The History of Economic Law in China

By
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1. Economic thought in ancient China
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1. Economic thought in ancient China

Since Antiquity, Chinese governments have implemented monetary economies and, long before their counterparts in the West, Chinese thinkers had turned their attention to problems of production and exchange of goods. For instance, the Analects of Confucius (551-479 B.C.) and the writings of his disciple Mencius (380-289 B.C.) contain comments on economic issues.

From the Spring and Autumn period beginning in the seventh century B.C. to the first unification of China in 221 B.C., Linzi, the capital of the Kingdom of Qi, stood out for its intellectual effervescence nurtured for instance in the Jixia Academy under the patronage of the legendary chancellor Guan Zhong (who died in 645 B.C.). In contrast with the rulers of other kingdoms that had concentrated on the promotion of agriculture, the leaders of Qi earned considerable revenues from exports of salt extracted from seawater. Lively debates were held about this trade, which produced China’s first economic theories.

During the Former Han dynasty (206 B.C.- 8 A.D.), a collection of texts of various dates treating economic theory were compiled under the title of Guanzi (the Treatise of Master Guan), which included a section entitled “The light and the heavy” dealing more specifically with problems related to markets. Its most innovative contribution to economic theory concerned an analogy with the action of weighing using the old Chinese balance to achieve an equilibrium between two sets consisting indifferently of goods or of money wherein may be gleaned the first formalization of a theory of supply and demand. Equilibrium might be modified by increasing or decreasing the supply of either goods or money. The authorities influenced prices through variations in the quantities of supply.

The commentators of economic issues in ancient China consistently adopted the viewpoint of the State and, in contrast with their Greco-Roman contemporaries, they manifested little interest in issues relating to the “management of private estates”. Manipulations of the terms of trade in foreign exchanges were regarded as means of conducting economic war, whereas economic management on the domestic level concerned the raising of revenues, such as through State monopolies, and the reduction of social tensions.

Such a concept of economic life ran contrary to the orthodox doctrine promoted by the Confucian school, which required that economic practices respect the rules of ethics while maintaining social order by guaranteeing that producers receive adequate revenues for their production. Thus, the Confucianists, while also approaching economic questions from the viewpoint of the State, opposed monopolies as the cause of price increases and called for remunerations proportional to individual merit.

They were thus led to promote the pricing of goods while discriminating between social classes so that goods intended for the ruling class would be rendered inaccessible to the common people. In the Confucian outlook, only working the land, including the production of fibres and textiles as well as the extraction of raw minerals, was considered to create wealth. Accordingly, agriculture was the basic economic activity. Commercial activities that caused the goods produced to circulate were considered to be of secondary importance and the profits to be made in their conduct were necessarily much lesser than those in production.
The opposition between these two conceptions of economic activities gave rise to a debate in 81 A.D., during the Later Han dynasty, between the disciples of Guanzi and the Confucianists, about the role of the salt and iron monopolies in fiscal revenue. The events are related in the *Discourse on salt and iron* which reveals how the Confucianists prevailed. The ideas promoted in the *Guanzi* were considered immoral in that the manipulations they encouraged and the price instability they engendered sapped the social order. Still, these ideas continued to exercise a significant influence on administrative practice. Those with respect to storing of goods and issuing coins are present in the “Rites of Zhou”, a later classic that purports to describe the monarchical institutions of ancient China.
2. The criminal orientation of traditional Chinese law

In ancient China, the concept of law (fa) as opposed to the notion of rite (li), which may be rendered as “behaviour appropriate to the situation”, only came into its own right in the fourth century B.C. when the country was torn by violence during the Warring States period leading up to its first unification in 221 B.C. by the State of Qin. The Confucianists considered written law to be a source of squabbling over its interpretation and application. In the Confucian tradition, government was to be conducted according to rites, but this approach supposed the existence of a social consensus.

During this period, the priority of government became the imposition of order that was thought best accomplished by implementing a regime of “rewards and punishments”.

The criminal laws were derived from legalist doctrine that gained ascendancy in the west of the country, in particular in the State of Qin (now the province of Shaanxi). After going through a series of social and administrative reforms implemented by Shang Yang (who died in 339 B.C.), this peripheral kingdom became centralized and was then able to conquer the feudal kingdoms to the east and south.7

The first Code to have survived in its entirety is that of the Tang dynasty (618-906), on which all subsequent dynastic law codes were patterned.8 The new code replaced the regime of mutilations for crimes with a range of punishments varying from lesser or larger numbers of strokes with a light or a heavy bamboo stick, temporary or permanent exile, and capital punishment by either strangulation or by decapitation (a desecration reserved for those guilty of the most heinous offences). In fact, capital punishments could be commuted or suspended for example to permit a convicted single son to care for his aged parents.

The Tang Code, adopted in 653 and revised several times before its final version in 707, contained 501 articles divided into 12 sections representing essentially a catalogue of criminal offences and relevant procedures and sanctions.9 The harshness of the old legal regime was somewhat attenuated under the influence of Buddhism, which had by then reached the summit of its ascendancy in Chinese society.10

The structure of the dynastic code undergoes an important change during the national Ming dynasty (1368-1644). In its first version in 1374, the number of articles was increased to 606 before being reduced to 460 articles in the final version in 1397. A main innovation is that the number of sections is increased to 30 and they are classified according to the jurisdiction of the six ministries. After a first part, devoted to the definition of general principles and the stipulation of punishments, the Ming Law is then divided into sub-sections gathered into groups depending on whether they concern administration, finances, the rites – including diplomacy, education, religious affairs – the army, justice, or public works.

The Law of the Qing dynasty, established by the Manchus and overthrown by the Revolution led by Sun Zhongshan (Sun Yat Sen), retained the structure of the Ming Law but contained only 436 articles and remained a reference until the 1930s.

A major difference between Chinese and Western legal traditions is the obliteration in the former of the distinction between criminal and civil law, or perhaps more accurately stated, criminal law was used to regulate matters that would be subject to civil law in the Western legal tradition. Chinese rules governing such civil matters as family law, property or commercial law akin to those found in the civil law of foreign countries are the subject of only a few provisions in the Chinese codes. Most concern family and property law and, to a lesser extent, commercial and employment law.11
3. Judicial procedure

Just as no distinction was drawn between criminal and civil law, nor were administrative and judicial functions separated at the level of the elementary units of the state organization, corresponding in traditional China to the county (xian) and sub-prefecture (zhou).

The lowest officials attached directly to the ministry of justice might be found in the upper echelons of the prefectures (fu) and circuits (dao). The local magistrates (zhixian, zhizhou) were multi-functional officials who combined administrative and judicial functions within their territorial jurisdictions. They carried out investigations and had at their disposal a “judicial bureau” headed by a secretary as well as police forces. The notion of separation of powers was traditionally alien to the Chinese legal culture. Commoners might file written complaints with the administrative office or “yamen”. They might do so directly or through unofficial counselors. Anonymous denunciations were inadmissible and often deemed to be infractions in their own right. Only homicides might ground legal actions by the authorities.

By our contemporary standards, justice in traditional Chinese society was expeditious. Investigations were usually carried out during the hearing of complaints when the parties were interrogated and might be tortured. Suspects had no right to counsel. The magistrate might summon witnesses and be assisted by a private judicial advisor. Magistrates rendered decisions on the basis of the ascertained facts. Judgments had to be rendered in writing, identifying the articles of the law applied and specifying the sanction to be implemented. When defendants were convicted of only minor crimes, judgments were executed immediately.

Notwithstanding its expeditious nature, justice in traditional China was not administered arbitrarily and magistrates of integrity enjoyed high public esteem.

Indeed, the quality of justice in traditional China attracted the admiration of contemporary commentators in the West.

The provisions of the law applied to persons of equal standing, which meant without family relations and not involved in any hierarchical relation. Magistrates were expected to pay special attention to the exact relationship between the parties.

In traditional Chinese judicial procedure, great importance was attached to determining the degree of responsibility of the accused. Account was taken of factors such as the existence of premeditation, the presence of criminal intent and the particular circumstances of the crime. Distinctions were made based on the deliberate, negligent or accidental nature of the acts. In accordance with these factors, the punishment would be aggravated or reduced. Crimes committed against one’s hierarchical superiors, whether a parent or a person exercising social authority, entailed aggravated punishments. The contrary applied to those having committed crimes toward persons in a position of inferiority, except when officials were guilty of abusing their powers over the administered, as such conduct was deemed to constitute corruption.

Rendering judgments was thus a delicate exercise involving a multiplicity of considerations.

In cases of doubt, magistrates might bring the case before colleagues in neighbouring counties.

Convicted defendants might appeal based on failures by judges of first instance to take account of the true situation.

In especially serious cases, appeals were presented to special officials representing the ministry of justice at the provincial level or to censors on tour.
Except in the cases of especially horrific crimes - the ten abominations including parricide and rebellion - cases of capital punishment had to be reported to the emperor for his approval before their execution.

In various situations, such as where the facts of a case were not covered by a specific provision of the law, the magistrate would reason by analogy on the basis of reports of prior judgments on appeal available in voluminous compilations of jurisprudence.

Laws entered into force on the date of their promulgation, even if the infraction had been committed earlier.

Commoners were discouraged from bringing their grievances before the courts and local magistrates able to keep down the number of legal actions enjoyed a good reputation and qualified for bureaucratic promotion. The resolution of complaints of a purely civil nature was better sought through the arbitration of “elders” (laoren) or heads of collective responsibility groups of 100 hundred households (baozhang) acting as justices of the peace.

These arbitral awards were often based on customs as ascertained from the analysis of various types of contracts, which, as will be examined below, played a very important role in economic and social life.
4. Civil law and economic law

At the time of the first premises of economic and legal theory in China more than 2,500 years ago, land was still not appropriated by individual owners. Peasants gained access to cultivated land by pledging allegiance as well as a fraction of their crops to a “feudal lord”. Chinese historians credit the legalist Shang Yang with the introduction of non-noble private ownership of land. Tax-exempt land, transmissible by inheritance or by alienation under certain conditions, was distributed to soldiers as rewards. Texts dating back to the Han Dynasty refer to aristocratic domains that sold a part of their crops on the markets and were exempted from taxation as well as to self-sufficient households tenancies that paid a fee in bronze coins based on the value of their assets (land, animals, tools). According to the first censuses, peasants registered on the tax roles as “free” constituted only a small fraction of the actual population. The growth of the proportion of dependant peasants ultimately contributed to the apparent decline of the population during the Later Han dynasty and the following period of division.

From the end of the fourth century to the latter part of the eighth century, several dynasties, beginning with the Northern Wei (386-532), implemented variations of the “equal field system” (juntian fa) with the objective of increasing agricultural production on which tax revenues depended. Plots of land, from three to seven hectares depending on the region, were distributed on lifetime leaseholds to all free households in proportion to the number of their members, including dependants, and sometimes in relation with the number of cattle they owned.

In return, these households were then bound to “triple taxation”: the remittance of quotas of grain and of textile fibers, as well as the accomplishment of corvée and military service.

In theory then, land belonged to the State and was to be returned to it by the heads of household upon reaching the age of 60 years. But historical documents leave the impression that it was possible for free peasants by contract to rent or mortgage parcels of land.

Until the end of eighth century, commercial transactions were allowed only during specific periods and only within the confines of walled markets where the government could verify respect for its price controls and where it could conveniently collect taxes.

The instauration of private ownership of land and the liberalization of economic transactions coincided with the reform of the taxation regime. In 780, a new system called “double taxation” was implemented according to which peasants could claim full ownership to their land by paying their share of the land tax in two installments (the spring textile quota and the fall grain contribution).

The society that emerged toward the end of the Tang dynasty had become much more open and its social inequalities resulted from economic status. There were then two social classes: the “residents” (zhu hu), who owned their land and paid the land-tax, and the “guests” (ke hu), who rented theirs. The wealthiest of the peasant households formed a sub-bureaucratic layer that managed rural society at the local level.

During the Song dynasty (960-1276), the right to engage in trade was further liberalized, spurring the development of rural markets. Nevertheless, monopolies were imposed on trading in salt, tea and alcohol and rights to sell these commodities were subject to advance payments of indirect taxes. There prevailed a monetary economy. Citizens could avoid performing their corvée duties by paying for substitutes to replace them. The tax reforms instituted by Wang An Shi (Chancellor from 1069 to 1086) even included compulsory loans to peasants during the spring when market prices peaked, to avoid their recourse to professional moneylenders who might impose excessive rates of interest. This interventionism, which was intended to improve the people’s living conditions, never materialized in the code.

The divergence of socio-economic realities and the state of legislation continued during the last dynasties, Ming (1368-1644) and the Qing (1644-1911).
The first part of the Ming dynasty coincided with a reaction against the monetary economy that led, during the 14th and 15th centuries to the prohibition of the use of silver in transactions and to the implementation of payments in kind of taxes. As during the Song dynasty, individual citizens’ relations with the State administration largely continued to be determined by their economic status. The wealthy peasants constituted a sub-administrative layer that managed the villages. Social stability was enhanced by the implementation of a system of ten-year rotations of corvée services. Land could be freely alienated. The provisions of the law with respect to land ownership were amended to require that land sales and mortgages be concluded in writing and that a special tax be levied on such transactions. The law, however, took no notice of other forms of alienations through contracts or private agreements (rental agreements subject to the payment of a deposit with possessory rights but not ownership). Over time, a category of “perpetual tenants” came into existence, called “managers” (ye zhu) who exercised all the prerogatives of owners, including the rights to alienate or rent their property, or to associate with other investors, for instance for the exploitation of mineral resources. They were, however, exempt from reporting to the fiscal authorities and paying property taxes. Managers were supposed to own only the surface of the soil. The obligation to pay land taxes remained for the account of the landowner, who would generally charge rent at least sufficient to cover the taxes. This legal regime is designated in Chinese literature as “stratified property” (yi tian liang zhu - a plot of land owned by two masters, sometimes even three). But no mention of it is made in the codes.

As regards trading activities, except for the salt and alum monopolies, which had lost much of the fiscal importance they enjoyed under the Song dynasty, they were undertaken independently on free markets. The authorities’ regulation of economic life was limited to the issue of currency (bronze coins), the monitoring of prices and the storage of a portion of all grain production to be sold on the market when prices reached unacceptable levels.

The provisions in the Ming and Qing codes concerning the regulation of markets amounted to only five articles. They covered private attempts to fix prices above market levels, attempts to monopolize river traffic through the installation of illegal wharfs, the use of weights and units of measure not conform with official standards, and the sale of defective silk or cotton cloth. Another article prohibited usury by limiting the total amount of interest to 100% of the principal.

The only domain of private law that receives detailed treatment in the codes is family law, which is treated in several articles, for the most part in sections dealing with offenses subject to the jurisdiction of both the ministry of finance and the ministry of justice. The special importance attached to family law in the written law is consistent with the role of family relations in Confucian ethics and the analogies that might be drawn between parental and imperial authority.

Marriages were considered to be alliances as well as contracts between two families. Their organization involved the intervention of intermediaries and an exchange of gifts. In the laws, these matters were in each case approached from the penal viewpoint, with sanctions being attached to violations.

In a manner similar to the absence from the Ming and Qing codes of a property law as actually practiced, the codes do not contain provisions with respect to the enlargement of the family that had become the rule from the Ming dynasty onward. The family as mentioned in the Qing code appears much the same as in the Tang Code that prevailed a millennium earlier, when lineage did not extend beyond one’s great-great-grandfather.

As early as the 15th century, the actual cell of society had become the clan, encompassing the totality of the descendants of a presumptive common ancestor that held property in common and manifested various forms of solidarity.
5. Conclusion

To conclude, traditional Chinese law was intended to manage relations between subjects and the imperial power exercised through the government. It is by nature penal in that its provisions stipulate infractions and their corresponding punishments. It served to maintain an idealized and ultimately archaic social and political order.

The concrete rules that governed social and economic practices in the late imperial period were mostly customary and they might vary considerably from one region to another. This paradoxical situation explains the importance attached to contracts in daily life in traditional China. They were applied on a wide variety of occasions. They had to respect very strict rules and were signed in front of witnesses, though they were rarely registered with the authorities except in matters involving State authority. Their widespread use facilitated spontaneous adjustments to new social conditions. They were binding upon their parties, and their provisions might be invoked before arbitrators agreed upon by the parties to obtain their enforcement. This state of affairs continued until the early 1930s, when the first civil code in the Western sense of the term was adopted.
Notes

1. The Kingdom of Qi covered the northern region of the current province of Shandong.
2. Guan Zhong centralized power while dividing the capital into quarters, each of which was dedicated to a specific trade. He shifted administrative responsibilities from hereditary aristocrats to officials selected based on merit and promulgated a uniform tax code that apportioned levies based on land’s productivity.
3. The currently available version of the *Guanzi* has been reconstituted from ancient Japanese editions.
4. In the presentation, reductions in the amounts in circulation corresponded to making money or commodities heavier, whereas increases in the stocks of goods or money translated as “decreases in the weights”.
5. The Greek word “oikonomia” originally meant estate management.
6. The *Guanzi* never achieved the distinction of being included in the works to be studied for the exams to enter government service.
7. There are several explanations of the origins of law in China. The most ancient Chinese text concerning the criminal goes back to 536 B.C., when the State of Cheng adopted the Wu Xing or Five Punishments, which all involved mutilations (amputation of hands and feet, and of the nose, castration and decapitation); 3,000 infractions were punished by one or the other of these five punishments. The Wu Xing recounts how a barbaric people, the Miao, under the reign of the legendary Shun (23rd century B.C.) had instituted the regime of the Five Punishments. This version of the origins of Chinese law is contested for instance by James D. Sellmann, On the Origin of Shang and Zhou Law, *Asian Philosophy*, Volume 16, Number 1 / March 2006, 49 – 64. The author argues that the Shang people originated their own law, http://taylorandfrancis.metapress.com/(qyquo245qekhceq5hjvzkgzw)/app/homecontribution.asp?referrer=parent&backto=issue,3,4;journal,3,20;linkingpublicationresults,1:104547,1.
8. From secondary sources, glimpses may be had of the law of the Han dynasty. It is reported to have contained as of the year 200 A.D. some 26,272 paragraphs and more than 17,000,000 words spread over 960 volumes.
9. The 12 sections were entitled: Definitions and General Principles (ming lì), Imperial Guard and Prohibitions (wei jin), Administrative Rules (zhì ze), Family and Marriage (hu hun), Stables and Treasury (jiu ku), Unauthorized Corvée Levies (shan xìng), Violence and Theft (zei dao), Conflicts and Suits (tòu sòng), Deceptions and Frauds (chà wéi); Miscellaneous Laws (za lù), Arrests and Escapes, (pu wáng), Trial and Imprisonment, (duàn yǔ). Derk Bodde and Clarence Morris, *Law in Imperial China*, Harvard Studies in East Asian Law, 1971, p. 58-59.
10. During the Tang dynasty, additions were made to the list of periods during the year when it was prohibited to execute capital punishments, such as on rainy days or after dark. In the end, there may have remained only a few days of the year when executions were permitted.
11. They are classified mostly in the second section of the Qing Code and correspond to infractions that fall within the jurisdiction of the ministries of finance and of public works.
12. Compared to its contemporary regimes in Western Europe or the Americas, the traditional Chinese regime may well have been more humane.
Civil Law

By
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Daniel Arthur LAPRES

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   2.3. Legal persons
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1. Introduction

The first discussions in China of the introduction of a legal system of Western inspiration go back to the 19th century. For instance, Tan Zitong (1865-1898), an official at the Qing court, recommended that the feudal system of governing China be replaced by an appropriate Western system of legal administration.¹

In 1904, before the overthrow of the Qing dynasty seven years later, the Imperial Law Codification Commission was founded to consider adoption of appropriate foreign legal concepts, but it was not until the mid 1930s, when the Nationalist regime was already in disarray, that a series of six codes were completed, including a civil code and a code of civil procedure.² The direct source of inspiration for these Codes was Japanese law of the time, itself grounded to a certain extent in German law and to a lesser extent in French sources.³

The Chinese Soviet Republic (1931–1934) implemented a legal system inspired by disparate sources including communist ideology (both Russian and nationalist), Qing Code norms and remnants of the Nationalist legal reforms.

But after the Communist Revolution, all the laws of the prior regime were repealed and, though some 150 laws were adopted under the new regime, authority was actually exercised on political considerations.

Prior to the launching of the reform and opening up movement, no citizen could bring an action before the Chinese courts to enforce rights to property.

But the implementation of a socialist market economy has induced the instauration of property rights and the development of civil rights. Provisions in the Constitution of 1982 were adopted for this purpose.

The General Principles of Civil Law (the GPCL)⁴ became effective as of January 1, 1987 and represent a milestone in the development of Chinese law. It remains debatable whether the foreign influences colour Chinese civil law as closer to the common law or to the civil law legal families. The better view is likely that Chinese civil law is sui generis.

While there is continuous discussion of the adoption of a “civil code”, there remains for the time being an intertwining of norms on the major topics of civil law: constitutional protections for private property and rights of access to courts for wrongs causing harm to private rights, the Contract Law ⁵ and its antecedents, the Property Law adopted in 2007 ⁶ and its antecedents, and the Trust Law.⁷
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Business Criminal Law

By
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and
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1. Introduction

During the history of the People’s Republic of China (PRC), the country’s criminal law regime has undergone tremendous change. The regime has developed from one in which the key considerations were political to one in which the police, the procuratorate and the judiciary are increasingly independent. The evolution of the PRC’s criminal law reflects the development of a market driven economy. In recent legislation, increased importance is placed on preventing and punishing economic crimes.

The first few decades of the PRC may be characterized as a period during which the rule of law was not one of the government’s priorities. This was certainly true of criminal law, and from 1949 to 1979, no specific laws or regulations were issued regarding principles or standards of punishment to be exercised by the government with respect to individuals. Nevertheless, although there was no statutory basis, during this time, almost all illegal acts continued to be punished as crimes.

In 1979, along with many other reforms, the PRC promulgated several basic laws. Among these was the Criminal Law, which was adopted at the Second Session of the Fifth National People’s Congress (NPC) on July 1, 1979, and which came into effect on January 1, 1980. Although this new criminal code represented a major step forward towards the rule of law, it was still dominated by political considerations, and crimes of counter-revolution constituted the bulk of its Specific Provisions. Little attention was paid to economic crimes.

The 1979 Criminal law also suffered from a lack of precision and certainty. Many crimes were either defined inadequately or not defined at all. Moreover, the law allowed people to be prosecuted for acts not listed as crimes. Specifically, article 79 of the 1979 Criminal Law stipulated that in cases where no specific provisions applied to a particular act, other provisions defining very similar acts as crimes could instead be applied. This made it possible for people’s courts to try cases by analogy, thereby seriously undermining the legal certainty that is an integral part of the rule of law.

In addition, soon after the passage of the 1979 Criminal Law, China’s rapid economic development and the attendant social changes were accompanied by an increase in criminal activity. As a result, there was a need to apply heavier punishments to crimes, such as drug dealing or smuggling, which became much more common during this period. In addition, it became necessary to criminalize various acts related to securities, money laundering, computers, and other matters.

The difficulties encountered in the implementation of the 1979 Criminal Law finally led to its amendment in 1997. Strictly speaking, though only an amendment of the original law, the 1997 Criminal Law is totally different in spirit from its predecessor. Where many of the provisions in the 1979 Criminal Law resembled political slogans, the 1997 version explicitly fostered both the rule of law and democratic principles in terms of the application of the law. In its statement of principles, the 1997 Criminal Law places great importance on the determination of both crime and punishment according to the law; the equality of all persons before the law, and the proportionality of penalties.

Overall, the 1997 Criminal Law aimed to maintain the stability and continuity of the system, while at the same time creating a more consistent and systematic criminal law that provided more precise and concrete definitions for offences. In pursuit of the latter goal, the 1997 law added a total of 261 articles to the 192 articles existing under the 1979 version.
It is significant that a large proportion of the new offences defined under the 1997 Criminal Law were economic crimes; most of these appear in Chapter III of the Specific Provisions entitled “Crimes of Disrupting the Order of the Socialist Market Economy”. These crimes include:

- manufacturing and selling fake and substandard goods;
- smuggling;
- disrupting the order of company and enterprise administration;
- undermining the order of financial management;
- financial fraud;
- endangering the collection and management of taxes;
- infringement of intellectual property rights; and
- disrupting market order.

Chapter VIII, on Crimes of embezzlement by civil servants and bribery, was also added.

Furthermore, the 1997 law introduced the liability of work units, a term which includes enterprises and companies.

In common with many foreign legal systems, almost all Chinese laws contain prohibitions that may give rise to administrative or judicial sanctions, including matters left largely outside the Criminal Law.

A particularity of Chinese criminal law is that almost any illicit activity may be characterized as criminal if it transgresses a standard of scale (e.g. “enormous profits”) or significance (e.g. “grave consequences”).

Since 1997, the Criminal Law has been amended six times, mostly either to take into account international issues such as terrorism or in response to economic development. Notably, amendments have concerned financial crimes related to securities, credit card or banking fraud. In order to clarify particular aspects of the Criminal Law, the Standing Committee of the NPC has also released seven interpretations since 1997.

This chapter focuses on the bribery of officials, commercial bribery, money laundering and corporate fraud.
International Trade

By
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Henry GAO
and
Daniel Arthur LAPRES

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1. **Introduction**

Over the course of the first thirty years following the foundation of the People’s Republic in 1949, China applied a system of planning in the management of its foreign trade. Reflecting the influence of the previous Soviet model, all imports and exports were handled by some ten State-owned import and export corporations acting in accordance with the State Plan. There were, at this stage, comparatively few foreign trade laws and regulations.

Once China adopted, in 1979, the policies of reform and opening to the outside world, its foreign trade and economic relations progressed considerably, as has the construction of its legal system. The improvement of China’s legal system has greatly comforted the development of its foreign trade.

In the following two decades leading to its accession to the World Trade Organization (WTO), China eliminated mandatory planning of its foreign trade. The Government continued to separate itself from business activities, and foreign trade operators increasingly were able to make independent decisions regarding their activities, while bearing responsibility for their profits and losses. Gradually, most commodities were priced according to market supply and demand.

Around the Foreign Trade Law adopted in 1994, China has built a system of foreign trade regulation composed of laws and regulations on customs, import and export licence, tariffs, inspection of import and export goods, foreign exchange, anti-dumping and anti-subsidy safeguards. The emergence of the new system of foreign trade regulation prompted further growth in China’s foreign trade. The next ten years witnessed several major shifts in China’s foreign trade environment.

In 2007 China’s exports will exceed $1 trillion and through September its trade surplus with the rest of the world had already reached $187 billion. While ten years ago, products exported from China were predominantly natural resource-intensive products, now the majority of China’s exports are labour intensive-products, and a growing proportion have advanced technological contents.

China’s emergence as a “world factory” has brought on the second change: many countries, fearing the threat of cheaper and better products “made in China” have begun to curb the inflow of Chinese goods using various trade barriers. These include not only the industrialized nations such as the United States and countries in Europe, but also many developing countries such as Mexico, Brazil, Argentina, Korea, India and the Philippines. However, with China’s growing importance as an exporter and importer for the world, i.e., as the supplier and buyer of many products of crucial importance for many countries, few countries possess sufficient leverage to effectively deal with China through unilateral measures.

