

The Making of the Chinese Bankruptcy Law: A Study in the Chinese Legislative Process

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Chinese television viewers were surprised last summer when they turned on their sets and witnessed actual and heated debates of the National People's Congress Standing Committee (NPC-SC) on the draft bankruptcy law. Previously, approval of laws by the National People's Congress (NPC), China's elected legislature, or by its standing committee, had been dismissed as no more than rubber-stamp formalities. Passage of the bankruptcy law of the People's Republic of China (PRC)¹ had been prematurely announced by the official government journal, the *Beijing Review*.² But the NPC-SC not only delayed passage of the new bankruptcy law, but also made numerous substantive amendments to the law. In the words of a subsequent Chinese press commentary, "the NPC-SC exhibited that its function and impact have been strengthened, which has deep and far-reaching significance."³

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Since coverage of the legislative process by the Chinese press is one focus of this article, many of the sources cited will be from general-circulation PRC Chinese newspapers and magazines. In the interest of accuracy, the original Chinese sources will be used rather than translations. The author's translation of the titles will precede their *pinyin* transliterations. Sources from Hong Kong will be marked "(HK)," and sources in English will be marked "(E)."

1. Before the founding of the People's Republic of China in 1949, China under the Qing Dynasty had passed a Bankruptcy Statute (Pochan Lu) in 1906. The Kuomintang government of the Republic of China had also passed a bankruptcy law in 1935. DICTIONARY OF JURISPRUDENCE [FAXUE CIDIAN (ZENGDEGBAN)] (Supp. Ed. 1985). In this article, the terms "China" and "Chinese" shall refer to the People's Republic of China.

2. *Bankruptcy Law to Come Out*, Beijing Rev., Sept. 8, 1986, at 4 (E).

3. Hu & Li, *Debate of the Debate on Temporarily Not Putting the Bankruptcy Law to a Vote* [Dui pochansha zanshi bu fubiaoju de yilun de yilun], China Legal News [Zhongguo Fazhi Bao], Oct. 27, 1986.

The spirited debates in the NPC-SC were the climax of a remarkable two-year legislative process that culminated in the passage of the "Law of the PRC on Enterprise Bankruptcy (For Trial Implementation)" on December 2, 1986 (hereinafter referred to as the Bankruptcy Law).⁴ This process is, however, still unfinished. According to the uneasy compromise reached in the NPC-SC, the Bankruptcy Law will not be implemented until three months after the implementation of the PRC Law on Enterprises Owned by the Whole People (the State Enterprise Law).⁵ The State Enterprise Law was tabled by the NPC-SC in March 1987, and will not be passed until, at the earliest, the 1988 session of the entire NPC. The Bankruptcy Law therefore now floats in legal limbo, passed but not implemented.⁶ The legislative process behind the Bankruptcy Law has been detailed with unprecedented openness in the Chinese media, in stark contrast to the shroud of secrecy that has surrounded the drafting of previous Chinese laws and regulations.

In light of the conservative backlash to the student demonstrations that had called for greater democracy and greater freedom of the press, this article will chronicle and bear witness to the hopeful first steps made in both these spheres during the making of the Bankruptcy Law. One reason that these democratic developments may be more long-lasting is that their beneficiaries—e.g., those in the National People's Congress who effectively voiced their opposition to the Bankruptcy Law—may be precisely those who oppose the rapid pace of economic and political reform urged by Premier Zhao Ziyang and his associates. As evident in the legislative process of the Bankruptcy Law, allowing more dissenting voices may, in the short run at least, actually strengthen the opposition to these reforms. Therein lies the irony of democracy.

4. [*Zhonghua renmin gongheguo qiye pochufa (shixing)*], People's Daily [Renmin Ribao], Dec. 3, 1986; a rough English translation appears in SUMMARY OF WORLD BROADCASTS FE/8435/CI/1, Dec. 6, 1986.

5. [*Zhonghua renmin gongheguo quanmin suoyou zhi qiyefa*]. For a summary of its legislative history, see *infra* note 101 and accompanying text. In this article, the term "state enterprise" (*guoying qiye*) will be treated as synonymous with the term "enterprise owned by the whole people." Only the latter term, however, is defined in the General Principles of Civil Law of the PRC.

6. The legislative process for the Bankruptcy Law has not been lengthy in comparison with past laws. For example, the Criminal Law and the Criminal Procedures Law were first drafted in 1956, and had gone through 33 drafts by 1963, but were finally passed in 1979 after the Cultural Revolution. From drafting to final passage, the General Principles of Civil Law took seven years (1979–86), the Patent Law, five years (1979–84), the Military Service Law, four years (1980–84), the Minority Nationality Region Self-Government Law, four years (1980–84) and the Cultural Artifact Preservation Law, three years (1979–82). Guo, *Discussion of the Conditions, Steps and Methods for Legislation in Our Country (Part I)* [*Lun woguo lifa de tiaojian, buzhou yu fangshi (shang)*], LAW SCIENCE Q. [FAXUE JIKAN], No. 6, 1986, at 4.

Part I will follow the course of the draft bankruptcy law through the successive stages of the legislative process in basic chronological order, beginning with the earliest public suggestions of the concept of a bankruptcy law, and the unprecedented publication of an initial draft of the law in a popular magazine in 1984. Some stages of this legislative process, such as the opinion solicitation procedure, the trial implementation of a local version of the law and the conference of scholars and officials may seem unfamiliar to those who would prefer the formal constitutional procedures of Western political systems. Yet, these are all mechanisms for gathering the input and participation of different interest groups in the Chinese system, mechanisms that may develop into uniquely Chinese legislative institutions.

As in the past, however, the Chinese law-making process can still strongly resemble an orchestrated propaganda campaign. Distinguishing between what is propaganda and what is genuine participation in the legislative process is a constant issue in the evaluation of potentially democratic institutions in China. The tension between these two perspectives underlies the analysis of every stage of the legislative process, including, for example, the opinion poll on the bankruptcy law and the trial implementation of bankruptcy systems in selected test cities. In another interesting innovation, the Chinese drafters also decided to discuss with foreign lawyers their experience with their own bankruptcy laws. In meetings in August 1986, resident and visiting foreign lawyers in Beijing were provided with a rare glimpse into the thinking of some of the drafters. In addition, the article will trace the draft bankruptcy law through the sessions of the NPC-SC and NPC. So little study has been done on actual legislative procedures in the PRC that it may be useful to walk through the legal framework with this case study.

Part II of this article will focus on the major issues in the debates on the draft bankruptcy law during the 16th, 17th and 18th sessions of the NPC-SC of the 6th National People's Congress. Instead of imposing on the Chinese legislative process the perspectives and prejudices of Western law, this article will focus on the issues that were the most important to the Chinese lawmakers themselves. The article will examine the issues of threshold of bankruptcy, scope of the law, punishment of management and protection of workers. These were the issues upon which there were important amendments during the NPC-SC sessions, and were the same issues that the Chinese drafters discussed with the foreign lawyers. The article will not undertake a comprehensive legal analysis of the Bankruptcy Law, but will instead concentrate generally on the form and manner of the actual NPC-SC debates on these issues. The article will also examine a recurring

dynamic in these debates that is a distinct feature of contemporary Chinese legal discourse on the ongoing economic reforms:

I. THE LEGISLATIVE PROCESS

A. State Council Study

A reasonable starting point⁷ for tracing the legislative process of the Bankruptcy Law is a 1983 study on technological progress in China conducted by the Technology and Economics Research Center of the State Council.⁸ The study concluded that the only way to accelerate technological progress in China was to enact a bankruptcy law that would have the effect of weeding out inefficient and technologically outdated enterprises.

The study was presented to a national conference in 1983, and parts of it were published in the influential national magazine *Outlook* (*Liaowang*).⁹ Although not part of the formal legislative procedures, these first public suggestions of the concept of a PRC bankruptcy law stimulated a great deal of interest and discussion among officials and the public.¹⁰

B. Proposal to the NPC

Under the 1982 PRC Constitution, all "basic laws" (*jiben falü*)¹¹ of the PRC must be passed by the NPC, and all "other laws" (*qita falü*) other than those passed by the NPC must be passed by the NPC-

7. The concept of a law to deal with closed and bankrupt enterprises has been suggested in the past. See, e.g., *Ideas on Developing the Effectiveness of Insurance Companies in Competition* [*Zai jingzheng zhong fahui baoxian gongsi zuoyong de shexiang*], FIN. & TRADE ECON. [CAIMAO JINGJI], No. 5, 1980 (proposing establishment of mandatory unemployment insurance system), cited in CAO, DISCUSSION OF THE ENTERPRISE BANKRUPTCY LAW [TANTAN QIYE POCHANFA], China Econ. Press, July 1986.

8. *Proposals Concerning Various Questions on Striving for Scientific Technological Progress and Promoting Economic Development* [*Guanyu zhengqu keji jinbu cujin jingji fazhan ruogan wenti de jianji*], INDUS. ECON. MGMT. [GONGYE JINGJI GUANLI], No. 3, 1984, cited in Cao, *supra* note 7, at 14.

9. *Preliminary Discussions on Handling the Bankruptcy of Enterprises with Chronic Losses* [*Shilun changqi kuisun qiye de pochan chuli wenti*], OUTLOOK, No. 9, Feb. 27, 1984.

10. See, e.g., Cao, *supra* note 7, at 15 (describing interest among members of Shenyang Communist Party Standing Committee).

11. The precise scope of legislative powers of the NPC and the NPC-SC has not been clearly defined, and practice has not been consistent. Some have pointed out, for example, that the Economic Contract Law was passed by the NPC, whereas the Foreign Economic Contract Law was passed by the NPC-SC. Wang, *The Legislative Process in the PRC* [*Zhonghua renmin gongheguo de lifa chengxu*] (unpublished paper). For some conventional definitions of "basic laws," see W. DAYING, ET AL., THE PROBLEM OF CHINESE SOCIALIST LEGISLATION [ZHONGGUO SHEHUI ZHUYI LIFA WENTI] (1984).

SC.¹² The Law on the Organization of the NPC stipulates the required numbers of NPC representatives or NPC-SC members and the particular governmental organs with the right to introduce bills (*yi an*) to the NPC or the NPC-SC.¹³ In practice, NPC representatives will generally only propose to the NPC that a certain law should be enacted, but the actual drafting of the law and its introduction to the NPC or NPC-SC will usually be left to other governmental units, such as the State Council.¹⁴

In the case of the Bankruptcy Law, the first formal step in the legislative process was the proposal made in May 1984 to the second session of the 6th NPC by a group of NPC representatives that the enterprise bankruptcy law be enacted.¹⁵ The proposal was subsequently sent to the Economic Legislation Research Center of the State Council (ELRC), which held six symposia on the bankruptcy law between May and October of 1984. The ELRC has in the past played a major role in the planning and drafting of laws and regulations,¹⁶ although its

12. In addition, during the period that the NPC is in recess, the NPC-SC has the authority to make additions and amendments to NPC laws which do not conflict with the basic principle of such laws. THE CONSTITUTION OF THE PRC [ZHONGHUA RENMIN GONGHEGUO XIANFA] arts. 62(3), 67(2), reprinted in COLLECTION OF LAWS OF THE PRC 1979-1984 [ZHONGHUA RENMIN GONGHEGUO FALÜ HUIBIAN 1979-1984] 18, 20 (Legislation Affairs Commission of NPC-SC, 1984). A rough translation of the Constitution appears in News From Xinhua News Agency—Special, Dec. 6, 1982. In contrast, under the 1954 PRC Constitution, the NPC was the "only authority for legislative power," an arrangement that proved to be impractical given the size of the NPC and the fact that it met only once annually. See Yao & Zheng, *Brief Discussion of the Special Characteristics of the Legislative System of Our Country* [Qianlun woguo lifa tizhi de tedian], LAW SCIENCE Q. [FAXUE JIKAN], No. 2, 1985, at 6. The NPC-SC publishes regularly the Public Gazette of the NPC-SC of the PRC [Zhonghua renmin gongheguo quanguo renmin daibiao dahui changwu weiyuanhui gongbao].

13. Bills may be proposed to the NPC-SC by the specialized committees of the NPC, the State Council, the Central Military Affairs Commission, the Supreme People's Court, the Supreme People's Procurate and a group of ten or more members of the NPC-SC. The Law of the PRC on the Organization of the NPC [Zhonghua renmin gongheguo quanguo renmin daibiao dahui zuzhifa], art. 32 [hereinafter NPC Law], reprinted in 1984 COLLECTION OF LAWS OF THE PRC 1979-1984, *supra* note 12, at 375. Bills to the NPC may be introduced by a group of 30 or more NPC representatives, any provincial delegation (*daibiaotuan*) of the NPC, the Presiding Committee of the NPC, the NPC-SC, the specialized committees of the NPC and the state organs specified above authorized to introduce bills to the NPC-SC. NPC Law, arts. 9, 10.

14. See generally D. WU & Y. REN, COMPARATIVE LEGISLATIVE STUDY [BIJIAO LIFAXUE] 161, 305-7 (1985).

15. See Li, *The Enterprise Bankruptcy Law is in Gestation* [Qiyepochanfa zai yunyu zhong], DEMOCRACY AND LEGAL SYS. [MINZHU YU FAZHI], 1985, at 6.

16. The Economic Legislation Research Center drafted in 1982 the 1982-1986 Economic Legislation Program (Draft) [1982-1986 Jingji lifa guihua (caogan)], which was the five-year plan for the timing of the introduction and implementation of laws and regulations of the PRC. Pan, *Discussion of Legislation Forecast and Legislation Program* [Tan lifa yuce yu lifa guihua], LAW & ORDER [FAZHI JIANSHE] No. 1, Feb. 15, 1987. There is a similar five-year plan for the Seventh Five-Year Plan, drafted by the Legislation Bureau of the State Council. The existence of such five-year plans for the timing of laws raises doubts about the spontaneity of the introduction of draft laws to the NPC and NPC-SC.

functions have reportedly been consolidated with those of the Legislation Bureau of the State Council.

C. 1984 Central Committee Decision

No analysis of the legislative process in the PRC would be complete without a discussion of the central role of the Communist Party. On October 20, 1984, the 3rd plenary session of the 12th Communist Party Central Committee passed the seminal Decision Concerning Reform of the Economic Structure (1984 Central Committee Decision).¹⁷

Even though the 1984 Central Committee Decision does not mention the bankruptcy law explicitly, many of the theoretical underpinnings for the concept of a PRC bankruptcy law, such as the differentiation between the right of ownership and the right of operations in state enterprises, were first legitimized there.¹⁸ The press and scholarly articles discussing the bankruptcy law (and the the State Enterprise Law) use the vocabulary of the 1984 Central Committee Decision, and many cite it in justifying their arguments.

