foreign-owned enterprises), apart from *applying State Council regulations*, they should be mindful of the following issues . . . ," following which the substantive provisions are listed.<sup>91</sup>

2. Example 2 - Specification by *Guizhang* and Internal *Guifangxing Wenjian* of an Article in the "22 Provisions" Concerning Autonomy of Foreign Investment Enterprises to Recruit Staff

Ji Wei Dong, a lecturer in Chinese law who hails from Beijing University and currently lectures at the University of Kobe, has claimed that the provision of broad law and its specification by means of *guizhang* and *guifangxing wenjian* which delineate areas of substantive law, operate, on balance, to the advantage of the regulated. He bases this claim on the fact that the discretion and flexibility inherent in the process allow regulatory authorities to make concessions in the form of preferential treatment to foreign investors. He contrasts this with the consequences for the regulated of the enactment of detailed governing laws, citing in particular the Technology Contracts Law which he states were "rather more strict than expected."<sup>92</sup> Ji asserts that "when foreigners call for essentially flexible rules to be clarified, they are actually painting themselves into a corner" and that the Technology Contracts Law is an example of this.<sup>93</sup>

As the legitimacy of legal norms is actually undermined by partial policies of selective non-implementation and inconsistency inherent in the practice of preferential treatment, it is submitted that the maintenance of

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<sup>90</sup> Foreign Economic Relations, *supra* note 75, at 135.

<sup>91</sup> A further internal MOFTEC regulation now exists stipulating that no more than 50% of a foreign joint venture party's capital contribution may be in the form of technology or know-how.

<sup>92</sup> Ji Wei Dong, *supra* note 65, at 18-19.

<sup>93</sup> *Id.*

such practices harms the long-term development of China's legal system. Moreover, contrary to Ji's assertion, broad law does not necessarily work to the advantage of foreign investors. It often breeds uncertainty and creates a gap in expectations held by foreign investors and by Chinese regulatory agencies. The more one investigates subordinate documents issued by the State Council departments, the greater this gap appears to become. Higher law as represented by NPC or State Council enactments can afford to ostensibly encompass Western legal principles as long as it is expressed in general terms. However, as administrative organs specify these enactments further, the subordinate enactments, namely *guizhang* and *guifangxing wenjian*, invariably reintroduce principles more familiar to the officials of the agencies who are responsible for their implementation in the Chinese context. In other words, the Western legal principles are "Sinofied" in the course of specification. This result is inevitable so long as these agencies are empowered to issue documents that deal with substantive law in accordance with the "spirit" of higher law.<sup>94</sup> Consequently, *guifangxing wenjian* are more indicative of the real regulatory practices of officials than higher laws and regulations.

In the area of preferential treatment of foreign investment, for example, general principles as expressed in the preeminent legislation in this area, the State Council Encouragement of Foreign Investment Provisions (22 Provisions),<sup>95</sup> appeared to guarantee foreign investors the application of familiar Western regulatory norms such as management autonomy and freedom to recruit labour. However, in the course of specification these guarantees took on a new meaning as they were interpreted from the perspective of Chinese central and local regulatory agencies whose expectation of the norms embodied in the law did not necessarily always match those held by foreign investors, or even, for that matter, those held by the drafters themselves.

In respect to enterprise autonomy, the 22 Provisions provide at Article 15 that:

[P]eople's governments at each level and relevant departments should guarantee the autonomy of foreign investment enterprises, and support foreign investment enterprises to manage themselves in accordance with international methods of advanced technology.

Foreign investment enterprises have the right within the scope of the approved contract, to *autonomously* make production management plans, raise money, utilise funds, acquire materials for production, sell goods,

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<sup>94</sup> See, e.g., Administrative Bench, *supra* note 73, at 11.

<sup>95</sup> State Council Encouragement of Foreign Investment Provisions (forthcoming).

*autonomously* set wage standards, the form of salary, as well as bonuses and system of allowances.

Foreign investment enterprises, based on the needs of production management, may *autonomously* make organisational and staff arrangements, hire and dismiss high level management, increase or dismiss workers; in the locality advertise for and recruit skilled workers, management and workers, and staff employed by their unit should give support and allow mobility; and with respect to infringements of the system of rules which cause certain consequences, foreign investment enterprises may, based on actual circumstances of the case, impose a variety of disciplinary sanctions up to and including discharge. Advertising for, recruitment, and dismissal or discharge of staff should be reported to the local department of labour and personnel for filing.

This Article was specified by *guizhang* and *guifangxing wenjian* and formulated by State Council departments soon after the 22 Provisions were promulgated. The first of these were *guizhang*, The Ministry of Labour and Personnel (as it then was) Provisions in Regard to the Autonomy of Foreign Investment Enterprises to Utilise Labour, Determine Wages of Staff and Fees for Insurance and Welfare (Provisions), which was issued about six weeks after the 22 Provisions on November 26, 1986. These were further specified by unissued measures, *guifangxing wenjian* dated August 4, 1987, annexed to a circular that appeared in the document series of the Ministry of Labour and Personnel, *Laorengan* ([1987] No. 34), entitled The Measures for the Regulation of Leaders on the Chinese Side of Sino-Foreign Equity Joint Ventures (Leaders' Measures).<sup>96</sup>

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<sup>96</sup> Foreign Economic Relations, *supra*, note 75, at 34. Some documents that are issued or promulgated, and almost every document which is not, belongs to a document series which emanates from the State Council and each of its departments. Some of the document series and their issuing bodies are as follows:

- State Council - *Guofa*, *Guobanfa*.
- Ministry of Foreign Economic Relations and Trade (now Ministry of Foreign Technological and Economic Cooperation) - *Waijinmaozizi*, *Waijinmaofazi*, *Waijinmaoguanchizi*, *Waijinmaozisizi*, *Waijinmaojitongzi*, *Waijinmaozierzi*.
- Ministry of Labour and Personnel (now split into two ministries) - *Laorenbanhua*, *Laaorengan*, *Laorenhuju*.
- Ministry of Finance - *Zaigongzi*, *Zaishuizi* (tax), *Zaishuiwaizi* (tax), *Zaihuizi* (foreign exchange).
- National Customs Administration - *Chushuizi* (tax), *Chuhuozi* (trade), *Chuxingzi*.
- State Administration of Exchange Control - *Yinghanhuiguantiaozi*, *Huiguantiaozi*.
- Bank of China - *Yingfazi*, *Zhongyezi*, *Yingfa*, *Zhongzongzi*, *Zhongxingzi*.
- State Economic Commission (now disbanded) - *Jingjin*.

One year later, a document, the Ministry of Labour and Ministry of Personnel Opinion Concerning "Furthering by One Step" the Implementation of the Autonomy of Foreign Investment Enterprises to Utilise Labour, was formulated (Opinion). Applying specifically to coastal regions, the Opinion was attached to a Circular that was disseminated by the State Council Office, appearing in the Ministry of Labour Document Series *Laorengan* ([1988] No. 20).<sup>97</sup>

Article 15 of the 22 Provisions was also indirectly impacted upon by another important regulatory document, also of August 1987, annexed to a circular entitled Circular of The State Economic Commission, Central Ministry of Propaganda, Central Ministry of Organisation, All-China General Council of Trade Unions and Central Youth League in respect of the printing and distribution of "Temporary Provisions in Regard to Ideological and Policy Work for Those Holding Positions on the Chinese Side of Equity and Cooperative Joint Ventures" (Ideology Provisions), which appeared in a document series on economic policy entitled *Jingzheng* (*Jingzheng* [1987] No. 483).<sup>98</sup>

### C. Supervision by the Local Labour and Personnel Office Over Recruitment

Through the use of the word "autonomously" (*zixing*), Article 15 of the 22 Provisions appears to make a genuine commitment to management autonomy, especially in relation to labour recruitment and dismissal practices. This is confirmed by the last sentence which provides that "advertising for, recruitment, and dismissal or discharge of staff should be reported to the local department of labour and personnel for filing." This appears to limit the role of the local labour office to one where it merely "remains informed" about labour recruitment and dismissal by means of filing, implying that it need not be at all involved in the process, unless of course, the foreign investment enterprise requests assistance.