China acceded to the WTO in November 2001. Of course, China was not forced to join the WTO but it had been seeking to resume its membership in the General Agreement on Tariffs and Trade (GATT), and later on the WTO, ever since 1986. For more than 30 years since the People’s Republic was established, China had not felt much inconvenience due to its absence from the GATT. Considering that China’s only foreign trade had been with its communist peers and developing countries, it really did not matter whether or not China was a contracting party of the GATT, which, for a long time since its provisional application in 1947, had been a “rich countries’ club” controlled by capitalist countries. However, with the increasing participation of the developing countries in the GATT in the 60s and 70s, and after China’s adoption of the reform and opening up policy in the late 70s and the gradual shift of its trading relationships towards the developed countries, China felt the need to join the WTO. Moreover, for China, membership also meant deeper integration into the global economy and recognition of its status as a major world power.
In conjunction with its accession to the World Trade Organization (WTO), China has further fundamentally reformed its foreign trade regime as well as substantial parts of its internal commercial law and economic regulatory framework. According to the Ministry of Commerce (MOFCOM) more than 2,300 laws and regulations were amended to comply with WTO norms and, in the year following accession, 850 laws were abolished.

Since accession, China has begun to assume an important role in the regulation of international trade, including through recourse to WTO dispute resolution mechanisms. As China was subject to more anti-dumping investigations between 1995 and 2003 than any other nation (some 15% of the worldwide total), its accession to the WTO has given it a forum to pursue its own claims against other members, such as against the United States, over its measures to protect the local steel industry.

After joining the WTO, China cut its average tariff for industrial goods from 14.8% to 9.1% in 2005, and the tariff for agricultural goods from 23.2% to 15.4%. According to a WTO Secretariat report in 2006 on China's trade policies and practices, “economic reform has produced impressive results but important challenges remain”. The Chinese authorities seem to consider their country’s WTO commitments to have been fulfilled.

1.1. Accession to the World Trade Organization

After some 15 years of negotiation, China’s accession to the WTO was approved by consensus of the Ministerial Conference held at Doha on November 10, 2001 and China formally entered the Organization on December 11, 2001. China has adopted all the principles of the GATT and of the other agreements within the scope of the WTO.¹

Even prior to its accession, China had already considerably reduced average rates of duties. Accession entailed gradual rate reductions on agricultural products to 15% and to an average of 8.9% on all other products, with a commitment to reach an overall average rate of duties of 9.4% on January 1, 2005 while those on information technology (computers, semi-conductors and telecommunications equipment) were to be eliminated altogether.

On trade in services, China’s commitments are adapted by sector and were largely met as of January 2005. For instance, the Foreign Trade Law reform of 2004 extended trading rights and distribution rights to foreign enterprises. In implementation of its commitments on this account, the MOFCOM has adopted:

- the Measures for Regulating Foreign Investment in the Commercial Sectors promulgated on April 16, 2004, that came into effect on June 1, 2004;² the new regulations will allow foreign investment in the trading sectors; and
- the Measures for Regulating Commercial Franchising issued on December 30, 2004, that became effective as of February 1, 2005.
Among the reforms accepted to ensure its accession to the WTO, China agreed to implement a uniform customs regime over its entire territory, including in Special Economic Zones, in open coastal cities, in economic and technical development zones. The regime governing trade in goods, services, trade-related aspects of intellectual property rights (TRIPs) and the control of foreign exchange must be administered in a uniform, impartial and reasonable manner including at the sub-national level.

Indeed, given the vast size of China and the differences in geographical conditions, levels of economic development, histories and cultures of each of the different regions, some members of the Working Party raised concerns as to whether China could ensure the uniform application of the trade regime. As a result, China made the following commitments in its accession protocol:

- the provisions of the WTO Agreement and the Protocol would be applied to the entire customs territory of China, including border trade regions and minority autonomous areas, Special Economic Zones, open coastal cities, economic and technical development zones and other areas where special regimes for tariffs, taxes and regulations are established;
- authorities would apply in a uniform, impartial and reasonable manner all laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub-national level pertaining to trade in goods, services, trade-related aspects of intellectual property rights or the control of foreign exchange;
- regulations, rules and other government measures at the sub-national level would conform with the obligations undertaken in the WTO Agreement and the Protocol and a mechanism would be established under which individuals and enterprises could bring to the attention of the national authorities cases of non-uniform application of the trade regime.

In addition, China undertook to publish and make readily available all laws, regulations and other measures relating to trade in goods and services, to TRIPs and to foreign exchange controls.

China agreed to provide impartial and independent tribunals for prompt review of administrative actions relating to the implementation of its international trade regime.

Within three years after accession, all enterprises in China were to have the right to trade in all goods, except for those listed in Annex 2A, which continue to be subject to State trading. The activities of State trading enterprises are expected to be transparent, including the provision of full information on their pricing mechanisms for exported goods.

All trade and foreign exchange balancing requirements, local content and export or performance requirements are to be abolished and China is committed not to enforce provisions of contracts imposing such requirements.

In principle, prices for traded goods and services in every sector are henceforward to be determined by market forces.

Upon accession, all subsidies on goods falling within the scope of article 3 of the Agreement on Subsidies and Countervailing Measures (SCM) were to be eliminated. Subsidies on exports of agricultural products were to be eliminated. Subsidies maintained within the meaning of article 1 of the SCM must be notified to the WTO.
Under specific provisions of the Accession Agreement, reference prices for determining the existence of dumping by Chinese exporters are to be Chinese prices or costs where it is “clear” that “market economy conditions prevail in the industry”. The importing WTO member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot “clearly” show market economy conditions in the industry. If and when China has established, under the national law of the importing WTO member, that it is a “market economy”, such provisions would be terminated. All such provisions are to expire 15 years after the date of accession. As of 2007, neither the United States nor the European Union had recognized China as a “market economy”. The former considers that the State’s control of critical sectors of the economy, such as raw materials, remains excessive and that transparency is inadequate, while the latter also considers that corporate governance is deficient, that the legal environment is discriminatory and that market principles do not apply in the financial sector.

Article 16 of the Accession Protocol creates a Transitional Product-Specific Safeguard Mechanism, which is to remain in effect for 12 years. Where products of Chinese origin are being imported into any WTO member under such conditions as to cause or threaten to cause “market disruption” to the domestic producers of like or directly competitive products, the WTO member so affected may request consultations with China to seek a “mutually satisfactory solution”. If, in the course of these bilateral consultations, it is agreed that action is necessary, China will adopt measures to prevent or to remedy the market disruption.

If consultations do not lead to an agreement between China and the WTO member concerned within 60 days of the receipt of a request for consultations, the WTO member affected may, in respect of such products, withdraw concessions or limit imports, but only to the extent necessary to prevent or remedy such market disruption.

In determining if market disruption exists, the affected WTO member must consider objective factors, including the volume of imports, the effect of imports on prices for “like or directly competitive articles” and the effect of such imports on the affected domestic industry.

The WTO member taking such action must provide reasonable public notice to all interested parties as well as provide adequate opportunity for importers, exporters and other interested parties to comment.

If the countervailing measures adopted by a WTO member remain in effect for more than two years, China has the right to suspend the application of substantially equivalent concessions or obligations under the 1994 GATT.

In “critical circumstances”, where delay would cause damage which it would be difficult to repair, and pursuant to a preliminary determination that imports have caused or threatened to cause market disruption, provisional safeguard measures may be adopted for up to 200 days.
When a third WTO member considers that countervailing measures cause or threaten to cause significant diversions of trade onto its market, it may request consultations with China and/or the WTO member concerned. If such consultations fail to lead to an agreement between China and the WTO member or members concerned within 60 days, the requesting WTO member may withdraw concessions granted to China, but only to the extent necessary to prevent or remedy the diversions.

All prohibitions, quantitative restrictions and other measures maintained by WTO members against imports from China listed in Annex 7 must be phased out.

The Multi-Fiber Agreement, which regulated international trade in textile products for some 30 years, expired on December 31, 2004. This Agreement had served to protect the markets of developed countries from the imports of developing country producers while distributing market share among exporting countries, though China had nevertheless accumulated the world’s leading market share of some 25% by 2006, which share has since then more than doubled. China has accepted that until 2008 WTO members experiencing “market disruption” may request consultations with a view to capping the annual growth in imports of textile products from China at 7.5%.

The Accession Protocol institutes a transitional review mechanism that does not preclude or constitute a precondition to recourse to consultation or other provisions of the WTO Agreement or this Protocol. The General Council of the WTO must review the implementation of China’s commitments and China may raise issues relating to any specific commitments made by other members. The General Council may make recommendations to China and to other members in these respects.

As the price for accession, China was forced to accept many discriminatory provisions. Overall, we can divide those provisions into two different categories.

One includes the provisions requiring China to assume “WTO-plus obligations”. For example, China is required to translate into one of the official languages of the WTO (English, French and Spanish) all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange while no other member of the WTO has assumed such an obligation. China is obligated to provide national treatment to investments in China by foreign enterprises and individuals, while the WTO national treatment rule usually only applies to foreign products. China is subject to annual review by the subsidiary bodies of the WTO for eight years after its accession, while under normally applicable trade policy review mechanisms, China should only be reviewed every four years.

The other category of provisions diminishes China’s rights as a member of the WTO. For example, paragraph 15 of China’s Accession Protocol allows WTO members to treat China as a non-market economy in their antidumping investigations. Thus, in determining the existence of dumping, they can use prices of third countries surrogated for domestic prices, rather than use the actual price in China as required by the antidumping rules of the WTO. As surrogate prices are usually higher than the actual prices in China, this provision means that Chinese products are more vulnerable to dumping charges.

Paragraph 242 of the Working Party Report and 16 of the Accession Protocol allow other WTO members to apply the so-called “Special Textile Safeguard Mechanism” and “Transitional Product-Specific Safeguard Mechanism” solely against Chinese textiles and certain other products, while under the safeguard rules of the WTO, measures have to be applied on a non-discriminatory basis, which excludes that any one country be targeted.
1.2. **International conventions and treaties to which China is a party or a signatory**

China has established trade relations with more than 170 countries and signed trade agreements or treaties with more than 90 countries and the European Union (EU)\(^5\) stipulating reciprocal grants of trade arrangements including the most favoured nation status. China has also signed or acceded to a series of international trade conventions and treaties, in particular:

- the United Nations Convention of April 11, 1980 with respect to contracts for the international sale of goods, which was signed in Vienna (the International Sale of Goods Convention)\(^6\) and
- the Convention of June 10, 1958 with respect to the recognition and enforcement of foreign arbitral awards (the New York Convention of 1958).\(^7\)

### Principal macro-economic effects of WTO accession through 2010 \(^8\)

(\% variation compared with non-accession scenario)

<table>
<thead>
<tr>
<th>Entire country</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross domestic product (GDP)</td>
<td>5.71</td>
</tr>
<tr>
<td>Consumption</td>
<td>4.81</td>
</tr>
<tr>
<td>Investments</td>
<td>7.95</td>
</tr>
<tr>
<td>Exports</td>
<td>15.66</td>
</tr>
<tr>
<td>Imports</td>
<td>13.03</td>
</tr>
<tr>
<td>Exports (inter-regional)</td>
<td>-4.13</td>
</tr>
<tr>
<td>Imports (inter-regional)</td>
<td>2.46</td>
</tr>
<tr>
<td>Trade surplus</td>
<td>-18.90</td>
</tr>
<tr>
<td>GDP deflation factor</td>
<td>-0.28</td>
</tr>
<tr>
<td>Income per household:</td>
<td></td>
</tr>
<tr>
<td>Urban</td>
<td>1.14</td>
</tr>
<tr>
<td>Rural</td>
<td>2.20</td>
</tr>
<tr>
<td>Number of salaried personnel</td>
<td>2.32</td>
</tr>
</tbody>
</table>

### Reductions in customs duties pursuant to the WTO Accession Agreement\(^9\)

<table>
<thead>
<tr>
<th></th>
<th>Rate in 2001(%)</th>
<th>Post-Accession rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture – average</td>
<td>18.9</td>
<td>11 (01.01.05)</td>
</tr>
<tr>
<td>Industrial products</td>
<td>14.8</td>
<td>8.9 (01.01.05)</td>
</tr>
<tr>
<td>Information technology</td>
<td>13.3</td>
<td>0 (01.01.05)</td>
</tr>
<tr>
<td>Automobiles</td>
<td>80-100</td>
<td>25 (01.07.05)</td>
</tr>
<tr>
<td>Textiles</td>
<td>25.4</td>
<td>11.7 (01.01.05)</td>
</tr>
<tr>
<td>Steel</td>
<td>10.6</td>
<td>8.1 (01.01.04)</td>
</tr>
</tbody>
</table>
China also participates in the activities of the Asian Pacific Economic Co-operation forum (APEC). 11

Before its accession to the WTO, China manifested little interest in regional trade agreements. But since its accession, China has concluded two Closer Economic Partnership Arrangements in 2003 with Hong Kong and Macau, followed by its signature of the Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation with the Association of Southeast Asian Nations (ASEAN) in 2004, and a free trade agreement with Chile in 2005. The Early Harvest Program of the China-Pakistan free trade agreement (2005) also provides for tariff elimination or reductions in several categories of products. In addition, China is in free-trade negotiations with Australia, New Zealand, Iceland, Japan and Korea.

### 1.3. Principal laws and regulations

The Constitution grants the central government the power to regulate foreign trade. 12

At the summit, the NPC and its Standing Committee adopt national laws on foreign trade, which must be uniformly applied throughout China.

Second, the administrative regulations and policies of foreign trade are adopted by the central government, that is, the State Council or the MOFCOM, with a view to their uniform application throughout the territory.
Third, local governments at all levels ensure that the national laws and administrative regulations and policies are uniformly applied all across China.

The reform of the foreign trade system after 1979 resulted in the promulgation of several important regulations, such as the trial measures of March 26, 1979 with respect to the promotion of imports and exports, the circular of December 28, 1981 with respect to export licence procedures for certain goods not included in the State Plan, and the interim regulations of January 10, 1984 with respect to the licensing system for imported commodities, all of which were promulgated by the State Council.

On May 12, 1994, the National People’s Congress (NPC) adopted China’s first general law with respect to foreign trade (the Foreign Trade Law). In addition, the NPC and its Standing Committee promulgated a series of laws and regulations with respect to foreign trade administration.

Amendments to the Foreign Trade Law were adopted as of July 1, 2004 to comply with the WTO commitments, and as a result the country’s international trade regime was radically reformed.

1.4. Foreign trade administration

The MOFCOM is a functional department under the State Council. It is in charge of the overall administration of China’s foreign trade and economic co-operation.

Established in November 1949 as the Ministry of Trade of the Central People’s Government, it was replaced in August 1952 by the Ministry of Foreign Trade. In March 1982, the Standing Committee of the NPC passed a resolution to merge the Ministry of Foreign Trade, the Ministry of Foreign Trade Relations, the State Import and Export Management Commission, and the State Foreign Investment Management Commission into the Ministry of Foreign Economic Relations and Trade. In March 1993, it was further renamed as the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) at the first session of the eighth NPC. Ten years later, the first session of the Tenth NPC sanctioned another round of restructuring of the State Council, during which parts of the State Economic and Trade Commission and the State Planning and Development Commission were merged into the MOFTEC to form the new MOFCOM. Its major responsibilities are the following:

- to formulate development strategies, guidelines and policies with respect to domestic and foreign trade and international economic cooperation; to draft laws and regulations governing domestic and foreign trade, economic cooperation and foreign investment; to devise implementation rules and regulations; to make proposals on harmonizing domestic legislation on trade and economic affairs, as well as to bring Chinese economic and trade laws into conformity with multilateral and bilateral treaties and agreements;
- to formulate development plans for domestic trade, to make proposals on reforming the commercial distribution system, to foster and develop urban and rural markets, to promote the restructuring of the commercial sector and the propagation of high technology logistics, chain store operations and franchising, and e-commerce;
- to formulate policies for regulating markets and imposing order, for breaking up market monopolies and regional blockages; to set up and improve integrated, open, competitive and orderly markets; to monitor and analyze market activities and commodity supply and demand; to organize the adjustment of markets’ supply of the principal consumer goods, and to regulate the allocation of the major means of production;

- to implement measures for the regulation of the import and export of commodities; to organize the implementation of import and export quota plans; to decide on quota quantities and to issue licences; to implement import and export commodity quota tendering policies;

- to formulate and execute policies concerning trade in technology, State import and export controls, and policies encouraging the export of technology and complete sets of equipment; to promote the establishment of foreign trade standardization systems; to supervise technology imports, equipment imports, exports of domestic technologies subject to State export restrictions and re-exports of imported technologies, and to issue export licences pertaining to nuclear energy subject to China’s non-proliferation commitments;

- to propose and implement multilateral and bilateral trade and economic cooperation policies; to assume responsibility for multilateral and bilateral negotiations on trade and economic issues; to coordinate domestic positions in negotiating with foreign parties, and to sign documents arising therefrom and to monitor their implementation; to establish multilateral and bilateral intergovernmental liaison mechanisms for economic and trade affairs; to handle major issues in country-specific economic and trade relationships; to regulate trade and economic activities with countries without diplomatic relations with China; to manage relations with the WTO on behalf of the Chinese government including multilateral and bilateral negotiations;

- to guide the work of the commercial branches of China’s permanent missions to the WTO, the United Nations and other international organizations, as well as Chinese embassies in foreign countries; to conduct relations with multilateral and international economic and trade organizations in China and the commercial departments of foreign diplomatic missions in China;

- to organize work pertaining to antidumping, countervailing, safeguard measures and other issues related to fair international trade; to institute a fair trade early warning mechanism for imports and exports, and to organize industry injury investigations; to coordinate domestic efforts in response to foreign antidumping, countervailing, and safeguard investigations and related issues;

- to give general guidance to nationwide efforts for the promotion of foreign investment; to monitor foreign investments in China and to report and make proposals to the State Council on a regular basis; to draw up and enforce foreign investment policies and reform schemes; to participate in the formulation of mid-term and long-term planning and development strategies for the use of foreign investment; to approve the establishment and changes of foreign-invested enterprises, and those engaged in restricted businesses, or in businesses subject to quotas and licences; to verify the contracts and statutes of large-scale projects with foreign investment and their major subsequent changes; to supervise the enforcement of laws, regulations, contracts and statutes by foreign-invested enterprises; to coordinate the work of State-level economic and technological development zones;
to undertake foreign economic cooperation; to implement policies and regulations on foreign economic cooperation, guide and monitor the regulation of overseas contract projects, labour cooperation and designing and consulting businesses; to adopt administrative measures guiding China’s overseas investments; to approve Chinese companies’ investments in overseas establishments (excluding financial companies) and to supervise their operations;

- to undertake and manage China’s efforts in providing aid to foreign countries and regions;

- to implement economic and trade policies as well as mid-term and long-term trade planning for the Hong Kong Special Administrative Region (SAR), the Macao SAR and Taiwan; to take charge of commercial and trade liaison between the mainland and the Hong Kong and Macao SARs, to organize direct trading activities with Taiwan, and to be responsible for bilateral and multilateral trade issues involving Taiwan; and

- to guide the work of the chambers of commerce for import and export and other concerned associations and societies.

The newly formed MOFCOM is composed of 25 departments. Also, the National Office of Rectification and Standardization of Market Economic Order and the Office of the Representative for Trade Negotiations operate under the MOFCOM.

After 1983, the Ministry established special representative offices in sixteen cities including Guangzhou, Shanghai, Tianjin, Dalian.

As an important component in China’s foreign trade and economic systems, local foreign trade authorities are responsible for implementation of the uniform foreign trade policy and law, and for the administration of foreign trade in the regions within their jurisdiction. After the establishment of the MOFCOM in 2003, many provincial foreign trade authorities have followed suit and changed their names. Some provincial foreign trade authorities, however, not only refused to adopt the new name, but also kept the old dual-layer structure of both the Department of Foreign Trade and Economic Cooperation and Commission of Foreign Trade and Economic Cooperation. Interestingly, almost all of the latter were economically more advanced provinces, such as Guangdong, Jiangsu, Zhejiang and Shandong. This reflected to some extent the power struggle between the provincial departments and commissions.
Shipping

By
CHEN Xin
and
WANG Jing

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   1.2. Scope of application of the China Maritime Code
   1.3. Foreign-related matters

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      4.3.2. Types of bill of lading
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1. **Introduction**

Chinese maritime law is generally similar to the legal frameworks found around the world, which derive mostly from English law.

Maritime transport and towage services between the ports of the People’s Republic of China (PRC) may only be undertaken by ships flying the national flag and foreign ships may only do so with special permission of the competent authorities of transport and communications under the State Council.¹

Under the revised Catalogue for the Guidance of Foreign Investment Industries issued jointly on October 31, 2007 by the National Development and Reform Commission and the Ministry of Commerce, transportation carriage has been upgraded from the restricted to the permitted category. In the liner and tramp maritime transportation sectors, the proportion of foreign investments may not exceed 49%. In international container multi-modal transportation, wholly foreign ownership was permitted before December 11, 2005 in accordance with China’s World Trade Organization (WTO) Accession commitment.²

1.1 **Sources of maritime law in China**

Maritime law refers to the body of laws and regulations governing the rights and duties arising between parties involved in maritime transportation. The primary laws and regulations relating to maritime affairs are:

- the China Maritime Code (the CMC), which was passed on November 7, 1992 and came into force on July 1, 1993;³ and
- the Marine Environment Protection Law adopted on December 25, 1999.⁴

Provisions of international treaties concluded or acceded to by China prevail over conflicting provisions in the CMC and international practice may be applied to matters not covered by the applicable laws and international treaties.⁵

1.2. **Scope of application of the CMC**

The territorial scope of the CMC covers the sea and water bodies in China connected with the sea, including water bodies used for sea-to-river and river-to-sea direct transportation. The carriage of cargo and passengers between river or lake ports falls outside the scope of the CMC, while transportation between a river port and a seaport, through a sea route, is treated as maritime transportation and is governed by the CMC.⁶

Only sea-going vessels and other mobile units fall within the scope of the CMC. Ships or craft used for military or public service purposes, and ships of less than 20 tons gross tonnage are excluded from its scope.⁷

The provisions of the Code apply to State-owned ships.⁸

The CMC applies to the entire complement of the ship, including the ship’s master.⁹ Crewmembers with important duties on Chinese ships must pass strict examinations.¹⁰ Chinese law requires that the master, chief engineer, navigating officer, engineers, and radio and telephone operators must hold valid job certificates. The examination and awarding of certificates to the crew is the responsibility of the Bureau of Maritime Safety Administration.
1.3. Foreign-related matters

Subject to mandatory provisions of law, parties to contracts may choose the law applicable to such contracts. In the absence of such a choice, the law of the country having the closest connections with the contract is applied.¹¹

The law of the State of the flag flown by the ship governs acquisitions, transfers and extinctions of ownership¹² and mortgages.¹³

The law of the forum governs matters pertaining to maritime liens.¹⁴

Claims for damages arising from ship collisions are subject to the law of the *locus delicti*, except that claims arising on the high seas are decided in accordance with the law of the forum.¹⁵

The law where the adjustment of general average is carried out governs its implementation.¹⁶

The law applicable to limitations of liability for maritime claims is that of the forum.¹⁷

The application of foreign laws or international practices must not jeopardize China’s public interests.¹⁸
Industrial Property

By
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1. **Patents**

The concept of industrial property was introduced to China from the West. Law students in China in the early 1940s would not have heard of the term “industrial property”, or the more popular term used today, “intellectual property”. Since the founding of the People’s Republic of China (PRC) in 1949, laws on industrial property such as patents have been enacted, but the term was not actually introduced into Chinese law until 1979.

After China embarked upon a course of economic reform, one of the first laws enacted recognized the concept of industrial property. The Sino-Foreign Equity Joint Ventures Law (the EJV Law) was adopted by the National People’s Congress (the NPC) and promulgated on July 1, 1979. Under this law, parties to joint ventures could contribute industrial property rights as a part of their investment. This was the first time that the term industrial property was used in Chinese law. Interestingly, while recognizing industrial property as a concept, there were no laws that defined the rights or scope of such property.

As part of the effort in the early 1980s to understand intellectual property rights, a Chinese delegation was sent to Geneva to attend the First Session of the Diplomatic Conference for the Revision of the Paris Convention for the Protection of Industrial Property (the Paris Convention). Careful review of the Paris Convention, the Basic Proposals for Revision and other related documents, including the works of Bodenhausen, were conducted by the delegation. Familiarity with the Paris Convention was very helpful when China drafted its own patent legislation.

According to the Paris Convention, the objects of protection are patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or names of origin; a further objective of the Convention is to restrain unfair competition.

In China, inventions, utility models and designs are protected by the Patent Law adopted in 1984, which was amended in 1992 and again in 2000. Trademarks and service marks are protected by the Trademark Law adopted in 1982, which was amended in 2001.

Since the 1980s, the recognition and enforcement of intellectual property has been a major issue in China’s domestic and foreign trade agenda. Increased attention to the importance of intellectual property is reflected in China’s continuing efforts to revise its laws to conform to international standards and to increase enforcement of the rights of both domestic and foreign owners of intellectual property. However, much remains to be done in this area.


Formerly called the China Patent Office, the State Intellectual Property Office (SIPO) is under the direct authority of the State Council and is generally responsible for the overall coordination of foreign-related affairs in the field of intellectual property and more particularly for regulating patents within China.
1.1. Evolution of the patent system

On March 19, 1474, Venice adopted the world’s first patent law. The Statute of Monopolies, enacted in England in 1623, constituted the foundation of modern patent law. J. Kohler, a world-renowned jurist from Germany, has referred to this Statute as the Magna Carta of inventors’ rights and free trade.³

Since the end of the 18th century, more and more Western countries have adopted patent laws: the United States in 1790, France in 1791, Prussia in 1815, Bavaria in 1825, Spain in 1826, Brazil in 1830, Chile in 1840, and Germany in 1877. Japan did so in 1885, and many other countries have since followed.

Hong Reng’an, the premier of the Tai Ping Heavenly Kingdom (1851–64) and a cousin of the Kingdom’s leader, Hong Xiuchuan, was the first person to recommend that China adopt a patent system similar to those in Western countries. In his famous book, *New Writings on the Administration of the State*, he wrote that if a person, as in other countries, manufactures locomotives, which can run seven thousand to eight thousand li⁴ in 24 hours, he should be permitted to have a patent (and to monopolize its benefits). The same should apply to steamships, machines and other techniques.

He also wrote that “simple inventions should enjoy five-year-terms, complex ones ten year-terms, with the advantages inherent in such longer terms. After expiration of the term, anyone should be able to imitate the patent.”⁵

In 1881, a reformist Zheng Guanying, established a mechanized weaving mill in Shanghai. He wrote a letter to Li Hongzhang, the Chief Minister of the Emperor Guangxu of the Qing dynasty, asking for a ten-year-patent.

The following year, Li Hongzhang wrote in his petition to the Emperor:

According to precedents in Western countries, any newly established industry hitherto non-existent in any country should, as a rule, be granted a monopoly over its exploitation (zhuanli⁶) for a term of some years. The mill in question used machines for weaving. For its time, this is a pioneering undertaking. It must be remembered that, for the next ten years, only those joining the mill as partners will be allowed to carry on this activity and no new establishments of this kind will be permitted.⁷

A year later, the petition was approved by Emperor Guangxu. This was the first patent issued in modern China.⁸

After the Opium War (1839–1840), the British extracted numerous concessions from the Qing Imperial government in the form of treaties. Among these concessions were requirements that Chinese merchants recognize and uphold Western notions of copyright and trademarks. However, these were never fully enforced due to the inherent weakness of the Chinese Imperial government.