D. Publication of Proposal Draft

In an unprecedented innovation, a complete draft of the Law on Enterprise Bankruptcy and Reorganization (Proposal Draft)¹⁹ was published in 1984 in the popular magazine *Democracy and Legal System*.²⁰ The Proposal Draft was part of an article by Mr. Cao Siyuan, who was later appointed chairman of the bankruptcy law drafting task force.²¹ The detailed fourteen-article Proposal Draft contained the basic ele-

17. [Guanyu jingji tizhi gaige de jue ding], State Council Gazette, *infra* note 23, vol. 26, 1984 at 899.

18. See Sun, *Preliminary Discussion of the Bankruptcy Problem of State Enterprises of Our Country* [Qiantan woguo guoying qiye de pochan wenti], ECON. LEGAL SYS. [JINGJI FAZHI], No. 5, 1986, at 3, 4.

19. [Qiye pochan zhengdunfa (jianyi gao)], reprinted in Cao, *Legal Measures for Strengthening the Vitality of Enterprises* [Zengqiang qiye huoli de falü cuoshi], DEMOCRACY AND LEGAL SYS. [MINZHU YU FAZHI], Nov. 1984, at 7.

20. The magazine *Democracy and Legal System* (English name changed to *Democracy and Legality* in 1987) usually carries stories of crime and many cartoons, and has even sponsored a television quiz show on law. According to a congratulatory message from NPC-SC chairman Peng Zhen, the mandate of the magazine was to "popularize and propagandize." *Id.*, Jan. 1985, at 2. The many important articles on the Bankruptcy Law that have appeared in the magazine may be characterized as propaganda in support of the legislative agenda of the government, but they inevitably had the effect of stimulating informed debate among the general public.

21. Mr. Cao was a staff member of the Technology and Economics Research Center that had conducted the 1983 study. He has played an unusually prominent role in the legislative process of the Bankruptcy Law, publishing numerous articles in the Chinese press (and also a 200-page book) in support of the law, as well as generating support in the Hong Kong press. See, e.g., *Domestic Enterprise Bankruptcy Law, Cao Siyuan Deems Time is Ripe* [Neidi pan qiye pochanfa, Cao Siyuan cheng shiji chengshu], Wen Wei Pao, Jan. 14, 1986 (HK).

ments of all later drafts of the bankruptcy law. The publication of a draft of the bankruptcy law more than two years before its final passage was not required by the formal Chinese legislative procedures, and is an important precedent for the incipient democratization of the Chinese legislative process.

E. Drafting Task Force

The State Council (which corresponds roughly to the executive branch in Western political systems) has drafted and introduced many of the draft laws considered by the NPC-SC and NPC.²² In addition, the State Council itself can issue "administrative measures," "administrative legal provisions (*fagui*)" and "decisions and decrees."²³ It has also been specifically authorized by the NPC to issue regulations relating to economic reform and foreign trade and investment,²⁴ and to certain tax and worker retirement matters.²⁵ Draft laws introduced by the State Council and regulations issued by the State Council are usually drafted primarily by the commission or ministry under the State Council that is in charge of the subject matter of the draft law.²⁶ The Legislation Bureau (*Fazhiju*) of the State Council also plays an important role in the drafting of laws and regulations.²⁷

The State Council coordinated the drafting of the draft bankruptcy law, and also introduced it to the NPC-SC. The State Council approved the formation of a bankruptcy law drafting task force on December

22. Certain major laws, however, have been introduced to the NPC by the NPC-SC or the NPC Law Committee, such as the Criminal Law, the General Principles of Civil Law, and the Criminal Procedure Law. Wang, *supra* note 11.

23. THE CONSTITUTION OF THE PRC art. 89(1). See also Li, *The Constitutional Basis for Administrative Legislation by the State Council* [*Guowuyuan xingzheng lifa de xianfa yiju*], LAW & ORDER [FAZHI JIANSHE], No. 6, 1985, at 3. The State Council publishes a Public Gazette about every ten days which, although only covering major regulations and decrees, is nevertheless the most up-to-date and comprehensive single publication of Chinese government documents.

24. Decision of the Third Session of the Sixth NPC of the PRC Concerning Delegating Authority to the State Council Such That It May Formulate Interim Provisions or Regulations in the Areas of Reform of the Economic Structure and Opening Towards the Outside [*Zhonghua renmin gongheguo diliujie quanguo renmin daibiao dahui disanci huiyi guanyu shouquan guowuyuan zai jingji tizhi gaige de duiwai kaifang fangmian keyi zhiding zhanxing de guiding huozhe tiaoli de jueding*] (NPC, Apr. 10, 1985) NPC-SC Gazette, No. 3, May 20, 1986.

25. See Yuan, *Special Characteristics, Current Conditions and Countermeasures for Legislation During the Period of Reform* [*Gaige shiqi jingji lifa de tedian, xianzhuang ji duice*], STUDIES IN LAW [FAXUE YANJIU], No. 1, 1987, at 7.

26. For example, the Fisheries Law was drafted originally by the Ministry of Fisheries. The Environmental Protection Law was drafted originally by the Ministry of Urban Construction and Environmental Protection. Wang, *supra* note 11.

27. The role of the Legislation Bureau in drafting "administrative legal provisions" has been codified. See *Interim Regulations on the Procedures for Formulating Administrative Legal Provisions* [*Xingzheng fagui zhiding chengxu zhanxing tiaoli*], CHINA LEGAL NEWS [ZHONGGUO FAZHIBAO], May 11, 1987 [hereinafter *Interim Regulations*].

29, 1984.²⁸ The drafting task force, headed by Mr. Cao, was under the leadership of the ELRC, the State Economic Commission²⁹ and the State Administration for Industry and Commerce.³⁰ The drafting task force included officials from not only commissions and ministries subordinate to the State Council, but also the Supreme People's Court and the Legislative Affairs Commission of the NPC-SC.³¹ In early 1985, the drafting task force travelled to major cities and provinces in China in order to investigate and solicit opinions on the bankruptcy law.³² In June, Mr. Cao published an article listing the 35 major questions in the drafting of the law.³³

F. Trial Implementation in Test Cities

Over the past few years, China has developed a successful procedure for refining new laws by implementing local versions of them in the Special Economic Zones before their eventual promulgation on a national level. This was the practice, for example, with the foreign economic contract law³⁴ and the technology import regulations,³⁵ which were based on prior local versions promulgated for the Shenzhen

28. *Formulating the Enterprise Bankruptcy Law Helps to Promote the Reform of the Operations and Management of Enterprises* [Zhidìng qìyè pòchǎnfǎ yǒulìyú cùjìn qìyè gǎishàn jīngyíng guǎnlǐ], People's Daily [Rénmín Rìbào], June 17, 1986 [hereinafter *Formulating the Bankruptcy Law*].

29. The State Economic Commission would reportedly be responsible for drafting the "detailed implementing rules" to the bankruptcy law, to be implemented after approval by the State Council. See Zhang, *Explanation Concerning the "Enterprise Bankruptcy Law of the PRC (Draft)"* [Guānyú "Zhōnghuá rénmin gōnghégúo qìyè pòchǎnfǎ (cǎo'àn)" de shuōmíng], NPC-SC Gazette, No. 7, Dec. 20, 1986, at 16 (main vol. 419).

30. The State Administration for Industry and Commerce is in charge of issuing business licenses to enterprises, and in the earlier drafts was intended to play a major role in the bankruptcy process because it was thought to be a more impartial third-party that would be less reluctant to close a failing enterprise than the government department in charge of that enterprise. See Wang, *Establishing a Bankruptcy System Suitable to the Condition of Our Country* [Jiànli fùhé woguo guóqíng de pòchǎn zhìdù], LAW SCIENCE Q. [FAXUE JIKAN], No. 3, Apr. 1985, at 26, 28.

31. The drafting task force also included officials from the Ministry of Finance, the Ministry of Labor and Personnel, the Ministry of Foreign Economic Relations and Trade, and the People's Bank of China. See *Our Country is Currently Pressing Ahead on Drafting the Enterprise Bankruptcy Law* [Woguo zhèngzài zhūajìng zhìdìng qìyè pòchǎnfǎ], China Legal News [Zhōngguó Fǎzhì Bào], Jan. 20, 1986.

32. *Id.* Members of the drafting task force investigated in Beijing, Shenyang, Jilin, Chongqing, Wuhan, Qingdao, Guangzhou, Shenzhen, and other cities.

33. Cao, *Various Issues that Must Be Studied in the Drafting of the Enterprise Bankruptcy Law* [Qīcǎo qìyè pòchǎnfǎ xúyào yánjiū de ruògān wèntí], JURISPRUDENCE J. [FAXUE ZAZHI], No. 3, June 1985, at 3.

34. See Law of the PRC on Economic Contracts Involving Foreign Interests [Zhōnghuá rénmin gōnghégúo shèwài jīngjì hetóngfǎ], Mar. 21, 1985; Provisions of Shenzhen Special Economic Zone on Economic Contracts Involving Foreign Interests [Shenzhen jīngjì tèqū shèwài jīngjì hetóng guǐdìng], Feb. 7, 1984.

35. See Regulation of the PRC for the Administration of Technology Import Contracts [Zhōnghuá rénmin gōnghégúo jìshù yìnjìn hetóng guǎnlǐ tiáolǐ], May 24, 1985; Interim Provisions of the Shenzhen Special Economic Zone for the Import of Technology [Shenzhen jīngjì tèqū jìshù yìnjìn zhānxíng guǐdìng], Feb. 8, 1984.

Special Economic Zone. Instead of the recently developed Special Economic Zones, however, four industrialized cities where many older enterprises are located were designated as test cities for the Bankruptcy Law.³⁶ Local experimentation with new laws is only one aspect of the current Chinese policy of experimenting with reforms in selected cities.³⁷

On February 9, 1985, the Shenyang City Government issued the twenty-four-article Trial Provisions of Shenyang City for the Handling of the Bankruptcy and Closing of Urban Collectively Owned Industrial Enterprises (Shenyang Provisions).³⁸ Although the Shenyang Provisions applied only to collective industrial enterprises in Shenyang, they, nevertheless, constitute the first bankruptcy law (in the general English sense of the word "law") in the history of the PRC. This legislation was not without considerable constitutional problems. The Shenyang City Government, as the people's government in the capital city of Liaoning Province, had the authority to issue "rules" (*gui-zhang*),³⁹ which presumably encompass "provisions" (*guiding*). During the drafting of the Shenyang Provisions, however, the local people's court refused to recognize the proposed provisions as being enforceable in court.⁴⁰ A compromise was finally worked out whereby the Shenyang Provisions stipulated that application for bankruptcy would be made to the local Administration for Industry and Commerce (*gong-*

36. The four cities are Shenyang, Wuhan, Chongqing and Taiyuan. See Cao, *Eleven Factories in Four Cities Implementing on a Trial Basis the Enterprise Bankruptcy System* [*Sishi shiyichang shixing qiye pochan zhidu*], People's Daily [Renmin Ribao], Aug. 28, 1986.

37. For example, the Chinese government has been experimenting with stock and bond exchanges in Shenyang and Shanghai, the leasing of enterprises to individuals in Shenyang and elsewhere, and the conversion of enterprises into stock companies in Shenzhen and Xiamen Special Economic Zones.

38. [Shenyang shi guanyu chengshi jiti suoyou zhi gongye qiye pochan daobi chuli de shixing guiding], THE CHINESE BUSINESSMAN [ZHONGGUO QIYEJIA] No. 1, 1986, at 55. A translation of the Shenyang Provisions appears in D. Clarke, *It Don't Mean A Thing If It Ain't Got That Sting: The Theory and Law of Bankruptcy in China* (unpublished paper) (E). See Han & Han, *Discussing the Enterprise Bankruptcy Experiment of Shenyang City* [*Lun Shenyang shi qiye pochan shiyan*], JURISPRUDENCE J. [FAXUE ZAZHI], No. 2, Apr. 15, 1987, at 31.

39. Law of the PRC on the Organization of the Various Levels of Local People's Congress and Various Levels of Local People's Government [Zhonghua renmin gongheguo difang geji renmin daibiao dabui he difang geji renmin zhengfu zuzhifa], art. 35(1), reprinted in COLLECTION OF LAWS OF THE PRC 1979-1984, 415 [hereinafter Local Law]. This became article 51(1) after the 1986 amendments. See *infra* note 99. The State Council had also given approval to the Liaoning Provincial Government for designating Shenyang as a "comprehensive" test city for economic reform. See State Council Gazette, vol. 16, 1984, at 558.

40. Cao, *supra* note 7, at 17. The enforceability of local regulations has been a topic of great controversy among Chinese scholars. Compare Zhuang, *Inquiry Concerning the Theory of Law of Local Legislation of Our Country* [*Guanyu woguo difangxing lifa de fali tantao*], POL. SCIENCE & LAW [ZHENGZHI YU FALÜ], No. 1, Feb. 5, 1987, at 16 (supporting enforceability of regulations) with Xu, *Inquiry Concerning Various Problems of Local Legal Provisions* [*Guanyu difangxing fagui ruogan wenti de tantao*], STUDIES IN LAW [FAXUE YANJIU], No. 5, Oct. 23, 1986, at 9.

shang guanliju), which would carry out the bankruptcy procedures.⁴¹ Petition to the court would be a last resort only if the debtor or creditor refused to cooperate.⁴²

On August 3, 1985, three collective enterprises in Shenyang were given warnings of imminent bankruptcies under Article 6 of the Shenyang Provisions. The warnings stated that, unless they "revitalized" within one year, they would be declared officially bankrupt.⁴³ Before the passage of the Bankruptcy Law, a total of eleven state enterprises and collective enterprises in the four official test cities were given warnings of imminent bankruptcy.⁴⁴ Many of these enterprises have been described in great detail in the press, perhaps as negative propaganda examples.

G. Opinion Solicitation Procedure

In September 1985, the drafting task force completed the "Law of the PRC on Enterprise Bankruptcy (Opinion Solicitation Draft)" (hereinafter referred to as the Solicitation Draft).⁴⁵ Although the sixty-one-article Solicitation Draft was greatly refined from the Proposal Draft, it still differed significantly from what was to become the final Bankruptcy Law. The Solicitation Draft was circulated for comment to a large number of officials in central governmental agencies and in the provincial and municipal governments, and was reportedly amended over twenty times.⁴⁶ This opinion solicitation procedure is perhaps

41. Shenyang Provisions, art. 6.

42. *Id.* art. 23.

43. The text of the "bankruptcy warning public notice" [*pochan jingjie tonggao*] for one of the Shenyang enterprises is published in Ling, *There is Only One Way Out* [*Chulu zhiyou yitiao*], DEMOCRACY & LEGAL SYS. [MINGZHU YU FAZHI], July 1986, at 22. The three enterprises are the Shenyang Explosion Prevention Equipment Factory, the Shenyang Ferrous Metal Processing Factory, and the Shenyang No. 3 Agricultural Machinery Factory. Huang, *Failing Enterprises Need a Hand* [*Dui kuisun qiye yao la yiba*], People's Daily [Renmin Ribao], July 14, 1986; see also *Record of Three Bankrupt Enterprises in Shenyang* [*Shenyang sanjia gongchang pochanji*], Ming Po, May 20, 30, 1986 (HK).