In the course of the specification of this Article by subordinate rules (*guizhang*) of the Ministry of Labour, however, the meaning of the

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- State Administration of Industry and Commerce - *Gongshang, Gongshangqizi, Qiwaizi*.
  - Ministry of Textile Industry - *Fangbanzi*.
  - State Planning Commission - *Jizi*.
  - State Bureau of Supplies and Materials - *Wujizi*.
  - State Scientific and Technological Commission - *Guoliaofazong(yin)zi*.
  - Ministry of Light Industry - *Qingshizi*.
  - Import and Export Commodities Bureau - *Guojianwuzi*.

<sup>97</sup> *Id.* at 131.

<sup>98</sup> *Id.* at 36.

autonomy to "hire and fire" was altered. Article 1-1 of the Provisions provides:

Foreign investment enterprises may, based on the needs of production management, autonomously determine their organisational and personnel makeup, and *with the assistance of the local labour and personnel office*, autonomously hire and dismiss staff, and through assessment select the best candidates.

The italicised words, *with the assistance (de xiezhuxia) of the local labour and personnel office*, imported a requirement that the Labour office be involved with the process of hiring and firing. The significance of the addition of this phrase cannot be understated in terms of its impact on foreign investment enterprise autonomy. Mandatory local labour office involvement in this process, therefore, extends far further than that suggested by the filing requirement mentioned in Article 15 of the governing regulations. This is confirmed in the Provisions which also provide that recruitment must be carried out *with the assistance* of the local labour department.

#### D. Recruitment Outside the Immediate Locality

The Provisions also extended the scope of the 22 Provisions. The 22 Provisions only made arrangements for recruitment from *within* the locality. However, the Ministry of Labour and Personnel felt free to recruit *outside* the locality without first having the relevant governing section in the 22 Provisions altered, thereby indicating the significance of the principle that lower rules should be drafted in accordance with *the spirit*, not necessarily *the letter* of governing law.<sup>99</sup> The relevant article in the Provisions, Article 1-1, provides in its second clause:

If there is no way in which management and engineering/technical personnel needed by Foreign Investment Enterprises (FIE) can be recruited from within the locality, recruitment can be made from another locality if approval is acquired from the relevant district labour and personnel department through discussions with the FIE's local district, autonomous zone or municipality labour and personnel department.

Chinese rulemakers are not restricted by the scope of higher legislation in the same way as are rulemakers in jurisdictions which have a strong tradition of judicial review of abstract administrative acts. In short, higher law is treated in the same manner as a policy pronouncement, the mandate for the formulation of implementing rules being vague and

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<sup>99</sup> Administrative Division, *supra* note 73, at 11.

flexible in scope.

The Measures at Article 2-1, further specified Article 1-1 of the Provisions providing:

Joint ventures may, in respect to their requirements for managers and technicians, with the assistance (*xiezhuxia*) of the local government department of labour and personnel, in accordance with the relevant national regulations, publicly recruit staff through examination or assessment and choose the best candidate; if it *cannot be satisfied (bu neng manzu)* by local recruitment, where necessary, the joint venture may recruit from other localities *with the assistance of (xiezhuxia)* the local government labour and personnel department.

This actually softened the Provision's stipulations in respect to out-of-locality recruitment. The Provisions stated that the foreign investment enterprise could only recruit from other areas if there was "no way" (*wufa*) in which recruitment could be effected locally. However, the Internal Measures merely provided that the foreign enterprise be "dissatisfied" with the results of local recruitment efforts with a proviso stating that filling the position is "necessary."

This "softening" may have been in response to the reaction by foreign investment enterprises to the publication of the Provisions nine months prior. As such, they are a further example of specification and the underlying philosophy of legal flexibility. Joint ventures possess important but little-known avenues to bring pressure to bear on specification of this kind. This is the China Association of Enterprises with Foreign Investment, an independent association of joint ventures with branches in most major Chinese cities that is set up in order to provide assistance to its members. It also acts as a lobby group that can take problems and proposals to MOFTEC. One of the Association's functions is to arrange meetings between joint venture representatives and government leaders in order to air grievances in respect to foreign investment regulation. Such lobbying can be very effective. For example, it would appear that the Association was primarily responsible for lobbying MOFTEC and acquiring its support to alter Article 6 of the Equity Joint Venture Law (1979). Article 6 provided that the chairman of the joint venture board must be from the Chinese side. In amendments that were enacted by the NPC in 1990, this article was changed to allow a member from the foreign side of the venture to assume the post of chairman. It is reported that the Association has been particularly active in respect to lobbying in the area of labor regulation.<sup>100</sup>

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<sup>100</sup> Interview with Zhu Xinren, Deputy Director, Investing Consultancy Department,

E. *Joint Venture Autonomy in Respect to Selection Criteria for the Appointment of Personnel*

We have ascertained the method by which the local labour department was given a role in the recruitment process. By further analysing the specified provisions we can also ascertain the criteria in relation to staff appointments that the labour department has the responsibility of enforcing. It appears that the Party Committee within the labor department, and each original unit, gives ultimate approval regarding a candidate's conformity with the political elements of this criteria.

Upon examination of the 22 Provisions, it is not apparent that the freedom of joint ventures to determine appropriate staff was restricted in any way by external selection criteria. The 22 Provisions provide:

Foreign investment enterprises, based on the needs of production management, may *autonomously* make organisational and staff arrangements, hire and dismiss high level management, increase or dismiss workers; in the locality advertise for and recruit technicians, management and workers . . . .

In respect to appointments (*weipai*) by a Chinese party to a joint venture of higher level cadres such as directors, the Provisions provide:

(1-3) The high level management (*gaoji guanli yuanyuan*) appointed (*weipai*) by the Chinese side should be able to *master policy*, understand technology, have the ability to manage, be bravely entrepreneurial, *and be able to cooperate with foreigners*. The relevant departments should support their work, and during the period of their appointment, generally should not transfer their post to someone else; where it is essential to transfer their post, they should ask for the approval of the board of directors.

The Provisions, however, do not lay down any criteria in respect to staff recruited (*pingyong*) by the joint venture. For this, one must look to the Leaders' Measures which provide:

(4) The managing director and directors appointed by the Chinese side of the joint venture and the general manager, deputy general manager, chief engineer, chief accountant, chief auditor and other high level management personnel should have the following characteristics:

. . . .



(1) Adhering to the four basic principles, ability to correctly apply the policy of opening to the outside world, familiarity with policy and regulations with respect to economic work, especially with respect to accepting and using investment law and regulations;

(2) Familiarity with the business of production technology in the industry involved, be good at management, have organisational ability, have the ability to correctly adhere to the management direction;

(3) Possess an entrepreneurial spirit, be honest in performing one's official duties, be honest and upright, have a good intellect, *have the ability to adhere to principle*, and be good at cooperating with foreigners.

(4) High level cadres in large and medium size ventures must generally have a high cultural level and the main and assistant general managers should understand a foreign language.

The provisions that higher level staff should (i) have the ability to adhere to principle and (ii) be good at cooperating with foreigners in subsection three of the Leader's Measures are particularly significant. The former means that they must be politically and ideologically sound and do not have any *chufen* or "black marks" in this respect on their personal files. Candidates for higher level staff positions must be confirmed by Article 7 of the Leader's Measures which provides that cadres from the Chinese side preparing to take up high level management positions for which they have been recommended first must make an internal report and then get approval from the unit that recommended them.