The first patent norms in China were enacted by Emperor Guangxu in 1898.⁹

According to the regulations on rewards for promotion of technology, inventions of new processes for manufacturing ships, guns, cannons, etc., or inventions of new methods for realizing major projects, like the Suez Canal, could be granted a 50-year patent. Also, patents with terms of ten to 30 years were granted over other innovative methods of manufacturing new products or imitations of Western products.¹⁰
After the Revolution of 1911, led by Sun Yat-sen, the Ministry of Industry and Trade of the Republic of China promulgated, in 1912, the provisional articles with respect to rewards for manufactured products, which stipulated that, excluding foods and pharmaceuticals, patents could be granted for periods of up to five years for any invented or improved product. In 1923, the Ministry of Agriculture and Commerce under the Northern Warlords Government in Beijing enacted the Provisional Regulations with respect to Rewards for Manufactured Products, which also protected inventions of processes or their improvement.

After the establishment of the Guomindang Government in Nanjing, similar regulations – the provisional regulations with respect to rewards for handicrafts and the provisional regulations with respect to rewards for industrial techniques – were promulgated respectively in June 1928 and September 1932. The 1932 regulations were amended in April 1939, with the addition of patents covering new models (utility models) and patents for new designs (industrial designs).

In modern Chinese history, the first patent law was promulgated in 1944, during the War of Resistance against Japan, by the Guomindang Government in Chongqing.

From the inception of the patent system in 1912 up to promulgation of the 1944 Patent Law, only 692 patents and 175 rewards were granted. These statistics illustrate that, prior to 1949, the patent system did not play an important role in Chinese industrial and technological progress.

Soon after the founding of the PRC, the Central People’s Government promulgated the provisional regulations for the protection of invention rights and patent rights. Under these regulations, two categories of certificate could be obtained: invention certificates and patent certificates. Invention certificates were granted for inventions discovered by staff of State organizations while on the job, for inventions relating to national defense, for those affecting the welfare of the great majority of the people, and for inventions made in the performance of a commission.

Invention certificates and patent certificates could be obtained for inventions discovered during off hours by staff of State organizations, for inventions developed in private enterprises and for inventions developed by foreign residents in China on a voluntary basis.

New methods for manufacturing chemical substances could be protected by invention certificates or patent certificates. However, no certificates were granted for substances obtained by chemical methods. When an invention right was recognized, and an invention certificate granted, and provided that the government had no intention of using it, the authorities would grant a patent or a patent certificate. On the other hand, when the government intended to use it, an invention certificate would be granted, instead of a patent certificate. The term of invention rights and patent rights ranged from three to 15 years, as decided by the competent authorities.

In November 1963, the Provisional Regulations for the Protection of Invention Rights and Patent Rights were abrogated by the State Council. During the 13 years from 1950 to 1963, four patents and six invention rights had been granted. In 1963, the regulations with respect to awards for inventions were promulgated, stipulating that all inventions that obtained prizes belonged to the State and any State or collectively owned entities could use them free of charge. Thus, inventions were not protected as property in the legal sense.
Prior to the period of reform and openness, the authorities had begun to reflect upon the necessity of establishing a patent system. In approving a report in July, 1978, the Central Committee of the Communist Party stated that “China should establish a patent system”. During the second half of 1978, the State Commission of Science and Technology (SCST) began to investigate and study the establishment of a patent system. When the reform and openness policies were approved at the 3rd Session of the 11th Central Committee of the Communist Party at the end of 1978, preparations for the establishment of a patent system were in full swing.

Mr Wu Heng, the first Deputy Minister of the SCST, was entrusted with the organization of the preliminary drafting work on a patent law. On March 19, 1979, a patent law drafting group was set up. After a series of studies and investigations, the SCST submitted a report to the State Council entitled, “Report on the Establishment of a Patent System in the People’s Republic of China”. The Report concluded that the establishment of a patent system was a necessary aspect of the movements of reform and openness and that it would be significant in the promotion of China’s science and technology as well as for developing the country’s economy within a global context. The Report was approved in January 1980 by the State Council, and by May 1980 the Patent Office had been established.

As soon as the preliminary draft of the Patent Law was distributed for comment and review, a vigorous debate emerged, especially among several governmental organizations.

The patent system had emerged in capitalist countries. On the other hand, in the PRC, most enterprises, companies, scientific institutions and other organizations belonged to the State, to the people as a whole. Consequently, the exclusive rights of patents did not suit the socialist nature of the PRC. Furthermore, as China was a developing country and a technological gap existed between it and developed countries, a patent law would have served essentially to protect the patent rights of foreigners, especially since foreign patents were expected to dominate the technological landscape.

The establishing of a patent system in China was approved by the Standing Conference of the State Council in September 1982. Soon after, the Report on the Sixth Five-year Plan, approved at the Fifth Session of the Fifth NPC, proclaimed that “a patent law should be enacted and implemented”.

In August 1983, a new draft patent law, the product of more than 20 revisions, was approved by the State Council and sent to the Standing Committee of the NPC for review and approval. Finally, it was approved on March 12, 1984 at the closing meeting of the Fourth Session of the Sixth NPC. The Patent Law entered into force on April 1, 1985.
1.2. Sources of norms

1.2.1. The Constitution of 1982

Under the 1982 Constitution, article 20, the State is responsible for promoting the development of the natural and social sciences and the dissemination of scientific and technical knowledge as well as for commending and rewarding achievements in scientific research and technological discoveries and inventions.

1.2.2. International conventions and agreements

Among the important international conventions and treaties relating to patents, China has acceded to the Paris Convention and the Patent Cooperation Treaty. The Memorandum of Understanding of January 1992 with respect to intellectual property signed by the United States and China (the US-China MOU)\textsuperscript{18} was an important bilateral agreement in the field of patents.

With its accession to the WTO in 2001, China subscribed to the General Agreement on Trade and Tariffs as well as the Trade Related Intellectual Property Rights (TRIPs) Agreement.
1.2.3. The Patent Law and its Implementation Rules

The Patent law is the most important statute in the field of patent protection. It contains 69 articles, which are divided into 8 chapters:

1. General principles
2. Patent applications
3. Applications for a patent
4. Examination and approval of patent applications
5. Duration, termination and invalidation of a patent
6. Compulsory licenses for exploitation of a patent
7. Protection of patents
8. Supplementary provisions.

The first set of implementing regulations under the Patent Law was approved by the State Council on January 19, 1985 and amended on December 12, 1992 with effect on January 1, 1993. In 2001, these regulations were superseded by the currently applicable Implementing Regulations of the Patent Law (Implementation Regulations) adopted by the SIPO on July 1, 2001. These were amended and reissued by the State Council on December 28, 2002. The new Implementation Regulations contain 122 articles, which are divided into 11 chapters:

1. General provisions
2. Patent applications
3. Examination and approval of patent applications
4. Re-examination of patent and invalidation of patent rights
5. Compulsory licenses for exploitation of patents
6. Rewards for inventors and creators of service-oriented creations
7. Protection of patent rights
9. Fees
10. Special provisions for international applications
11. Supplementary provisions.

1.2.4. The General Principles of the Civil Law

Article 95 of the General Principles of Civil Law provides that patent rights obtained by citizens and legal persons in accordance with the law are protected by the law. Article 118 provides that, when patent rights of citizens or legal persons have been infringed, they have the right to demand that the infringements cease, that their effects be eliminated and that their losses be compensated.
1.2.5. The Criminal Law

The Criminal Law contains sanctions specific to “serious” violations of patents, which are graduated as a function of the gravity of the offence. Those found guilty may be sentenced to a maximum of three years’ imprisonment and, in especially serious cases, up to seven years’ imprisonment, in addition to fines. When the crimes are committed by units and legal persons, the individuals responsible in fact for the infringements are subject to prosecution.

1.2.6. The laws on enterprises

Article 24 of the Company Law provides that industrial property rights may be contributed as capital.

Article 5 of the EJV Law provides that each party to a joint venture may make its investment in cash, in kind or in industrial property rights.

The income tax law with respect to sino-foreign equity joint ventures was adopted by the Standing Committee of the NPC on September 10, 1980, and its implementation rules (the Tax Rules) were approved by the State Council on December 10, 1980. Article 1 of the law provides that income tax is paid by sino-foreign equity joint ventures established in China on all of their income from production and business operations and on other income. Other income, as provided in article 2 of the Tax Rules, includes that from patent rights. This is the first instance after adoption of the reform and openness policies that the term patent is used in a legal rule. This law has since been replaced by the Foreign Enterprise Income Tax Law, covering all forms of foreign investment in China, not just equity joint ventures. Effective in 2008, the new Enterprise Income Tax Law will replace all prior rules but, as per its article 6, income derived from exploiting patents remains taxable.

1.3. Patentable subject matter

Patents in China are given for inventions, for utility models and for designs.

In essence, both inventions and utility models refer to any solution to a specific problem in a technological field. What differentiates them is that inventions refer to any new technical solution relating to a product, process or improvement thereof, and utility models refer to a new technical solution that involves the shape, the structure or a combination thereof, of any product, and that is fit for practical use. Design means any new configuration of the shape, pattern, color or some combination thereof, in relation to a product, that creates an aesthetic feeling and is fit for industrial application.

A patent may be granted for new technical solutions, to the exclusion of scientific discoveries, rules and methods for mental activities and methods for the diagnosis or for the treatment of diseases and substances obtained by means of nuclear transformation. While animal and plant varieties are excluded from patent protection by virtue of paragraph 4 of article 25 of the Patent Law, patents are granted to inventions of new biological material and new plant varieties have been given sui generis protection as described below.
The technological fields protected in the revised Patent Law of 1993 are much wider than those in the 1984 version. In the Patent Law of 1984, no patent right could be granted for foods, beverages, flavorings, pharmaceuticals or substances obtained by means of chemical processes. This was so because China, as a developing country, had remained backward in terms of technology and lacked experience in this field.

During the revision of the Patent Law in 1992, most experts had sought to enlarge the scope of patent protection and to grant patents for food, beverages and flavorings. But opinions differed as to the protection of pharmaceuticals and substances obtained by means of chemical processes. After heated debate and in conformity with the demands of socialist market economy as well as the Uruguay Round TRIPs Agreement, the Chinese authorities decided to grant patents for pharmaceuticals and substances obtained by means of chemical processes. The decision first expressed in the US-China MOU of 1992 was subsequently incorporated into the 1993 revision of the Patent Law. The amendments in 2000 bring Chinese patent law into substantial compliance with international standards.

1.4. Conditions of patentability

Patents are granted for inventions, utility models or designs that fulfill the conditions of patentability provided in the Patent Law, namely:31

1. the application must concern an invention, utility model or industrial design within the meaning of the Patent Law and its Implementation Regulations;

2. the application must not fall within the scope of any of the clauses that exclude the grant of a patent;

3. grant of the patent must not offend social morality or be detrimental to the public interest; and

4. inventions and utility models should possess novelty and involve an inventive step while having practical applicability; designs must not be identical with or similar to any design which, before the date of filing, has been disclosed in publications in the country or abroad or has been publicly used in the country, and they must not collide with any legal prior rights obtained by any other person.

A patent application should be rejected and an extant patent right should be invalidated, if any of the first three substantive requirements is not fulfilled. A patent may be revoked when it does not fulfill the fourth requirement.

1.4.1. Novelty

The Patent Law provides that any invention or utility model for which a patent right may be granted must be novel. According to article 22, paragraph 2 of the Patent Law, novelty means that, before the date of filing, no identical invention or utility model has either been disclosed in any publication within the country or abroad or been publicly used or made known to the public by any other means within the country, and that no one has previously filed with the Patent Administrative Department an application that described the identical invention or utility model and that was published after the said date of filing.
Novelty is an objective criterion. For determining novelty, the decisive moment is the filing date or the priority date.

Means of public disclosure include writings, pictures and recordings. The criterion for determining what constitutes publication of an invention or model is whether it has been made available to the public. Even a single copy accessible in a public library constitutes publication for the purposes of determining the current state of the art.

Novelty requires that no identical invention or utility model has been used in public within the country, so public use abroad does not destroy the novelty of a patent application.

If an identical invention or utility model has been made known to the public by means other than public use, its novelty will be lost. However, such public disclosure in a foreign country has no effect on novelty for the purposes of a Chinese patent application.

There must be no conflict of applications. This requirement means that no one has previously filed with the Patent Administrative Department an application, which described the identical invention or utility model and which was published after the date of filing. Generally speaking, only publications before the filing or priority date will affect novelty in a patent application. However, the whole contents of an earlier application will be considered as prior art, even though they have not been disclosed to the public, wherever the earlier application is published after the filing or priority date. This is to avoid that the same invention or utility model be protected by two patents.

Article 24 of the Patent Law provides that an invention or creation for which a patent application is pending does not lose its novelty where, within six months before the date of filing, one of the following events has occurred:

- where it was first exhibited at an international exhibition sponsored or recognized by the Chinese Government;
- where it was first made public at a prescribed academic or technological meeting;
- where it was disclosed by any person without the consent of the applicant.

The novelty of a design is decided by comparing it with designs which, before the date of filing or of priority, have been disclosed in publications within the country or abroad or which have been used within the country. If a design is not identical or similar to prior designs, it is regarded as novel. To decide whether a design is identical with or similar to any prior design, it is necessary to study the design as a whole. If the essential constituent elements of a design are not identical with or similar to those of any prior design, it is then regarded as novel. In judging whether a design is novel, it is also necessary to consider the class to which the product belongs. If a design is identical with or similar to any prior design incorporated in a product belonging to a different class, its novelty is not affected.
1.4.2. Inventiveness

Inventiveness, or non-obviousness, is another fundamental requirement that an invention or utility model must fulfill in order to qualify for a patent. Here, the prior art as a whole must be taken into account to assess the inventive step of an invention.

According to article 22, paragraph 3 of the Patent Law, inventiveness means that, as compared with the technology existing before the date of filing, the invention has prominent substantive features and corresponds to notable progress; for their part, utility models must have substantive features and represent progress.

Prominent substantive features of an invention refer to its technical features, as compared with the state of the art. They must manifest essential differences in comparison with the existing technology. Also, they should not be obvious to a person possessing ordinary skills in the art. For judging inventiveness, the Patent Law uses a test based on the judgment of a person possessing ordinary skills in the art, which in fact means a notional expert with knowledge and skills in the relevant field. He must be neither an ordinary non-professional person, nor a leading expert in this technical field. However, he is presumed to be familiar with everything in the state of the art.

Notable progress is to be evaluated in terms of the objective results of the invention. An invention that, compared with the prior art, produces better technological, economic or social results is considered to constitute notable progress.

1.4.3. Practical applicability

According to article 22, paragraph 4, practical applicability means that the invention or utility model can be made or used and that it can produce effective results. In other words, a product must be capable of being made and a process must be capable of being used in practice. Practical applicability is understood in its broadest sense, including in industry, agriculture, mining, handicraft, fishery, service and so on. Effective results include those in the technical, economic or social fields.
1.4.4. Subject matter excluded from patent protection

In accordance with the Patent Law, the following inventions or utility models are excluded from patent protection:

- technical inventions that are contrary to the law of the State or social morality or detrimental to the public interest, such as gambling devices;\(^{34}\)
- scientific discoveries\(^{35}\) since it is generally recognized that a scientific discovery uncovers the existence of something that is unknown but does not create something that was non-existent;
- rules and methods for intellectual activities\(^{36}\) since it is generally recognized that pure creations of the human mind, that do not apply the laws of physics, are non-technical and cannot be practically applied;\(^{37}\)
- methods for diagnosing and treating diseases;\(^{38}\) and
- substances obtained by means of nuclear transformation.\(^{39}\)

1.5. Formalities

1.5.1. Application for patents

The Patent Law provides that, where a patent application is filed for an invention or a utility model, it must include a request, a description and its abstract, and claims.

The request states the title of the invention or utility model, the name of the inventor or designer, the name and the address of the applicant and other related matters.\(^{40}\)

The description sets forth the invention or utility model in a manner sufficiently clear and complete so as to enable a person skilled in the relevant field of technology to carry it out; drawings are often required to achieve clarity of explanation.\(^{41}\)

The abstract briefly states the main technical points of the invention or utility model. It indicates the technical field to which the invention or utility model pertains, the technical problems to be solved, the essential technical features and the use(s) of the invention or utility model.

The claims section serves to define the scope of protection of patent rights claimed and forms the basis on which to decide whether any third party has infringed the patent.\(^{42}\) Claims should be drafted with much attention, thought and skill. They should be supported by the description and should state the extent of the patent protection sought.
The claims clearly and concisely define the matters for which protection is sought in terms of the technical features of the invention or utility model. If there are several claims, they are numbered consecutively in Arabic numerals. The technical terminology used in the claims must be consistent with that used in the description. The claims section may contain chemical or mathematical formulae but no drawings. The technical features mentioned in the claims may, in order to facilitate quicker understanding of the claim, make reference to the drawings in the description section. Such references must follow the corresponding technical features and be placed between parentheses. They are not construed as limiting the claims.

The claims section includes an independent claim, and may include one or more dependent claims. An independent claim outlines the technical solution of the invention or utility model and describes the indispensable technical features necessary for fulfilling the purpose of the invention or utility model. A dependent claim further defines the claim in terms of additional features that are intended to be protected. Each invention or utility model may have only one independent claim, which is to precede all the dependent claims relating to the same invention or utility model. A dependent claim referring to one or more other claims is to refer only to the preceding claim(s). A multiple dependent claim that refers to more than one other claim may not serve as the basis for any other multiple dependent claims.

In applying for a patent for a design, drawings or photographs thereof must be submitted and the product incorporating the design and the class to which that product belongs must be indicated.

The date of filing is the date on which the Patent Administrative Department receives the application. If the application is sent by mail, the date of mailing indicated by the postmark is considered to be the date of filing.

Within 12 months from the date on which applicants have first filed in a foreign country an application for a patent covering an invention or a utility model or, within six months from the date on which they have first filed in a foreign country an application for a patent covering a design, they may file in China an application for a patent covering the same subject matter, while enjoying a right of priority in accordance with any agreement concluded between such foreign country and China, or in accordance with any international treaty to which both countries are parties, or on the basis of the principle of mutual recognition of the right of priority.

Within 12 months from the date on which any applicant first filed in China an application for a patent covering an invention or a utility model, he or it may file with the Patent Administrative Department an application for a patent extension covering the same subject matter.

Any applicant who claims the right of priority must make a written declaration when the application is filed and submit, within three months, a copy of the patent application document which was first filed; if the applicant fails to make the written declaration or to meet the time limit for submitting the patent application, the claim to the right of priority is deemed not to have been made.
An application for a patent covering an invention or a utility model must in principle be limited to one invention or utility model. But two or more inventions or utility models belonging to a single general inventive concept may be filed as one application.

An application for a patent covering a design must be limited to one design incorporated in one product. Two or more designs that are incorporated in products belonging to the same class and that are sold or used in sets may be filed in one application. 45

An application may be withdrawn at any time before the patent is granted.

Amendments to invention or utility model applications may not go beyond the scope of the disclosure contained in the initial description and claims, and amendments to design applications may not go beyond the scope of the disclosure in the initial drawings or photographs. 46

There are time limitations to amendments to Chinese patent applications. Substantive revisions of a patent application may be made within three months of receipt of the notice that the patent application has entered into the substantive examination stage. For utility models and design patents, the amendment period is two months from the date of filing.

1.5.2. Examination of patent applications

After receiving an application for an invention patent, the Patent Administrative Department, upon preliminary examination, verifies that the application complies with the requirements of the Law, and it publishes the application promptly after the expiration of eighteen months from the date of filing. Upon request of the applicant, the Patent Administrative Department may publish the application earlier.

In China, a substantive review is not automatic. Still there is debate about whether substantive review for utility model and design patents should be automatic to avoid the issue of patents that are later invalidated.

Upon request of any invention patent applicant, made at any time within three years from the date of filing, the Patent Administrative Department will proceed to examine the application as to its substance. If, without any justification, the applicant fails to meet the time limit for requesting substantive examination, the application is deemed to have been withdrawn. Whenever it deems necessary to do so, the Patent Administrative Department may examine the substance of any invention patent application.

When an invention patent applicant requests an examination of the substance of the application, pre-filing date reference materials concerning the invention must be furnished. An invention patent applicant that has filed in a foreign country for the same invention must, at the time of requesting examination as to substance, furnish documentation concerning any search made for the purpose of examining that application or concerning the results of any examination made in the foreign country. If, without any justification, the said documents are not furnished, the application is deemed to have been withdrawn.
If the substantive examination of the invention patent application reveals that it is not in conformity with the provisions of the Law and Implementation Regulations, the examiner notifies the applicant and requests submission, within a specified time limit of observations or amendments of the application. If, without any justification, the time limit for responding is not met, the application is deemed to have been withdrawn.

If the Patent Administrative Department, after the applicant has filed his or its observations or amendments, finds that the application still does not comply with the provisions of the Patent Law, the application is rejected. Where, after substantive examination, it is found that there is no cause for rejection of the application, the Patent Administrative Department will grant the patent, issue the invention patent certificate, register and give public notice of the patent.

When a preliminary examination turns up no cause for rejection of the application for a patent covering a utility model or design, the Patent Administrative Department grants the patent, issues the relevant patent certificate, registers and gives public notice of the patent.

The Patent Administrative Department is responsible for setting up a Patent Re-examination Board, which consists of experienced technical and legal experts and the Director General of the Patent Administrative Department, who is ex officio the Chairman of the Board. Where any party is not satisfied with the decision of the Patent Administrative Department rejecting an application, or its decisions revoking or upholding a patent, such party may, within three months from the date of receipt of the notification, request that the Patent Re-examination Board undertake a re-examination. After re-examination, the Board renders a decision and notifies the applicant, the patent owner and the person who requested the patent’s revocation. Where invention patent applicants, invention patent owners or invention patent revocation petitioners are not satisfied with the decision of the Patent Re-examination Board, they may, within three months from the date of receipt of the notification, institute legal proceedings in the people’s courts.

Patent rights that have been revoked are deemed to be void ab initio.

1.6. Ownership and assignments of patents

1.6.1. Ownership of patents

Natural persons and legal persons may apply for patents and become owners of patents upon their registration.

For inventions, and creations developed by individuals in the course of performing their work within the entities to which they belong, or which they have developed mainly by using material means provided by the entity, the right to apply for a patent belongs to the entity, and the entity is the patentee for any patents issued.
For inventions and creations other than those developed in the course of employment, the right to apply for a patent belongs to the inventor or creator. Inventor or creator means any person who has made creative contributions to the substantive features of the invention or creation. Organizational work, offers of facilities or participation in auxiliary functions are not sufficient to qualify a person as an inventor or creator.\textsuperscript{54}

Where two or more applicants file patent applications for identical inventions or creations, the patent is granted to the applicant whose application was filed first.\textsuperscript{55} For identical inventions or creations, only one patent is granted.\textsuperscript{56}

As regards inventions and creations made in co-operation by two or more entities, or made by an entity in execution of a commission for research or design given to it by another entity, unless otherwise agreed upon, the right to apply for a patent belongs to the entity that made, or to the entities that jointly made, the inventions or creations. After approval of the application, the patent is owned or held by the entity(ies) that applied for it.\textsuperscript{57}

Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent, the application is governed by the Patent Law and any agreement concluded between the country to which the applicant belongs and China or is treated in accordance with any international treaty to which both countries are parties or on the basis of the principle of reciprocity.\textsuperscript{58}

1.6.2. Assignments of patents

The right to apply for a patent as well as the patent rights themselves may be assigned.

Any assignment of the right to apply for a patent or of the patent itself made by an entity or an individual to a foreigner must be approved by the Patent Administrative Department.\textsuperscript{59}

According to article 10 of the Patent Law, where the right to apply for a patent or patent rights are assigned, the parties must conclude a written contract, which will come into force upon its registration with, and publication by, the Patent Administrative Department.

Any license covering the exploitation of a patent concluded by the patent owner with an entity or individual must, within three months from the date of entry into force of the contract, be submitted to the Patent Administrative Department for registration.\textsuperscript{60}
1.7. Scope of exclusive rights

1.7.1. Exclusive rights of the patent owner

Article 11 of the Patent Law defines the scope of exclusive rights of patent owners.

After the grant of an invention or utility model patent, and except as otherwise provided by the law, no entity or individual may, without the authorization of the patent owner, exploit the patent, make, use, offer to sell, sell, or import the patented product, or use the patented process, or use, offer to sell, sell or import products directly obtained through the patented process for production or business purposes. The inclusion of “offer to sell” as an act of infringement is one of the latest improvements to allow patentees to intervene and stop infringement at an earlier stage.

After the grant of a design patent, no entity or individual may, without the authorization of the patent owner, make, sell or import products incorporating such patented design for production or business purposes.

In addition to the exclusive rights mentioned above, the patent owner may affix markings of its patent, including their numbers, on patented products and on the packaging of such products.

1.7.2. Obligations of patent owners

After the granting of a patent, the patent owner must pay an annual fee beginning with the year during which the patent was granted. As soon as an applicant successfully completes the formalities of patent registration, and the patent certificate is issued, the annual fee must be paid. Subsequent annual fees must be paid in advance within the month before the expiration of the preceding year. Where the annual fee is not paid in due time by the patent owner, or the fee is not paid in full, the Patent Administrative Department summons the patent owner to pay the fee or to make up the insufficiency within six months from the expiration of the time within which the fee was to have been paid, and to pay a surcharge. Non-payment of the maintenance fee can result in premature termination of the patent.

1.8. Limitations and exceptions to the scope of patent protection

1.8.1. Compulsory licenses

Three different kinds of compulsory licenses for exploitation of patents have been provided in the Patent Law. These are in conformity with the TRIPs standards.

Where any entity qualified to exploit an invention or utility model has requested from the owner of an invention or utility model patent a license for its exploitation on reasonable terms and such efforts have not been successful within a reasonable period of time, the Patent Administrative Department may, upon application of such entity, impose a compulsory license.
In the event of national emergencies or extraordinary states of affairs or when it is in the public interest, the Patent Administrative Department may grant a compulsory license to exploit an invention or utility model.  

If the invention or utility model for which the patent right was granted has undergone great improvement or progress and the exploitation of the later invention or utility model depends on the exploitation of the earlier one, the Patent Administrative Department may, upon the request of the later patent owner, grant it a compulsory license to exploit the earlier invention or utility model and it may, upon the request of the earlier patent owner, also grant it a compulsory license to exploit the later invention or utility model.

Entities or individuals requesting a compulsory license must furnish proof that they have not been able to conclude with the patent owner a license for exploitation on reasonable terms. The decision made by the Patent Administrative Department granting a compulsory license for exploitation must be registered and published. Entities or individuals that are granted compulsory licenses do not obtain exclusive exploitation rights and do not enjoy the right to authorize exploitation by any others. Entities or individuals that are granted compulsory licenses must pay to the patent owner a reasonable exploitation fee, the amount of which is determined by mutual agreement of the parties.

Patent owners not satisfied with the decision of the Patent Administrative Department granting a compulsory license and parties that have not reached an agreement concerning the remuneration may, within three months from receipt of the notification, institute legal proceedings in the people’s courts.

### 1.8.2. Exploitation according to the State plan

Although generally conforming to international standards, the PRC patent system does reflect its socialist leanings in several provisions of the Patent Law.