44. The other nine enterprises are the Wuhan No. 3 Radio Factory, the Wuhan Measuring and Cutting Tools Factory, the Wuhan Experimental Cloth Mill, the Chongqing Washing Machine Factory, the Chongqing Jiangbei County Stone Boat Garment Factory, the Liujing Brick and Tile Collective (Chongqing), the Dawan Sewing Collective (Chongqing) and the Taiyuan Motorcycle Factory. See, e.g., Cao, *supra* note 36; *China Issues Warning To State-Owned Firms*, Asian Wall St. J. Weekly, Aug. 8, 1986 (HK & E). Guangdong Province has announced that it will close ten insolvent state enterprises. *Guangdong to Close Down Factories in Debt*, Ta Kung Pao (Weekly Supp.), Oct. 9, 1986 (HK & E).

45. [*Zhonghua renmin gongheguo qiye pochanfa* (caoran) (zhengqiu yijian gao)], Sept. 20, 1985.

46. Cao, *supra* note 7, at 16. The drafting task force also travelled to various cities to solicit opinions, including Shanghai at a conference on the Solicitation Draft sponsored by the municipal government and the magazine *Democracy and Legal System. Soliciting Opinions Concerning the Enterprise Bankruptcy Law (Draft)* [*Zhengqiu guanyu qiye pochanfa* (caoran) de yijian], DEMOCRACY & LEGAL SYS. [MINZHU YU FAZHI], Dec. 1985, at 6. In Shenyang, the city government gathered

the most important institution in the Chinese legislative process today for gathering the input of various constituents in the governmental bureaucracy.

H. Approval by the State Council

After the bankruptcy law drafting task force had compiled all the comments on the Solicitation Draft, it formulated a draft law. On January 31, 1986, the Standing Committee of the State Council,⁴⁷ in its 99th session, approved in principle the "Law of the PRC on Enterprise Bankruptcy (Draft)" (hereinafter referred to as the Draft Law).⁴⁸

I. Opinion Poll

A novel experiment was carried out in January 1986, when over 500 governmental cadres and enterprise managers and workers in four cities⁴⁹ were surveyed for their opinions on the bankruptcy law and on the current economic reform. The results were widely publicized in the press during the summer of 1986, including in detailed articles by graduate students of the Theory Department of the Communist Party Central Party School.⁵⁰ This attention by Party theorists may be an indication of high-level endorsement for the experiment.

Not surprisingly, the poll showed that a majority of the respondents agreed that the bankruptcy law should be promulgated. However, in a rather transparent attempt to slant the data, the report of the results of the poll stated prominently that 91% of the respondents believed that implementing the bankruptcy system was very essential *and* could

representatives from many enterprises, government and judiciary departments and schools to discuss the Opinion Solicitation Draft. See Cao, *Economic Reform Urgently Needs the Enterprise Bankruptcy Law* [Jingji gaige jixu qiye pochanfa], *id.* at 7, 9.

47. The Law on the Organization of the State Council [Zhonghua renmin gongheguo guowuyuan zuzhifa], Dec. 10, 1982, reprinted in *COLLECTION OF LAWS OF THE PRC 1979-1984* at 30. The law is brief, and does not contain detailed procedures on the legislative process. In practice, the Standing Committee of the State Council usually approves draft laws to be introduced by the State Council.

48. [Zhonghua renmin gongheguo qiye pochanfa (caoan)]. A summary of the content of the Draft Law appears in Wang, *The Enterprise Bankruptcy Law in Gestation* [Yunyu zhong de qiye pochanfa], *ECONOMIC LEGAL SYS.* [JINGJI FAZHI], No. 5., May 1986, at 7. See also *Our Country Is Currently in the Process of Formulating the Enterprise Bankruptcy Law*, *People's Daily* (Overseas Edition) [Renmin Ribao (Hawaiiban)], Feb. 5, 1986; *China Drafting Bankruptcy Law*, [Zhongguo niding pochanfa], Ming Po, Feb. 5, 1986 (HK).

49. The four cities were Harbin, Hefei, Changsha and Guilin. Of those surveyed, 40% were cadres of governmental departments in charge of industrial enterprises; 17% were decision-makers of enterprises; and 43% were staff and workers of enterprises.

50. See, e.g., Hu, Yang, Sun & Wang, *How Do the People Regard the Enterprise Bankruptcy Law* [Renmin rube kandai qiye pochanfa], *DEMOCRACY & LEGAL SYS.* [MINZHU YU FAZHI], July 1986 at 25.

be considered.⁵¹ Buried in statistics in another article is the actual breakdown of that figure—47% believed that implementing the bankruptcy system could be considered, and only 44% believed that it was very essential to implement the bankruptcy system.⁵² Even these figures are suspect, moreover, for in a revealing commentary on the Chinese conception of public opinion, another article reported ingeniously that 81% of those who had not participated in a propaganda seminar on the bankruptcy law thought that it would *not* be possible to promulgate and implement the law. But of those who had attended a seminar, 91% agreed that the bankruptcy law should be promulgated as soon as possible.⁵³ This data illustrated, according to the article, the importance of the role of propaganda.

J. Conference of Scholars and Officials

On June 15, 1986, a major policy conference on the "theory and practice of bankruptcy and closing of enterprises" opened in the test city of Shenyang, sponsored by the drafting task force, the Shenyang City Government and the Academy of Social Sciences of Liaoning Province.⁵⁴ Over 230 scholars and governmental officials from all over China attended this "dialogue" on policy. The timing of the conference was particularly interesting, because it began one day before the Draft Law was formally presented to the NPC-SC and coincided with the period during which the Draft Law was debated before the NPC-SC. The timing of the conference was thus orchestrated by the law's supporters, who wished to create the maximum impact for the introduction of the Draft Law. As later detailed in *Democracy and Legal System*, many of the issues in the debate on the bankruptcy law emerged at the conference.⁵⁵ The second conference on bankruptcy is scheduled to be held in the other test cities of Wuhan and Chongqing in the fall of 1987.

Conferences of this type provide important ad-hoc forums in the Chinese legislative process for fostering new ideas and gathering divergent opinions. Soliciting the opinions of experts at such conferences

51. *Id.*

52. Hu, Yang, Sun & Wang, *Society's Psychological Reactions to the 'Enterprise Bankruptcy Law'* [Dui 'qiye pochanyfa' de shehui xinli fanying], Beijing Daily [Beijing Ribao], Aug. 18, 1986 [hereinafter *Society's Reactions*].

53. Ling, *Essential Legal Measures for Pushing Forward the Reform of the Economic System* [Tuidong jingji tizhi gaige de biyao falü cuoshi], DEMOCRACY & LEGAL SYS. [MINZHU YU FAZHI], July 1986, at 20 [hereinafter *Essential Legal Measures*]. The opinion poll referred to was probably the one conducted in May 1986 by Mr. Cao in Chongqing and Shanghai. Cao, *supra* note 7, at 192-97.

54. *Essential Legal Measures*, *supra* note 53; see also *Bankruptcy Law Proves Successful*, China Daily, June 24, 1986, at 3 (E).

55. See *Essential Legal Measures*, *supra* note 53.

is one of the principal ways by which the Legislative Affairs Commission of the NPC-SC gathers information for its reports to the NPC-SC on draft laws.⁵⁶

K. June Session of the NPC-SC

The two principal institutions within the NPC for the actual drafting and revision of new laws are the NPC Law Committee and the Legislative Affairs Commission of the NPC-SC. The NPC Law Committee is one of the six official committees of the NPC stipulated under the Constitution,⁵⁷ and is composed of NPC representatives. Under the Law on the Organization of the NPC, it carries out "unified" examination and discussion of all draft laws presented to the NPC and NPC-SC, whereas the other NPC committees can only "propose suggestions" to the NPC Law Committee.⁵⁸ The other NPC committees do carry out examination and discussion of proposed bills in their areas of jurisdiction.

The other principal NPC institution in the legislative process is the Legislative Affairs Commission of the NPC-SC, which is the legal staff of the NPC-SC and the NPC Law Committee. Under the Law on the Organization of the NPC, the NPC-SC may establish such necessary "work committees," whose members and officers are appointed by the NPC-SC.⁵⁹ The Legislative Affairs Commission plays a very active role in each stage of the legislative process, including the drafting task force, investigation in different cities and provinces, solicitation of opinion from government officials, and conferences of scholars and officials.⁶⁰ The Legislative Affairs Commission makes an official report to the NPC Law Committee of its investigations on the proposed draft law, and also judges the feasibility of passage of the draft law, so that the NPC Law Committee can recommend to the meeting of NPC-SC chairmen whether the draft law should be put on the agenda of the NPC-SC. The Legislative Affairs Commission is responsible for making the draft law consistent with existing laws, and for drafting amendments under the direction of the NPC Law Committee.

In June 1986, the Draft Law was presented on behalf of the State Council by the Vice Chairman of the State Economic Commission to

56. Wang, *supra* note 11; see also *infra* text accompanying note 60.

57. THE CONSTITUTION OF THE PRC, *supra* note 12, art. 70 [Falü weiyuanhui].

58. NPC Law, *supra* note 13, art. 37(5).

59. *Id.* art. 28. Translated literally, the Chinese name *Fazhi gongzuo weiyuanhui* is the "legal system working committee." Most of its staff are not NPC representatives. See also CHINA DIRECTORY 1987 (Radiopress, Inc.) 39.

60. See Wang, *supra* note 11; Du, *Strengthen Economic Legislation in the Reform of the Economic Structure* [Zai jingji tizhi gaige zhong jiaqiang jingji lifa], POL. SCIENCE & LAW [ZHENGZHI YU FALÜ], No. 6, Dec. 5, 1985, at 1, 4.

the 16th session of the Standing Committee of the 6th National People's Congress (hereinafter referred to as the June Session).⁶¹ As is the current practice of the NPC-SC, the Draft Law was only presented with an explanation and would not be put to a vote until the next NPC-SC session two months later. But the intensity of opposition to the bankruptcy law expressed in the preliminary opinions of the NPC-SC members⁶² was clearly unanticipated. In the period between the June Session and the subsequent NPC-SC session, the proponents of the bankruptcy law mounted a vigorous campaign in the press to drum up support for the law.⁶³

L. Bankruptcy of the Shenyang Factory

On August 3, 1986, about a month before the start of the 17th session of the NPC-SC, the Shenyang Explosion Prevention Equipment Factory was declared officially bankrupt, one year to the date after it had been given the warning of imminent bankruptcy.⁶⁴ News of the first official bankruptcy in the history of the People's Republic was promoted by the Chinese news media and reported worldwide.⁶⁵ Very detailed articles covering all aspects of this small collective enterprise of some seventy-odd workers proliferated in the Chinese press and the pro-PRC press in Hong Kong.⁶⁶ These articles served to educate the Chinese public about the unfamiliar concepts of bankruptcy, as well

61. See *supra* notes 28, 29. The agenda of the NPC-SC is proposed by the committee comprised of the Chairman and vice-chairmen of the NPC-SC (*weiyuanzhang huiyi*) and decided by the entire NPC-SC.

62. For examples of opinions expressed at the June Session in opposition to the Draft Law, see *Formulating the Enterprise Bankruptcy Law is A Requirement of Reform and of the Open Policy* [*Zhiding qiye pochansha shi gaige he kaifang de xuyao*], *Guangming Daily*, [Guangming Ribao], June 22, 1986 [hereinafter *Requirement of Reform*] (opinions of NPC-SC members Yang Ligong, Gu Gengyu, Hu Keshi, and Qian Min).

63. For example, the reports on the bankruptcy law opinion poll were published during this period. See Hu, Yang, Sun & Wang, *supra* note 50; *Society's Reactions*, *supra* note 52. Cao Siyuan, the head of the drafting task force, also published numerous articles (and a book) supporting the bankruptcy law. See, e.g., notes 7, 36, 115, 118, 135, 168.

64. See *Shenyang Tries Bankruptcy Law*, *Beijing Rev.*, Mar. 3, 1986, at 6 (E); *Shenyang Factory 'Doomed'*, *South China Morning Post*, Mar. 3, 1986, at 5 (HK & E).

65. Shang, *Bankruptcy Closing Aroused Domestic and International Response* [*Pochan daobi hou yinqi de guo neiwai fanxiang*], *JURISPRUDENCE J.* [FAXUE ZAZHI], No. 2, Apr. 15, 1987, at 35; see Li, *First Bankruptcy Shocks China*, *Beijing Rev.*, Sept. 8, 1986, at 25; News from Xinhua News Agency, Aug. 4, 1986, at 14 (E); *First Factory Goes Bankrupt*, *China Daily*, Aug. 5, 1986 (E); Fung, *China's First Bankruptcy Tests Reforms*, *Asian Wall St. J. Weekly*, July 30, 1986 (HK & E); *Shenyang Factory Declared Bankrupt*, *South China Morning Post*, July 18, 1986, at 2 (HK & E).

66. See, e.g., *supra* notes 43, 65; Zhou, *Why Did the Shenyang Explosion Prevention Equipment Go Bankrupt?* [*Shenyang fangbao qixiechang weishemo pochansha?*], *Beijing Daily* [Beijing Ribao], Aug. 7, 1986; *Bankruptcy Factory Up For Auction*, News from Xinhua News Agency, Aug. 29, 1986 (E); *Former Shenyang Explosion Prevention Factory Begins to Repay Debts* [*Yuan Shenyang fangbaochang kaishi huanzai*], *People's Daily* [Renmin Ribao], Oct. 18, 1986; *Bankrupt Factory Auctioned Off*, News from Xinhua News Agency, Sept. 26, 1986 (E).

as to give warning to the many enterprises in China chronically in the red.

M. Meetings with Foreign Lawyers

In late August of 1986, through arrangements made by the Ministry of Foreign Economic Relations and Trade, certain staff members of the NPC-SC held meetings with Western lawyers who were resident in or were visiting Beijing. The NPC-SC staff requested information on foreign bankruptcy laws relating to certain issues which were the subject of amendments made during the subsequent sessions of the NPC-SC. The Chinese commentators and lawmakers were also familiar with the bankruptcy laws of other countries, including Poland,⁶⁷ the U.S.S.R.,⁶⁸ Yugoslavia,⁶⁹ and Hungary.⁷⁰

N. The August Session of the NPC-SC

The bankruptcy law was scheduled to be passed at the 17th session of the NPC-SC, held in late August and early September of 1986 (hereinafter referred to as the August Session).⁷¹ The usually authoritative English-language governmental journal, *Beijing Review*, reported that at the August Session "the draft law will be adopted and promulgated as expected."⁷² The premature announcement is evidence that the prolonged debates in the NPC-SC on the bankruptcy law probably were not staged propaganda, but instead genuine discussions of substantive issues.