The latter refers to their ability to get along with foreigners without being corrupted by them, the implied meaning, clearly understood by all Chinese in that position, being that their first responsibility is to China's welfare over and above that of the joint venture. Any candidates for a senior joint venture position will, at an initial stage, be screened, usually by the Party Committee of their original unit, as to whether or not they satisfy these criteria.

In addition to this initial screening, if appointed by the joint venture, high level appointees receive preparatory training which incorporates political education in order to reinforce the attitudes deemed appropriate for high level staff:

(6) Leaders from the Chinese side who are preparing to be appointed and recommended for high level positions within the joint venture must undergo "training" (the content of the "training" includes becoming familiar with the State policy of opening to the outside world, foreign

related regulations and laws, basic knowledge of foreign trade and use of foreign investment, etc.) *in order to improve their thought (sixiang), professional work, skills and management level; specialist technical staff must undertake specialised training before assuming their posts.*

*F. Joint Venture Autonomy in Respect to the Criteria for Assessment and Promotion of Staff*

The Leaders' Measures also provided for regular ideological assessment of high level staff:

7) Leaders from the Chinese side preparing to take up high level management positions for which they have been recommended in a joint venture, must first internally make a report and get approval from the unit that recommended them; *After starting work at the joint venture, they are to be assessed as to their work performance and to whether they are ideologically sound (sixiang biaoixian).*

Autonomy in joint ventures was also impacted upon by rules released by the State Economic Commission, Ministry of Propaganda, Ministry of Organisation, Federation of Trade Unions and Youth League Central Committee, the Provisional Provisions Concerning Ideological-Political Work for Staff on the Chinese Side of Joint Ventures, (Ideology Provisions). In providing guidelines for the content of political education of Chinese staff within the joint venture, the provisions clearly provide criteria against which promotions are assessed. For example, the provisions state:

7) In order to guarantee the smooth development of ideological-political work, all equity and cooperative joint ventures should, in accordance with documents of the Central Ministry of Organisations, the All-China Committee of Trade Unions and Central Youth League and relevant law, regulations and provisions, establish and perfect Party organisation, Trade Unions and Youth League structures. The subordinate relationship of the Youth League to the Party generally ought to be identical to other administrative relationships of subordination. The Party and Youth League organisations generally are not constituted by technical personnel, and the Party and Youth League may take responsibility in respect to, and in accordance with certain conditions befitting the enterprise, exercising leadership over cadres and sections of the enterprise or the appointment of cadres of the trade union. Enterprises where staff numbers are quite high, after acquiring the understanding or support of the foreign side, in accordance with the principle of efficiency, may appoint the necessary quantity of specialist political cadres.

8) The cadres undertaking ideological-political work in Sino-foreign

equity and cooperative joint ventures, should, in accordance with the "four modernisations," by understanding policy, the business and how to be ideologically correct, be good at working together with foreign personnel. The administrative leaders of the enterprise and higher relevant departments should pay attention to their ideology, their work, their study and life, and work constantly to improve their ideology and business standards, and those who excel in their performance should be given praise.

The operation of these provisions is illustrated by the documented experience of Beijing Jeep. The members of the staff of Beijing Jeep who were Party members were responsible for political education, propaganda, and social welfare. Numbering about 300 out of the total work force of 4000 employees, they had influence over promotions and key appointments. Through this influence, the party members had influence over management.<sup>101</sup>

With the gradual marginalisation of the ideology promoted by the CCP, it would appear that enforcement of these provisions has been extremely uneven. Implementation is rigorous in those joint ventures which contain active Party committees. However, in many joint ventures, particularly those situated in regions further away from Beijing, such as Guangdong, the role of political education appears to have declined in the face of new values now accorded priority, namely wealth and material success. Lack of support by foreign managers has also contributed to the decline of the role of political education. The Explanation annexed to the Ideological Provisions admits that as early as 1987, of the 2,211 FIEs surveyed the seven provinces, forty-eight percent employed only several Party members, 18.2% had no Party members on their books at all, and the work of Party organs in many other FIEs was being hindered by a lack of understanding and support from the foreign joint venture participant.<sup>102</sup> The decline in Party activity in foreign-funded enterprises, and the total absence of its membership in wholly owned foreign enterprises is high.<sup>103</sup> Circumstances in Beijing Jeep reflect this trend; it has been

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<sup>101</sup> Jim Mann, *BEIJING JEEP: THE SHORT UNHAPPY ROMANCE OF AMERICAN BUSINESS IN CHINA* 249 (1989).

<sup>102</sup> Article 2-1, *Jingzhi* [1987] No. 483.

<sup>103</sup> The Party resolved at the end of 1993 to try to form basic level Party organisations within foreign-funded enterprises, particularly wholly foreign-owned enterprises, in response to an internal document which reported that approximately 70% of wholly owned foreign enterprises lacked any Party group. This was due to enterprises instructing local enterprise management departments which are responsible for supplying staff not to select CCP members and the departments being responsive to such requests. Li Han, *CPC Penetration into Foreign Companies Viewed*, CHENG MING,

reported a significant amount of workers preferred to receive *chufen* in the form of fines deducted from their pay, rather than be forced to attend the mandatory political study sessions.<sup>104</sup>

It should be noted that the right of management of joint ventures to impose administrative punishments was retained in the 22 Provisions and escaped specification, merely being duplicated in the Provisions and the Leaders' Measures.

### G. Management Autonomy as an Ideal Rather than a Reality

In light of what has been noted about the specification of the 22 Provisions, it appears that they are actually hortative in the sense that joint venture autonomy in respect to labour utilisation is an ideal. By specifying this section of the 22 Provisions and applying it to normative reality, government departments naturally must deal with the task of reconciling the autonomy of joint ventures with the reality in China of strict regulatory control (by both the Party and administrative organs) over worker mobility, and every other aspect of working life. Indeed, the Ministry of Labour and Personnel, (as it was previously known) in the process of specification, sought to actively grapple with the problems involved in acquiring approvals for recruitment of staff by providing in the Provisions:

*(1-2) FIEs through assessment determine the engineering and technical staff, management and technical workers they will employ, and the original work unit actively support this and allow the relocation. Where there is a dispute the local labour and personnel departments make a ruling.*

This however was altered and further refined by the Leaders' Measures which provided:

*3) The joint venture through either examination or assessment determines the specialized technicians and managers it will recruit, and the original work unit or supervisory department must actively give support and allow relocation. If there is a dispute, the supervisory department of the joint venture should consult with the relevant unit to solve the problem, and if it still cannot be solved through consultation, the local department of labour and personnel to the work unit should arbitrate, and if the dispute cuts across regions, the higher level labour and per-*

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May 1, 1994, at 28, an English translation is microformed on PrEx 7.10:FBIS-CHI-94-103 (Foreign Broadcast Info. Serv.).

<sup>104</sup> MANN, *supra* note 96, at 251.