The Chinese Patent Law provides that the competent departments of the State Council and the people’s governments of provinces, autonomous regions or municipalities directly under the central government have the power to decide, in accordance with the State plan, that any entity owned by the people as a whole, which is within their system or directly under their administration and which holds patent rights to an important invention or creation, will issue a license to designated entities. The exploiting entity must, according to the prescriptions of the State, pay an exploitation fee to the entity holding the patent right. Any patent owned by a Chinese individual or a State-owned entity or collective, which is of great significance to the interests of the State or to the public interest and that requires dissemination and application may, after approval by the State Council and upon petition of its competent department, be treated in a similar manner.
1.9. Duration of patents

1.9.1 Term of patents

A patent is a form of property right. However, it differs from tangible property rights, which terminate when the tangible object ceases to exist. Patent rights are intangible rights, the objects of which are inventions, utility models or industrial designs, that is, intellectual creations of the human mind.

Chinese Patent Law provides a term of 20 years for inventions and ten years for utility models and designs, commencing on the date of filing. However, this does not mean that patent rights are effective from the filing date. A patent right is not effective until the day of its issue. The date of issue of a patent is indicated on the patent certificate.

1.9.2. Cessation of patent rights

In the following situations, patents may cease before the expiration of their term:

- where annual fees are not paid as prescribed; and
- where they are abandoned by a written declaration of their owner.

Cessation of patent rights must be registered. Public notice is given by the Patent Administrative Department.

1.9.3. Invalidation of patent rights

Once there is a public announcement of the grant of a patent, any entity or individual may appeal to the Patent Re-examination Board to have the patent declared invalid for non-compliance with the Patent Law and applicable regulations.

The Patent Re-examination Board must promptly examine the request for invalidation, render a decision and give notice to the person who made the request as well as to the patentee. When a patent is declared invalid, the Patent Administrative Department registers the decision and gives public notice. Where any party is not satisfied with the decision of the Patent Re-examination Board, it may, within three months from receipt of notice of the decision, institute legal proceedings in the people’s court.
In principle, any patent that has been declared invalid is deemed to be non-existent from the beginning. The decision of invalidation does not have retroactive effect with respect to:

- any judgment or order on patent infringement that has been pronounced and enforced by the people’s courts;
- any decision concerning the handling of patent infringements that has been made and enforced by the administrative authority for patent affairs; or
- any patent license or assignment that has been performed prior to the invalidation.

Damages may be claimed from the putative patent owner for acting in bad faith. Where the fees for the use of patents or the price for the assignment of the patent rights are obviously inequitable, the patent owner or the assignor may be obliged to repay the undue part of the fees or price paid to the licensee or the assignee.79

1.10. Infringement of patent rights

To determine whether there is an infringement, the most important task is to delineate the scope of protection afforded by the patent. In accordance with the Patent Law, the extent of protection of invention and utility model patents is determined by reference to the claims. The description and the appended drawings are used to interpret the claims. The extent of protection of design patents is defined by reference to the product incorporating the patented design as shown in the drawings or photographs.80

Accurate interpretation of the scope of claims is a very important and difficult task for a judge. On the basis of the description the judge interprets and limits the technical features as stated in the description and then determines the scope of patent protection in accordance with the restricted claims. However, at the same time, the judge interprets the claims according to the doctrine of equivalence. Under this doctrine, claims are to be interpreted as conferring protection not only with respect to those elements that are expressed in a claim, but also with respect to equivalents of such elements.

None of the following is deemed to be an infringement of patent rights:

- where patented products or products derived from patented processes are obtained from the patentee or its licensees;
- where any party has already made identical products, used identical processes or made necessary preparations for their making or their use before the date of the application, it may continue to make or use them but only within their original scope;
- where any foreign means of transport temporarily passes through the territory, territorial waters or territorial airspace of China, it may use the patents concerned, in accordance with any agreement concluded between its country of origin and China, or in accordance with any international treaty to which both countries are parties, or on the basis of the principle of reciprocity, for its own needs, in its devices and equipment; and
- where the patent is used solely for scientific research and experimentation.81
1.11. Sanctions of patent infringements

If a patent right is violated and the dispute is not settled through negotiation with the infringer or its agent, two types of remedies are available to the patent owner. One of the major changes in the latest amendments is the ability of the patentee to seek judicial resolution of infringement cases. This revision brings the Chinese Patent Law into compliance with article 62 of the TRIPs Agreement.

1.11.1. Administrative recourses

The SIPO has promulgated, as of December 17, 2001, the Administrative Enforcement of Patents Measures (the Patent Enforcement Administrative Measures). The Measures are stated to prevail over conflicting rules and regulations issued by SIPO or its predecessor, the Patent Office. The administrative authorities are available to mediate disputes over the facts or the law. Administrative decisions must respect the law and apply the principles of impartiality and promptness. The administrative authorities have the powers to conduct investigations and to collect evidence. The Measures distinguish between infringement disputes, on the one hand, and disputes over passing off and counterfeiting, on the other. In each case, the administrative authority must render a written and reasoned decision.

According to article 5 of the Patent Enforcement Administrative Measures, to be admissible an infringement claim must satisfy the following conditions:

- the claimant is the patentee or an interested party;
- the respondent is clearly identified;
- the matter in respect of which the request is filed is specific and the facts and reasons definite;
- the administrative authority for patent affairs seized is competent to receive it; and
- the claimant has not instituted proceedings in the people’s courts in respect of the patent infringement dispute.

If these conditions are fulfilled, the claimant is notified within seven days and appoints at least three staff members to handle the dispute. Otherwise, the administrative authority must communicate the reasons for the inadmissibility within seven days. It may organize oral hearings.

In cases of patent infringement, the authority may order cessation of the illegal activities, including manufacturing, importation and distribution.

In cases of patent passing off and counterfeiting, the patent administrative authority with jurisdiction is that where the acts allegedly occurred. When there is a disagreement over territorial jurisdiction, the authority at the next higher level may be called upon to designate the appropriate authority.
Where passing off or counterfeiting a patent is established, the administrative authority for patent affairs may order remedial measures, including removal of the marking and number of the patent from products and packaging or, where this is impossible, the destruction of goods bearing the infringing references, and cessation of advertisements and promotion using the impugned references.  

In cases of passing off and counterfeiting a patent, the administrative authority orders publication of its decision. The illicit income is calculated as the product of the number of units sold times the price of sale.  

The implementation of administrative decisions that are contested before the people’s courts is not suspended pending the outcome of the judicial procedures. Where the administrative decision is not implemented by the concerned party, the administrative authority may approach the people’s courts for judicial execution.  

### 1.11.2. Civil remedies

A wronged patent owner may, without first requesting the administrative authorities to handle the matter, directly institute legal proceedings in the people’s court. In accordance with the relevant provisions of the Civil Procedure Law and the principles with respect to evidence, the patentee should provide evidence proving the infringement, namely that, without authorization of the patent owner or under the terms of the law, the infringer has made, used, sold or imported the patented products.

However, if a process patent is violated, it is unreasonable to require the patent owner to provide evidence for want of being able to enter the infringer’s premises and collect evidence of infringement. Therefore, it is stipulated in the Patent Law that, when any infringement dispute arises over any patented product or product derived directly from a patented process, the burden of proof that the source of the product or process is legitimate rests with the accused infringer.

In the presence of reasonable evidence of an actual or imminent infringement, and where delay in stopping the infringement is likely to cause irreparable harm to the patent owner’s legitimate rights, injunctions and conservatory measures may be imposed by the people’s courts. On June 5, 2001, the Supreme People’s Court issued its Notice on the Patent Rights Before Instituting Legal Proceedings. Applicants must provide valid and reasonable pledges or mortgages as guarantees lest their applications be rejected. The effects of measures ordered by the courts cannot be avoided by providing counter-guarantees.
The people’s courts render written judgments within 48 hours unless they intend to hold hearings or want other information. In any event, their decisions are rendered within five days. Unsatisfied parties may apply for reconsideration of the judgment within ten days from the date of the receipt of the ruling. The execution of rulings is not suspended during the reconsideration. Any injunctions or orders must be executed without delay. In addition to the criteria applicable for determination of the original ruling, the reconsideration also takes account of whether stopping the alleged infringement would harm the public interest. If legal proceedings are not initiated within 15 days after the order, the people’s courts must abrogate the measures.

Orders to stop infringements of patents generally remain effective until the definitive legal judgment, though the people’s courts may also set other expiration dates that can be extended, where appropriate, upon the request.

The people’s court may order measures to preserve property pursuant to articles 92 and 93 of the Civil Procedure Law.

The limitation period applicable to legal proceedings relating to infringements of patent rights is two years from the date on which the patent owner or any interested party knew or should have known of the infringing act.

1.11.3. Criminal sanctions

In addition to civil penalties and confiscation of illegal gains, violators of patents are also exposed to criminal liability.

Serious violations of patent rights may give rise to prosecutions under article 216 of the Criminal Law entailing up to seven years imprisonment in especially serious cases.

Article 280 of the Criminal Law prohibits forgery of documents issued by State organs, which includes patent certificates. In especially serious cases, those found guilty might be sentenced to up to ten years in jail.
Trademarks

By
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7. Conclusion
1. Evolution of trademark law

China was among the first countries to use trademarks. In commodity exchanges, markings on goods existed more than two thousand years ago. From unearthed artifacts, marks such as gong and yeshi have been discovered carved on copper plates from the period of the Warring States (475 – 221 B.C.). At that time, marks were often used on tools and utensils to indicate their makers.

In the Northern Zhou dynasty (557 – 581 A.D.), pottery carved with the name of its maker, Guoyeni, was produced and artifacts have been unearthed by archaeologists. In the Tang dynasty (618 – 907 A.D.), handmade paper was usually produced and sold with a watermark. By the period of Northern Song dynasty (960 – 1127 A.D.), there were already products bearing trademarks containing both designs and Chinese characters. Copper plates engraved with a white rabbit and the Chinese words evoking the rabbit as a mark, and produced by Liu’s Needle Workshop of Jinani, are kept at the Museum of Chinese History, located at Tiananmen Square in Beijing.

Much litigation relating to trademarks may be found in county annals from the Ming dynasty (1368 – 1644 A.D.) and the Qing dynasty (1644 – 1911 A.D.). A well-known case of trademark infringement, described in the Changzhou county annals, occurred in 1736. The infringer Huang Yiolong, a cloth merchant, was banned for life as a result of his counterfeiting. In 1825, during the reign of Emperor Daoguang, the Qizaotang Drapers Society of Shanghai established a list of marks. In order to avoid confusion between two or more Chinese character trademarks, the first and second characters or the second and third characters could not be the same; nor could any two consecutive characters have the same or similar pronunciation.

After the Opium War in 1840, a series of unequal treaties was concluded between the Qing Government and many governments of Western countries. Usually, there were articles providing protection for trademarks, such as article 7 of the Sino-British Commercial Treaty (revised in 1902), article 9 of the Sino-U.S. Commercial Treaty (1902) and article 3 of the Sino-Japan Commercial Treaty.

In 1903, the Qing Government established a Ministry of Commerce and a Trademarks Registry. In 1904, the trial regulations on trademark registration, prepared by an Englishman, the then Director-General of Chinese Customs, were promulgated, though never put into effect because of strong opposition from Western States. The regulations provided a registration system for trademarks. Article 20 of the regulations stipulated a system of consular jurisdiction.

After the 1911 Revolution, the Northern Warlord Government promulgated a Trademark Law on May 3, 1923, which contained 44 articles. Its Implementation Regulations, were published on May 8, 1923. The Trademark Office under the Ministry of Industry and Commerce was responsible for dealing with applications for trademark registration. The term of trademarks was set at 20 years with the possibility of an unlimited number of renewals, each for a maximum of 20 years.

On May 6, 1930, the Guomindang government promulgated a trademark law that entered into force on January 1, 1931. The law was revised on November 23, 1935. The Ministry of Industry published Implementation Regulations on December 30, 1930 and they entered into force on January 1, 1931. The term of trademarks remained 20 years with each renewal also of 20 years. The law stipulated the principle of first use. All laws adopted by the Guomindang government were abolished on the mainland after the founding of the PRC.

Before the founding of the PRC, many liberated areas under the leadership of the Communist Party promulgated their own regulations for the protection of trademarks.
Since the founding of the PRC, three laws and regulations with respect to the registration of trademarks have been promulgated:

- the provisional regulation of July 28, 1950, with respect to the trademark registration (the Provisional Trademark Regulation) and its Implementation Rules, which were approved by the Administrative Council, then the central government of the PRC;
- the regulations of April 10, 1963 with respect to the administration of trademarks, promulgated by the State Council (the Trademark Regulation of 1963), and
- the Trademark Law, adopted at the 24th Session of the Standing Committee of the Fifth NPC on August 23, 1982, revised for the first time by the Decision on the Amendment of the Trademark Law adopted at the 30th Session of the Standing Committee of the Seventh NPC, on February 22, 1993, and revised for the second time by the Decision on the Amendment of the Trademark Law adopted at the 24th Session of the Standing Committee of the Ninth NPC on October 27, 2001.

Under the Trademark Regulations of 1963, which supplanted the Provisional Trademark Regulation of 1950, every trademark used by an enterprise was to be filed for registration but the registrants obtained no exclusive rights. Thus trademarks became a means of administrative control.

During the Cultural Revolution (1966-76), almost all trademarks were cancelled for containing meanings associated with feudalism, capitalism or revisionism. The exceptions were trademarks with revolutionary connotations, such as Red Flag, Workers, Peasants and Soldiers and so on. Even the Trademark Office was abolished and its seal was transferred to the China Council for the Promotion of International Trade (CCPIT) for management of trademarks owned by foreigners.

With the end of the Cultural Revolution, the Trademark Office was re-established. In accordance with the new policies of reform and openness, the Trademark Office was entrusted with the preparation of a new trademark law. Though its drafting began after that of the Patent Law, it was approved earlier. This occurred because there was no strong opposition to its adoption.

**PRC Trademark Applications**

**Trademark**

![Graph showing trademark applications by Chinese and foreigners from 2002 to 2005](graph.png)
Copyright

By
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and
Daniel Arthur LAPRES

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7. Conclusion
1. Introduction to copyright in China

In China, the origins of copyright are presumed to coincide with the advent of printing. The first Chinese copyrights pre-dated their counterparts in Europe by several hundred years. The word “copyright” was first introduced into Chinese law in the Sino-American Treaty of Navigation of 1903 and the first Chinese copyright legislation was adopted by the Qing Emperor in 1910. Further norms on copyright were published under the Northern Warlords government in 1915 and by the Guomindang government in 1928.

After 1949 and prior to the reform movement, authors’ rights in books were largely governed by the provisions of a few standard form contracts for book publishing (covering creation of the work, its publication and the remuneration due to the author). While the draft copyright law was going through more than ten years of gestation, the authorities were nevertheless very active in issuing numerous provisions governing aspects of copyright. For instance, in 1986, the Civil Code provided special legal rights for the authors of literary, artistic and scientific works. In fact, the sheer number of these provisions multiplied the opportunities for inconsistencies and conflicts, thus aggravating the difficulties of effectively protecting copyright.

The Copyright Law was first enacted on September 7, 1990, by the 15th Session of the Standing Committee of the Seventh National People’s Congress (NPC) and it entered into effect on June 1, 1991. But, practical difficulties with enforcement of the rules engendered frustration and inspired the search for more effective protection of copyright. It was in this context that China and the United States signed bilateral agreements regarding the reinforcement of intellectual property protection in 1992 and 1995. As part of its commitment to the protection of copyright, China has also joined the Universal Copyright Convention, the Berne Convention for the Protection of Literary and Artistic Works, the Geneva Phonograms Convention and the World Intellectual Property Organization.

To improve enforcement of copyright, the authorities established in September 1994 a non-governmental watchdog, the United Intellectual Property Protection Centre, to protect intellectual property recognized in China or internationally. Moreover, specialized intellectual property chambers were created within the people’s intermediate courts in Beijing, Shanghai, Guangdong, Hainan and Fujian. In July 1994, the NPC increased the maximum prison term for copyright violations from five to seven years.

The latest effort to further improve the intellectual property regime in China came with the revision of the Copyright Law, effective from October 27, 2001. Its provisions are completed by the Implementation Regulations with respect to the Copyright Law, issued by Premier Zhu Rongji on August 2, 2002, effective as of September 15, 2002 (the Copyright Implementation Regulations). The latest revisions expand the scope of works protected to comply with the Trade Related Intellectual Property Rights Agreement (TRIPs) within the World Trade Organization (WTO) and the Berne Convention, to improve the mechanisms for enforcement and increase the penalties for infringements.

Throughout this debate, the draftsmen have had to reconcile socialist purpose and individual initiative within a market economy.
Considering that the authors of the Chinese legislation spent more than a decade reviewing the systems of copyright protection in other countries and given the framework of conventional norms to which China has subscribed, the Chinese model of copyright protection exhibits many of the best elements of other countries’ regimes. The regime of protection of copyright has been more vulnerable to criticism on the enforcement side. But the authorities are clearly making serious efforts, recognized as such by China’s major trading partners, to reduce the flow of counterfeit goods. A factor that will no doubt amplify this trend is the increasing desire among Chinese creators to be guaranteed adequate protection against local counterfeiting.¹

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**SIPO site Report on China’s Intellectual Property Protection in 2006**

http://www.sipo.gov.cn/sipo_English/laws/whitepapers/200705/t20070529_173333.htm

In 2006, 10,559 cases were received, and 10,344 of the cases, or 98%, were resolved by various levels of copyright administrative authorities across the country. Of all the resolved cases, 8,524 were resolved with administrative punishment, 1,585 were resolved with settlement agreement, and 235 were transferred to judicial authorities. And in the year, more than 73 million pieces of different kinds of pirated products were confiscated. Of all confiscated pirated products, more than 18 million were pirated books, about 1.1 million were pirated periodical magazines, 48 million were pirated audio-video products, 2.01 million were pirated electronic publications, 3.79 million were pirated software discs, and 240 thousand were other kinds of pirated products.

In 2006, cooperating with related departments, the NCAC promulgated and issued a series of documents and continuously deepened the work of using legitimate software. The documents include the Implementation Program of Promoting the Use of Legitimate Software in Enterprises, the Notice About Computer’s Pre-installation of Legitimate Operating System Software, the Notice About Government Official Purchases of Computers That Must Be Pre-installed Legitimate Operating System Software, and so on.

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1.1. **The general administrative framework governing copyright**

While the National Copyright Administration of China (NCAC) is the State Council organization responsible for copyright issues, the General Administration of Press and Publication (GAPP) regulates publishing activities and related copyrights. They are actually the same structure with two different names and a common director. The NCAC is responsible for the nationwide administration of copyright² and software,³ as well as issues relating to the implementation of China’s international copyright treaty commitments.⁴ It drafts laws and regulations on publishing and copyright; proposes policies, standards and regulations with respect to press, publishing and printing activities, and supervises their implementation; approves the establishment of publishing houses and distribution units, of audio-video publishing units, of electronic publishing and production units, of newspaper groups, of collective copyright managing bodies and agents involving foreign investment; and it approves the founding of sino-foreign joint ventures and cooperative enterprises in the press and publishing industry, administers copyright matters, and manages the conservation of ancient books and documents.
It is made up of nine departments: the general affairs office, the book publishing department, the newspapers and journals department, the audio-video and electronic publishing department, the distribution department, the printing industry department, the personnel and education department, the external cooperation department and the copyright department.

The Copyright Administration Departments of the people’s governments of each province, autonomous region or municipality directly under the central government are responsible for copyright administration within their own jurisdiction. Below, we use the designation Copyright Administrative Department to indicate its office at the level that is competent for dealing with the specific issue in discussion.

Other ministries and authorities also issue or join the above-mentioned copyright authorities in issuing legal norms affecting intellectual property and trade thereof, such as the Ministry of Commerce (MOFCOM), the Ministry of Information Industry (MII), the Ministry of Public Security, the State Administration of Radio, Film and Television, and the State Administration for Industry and Commerce (the SAIC).

The Supreme Court of China (SPC) has issued several answers to questions, notices and interpretations that bear upon the application of copyright laws and regulations, for instance:

- the Notice on Certain Issues on Further Implementation of the Copyright Law of September 24, 1993;
- the Interpretations of the Application of the Decision of the Standing Committee of the NPC on punishing Crimes of Infringement of Copyright of January 16, 1995; and
- the Reply of the Civil Division to Legal Issues between the China Music Copyright Association and Music Copyright Owners.

On October 12, 2002, at the 1246th Meeting of its Adjudication Committee, the Supreme People’s Court (SPC) adopted the Interpretation Concerning Several Issues on the Application of Law in Hearing Correctly Civil Copyright Cases. The Judicial Committee of the SPC at the 1331st Session on November 2, 2004 and the Tenth Procuratorial Committee of the Supreme People’s Procuratorate at its 28th Session on November 11, 2004 adopted an Interpretation on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property that became effective as of December 22, 2004.

1.2. General scope of the Copyright Law

The Constitution of 1982 imposes upon the State the obligation to promote the development of natural and social sciences and to disseminate the knowledge of science and technology, scientific research, technological innovations and inventions. The protection of copyright enhances the development of the socialist market economy.

The Copyright Law covers both personal rights (ren shen quan) and property rights (cai chan quan).
For the purposes of the Law, works subject to protection include works of literature, art, natural science, social science, engineering and technology and other works created in forms such as:

- written works;
- oral works;
- musical, dramatic, folk arts (qu yì) and choreographic works and acrobatic works;\(^{10}\)
- works of fine art and architectural works;
- photographic works;
- cinematographic works and works created by similar processes; television and video works;
- graphic works such as drawings of engineering designs and product designs, drawings of product designs, maps, schematic drawings, etc. and three-dimensional model works as well as descriptions of such works;
- maps, sketches and other graphic works;
- computer software; and
- other works as stipulated in laws and administrative regulations.

The provision of consultations, material means or other supporting services for others in their creative activities are not considered to be acts of creation.\(^{11}\)

Chinese citizens are protected for their unpublished works. But foreigners, outside of any conventional framework or reciprocal treatment of Chinese copyright holders by any foreigner's home state, must first publish their works in China to gain protection.\(^{12}\)

### 1.3. Application of China’s copyright treaty commitments

The Provisions on the Implementation of International Copyright Treaties promulgated by the State Council, which came into effect on September 30, 1992 (the Copyright Treaties Implementation Provisions), regulate the conditions of implementation of China’s commitments in the Berne Convention and other treaties.

Under article 4 of these Provisions, covered foreign works include:

- works of which the author or one of the co-authors is a national or a permanent resident of a country party to international copyright treaties to which China is also party;
- works of which the author is not a national or a permanent resident of a country party to international copyright treaties to which China is party, but which have been first published or published simultaneously in a country party to international copyright treaties to which China is party; and
- works created on commission from a sino-foreign equity joint venture, a sino-foreign contractual joint venture or a foreign capital enterprise, which, by virtue of a contract, own the copyrights in the works.

Foreign works covered by the Berne Convention or bilateral or multilateral treaties are protected whether published or not.\(^{13}\)
Foreign works of applied art are protected for twenty-five years from their creation. But works of fine arts and designs, such as for cartoon characters, used in industrial goods are protected as industrial designs.\textsuperscript{14}

Foreign computer programs are protected as literary works and their registration is not required before instituting legal actions.\textsuperscript{15}

Foreign works created by compiling non-protected materials are protected subject to originality in their selection and in the arrangement of their contents.\textsuperscript{16}

Foreign video recordings are protected as cinematographic works to the extent that international copyright treaties regard them as such works.\textsuperscript{17}

Prior authorizations of copyright owners are required:

- to translate into the language of a minority nationality and to publish a foreign work created in Chinese;\textsuperscript{18}
- to perform in public their works in any manner and by any means, or to communicate to the public their works;\textsuperscript{19}
- to perform in public their cinematographic works, television works and video recordings;\textsuperscript{20}
- for newspapers and periodicals, to reprint foreign works, except the reprinting of articles on current political, economic and social topics;\textsuperscript{21} and
- for those authorized to distribute copies of their works, to rent them out.\textsuperscript{22}

Copyright owners of foreign works have the right to prohibit the importation of infringing copies as well that of copies coming from a country where their works are not protected.\textsuperscript{23}

Article 16 of the Provisions provides foreign sound recordings with the following protections:

- they are protected even when unpublished;
- they may not be performed in public without authorization;
- authorized distributors may not rent them without express permission; and
- it is prohibited to import infringing copies and copies coming from a country where they are not protected.

By virtue of article 19, China’s treaty commitments prevail over the Provisions.

Copyright may not be obtained in works whose publication or distribution is prohibited by law.\textsuperscript{24}

Foreign copyright management organizations are subject to the Interim Measures for the Administration of Foreign-Related Copyright Agency Organizations, promulgated jointly by the SAIC and the NCAC on April 15, 1996.
Internet-related Intellectual Property

By
GUO Shoukang,
Anna M. HAN
and
Daniel Arthur LAPRÈS

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4. The regulation of internet keywords

5. Domain name and internet keyword disputes
   5.1. Domain name disputes
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6. Conclusion
According to the China Internet Network Information Centre (CNIIC), as of the end of 2007, the country’s internet had attracted 210 million users and this population was growing at an annual rate in excess of 50%. Because of its relatively low penetration rate (16% of the population compared with a world average of 19%), China remains second in the world for the number of its internet users, behind the United States.

Despite its claims of best efforts to combat violations of intellectual property, the country is accused of being a prime source piracy on the web. The motion picture industry reports, for example, that all of the major peer-to-peer (P2P) sites streaming broadcast programs operate out of China. The recording industry reports that seven or more MP3 search engines offer deep links to thousands of infringing song files. The largest of these is alleged to be Baidu (the preferred search engine of 75% of Chinese internet-users). The record industry is also alleged to have filed cases against Yahoo China for its deep linking service. But on November 17, 2006, the Beijing Intermediate Court dismissed the recording industry’s civil actions against Baidu seeking some USD 226,000 in damages for violations of the rights to 137 songs and, on December 31, 2007, the Beijing High Court was reported to have affirmed the trial judgment.

In October, 2007, the National Copyright Administration of China (NCAC) issued the Notice of Launching of a Special Crackdown on Internet Infringement and Piracy that focused on illegal operations of offering downloads of movies, music, software and textbooks for profit. The copyright administrative departments across the country conducted investigations of 436 cases, alleged violators in 361 cases were ordered to cease their infringements, fines of some RMB 750,000 were imposed, 71 illegal servers were confiscated, 205 illegal websites were closed, and six cases were transferred to the judicial authorities for criminal investigations.
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10. Conclusion
1. Introduction

Under State planning, the distribution of goods in China was controlled by the State and functioned solely for the purpose of allocating goods. Producers sent their goods to the Ministry of Commerce Central Distribution Centres, where they were classified and distributed. Only the Ministry of Commerce and its local offices ran wholesale and retail operations. Stores could only buy from designated sources and only at prices set by the State Price Bureau. The development of a tertiary sector, including for the supply of commercial intermediation services, was frustrated.¹

But since 1978, with the launching and progress of reform, the economy has been shifting to market mechanisms and correspondingly, the distribution sector has revived and developed gradually.²

With China’s accession to the World Trade Organization (WTO) at the end of 2001, the regulatory framework has been further reformed to integrate China’s internal market into the global economy.