A principal function of the NPC Law Committee is to discuss, draft and recommend amendments to draft laws with the assistance of the Legislative Affairs Commission. The NPC Law Committee held four meetings before the start of the August Session to discuss the opinions

67. The Law on Improving the Management and on the Bankruptcy of State Enterprises, cited in Sun, *Formulating the Enterprise Bankruptcy Law is the Objective Requirement of the Law of Survival of the Fittest* [Zhiding qiye pochanfa shi yousheng lietai guilu de keguan yaoqiu], LAW & ORDER [FAZHI JIANSHE], No. 6, Dec. 15, 1986, at 5, 6.

68. See Yang, *Discussing the Bankruptcy Law* [Lun pochanfa], TRIBUNE OF POL. SCIENCE & LAW [ZHENGFA LUNTAN], No. 6, Dec. 1986, at 12, 13.

69. Law on the Rehabilitation and Termination of Organizations of Associated Labor, Official Gazette, No. 41/80 [hereinafter Rehabilitation Law]; see also Law on Mandatory Liquidation and Bankruptcy (1962), cited in Sun, *supra* note 67, at 6.

70. New Rules of Winding-Up and Economic Rehabilitation of Enterprises, Ministry of Finance, Law Decree 11 of 1986 of the Presidential Council. See *Hungaropress—Economic Information*, No. 17, 1986. The Chinese drafters were well aware of the bankruptcy laws of Yugoslavia and Hungary. See NPC-SC *Examine and Debate the Enterprise Bankruptcy Law Draft* [Renda changwei shen yi qiye pochanfa caoan], People's Daily [Renmin ribao], Aug. 30, 1986 (comments of NPC-SC member Cheng Siyuan) [hereinafter *Examine Law Draft*].

71. NPC-SC sessions are generally held every two months, and each session lasts approximately two weeks. NPC Law, *supra* note 13, art. 29.

72. See *Bankruptcy Law to Come Out*, *supra* note 2.

on the Draft Law that had been expressed by NPC-SC members, central and local government officials, and by the NPC Committee on Finance and Economics.⁷³ The NPC Law Committee then proposed a number of compromise amendments that were the result of study by the various governmental organs represented on the drafting task force,⁷⁴ and which were described in detail in the press.⁷⁵

The amended draft law was debated vigorously by the NPC-SC, and excerpts from the debates were aired extensively on national Chinese television. As is the practice in the NPC, examination and discussion of draft laws in the NPC-SC is generally by means of small group meetings. The NPC-SC also holds "joint sessions of the groups," which are informal discussion sessions in which NPC-SC members, with prior notice to the Secretariat of the NPC-SC, might voice their opinions in the time allotted by the Chairman of the NPC-SC.⁷⁶ Immediately following the joint sessions of the groups of the August Session, the press gave extensive coverage to the arguments voiced both by proponents and opponents⁷⁷ of the bankruptcy law.⁷⁸ Despite further amendments recommended by the NPC Law Committee, the NPC-SC was unable to reach a decision. The draft law was not put to a vote and was tabled until the next session.

73. Song, *Report on the Result of Examination and Discussion by the NPC Law Committee of the "Enterprise Bankruptcy Law of the PRC (Draft)"* [Quanguo renda falü weiyuanhui dui "Zhonghua renmin gongheguo qiye pochansha (caoran)" shenji jiegou de baogao], NPC-SC Gazette, No. 7, Dec. 20, 1986, at 18 (main vol. 421).

74. For example, the amendment on the threshold of bankruptcy was recommended after study by the Legislation Bureau of the State Council, the State Economic Commission and the Supreme People's Court. See text accompanying note 143. The amendment on protection of workers was recommended after study by the Legislation Bureau of the State Council and the State Economic Commission. See text accompanying note 186.

75. *The Enterprise Bankruptcy Law Is Beneficial to the Reform of the Operation and Management of State Enterprises* [Qiye pochansha youli yu quoying qiye gaishan jingying guanli], Econ. Daily [Jingji Ribao], Aug. 28, 1986 [hereinafter *Law Is Beneficial*]. Substantially identical articles appeared in the same day's Guangming Daily [Guangming Ribao], Workers' Daily [Gongren Ribao], Beijing Daily [Beijing Ribao], China Legal News [Zhongguo Fazhibao], and People's Daily [Renmin Ribao]. See also Xu, *Bankruptcy Draft Law Revised at NPC Session*, China Daily, Aug. 28, 1986, at 1, col. 1 (E); Schiffman, *China Moves a Step Closer to a Bankruptcy Law*, Asian Wall St. J. Weekly, Sept. 1, 1986, at 16, col. 1 (HK & E); *Beijing Amends Bankruptcy Law*, South China Morning Post, Aug. 29, 1986 (HK & E).

76. Wang, *supra*, note 11.

77. This article will refer generally to supporters of the bankruptcy law as "proponents," and those who oppose the law as "opponents."

78. Two important articles on the August Session appeared in People's Daily on Sept. 5, 1986 under the headline *The Implementing Conditions for the Bankruptcy Law Still Are Not Ready, Propose Change to Trial Implementation or Interim Regulations* [Pochansha shishi tiaojian shang bu jubei, jianyi gai wei shixing huo zanxing tiaoli]. The first is a factual report on the amendments to the bankruptcy law recommended by the NPC Law Committee [hereinafter *Implementing Conditions*]. The second is a detailed report by Zhan Xiang and He Ping on arguments made by individual NPC-SC members during the August Session [hereinafter Zhan & He]. See also, Yan, *Propose Bankruptcy Law First for Trial Implementation or Change to Interim Regulations* [Jianyi pochansha xian shixing huo gai wei zanxing tiaoli], China Legal News [Zhongguo Fazhibao], Sept. 5, 1986.

Subsequently, there were those who criticized the NPC-SC for "misusing its right of legislation and hindering the reform of the economic structure."⁷⁹ But other commentators defended the NPC-SC:

This time, the members of the NPC-SC were able to listen broadly to the opinions of all the parties, and to speak freely, to discuss repeatedly and even to argue heatedly, so that an unprecedented democratic atmosphere emerged at the NPC-SC. This is a wonderful thing that is so very gratifying, how could it be called misusing its rights?⁸⁰

The *People's Daily* also commended the August Session for being "filled with an extremely lively democratic atmosphere."⁸¹

O. Meetings of NPC Committees

Following the unexpected tabling of the draft bankruptcy law by the August Session, a series of meetings were held by committees of the NPC and by other political bodies. The press reports of these meetings shed light on the procedures that have developed in the PRC for moving stalled legislation forward.

In October 1986, members of the NPC-SC and the "bankruptcy law investigation task force" conducted investigations in several cities and provinces.⁸² The Legislative Affairs Commission also solicited opinions from the various local people's congresses and central governmental departments. In addition, "democratic" and "free" discussions on the bankruptcy law were held by the Legal System Group and the Economic Construction Group of the China People's Political Consultative Conference, the important consultative body whose meetings are generally convened in parallel with each session of the NPC.⁸³

Subsequently, the NPC Law Committee and the NPC Committee on Finance and Economics, two of the six official committees of the NPC, invited officials from the relevant governmental departments for

79. See Hu & Li, *supra* note 3.

80. *Id.*

81. *Implementing Conditions*, *supra* note 78.

82. *Law Committee Members Believe that the Bankruptcy Law Draft Is Basically Workable* [*Falü weiyuan renwei pochanfa caoan jiben kexing*], *People's Daily* [*Renmin Ribao*], Nov. 16, 1986 [hereinafter *Law Committee Members*].

83. Wang, *Members of the Political Consultative Conference Discuss the State Enterprise Bankruptcy Law Draft* [*Bufen zhengxie weiyuan taolun guoying qiye pochanfa caoan*], *China Legal News* [*Zhongguo Fazhi Bao*], Oct. 16, 1986.

an eight-day symposium in Beijing on the bankruptcy law.⁸⁴ The two committees then separately held further discussions. Finally, the Law Committee proposed a number of revisions to the draft law, and concluded that the draft law was "basically workable."

It is difficult to state definitively that the meetings and symposium had a real and substantive effect on the final Bankruptcy Law. But an effort, even if only procedural, had been made to include the opinions of the opponents in a general consensus.⁸⁵ Important concessions and compromises were also worked out that seemed to reflect the give and take characteristic of genuine political processes.

Furthermore, the commentaries in the press during this period were more impartial in representing the views of the opponents than during any other stage of the legislative process.⁸⁶ In addition to articles expressing the arguments of the proponents and opponents, there were also articles that summarized the views of readers who had written in support of or opposition to the Bankruptcy Law.⁸⁷

P. The November Session of the NPC-SC

The 18th session of the NPC-SC was held in November and December of 1986 (hereinafter referred to as the November Session). The Vice Chairman of the NPC Law Committee presented to the NPC-SC compromise amendments proposed by the NPC Law Committee, which were reported in detail in the press.⁸⁸ After close to two weeks of heated discussions and repeated amendments, the two sides in the controversy finally reached a compromise. Accordingly, the bankruptcy law will be put into trial implementation at the same time or shortly after implementation of the State Enterprise Law.⁸⁹ The trial implementation program in the test cities will be expanded, after which

84. He, *Further Soliciting Opinions Toward the Bankruptcy Law Draft* [Jin yibu zhengqiu dui qiye pochanfa caoan yijian], *People's Daily* [Renmin Ribao], Nov. 6, 1986. The symposium included 53 persons from the NPC, 13 central government leaders and 26 local government leaders.

85. *Differences Narrow on Bankruptcy Law*, *Ta Kung Pao*, Nov. 20, 1986, at 1, col. 1 (HK & E).

86. See, e.g., Jiang, *Implementing the State Enterprise Bankruptcy Law Is Bankrupting the Property of the State* [Shishi guoying qiye pochanfa shi po guojia de chan], *Workers' Daily* [Gongren Ribao], Oct. 11, 1986; *Discussion Concerning the Problems of Passing the State Enterprise Bankruptcy Law* [Guanyu zhiding guoying qiye pochanfa wenti de taolun], *Workers' Daily* [Gongren Ribao], Oct. 25, 1986.

87. *Summary of the Issues in the Discussion on Passing the State Enterprise Bankruptcy Law* [Guanyu zhiding guoying qiye pochanfa wenti de zongjie], *Worker's Daily* [Gongren Ribao], Nov. 15, 1986 [hereinafter *Summary*].

88. See *Law Committee Members, supra* note 82; *Again Examine and Discuss Bankruptcy Law and other Law Drafts* [Zaici shenya pochanfa deng falü caoan], *People's Daily* [Renmin Ribao], Nov. 16, 1986.

89. *The Bankruptcy Law Can Be Put into Trial Implementation at the Same Time or Shortly After the Industrial Enterprise Law*, [Pochanfa ke yu gongye qiyefa tongbu huo shaobou shixing], *Beijing Daily* [Beijing Ribao], Nov. 28, 1986.

the Bankruptcy Law may be amended.⁹⁰ At the same time, the "propaganda and explanation work on the bankruptcy law will be strengthened." The NPC-SC passed the Bankruptcy Law on December 2, 1986,⁹¹ and in accordance with the Constitution, the President (*Zhuxi*) of the PRC proclaimed the law on the same day.⁹² The full text of the law appeared in the newspapers the next day. In accordance with its last article and the President's proclamation, the Bankruptcy Law will not go into trial implementation until three months after the implementation of the State Enterprise Law.

The growing influence of the NPC as a legislative body is particularly significant because of the extensive amendments to the election law for the NPC and local people's congresses, which were also passed by the November Session of the NPC-SC.⁹³ In December 1986, the Beijing City government announced implementing local rules to these national election laws.⁹⁴ These received world-wide (though often inaccurate) press coverage because they had been announced at the height of the student demonstrations.⁹⁵ Ironically, the issue upon which the world press focused—that there will be more candidates than slots for elections at the first level of local people's congresses in Beijing—was not only already provided for in the election law of 1979 and 1982,⁹⁶ but the 1986 amendments (and the Beijing implementing

90. Many NPC-SC members have argued that national promulgation of the law should be delayed until more experiences are gathered from the test cities. See *Examine Law Draft*, *supra* note 70 (arguments of NPC-SC members Duan Suquan and Song Yiping).

91. The law was passed by a vote of 101 in favor and 9 abstentions. Salem, *Insolvency and the State*, FAR EASTERN ECON. REV., Jan. 15, 1987, at 46 (HK & E). According to the NPC Law, resolutions of the NPC-SC are passed by vote of a majority of the entire NPC-SC. See NPC Law, *supra* note 13, art 31.

92. THE CONSTITUTION OF THE PRC art. 80. The Constitution does not provide for the contingency in which the President of the PRC refuses to proclaim a law passed by the NPC or NPC-SC.

93. Law of the PRC on the Election of the NPC and the Various Levels of Local People's Congresses [*Zhonghua renmin gongheguo quanguo renmin daibiao dahui he difang geji renmin daibiao dahui xuanjufa*] (amended and promulgated Dec. 2, 1986), People's Daily [Renmin Ribao], Dec. 5, 1986 [hereinafter 1986 Local Law]. See also Decision of the NPC-SC Concerning Amending the Election Law [*Renda changweihui guanyu xiugai xuanjufa de jue ding*] passed by the Nov. Sess., Dec. 2, 1986.

94. Implementing Detailed Rules of Beijing Municipality on the Election of Representatives to People's Congresses of Districts, Counties, Villages and Towns [*Beijingshi qu xian xiang zhen renmin daibiao dahui daibiao xuanju shishi xize*] (amended and passed by 33rd sess. of Standing Committee of 8th People's Congress Beijing Municipality, Dec. 26, 1986), Beijing Daily [Beijing Ribao], Dec. 27, 1986.