*sonnel department should arbitrate. All parties (JV, the units in which the cadres are located, the people involved) should abide by the decision of the labour and personnel department.*

This was still further refined by the Ministry of Labour, and the Ministry of Personnel Opinion Concerning Furthering the Implementation of the Autonomy of Foreign Investment Enterprises to Utilise Labor (Opinion), which was issued one year after both the Provisions and the Internal Measures on April 25, 1988. The Opinion added that in certain circumstances, prospective joint venture staff have the right to resign, providing that:

2) In the process of recruitment of necessary personnel by the FIE, the relevant departments and units should provide active support, allowing transfer, *without imposing inappropriate charges, or restrictive measures such as the taking back of accommodation.* If the work unit of origin without justification resists, the person being recruited may resign, *and after his resignation continue to increase his length of service (gongling).*<sup>105</sup> *If there is a dispute, the people involved may apply for the matter to be arbitrated at the local labour dispute arbitration committee or the local personnel exchange service organ, and all relevant parties to the dispute must implement the arbitrator's decision. If it is necessary, the local labour department and personnel department may directly handle the transfer of the person being recruited.*

The difference in these three documents illustrates that an unissued normative document may prevail over *guizhang* where it is formulated in accordance with the spirit of the higher document and is more recent in time. This is most starkly illustrated by the Opinion, which explicitly provides that it is to prevail in case of conflict with higher law:

7) *This Opinion is to apply if there is any conflict between it and Articles 3 and 6 of the PRC Provisions for the Regulation of Labour in Joint Ventures [Guofa (1980) No. 199] issued by the State Council, Article 34 of the Equity Joint Venture Implementing Regulations, Article 15 of the 22 Articles, Article 2 of the Provisional Provisions for the Handling of Labour Disputes in State Enterprises and Articles 1, 2 and 3 of the Provisional Provisions for the Administration of Labour in Sino-foreign Joint Ventures.*

The Opinion is actually an example of specification working in a way that seeks to liberalize the provisions of higher documents that have narrowed down the scope of the 22 Provisions. The relevant articles of

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<sup>105</sup> This is important for the accrual of welfare and housing benefits.

the Opinion which have not already been mentioned above, provide:<sup>106</sup>

*In order to improve the environment for investment, and for the purpose of further implementing the strategy of developing the economies of coastal regions, the following opinion is put forward in respect to promoting the autonomy of FIEs to utilise personnel:*

*1) The workers, technical personnel and managerial staff (including high level cadres) needed by FIEs may be employed through public recruitment within society, by selective recruitment through recommendation by the Chinese side of a joint venture. If the personnel required by the enterprise are not available within the locality, [then] recruitment can be undertaken outside the locality.*

. . . .

*3) Where the FIE in order to recruit staff crosses the jurisdictional boundary of the province, municipality or quite large city, the relevant local labour and personnel departments should, without reporting this a second time to the provincial level labour department and personnel department for approval, perform organisational coordination and services.*

*4) When a Chinese enterprise enters into a joint venture agreement with a foreign enterprise, the original enterprise may select its best staff according to the needs of the joint venture. The joint venturer on the Chinese side and the supervisory department should settle the matter of recruitments in an appropriate way, and the local government should actively assist in the making of these adjustments.*

*5) FIEs may according to the contract and relevant provisions dismiss staff, and all departments, units and individuals should not intervene. Those dismissed who were originally transferred or engaged on a secondment basis from another unit should be taken back by that unit at which they were employed prior to recruitment, and they will be registered with the local labour service company or personnel exchange service organ as waiting for employment, and may be recommended for employment through the relevant department, or else themselves actively seek and find a job of their own accord.*

*6) In respect to Sino-foreign joint ventures, the Managing Director,*

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<sup>106</sup> Sections which represent specification of the 22 Provisions, Provisions and Leaders' Measures are italicised.

and the Directors from the Chinese side of the joint venture, during their period of tenure must not without authorization be transferred, and if there is a need for transfer, the unit seeking to appoint them *must request the opinion of the organ that examined and approved the relevant enterprise and the opinion of the joint venture*. Chinese-side high level cadres recruited by the joint venture, during the period of the employment contract cannot be transferred without the approval of the board of directors *and the general manager*. No department has the power to transfer staff.

Although most of the Opinion merely represents a duplication of provisions in the Leaders' Measures that were formulated and transmitted to relevant departments and localities a year earlier, it did, through specification, liberalise some of the provisions of the Leaders' Measures and the Provisions. Significantly, the Opinion only applied to coastal cities, thereby reflecting Government policy that the coastal regions be "one step ahead" (*jin yi bu*).<sup>107</sup>

The above discussion illustrates that the interpretation of a piece of legislation adopted by a Chinese regulatory department does not necessarily match the interpretation that a foreign investor would derive from his reading of the same enactment. Such differences in normative expectation only become apparent upon close examination of the relevant implementing rules and other normative documents.

Some may categorise this phenomenon as deliberate "window dressing" in order to attract foreign investment under false pretenses. However, such judgments are too harsh. Vague law naturally leads to a difference in normative expectation depending on the background of the

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<sup>107</sup> The formal procedure for enactment of *xingzheng fagui* by the State Council are laid down in The Provisional Regulations for the Formulation Procedure of *Xingzheng Fagui*, issued and published by the State Council General Office on April 21, 1987. Enactment procedure at and below the level of administrative rules is not subject to any procedural guidelines, resulting in vague drafting processes from which it is difficult to ascertain whether an instrument has been legally enacted. A national-level "procedural law" has not been enacted. Some local governments have, however, passed their own rulemaking procedures. See, e.g., *Shenzhen Municipal People's Government, Formulation of Shenzhen Special Economic Zone Rules and Regulations and Drafting of the Rules and Regulations in Shenzhen Special Economic Zone Procedural Provisions*, 2 CHINA L. & PRAC. 12 (1993) (laying down procedures in respect to planning, drafting, examining, approving, and promulgating local rules). The Shenzhen Municipal People's Congress has also adopted procedural rules for the enactments. 2 CHINA L. & PRAC. 13 (1993). This may be explained because Shenzhen, as a Special Economic Zone, tends to be "a step ahead" of the rest of the country. Daniel Kwan, *Managers in SEZ Get More Powers*, S. CHINA MORNING POST, Jan. 27, 1993, at 6.

interpreter. As can be understood from the normative variety of local implementing legislation,<sup>108</sup> the differences in interpretation from region to region of "the spirit" of the governing central law can also be quite significant. Discrepancy in interpretation is an inevitable and unavoidable result of specification of broad law and, for better or for worse, it is this system that China has chosen to adopt as its own.

#### *H. Specifications by Local Governments and Local Functional Departments*

China is a country which encompasses regions at vastly different stages of economic development, with every province, city, and county having its own peculiar features and problems. Kenneth Lieberthal describes China's regional diversity in the following terms:

The provinces and directly ruled cities (Tianjin, Beijing and Shanghai) vary enormously in size, population, climate, topology, and level of economic development. Chinese provinces are the size of countries: Sichuan, over 100 million people; Henan and Shandong, 75 million each; Jiangsu and Guangdong, 61 million each. Some have large concentrations of non-Han, minority peoples, while others are nearly pure Han. Mountain ranges define the boundaries of some provinces, with the core of such provinces defined by a set of river valleys. Hunan, Jiangsu, Shanxi, and Sichuan are examples. Others have less well defined, natural boundaries. Some have a well defined sense of cultural and historical distinctiveness (such as Guangdong or Shanghai), while others either have a less well defined provincial identity (Jilin and perhaps Henan) or, due to their topography and linguistic considerations, embrace distinctive cultural subunits of great longevity (Fujian or Anchi). Some correspond to relatively self-contained, natural economic systems (Sichuan); others are a part of a larger, natural economic region (Hubei in central China or Hebei as part of the north China plain); and others fall into more than one natural commercial system (Zhejiang, Inner Mongolia or Shaanxi).<sup>109</sup>

Central power authorities and empowered administrative authorities only make laws dealing with national concerns, the content of which are expressed in the form of broad principles as the Chinese believe it impractical and unnecessary for these authorities to make detailed provisions in regard to every aspect of social and economic life. The onus

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<sup>108</sup> See *infra* Section III.G.

<sup>109</sup> KENNETH LIEBERTHAL & M. ODEENBERG, BUREAUCRATIC POLICIES AND CHINESE ENERGY DEVELOPMENT 330 (1986).



falls on local governments for the interpretation and actual implementation of these principles in accordance with local conditions.