1.1. Instauration of the internal market

In contemporary social thought in China, State planning and markets are viewed as complementary mechanisms for the achievement of the goals of socialism. The displacement of emphasis on State planning toward emphasis on markets is thus not an abandonment of socialism.³

The evolution was consecrated by the constitutional reforms⁴ declaring that:

- The State practises a socialist market economy. The State shall enhance economic legislation and improve macro-control of the economy;⁵
- The non-public sector of the economy comprising self-employed and private businesses within the domain stipulated by law is an important component of the country’s socialist market economy. The private sector of the economy is a complement to the socialist public economy. The State protects the legitimate rights and interests of the self-employed and of private business.⁶

The adoption of markets has, however, entailed a radical transformation of ownership of the whole people to accommodate private ownership and independent management of the means of production and distribution.⁷ A major vector of reform proved to be the town and village enterprises which grew in number from 1.5 million in 1978 to 22 million by 1995.⁸

The pursuit of a unified national market has required that regional barriers to trade be dismantled.

By 1995, 30% of retail sales were generated by individual and private enterprises, while collectively owned stores and State-owned stores accounted for 30% and 40% respectively. At the same time, only 10% of gross sales of industrial consumer goods and some 30% of sales of means of production were fixed administratively. Production quotas imposed administratively on industrial units had been reduced from 95% of output value to only 7%.⁹
1.2. Foreign access to the local market

The former system for handling imports was as rigid as that applied to domestic goods. Foreign products entered the country only via State-run foreign trade corporations, which would purchase and import foreign goods according to central directives.

The PRC started to open the foreign trade corporation system in 1984, when foreign companies were permitted to deal directly with newly created import-export enterprises. In 1986, the domestic distribution system was further deregulated when factories were allowed to sell goods directly to end-users.

Before 1986, as much as 80% of all goods in China travelled through the State-run system. By 1997, most Chinese distribution companies had spun off from local and provincial offices of the former Ministry of Commerce.

Prior to 1991, sino-foreign joint ventures engaged in manufacturing could sell a portion of their production on the local market, usually limited to 30% of their output, though much higher quotas were sometimes claimed. Most of these sales were made through domestic trading companies acting as sales agents. The more aggressive and well-connected joint ventures were however able to tap the retail market by setting up exclusive sales counters at leading department stores in the major cities.

Foreign manufacturers were not generally allowed to engage in the distribution of products other than their own.

Pursuant to a decision of the Central Committee of the Communist Party with respect to the accelerated development of the tertiary sector, the State Council, in June 1992, issued rules creating an experimental regime for foreign investment in the retail sector in six cities (Beijing, Shanghai, Tianjin, Guangzhou, Dalian, Qingdao) and in the Special Economic Zones (Zhuhai, Shantou, Shenzhen, Xiamen).

Throughout the 1990s, the State Planning Commission designated, as of “restricted access” for foreign investment:

- wholesaling and retailing;
- the supply and sale of commodities;
- international trade;
- construction and operation of tourist sites of a national scale;
- office towers, luxury residences and upscale markets for tourist sites;
- golf courses;
- travel agencies;
- the professions of accountant, auditor, the legal profession, as well as securities brokerages;
- brokering of ships, maritime transportation, forward contracts, the sale of advertising consulting and production services; and
- training and translation services.
Wholly foreign-owned enterprises for their part were excluded from certain sectors: press, publishing, radio and television stations, film, wholesaling and international trade, insurance, postal services and telecommunications.\textsuperscript{10}

As in other contexts of legal reform, though rarely so graphically, the role of experimentation proved to be crucial in the distribution sector, as new ideas were approved at the local level, which fitted in more or less comfortably with announced national policies.
Trade Finance

By
Daniel Arthur LAPRÈS
and
JIN Mo

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1. **Introduction**

Throughout the 1990s, China’s increasing engagement in international commerce led its enterprises carrying on in international trade, including carriers, insurers and banks to adhere to international standards such as the International Chamber of Commerce Rules for Documentary Credits. But the Chinese financial markets remained stubbornly wanting in short-term instruments.

Chinese authorities undertook to spawn such a market with the adoption of the Law of Secured Transactions¹ and that of the Negotiable Instruments Law² that entered into effect respectively on October 1, 1995 and on January 1, 1996.

It was after a structure of norms dealing with various aspects of financing arrangements had been put in place that the National People’s Congress (NPC) finally adopted the Property Law that entered into effect on October 1, 2007.³ The new law does not significantly modify the existing trade financing framework.
Foreign Direct Investment

By
Paul-Emmanuel BENACHI

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1. Introduction

In the fashion that has been archetypical of the reform movement launched by Deng Xiao Ping in 1978, the country’s opening to foreign investment was initiated on an experimental basis in 1980 when four coastal cities were transformed into Special Economic Zones offering foreign investors advantages for establishing export-manufacturing operations. Four years later, in the light of the success of these experiences with foreign investment, Economic and Technological development Zones (TEDZ) were opened in 14 coastal cities. By the 1990s, many more special zones had been opened in cities along the major river deltas and the Gulf of Boa. Currently there are over 4,000 zones in which foreign investors may find one or another of a large range of facilities and incentives.

In the process, China has become a world leader for the attraction of foreign investment.

1.1. The regulatory framework

On June 5, 1986, the State Council promulgated the Provisions with respect to the Encouragement of Foreign Investment. These have played an important role in attracting foreign investment by offering a series of preferential and priority treatments as well as advantageous government guarantees.

In order to further improve the investment environment, the State Council approved on June 7, 1995 a provisional regulation with respect to foreign investment guidelines (the Foreign Investment Guidelines Regulation), to which is annexed a catalogue of industries. The purpose of the Foreign Investment Guidelines Regulation is to create a framework for foreign investment in China’s industries, to provide foreign companies with greater access to information about internal policies (neibu zhengce), and to orient foreign investment toward China’s priority industries and its underdeveloped central and western regions.

The Foreign Investment Guidelines of 1995 broadened the range of industries in which foreign investment was permitted. Industries that had been off limits to foreign participation, such as air transport, finance, insurance, investment services, accounting and commerce, were opened to foreign investment, though still under restrictive conditions.

In accordance with the Marrakech Agreement, the People’s Republic of China (PRC) officially became the 143rd full member of the World Trade Organization (WTO) on December 11, 2001.

In order to access the WTO, China accepted substantial commitments resulting primarily from a Working Party Report and a Protocol of Accession and Market Access Schedules for both goods and services. At that time, most foreign investors already established in China or prospecting the Chinese market thought that China was truly motivated to aggressively continue its economic and legal reforms in order to create a liberal and market-oriented economy but they also had doubts about China’s ability to honour its WTO commitments as quickly or as completely as agreed.
Four years after its accession to the WTO, China has adopted major legal reforms (notably the reform of the banking and insurance sectors, the new regulations relating to mergers and acquisitions, the amendment of the Foreign Trade Law and the new regulations relating to distribution in China) and, consequently, offers wide opportunities to foreign investors. Driven by this liberalization process and industrial restructuring, foreign direct investments have sustained China’s growth in services and medium- and high-tech manufacturing industries.

1.2. The choice of venue

As the Chinese economy has opened up to diversified foreign direct investments and the local authorities have increasingly committed to the liberalization of the market, the choice of location for opening a first establishment has broadened. The choice of venues is rendered even more difficult since specific tax incentives and other advantages are offered by free trade and development zones as well as by some Chinese cities.

In general, foreign investors choose the place of their first establishment in China on the basis of their individual business needs, the quality of the infrastructure, the size and specificities of the local market and the availability of local incentives.

Foreign investors might set up their registered office: close to their main suppliers if their main activities are the production of goods for export; near their main customers if their main activities are distribution of goods in China; or in the same area/district as their regulatory authorities if their activities require the obtaining of specific licences or recurrent authorizations.

In terms of infrastructure and quality of business environment, some cities have made greater efforts than others in building roads, tunnels, hotels, communication systems, power plants, high-tech offices, etc. For example, Shanghai has created 17 development zones and offers incentives such as tax reductions, subsidies and value added tax refunds.

Nowadays, most multinational companies consider these incentives as “bonuses” rather than essential criteria in the choice of venue to establish their headquarters. Indeed, as a result of the amendment of the Foreign Trade Law and the new regulations on distribution, these development zones have lost some of their comparative advantages for companies in the commercial services industries.

China’s major economic regions are:

- the Pearl River Delta area, including 14 cities (Guangzhou, Shenzhen, Zhuhai, Foshan, Jiangmen, Dongguan, Zhongshan, Zhaoqing, Huizhou, Huiyang, Huidong, Boluo, Gaoyao, Shihui);
- the Yangtze River Delta area, including 16 cities (Shanghai, Suzhou, Hangzhou, Wuxi, Ningbo, Nanjing, Nantong, Shaoxing, Changzhou, Jiaxing, Zhenjiang, Yangzhou, Zoushan, Huzhou, Taizhou (Zhejiang), Taizhou (Jiangsu));
- Beijing – Tianjin – Hebei cities; and
- the Northeastern cities, including Harbin, Changchun, Shenyang and Dalian.

Each of these regions presents specific strengths and contributes in its own manner to the economy’s rapid growth.
The Yangtze River Delta region is the foremost region in terms of gross domestic product (GDP) and in terms of fixed asset investments. In 2003, the region represented a GDP of RMB 2,379.8 billion, after a year-to-year increase of RMB 381.5 billion, and it had the highest level of fixed asset investments (RMB 1097.4 billion). It also possesses a dynamic retail market – in 2003, its retail sales amounted to RMB 718.6 billion, up 12.1% year on year.

The Pearl River Delta area, as well as the Beijing – Tianjin – Hebei cities and the North-eastern China cities also show fast and sustainable growth. In 2003, the Pearl River Delta area achieved the fastest average growth rate (15.5%) among the four regions and its GDP reached RMB 1,133.5 billion. The Beijing – Tianjin – Hebei cities have developed into one of the country’s largest and most modern logistics centres as well as one of its biggest consumption markets. In 2003, the three Northeastern provinces, total retail sales (RMB 481.7 billion) corresponded to 10.5% of the national market.

1.3. Tax considerations

Under the policies applicable until January 1, 2009, foreign investors in specially constituted zones generally enjoy a favourable tax treatment consisting in an income tax rate of 15% as well as two years exemption and three years of half taxes after the first profit-making year for manufacturers.

These policies played a key role in orienting foreign investment in the past, most notably in the foreign investor’s choice of place of establishment.

But the reform of business income taxation to come into effect on January 1, 2008 institutes a uniform national rate for the taxation of business income at 25%. This harmonization of domestic companies’ and foreign investors’ tax treatments will eliminate most of the preferential tax treatments hitherto enjoyed by FIEs.
Business Organizations

By
Lester ROSS
and
Kenneth ZHOU

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8. Conclusion
1. Introduction

Since the late 1970s, China has been engaged in the transformation of its economy from a “planned economy” to a “socialist market economy with Chinese characteristics”. Before the adoption of the policies of internal economic reform and opening up internationally, its economy was generally characterized by central planning in which the central government under the direction of the Communist Party allocated key resources and supplied commodities on the basis of administrative orders through State monopolies. In other words, the allocation of resources and distribution of wealth were determined by the State rather than market forces, and social stratification was determined by political status rather than by income or other criteria.

1.1. Evolution of Chinese economic organizations since 1949

From the founding of the Communist regime in 1949 until the reform and opening-up movement, State-owned enterprises (SOEs) were positioned at the centre of the State’s economy and all production and supply activities of SOEs were carried out in accordance with government instructions. Thus, SOEs essentially served as administrative arms of the government to manage and control the State’s economy. Under this system, SOEs were not independent and lacked, for example, their own accounting systems for profits and losses. This hampered the development of China’s economy because of the absence of a mechanism to encourage SOEs and other business organizations to maximize profits by improving productivity and reducing expenses.

Under the planned economy, business organizations were generally classified into four categories in accordance with their respective ownership forms: State-owned (nominally owned by the whole people), collectively-owned (owned by smaller groups such as all members of a village or township), privately-owned and individually-owned enterprises. While the State encouraged the development of the first two categories, the third and fourth categories were simply deemed as unintended by-products of the planned economy and mere accompaniments to the publicly owned economy, and were at times banned outright. The growth of individual or household enterprises was legally constrained by capping the number of their employees at seven.

In 1978, following the Cultural Revolution, the Communist Party led by Deng Xiaoping convened the Third Plenary Session of its Eleventh Central Committee. At this meeting, the Central Committee approved the shift of the focus of the Party’s work from “political struggle” to “building China’s economic system” and decided to launch a campaign to reform China’s economic system to realize the objective of building a socialist market economy. To establish a market economy, a modern enterprise system first had to be established with the features of “clear property rights, clear rights and obligations, separation of government administrative functions from enterprise operations and adoption of scientific management systems.”
To this end, the government has gradually promulgated a series of laws and regulations since the late 1970s, including the Company Law, several laws and regulations governing foreign-invested enterprises (FIEs), the Wholly Individual-owned Enterprise Law, the Partnership Enterprise Law, and others, for the purpose of creating a variety of forms of business organization to promote the development of the socialist market economy in accordance with international standards with the aim of facilitating China’s integration into the global economy. Under these laws and regulations, business organizations may be constituted and operated as sole proprietorships, partnerships, private limited liability companies, or joint stock companies.

Since the reform, business organizations are less restricted by their respective forms and increasingly subject to modern corporate standards including independence in the ownership of their assets and in the assumption of the risks and rewards of their activities, and protection for the rights of shareholders and creditors. The modern enterprise system encourages business organizations to pursue and maximize their economic returns by improving productivity and reducing costs, a vision that conforms to the political and economic requirements for establishing a market economy in China, the nominally ‘socialist’ nature of which has faded over time.

1.2. Legal framework

As stated above, under the planned economy, business organizations generally included State-owned (owned by the whole people), collectively-owned (owned by smaller groups such as all members of a village), privately-owned and individually-owned enterprises.

The reformed normative framework governing business organizations included:

- the Law of Industrial Enterprises Owned by the Whole People\(^1\) which governs SOEs (the SOE Law);
- the Rural Collectively-owned Enterprise Regulations\(^2\);
- the Urban Collectively-owned Enterprise (COE) Regulations\(^3\);
- the Urban and Rural Individual Industrial and Commercial Households (IICHs) Provisional Regulations\(^4\);
- the Rural Land Contract Operations (RLCOs) Law\(^5\) which governs rural land contract operation households; and
- the Township and Village Enterprise Law\(^6\).

To establish a modern enterprise system to facilitate the transformation from the planned economy to a market economy, the government has since promulgated the following important laws and regulations to oversee the creation and operation of modern business organizations:

- the Company Law that was originally adopted on December 29, 1993 with effect on July 1, 1994 governs all types of limited liability companies, wholly State-owned SOEs and companies limited by shares (except for certain special industries); it was substantially amended on October 27, 2005 with effect from January 1, 2006 (the Company Law of 2005);
- the Partnership Enterprise Law which governs partnership enterprises;
- the Wholly Individual-owned Enterprise Law, which governs wholly individually-owned enterprises; and
- the Sino-foreign Equity Joint Venture Law, Sino-foreign Cooperative Joint Venture Law, Wholly Foreign-owned Enterprise Law and the Regulations on Foreign-Invested Holding Companies, which govern foreign-invested holding companies.

Most recently, a consortium of ministries adopted the Provisional Measures on the Administration of Venture Capital Enterprises.

We discuss these laws and regulations and the business organizations to which they apply in greater detail later in this chapter. It should be stressed, however, that China is still in a transitional period during which business organizations under the planned economy system and the new market system continue to co-exist, although the general trend is in favour of the market and the recognition of private equity interests. The State plan now serves mainly to guide rather than to command. The theoretically distinctive features of a socialist market economy with Chinese characteristics appear to be rooted in these transitional features of the transformation toward a market economy, coupled with continuing State control of key industries and Communist Party control of labour organizations.
Real Estate

By
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8. Conclusion
1. **Introduction**

As China has one of the lowest ratios of arable land in the world,⁴ as well as one of the highest densities of urban populations⁵, land administration occupies an especially important place in Chinese government policies. In contemporary China, land management and development make important contributions to economic growth⁶ and general well-being.⁷ Still, the legal regime governing property rights remains underdeveloped in terms of precision, clarity and reliability.⁸ The Government is hard pressed to curb such excesses as speculative bubbles, and abnormally low prices for transfers of land-use rights to private investors.

Serious shortcomings of the real estate regime in China include the underutilization of mortgages in the primary acquisition market, as well as the underdeveloped secondary market for trading in real estate-based financial instruments.⁹

The endemic advantage of Chinese enterprises that have benefited from allocations or grants for free of rights to the land and buildings on which they have been carrying on business was apparently not treated by the negotiators of China’s accession to the World Trade Organization.

The drafting of a law on property was started in 1993. But the project was overtaken by a series of partial reforms necessary to create rights in objects and to allow services to circulate in the socialist market economy in development since 1978.

Finally, in July 2005, the Standing Committee of the NPC published a draft law and collected some 10,000 comments from the public. In all, the draft law was presented an unprecedented six times to the Standing Committee for deliberation. Property has received official consecration as a vector to reach equality before the law once the State, collectives and individuals benefit from uniform conditions for its acquisition and transfer. The Property Law has served to consolidate the existing texts and to advance in particular in: the disaggregation of property rights to optimize the conditions of their exploitation; the separation of ownership from management of State-owned assets; the guarantees of renewal of rights under rural land contract management and in its broadening of the scope for their transfer; clarification of the property rights in rural collectives and in urban buildings; and its guarantee of compensation in the event of expropriation in the public interest such as that of rural collectives.

1.1. **Land administration in Chinese history**

Land administration has been a major concern of Chinese government since imperial times, on matters as elementary as whether to use the land for grazing (favoured under dynasties founded by the Mongols and the Manchus) or for cultivation (including what products, typically rice or wheat), and how to allocate rights to land among the population.
Non-noble private ownership of land arose in the fourth century B.C. By the Han
dynasty, large aristocratic domains had been constituted and “free” peasants
represented only a small fraction of the total population. From the end of the fourth
century to the latter part of the eighth century, the “equal field regime” system
prevailed among many of the splintered dynasties. The Toba tribe of North Western
China in 485 A.D. instituted a regime attributing to each man and woman a life
leasehold on a certain plot of land as well as the right to a patch for growing mulberry
bushes to supply silkworms. The first Emperor of the Tang dynasty undertook a
major reform of landholdings to equalize the allocations to all peasants. In 780 during
the Tang dynasty, peasants were enabled to claim full ownership to their land subject
to paying their share of the land tax. In 1275, under the Southern Sung dynasty, the
Government created a fund to acquire lands of the wealthy for redistribution to the
poor. Through subsequent dynasties, the land tax played a pivotal role in imperial
finances and the land-owning gentry assumed a dominant social role at the local
level.

As China did not practice the rule of primogeniture, the splitting of properties among
the surviving sons limited the size of estates. By the 18th century, among the elite of
about one million landholders, estates varied between 100-150 mus. At that time,
about 30% of farm families were tenants and another 20% both owned and rented
land.

Land redistribution was a pillar of the Revolution of Sun Zhongshan (Sun Yatsen) in
1912 and of course it played a major role in the Communist Revolution in 1949.

### 1.2. Land ownership after the Communist Revolution

At the time of the Communist Revolution, the average land holding of a Chinese
peasant corresponded to 0.39 acres. The Party first implemented a policy of land
equalization; it divided the rural population into great, middle and small landowning
families (some 10% of the population), rich and middle class peasants (20%), and
poor peasants (the remaining 70%). As of 1952, the landlord class had been stripped
of its landholdings and some 118 million acres of farmland had been redistributed
among some 300 million peasants. Even before the redistribution programme had
been completed, the Communist Party led and encouraged the creation of rural
cooperatives to achieve economies of scale. Peasants were induced to join them by
granting them advantages such as access to loans.

Between 1952 and 1956, the Party led the rural community from mutual aid teams,
to small-scale cooperatives to advanced producer’s cooperatives. In the initial
cooperatives, villagers contributed their land by turning over deeds of sale, livestock
and other property in exchange for shares. The peasants’ income was based on a
proportional share of the cooperatives’ results as well as their individual labour.
Advanced cooperatives comprising as many as a few hundred members from entire
villages and sometimes several villages pooled their resources including land. By
1957, 120 million households, some 96% of the peasantry, had turned over their
cooperative shares and there existed some 740,000 advanced agricultural
cooperatives.
While most rural land had been put under cooperatives after the Revolution, there remained privately owned plots of farmland, as well as private houses. But on August 29, 1958, the Central Committee of the Communist Party announced its directive instituting the regime of people’s communes into which would be merged the existing cooperatives. The communes might comprise some 2,000 peasant households. Ownership of rural land, however, remained vested in the village cooperatives. Peasants could still keep very small-scale garden plots (no larger than a fifth of an acre). By the end of 1958, the advanced agricultural cooperatives had been merged into 26,000 communes, later shrunk to 24,000. But the results of the reforms did not meet expectations and rapidly private property was returned to commune members who were again allowed to own their houses.

In March 1959, new directives decentralized the communes by instituting three levels of ownership: commune or township ownership, production brigade or village ownership, and ownership by production teams of some 10–20 families. Gradually, ownership of land, tools and livestock was concentrated in the villages and production brigades. Families could own their houses, private plots of land and a small number of domestic animals. In January 1961, this system was consolidated by a directive of the Communist Party’s Central Committee.
Labour and Social Law

By
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and
LEI Kai

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1. **Introduction**

Until the 1980s, the “iron rice bowl” applied in State-owned enterprises that monopolized economic activity, and accordingly there arose no need for negotiating or concluding labour contracts. The use of labour contracts has developed gradually in conjunction with economic reform and the emergence of foreign invested enterprises (FIEs).

The Constitution adopted in 1982 after the launching of the reform movement stipulates that “citizens of the People’s Republic of China have the right as well as the duty to work”.1 The State’s role in matters of employment is to create conditions propitious for its development, to improve occupational safety and health standards and working conditions, to facilitate vocational training and to promote increases of remuneration for work and of welfare benefits.2

Their rights to rest,3 to retirement pensions,4 to material assistance in the event of disability,5 to education6 and to engage in scientific research7 are guaranteed by the Constitution. Women in the People’s Republic of China (PRC) enjoy equal rights with men in all spheres of life, including the workplace.8

A fundamental characteristic of the Chinese labour market has traditionally been and remains its fragmentation resulting from the stringent rules limiting movement of people within the country, from rural to urban areas and from region to region.9 All Chinese are assigned a residence based on their mother’s place of residence. Apart from the difficulties of obtaining an authorization to move, the economic cost is in many cases prohibitive. For instance, as social security systems are funded and managed locally, there are few opportunities to transfer rights from one jurisdiction to another.

The labour regulatory framework in China is characterized by the high degree of autonomy granted to local authorities to legislate with respect to labour relations, a fact which makes it difficult for decision-makers to extrapolate from one local regime to another.

A further characteristic of labour relations in China is that employers frequently violate the laws and regulations.

The representative office of a foreign enterprise is subject to different regimes according to the nature of the activity in China.

The institution of minimum salary levels set by the local governments entailing differences of remuneration levels among the different regions is becoming a factor that Western enterprises, principally attracted by the low cost of labour, must take into consideration when they choose where to set up their business in China.

1.1 **The labour market**

According to official statistics, as of the end of 2004, the labour market in China consisted of some 752 million workers, which represented more than 50% of the Chinese population.

The labour force is continuously growing.

In terms of its allocation, 46.9% of the labour force are employed in the agricultural sector, 22.5% in industry and 30.6% in the service sector.10
The level of education varies enormously according to the region. In large cities like Beijing, Shanghai, Guangzhou, Wuhan, Chongqing, Chengdu, Hangzhou and Nanjing, it is relatively easy to find graduates of higher education who speak a foreign language or are specialized in a technical field.

In 2006, the average salary of employees in China was RMB 21,001 per year.\textsuperscript{11}

**Average salary of employees in major cities in China (2006)**

<table>
<thead>
<tr>
<th>City</th>
<th>Average salary (RMB/yr)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Guangzhou</td>
<td>36,321</td>
</tr>
<tr>
<td>Beijing</td>
<td>32,097</td>
</tr>
<tr>
<td>Shanghai</td>
<td>29,569</td>
</tr>
<tr>
<td>Chongqing</td>
<td>19,215</td>
</tr>
</tbody>
</table>

In terms of entrance-level “basic” salaries, in Shanghai, for example, the monthly salary for electrical engineers varies from RMB 1,457 to RMB 4,157, for car mechanics from RMB 1,002 to RMB 2,205.\textsuperscript{12}

It should be noted that in China the concept of “basic salary” does not include social charges and benefits such as insurance, pensions, provision of accommodation, reimbursement of transportation costs or meal expenses intended to compensate for rising prices due to inflation. These latter expenses often constitute a significant sum that the employer must pay for the benefit of the employee. The total of all these charges may reach 45% to 55% of the basic salary.\textsuperscript{13}

Bonus systems are widely practised among Chinese enterprises, and for some categories, such as sales representatives, such payments may represent several months' salary.

The officially announced rate of unemployment was 4.6% at the end of 2006. In reality, the rate may be far higher for urban workers.

Despite the large numbers of the Chinese labour force, it is sometimes difficult for FIEs to find skilled professionals, notably in the areas of finance, marketing, accounting, advertising, management and technical maintenance. FIEs are often obliged to train their local personnel. Moreover, FIEs may encounter difficulties in keeping the local personnel that they have trained, especially in a booming economy. In recent years, positive trends on the labour market include the ever-greater production of graduates in technical fields and the government’s support for vocational training.
1.2. Evolution of labour legislation

During the first half of the 1980s, while the State-planning regime remained in effect, labour regulation was almost non-existent, as State-owned enterprises did not enjoy autonomy in the recruitment and management of their personnel. However, in response to social problems arising in the rapidly developing private- and mixed-ownership sectors, *ad hoc* provisions were intermittently issued. The Chinese government quickly became aware that the deficiency of the social legal framework constituted an obstacle to the sustained development of the socialist market economy.

The State Council promulgated on July 26, 1980, a general text concerning the management of personnel in sino-foreign equity joint ventures (EJVs). This text was criticized by foreign investors as being too constraining.

In order to create a more favourable investment climate to attract and reassure foreign investors, the Chinese government subsequently issued two important regulations:

- the provisions with respect to the right of autonomy in the administration of personnel, salaries, insurance and expenses for social benefits in FIEs, promulgated on November 10, 1986, by the Ministry of Labour (renamed first Ministry of Labour and Social Security, and most recently, Ministry of Human Resources and Social Security; MHRSS); the provisions were replaced by the Regulation on Administration of Labour in FIEs, issued jointly by the Ministry of Labour and the Ministry of Foreign Trade and Economic Co-operation (now Ministry of Commerce, MOFCOM); and
- the notice with respect to the implementation of the right of autonomy in hiring personnel in FIEs, approved by the State Council on April 25, 1988.

These two texts, which were usually referred to collectively as the FIE Autonomy Right Regulations, were intended to offer FIEs realms of autonomy in the management of their personnel and in determining their policies on salaries and social benefits as a means of attracting foreign investors.