95. See, e.g., Gargan, *Beijing to Offer Voters a Choice in City Election*, N.Y. Times, Dec. 28, 1986, at 1, col. 5.

96. Law of the PRC on the Election of the NPC and the Various Levels of Local People's Congresses, art. 27, passed by 2nd sess. of 5th NPC July 1, 1979, promulgated July 4, 1979, implemented Jan. 1, 1980. The 1979 law was amended slightly in 1982. See Decision of the 5th Session of the 5th NPC on Various Provisions Concerning Amending the Law of the PRC on the Election of the NPC and the Various Levels of Local People's Congresses [*Diwujie quanguo renmin daibiao dahui diwuci huiyi guanyu xiugai "zhonghua renmin gongheguo quanguo renmin daibiao dahui he difang geji renmin daibiao dahui xuanjufa" de ruogan guiding*]

rules) actually decreased the proportion by which the number of candidates must exceed the number of slots.⁹⁷ The 1986 amendments and the Beijing implementing rules do, however, clarify and set forth in concrete detail each stage of the electoral procedures and make it more likely that in the future the Chinese government will actually follow the stipulated procedures and requirements in practice.⁹⁸

Equally important from the perspective of democratic reforms were the extensive amendments made at the November Session to the Law on the Organization of the Various Levels of Local People's Congresses and People's Governments.⁹⁹ These amendments significantly strengthen and clarify the powers of the local people's congresses. A logical next step for reform of the legislative process in the PRC would be an overhaul of the 1982 Law on the Organization of the NPC, which could codify, clarify, and strengthen many of the legislative procedures described in this article.¹⁰⁰

Q. *The March Session*

The State Enterprise Law, which had been proposed as early as 1979,¹⁰¹ was considered a "basic law" that must be passed by the

de jueding], passed by NPC Dec. 10, 1982, reprinted in *COLLECTION OF LAWS OF THE PRC 1979-1984* at 419.

97. According to Article 27 of the 1979 and 1982 versions, the number of candidates for local people's congressmen elected directly by the people should be one-half more to double the number of slots. The 1986 version (art. 27) and the Beijing implementing rules (art. 35) reduce the requirement, however, to stipulate that the number of candidates need only be one-third more to double the number of slots.

98. For example, certain elections in Xinjiang were declared illegal in 1987 because they did not fulfill the requirement that there must be more candidates than slots. *Elections Declared Illegal*, China Daily, 1987 (E). The local people's congresses at the county and village levels held elections in late 1986 and early 1987. *The Democratic Election System of Our Country Is Being Further Improved* [Woguo minzhu xuanju zhidu gengjia wanshan], People's Daily [Renmin Ribao], Mar. 24, 1987; see also She & Xu, *Inquiry Concerning Various Problems in Direct Elections* [Guanyu zhibie xuanju zhong ruogan wenti de tantao], *STUDIES IN LAW* [FAXUE YANJIU], No. 1, Feb. 23, 1987, at 1.

99. Promulgated Dec. 2, 1986, People's Daily [Renmin Ribao], Dec. 5, 1986; see also *Local Law*, *supra* note 39.

100. The proposal had already been made by 53 NPC representatives, including NPC representative Zhang Li, and by the Anhui Province delegation "to pass the Regulation on the Work of the NPC and laws on carrying out the duties of NPC representatives." The proposal was submitted to the NPC Law Committee for examination and discussion by the Presiding Committee of the NPC, 3rd session of the Presiding Committee of the 4th meeting of the 6th NPC on April 11, 1986. NPC-SC Gazette, No. 4, May 30, 1986, at 86 (main vol. 268). Fifty NPC representatives, including Li Jianshen, also made a proposal, *Concerning Improving the Make-up and Work of the NPC-SC*, which was submitted to the relevant department for suggestions, criticisms and comments at the same session of the Presiding committee. *Id.* at 88.

101. The proposal was made in 1979 to enact a Factory Law (*Gongchang fa*). Guo, *supra* note 6, at 5. The State Economic Commission organized an investigation team of over 400 persons from relevant government departments to conduct investigations throughout China. The investigations revealed an unresolved fundamental question on the leadership structure of industrial enterprises: should the previous system of "factory director responsibility system under the leadership of the Communist Party" be preserved, or should it be changed to the "factory director

entire NPC. The NPC-SC had debated the draft State Enterprise Law at the November Session, and the NPC-SC planned to introduce the law at the fifth session of the 6th NPC (the 1987 NPC Session) to be held in March and April of 1987. On the last day of the 20th session of the NPC-SC (the March Session) on March 19, the NPC-SC decided that, due to remaining differences of opinions among the NPC-SC members, the law would not be introduced to the NPC.¹⁰²

Meanwhile, the compromise decision reached at the November Session—to continue trial implementation in test cities and to strengthen propaganda work—was carried out. Four more enterprises in Shenyang were given bankruptcy warnings,¹⁰³ and one enterprise in Nanchang City was declared bankrupt.¹⁰⁴ The Bankruptcy Law was published widely and in annotated editions,¹⁰⁵ and numerous articles appeared in the press supporting or explaining the Law,¹⁰⁶ including a ten-part series of lectures in the *Worker's Daily*.¹⁰⁷

responsibility system," or to the "staff and workers' representative congress system?" For subsequent State Council regulations on these issues, see *infra* notes 102, 122, 123, 124 and accompanying text. A draft of the Enterprise Law was presented to the NPC-SC in January, 1985, but promptly tabled. *The Draft Enterprise Law After Being Amended Seven Times Is Gradually Maturing* [Qiyefa caoan jing qici xiugai zhubu chengshu], People's Daily [Renmin Ribao], Mar. 14, 1987. The State Council had also implemented the law in certain test cities. Thirty representatives of the NPC, including Zhang Churan, had proposed putting the draft law on the agenda of the NPC, which the Presiding Committee of the 3rd session of the 6th NPC had turned over to the NPC Law Committee for examination and debate. The NPC Law Committee recommended against putting the draft law on the NPC agenda in 1986. *Report Concerning the Result of the Examination and Debate of the Bills Proposed by Representatives Given by the Presiding Committee of the 3rd Session of the 6th NPC to the NPC Law Committee for Examination and Debate* [Guanyu diliujie quanguo renda disanci huiyi zhuxituan jiaofu falü weiyuanhui shenyi de daibiao tichu de yan shenyi jiegou de baogao], passed by 14th sess. of NPC-SC of 6th NPC Jan. 20, 1986, NPC-SC Gazette, No. 1, Feb. 20, 1986.

102. *Law on Industry Not Ripe for NPC*, China Daily, Mar. 20, 1987 (E). One of the unresolved issues was that, even though the 1984 Central Committee Decision had confirmed that the leadership structure of enterprises would be changed to a "factory director responsibility system," there was intense disagreement on whether (and how) the Party organization should be mentioned in the State Enterprise Law. *The Standing Committee of the 6th NPC Hold Continuous Days of Joint Sessions of the Groups* [Liujiie renda changweihui lianri juxing lianzuhuiyi], People's Daily [Renmin Ribao], Mar. 19, 1987.

103. *Four Collective Enterprises Receive Bankruptcy Warning Notices* [4 jia jiti qiye shoudao pochan jingjie tonggao], CHINA LEGAL NEWS [ZHONGGUO FAZHIBAO], Mar. 7, 1987.

104. *Nanchang Underground Market Bankrupt* [Nanchang dixia shangchang pochan], Beijing Daily [Beijing Ribao], Mar. 8, 1987. Two other enterprises in Hebei reportedly went bankrupt in October 1986. *Bankruptcy A Signal of Reform*, South China Morning Post, Mar. 19, 1987 (HK & E).

105. See, e.g., edition published by Law Press, Jan. 1987; detailed annotated edition published by Press of the China University of Political Science and Law (*Zhengfa Daxue*).

106. See, e.g., Yuan, *Understanding of Several Points Concerning Formulating the Enterprise Bankruptcy Law* [Guanyu zhiding qiye pochanfa de jidian renshi], People's Daily [Renmin Ribao], Dec. 6, 1986; *Implementing the Bankruptcy System Will Promote the Autonomy of Operations of Enterprises* [Shixing pochan zhidu cujin qiye zizhu jingying], People's Daily [Renmin Ribao], Dec. 7, 1986 (questions and answers with leader of Legislative Affairs Commission); Yang, *Preliminary Discussion on the Effect of Implementing the Enterprise Bankruptcy System* [Shilun shixing qiye pochan zhidu de zuoyong], Guangming Daily [Guangming Ribao], Dec. 13, 1986.

107. Lectures by Q. Fengyuan of the Legislative Affairs Commission, G. Cheng and C. Zhong. See *Worker's Daily* [Gongren Ribao], Jan. 3–Mar. 28, 1987.

R. The 1987 NPC Session

The 1987 NPC Session which followed the March Session was, in the words of a NPC representative, "a more democratic and dynamic session than any previous session."¹⁰⁸ The precedent of the previous NPC-SC sessions, the growing political influence of Peng Zhen, chairman of the NPC-SC, and the increasing political power of the more conservative government factions following the forced resignation of Communist Party Secretary Hu Yaobang, perhaps all contributed to the "unprecedented democratic atmosphere."

In contrast to previous sessions in which the NPC would routinely pass all the items on the agenda, the 1987 NPC debated at length the draft Regulations on Villagers' Committee Organization, which was the principal item on the agenda. The NPC finally approved the Regulations in principle only, and sent them back to the NPC-SC for revisions.¹⁰⁹ Instead of the past practice of unanimous voting,¹¹⁰ some votes were cast against NPC resolutions, including reportedly forty votes cast against the Report on the Work of the Government presented by Premier Zhao.¹¹¹ The NPC also added several key sentences to the authorized text of Zhao's Report.¹¹²

II. MAJOR ISSUES IN THE BANKRUPTCY LAW DEBATE

The choice of issues for controversy in the debates over the bankruptcy law, as well as the manner of their argumentation, provide insight into Chinese conceptions of the bankruptcy law and the patterns of Chinese legal discourse. Before examining these issues, it may be illuminating to highlight an underlying dynamic in the debate on bankruptcy law that also recurs in contemporary Chinese legal discourse on the ongoing economic reforms.

This dynamic may be summarized simply as a pattern of reversal. Let us take the example of the theme, frequently arising in debates on the bankruptcy law, of the right of autonomy of the enterprise (*zizhuquan*). The opponents of the law argue that Chinese enterprises

108. *National People's Congress: A Democratic Session*, Beijing Rev., Apr. 20, 1987, at 5 (E).

109. *Resolutions and Decisions of the 5th Session of the 6th NPC* [*Liujie quanguo renda wuci huiyi jueye jue ding*], People's Daily [Renmin Ribao], Apr. 12, 1987.

110. The practice of unanimous voting is criticized in Li, *Ideas on the NPC Voting System and Its Reform* [*Renda biaoju zhi ji qi gaige shexiang*], LAW SCIENCE [FAXUE], No. 11, Nov. 10, 1986, at 2. There had been some votes cast at the 1986 NPC session against the work reports of the Supreme People's Court and of the Supreme Procurate, and against certain personnel changes.

111. *Three Axed in China Purge*, South China Morning Post, Apr. 12, 1987 (HK & E). In total, there were reportedly 130 negative votes recorded on the 11 items that were voted on. See also Liu, *Appointment of Ministers Ends NPC Session*, China Daily, Apr. 13, 1987 (E).

112. Delfs, *Stamp of Authority*, FAR EASTERN ECON. REV., Apr. 23, 1987, at 18 (HK & E).

have little autonomy over the pricing of their products, and they cannot control the cost of labor, energy and other inputs.¹¹³ In addition, managers do not have autonomy in the management of the enterprise because of heavy interference by the government, particularly by the governmental department that directly supervises the enterprise.¹¹⁴ Therefore, the opponents argue, it is unfair to penalize an enterprise by bankruptcy when it has so little autonomy.

The proponents of the bankruptcy law turn that argument on its head: yes, it is unfair to make enterprises go bankrupt when they lack autonomy; therefore, why not grant enterprises more autonomy?¹¹⁵ That, in its simplest form, is the pattern of reversal found time and again in the contemporary debate in China on economic reform.¹¹⁶ The opponents argue that the "concomitant conditions" (*peitao tiaojian*) for a particular reform, such as the bankruptcy law, are not yet present, because all the other accompanying reforms—the concomitant conditions—have not yet been implemented.¹¹⁷ The proponents turn that argument around, and urge that the concomitant reforms should therefore be implemented as soon as possible.¹¹⁸ For the opponents, it is catch-22 logic—no reform until the concomitant conditions (other reforms) are present.¹¹⁹ The proponents see it as a chicken-and-egg fallacy—which comes first is not important as long as you start somewhere.¹²⁰

The proponents successfully urged the accelerated passage of a number of very significant "concomitant reforms" around the time of the

113. See, e.g., Zhan & He, *supra* note 78 (arguments of NPC-SC member Hou Xueyu).

114. See *Differences Narrow on Bankruptcy Law*, *supra* note 85 (arguments by NPC-SC member Chen Anyu); *Summary*, *supra* note 87 (views of Worker's Daily readers).

115. See, e.g., Cao, *Deepen Economic Reform, Promote Political Reform* [*Shenhua jingji gaige, cujin zhengzhi gaige*], Worker's Daily, [Gongren Ribao], Aug. 19, 1986; Zhan & He, *supra* note 78; Yan, *supra* note 78 (arguments put forth by NPC-SC member Rong Yiren).

116. For example, at the time of the passage of the Patent Law of the PRC, the opposition had argued that a concomitant condition was passage of a copyright law. After the Patent Law was passed, however, the reformists used the same arguments to argue for the passage of the draft copyright law.

117. See, e.g., *Requirement of Reform*, *supra* note 62 (arguments by opponents at June session); Zhan & He, *supra* note 78; Yan, *supra* note 78 (arguments of NPC-SC member Geng Biao); *Examine Law Draft*, *supra* note 70 (arguments of NPC-SC member Lei Jieqiong).

118. Cao, *Are the Conditions Present Currently in Our Country for Implementing the Bankruptcy Law?* [*Dang qian woguo shixing pochansa de tiaojian shifo jubei?*], Worker's Daily [Gongren Ribao], Aug. 20, 1986; Wang & Zhang, *If the Bankruptcy Law Came Out, Are the Implementing Conditions for Enterprises Present Now?* [*Ru pochansa chutai, qiye muqian shifo jubei shishi tiaojian*], China Legal News [Zhongguo Fazhi Bao], Nov. 25, 1986; Zhang, *Experts Argue for a Bankruptcy Law*, China Daily, Sept. 10, 1985 (opinions of Qiu Shufang) (E).

119. See, e.g., *supra* notes 113, 114, 116.

120. See, e.g., Zhan & He, *supra* note 78; Yan, *supra* note 78 (arguments of NPC-SC member Xu Dixin); *The Enterprise Bankruptcy System Can Be Implemented First* [*Qiye pochanshi zhidu keyi xianxing*], People's Daily [Renmin Ribao], Aug. 28, 1986; *Examine Law Draft*, *supra* note 70 (arguments of NPC-SC member He Ying).