As mentioned above, local people's congresses and governments below the provincial level, although they lack official lawmaking power (the exception being municipalities and "quite large" cities which are in effect local bodies that do possess lawmaking power),<sup>110</sup> are authorised by the Constitution and Local Organic Law to enact administrative measures that specify and detail<sup>111</sup> *guizhang* enacted by higher level people's governments according to local reality, the stated objective being to realise *guizhang's* function as a tool to adjust society.<sup>112</sup> Chinese legal scholars Ying Songnian and Dong Hao describe specification in the following terms:

In enacting and using administrative rules and regulatory documents, administrative organs do not deny laws, statutes and regulations, but within the scope of their functions and powers they (either) supplement gaps in the law, statutes and regulations, or make them more specific. The application of administrative rules and regulations is a specific manifestation of the administrative exercise of law enforcement.<sup>113</sup>

The process of specification is, therefore, an attempt to address the reality of diversity, localism, and uneven development in China — a deliberate effort to overcome the inherent limitations of a unitary system of law in a large and incredibly diverse country. It is a process in which law is continually adjusted to match the social exigencies of the locality in question. In essence, the power to enact local legislation whether it be *difang xingzheng fagui*, *difang guizhang* as enacted by local municipalities and "quite big" cities, or administrative measures (*xingzheng cuoshi*) enacted by local counties<sup>114</sup> and townships,<sup>115</sup> essentially amounts to a form of local legal autonomy that parallels local political autonomy. The

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<sup>110</sup> Zhuang, *supra* note 72, at 10.

<sup>111</sup> *Id.* at 9.

<sup>112</sup> *Id.*

<sup>113</sup> Ying & Dong, *supra* note 25, at 57.

<sup>114</sup> Under Article 51 of the Local Organic Law, governments at or above the county level can formulate administrative measures, decisions, and orders. The Organic Law of the Local People's Congresses and Local People's Governments of the PRC (1979). An English translation is available in CHINA LAW YEARBOOK, 1987, at 138, 144-45 (Publishing House of Law, Beijing, 1989).

<sup>115</sup> Under Article 9 of the Local Organic Law, the township level people's congress can pass resolutions within the scope of their functions and powers. The Organic Law of the Local People's Congresses and Local People's Governments of the PRC, art. 9 (1979). An English translation is available in CHINA LAW YEARBOOK, 1987, at 138, 144-45 (Publishing House of Law, Beijing, 1989).

result is a "not-so-unitary" legal system that sits uncomfortably between unitary and federal systems of law.

For the regulated, it is the lowest form of local regulatory norm, the administrative measure in the case of counties and townships and local *guizhang* and/or *guifangxing wenjian* in the case of municipalities and "quite big" cities, that represents the formal law of the state at the level of the law in action. However, such measures are neither subject to strict procedure or enactment<sup>116</sup> nor, like other abstract administrative acts such as law, *xingzheng fagui* or *guizhang*, are challengeable under the Administrative Litigation Law or Administrative Reconsideration Regulations.<sup>117</sup> Supervision for legality and consistency is the responsibility of the administrative authority immediately above,<sup>118</sup> the people's congress,<sup>119</sup> or the standing committee<sup>120</sup> at the same or higher level, although it is doubtful whether this is conducted on anything more than a nominal basis.

Irrespective of whether they are applicable in administrative litigation and reconsideration, the Constitution and the Local Organic Law grant administrative organs of local counties and townships the right to enact and apply *xingzheng cuoshi*. They are without a doubt, as Ying Songnian and Dong Hao maintain, playing a role in practice and cannot be replaced<sup>121</sup> under the present framework of legal regulation.

Discrepancy in interpretation and implementation of central law from one local jurisdiction to another is considered a natural consequence of specification. It is not, as asserted by some foreign commentators, evidence of the failure to institute an all-encompassing system of consistent legal interpretation.<sup>122</sup> The creation of such a system was never an ob-

<sup>116</sup> Zhuang, *supra* note 72, at 10.

<sup>117</sup> Administrative Litigation Law, art. 12(2); an English translation is available in 1 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN RELATED MATTERS 356 (Bureau of Legislative Affairs of the State Council of the People's Republic of China ed., (1991)). Regulations on Administrative Reconsideration, art. 10(1); an English translation is available in 1 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN RELATED MATTERS 398 (Bureau of Legislative Affairs of the State Council of the People's Republic of China ed., (1991)).

<sup>118</sup> The lowest "administrative body immediately above" is the county level government. The Organic Law of the Local People's Congresses and Local People's Governments of the P.R.C., art. 51(3) (1979). An English translation is available in CHINA LAW YEARBOOK, 1987, at 138, 144-45 (Publishing House of Law, Beijing, 1989).

<sup>119</sup> *Id.* at arts. 7(10), 9(8), 11.

<sup>120</sup> *Id.* at arts. 38(7), 8.

<sup>121</sup> Ying & Dong, *supra* note 25, at 58.

<sup>122</sup> Ji Wei Dong, *supra* note 65, at 18.

jective and is in fact antithetical to the whole concept of legal specification.

### 1. Local Specification of 22 Articles' Provisions on Management Autonomy

Article 15 of the 22 Articles and lower departmental rules and normative documents, which were examined above in the context of central departmental specification, were further specified at the local level in local *guizhang* issued by the Shanghai Municipal People's Government<sup>123</sup> and further provisions issued by the Shanghai Labour Bureau.<sup>124</sup> The former provides at Article 6 that:

Enterprises with foreign investment may employ and recruit technical personnel, managerial personnel and workers within the territory of Shanghai. These enterprises may also employ or secure the above-mentioned personnel from other provinces and cities *under the guidance of the labour and personnel department*. If they are dismissed, they shall return to where they come from.

These provisions, although they do *not* stipulate that the foreign enterprise need conform to any filing requirement or that the services of the local labour bureau be utilised when seeking to recruit staff from within Shanghai, provide that the recruitment of staff from other regions must be conducted *under the guidance of (zhilingxia)* the labour and personnel department. This is potentially much more intrusive than that which is implied by the words *with the assistance of* found in the Ministry of Labour Measures or the filing (*beian*) requirement found in the governing State Council Regulations.

Admittedly, as a matter of practical necessity, one is compelled to solicit the assistance of the local labour bureau in China in order to recruit from other regions. However, the Shanghai Labour Bureau Regulations specified this further, in Article 2 which provides:

Staff and workers needed by enterprises with foreign investment may be either recommended by a superior administration and the Chinese partner from their own industrial system and accepted through an examination

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<sup>123</sup> Provisions of Shanghai Municipality for the Encouragement of Foreign Investment (promulgated Oct. 23, 1986).

<sup>124</sup> The Regulations of Shanghai Labour Bureau and Shanghai Personnel Bureau for the implementation of Relevant Articles in "Provisions of the Shanghai Municipality for the Encouragement of Foreign Investment" Concerning Staff and Worker's Employment (promulgated Aug. 17, 1987).

and review process, *or recruited from the public within the territory of Shanghai under the guidance of the Shanghai Labour Bureau and Shanghai Personnel Bureau.*

Therefore, in Shanghai, *even when recruiting locally*, one must still recruit *under the guidance of* the local labour bureau despite the apparent guarantees of management autonomy in this respect provided in Article 15 of the 22 Provisions. Furthermore, higher documents and rules provide that the role of the local labour bureau is one of mere assistance - which in any language has overtones far less intrusive than the word *guidance*.

By way of comparison, in Tianjin Municipality, the Regulatory Measures of Tianjin Municipality Concerning Cadres of the Chinese side of Sino-foreign Equity and Cooperative Joint Ventures<sup>125</sup> (Tianjin Measures) also provide for local recruitment *under the guidance of* the local labour bureau.<sup>126</sup> However, the relevant legislation in Guangdong Province, the Regulatory Provisions Concerning Cadres on the Chinese side of Foreign Investment Enterprises,<sup>127</sup> provide for the same *with the assistance of* the local labor bureau, therefore underlining the regional disparities in respect to the specification of this point.<sup>128</sup>

The Tianjin Measures reinforced the concept of "guidance" by further providing in respect to the recruitment of management and technical personnel:

Equity and Cooperative joint ventures, before advertising for management and technical staff on the Chinese side, should firstly submit some summary principles and the standard contract to be adopted to the Municipal Office. After an examination that ascertains whether it conforms with laws and regulations, the joint venture will, in accordance with the opinion of the Municipal Office, advertise through the press, radio, television and other media and report it to the enterprise's department in charge for filing.