The reform of the socialist market economy announced at the beginning of 1992 naturally extended to the labour market. The boom of foreign investment after 1992 entailed the constitution of a large number of FIEs that employed their personnel pursuant to labour contracts. Thus, the regulation of the labour market became a priority of market reform.
Since 1993, the reform of labour law has taken on great significance. The objective has been to establish a social law of general application and to adapt the labour market to the needs of the construction of the socialist market economy. A whole series of texts governing labour relations was promulgated, including most importantly six laws and regulations:

- the regulation with respect to the settlement of labour disputes, issued by the State Council on July 6, 1993 (the Labour Disputes Regulation);
- the regulation with respect to the administration of labour in foreign invested enterprises, issued jointly by the MHRSS and the Ministry of Foreign Trade and Economic Co-operation (MOFTEC, now MOFCOM) on August 11, 1994 (the FIE Labour Regulation) (which is no longer in effect);
- the Notice with respect to the reinforcement of the protection of the legal rights of personnel employed by foreign invested enterprises and private enterprises, issued jointly by the MHRSS, the Ministry of Public Security and the National Association of Worker’s Unions on March 4, 1994 (which is no longer in effect);
- the Labour Law, which was adopted by the eighth Meeting of the Standing Committee of the eighth National People’s Congress (NPC) on July 5, 1994 and promulgated on the same date, and which entered into force on January 1, 1995 (the Labour Law);
- the regulation with respect to the employment of foreigners in China, issued jointly by the Ministries of Labour, Public Security, Foreign Affairs and the MOFTEC on January 22, 1996 (the Foreigner Employment Regulation); and
- the Employment Contract Law, promulgated by the 28th Session of the Standing Committee of the Tenth NPC on June 29, 2007 with effect as of January 1, 2008 (the Employment Contract Law).

The two most important of these sources are the Labour Law and Employment Contract Law. They are applicable to all forms of enterprises including FIEs and Chinese enterprises, whether State-owned or privately owned.

Since the promulgation of the Labour Law and of the Employment Contract Law, a comprehensive legal regime governing labour relations has been taking shape in China, primarily covering the following subjects: general principles and policies, employment and re-employment, vocational training and certification of skills, payment of salaries, annual paid leaves, employment relationships, retirement pensions, medical care insurance, unemployment insurance, workmen’s compensation insurance, childbirth support, social security in rural areas, and the supervision of social security funds.

Within these fields, the most important regulations are:

- the Provisions on Unemployment Insurance issued by the State Council on January 22, 1999;
- the Provisions on Collective Agreements issued by the MHRSS on January 20, 2004;
- the Provisions on Minimum Wages issued by the MHRSS on January 20, 2004; and
The Labour Law and the Employment Contract Law treat Chinese employers and FIEs in the same way and the same legal regime applies to both.

According to the Employment Contract Law, some of the major changes are as follows:

- where an employment relationship has already been established, but no written employment contract has been concluded, a written employment contract must be concluded within one month from the date when the employee joined the employer;
- in the absence of an employment contract, the assumptions of employees concerning the terms of their employment prevail before the people’s courts;
- the term of non-competition clauses may not exceed two years;
- when a fixed-term contract is not renewed at its expiration, compensation is due;
- labour unions are involved in a broader spectrum of issues;
- employers must implement effective internal labour-related rules and regulations;
- probation periods for different labour terms are clearly stipulated;
- the availability of economic compensation for termination of labour contracts is expanded and the rules for its calculation are adjusted in favor of employees;
- in case of mass lay-offs (i.e. where a minimum of 20 persons, or whatever lesser number accounts for 10% of the total number of employees, are laid off), strict procedure must be followed;
- more specific rules have been introduced for labour secondment and related services agents; and
- jurisdiction over the validity of labour contracts is given to arbitration committees or the people’s courts.

1.3. Roles of the Chinese Communist Party and of labour unions

The Chinese Communist Party (CCP) may carry out political study activities in enterprises. In FIES, only the Chinese personnel is concerned. Political study involves the political directives of the CCP, the laws and regulations of the State, general culture, including a basic knowledge of science and history, as well as instruction on social morality and discipline.

However, taking account of the particularities of FIEs, the political activities of the CCP may only be organized outside working hours. Studies may be organized within working hours only with the prior authorization of the manager of the FIE. Political study activities are unpaid and in principle they are conducted by volunteers. In enterprises with a large number of employees, after having obtained the prior approval and support of the foreign party to the FIE, a full-time administrative and political office may be set up on the enterprise’s premises.
Pursuant to the law with respect to labour unions of employees of April 3, 1992, (the Labour Union Law) and several implementing regulations of the EJV Law, employees have the right to create a union within the enterprise. The principal role of Chinese unions is to protect the employees’ rights and interests, and subsidiarily its role is to support the management organ of the FIE. In practice, unions may play a positive role, notably as intermediaries and mediators between employers and their employees. FIEs should cooperate in their activities, such as by providing them with offices and by cooperating in the organization of cultural and sporting activities for the employees.

Like Chinese enterprises, FIEs must allocate to the labour union, if any, an amount equal to 2% of their total payrolls.

1.4. Labour regulations specific to FIEs

The most important laws and regulations governing labour relations within FIEs are the Labour Law and the FIE Labour Regulation.

However according to the Decision on Abolishment of Certain Labour and Social Security Regulations promulgated by the Ministry of Labour and Social Security on November 9th, 2007, the FIE Labour Regulation was repealed on November 7th, 2007 and replaced by the rules in the Labour Law and other labour-related rules and regulations. Accordingly, labour relations within FIEs are now subject to the general labour law regime.

1.5. Employment by representative offices

Representative offices of foreign enterprises are not allowed to recruit local staff without resorting to the services of intermediaries approved by government. Until the early 1990s, the State-owned Foreign Enterprise Services Corporation (FESCO) had a monopoly on all recruitment. Since then, the number of intermediaries has grown steadily and it is now possible for foreign representative offices to recruit the personnel of their choice while still organizing the employment relationship through an agent. Representative offices often adopt rules of conduct in employee manuals but it is doubtful that such provisions would be binding on their personnel hired by intermediaries. The working conditions of personnel in representative offices may not violate the Labour Law.
Environmental Law

By
Patrick THIEFFRY

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1. **Introduction**

The overall situation of the environment in the People’s Republic of China (PRC) is a serious concern according to the State Environmental Protection Administration (SEPA) itself. In five of China’s seven major river systems, over 70% of the water is “unsuitable for human contact”. Only 20% of solid waste is properly treated. And, in almost two-thirds of 300 tested cities, air quality fails World Health Organization standards. The World Bank estimates that the costs of direct pollution damage correspond to 8–12% of China’s annual gross domestic product (GDP). Public environmental spending has increased swiftly as the government manifests a more concerned attitude, in part due to pressure from domestic public opinion and international stakeholders’ initiatives.¹

Against such a background, a constant legislative and regulatory movement should not come as a surprise. The PRC has adopted a comprehensive set of laws aiming at the protection of the environment and its main fields, some of which have been progressively improved over the 1980s and 1990s, so as to constitute a corpus of legislation not unlike those of the United States or the European Union.

As a general rule, it is thus in all respects advisable to conduct thorough environmental due diligence prior to undertaking any corporate or real estate acquisition or before entering into any joint-venture agreement with an existing business entity.²

1.1. **International treaties**

The PRC is a party to major international environment protection treaties such as the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer, the New York Framework Convention on Climate Change and the Kyoto Protocol, the Rio de Janeiro Convention on Biological Diversity and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their disposal.

1.2. **Constitution**

The Chinese Constitution provides that “the State protects and improves the human environment and the ecological environment and prevents and controls pollution and other public hazards”.³ With respect to nature, the State ensures the rational use of natural resources and protects rare animals and plants. The Constitution further prohibits the appropriation of natural resources or damage thereto by any organization or individual by whatever means.⁴
1.3. Major environmental protection laws

Chinese environmental legislation is substantially organized along the lines of the law of December 26, 1989 on environmental protection (the “Environment Protection Law”), which sets forth general rules that are reiterated and specified in the major laws dealing with the main aspects of the environment or in relation to specific environmental protection devices. Those major laws include:

- the law of May 15, 1996 on the prevention and control of water pollution (Water Pollution Law);
- the law of October 30, 1995, amended on December 29, 2004, on the prevention of environmental pollution caused by solid waste (Law on Pollution by Waste);
- the law of April 29, 2000 on the prevention and control of air pollution (Air Pollution Law);
- the law of June 29, 2002 on cleaner production promotion (the Cleaner Production Promotion Law);

Also worth noting are:

- the Regulations of October 9, 1994 on Nature Reserves;
- the Measures of July 28, 1994 on the Certification Management of Products Bearing Environmental Labels;
- the Regulations of May 23, 2001 on Administration of Agricultural Genetically Modified Organism Safety (the “GMO Regulations”).

Several of the legal sources governing foreign investments, such as the Provisions on Guiding Foreign Investment Direction, and the Catalogue for the Guidance of Foreign Investment Industries, echo concerns for environmental protection.

While China has been emphasizing the “rule of law” since the economic reform led by Deng Xiao Ping in the 1970s, Chinese legislation is generally considered as vague and loosely drafted. It thus provides flexibility of interpretation to meet the policy goals of the Communist Party. Environmental legislation does not differ from other areas of the law in this respect, and a wide margin of appreciation is invested in the competent administrative and judicial authorities, which often leads to poor and inconsistent results.

1.4. General principles of environmental policy

Chinese law does not decree general principles of prevention or precaution as do some other countries’ laws or certain international treaties. Nevertheless, the main principles do have some clear influences on Chinese legislation.
The prevention principle is implicitly acknowledged by the Constitution when it provides that “the State protects and improves the living environment and the ecological environment” and even more directly when it mandates the public authorities to “prevent and control pollution and other public hazards”. In addition, it unquestionably underlies environmental protection legislation. The word “prevention” appears in the titles of the Water Pollution Law, the Air Pollution Law and the Law on Pollution by Waste. Further, the first article of each one of these statutes indicates that their subject matter indeed includes the prevention of environmental pollution.

The precautionary principle has started to make some progress in Chinese environmental legislation. The requirement of precautionary measures is imposed in the event of several occurrences stipulated in the Regulations and Administration of the GMO Regulations. In practice, the adoption of precautionary measures is one of the conditions for obtaining a licence to produce genetically modified seeds, breeding livestock and poultry or aquatic fry and seeds. Such measures are also required for marketing licences and for authorizations to import into the PRC or to export from the PRC.

1.5. Integration of the requirements of environmental protection in other policies

The integration of the requirements of environmental protection in other policies has also made a de facto appearance in environmental protection legislation since the 1980s. The main above-mentioned laws indeed provide that “the plans for environmental protection formulated by the State must be incorporated into the national economic and social development plans”. More specifically, the requirements of environmental protection must be taken into account when considering foreign direct investment projects in the PRC. The Provisions on Guiding Foreign Investment Direction approved and promulgated by the State Council on February 21, 2002 expressly accomplish this with respect to all types of foreign investment projects, such as Chinese/foreign Equity Joint Ventures (EJVs), Contractual Joint Ventures (CVJs) as well as Wholly Foreign Owned Enterprises (WFOEs).

Foreign investment projects are classified into four categories according to their variable desirability for the country. As a result of such categorization, investment projects may be encouraged, permitted, restricted or prohibited. Projects that involve new technology and equipment and are able to save energy and raw materials, to comprehensively use resources and renewable resources and to prevent environmental pollution are to be encouraged. The Catalogue for the Guidance of Foreign Investment Industries encourages foreign investment in a number of particular activities with positive effects on environmental protection.

Investments that are unfavourable to energy saving or to the biological environment are restricted while those that cause environmental pollution, destroy natural resources or impair human health are prohibited.
Under the revised Catalogue for the Guidance of Foreign Investment Industries issued jointly on October 31, 2007 by the National Development and Reform Commission and the Ministry of Commerce, that became effective on December 1, 2007 foreign investments in clean energy production, renewable energy research and development, environmental protection, development and production of green foods are encouraged and those in high energy-consuming and pollution-generating are restricted or prohibited.

1.6. Implementing regulations and application

Environmental legislation generally refers to the “competent department of environmental protection administration under the State Council” for regulatory and implementation purposes. As a matter of fact, a significant part of the regulatory and implementation authority lies in SEPA, a simple administrative department, as opposed to a full ministry, that was created in 1982 as the National Environmental Protection Agency (“NEPA”) before being renamed SEPA in 1998. SEPA has authority to appoint the heads of the local Environment Protection Bureaus. It is generally considered that the SEPA has insufficient resources.

While the PRC is a unitary State, environmental protection legislation generally authorizes the people’s governments of provinces, autonomous regions and municipalities to adopt “more stringent” measures. For instance, they are expressly empowered to adopt their own standards for environmental quality of water, of air and, more generally, of the environment for “items” with respect to which there are no national standards for environmental quality. Even more significantly, they may adopt their own standards for the discharge of pollutants into water resources, into the air and into the environment in general, not only with respect to those items for which there are no national standards for the discharge of pollutants, but also to make them “more stringent than the national standards”. In all such cases, local authorities must report to the SEPA.

As to the implementation of environmental laws and regulations, local authorities are involved in much the same manner as in many other countries. Environmental protection legislation thus generally provides that administrative departments in charge of environmental protection “at various levels” exercise “unified supervision and management” of the relevant polluting activities. Central authorities perform such tasks at the national level while the second-level and lower authorities intervene within their respective jurisdictions.
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1. Introduction

Under China’s former system of central planning, the State alone financed and managed pensions, housing and social security, largely through the State enterprise system. Domestic insurance was not available during this period.¹

But the institution of a socialist market economy has required the implementation of new mechanisms to convert savings into investment. In the process, the concept of risk management has appeared in the Chinese regulatory framework.

While savings levels in China are very high, due in part to the ample provision of social services by the State through its enterprises, the share of these funds collected by insurance companies has been very low, even by the standards of other Asian countries, developed or undeveloped.²

Since the adoption of the policy of reform and opening-up, China’s insurance industry has experienced rapid growth. The market has seen a constant increase in the number of insurance products, a multiplication of insurance service networks, and the rapid development of an intermediary market. Participants in the insurance sector now include State-owned enterprises, Chinese private enterprises and foreign-invested insurers. Attention is increasingly turning to the creation of insurance products to meet broad social demands for medical care, for education, for housing, for care for the aged, etc.

On September 1, 1983, the State Council issued the regulations with respect to property insurance (the Property Insurance Regulations), which explicitly laid down the principles with respect to the making, alteration and transfer of insurance contracts as well as the obligations of policy holders and the insurer’s liabilities.³

In March 1985, the State Council issued another document entitled the Provisional Regulations on the Management of Insurance Enterprises. They normalized the establishment of insurance enterprises, thus ending the previous tendency toward unbridled, uncoordinated opening of insurance enterprises. In order to guarantee a stable business environment, special emphasis was put on the solvency of all insurance enterprises.

On November 7, 1992, the Standing Committee of the Seventh National People’s Congress (NPC) passed the Maritime Law, of which chapter 12 concerns marine insurance contracts. This chapter stipulates the principles that govern the conclusion of marine insurance contracts. The Maritime Law was a forerunner of all other property insurance laws and regulations.

In order to build a strong foundation for further development of China’s insurance industry and fully protect the legitimate rights and interests of parties involved in insurance activities, the People’s Bank of China (PBOC) in October 1991 established a group to draft an Insurance Law. It was finally passed on June 30, 1995 and entered into effect on October 1, 1995.⁴ To facilitate its implementation, the PBOC, in January 1996, issued the provisional regulations on insurance management (the Insurance Management Regulations) as well as, on February 2, 1996, the regulations with respect to the management of insurance agents (the Insurance Agents Management Regulations), clarifying such matters as the qualifications, scopes of business, commission and fee structures, assessments, and the legal relationships between parties to insurance contracts.

In 1998, the China Insurance Regulatory Commission (CIRC) was established to take over the supervision and administration of the insurance industry from the PBOC. One of its main duties is to draft laws and regulations for supervising and administering the insurance industry. Rules formerly issued by the PBOC remain valid unless specifically overruled.
To further the opening of the insurance industry after China’s accession to the World Trade Organization (WTO), the Insurance Law was amended on October 28, 2002. The amendments became effective on January 1, 2003.

Since China’s accession to the World Trade Organization (WTO) in December 2001, a large number of foreign insurance companies have entered the market, and formerly restricted sub-sectors have been opened to such foreign-invested insurers and brokers.

Overall, the Chinese insurance market remains contracted mostly on a non-admitted basis, that is, the market is essentially closed to the writing of policies in China without issuing a local policy, which would then be subject to local law. Examples of insurance written on a non-admitted basis include cargo risks in international trade, casualty risks for international travellers and product liability insurance on exported goods. In each case, the risks in China are considered either minor or transitory.

1.1. Hierarchy of insurance laws and regulations

Insurance laws and regulations fall into three categories depending on which of the three levels of institutions are their sources.

The highest authority is the Insurance Law in so far as it was adopted by the NPC and put into effect in the form of an order of the President of the State. Ranked second are the insurance regulations issued and implemented by the State Council. The third normative level includes insurance regulations issued during the first phase of reform by the PBOC, China’s central bank, and now by the China Insurance Regulatory Commission. Such regulations include for example the Regulations on the Administration of Foreign-invested Insurance Companies adopted on December 12, 2001 by the CIRC, which took effect on February 1, 2002.

Insurance laws and regulations provide important civil and commercial rules to ground legal relations between insurers and their insured and beneficiaries, and also to supervise the insurance industry.

According to article 153 of the Insurance Law, the Maritime Law is the primary source concerning marine insurance. For matters not covered in the Maritime Law, the provisions of the Insurance Law are applicable. Article 155 specifies that agricultural insurance is governed by separate laws and regulations.

On November 1, 2002, the State Administration of Foreign Exchange (SAFE) and the CIRC jointly promulgated temporary regulations with respect to foreign exchange in the insurance business. All property insurance in China must be written in renminbi, except:

- where the interest insured is located outside China,
- where the insured subject matter is moveable property destined to move onto and out of China’s territory,
- where both the insured and insurer are located outside China,
- where the interest in China arises from international leasing, loan or other financial facilities.

Casualty and medical insurance may be insured in foreign currencies where the insured is a Chinese national travelling abroad, or is a foreign legal entity or a foreign government, provided the beneficiary is domiciled outside China.
1.2. Supervision and administration of the insurance industry

Before revision in 1998, the Insurance Law provided that the insurance industry fell under the financial supervision and administration department of the State Council. Article 4 of the Interim Regulations on the Administration of Insurance Companies explicitly designated in the role the PBOC’s insurance administration organ.

On November 14, 1998, the State Council issued the Circular on the Establishment of the China Insurance Regulatory Commission, establishing the principle of separation of the finance and insurance industries as well as of their regulatory frameworks. This Circular designates the CIRC as responsible for administration of commercial insurance and the uniform supervision of the insurance market.

According to the Memorandum of Understanding on Division of Responsibilities and Cooperation in Financial Supervision and Regulation among the CBRC, the CSRC and the CIRC, the scope of the latter’s responsibilities includes:

- formulating strategies, policies and plans for the development of the insurance industry; drafting relevant laws and regulations for the supervision and regulation of insurance activities, and enacting rules for the insurance industry;
- approving the establishment of insurance companies and their branches, insurance groups, insurance holding companies; approving in conjunction with relevant authorities the establishment of insurance asset management companies; approving the establishment of representative offices in China by overseas insurance institutions; approving the establishment of insurance intermediary companies (insurance agent companies, insurance broker companies, insurance and appraisal companies, etc.) and their branches; approving the establishment of overseas insurance institutions by domestic insurance and non-insurance entities; and approving the mergers, splits, changes, dissolutions, take-overs and assigned acceptances of insurance institutions; participating in and organizing the bankruptcy and liquidation of insurance companies;
- reviewing and approving the qualifications of the senior managerial personnel of insurance-related institutions; formulating rules regarding the basic qualifications of insurance practitioners;
- approving the insurance clauses and premium rates of those insurance products that have a bearing on the public interest, approving compulsory insurance products and newly developed life insurance products; enforcing the filing of insurance clauses and premium rates of other insurance products;
- overseeing the solvency and conduct of insurance companies and the management policies of insurance guarantee funds; formulating regulations for and supervising the use of the insurance funds;
- overseeing the activities of self-insurance companies and mutual insurance companies; supervising insurance industry associations, insurance institutes and other insurance social organizations;
- investigating violations of insurance laws and regulations and imposing penalties in appropriate cases, including unfair competition by insurance institutions and practitioners, and investigations and sanction of non-insurance institutions’ direct or indirect operations of insurance businesses;
- supervising overseas insurance institutions established by domestic insurance and non-insurance entities;
formulating standards for the insurance industry; improving risk assessment; tracking, analyzing, and predicting the performance of the insurance market; compiling statistics and statements concerning the insurance industry; and overseeing the daily activities of supervisory boards of the State-owned insurance companies according to related rules of the Central Committee of the Communist Party of China and purview of cadre administration.

The self-regulating China Insurance Trade Association was established on March 12, 2001, with the approval of the State Civil Administration. It is under the tutelage of the CIRC. Its members are insurance companies, insurance intermediaries, local insurance trade associations and actuaries. It is designed as a risk-prevention mechanism and is intended to provide self-discipline to the insurance industry. Its services to its members include the defence of their rights, coordination, communication and publishing.

1.3. Insurance market participants

Currently, there are over one hundred insurance companies with business operations in China, including both Chinese-invested and foreign-invested companies. China also counts some two hundred representative offices established by foreign insurance companies, many of which will be replaced by subsidiaries with full operational activities as the market further opens up. In addition, there are over 1,000 insurance intermediaries set up with the approval of CIRC, including insurance agents, insurance brokers and insurance loss adjustors.

1.3.1. Insurers

In China, insurers are subject to regulation along two vectors, one based on supervision and control of their activities by the CIRC and the other based on their contractual relationships with their insured.

According to article 71 of the Insurance Law, the establishment of an insurance company is subject to approval from the CIRC. Article 70 provides that insurance companies may be formed as joint-stock companies with limited liability or as wholly state-owned companies. Accordingly, article 3 of the Regulations on the Administration of Insurance Companies defines insurance companies as those commercial entities established with the approval of insurance regulatory organizations and registered in accordance with the law. Meanwhile, according to the Company Law, insurance companies can establish subsidiaries and branches.

Insurers' contracts are characterized by the collection of premiums for promising indemnification after occurrence of the insured events.

Currently, there are four major insurance companies with nation-wide coverage.
PICC Property and Casualty Company Limited. In 2002, the People’s Insurance Company of China (PICC), the oldest of China’s insurers (established in 1949), was transformed into a joint stock company with the approval of the CIRC. PICC became PICC Holding Company, which established PICC Property and Casualty Company Ltd. and PICC Asset Management Company Ltd. The holding company remains State-owned, it holds stocks in various listed companies and other financial organizations, and performs the function of asset-holder. PICC Property and Casualty Company Ltd is currently the largest non-life insurance company in mainland China. PICC is estimated to hold a 75% market share serviced by some 4,000 branches and 90,000 staff members. PICC has had shares listed on the Hong Kong Stock Exchange since 2003. AIG Group holds a 20% share of the company. China Life Insurance (Group) Company is a large State-owned financial insurance enterprise headquartered in Beijing. It evolved from PICC, People’s Life Insurance of China Co., Ltd. (1996) and China Life Insurance Company (1999). In 2003, the original China Life Insurance Company was restructured into the China Life Insurance (Group) Company, with the consent of the State Council and the approval of the CIRC. Its subsidiary, China Life Insurance Co., Ltd is China’s largest life insurer.

China Pacific Insurance (Group) Company Limited is an insurance, investment and holding group with separate operations for property insurance and life insurance (as under current regulations). It was established in 1991 and holds approximately 12% of the domestic market.

China Ping An Insurance (Group) Company Limited was founded in 1988. It is headquartered in Shenzhen. Its major wholly owned subsidiaries are Ping An Life Insurance Company of China, Ltd, Ping An Property and Casualty Insurance Company of China, Ltd and Ping An Old-age Insurance Co., Ltd. It also controls China Ping An Insurance Overseas (Holdings) Limited and Ping An Trust & Investment Co., Ltd which holds an equity interest in Ping An Bank Limited and Ping An Securities Company, Ltd. With insurance as its core business, Ping An has grown into a closely knit, efficient and diversified financial holding group that integrates securities, trusts and banking. Its foreign shareholders include Morgan Stanley, Goldman Sachs and HSBC.

Huatai Insurance Company of China Ltd is the first national joint-stock property insurance company in China, and was established on August 29, 1996. Its 60-plus initial shareholders are principally large, financially strong enterprises and enterprise groups, covering 24 industries including petroleum, power, metallurgy, electronics, chemicals, aviation, construction, light industry and shipping. The assets of Huatai’s shareholders are worth over RMB 1 trillion. Huatai was also the first property insurance company that included a foreign company as one of its shareholders. As a major shareholder and strategic cooperation partner of Huatai, ACE Limited has provided Huatai with support and assistance in many areas, enabling Huatai to adapt itself to international standards in both managerial expertise and operational standards.

New China Life Insurance Co., Ltd was founded in August 1996 with the approval of the State Council and the PBOC, and is a joint-stock life insurance company operating nationwide offering various life insurance, health insurance and accident insurance services.
In September 1992, American International Group, Inc. (AIG) became the first foreign insurer permitted to carry on insurance business in China by obtaining business licences for its subsidiaries, American International Assurance Ltd and AIU Insurance Company to set up branches in Shanghai. AIA’s Shanghai Branch provides a series of life insurance products and services. AIU Insurance Company’s Shanghai Branch evolved from the property-casualty insurance organization of AIG Shanghai Branch and it provides various products, including property insurance, marine cargo insurance, liability insurance and other commercial insurance.

Allianz AG was approved to set up its first representative office in Beijing in January 1994 and subsequently established representative offices in Shanghai and Guangzhou. In 1998, it constituted Allianz Dazhong Life Insurance Co., Ltd and Dazhong Insurance Co., Ltd in Shanghai. On January 8, 2003, the first property insurance branch of the Allianz Insurance Group in China – Allianz Insurance Company Guangzhou Branch – was founded, and it formally commenced business on February 14, 2003. Allianz Insurance Company Guangzhou Branch provides clients with a series of property insurance and related reinsurance services including property loss insurance, liability insurance, transportation insurance and project insurance.

Other foreign insurance companies with offices in China include AXA, Chubb, Royal & Sun Alliance, Tokyo Marine and Fire Insurance, Wintherthur, Ming An, Mitsui Marine & Fire and Samsung Insurance, Zurich. According to the Regulations with respect to the Establishment of Reinsurance Companies issued by the CIRC on September 17, 2002, reinsurance companies are subject to the CIRC’s approval.

The China Reinsurance Company, founded in 1999, was transformed on August 18, 2003 into China Reinsurance (Group) Company. Currently it is the only local reinsurance operator in China. The group is a financial holding company that mainly operates reinsurance business. It also is a founding investor in China Property & Casualty Reinsurance Co., Ltd, China Life Reinsurance Co., Ltd and China Continent Property Insurance Co., Ltd. Some multinational reinsurers have successively launched their China companies, such as Swiss Re and Munich Re.

1.3.2. Insurance intermediaries

Intermediaries in China’s insurance market mainly consist of insurance agents and insurance brokers.

Insurance agents are entities or individuals that have been authorized by an insurer to transact insurance business on its behalf, and that in return receive fees from the insurer.6

Insurance brokers are entities that provide intermediary services to applicants for insurance in the identification of insurers and the conclusion of insurance contracts, and that receive commissions for their services.7
In order to standardize the operations of insurance agencies and their branches and protect fair competition, the CIRC issued on December 1 and 15, 2004 respectively the Provisions on the Administration of Insurance Agency and the Provisions on the Administration of Insurance Brokerage, which provide for supervision of agents and brokers in respect of their organizations, qualifications, agent relations and operations, etc. To address issues of civil liability arising from intentional torts and negligence, the CIRC issued the Circular on Matters of Applying for Career Liability Insurance by Insurance Agencies (Brokerages) on March 10, 2005, requiring agents and brokers to obtain liability insurance covering the scope of their business activities.