August Session. During that period of fertile legislative creativity, the State Council passed new labor regulations which placed all new state enterprise workers on terminable employment contracts, permitted state enterprises to recruit employees publicly and authorized state enterprises to dismiss unsatisfactory employees.¹²¹ The State Council also passed new regulations that granted greater freedom of management to the general managers of state enterprises,¹²² circumscribed the powers of the Communist Party organizations within enterprises,¹²³ and delineated the role of the workers' congress in the enterprises.¹²⁴ The proponents also pointed to other regulations that had already been implemented,¹²⁵ which, for example, expand the right of autonomy of state enterprises¹²⁶ and strengthen the "vigor and liveliness of industrial enterprises."¹²⁷ In addition, the previous system in which enterprises surrendered to the government all of their profits had been abolished so that enterprises could retain their after-tax profits.¹²⁸

But the opponents were no less adept at using the concomitant-conditions argument effectively. Throughout the NPC-SC debates, the opponents argued that the "concomitant laws" for the bankruptcy law have not yet been promulgated, including "the State Enterprise Law,

121. These labor regulations were passed in the State Council on July 12, 1986, and implemented on October 1, 1986. See Chang, *Breaking the Iron Rice Bowl: The New Labor Regulations* 8 EAST ASIAN EXECUTIVE REPORT, Nos. 12, 13, Dec. 15, 1986 (E).

122. Regulations on the Work of Factory General Managers of Industrial Enterprises Owned by the Whole People [Quanmin suoyouzhong gongye qiye changzhang gongzuo tiaoli] (passed by State Council Sept. 15, 1986), China Legal News [Zhongguo Fazhibao], Oct. 22, 1986.

123. Regulations on the Work of Basic Level Organization of the Chinese Communist Party in Industrial Enterprises Owned by the Whole People [Zhongguo gongchandang quanmin suoyouzhong gongye qiye jiceng zuzhi gongzuo tiaoli] (adopted by State Council Sept. 15, 1986), China Legal News [Zhongguo Fazhibao], Oct. 22, 1986.

124. Regulations on the Representative Congress of Staff and Workers of Industrial Enterprises Owned by the Whole People [Quanmin suoyouzhong gongye qiye zhigong daibiao dahui tiaoli] (adopted by State Council Sept. 15, 1986), China Legal News [Zhongguo Fazhibao], Oct. 22, 1986.

125. Wang & Zhang, *supra* note 118.

126. Interim Provisions Concerning Further Expanding the Right of Autonomy of State Industrial Enterprises [Guanyu jinyibu kuoda guoying gongye qiye zizhuquan de zanxing guiding] (passed by State Council).

127. Interim Provisions Concerning Various Problems of Strengthening the Vigor of Medium to Large State Industrial Enterprises [Guanyu zengqiang dazhongxing guoying gongye qiye huoli ruogan wenti de zanxing guiding] (passed by State Council Sept. 11, 1985), People's Daily [Renmin Ribao], Sept. 20, 1985.

128. The tax burden upon enterprises can still be very heavy, as demonstrated by the reported example of an enterprise that had to pay 55% income tax, 15% energy and transportation tax and 24% adjustment tax. Yang, *Establishment of the Enterprise Bankruptcy System and Its Related Conditions* [Qiye pochuan zhidu de jianli ji qi xiangguan tiaojian], INVESTIGATION OF STRUCTURAL REFORM [TIZHI GAIGE TANSUO], No. 5, 1986, at 61, 63. See The Trial Measures for the Second Stage Profit Adjustment Tax for State Enterprises [Guoying qiye dierbu ligaishui shixing banfa], State Council Gazette, No. 23, 1984, 798.

the corporation law, the collective enterprise law, the rural and town enterprise law, the labor law, the social insurance law, etc."¹²⁹

The proponents countered that the concomitant laws were already in place. The General Principles of Civil Law, promulgated in April 1986, established the principle that a state enterprise would be responsible for its debts to the extent of the assets that the State had entrusted it to operate and manage.¹³⁰ The General Principles also state explicitly that "declaration of bankruptcy in accordance with the law" is one circumstance for the termination of an enterprise.¹³¹ And the regulation establishing an unemployment-compensation system for laid-off workers of bankrupt enterprises was passed in July 1986.¹³²

The eventual outcome of the debate on concomitant conditions—to publish the Bankruptcy Law but delay its implementation—reflects a rather peculiar, and perhaps very Chinese, compromise. On the one hand, the proponents saved the text of law from second thoughts and additional amendments; on the other hand, the opponents delayed implementation of the Bankruptcy Law for at least a year and a half.

A. Threshold of Bankruptcy

In capitalist economies, failing companies go out of business when their owners run out of money, with or without the intervention of the laws of the State on bankruptcy. In contrast, 20% to 25% of all state enterprises in China sustain chronic losses¹³³ and yet most continue to operate, subsidized by their owner, the State.¹³⁴ Thus, unlike bankruptcy laws in capitalist economies, an important function of the Chinese bankruptcy law is to provide a mechanism for triggering the bankruptcy of failing and inefficient Chinese enterprises.¹³⁵

129. *Requirement of Reform*, *supra* note 62; see *Examine Law Draft*, *supra* note 70 (arguments of NPC-SC member Qian Min); Zhan & He, *supra* note 78 (arguments of NPC-SC member Geng Biao); see also *Implementing Conditions*, *supra* note 78 (comments of Sheng Shuren).

130. General Principles of Civil Law of the PRC [Zhonghua renmin gongheguo minfa tongze], art. 48 (passed by NPC Apr. 12, 1986), People's Daily [Renmin Ribao], Apr. 17, 1986; see also 1984 Central Committee Decision, *supra* note 17 and accompanying text.

131. General Principles of Civil Law, art. 45.

132. Interim Provisions on the Unemployment Insurance for State Enterprise Employees [Guoying qiye zhigong daiye baoxian zanxing quiding], issued by the State Council on July 12, 1986, China Legal News [Zhongguo Fazhibao], Sept. 10, 1986. See also Chang, *supra* note 121.

133. See Cao, *supra* note 7, at 1 (more detailed figures on enterprise losses).

134. It should be noted that some failing Chinese enterprises have been closed in the past, particularly in connection with economic setbacks such as the Great Leap Forward and the "backyard iron furnace movement." Gu, *Bankruptcy Law is a Law that Promotes the Socialist Planned Commodity Economy* [Pochanfa shi shehui zhuyi youjihu shangping jingji de cujin fa], ECON. LEGAL SYS. [JINGJI FAZHI], No. 11, Nov. 20, 1986, at 3, 4.

135. The effect of elimination of inefficient enterprises through competition (taotai zuoyong) is frequently mentioned in press commentaries as a primary goal of the bankruptcy law. See, e.g., *Requirement of Reform*, *supra* note 62 (arguments of NPC-SC vice chairman Xue Yan); Cao, *Economic Reform Needs Urgently the Enterprise Bankruptcy Law* [Jingji gaige jixu qiye pochansfa], ECON.

1. Imminent Bankruptcy Warning

The initial conceptions of the Chinese bankruptcy law contained an original and intriguing idea, unique among the bankruptcy laws of nations, namely, the warning of imminent bankruptcy. An enterprise that has gone past the "threshold of bankruptcy" specified in the law will be given the warning of imminent bankruptcy, which notifies the enterprise that unless it recovers within one year, it will be declared officially bankrupt. The earliest conceptions of this idea were outlined in the Shenyang Provisions: an enterprise would receive such a warning if, in general terms, its liabilities exceeded its tangible assets, or if its losses exceeded 80% of its fixed assets. The enterprise would have one year "to return to vitality," but no specific mechanism was provided for compromise with creditors and reductions of debt. The original idea, as illustrated in the many press articles on warned enterprises that have returned miraculously to profit, seemed to have been that the warning would so galvanize the workers of the enterprise that they would be able to reverse the losses within one year.¹³⁶

This simplistic view of the causes of and solutions to bankruptcy was refined through the successive drafts of the bankruptcy law. In the final Bankruptcy Law, the concept of the warning of imminent bankruptcy is subsumed within the common terminology of reorganization shared with the bankruptcy laws of other countries. The one-year warning period becomes a general two-year limit on the reorganization procedure. Even the term "threshold of bankruptcy" no longer appears in the law.

2. Workable Standards

The principal problem facing the drafters was setting workable standards for defining the threshold of bankruptcy (or more accurately, imminent bankruptcy). The earlier drafts of the bankruptcy law all contain varying formulations of three general types of standards of bankruptcy: ratio of liabilities to assets, ratio of losses to assets, and timely payment of debts.

The simplest formulation of the liabilities to assets standard is in the Shenyang Provisions, which identifies an enterprise as past the

Reference [Jingji Cankao], June 27, 1986; Cao, *Two Discussions on the 'Disciplining Factors' of the Enterprise Bankruptcy Law* [Qiye pohanfa 'zhiyue yinsu' liangyi], *Economic Daily* [Jingji Ribao], Aug. 30, 1986; Yan, *How to Deal with Losing Enterprises*, *Beijing Rev.*, Mar. 11, 1985, at 25 (E).

136. Press coverage of the warned enterprises in the test cities has emphasized how the warning had such a "great impact on both the managers and workers" that the enterprise promptly returned to profitability. *Bankruptcy Warning Saves Radio Factory*, *China Daily* (1986) (E); see also *Bankruptcy Warning Saves Enterprise*, *News from Xinhua News Agency*, Nov. 11, 1986 (E); *Examine Law Draft*, *supra* note 70 (arguments of NPC-SC member Qiu Weifan).

threshold of bankruptcy if its debts exceed the "total amount of property owned by it (including fixed assets, working capital, money or objects owed to it, etc.)."¹³⁷ Expressing the standard in terms of assets and liabilities is somewhat misleading, because the standard seems to be really a restriction against negative net worth, that is, any accumulated losses. The Solicitation Draft utilizes a somewhat less ambiguous standard, and compares liabilities and "registered capital," an undefined term.¹³⁸ The Draft Law compares "liabilities" with "actually-possessed assets."

In addition to these definitional problems are the substantive objections to this standard voiced by members of the NPC-SC. They pointed out that many enterprises in China, especially the larger enterprises, have tremendous amounts of debt. Thus, in their view, the ratio of assets to liabilities did not "directly reflect the operating conditions of enterprises," and was not "suited to the actual conditions of [such] enterprises."¹³⁹ The standard of liabilities to assets was deleted from the draft law during the August Session.

As noted above, the liabilities-to-assets standard is really another way of expressing an overall limitation on cumulative losses, which is the focus of the early drafts of the bankruptcy law. The Proposal Draft stipulated that the threshold for bankruptcy is crossed when the "accumulated net losses" exceed 60% of the "productive capital actually possessed by the enterprise (including working capital other than loans and net value of fixed assets)"—the latter term a most confused mishmash of accounting terminology.¹⁴⁰ The Solicitation Draft standard is simpler, though perhaps no less ambiguous: if "losses that cannot be made up" exceed 80% of registered capital.¹⁴¹ Again, the standard was impractical because, if taken literally, it would make an unacceptably large number of Chinese enterprises definitionally bankrupt. The standard of the ratio of losses to assets was therefore also eliminated from the draft law during the August Session.

The standard that remained in the Bankruptcy Law is what is referred to as the "timely payment of debts" standard, which has the

137. Shenyang Provisions, art. 1. This standard would seem to exclude most intangible assets, such as goodwill. Because enterprises are not generally bought and sold in China, this exclusion is understandable.

138. Solicitation Draft, art. 5. The tremendous difference between comparing liabilities to tangible assets, as in the Proposal Draft, and comparing liabilities to registered capital, as in the Solicitation Draft, illustrates what seems to be a general lack of accounting sophistication among the Bankruptcy Law's drafters. This criticism is implied in Zhu, *The Reasonableness (and Its Limitations) of Implementing the Enterprise Bankruptcy Law* [*Shixing qiye pochansha de belixing ji qi xianzhi*], *STUDIES IN ECON.* [JINGJI YANJIU], No. 9, 1986, at 50, 52.

139. See *Law Is Beneficial*, *supra* note 75.

140. Proposal Draft, art. 4(2).

141. Solicitation Draft, art. 5.

advantage of being in the mainstream of international practice. During the discussions between foreign lawyers and the Chinese drafters in August 1986, the American lawyers pointed out that the United States bankruptcy statute once contained analogous tests for balance-sheet insolvency and "acts of bankruptcy," but these were abolished in 1978 in favor of the one general standard for involuntary bankruptcies of "generally not paying . . . debts as such debts become due."¹⁴² The foreign lawyers explained that similar general standards are found in the bankruptcy laws of other Western countries.

In the final Bankruptcy Law, the threshold for bankruptcy is stipulated to be "an enterprise that has sustained serious losses resulting from poor operation and management, and cannot pay debts that are due."¹⁴³ Unlike mechanical financial ratio standards which do not take into account the varying capital structures and circumstances of Chinese enterprises, the timely-payment-of-debts standard allows greater flexibility in the bankruptcy system, although at some sacrifice to the initial conceptions of the law as an automatic and certain criterion for weeding out inefficient enterprises. By establishing a relatively flexible standard of bankruptcy, the role of the judicial branch may be enhanced, because it is ultimately up to the people's court to determine whether a particular enterprise would be considered bankrupt.¹⁴⁴

3. Exceptions to the Standard

The Shenyang Provisions had attempted to deal with the reality of the lack of autonomy of the enterprise by defining the standard of bankruptcy to focus only on "losses of a non-policy nature" (*fei zhengcexing kuisun*).¹⁴⁵ In other words, an enterprise presumably would not be penalized by bankruptcy if its losses were the results of policies of the government.¹⁴⁶ The final Bankruptcy Law reflects this concern and limits the definition of bankrupt enterprises only to those suffering from losses resulting from poor management.

The drafters also seemed to have decided that, instead of haggling over the precise wording of the financial ratio standards (e.g., 60% or 80%, fixed assets or registered capital), they would deal with the objections of the opponents by carving out a number of specific exceptions to the standard of bankruptcy. During the August Session,

142. 11 U.S.C. § 303 (1982 & Supp. III 1985).

143. Bankruptcy Law, art. 3.

144. Under the Bankruptcy Law, the "people's court," rather than a special system of bankruptcy courts, will have jurisdiction over enterprise bankruptcies.

145. Shenyang Provisions, art. 2.

146. See Clarke, *supra* note 38, at 49.

the NPC Law Committee recommended that an enterprise would be exempted from bankruptcy if relevant governmental departments supplied funds or took other measures to help it to pay its debts, or if the enterprise obtained guarantees that its debts will be repaid within six months.¹⁴⁷ The proponents argued vigorously against these rule-swallowing exceptions, and were able to limit the first exception considerably, to only "public utility enterprises and enterprises which have a great impact on the people's livelihood and economy."¹⁴⁸

B. Scope of the Law

The Chinese law-makers debated at length the question of the scope of application of the bankruptcy law. This seemingly technical controversy conceals fundamental disagreements about the structure of the Chinese legal system. It also substitutes for debates on other substantive issues, for the impact of the bankruptcy law is vitiated in effect by restrictions on its scope. The two specific issues of scope are: whether the law should apply to enterprises with foreign investment, or just to Chinese enterprises, and if the latter, whether it should apply only to state enterprises, or should it apply also to collective enterprises and other types of Chinese economic organization.