This provision goes some way towards clarifying the true meaning of the word "guidance" in this context and in so doing, specified Articles 1-1(b) of the Provisions and 2-1 of the Internal Measures which provide generally that the local labour office have a role in recruitment of staff.

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<sup>125</sup> Tianjin Municipality Concerning Cadres of the Chinese Side of Sino-foreign Equity and Cooperative Joint Ventures (promulgated Mar. 3, 1988), *reprinted in CHINA L. REP.*, Nov., 1988, at 18.

<sup>126</sup> *Id.* at art. 6.

<sup>127</sup> *Wen Wei Po*, July 22, 1988, at 18, *reprinted in CHINA L. REP.*, Nov. 1, 1988, at 13.

<sup>128</sup> *Id.* at art. 5.

The Tianjin Measures also significantly limited the type of people eligible to apply for recruitment. The measures provide:

Apart from those falling under the following categories, all cadres may apply for recruitment in private joint venture enterprises:

- 1) Personnel engaged in work closely associated with the Municipality;
- 2) Personnel working for priority enterprises and work units, undertaking construction or scientific research, or responsible for a design project;
- 3) Primary, middle and high school attendees;
- 4) Personnel in sectors that lack human resources or those involved in particular types of industries;
- 5) Personnel who leave their current work voluntarily.

The categories listed under terms (1) and (4) are particularly wide in scope. This provision is not directly derived from any particular article in either the Internal Measures or the Provisions. It is rather an example of specification in accordance with the perceived "spirit" of the 22 Provisions, the Provisions, and the Internal Measures. By way of contrast, the Guangdong Province Regulatory Provisions Concerning Cadres on the Chinese Side of Foreign Investment Enterprises (Guangdong Provisions) do not contain any articles that even remotely resemble the above provisions cited from the Tianjin Measures. Articles 1 through 6 simply reiterate word-for-word the requirements of the Provisions and the Internal Measures.

Article 12 of the Tianjin Measures, which further specified Article 3 of the Internal Measures and Article 2 of the Opinion, lays down a procedure by which people who have been recruited by the joint venture and who are facing opposition to the transfer from their work unit can tender their resignation. The Internal Measures do not mention the option of resignation in these circumstances. They merely provide for a process of consultation and arbitration involving the local labour department in order to solve the dispute. The Opinion, however, does provide for the right of resignation, after which the person concerned may continue to count his period of employment with the joint venture towards his total length of service (*gongling*), a crucial consideration for any prospective employee as it has direct bearing on the conferral of social security and other benefits. Thus, specification at the local level is executed in respect to the relevant provision contained in the lowest and most recent normative document that has emanated from the centre, even though it may be merely *guifangxing wenjian*.

The matter of resignation is not, however, mentioned by the Guangdong Provisions, which are characterized by their detailed specification of the circumstances under which termination of employment can be compulsorily or voluntarily effected.<sup>129</sup> With respect to an employee seeking to resign in order to join a joint venture, the Opinion would presumably be applied.

Both Tianjin Measures and Guangdong Provisions, in contrast to the Provisions and the Internal Measures, specified in almost identical terms the power of the enterprise to impose sanctions on their employees, providing that:

The Foreign Investment Enterprise, with the approval of the Board of Directors and the General Manager, in line with the seriousness of the case, may impose reasonable sanctions on cadres from the Chinese side who infringe upon the enterprise's articles of association or its system. In respect to the sanctions imposed on cadres from the Chinese side, the trade union of the FIE must be consulted, and an explanation acquired from the person in question. After making a decision in respect to the sanction, the enterprise must report it for filing to the supervisory department of the Chinese joint venture party.<sup>130</sup>

Significantly, by providing that an explanation be compulsorily acquired from the person in question, a form of natural justice was introduced into Chinese law which is yet to be instituted at the national level or recognised by the Administrative Litigation Law.

## 2. Local Specification of National Foreign Exchange Control Litigation

The second example of local specification is taken from the area of foreign exchange control - the Provisions Concerning the Opening of Deposit Accounts by Enterprises with Foreign Investment, the Control of Receipts and Payments, and the Control of Statements (Shanghai Provisions),<sup>131</sup> which were formulated and issued by the local exchange control department and Bank of China branch in Shanghai. These are

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<sup>129</sup> Provisional Regulations of the Special Economic Zones of Guangdong Province Governing Labor and Wages for Business Enterprises (promulgated Nov. 17, 1981). An English translation is available in 2 COMM., BUS. & TRADE LAWS: PEOPLE'S REPUBLIC OF CHINA (Owen D. Nee, Jr. ed., 1991).

<sup>130</sup> Tianjin Measures, art. 22; Guangdong Provisions, art. 15.

<sup>131</sup> Provisions Concerning the Opening of Deposit Accounts by Enterprises with Foreign Investment, the Control of Statements, *reprinted in* E. ASIAN EXEC. REP., Aug. 15, 1988, at 22 [hereinafter Deposit Accounts].

*guifangxing wenjian* as they were not approved by the Shanghai People's Municipal Government. Indicative of their usual role to specifically apply national legislation to local conditions and reflecting the principles expressed in the Local Organic Law, its opening sentence reads as follows:

In accordance with the Regulations of the State on foreign exchange control and their implementing rules and relevant provisions, *taken together with the circumstances of the Municipality*, the following provisions are made concerning the opening of foreign exchange, foreign exchange certificate and renminbi deposit accounts by enterprises with foreign investment at banks (including other financial institutions) as well as the control of account receipts and payments and the control of statements.

The Shanghai Provisions specified the Rules for the Implementation of Foreign Exchange Controls Relating to Overseas Chinese Enterprises, Foreign Enterprises, and Chinese-Foreign Joint Venture (1983)<sup>132</sup> which in turn were issued to implement Chapter 5 of the Provisional Regulations for Exchange Control of the PRC (1980).<sup>133</sup>

Various articles of the Shanghai Provisions illustrate how localities can seem to treat central law merely as a general guideline, feeling free to impose stricter restrictions of their own or introduce more liberal provisions in accordance with their understanding of what the "spirit" of the central legislation may be. For example, in respect to the remittance of FIE profits, Article 13 of the 1983 Implementing Rules, elaborating on the requirement in the 1980 Interim Regulations that remittance of the foreign exchange profits must be approved by the Bank of China, specified the documentation had to be submitted for approval in order for permission to be granted to remit overseas. The Shanghai Provisions, however, extended the scope of the remittance for which approval was required, laying down that in addition to remittances overseas, approval of the bank had to be obtained in respect to any transfer of profits out of the foreign exchange account of the foreign enterprises, including, implicitly, transfers of funds to other bank accounts within China for the purpose of use in other domestic projects.<sup>134</sup>

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<sup>132</sup> Approved by the State Council on July 19, 1983 and issued by the State Administration of Exchange Control on August 1, 1983 [hereinafter *Implementing Rules*].

<sup>133</sup> Provisional Regulations for Foreign Exchange Control of the People's Republic of China (promulgated Dec. 5, 1980). An English translation is available in WESTLAW, Chinalaw database, file no. 0128 [hereinafter *Interim Regulations*].

<sup>134</sup> *Implementing Rules*, *supra* note 132, at art. 11(A)(2)(1).

The scope of regulation was similarly increased by the Shanghai Provisions in respect to remittance of foreign exchange to other branches of the FIE for the purpose of paying expenses. Article 16 of the 1983 Implementing Rules provided that approval of the SAEC needed to be obtained only where the FIE sought to transfer foreign exchange to its branches *abroad*. Article 11(A)(2)(4) of the Shanghai Provisions extended the scope of this approval to remittances to branch offices established by FIEs abroad and *in China*.