In addition to agents and brokers, loss adjustors intervene on the market to provide claim management and settlement as well as loss adjusting services. With the implementation of the Decision of the Standing Committee of the NPC on administration of judicial expertise, the role of insurance loss adjustors has become clearer and their influence as intermediaries on the insurance market reinforced.

1.3.3. Policyholders

Opposite insurers in insurance contracts there are the applicants, the insured and the beneficiaries. In respect of an insurance contract of cargo carriage, the contract may be transferred by endorsement. Legal persons, other organizations or individuals may subscribe property insurance. Individuals mainly contract life insurance.
Project Management

By
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and
Daniel Arthur LAPRÈS

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The authors thank Lan Yan for her contribution of Section 5 of this chapter entitled Build-Operate-Transfer projects.
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1. **Introduction**

As the construction industry in the People’s Republic of China (the PRC) represents more than USD 300 billion of annual spending, fourth among domestic sectors of activity, and as China has gradually opened up its market in connection with its World Trade Organization commitments, opportunities for foreign investors have multiplied.

The transition to a socialist market economy has entailed the creation of a legal framework for managing the transfer of functions conducted within the State structure toward outside suppliers of goods, services, construction, public amenities, and infrastructure development and other services.

Although in the early phases of opening up and reform, most contracts, including for public projects, were attributed by private negotiations and their attribution was influenced by personal relations (guanxi), the Chinese authorities have more recently sought to impose transparency, competition and fairness in the awarding of projects.

Chinese law emphasizes the use of public bidding for the attribution of government procurement contracts while admitting national preference.

The Chinese authorities have encouraged the diversification of the forms of participation of private, including foreign, operators, with techniques such as Build-Operate-Transfer (BOT) and Transfer-Operate-Transfer (TOT).
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By
Gregory LOUVEL

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9. Conclusion
1. Introduction

With the establishment of the People’s Republic of China (PRC) on October 1, 1949, the existing Chinese banks and cooperative financial institutions created in the rural areas were integrated into the People’s Bank of China (PBOC) and foreign banks in China were nationalized.

All domestic banking activities were controlled by the PBOC, which collected funds from State-owned enterprises (SOEs) and allocated investment according to government policy, mainly through the SOEs.

Furthermore, the PBOC acted as the country’s central bank.

The Bank of China was assigned the mission of dealing in foreign exchange.

Financial sector reform began in China in 1979 with the end of the monopoly of the PBOC and the reattribution of its commercial functions to four State-owned commercial banks (SOCBs). In 1986, the missions of the PBOC were refocused on the conduct of monetary policy.

Fundamental reforms were adopted in 1995 with the enactment of the Commercial Banking Law and the amendment to the PBOC Law, and then again after December 2001, with the entry of China into the World Trade Organization.

The commercial banking sector in China now includes various categories of banks.

There are four SOCBs, formed under the State Council’s Decision on Financial System Reform issued in December 1993. The Law on Commercial Banks, which became effective in 1995, permitted commercial banks, including the SOCBs, to operate under market criteria. The SOCBs are extremely large, with extensive regional networks throughout China. Their influence over the banking sector has been declining, however, in recent years. The SOCBs remain under State control, although foreign strategic investors are now permitted, as described below, to acquire minority positions. Some SOCBs are currently being transformed into joint-stock companies. Their financial performance has been poor and they hold a large share of China’s non-performing loans.

In 1994, three “policy” banks were launched to assume the mission of promoting development, which had hitherto been carried out by the SOCBs. They are the Agricultural Development Bank of China, the Development Bank of China, and the Export Import Bank of China. Their funds come mainly from government deposits and guaranteed bond issues and their lending is respectively focused on agricultural modernization, infrastructure and facilities financing and import-export financing.

The first joint-stock banks were formed in the 1980s. Currently there are 12 such banks in China of which five are listed on domestic stock exchanges. These banks are partly owned by the State and partly by SOEs, private enterprises, and individual investors. Subject to closer scrutiny by shareholders, they usually apply better disclosure and governance practices, especially those listed on a stock exchange. As a result, they have fewer non-performing loans, they are better capitalized, and their provisions more ample than those of the SOCBs.

City commercial banks are owned by municipal governments with participations from SOEs, private enterprises, and individual investors. There are 112 city commercial banks in China with widely ranging standards of governance and performance.
The first rural commercial banks were opened in 1994 to take over some of the activities of the rural credit cooperatives. Otherwise, they mainly provide financing for commercial projects in rural areas.

The urban credit cooperatives are gradually being consolidated to form city commercial banks.

There are 38,000 rural credit cooperatives. They mainly provide funding for agricultural households. They are considered the weakest entities in the banking sector as they are burdened with large amounts of non-performing loans and are afflicted with poor governance.

This increasingly diverse banking sector still manifests two common features.

The banking sector remains the most important source of credit, while equity and bond markets remain underdeveloped by international standards and the fledging insurance sector attracts a relatively small share of savings.

Another remarkable feature of the financial sector is the high degree of government ownership. All the banks and insurance companies are majority or fully owned by the State. Foreign participation in the financial sector remains insignificant. Thus, in contrast with the industrial sector, where efforts have been made to develop and strengthen private enterprises, including through deregulation of activities and through improved access to credit, the financial services sector displays a high level of public ownership and control.

Banking activity lies at the intersection of different domains of regulation:

- that covering banks (including their foreign business operations) established in China that receive deposits from the general public, i.e. commercial banks (including SOCBs), urban and rural credit cooperatives and policy banks;
- non-bank financial institutions (including their foreign business operations) established in China (such as financial asset management companies, trust and investment corporations and other financial institutions);
- the foreign establishments of Chinese banks and financial institutions; and
- offshore banking and financial institutions carrying on activities in China (for example, over the internet).
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16. Conclusion
1. **Introduction to the capital markets in China**

As early as 1996, the World Bank pronounced the state of financial regulation in China to be “basically sound and in accordance with international principles”.

In the fashion illustrative of the approach of the reform movement in China implemented since 1978, experiments successful at the local level have evolved into national phenomena. More specifically in the context of the capital markets, what was allowed to begin as street trading of bonds, shares, or commodities, has evolved into a network of technically sophisticated markets.

According to the China Securities Regulatory Commission (CSRC) 2007 Report, the Shanghai and Shenzhen stock exchanges had listed a total of 1,434 companies with a total market capitalization of RMB 8,940 billion (corresponding to about 44% of 2006 Gross Domestic Product), but of which only some RMB 2,500 billion were in tradeable shares. The market included 104 securities and 183 futures brokerage firms. There were also 58 fund management companies (including 24 joint ventures) managing some 53 closed-end funds and 252 open-ended funds with total assets of RMB 856 billion.

Yet the nation’s huge savings pool, estimated at some US$ 2.3 trillion by the end of 2007, funded with 25% of disposable income, is mostly (86%) on deposit with the banking system.

The range of securities traded includes: treasury bonds and financial bonds (issued by emanations of the State, such as the Export Import Bank) traded principally on an inter-bank market (spot and repurchase agreements), corporate bonds, convertible corporate bonds, international organization bonds in local currencies, shares in Chinese companies (A shares), and warrants on shares in Chinese companies. Trading is also conducted in futures contracts on commodities and currencies.

The often-repeated official commitment to convertibility of the renminbi on the capital account has not been implemented, though cracks in the walls around the domestic capital markets have increased the permeability between the domestic and overseas financial markets. In particular, the authorities have opened up the following passages through the wall of non-convertibility. They have spawned an overseas market for shares in companies traded on the Chinese stock exchanges (B-shares). They have promoted the listing of Chinese companies on foreign stock exchanges (so-called H-shares). They have permitted the raising of funds among the public overseas through companies constituted abroad to finance activities in China. They have permitted foreign institutional investors to acquire and trade shares in Chinese companies that are traded on the domestic stock exchanges (A-shares). They have removed most barriers to foreign direct investment by Chinese enterprises and individuals, and have allowed the launching of funds in China to conduct portfolio investment abroad.

While State interventionism in the financing of business activity has been in contraction since the inception of the reform and opening up in 1978, the State’s influence remains decisive in the financial sector. Though some 70% of economic activity is now under private control, almost all the companies quoted on the stock exchanges are State-owned enterprises (SOEs), as are most financial intermediaries and service providers.

A major impediment to efficiency of the markets remains the cumulating of ownership and regulatory authority in the State and its ramifications. The authorities have addressed this problem by creating an organization to act as interface between the State/owner of the major enterprises, and a separate management, which is expected to act independently and respond to the interests of its enterprise.
A particularly thorny problem remaining on the agenda of the authorities as regards the stock markets is the approximately two thirds of the stock market capitalisation that is tied up in non-tradable shares. In February 2004, the State Council concluded that this situation hindered transparency and price setting and discouraged investment and innovation. By the end of 2004, non-tradable shares of listed companies accounted for 64% of total share capital in the domestic market, with 74% thereof in the hands of the State. On April 29, 2005, the CSRC created a framework to allow pilot companies to convert their non-tradable shares into tradable shares. Proposals to such effect must be approved by a two-thirds majority vote of the shareholders’ meeting. A lock-up period of one year after conversion is imposed and shareholders may sell no more than 5% of their holdings in each of the following two years. As of May 15, 2006, 919 companies had completed or were in the process of implementing the reforms.

In connection with the reform of non-tradable shares, issues of new shares were suspended between April 2005 and April 2006. Before the end of 2006, 71 companies conducted IPOs, raising about RMB 156.25 billion; 2 companies made rights issues raising RMB 432 million; and another 45 companies carried out new issues raising RMB 81.77 billion. In China during 2007, IPOs of Chinese companies plus the first offerings of their stock by foreign companies already listed elsewhere totaled some $ 90 billion, about as much as in New York and London combined.

The pursuit of openness on the capital markets as a vehicle of efficiency has emphasized the importance of truthful (shi shi), accurate (zheng que) and complete (wan zheng) disclosure by issuers of securities. Despite the imposition a Code of Corporate Governance and draconian criminal sanctions in egregious cases, the markets remain rife with breaches of good governance, fraud and corruption. A perennial debate among decision-makers concerns whether financial regulatory authorities should turn a blind eye to such improper behaviour lest confidence in the markets be sapped and their development thereby hampered. After a requirement was imposed in 2007 that companies in polluting industries, such as power generation, cement, and electrolytic aluminum, meet environmental standards before listing their shares, ten initial public offerings scheduled for the second half of 2007 were delayed on this account by China’s environmental protection agencies.

A characteristic of the Chinese financial regulatory edifice has been the coexistence of parallel regulatory frameworks for domestic and foreign investments. Generally, conflicts between the regulatory regimes are avoided by interpreting the foreign regime as “special”, in that it complements the general system. To a large extent, this differentiation has had to be reduced as a result of China’s accession to the World Trade Organization (WTO), which entailed the adoption of its principles of non-discrimination, including in the provision of financial services. Chinese participation in the Services Agreement concluded during the Uruguay Round of Negotiations has improved foreign access to the Chinese market for financial services.

As of the end of 2006, Shanghai and Shenzhen Stock Exchanges each had three overseas special members. They had respectively granted 46 and 19 special B-share trading seats to overseas securities companies. The CSRC had approved seven joint venture securities companies and 24 joint venture fund management companies. Since 2002, foreign institutions have been allowed under the Qualified Foreign Institutional Investor (QFII) scheme to invest in A shares. Since 2001, foreign companies have been able to offer and list A shares and, since 2002, they can take over Chinese listed companies.
China practises the segregation of the sub-sectors of its financial markets into banking, securities and insurance activities, each with its own regulatory framework and specific regulatory authority. During the first quarter of 2008, after banking and insurance regulators signed a memorandum of understanding to boost cross-sector cooperation, the State Council cleared the way for banks and insurers to invest in each other on a trial basis, a step toward the goal of creating large financial firms that operate in a variety of sectors.

A peculiarity of the Chinese stock markets is that trading activity is dominated by individuals rather than financial institutions. At the end of 2006, the CSRC counted 78 million accounts but that number probably reached 100 million in the market run-up during 2007.
International Capital Flows

By
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9. Conclusion
1. Introduction

After decades of financial autarky, in the early 1980s China began a gradual reintegration into the international financial system.

In 1980, China joined the World Bank and the International Monetary Fund (IMF). In 1988, it signed the Multilateral Investment Guarantee Agency Convention.

On December 1, 1996, China accepted the regime of Article VIII of the IMF Articles of Agreement and implemented the convertibility of the renminbi (RMB) with respect to current account transactions.

Accordingly, exchange contracts concluded with parties subject to Chinese jurisdiction for non-current transactions in violation of Chinese exchange controls are not enforceable by the courts of other IMF members having accepted the Article VIII regime.

Since 1993, the authorities have committed the country to achieve convertibility of the renminbi in capital account transactions. While the currency remains officially non-convertible for capital account transactions, the windows opened to capital flows have become ever wider and more numerous. The current five-year plan projects full capital convertibility by 2010.

China’s large and long-running current account surplus and its concomitant accumulation of international reserves, which exceeded USD 1.53 trillion as of the end of 2007, the highest of any country, have attracted increasing pressure to make the renminbi convertible and to open its borders to international financial flows.

Beginning in the 1990s, the Chinese authorities gradually made it easier for Chinese companies to raise capital abroad, and they have opened the domestic financial markets to foreign investors, thus rendering the renminbi partially convertible in practice even on the capital account. However, this cloistering of the domestic financial markets has engendered pricing anomalies that have accentuated the pressure to merge the financial market’s domestic and foreign compartments.

China has not only become a leading country for the attraction of foreign direct investment, it is also gradually emerging as a powerhouse of global finance. In 2003 and 2004, TLC acquired operations from Thomson and Alcatel and in 2004 Lenovo acquired IBM’s personal computer unit. In June 2007, CIC paid USD 3 billion for a 9.3% of Blackstone Group’s initial public offering. In December of the same year, it spent USD 5 billion for a 9.9% stake in Morgan Stanley. (Within six months, Blackstone shares lost 40% and Morgan Stanley’s even more.) In February 2008, the Chinese aluminum giant, Aluminum Corporation of China Limited (Chinalco), acquired a 9% stake in Rio Tinto for USD 14.05 billion.

As China’s integration into global finance progresses, its proportionately reduced ability to isolate its financial markets portends an increased risk of the contagious spread of trends, not only toward China from abroad, but in the opposite direction as well. This was most recently demonstrated by the “mini-crack” in the Chinese stock markets in March 2007, which jarred financial markets all over the world.

The Anti-Money Laundering Law was adopted by the 24th Meeting of the 10th Session of the National People’s Congress (NPC) on October 31, 2006 with effect on January 1, 2007. On the heels of this reform, in July 2007, China was admitted as a full member of the Financial Action Task Force on Money Laundering established by The Group of Seven nations 1989 to set standards to prevent money laundering and to share best practices among national regulators.
On August 21, 2007, the State Administration of Foreign Exchange (SAFE) announced that Chinese citizens, who could already buy or sell USD 50,000 of foreign currency every year, will be able to open accounts at Bank of China branches across the country to trade securities listed in Hong Kong.

1.1. The gradual liberalization of capital account transactions

On November 6, 1984, the Bank of China (BOC) issued 20 billion yen of Samurai bonds, which was the first overseas bond issue in modern Chinese history. 

In 1989, the SAFE allowed domestic enterprises to invest overseas with their own foreign exchange earnings, subject to depositing 5% of the amount in a special account. Their profits had to be repatriated and converted at State counters. In the same year, the State Council imposed a ceiling on the short-term external debt of financial institutions. Both direct borrowing and borrowing for onward lending had to be registered with SAFE. Enterprises could only extend foreign guarantees within the limits of their own foreign currency assets.

From November 1991, individuals were allowed, admittedly within very low limits, to purchase foreign currency for overseas travel, studies, emigration and family support.

On January 1, 1994 the foreign exchange market was unified at a rate of RMB 8.7 to the US dollar. The authorities adopted a market-based managed float within a band of +/- 0.3% in any single trading day. A foreign exchange market was established in Shanghai (the China Foreign Exchange Trading System – CEFTS) involving trading among banks and among banks and enterprises. The foreign exchange retention and quota systems were abolished and the Foreign Exchange Plan was discontinued.

Within months of the opening of the Shanghai and Shenzhen stock exchanges to channel domestic savings toward State-owned enterprises (SOEs) in need of financing, the government instituted an overseas market for issuing and trading of their shares (so-called B shares) to enrol foreign investors in their project. In 1992, nine companies issued B shares and trading in B shares totalled USD 3.1 billion. As of the end of 2006, 109 companies had raised RMB 38 billion from the issue of B-shares.

Chinese companies were then allowed to issue and list their shares on overseas stock exchanges, mostly in Hong Kong. On July 15, 1993, Tsingtao Brewery Co. Ltd listed shares in Hong Kong, thereby becoming the first Chinese enterprise to complete an overseas listing. According to the CSRC 2007 Report, as of the end of 2006, 143 domestic companies had issued H-shares and obtained listings on the international capital markets, raising a total capital of USD 95 billion. Of these, 126 were listed only on the Hong Kong exchanges, ten were listed in Hong Kong and New York, four in Hong Kong and London, one in Hong Kong, New York and London and two in Singapore. As of March 31, 2008, 107 Chinese companies listed H shares on the Hong Kong Stock Exchange’s Main Board with a market capitalization of USD 575 billion and another 40 were listed on the Exchange’s GEM market for small companies with a market capitalization of USD 833 million.
The legal segmentation between A, B and overseas listed shares engendered distortions. For instance, A shares trade at excessive prices relative to their earnings, while B shares have traded at deep discounts relative to A shares. Development of the B share market has stagnated and its market capitalization as of the end of 2003 was barely 2% of the total market capitalization of the Chinese markets.

The most popular vehicle for Chinese companies to raise capital abroad has become the listing of an overseas company to raise funds to invest in China. In this approach, an overseas company is constituted or an already listed company is acquired. The greater reliability of the accounts and documentation set down according to overseas professional and legal standards has contributed to this preference from the viewpoints of both investors (more transparency and accountability) and issuers of securities (downward pressure on the cost of capital). According to some estimates as many as several hundred Chinese companies may have obtained listings on foreign markets. As of March 31, 2008, 88 such overseas companies, called Red Chips, were listed on the Hong Kong Stock Exchange’s Main Board with a market capitalization of USD 585 billion and another 40 were listed on the Exchange’s GEM market for small companies with a market capitalization of USD 2 billion. As of 2006, 33 American Depositary Receipts (ADRs) in companies carrying on their main businesses in China were traded on the NASDAQ and 16 on the New York Stock Exchange and countless others traded on the OTC Bulletin Board [OTCBB].

Also, the government moved to open the market for A shares to foreign institutional investors. The CSRC and the People’s Bank of China (PBOC) promulgated on December 1, 2002, for immediate effect, the Provisional Measures on Administration of Domestic Securities Investments of Qualified Foreign Institutional Investors (QFIIs). By June 2006, there were 40 licensed QFIIs holding securities assets worth RMB 34.7 billion, of which RMB 22.3 billion (64%) was invested in A shares, RMB 6.0 billion (17%) in funds, RMB 2.6 billion (7%) in convertible bonds, and RMB 3.7 billion (11%) in treasury bonds. By the end of 2007, 49 institutions had obtained QFII licenses and the value of their securities had risen to USD 26.5 billion (RMB 200 billion) from their initial investment quota of USD 10 billion.

On February 18, 2005, the PBOC, the MOF, the National Development and Reform Commission and the CSRC jointly announced that approved international organizations would begin issuing renminbi bonds on the domestic market.

On May 13, 2005, the PBOC announced that the first foreign financial institution had been admitted to the interbank bond market.

The authorities have also loosened the spout on outward financial flows. For instance, individuals were allowed to buy up to USD 5,000 to finance travel abroad for extended trips.

To buoy the B-share market by creating openings for Chinese residents’ investments, the China Securities Regulatory Commission (CSRC) promulgated on February 19, 2001, its Notice Regarding B-share Investment by Chinese citizens, allowing domestic individual investors to open B-share accounts and trade B shares in foreign currency.
Gradually, the restrictions on outflows of Chinese foreign direct investment were relaxed. By 2001, Chinese overseas direct investments totalled USD 8.4 billion, involving 6,610 projects. Since 2004, a series of reforms has been implemented to facilitate overseas direct investment by Chinese enterprises. The Chinese establishments of multinational corporations were permitted to lend to their foreign affiliates. The proceeds from overseas initial public offerings or bond issues by Chinese companies could be deposited abroad for up to two years, up from the previous six months. The ceiling on enterprises’ settlement account balances was raised from 20% of their foreign exchange proceeds to 30–50% and in 2005 it was hiked to 50–80%.

In 2006, Chinese overseas non-financial direct investment flows had reached USD 16.1 billion, ranking 13th in the world and, by the end of 2006, accumulated Chinese direct investments abroad reached USD 73.3 billion (about 15% of accumulated foreign direct investment in China).

In June, 2007, the CSRC adopted measures to allow domestic institutional investors to invest in foreign securities but a combination of rising prices on the Chinese stock markets as of the end of 2007 and expectations of the renminbi’s continued appreciation have dampened enthusiasm for this vehicle on which only a fraction of the USD 50 billion quota had been used as of that time.

As of the first quarter of 2008, the authorities have announced as a priority the stemming of inflows of short-term foreign capital seeking to profit from the expected appreciation of the renminbi. According to some observers, inflows of short-term capital in 2007 alone amounted to USD 200 billion, surpassing foreign direct investment by foreigners of USD 82.6 billion in the same year, and the total might well reach USD 500 billion. To the same end, they have reduced domestic banks’ quotas of short-term foreign debt to 30% of the 2006 level.

One reliable indication of the degree of liberalization of China’s international capital flows is that by 2008 the perennial discount at which H shares, and to an even greater extent B shares, traded with respect to A shares has been reduced on and some A shares have actually traded, if only briefly, at a premium relative to their A share counterparts.

1.2. Introduction to the exchange regime

The current regulations on the foreign exchange system came into effect on April 1, 1996.

The PBOC regulates the foreign exchange market in accordance with the orientation of monetary policy and developments in the foreign exchange market. Under authorization from the PBOC, the SAFE and its branches act as the regulatory organ for foreign exchange.
Article 3 of the Foreign Exchange Regulations defines foreign exchange as:

- foreign currencies, including bank notes and coins;
- payment instruments denominated in foreign currency, including bills, bank certificates of deposit and certificates of postal deposit etc.;
- securities denominated in foreign currency, including government bonds, corporate debentures and stocks etc.;
- Special Drawing Rights and European Currency Units; and
- other assets denominated in foreign currency.

Article 5 makes the rules applicable to domestic entities, individuals, foreign establishments and foreign nationals in China.

Foreign currency is prohibited from circulation in China.\(^{15}\)

Article 19 requires that, unless the State Council stipulates otherwise, all foreign exchange receipts for capital account transactions must be repatriated.

All foreign exchange receipts for capital account transactions must be placed in specific foreign exchange accounts opened at designated foreign exchange banks; such receipts can be also sold to the designated foreign exchange banks upon approval by the exchange administration agencies.\(^{16}\)

External borrowing is subjected to approval.\(^{17}\)

The issue overseas of bonds in foreign currency by financial institutions is subject to prior approval by the SAFE.\(^{18}\)

External guarantees may only be given by financial institutions and enterprises approved by, and registered with, the SAFE and its agencies.\(^{19}\)

Article 25 establishes a regime of registration of all external debt.

When FIEs are terminated, the proceeds on liquidation owed to the foreign investors may be repatriated net of tax.\(^{20}\)

Foreign exchange operations are the exclusive domain of financial institutions approved by the SAFE and its agencies.\(^{21}\) They must open specific accounts for their clients’ foreign exchange operations.\(^{22}\) They must respect official asset and liability ratios\(^{23}\) and submit to investigations by competent authorities.\(^{24}\)

Foreign exchange trading must respect the principles of transparency, openness, fairness, and honesty.\(^{25}\)

Severe financial and criminal sanctions apply to especially grievous infractions of the Foreign Exchange Regulations.

Fines for evasion may range between 30% and 500% of the illicit amounts.\(^{26}\)
Criminal offences include:

- the payment, in violation of regulations, in renminbi or in kind, of imports that require payment in foreign exchange or of similar types of expenses;
- the payment in renminbi of local expenses on behalf of others and obtained in return for foreign exchange;
- investments in China on the part of overseas investors in renminbi or with goods purchased locally without the authorization of the exchange administration agencies;
- purchases of foreign exchange with invalid documents, contracts and bills;
- illegal arbitrage activities;
- processing external borrowing without authorization;
- issues of bonds denominated in foreign currency abroad without authorization and in violation of the relevant regulations;
- the provision of guarantees for external obligations without authorization and in violation of the relevant government regulations;
- using foreign exchange in China for pricing or settlement;
- pledging foreign exchange or subjecting it to liens without authorization; and
- changing the designated use of foreign exchange without authorization.

Parties penalized for violations may within 15 days appeal to the exchange administration agencies at the next higher level that must decide within two months. If the party contests the decision as reviewed, it may appeal to the people’s courts.

1.3. Recent reforms of the foreign exchange market

The PBOC regulates the foreign exchange market in accordance with the orientation of monetary policy and developments in the foreign exchange market.

Since July 21, 2005, the PBOC, with the authorization of the State Council, has instituted a new exchange rate regime departing from its prior peg to the US Dollar and moving toward a determination with respect to a basket of currencies. The exchange rate regime corresponds to a managed float based on market supply and demand. As of that date, the exchange rate was adjusted to RMB 8.11 per US dollar. As of March 8, 2008, the central bank was fixing the reference rate for trading the RMB at 7.1115 against the dollars.

The daily trading price of the US dollar against the RMB in the inter-bank foreign exchange market floats within 0.5 per cent around the central parity published daily by the PBOC, while the trading prices of the non-US dollar currencies against the RMB will be allowed to move within a band to be announced separately by the PBOC.
On August 8, 2005 the PBOC announced a reform of the conditions of access to foreign exchange trading intended to attract more entities, including non-financial enterprises and non-banking financial institutions, while maintaining scale of operations thresholds that only the largest enterprises might meet:

- for non-financial enterprises, annual foreign exchange receipts and expenditures under current account in excess of USD 2.5 billion, or goods imports and exports totalling more than USD 2 billion;
- for insurance companies, a registered capital of no less than RMB 1 billion or equivalent amount of foreign exchange, for trust companies and finance companies a registered capital of no less than RMB 500 million or equivalent amount of foreign exchange, and for fund management companies a registered capital of no less than RMB 150 million or equivalent amount of foreign exchange.

Non-financial enterprises intervening on the inter-bank foreign exchange market may only deal in spot transactions based on their real need to hedge transactions. Non-bank financial institutions can deal in all spot transactions except those that require approval of the SAFE.

The foreign currency forward market is accessible to policy banks, commercial banks, trust and investment companies, financial leasing companies, finance companies and auto finance companies, provided that they obtain the approval of the CBRC to deal in financial derivatives. Other non-banking financial institutions must obtain the approval of their regulatory authorities. Non-financial enterprises require the approval of the SAFE.

The SAFE determines the maximum amount of trading between domestic and foreign currencies for non-financial enterprises and non-banking financial institutions on the basis of the amounts of their foreign exchange tenders, their capital and their operating capital.