1. Does Not Apply to Foreign Investment Enterprises

The earlier draft of the bankruptcy law had been drafted so as to apply to all types of enterprises in China, including Chinese-foreign equity joint ventures, Chinese foreign cooperative ventures and wholly foreign-owned ventures.¹⁴⁹ The all-encompassing nature of this draft reflects a conception of the Chinese legal system as a unified whole, not bifurcated into two parallel systems with one system regulating matters involving foreign-related entities and the other system regulating Chinese entities. An example of such bifurcation is the parallel systems of law established by the Foreign Economic Contract Law, which regulates contracts involving foreign interests, and the Economic Contract Law, which regulates all other contracts.¹⁵⁰

According to the speech accompanying the presentation of the Draft Law to the June Session, a major purpose of the law was to "meet the

147. See *Law Is Beneficial*, *supra* note 75.

148. Bankruptcy Law, art. 3(2). See Hu, *The Transformation of Modern Bankruptcy Laws* [*Xiandai pochanfa zhi biange*], Chinese Legal News [*Zhongguo Fazhibao*], Oct. 24, 1986; *Passing the Bankruptcy Law Will Not Create Large Disturbances in Society* [*Zhiding pochanfa bubui zaocheng shehui da de podong*], People's Daily (Overseas Edition) [*Renmin Ribao (Haiwaiban)*], Nov. 14, 1986 (comments of Gu Ming).

149. See Proposal Draft, art. 2; Solicitation Draft, art. 3; Draft Law, art. 69.

150. See MacNeil, *China Needs Only One Legal System*, *Asian Wall St. J.*, Nov. 25, 1985 (HK & E).

needs of the policy of opening to the outside," and to be "beneficial to the handling of problems of creditors and debtors in economic activities involving foreign interests."¹⁵¹ For some foreign investors, the drafts raised the alarming specter that their money-losing investments in China might actually be declared bankrupt. On the other hand, there were other foreign investors and lawyers who had hoped that the new law would apply to Chinese-foreign joint ventures. Instituting such a bankruptcy law might have forced the drafters to acknowledge in the law the priority rights of secured creditors, and thus put into place one essential foundation block for the establishment of a national mortgage system for joint ventures. The absence of a mortgage system in China, or of any adequate substitutes, may be one of the fundamental impediments to substantial foreign investment in China.¹⁵²

Given the often divergent rules that govern Chinese enterprises and those involving foreign investment, there were innumerable technical difficulties in drafting a bankruptcy law that could satisfy the needs and peculiarities of both kinds of enterprise. For example, key features of the Bankruptcy Law discussed in this article, such as punishment of management, would be very difficult to apply to enterprises involving foreign investment. Thus, during the August Session of the NPC-SC, the draft law was revised to apply only to Chinese state enterprises. But the Chinese government has already begun to establish a bankruptcy system for enterprises involving foreign investment, and has issued a local regulation on this for the Shenzhen Special Economic Zone.¹⁵³

2. Limited to State Enterprises

The Proposal Draft and the Solicitation Draft were drafted so as to be applicable to state enterprises, as well as to collective enterprises,

151. See *Formulating the Bankruptcy Law*, *supra* note 28. Commentators have also cited attracting foreign investment as one of the major reasons for promulgating the bankruptcy law. Lu, *Ideas Concerning the Formulation of the Enterprise Bankruptcy Law* [Guanyu zhiding qiye pochanfa de shexiang], POL. SCIENCE & LAW [ZHENGFA YU FALU], No. 6, Dec. 5, 1985, at 10; Ye, *Formulate the "Enterprise Bankruptcy Law" As Soon As Possible* [Jinkuai zhiding "qiye pochanfa"], ECON. LEGAL SYS. [JINGJI FAZHI], No. 5, Nov. 30, 1985, at 39.

152. Because there is no mortgage law in China (other than in the Shenzhen Special Economic Zone), loans to a joint venture generally cannot be secured by the assets of the joint venture. Consequently, such loans must usually be guaranteed by the foreign investor (usually an unacceptable risk), or by one of the specified Chinese financial institutions authorized to provide guarantees, most of which are dangerously overcommitted. See Chang, *The East is in the Red*, 14 CHINA BUS. REV. No. 2, at 42 (1987) (E).

153. Regulations of Shenzhen Special Economic Zone on Bankruptcy of Corporations Involving Foreign Interests [Shenzhen jingji tequ shewai gonsi pochan tiaoli], passed Nov. 29, 1986, promulgated Dec. 7, 1986, implemented July 1, 1987 [hereinafter Shenzhen Regulations].

individual enterprises and other forms of economic organization.¹⁵⁴ In contrast, the Shenyang Provisions applied only to collective enterprises. The fundamental question here is how an enterprise owned by the State can go bankrupt.¹⁵⁵

According to the General Principles of Civil Law, a collective enterprise owns and manages its assets, whereas a state enterprise only has the right to operate and manage assets owned by the State.¹⁵⁶ Thus, as noted in an important and much reprinted article by the prominent economist, Dong Furen,¹⁵⁷ the question of whether state enterprises can go bankrupt is quite problematic. Because no one (other than the State) feels the direct loss as the result of the bankruptcy of a state enterprise, the disciplining effect exerted by bankruptcy on a state enterprise is much less than on other types of enterprise. Dong goes on to conclude that it is even more essential that the bankruptcy system be implemented for State enterprises than for other types of enterprises. Whereas the owners of collective enterprises and individual enterprises feel the "flesh-cutting pain" of bankruptcy, the State usually winds up subsidizing failing state enterprises.

The usual solution in the past had been "close, stop, merge and transfer," in which the failing state enterprise was merged into a profitable state enterprise.¹⁵⁸ The proponents felt that this was like putting money down a "bottomless hole,"¹⁵⁹ and perpetuating the old

154. Both the Proposal Draft and Solicitation Draft are imprecise as to their scope. Article 2 of the Proposal Draft states that it applies to "all types of enterprises with collected-capital, joint operation or united operation, as well as subcontracted enterprises." The Solicitation Draft states that it applies to "other economic organizations with independent accounting [and] bearing its own profits and losses." The Draft Law states that the bankruptcy of "collective enterprises and other enterprises" shall be "implemented with reference to the basic principle" of the Draft Law.

155. This question is a major preoccupation of the press in the theoretical debate over the bankruptcy law. See, e.g., Wang, *Implementing the State Enterprise Bankruptcy Law Will Not Bankrupt the 'Property' of the State* [*Shishi guoying qiye pochansa bubui po guojia de 'chan'*], *Workers' Daily* [Gongren Ribao], Oct. 11, 1986.

156. See *supra* note 130.

157. Dong, *Discussing the Enterprise Bankruptcy System* [*Tan tan qiye pochanzhi*], *People's Daily* [Renmin Ribao], Oct. 10, 1986; excerpts from the article are translated in *Bankruptcy Threat Can be Stimulant*, *China Daily*, Oct., 1986 (E); *A Case for the Bankruptcy Law*, *Ta Kung Pao*, Nov. 13, 1986 (HK & E); *The Bankruptcy of Enterprises as a Spur to Other Reforms*, SUMMARY OF WORLD BROADCASTS FE/8399/BII/13, Oct. 25, 1986 (E).

158. See Gu, *Why Socialist Countries Still Need to Have A Bankruptcy Law* [*Weisheme shehui zhuji guojia haiyao li pochansa*], *Econ. Daily* [Jingji Ribao], Nov. 11, 1986. Commentators noted that, even if the bankruptcy law is not passed, a legal procedure must still be established for dealing with the closing of enterprises. Li, *How to Put in Order the Claims and Liabilities of Closed Enterprises* [*Zenyang qingli guanting qiye de zaiquan zaiwu*], *LAW SCIENCE Q.* [FAXUE JIKAN], No. 3, July 1986, at 33.

159. *The Domestic Draft "Corporation Law" Expected To Be Completed Within Next Year*, Gu Ming in Hong Kong Expects "Bankruptcy Law" Can Pass [*Neidi caoni "gongsifa" yuliao mingnian nei ke wancheng, Guming zai gang cheng "pochansa" liao ke tongguo*], *Da Gong Bao*, Nov. 25, 1986 (quoting Ming Gu, head of Economic Legislation Research Center of State Council) (HK).

system of "eating from one big pot."¹⁶⁰ On the other hand, many NPC-SC members and press commentators believed that merger was still the better solution for dealing with inefficient enterprises.¹⁶¹

In order that bankruptcy can have a greater disciplinary effect on state enterprises, Dong asserted boldly that "one must do work on the reform of the country's system of ownership." With surprising candor and lack of ideological inhibition, Chinese commentators have discussed openly, often in the context of the bankruptcy law, the possibility of reforming the system of ownership in China.¹⁶² This could be seen as another variation of the pattern of reversal in argumentation. If the bankruptcy of a state enterprise is really the bankruptcy of property owned by the State, as argued by many opponents, then why not reform the system of ownership of enterprises? Some commentators have suggested, for example, that a two-tier system of ownership may be established, in which the management of an enterprise would have "relative ownership," while the State retained absolute ownership of the enterprise.¹⁶³

3. Title of the Law

The next two subsections will focus on two issues which are usually inconsequential in the construction of Western laws. Yet, deciphering the subtle shifts in the words of the title of a Chinese law, or in the hortatory language used in its preamble, can often reveal important insights. The changes in the title of the Chinese bankruptcy law may be interpreted as a moving indicator of the relative strength of the opponents during the course of the NPC-SC sessions. The Solicitation Draft and the Draft Law had both been entitled the "Law of the PRC on Enterprise Bankruptcy (Draft)." Following the narrowing of the scope of the law to state enterprises during the August Session, the title was changed to the "Law of the PRC on State Enterprise Bankruptcy (Draft)." In a further concession to opponents, the NPC Law Committee recommended during the August Session that the words

160. See *Again Examine*, *supra* note 88 (comments of NPC Law Committee Vice Chairman Peng Chong at Nov. Session).

161. See, e.g., *Examine Law Draft*, *supra* note 70 (views expressed at Aug. Session by NPC-SC member Cao Longhao); Huang, *supra* note 43.

162. See, e.g., Zhang, *supra* note 118 (comments of Qiu Shufang); *A Conception of Reform of the Ownership System in Our Country*, People's Daily, Sept. 26, 1986, translated in SUMMARY OF WORLD BROADCASTS, FE/8384/BII/8, Oct. 8, 1986 (E).

163. Sun, *supra* note 18, at 5; see also Lu, *General Discussion of the Duality of the Right of Ownership of Property of Enterprises Owned by the Whole People* [Luelun quanmin suoyouzhi qiye caichan suoyouquan de eryuanxing], LAW SCIENCE Q. [FAXUE JIKAN], No. 3, July 1986, at 36.

"for Trial Implementation" (*shixing*)¹⁶⁴ be added to the title of the law, or, alternatively, that the law be changed from a law (*fa*) to an "interim regulation" (*zanxing tiaoli*).¹⁶⁵ In a minor victory for the proponents, however, the title of the final Bankruptcy Law reverted partially to the broad term first proposed in the Solicitation Draft and Draft Law, and referred to *all* enterprises, even though the law by its terms applied only to state enterprises and would only be for "trial implementation."

4. Preamble

Even the preamble of the Bankruptcy Law was cause for debate. Chinese laws generally contain a great deal of hortatory language, which has tended to have greater legal content and literal meaning than in Western legal systems.¹⁶⁶ The preamble of the Bankruptcy Law is a good summary of the major goals of the Chinese bankruptcy law, placed in descending order of importance:

This law is formulated in order to suit the development of the socialist planned commodity economy and the needs of the reform of the economic structure, to promote the autonomy of operation of enterprises owned by the whole people, to strengthen the economic responsibility system and democratic management, to improve the condition of operations, to raise economic efficiency, and to protect the lawful rights and interests of creditors and debtors.

A goal that had been previously in the preamble, "to maintain and protect socialist economic order," was deleted during the November

164. Three laws have been passed in the past for trial implementation: the Environmental Protection Law, the Civil Procedures Law and the Food Health Law. Song, *Explanation of Several Amendment Proposals Concerning the "State Enterprise Law of the PRC (Draft)" (Amended Draft)* [Guanyu "Zhonghua renmin gongheguo guoying qiye pochufa (caoran)" (xiugaigao) jidian xiugai yijian de shuoming], NPC-SC Gazette, No. 7, Dec. 20, 1986, at 21 (main vol. 424).

165. Terms such as "for trial implementation" and "interim regulation" have been used quite unsystematically by Chinese lawmakers, and are criticized in Zhang, *The Titles of Local Legal Provisions Should be Made Uniform* [Difangxing fagui mingcheng ying guifanhua], JURISPRUDENCE J. [FAXUE ZAZHI], No. 1, Feb. 15, 1987, at 27. In a welcome step, the State Council has codified the legal definitions of certain confusing terms, such as regulations (*tiaoli*), provisions (*guiding*) and measures (*banfa*). *Interim Regulations*, *supra* note 27, art. 3.

166. An example of hortatory language that the Chinese have, in practice, regarded as substantive is the phrase "equality and mutual benefit," found in the Law of the PRC on Chinese-Foreign Equity Joint Ventures. The vagueness of Chinese statutory language is defended in Guo, *Discussion of the Integration of Being in Principle and Being Flexible in Legislation* [Lun lifa zhong yuanzexing yu linghuoxing jiebe], LAW REV. [FAXUE PINGLUN], No. 1, Jan. 1987, at 15.

Session.¹⁶⁷ Instead, other clauses were added that reflected the strategy of the proponents to identify the law with the "concomitant reforms," that is, the ongoing transformation of the Chinese economy into a planned economy with market mechanisms—what the reformers euphemistically call the "socialist commodity economy."¹⁶⁸

C. Punishment of Management

Whereas inefficient companies in capitalist economies are disciplined by the stock market, by banks that refuse to lend them money, and by the owners' fear of losing their investment, Chinese state enterprises can rely on the State to take the brunt of the losses resulting from bankruptcies. The problem was how to make the management of the enterprise feel the pain of the losses resulting from bankruptcy in the same way that the owner of an enterprise would.¹⁶⁹

The earlier drafts embodied most strongly the conception of bankruptcy law as a legal mechanism for punishing the managers of bankrupt enterprises. In their discussions with Western lawyers, the Chinese drafters expressed great interest in the subject, and seemed disappointed to find out that Western bankruptcy laws did not contain specific provisions for punishing the managers of bankrupt companies. Under the Proposal Draft, the managers of a failing enterprise that has received a bankruptcy warning are to be removed immediately.¹⁷⁰ Under the Solicitation Draft, various types of fraud and misrepresentation are punishable by prison terms of two to five years, and the managers may be subject to other criminal penalties if the bankruptcy was caused by their "dereliction of duty."¹⁷¹ Fines may be assessed not only against those "primarily responsible for the bankruptcy," but also against those who act to prefer one creditor over another. Similar to

167. See *Law Committee Members*, *supra* note 82. The protection of the interest of creditors and debtors, perhaps the major goal of bankruptcy laws in capitalist countries, is only a subsidiary goal of the Chinese bankruptcy law. See Yin, *Preliminary Discussion on Establishing a Bankruptcy System with Chinese Special Characteristics*, *TRIBUNE OF POL. SCIENCE & LAW* [ZHENGFA LUNTAN], No. 5, Oct. 1985, at 53, 54.