Transfers of foreign exchange by FIEs to banks in China and abroad were subject to an approval requirement in the Shanghai Implementing Rules that did not exist in national legislation. National regulations issued in 1987, the Interim Provisions for Monitoring Statistics on Foreign Debt<sup>135</sup> require only that loans be registered with the SAEC Sub-Bureau and that periodic reports on loan activity be submitted.<sup>136</sup> However, the Shanghai Implementing Rules at Article 11(A)(2)(5) provided that approval was required from the Sub-Bureau for each payment of foreign exchange to a foreign bank abroad, the implication being that every time a payment of interest or principle on a loan was to be made, the approval of the Sub-Bureau was necessary.

At the opposite end of the spectrum, the Shanghai Implementing Regulations were actually more lenient in regard to the submission of various yearly statements in respect to foreign exchange to the SAEC, allowing one month more than the 1983 Implementing Rules for submitting some of the required statements.<sup>137</sup>

To illustrate how rules at the local level can vary, the Beijing Municipality Sub-Bureau of the SAEC also issued rules regulating FIE bank accounts entitled Interim Measures on Foreign Exchange Control of Enterprises with Foreign Investment.<sup>138</sup> These measures mirrored national legislation in the areas mentioned above, adding no new requirements or areas that needed approval. As indicated by this example, specification by localities of national law makes a careful study and comparison of local rules vital to foreign investors in choosing an investment site.

It is through the multi-layered process of specification that law gradually loses some of the characteristics that set it apart from policy - universality, certainty, and consistency, and this is assisted in part by the oft-cited requirement that local enactments need only be consistent with

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<sup>135</sup> Interim Measures for Monitoring Statistics on Foreign Debt (promulgated July 17, 1987).

<sup>136</sup> Timothy A. Gelatt, *Beijing Issues New Measures for Foreign Invested Firms*, E. ASIA EXEC. REP., Oct. 15, 1988, at 8, 11.

<sup>137</sup> Article III.A, C.

<sup>138</sup> See generally Gelatt, *supra* note 136, at 8.



the spirit (*jinsheng*) rather than the letter of the law. The rationale of legal flexibility, combined with the resulting broad scope for localities to specify law, far from encouraging reform in line with legal accountability, has led to legal implementation being based on the same principles as policy implementation. It has not been necessary to institute reform at the local level in order to specifically implement law, for at this level, law and policy are virtually indistinguishable. They are virtually two sides of the same coin. As a result, many local administrative bodies which lack lawmaking power (counties, townships, cities) have granted themselves virtually unlimited powers of office through the enactment of *xingzheng cuoshi*<sup>139</sup> - so many in fact that legal regulation at this level has been described by one Chinese legal scholar as being in "a state of total disarray."<sup>140</sup>

Legal implementation, therefore, mirrors policy implementation. Law is implemented in the same way as policy has been implemented traditionally, that is, in the manner of law by decree. The consequence is that although law on the surface may look ostensibly Western and familiar, it loses these familiar characteristics in the course of specification.<sup>141</sup> Policy has traditionally involved a great amount of discretion in being retained at the local level by implementing authorities. In China, laws share this characteristic. Local bodies are given the power to draft the rules that they please within certain vaguely specified limits as broad laws leave them with the responsibility of filling in the detail. The system that the legal system was supposed to replace, that of normative determination through policy decree, therefore continues under the guise of the rule of law - at the cost of universality, predictability, consistency, and ultimately, in some cases, investor confidence.

#### IV. ADMINISTRATIVE INTERPRETATION

We have discussed how administrative bodies, through administrative specification, seek to adjust law to reality. Administrative authorities with lawmaking power have another device through which they can construe law and regulations in a way that reflects departmental policy and/or the social reality of the regulated. This device is known as administrative interpretation.<sup>142</sup>

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<sup>139</sup> Zhuang, *supra* note 72, at 10. Zhao, *supra* note 78. In Chinese this phenomenon is expressed as being *yueding sucheng* - accepted through common practice.

<sup>140</sup> Zhuang, *supra* note 72, at 10.

<sup>141</sup> Imported Western legal concepts are often "tested" at the local level first, as has been the case in Shenzhen. At the testing stage, "alien" legal concepts may be less prone to dilution through specification as fewer levels of specification exist than would be the case for a national law.

<sup>142</sup> Chinese legal theorists distinguish between formal and informal interpretation.

Administrative interpretation is not only the most important mode of legal interpretation in the PRC, it is in effect an authoritative supplement and accretion to legislation. "Indeed, the principle of jurisprudence adopted in the PRC is that only the enacting body or its representative or controlling organ is competent to interpret any piece of legislation in a manner that is generally binding."<sup>143</sup> The State Council, its subordinate ministries and departments have the authority to make interpretations in regard to the specific application of administrative rules and regulations not subject to judicial and procuratorial work.<sup>144</sup> Similarly, responsible departments under local people's governments are charged with making interpretations concerning the specific application of laws and regulations of a local character.<sup>145</sup>

Express authority for an administrative body to interpret a certain piece of legislation is normally conferred in the regulation itself. The methods by which such interpretations are issued are not specified. The same administrative bodies are usually responsible for the implementation of the law or regulation and are usually the original drafters. Each ministry and commission has personnel responsible for drafting laws and before a bill is proposed by the State Council, a draft version is prepared by the relevant subordinate unit.<sup>146</sup> It is not surprising, therefore, that such bodies ensure that they are allocated as much discretion as possible, which allows them to define their position through interpretation or change position through reinterpretation where necessary.

Administrative interpretation takes its form in various types of documentation and is issued to explain *xingzheng fagui* or *guizhang*. Such interpretations are considered as "abstract administrative acts"<sup>147</sup> with

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Informal interpretations, which appear in scholarly writings, are not binding and lose their persuasive effect if a formal interpretation has been issued on the same point. Formal interpretations are made by state organs and have binding legal force. Formal interpretation in turn can be separated into legislative, judicial, and administrative interpretation; administrative interpretation and legislative interpretations being accepted sources of administrative law in the PRC. Our focus will be on administrative interpretation. TAO-TAI HSIA & CONSTANCE JOHNSON, *LAW MAKING IN THE PEOPLE'S REPUBLIC OF CHINA: TERMS, PROCEDURES, HIERARCHY AND INTERPRETATION* 20 (1986).

<sup>143</sup> Joseph Y.S. Cheng, *The Constitutional Relationship Between the Central Government and the Future Hong Kong Special Administrative Region Government*, 20 CASE W. RES. J. INT'L L. 65, 79 (1988).

<sup>144</sup> Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law, Item 3 (1981). An English translation is available in WESTLAW, China Database, File no. 0029.

<sup>145</sup> *Id.* at Item 4.

<sup>146</sup> Tao-tai Hsia & Constance A. Johnson, *Lawmaking in China, Part IV*, E. ASIAN EXEC. REP., Aug. 15, 1987, at 9-10.