168. See Cao, *The Implicit Meaning of Bankruptcy and the Basic Effect of the Bankruptcy Law* [*Pochan de hanyi ji pochanfa de jiben zuoyong*], *Chinese Legal News* [Zhongguo Fazhibao], Sept. 17, 1986; *Law Committee Members*, *supra* note 82 (comments of Vice Chairman of NPC Law Committee Song Rufen at Nov. Session); *Examine Law Draft*, *supra* note 70 (argument of NPC member Deng Jiatai). The word "planned" was added to the phrase in the Bankruptcy Law "socialist commodity economy" in the last days of the November Session.

169. See Dong, *supra* note 157. The current and past general managers of the Shenyang Explosion Prevention Equipment Factory were investigated as to responsibility for the bankruptcy, as well as the unit in charge of the Factory, the Shenyang City Automotive Industry Corporation. Han, *The Actual Handling of Enterprise Bankruptcy and the Problems which Await Improvement* [*Qiye pochan de juti culi ji qi youdai gaijin de wenti*], *LAW & ORDER* [FAXHI JIANSHE], No. 6, June 1986, at 10, 12.

170. Proposal Draft, art. 7.

171. Solicitation Draft, art. 55.

certain provisions under the Yugoslavian bankruptcy law,¹⁷² the Solicitation Draft also prohibited leaders of the enterprise with responsibility for the bankruptcy from taking another leadership position, or operating another enterprise, for a period of three years.¹⁷³

As noted above, the notion of punishment of managers is alien and alarming to the top managers of enterprises involving foreign investment, many of whom are foreign. Since the registered capital of enterprises with foreign investment is owned by foreign companies and their Chinese partners, the possibility of its loss in bankruptcy may have enough of a disciplining effect to obviate the need for additional State measures for punishing the managers.¹⁷⁴ Accordingly, the provisions on penalties in the Shenzhen regulations on the bankruptcy of enterprises involving foreign interests apply only to specific acts of perjury, fraud and noncooperation with bankruptcy proceedings.¹⁷⁵

A fundamental question noted above underlies the issue of punishment of managers: is it fair to punish the managers of a bankrupt enterprise when they only have limited autonomy in their management of the enterprise? At the beginning of the August Session, the NPC Law Committee recommended that the extensive chapter on "Penalties" found in the earlier drafts be replaced by a very general provision.¹⁷⁶ But the debates in the NPC-SC on the autonomy of the enterprise highlighted the dominant role that the governmental department in charge of the enterprise played in the management of the enterprise.¹⁷⁷ In many cases, the department may actually be the party most responsible for the bankruptcy of the enterprise. Many NPC-SC members had argued against the initial drafts of the bankruptcy law because it seemed to single out unfairly the managers of the enterprise for punishment.¹⁷⁸

In contrast to other issues, the proponents did not use the pattern of reversal in their arguments, that is, to urge the implementation of concomitant laws prohibiting interference by the department in charge

172. See Rehabilitation Law, *supra* note 69; see also 8 MARTINDALE-HUBBELL LAW DIRECTORY, Yugoslavian Law Digest, Bankruptcy (1987) (E).

173. Solicitation Draft, art. 58.

174. See Dong, *supra* note 157.

175. Shenzhen Regulations, *supra* note 153, ch. 7.

176. Such deletions were supported by some of the opponents, who wished to weaken the law. The deletions may also have been supported by the proponents, who wanted to facilitate passage of the law by postponing debate on the subject. The drafters may also have been influenced by Western bankruptcy laws.

177. See also Lichtenstein, *Legal Implications of China's Economic Reforms*, 1 I.C.S.I.D. REV. 2, at 289, 299 (1986).

178. See Zhan & He, *supra* note 78; Yan, *supra* note 78 (views expressed by NPC-SC member Song Shaowen); *Examine Law Draft*, *supra* note 70 (arguments of NPC-SC member Cao Longhao); *Differences Narrow on Bankruptcy Law*, *supra* note 85 (arguments of NPC-SC member Chen Anyu).

in the management of the enterprise. Instead, the final Bankruptcy Law provides that if the superior department in charge of the bankrupt enterprise has primary responsibility for the bankruptcy, then the leaders of the department will be subject to "administrative sanctions." Although this may be the most logical measure under the current Chinese system for disciplining the party most directly responsible for the bankruptcy of an enterprise, it runs counter to the general trend of the reforms of the Chinese economy. Indeed, exposing the leaders of the department in charge to possible punishment may actually force the department in charge to take a much more intrusive role in the management of the enterprise. Thus, ironically, the measure may serve to reinforce the previous scheme of management authority.

Despite the rhetoric of the proponents about the necessity of separating government (*zheng*) from enterprise (*qi*),¹⁷⁹ the role of the governmental department in charge in the bankruptcy process seemed to have been actually increased during the course of amendments to the draft law by the NPC-SC. Under the Bankruptcy Law, not only is the department in charge the only party that can petition for reorganization, but it is also responsible for coordinating and carrying out the reorganization.¹⁸⁰

The dominant role of the department in charge is perhaps an inescapable feature of the Chinese socialist system. In a sense, the strict dichotomy between the governmental department in charge and the "private sector" managers of the enterprise is really the imposition of a not entirely applicable capitalist framework on the Chinese socialist system. If sufficient incentives and disincentives are established to motivate the department in charge of an enterprise toward efficiency, it perhaps does not really matter whether the department in charge is considered part of government or as a sort of board of directors of the enterprise which represents the interests of the owner of the enterprise, the State.

D. Protection of Workers

The Bankruptcy Law has met its most entrenched resistance from those who believe that the very concept of a Chinese bankruptcy law challenges fundamental assumptions of socialism about the welfare of workers and the full employment society.¹⁸¹ Indeed, the impossibility

179. See Cao, *supra* note 115.

180. Bankruptcy Law, arts. 3(2), 17, 20.

181. See generally Summary, *supra* note 87 (opinion of readers of Worker's Daily); Hu, *Bankruptcy and Unemployment Do Not Contradict the Principles of the Constitution*, Worker's Daily [Gongren Ribao], Nov. 1, 1986, translated in SUMMARY OF WORLD BROADCASTS FE/8413/BII/5; Qian, *Will Workers Lose Their Right to Work When an Enterprise Goes Bankrupt?*, Worker's Daily [Gongren Ribao], Nov. 1, 1986, translated in SUMMARY OF WORLD BROADCASTS FE/8418/BII/1; Discussion

of bankruptcy under the socialist system had often been claimed as evidence of its superiority. On an individual level, the law threatened the long-assumed job security of workers in China.

But the proponents had anticipated these concerns from the start and had already prepared counterarguments and parliamentary strategies. The Shenyang Provisions, the Proposal Draft and the Solicitation Draft all contained detailed provisions on unemployment compensation for the workers of bankrupt enterprises.¹⁸² The Solicitation Draft even had a separate attachment entitled "Measures on Bankruptcy Relief," outlining specifically the unemployment compensation to be paid to the workers of bankrupt enterprises.¹⁸³

The reformers also realized that the bankruptcy law cannot single-handedly create a national unemployment-compensation system in China, where such a system had not existed previously. Thus, at the same time that the bankruptcy law was being drafted and revised, the regulation establishing a national unemployment-compensation system was passed by the State Council (the Unemployment Provisions).¹⁸⁴ By providing a safety net for the unemployed, the Unemployment Provisions make the bankruptcy law much more politically palatable. In general, the Unemployment Provisions reduced the unemployment benefits applicable under the previous bankruptcy law drafts. Laid-off workers of bankrupt enterprises would receive 50–75% of previous wages (reduced from up to 90% in the proposal draft) for a period of two years (reduced from three years under the Solicitation Draft), and the employers would fund such compensations through monthly contributions of 1% of the total wage bill (reduced from 2% in the Solicitation Draft).

During the August Session, the proponents were able to counter the concomitant-conditions argument by pointing out that, since the State Council had already passed the Unemployment Provisions, the entire chapter on unemployment benefits in the draft law should be deleted, except for a general sentence at the beginning of the law.¹⁸⁵ By using this parliamentary tactic, the proponents cut short debate on perhaps the most inflammatory issue in the bankruptcy law debate.

The opponents were not about to let this issue go by without a fight. The NPC Law Committee had recommended to the August

Concerning the Problems of Passing the State Enterprise Bankruptcy Law, *supra* note 86; Zhan & He, *supra* note 78 (views expressed by NPC-SC member Gu Dachun).

182. Shenyang Provisions, chs. V, VI, VII; Proposal Draft, arts. 11, 12; Solicitation Draft, ch. 6.

183. Measures on Bankruptcy Relief (Envisaged plan, for reference in the drafting work) [Pochan jiuji banfa (fang'an shexiang, gong qicao gongzuo cankao)].

184. See *supra* note 132.

185. See *Law Is Beneficial*, *supra* note 75; see also Cao, *supra* note 118.

Session that the chapter on unemployment compensation be replaced with a single sentence in the General Principles chapter of the law: "The State will handle appropriately the living compensation of staff and workers of bankrupt enterprises before their reemployment; the specific measures will be in separate provisions of the State Council."¹⁸⁶ During the August Session, the opponents caused the sentence to be amended to provide that the State will also "guarantee the basic living expenses" of the laid-off workers.¹⁸⁷ During the November Session, the opponents further strengthened the language: "The State will, using all types of methods, appropriately arrange reemployment for the staff and workers of bankrupt enterprises, as well as guarantee their basic living needs before reemployment; the specific measures will be in separate provisions of the State Council."¹⁸⁸ But since the specific provisions on unemployment compensation of the previous drafts had been deleted and replaced by the less generous provisions of the Unemployment Provisions, the amendments by the opponents may be perhaps only a Pyrrhic victory.

III. DEMOCRATIC REFORMS

That terms such as "democratic" and "freedom of the press" are found throughout the constitutions, laws and press editorials of socialist countries is often a surprise to those in the West.¹⁸⁹ The meanings that the West attributes to those terms either are culture-bound and parochial, or laws, constitutions and press editorials in socialist countries simply do not mean what they say. In any case, it is always dangerous to draw conclusions about trends in China toward democratic institutions and greater press freedoms.

What can be said, at a minimum, about the legislative process for the Bankruptcy Law is that the extensive media coverage was unprecedented, although still quite meager by Western standards. An article such as this, based mostly on contemporary public sources, would probably have been impossible to write for any previous law. The various methods in the legislative process for channeling public input are becoming routinized, and may in time develop into legislative procedures that resemble in certain respects quasi-democratic institutions. Perhaps most significantly, the new-found "authority and im-

186. See *Law Is Beneficial*, *supra* note 75.

187. See *Implementing Conditions*, *supra* note 78.

188. Bankruptcy Law, art. 4.

189. For example, article 3 of the Constitution of the PRC states that "the state organs of the PRC shall implement the principle of democratic centralism. The national people's congress and the local people's congresses at different levels are instituted through democratic election." Article 35 states that "the citizens of the PRC enjoy freedom of speech, of the press, of assembly, of association, of parading and of demonstrating."

pact" of the NPC-SC and the NPC in shaping legislation, as evident in the legislative process for the Bankruptcy Law and the the 1987 NPC Session, could potentially develop into a viable pluralistic force and form the basis for a nascent system of checks and balances.

It would be naive to suppose that the center of political power and decision-making in the PRC could ever shift radically away from the Communist Party. The source of political legitimacy and the theoretical foundation for most of the recent urban economic reforms in China, including the Bankruptcy Law, still rest on the 1984 Central Committee Decision.¹⁹⁰ The Decision predated—and was undoubtedly a major impetus for—the formation of the bankruptcy law drafting task force.¹⁹¹

Yet, Chinese commentators are already writing bold articles about how the NPC-SC should exercise "Constitutional supervision" over the Party.¹⁹² Even NPC-SC Chairman Peng Zhen, whom some in the Western press have perhaps unfairly caricatured as an arch-conservative, has emphasized that "the Party must act within the confines of the Constitution and of the law."¹⁹³ Peng has been quoted at length in the Chinese press as speaking in the NPC-SC in favor of passage of the Bankruptcy Law,¹⁹⁴ and he is also one of the most stalwart supporters of the rule of law for China. The ongoing controversy in China over political and economic reform is one that defies easy generalizations or simplistic dichotomies between conservatives and reformists.

Ironically, the growing political power of the legislative branch of the PRC government (and of its leader Peng) may mean a slowing down in some of the political and economic reforms that are urged by Premier Zhao, who heads the executive branch, and by Hu Yaobang, who was formerly the head of the Communist Party. Some may view these shifts in the balance of power among major PRC political institutions and their leaders as merely a power struggle among men. Yet the development of political institutions in any young nation, such as the PRC, is inevitably a partial reflection of the conflicts between the persons who head those institutions. *Marbury v. Madison*

190. See *supra* note 17.

191. See Cao, *supra* note 7, at 16.

192. Zeng & Zhong, *Discussion of the Constitutional Supervision by the NPC-SC of the Party Organization* [Lun renda changweihui dui dang zuzhi de xianfa jiandu], LAW SCIENCE Q. [FAXUE JIKAN], No. 1, Jan. 1987, at 39; Yang & Zhong, *The Right of Leadership of the Party and the Right of Decision-Making of the NPC-SC* [Dang de lingdaoquan yu renda changweihui de jue ding quan], *id.* at 14.

193. Chairman Peng Zhen Emphasizes at NPC Meeting [Peng Zhen weiyuanzhang zai renda huiji qiangdiao], DEMOCRACY & LEGAL SYS. [MINSHU YU FAZHI], Apr. 1986, at 1.

194. *The Bankruptcy Law Is Also A "Law that Promotes"* [Pochanfa yeshi ge "cujin fa"], People's Daily [Renmin Ribao], Nov. 30, 1986; see also Sun, *Discussion of the Active Meaning and Effect of the Enterprise Bankruptcy Law* [Lun qiye pochanfa de jiji yiyi he zuoyong], JURISPRUDENCE J. [FAXUE ZAZHI], No. 1, Feb. 1987, at 6 (Peng's comments quoted in support of Bankruptcy Law).

and the development of the American presidency, for example, can only be fully understood in the context of the personalities of, and the relationships between, the early leaders of the American nation. Institutions, and the relationships between them, however, last beyond the lives of the persons who head them. When the dust settles, the legislative process for the Bankruptcy Law may well remain a valuable paradigm for future democratic reforms in China.