<sup>147</sup> "Abstract administrative acts" refers to instruments passed by administrative

legal status equal to that of the instrument that they are interpreting. Documents are issued in the form of Circulars and contain the name *jieshi* (interpretation) or *shuoming* (explanation) in their title. Interpretations or explanations are often issued at the request of local administrative organs. Examples of such documents are MOFERT Circular in Respect to its Interpretation of Articles 71 and 74 of the Equity Joint Venture Law Implementing Regulations [(85) *Waijinmaofazi* No. 34]<sup>148</sup> and [(85) *Waijinmaofazi* No. 30],<sup>149</sup> issued pursuant to MOFERT's right of interpretation under Article 117 of the Equity Joint Venture Implementing Regulations. A further example is the Reply by the SAIC Registration Section in Respect to Request for Interpretation of Article 5 of the Provisional Provisions on the Percentage of Registered Capital and Total Investment [*Qiwai* (1987) No. 54].<sup>150</sup>

A further example of administrative interpretation is the State Economic Commission<sup>151</sup> Explanation in Respect to Method of Implementation of Article 5 of the Mechanical and Electrical Product Importation Substitution Management Measures Concerning Sino-foreign Equity and Cooperative Joint Ventures (Explanation), released in October, 1987, pursuant to the power of interpretation that the State Economic Commission accorded to itself under Article 8 of the State Economic Commission Management Measures Concerning Mechanical and Electrical Product Importation Substitution of Sino-foreign Equity and Cooperative Joint Ventures (Management Measures)<sup>152</sup> to clarify the State Economic Commission's position in respect to Article 5 which provided:

Customers who need listed products (*on mechanical and electrical import substitute products lists*) should order them through (*local*) manufacturers or submit bids through the China Mechanical and Electrical Facility Tendering Centre (or through tender companies or centres ap-

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authorities that are generally applicable to numerous situations. "Specific administrative acts," which are reviewable by the courts and administrative organs, are administrative acts which are not universal in nature and aimed at a specific target. ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 204 (1992).

<sup>148</sup> Foreign Economic Relations, *supra* note 75, at 75.

<sup>149</sup> *Id.* at 78.

<sup>150</sup> *Id.* at 19.

<sup>151</sup> Note that the State Economic Commission is now defunct, having been recently abolished and its functions reallocated to other administrative departments under the State Council.

<sup>152</sup> State Economic Commission Management Measures Concerning Mechanical and Electrical Product Importation Substitution of Sino-foreign Equity and Cooperative Joint Ventures (1987). Foreign Economic Relations, *supra* note 75, at 24.

proved by the State Economic Commission) in order to direct customers to choose their goods locally as import substitutes.<sup>153</sup> (*italicised words added*)

The purpose of this provision was to direct joint ventures to purchase products produced by domestic enterprises approved as suitable to replace products imported from overseas.

The Explanation provided that:

Any good listed in a nation import substitution list will be regulated in accordance with *Guofa* (1985) No. 90 and the State Economic Commission Circular Concerning Further Control of Mechanical and Electrical Products Importation Reports [*Jinglin* (1986) No. 302, issued by the State Economic Commission with State Council approval]. Under state controlled mechanical and electrical product importation (*note some are controlled at the local level, e.g. elevators*), that is to say, listed products should not be imported in principal. If certain special reasons exist to justify importation, one should first tender for goods locally in accordance with the requirements of the China Mechanical and Electrical Products Facility Tendering Centre. If the need for the goods cannot be satisfied locally through tender, then importation will be permitted. However, in this situation one is not entitled to the relevant preferential tariff deductions; if one has imported listed mechanical or electrical products at one's own accord without bidding, he is not entitled to preferential tax deductions (*and the usual import duty*), will be levied with the import adjustment tax. (*italicised words added*)

It is significant that although the Management Measures were formally issued, both the Explanation and one of the documents that it refers to, Document No. 90, were not. This illustrates two features of administrative interpretation. First, it perpetuates a situation in which legal transparency is absent. Article 5 on its face gives no indication that it is intended that Document No. 90 is to continue to be applied. Indeed, as both the Explanation and Document No. 90 are not issued, it is virtually impossible for the regulated parties to make any sense of the patterns of implementation of Article 5, which, typically, is short on detail and long on principle.

Second, the fact that the Explanation refers to Document No. 90, arguably *guifangxing wenjian* on account of its nature as an unissued document, indicates the methods that administrative departments employ in order to perpetuate the efficacy of unpublished documents as the true basis of regulation. Document No. 90 was formulated in 1984. Rather

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<sup>153</sup> *Id.* at 25.

than specifying the content of Document No. 90 within the body of the Management Measures, the department favoured perpetuating its status as an informal, hidden document, indicating the departmental policy of retaining as much flexibility as possible to issue lower level documents as the true determinants of regulatory norms.

On its face, Article 5 of the Management Measures makes no suggestion that product types that are listed as import substitutes can be imported from overseas. However, the Explanation qualifies this by stating that although listed products should not be imported in principle, that one may actually do so if one fulfills certain conditions, the sanction being that one will incur significant extra tariffs if one chooses to take this course of action. Thus, the Explanation has the effect of softening Article 5 at the expense of legal certainty, as, needless to say, the department empowered with the right of interpretation may at any time alter a previous interpretation by issuing a new one depending on changes in departmental or CCP policy.

Occasionally administrative agencies go too far with their administrative interpretations. A case in point is Article 3 of the Explanation of Various Problems of the Public Security Bureau's Implementation of the Regulations of the PRC on Administrative Penalties for Public Security (PSB Explanation), which interpreted Article 39 of the Regulations of the PRC on Administrative Penalties for Public Security (1986).<sup>154</sup> Article 39 provided:

If an offender or victim protests the ruling of the public security organ or the people's governments of townships or towns, he may petition the public security organ, at the next higher level within five days after receiving the notice, the public security organs at the next higher level shall make a new ruling within five days after receiving the petition. Whoever protests the ruling of the public security organ at the next higher level may file suit with the local people's court within five days after the notice.<sup>155</sup>

However, Article 3 of the PSB Explanation stated that:

If an offender or victim protests the ruling of the public security organ in regard to compensation or medical damages, he may petition the

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<sup>154</sup> Laws and Regulations of the PRC on Administrative Penalties for Public Security, art. 39 (promulgated Sept. 5, 1986). An English translation is available in WESTLAW, Chinalaw database, and in the Legislative Affairs Commission of the Standing Committee of the NPC, *The Laws of the PRC, 1983-1986* (1989), 271.

<sup>155</sup> Translation from the Legislative Affairs Commission of the Standing Committee of the NPC, *supra* note 154.

public security organs at the next higher level *within two days* after receiving the notice of the initial decision and that the decision of the superior organ *is final and conclusive*.

In a case before the administrative bench of the Xinyang District Intermediate Court, the court declined to apply the Explanation as they considered that the PSB Explanation narrowed down the actionable rights conferred by the Regulations in two obvious respects - that the time period within which appeal must be made was reduced from five to two days, and that appeal to the people's court was precluded. This, however, is some indication of how administrative agencies have at times abused their right to issue interpretations, a danger implicit in a system which allows formal powers of rule making, interpretation, and enforcement to lie in the same body.

#### V. CONCLUSION

The Chinese have adopted a rationale that lends itself to the creation of law that is broad and inherently flexible. Laws are characterised by features, namely principle-like pronouncements, vagueness and ambiguity, broadly worded discretions, undefined terms, omissions, and general catch-all phrases, that assist flexibility in the issuing of lower implementing documents. Administrative bodies have two techniques at their disposal to introduce specificity. These are administrative specification and administrative interpretation. Through such devices, laws are "adjusted" in ways that best suit the implementing agency. It has also been shown that this process occurs at the level of local government. Even local governments that lack formal lawmaking power have the power to specify law, by issuing "administrative measures," to adjust the content of legal norms to "suit local conditions."

The end result is that law is treated as only a flexible guideline that sets the parameters within which administrative discretionary lawmaking authority can be practised. Administrative organs thus are free to reinterpret law as they see fit, either to reflect departmental policy or to reflect the conditions of local reality. The authority to specify and interpret law is thus the source of enormous power, power that can be easily abused and which administrative organs are anxious to protect.

Foreign-funded enterprises in China should therefore not take the letter of higher law for granted - they would be well-advised to access, where possible, the relevant rules, interpretations, and circulars. Only then will legal regulation begin to take on some transparency. They should expect reinterpretation of laws in accordance with shifts in policy at both the national and local levels. Above all, they must be prepared to show ingenuity - for the only effective way to contend with legal flexibility is to be even more flexible in response.