Forward transactions in the inter-bank foreign exchange market are subject to the following conditions:

- both parties use the PBOC’s Centre quoting system to trade and negotiate to determine the currency, amount, maturity, exchange rate and delivery arrangements;
- forward transactions can be delivered at full amount at the maturity date or at net between forward price and spot prices, entailing that the means of delivery and currency be specified in the contract; and
- participants of the foreign exchange forward market can require their counterparts to deposit a certain amount of margins at the Centre.

Six months after market participants become qualified to deal in forward transactions, they may deal in swaps that combine spot and forward transactions, or combine different forward transactions.
Indirect Taxation

By
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In the People’s Republic of China, the principal source of government tax revenue is indirect taxation.


State Fiscal Revenue Composition (2004)

Percentage of Central Fiscal Revenue over the Total (1978-2004)
## Composition of public receipts in the PRC and in countries of the OECD as a % of total mandatory payments, 2003

<table>
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<tr>
<th></th>
<th>Total direct taxes</th>
<th>of which on households</th>
<th>of which on enterprises</th>
<th>Total indirect taxes</th>
<th>of which VAT-type</th>
<th>Other taxes</th>
<th>Social security charges collected by the State</th>
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Taxation of Business Income

By
Edward ROWE
and
Jinyan LI

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1. Introduction

The Chinese enterprise income tax system has undergone major reforms since its inception in 1980. From 1980 to 2007, there have been two distinct sub-systems: one for domestic enterprises and another for foreign-investment enterprises (FIEs) and foreign enterprises (FEs). As described in the historical review below, each sub-system per se went through a consolidation process.

Following the consolidation of the taxation system applicable to domestic enterprises and the separate consolidation of the taxation system applicable to FIEs and FEs, income from business was taxed under two separate sets of legislation until the end of 2007.

As of January 1, 2008, there will be a uniform Enterprise Income Tax Law\(^1\) (the Uniform EIT Law) applicable to all enterprises, irrespective of ownership under which tax will generally be imposed at a rate of 25%.

In this chapter, we will refer to the new uniform law where possible. However, at the time of writing, detailed implementation rules for the uniform tax law have not been released.

Given the history of the uniform law, most technical rules for the computation of taxable income and administrative rules are likely to remain the same as the pre-2008 rules for FIEs and FEs, which are described in detail herein (the FIT Rules).\(^2\) The two most significant changes to FIEs and FEs relate to tax rates and tax incentives. Those changes are addressed in the latter part of this chapter.

1.1 Scope of the Uniform Enterprise Income Tax

Under the Uniform EIT Law, enterprises are classified as “residents” and “non-residents”. Resident enterprises are subject to tax on their worldwide income, whereas non-residents are taxed only on income that has its source in China.\(^3\)

Enterprises are residents in China if they are established under the law of the People’s Republic of China (PRC), or if they are established under the law of a foreign country but the place of effective management is in China.

Non-resident enterprises are those that are established under foreign laws, that do not have a place of effective management in China but that have a place of establishment in China or receive income from China.

1.2 History of the taxation of domestic enterprises

Prior to January 1, 1994, depending on their types, domestic enterprises were subject to different taxes:

- State enterprise income tax;
- State enterprise income regulatory tax;
- collective enterprise income tax;
- private enterprise income tax; and
- household income tax.
From January 1, 1994, however, these taxes were abolished and all Chinese domestic enterprises became subject to the Provisional Regulations on Enterprise Income Tax (the Enterprise Income Tax Regulations). Until January 2008, enterprises within the territory of the PRC, excluding FIEs and FEs, are subject to Enterprise Income Tax on their income from production and business operations, whether derived from inside or outside China.

More specifically until January 2008, the Enterprise Income Tax Regulations apply to:

- State-owned enterprises;
- collective enterprises;
- privately owned enterprises;
- jointly run enterprises;
- joint-stock enterprises; and
- other organizations with income derived from production, business operations and other sources.

1.2.1 Scope of taxation of domestic enterprises

Domestic enterprises are, without exception, resident in China and are therefore subject to tax on their worldwide income under the laws applicable prior to 2008.

Under the Rules relating to the Consolidated Payment of Enterprise Income Tax, which became effective from January 1, 1995, domestic subsidiaries, corporations or enterprises belonging to one business group may report their profits to their head office and file a consolidated tax return for the year.

1.2.2 Computation of taxable income

Until 2008, taxable income for domestic enterprises was defined as the excess of gross income over permissible deductible costs and other expenses. Taxpayers’ total income includes:

- income from production and business operations;
- income from the transfer of property;
- income from interest;
- income from leases;
- income from royalties;
- income from dividends; and
- income in other forms.
The following items are deductible in computing taxable income:

- interest on loans from financial institutions paid in the course of production and business;
- interest on loans from non-financial institutions, where it is not higher than that charged by financial institutions on the same category of loan for the same period;
- wages paid to staff and workers;
- payments to workers’ trade union funds, welfare funds and educational funds on the basis of 2%, 14% and 1.5% respectively of total taxable wages; and
- donations to charities and relief funds, up to a maximum of 3% of annual taxable income.\(^8\)

The following items are not deductible in computing taxable income:

- capital outlays (except as specifically permitted on an amortized basis);
- spending on the transfer and development of intangible assets;
- fines for illegal operations and losses incurred through confiscation of property;
- fines for overdue tax payments, and other fines or penalties;
- losses due to accidents, for which compensation has been received or is receivable;
- non-charitable donations, and charitable donations in excess of the maximum deductible amount;
- spending on sponsorships; and
- other non-income-related expenditures.\(^9\)

1.2.3. Rates

The rate of tax on domestic enterprises prior to 2008 was 33%.\(^10\)

1.2.4. Losses

Under the system applicable to domestic enterprises until 2008, losses in a tax year may be carried forward for a maximum of five years.\(^11\)

1.2.5. Double taxation relief

Where foreign tax has been paid by a domestic enterprise on income derived from outside China, this can be offset against taxes due in China. The offset may not, however, exceed the Chinese tax payable on the foreign income.\(^12\)
1.2.6. Administration

Enterprise Income Tax as imposed on domestic enterprises until 2008 is paid on an annual basis, but with monthly or quarterly payments on account. Each payment on account should be made within 15 days after the end of the month or quarter concerned. The annual payment should be made within four months of the end of the tax year. The tax authorities will refund any overpayments.\(^{13}\)

At the time of the payments on account, the taxpayer should submit a statement of account and a tax return to the tax authorities. An annual statement of accounts and tax return should be submitted to the tax authorities within 45 days after the end of the tax year.\(^{14}\)

1.3. History of the taxation of FIEs and FEs

Whereas Chinese domestic enterprises were taxed under the Enterprise Income Tax Regulations, FIEs and FEs are taxed under the Income Tax Law on Enterprises with Foreign Investment and Foreign Enterprises (the FIT Law) until January 2008.

The FIT Law, adopted on April 9, 1991 by the Fourth Session of the Seventh WPC with effect as of July 1, 1991, applies to FIEs and FEs, including Chinese-foreign equity joint ventures (EJVs), Chinese-foreign cooperative joint ventures (CJVs) and wholly foreign owned enterprises (WFOEs) that are established in China. Prior to 1991, there were two separate taxes that applied to foreign investment enterprises: the Joint Venture Income Tax (JVIT) and the Foreign Enterprise Income Tax (FEIT). The FIT Law was promulgated to consolidate the JVIT and FEIT. The tax rates were designed to be competitive with other countries in order to attract foreign investment.

The FIT Law has provided various tax incentives to foreign investors engaged in productive ventures and/or established in special open areas. In reality, about 80% of foreign investment is in coastal regions, where the effective tax rate could be significantly lowered through a series of tax holidays and reductions provided under Chinese Laws.

1.3.1. Scope of taxation on FIEs and FEs

Resident enterprises are subject to tax on their worldwide income, whereas non-residents are taxed only on income that has its source in China.\(^ {15}\)

Under the laws applicable until 2008, FIEs and FEs, including EJVs, CJVs or WFOEs were considered resident in China for income tax purposes if their head offices were in China, and they enjoyed legal person status under Chinese laws.\(^ {16}\)

A “head office” is defined in article 5 of the FIT Rules to mean the central establishment responsible for the operation, management and control of the enterprise. Article 4 of the General Principles of Civil Law\(^ {17}\) recognizes EJVs, CJVs and WFOEs as legal persons if they are established in accordance with Chinese laws, possess the necessary property or funds, have their own name, organizational structure and premises, and are able to assume civil obligations independently.
Under the Cooperative Joint Venture Law, however, a CJV has an option not to be incorporated as a legal person. If the joint venture is not a legal person, but a partnership, the parties to the venture are taxed separately. In other words, the venture is not considered to be a resident in China, although the parties to the venture may, with the approval of the tax authorities, elect to be taxed as one entity.\(^\text{18}\)

The FIT Law does not permit consolidated taxation of subsidiary corporations or enterprises belonging to one business group. Hence, each member of the business group must apply for a specific ruling.

### 1.3.2. Determination of the source of income

For non-resident enterprises with a site or establishment in China, income earned from China through the site or establishment is Chinese-source income. Moreover, income earned from outside China is also Chinese-source income if it is effectively connected with the site or establishment in China.

The general principle is that income is deemed to arise at the place where the substantial elements of its production occur. In other words, the source of business income is determined on the basis of production and business activities and the operational sites established in China. The place of contract can be considered a significant factor in determining the source of income. Article 6 of the FIT Rules defines income from Chinese sources as:

- income from the production and business operations of the establishments and places in China of foreign investment enterprises and foreign enterprises, as well as profits, interest, rental revenues, royalties and other income derived both inside and outside China that is actually attributable to the said establishments or places; and

- if foreign enterprises have no establishments or places in China, income from Chinese sources corresponds to profits obtained from enterprises within China, interest derived from China on deposits, loans and advance payments, as well as receipts on assets leased to and used by parties in China, royalties, earnings from alienation of assets such as buildings and land-use rights, and other income stipulated as taxable by the Ministry of Finance.

In addition to business income, Chinese-source income includes passive income, such as dividends, interest, rental income and royalties received from China and gains on transfers of property in China.
Taxation of Real Property

By
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Under the Chinese Constitution, land is publicly owned and cannot be transferred, though it is possible to transfer the right to use land. Ownership of urban land is vested in the State whereas agricultural land is owned by collectives. Typically, the State grants land-use rights for periods ranging between 20 and 70 years. Land-use rights are treated as intangible assets and may be amortized.¹
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1. Introduction

The Individual Income Tax Law (IIT Law)\(^1\) introduced a unified personal tax regime for Chinese and foreign taxpayers. Previously, there were separate tax regimes for Chinese taxpayers and foreigners. The new regime was introduced to make the tax system more equitable and easier to administer, and to broaden the tax base.

Compared to the income taxes imposed by most developed countries, the individual income tax regime has some unusual features as described below.

The tax is essentially schedular. Only certain listed types of income are liable to tax, each category of income is computed separately, and there is no aggregation of the different categories. Some categories of income are taxed at progressive rates, while others are taxed at a flat rate.

There is no system of personal deductions, though a standard monthly deduction is allowed for some income (such as employment income) and specified deductions may be made against some types of income. Each individual is considered to be a separate taxable person and there is no aggregation of the income of, or joint taxation of, spouses.

Income is taxed at different rates depending on its nature. Whereas wage income, business income and management fees are subject to progressive taxation, some other types of income, such as remuneration for professional services and rent, royalties, interest and dividends are taxed at a flat rate.
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1. Introduction

Conciliation refers to the intervention of a third party designated by the parties in a dispute to assist them in achieving an amicable settlement.

Conciliation is not a required step in the dispute settlement process.

Conciliation must be conducted in accordance with the law, but otherwise its elements are determined by agreement of the parties.

Since conciliation is based on the voluntary participation of the parties, proceedings may be terminated at the behest of any of the parties.

Conciliation agreements are enforceable if they are written into arbitration agreements or are concluded before a people’s court. However, they are non-binding when concluded in other circumstances.

In China, the principal conciliation institute for international commercial affairs is the Conciliation Centre under the joint sponsorship of the China Council for the Promotion of International Trade (CCPIT) and the China Chamber of International Commerce (CCIC) and its sub-councils.

Conciliation is also conducted in a variety of contexts: on an ad hoc basis, under the framework of an institution, by arbitrators in the context of arbitration proceedings or by judges in proceedings before the courts.
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By
HAN Jian
and
WEN Yanhua

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1. Introduction to administrative remedies

In China, the system of administrative remedies mainly consists of three mechanisms: administrative reconsideration, administrative litigation, and administrative compensation.

Citizens, legal persons and other organizations may seek administrative remedies if they consider their rights and interests to have been violated by the act of an administrative body in China.

Foreign nationals, foreign enterprises and foreign organizations have the same rights and obligations as Chinese citizens, enterprises and organizations in any proceedings in pursuit of administrative remedies in China, nevertheless the principle of reciprocity applies in administrative proceedings, so that China will not recognize rights of a foreigner, a foreign enterprise or a foreign organization broader than the protection given its citizens, legal persons or other organizations to resort to administrative remedies by their State of origin.

1.1. Parties to administrative proceedings

Citizens, legal persons and other organizations enjoy reciprocal rights and obligations in relation with the executive branch of government and the agencies through which it carries out administrative acts.

Parties harmed by an unlawful act undertaken on behalf of an administrative agency may claim administrative remedies.

Administrative agencies refer to those exercising administrative functions and powers, that assume independently liabilities arising from the exercise of their administrative functions and powers and that enjoy rights and bear obligations toward parties affected by their acts.

The definition of an administrative agent includes not only administrative agencies of the State but also the bodies or organizations to which are attributed administrative functions and powers by law or by decisions of administrative organs.

1.1.1. Administrative organs

Administrative organs are established in accordance with the constitution and organic laws. Administrative organs include the State Council (i.e. the cabinet of the central government), the ministries, committees and agencies under the State Council, the local governments at various levels, the departments under local governments, and the detached organs of local governments.

Administrative organs are the principal administrative agents. Administrative remedies of all types are usually sought against administrative organs.
1.1.2. Other bodies or organizations authorized by laws or mandated by administrative organs

In accordance with laws or regulations, some bodies or organizations, that are not administrative organs, may undertake administrative acts within the scope of their authorizations, for example, the police, the Trademark Review Board, the China Securities Regulatory Commission and their subsidiary institutions.

An administrative organ may entrust bodies or organizations to exercise certain administrative functions and powers. The mandated body or organization then undertakes administrative acts in the name of the mandating organ.

1.2. Specific and abstract administrative acts

Administrative acts may be divided into specific and abstract acts. The distinction is significant in ascertaining the availability of remedies and their scope.

China’s existing laws and regulations contain no definitions of specific and abstract administrative acts.

1.2.1. Specific administrative acts

In its Trial Opinions on Several Matters concerning the Implementation of the Administrative Legislation Law of 1991, the Supreme People’s Court (SPC) defined in article 1 specific administrative acts as unilateral acts directed at a particular citizen, legal person or organization concerning their rights and obligations carried out by administrative organs of the State, their officers, by organizations authorized by laws and regulations, or organizations or individuals authorized by administrative organs when acting in the exercise of their administrative functions in the management of a particular matter.

But this document was repealed and replaced in 2000 by the Interpretations of the SPC on Several Problems concerning the Implementation of the Administrative Procedure Law, in which there is no definition of specific administrative act.

Scholars in China provide explanations of specific administrative acts in their works. For instance, they are defined as:

“Lawful acts carried out by administrative organs in the course of exercising administrative functions and powers, which concern specific matters and affect the rights or obligations of citizens, legal persons or organizations.”

Others define specific administrative acts as “measures undertaken in conformity with legally binding administrative norms and rules by administrative agents aimed at a particular matter or person.”
One of the purposes of enacting the Administrative Reconsideration Law was to clarify the meaning of “illegal or improper specific administrative acts”. Accordingly, to qualify under the Law, claimants must invoke the infringement of lawful rights and interests by a specific administrative act. The Administrative Procedure Law provides that:

If citizens, legal persons or any other organizations consider that their lawful rights and interests have been infringed upon by a specific administrative act of an administrative organ or its personnel, they shall have the right to bring a suit before a people’s court in accordance with this Law.

Although the term “specific administrative act” is not used in the State Compensation Law, its provisions obviously apply only to specific acts because it requires that the litigious administrative acts have been carried out by administrative organs “in the exercise of their administrative functions and powers” and that they infringe upon personal rights of citizens or upon property rights. The types of acts that may ground personal claims are set down as follows:

- detaining citizens in violation of the law or unlawfully taking compulsory administrative measures in restraint of their personal freedom;
- unlawfully taking citizens into custody or depriving them of their personal rights by unlawful means;
- using or instigating violence thereby causing a citizen bodily injury or death;
- unlawfully using weapons or police restraint tools, thereby causing a citizen bodily injury or death; or
- other unlawful acts causing a citizen bodily injury or death.

Claims involving property rights may be based on any of the following administrative acts:

- illegal imposition of administrative sanctions such as fines, revocation of certificates and licences, suspension of production and business operations, or confiscation of property;
- illegal implementation of compulsory administrative measures such as sealing up, seizing or freezing property;
- expropriation of property or apportioning of expenses in violation of the provisions of the State; or
- other illegal acts causing damage to property.

Accordingly in Chinese law, and except in special circumstances stipulated by law, the administrative acts that can give rise to administrative remedies must be of the specific nature stipulated above.
Concretely, specific administrative acts include:

- decisions on administrative sanctions, such as warnings, fines, confiscations of illegal gains or property, orders to suspend production, suspensions or revocations of licences or permits, and administrative attachments;
- decisions on compulsory administrative measures, such as restrictions of personal freedom or placing property under seal, seizing or freezing of property;
- decisions altering, suspending or discharging certificates, such as licences, permits, credit certificates, credentials;
- decisions confirming ownership or rights to use of natural resources, such as land, mineral resources, rivers, forests, mountains, grasslands, unreclaimed land, beaches, maritime waters;
- acts involving the exercise of managerial decision-making powers;
- acts altering or nullifying agricultural contracts;
- raising of funds, levies against property, apportioning of charges, or demanding performance of duties;
- the issue of certificates, such as permits, licences, credit certificates, or credentials, or the examination, approval or registration of such matters;
- performance of statutory duties, such as protecting personal or property rights, for example the right to receive education; and
- the distribution of pensions, social insurance funds or minimum maintenance allocations.

1.2.2. Abstract administrative acts

The Administrative Procedure Law stipulates that disputes over abstract administrative acts are outside the scope of application of administrative remedies, while the Administrative Reconsideration Law provides that an applicant may only petition for review of abstract acts in connection with an application for administrative reconsideration of a specific administrative act. The people’s courts may not accept cases brought to challenge administrative regulations, rules, decisions or orders of general application.

Abstract administrative acts refer to norms promulgated by administrative organs for repeated application in individual cases. They are characterized by their universal binding force, their continuous effect and their repeated applications.

In practice, abstract administrative acts include administrative regulations, rules, local rules, and other decisions or orders enacted and promulgated by administrative organs.
Not all normative documents may ground applications for administrative review. According to the Administrative Reconsideration Law, only measures of the departments under the State Council, those of local governments at or above the county level and of their departments, and those of the governments of towns or townships, which are the basis of a specific administrative act, may support applications for administrative review in connection with an application for reconsideration of specific acts considered to be illegal.24 Rules of the departments and commissions under the State Council, and of the local people’s government are subject to other laws and administrative regulations.25

1.2.3. Options with respect to administrative remedies

Administrative reconsideration and administrative litigation are separate remedies and they may not be claimed simultaneously.26 Compensation may be claimed either solely or in connection with applications for administrative reconsideration or administrative lawsuits.

Both the legality and appropriateness of any specific administrative act may be submitted for administrative reconsideration while administrative litigation is confined to issues of legality.

In certain particular circumstances, claimants must first apply for administrative reconsideration and only after that decision is rendered may an administrative suit be brought before a people’s court,27 unless the law provides that the reconsideration decision is final.28

Where an application for administrative reconsideration is not a prerequisite to bringing an administrative suit, a claimant in an administrative dispute may petition either the people’s court or the administrative reconsideration organ.

If a claimant first files for administrative reconsideration, then brings an administrative suit in the people’s courts during the prescribed reconsideration period without withdrawing the application for reconsideration, the people’s court will dismiss the case.29

An application for administrative reconsideration will be turned down if it is submitted to an administrative reconsideration organ after a people’s court has accepted a case regarding the same dispute.30

Unless otherwise provided by law, claimants that are not satisfied with an administrative reconsideration decision may bring a suit before the people’s courts.

Cases concerning the ownership of, and rights to use, natural resources31 and the levying of charges 32 must first be submitted for administrative reconsideration. In these cases, if the administrative reconsideration organ refuses to accept the application or fails to make a decision within the prescribed time limit, the claimant may bring a suit before the people’s courts upon receipt of a written decision or within 15 days after expiration of the time limit for administrative reconsideration.33

Claimants of administrative compensation must first seek satisfaction from the organ allegedly liable, and then they may claim compensation in conjunction with applications for administrative reconsideration or in connection with administrative lawsuits.34
Litigation

By
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7.3. Enforcement of foreign judgments and orders
1. Introduction to civil litigation

According to article 18 of the Organic Law of the People's Courts, which was adopted on July 1, 1979, the people’s courts exercise their powers independently and are not subject to interference by any administrative organ, public organization or individual.¹

The people’s courts apply the law equally to all, regardless of ethnic status, race, sex, occupation, family background, religious belief, education, property status and length of residence.²

Cases are heard in public except when they involve State secrets and private affairs of individuals.³

A primary feature of the judicial system in contemporary China is the inquisitorial process. Courts in China conduct investigations and collect evidence.⁴ During hearings, judges take an active role in questioning the litigants and witnesses.

Chinese judges routinely conduct conciliation between the litigants.⁵ They are expected to participate willingly in the process.

In Chinese courts, substantial justice and fairness are emphasized.

People’s courts at all levels practice democratic centralism.⁶

Chinese courts sit in panels and only the simplest cases are decided by a single judge.⁷

Juries are not used in China. But judges are joined on panels by public assessors who generally have other professional occupations. Judges are expected to have “adequate knowledge of the law”.⁸

Parties to judicial proceedings may challenge judges for partiality.⁹

Judges are personally liable for derelict behaviour, including corruption and favouritism.

Parties have a right of appeal against the judgment of the court of first instance to the next higher level of court and the second court’s decision is not subject to further appeals.¹⁰ Judgements are, however, subject to revision in the event of definite error.¹¹

China has a four-level court structure: the basic people’s courts, the intermediate people’s courts, the high people’s court and the Supreme People’s Court (SPC).¹² The level of court with original jurisdiction rises in proportion to the importance of the case. The first three levels are organized along the lines of the administrative regions. The basic courts are established in each county and autonomous county and in each urban district.¹³ Intermediate courts are established at the prefectural-level (including autonomous prefectures), in provincial capitals (and cities under direct control of the governments of provinces or autonomous regions), and in municipalities directly under the central government.¹⁴ The high courts are instituted for each province, autonomous regions and municipality directly under the central government.¹⁵ The SPC sits at the apex and supervises the courts at all levels.¹⁶

In addition, there are several special people’s courts with specific jurisdiction, including maritime courts, military courts, railway transportation courts and forestry courts.

In general, each of the various levels of people’s courts has at least three divisions: criminal, civil, and economic. Examples of additional divisions include the Intellectual Property Tribunals attached to the Beijing Municipal Intermediate and High Courts.
Chinese courts do not practice the rule of precedent and their judgments need not specifically address the arguments of the parties.

Only Chinese lawyers may represent parties in proceedings before the people’s courts.\textsuperscript{17} Hearings before Chinese courts are conducted in Chinese but, when minorities who live in concentrated communities are involved, their languages may be adopted.\textsuperscript{18}

Foreign parties have the same rights and obligations as Chinese parties in proceedings before the people’s courts, which does not prevent the application of a special procedural regime when cases are foreign-related.\textsuperscript{19}

\section{1.1. Legal framework}

The first formal code of civil procedure in Chinese history was prepared in 1902 under the auspices of the Emperor Guangxu. It was intended to improve China’s legal system as an argument to obtain the extinction of extraterritorial privileges. The Nationalist Government adopted a civil procedure law in 1936, which was never generally implemented, before being abolished after the inception of the People’s Republic of China (PRC). During the 1950s, the NPC drafted a civil procedure law but it was never promulgated.

The primary legislation governing civil litigation in contemporary China is the Civil Procedure Law that was adopted in 1991. The law is composed of four parts: general provisions, trial procedure, enforcement procedure and special provisions for foreign-related civil procedures.

On October 28, 2007, the Standing Committee of the NPC amended the Civil Procedure Law with effect from April 1, 2008. Considering that as many as one million civil judgments rendered in 2006 remain unenforced, a major focus of the amendments to increase the effectiveness of judgment recovery.

Apart from the Civil Procedure Law, certain provisions in the Constitution, as well as the Law on the Organization of People’s Courts and the Special Procedure for Maritime Lawsuits, make direct or indirect references to civil procedure.

Statutes are supplemented by a series of judicial interpretations issued by the Supreme People’s Court (the SPC), of which the major ones in recent years concerning the Civil Procedure Law are the following:

- the Opinions of the SPC on Several Issues concerning the Application of the Civil Procedure Law, adopted at the 528th Session of the Judicial Committee of the SPC and issued on July 14, 1992, No.22 Judicial Issues (1992);
- Several Provisions of the SPC concerning the Application of Summary Procedures in Trials of Economic Cases, adopted at the 602nd Session of the Judicial Committee of the SPC and issued on November 16, 1993, No.35 Judicial Issues (1993);
- Several Provisions of the SPC on Applying Ordinary Procedures to the Trial at First Instance of Economic Cases, adopted at the 602nd Session of the Judicial Committee of the SPC and issued on November 16, 1993, No.34 Judicial Issues (1993);
- Several Provisions of the SPC concerning the Strict Implementation of the Civil Procedure Law in Economic Trials, issued on December 22, 1994, No.29 Judicial Issues (1994);
Several Provisions of the SPC concerning the Reform of the Means of Civil and Economic Trials, adopted on June 19, 1988 at the 995th Session of the Judicial Committee of SPC, No.14 Judicial Interpretations (1998);

Several Provisions of the SPC concerning Evidence in Civil Litigation, adopted on December 6, 2001 at the 1201st Session of the Judicial Committee of SPC, No.33 Judicial Interpretations (2001);

Provisions of the SPC on Several Problems concerning Jurisdiction over Foreign-related Civil and Commercial Cases, adopted on December 25, 2001 at the 1203rd Session of the Judicial Committee of the SPC, No.5 Judicial Interpretations (2002);

Interpretations of the SPC on Problems of Jurisdiction and Applicable Law in Trademark Cases, adopted on December 25, 2001 at the 1203rd Session of the Judicial Committee of the SPC, No.1 Judicial Interpretations (2002); and


Except in the simplest cases, cases in first instance are heard by panels consisting of at least three judges (in odd numbers) or of a combination of judges and people’s assessors. The judges and people’s assessors enjoy the same rights.20

Appeals are heard by panels of judges.21

Panels can reach decisions unanimously or by majority opinion, provided that the opinions of the minority are recorded in the court record.22

Where a case needs to be retried, a new panel is formed for the retrial.23

The parties have no discretion to choose the form of trial for their cases.

1.2. Treaties


The provisions of China’s international treaty commitments prevail over conflicting provisions of the Civil Procedure Law.25

1.3. Foreign-related civil proceedings

Foreign-related civil cases are governed by special provisions of the Civil Procedure Law contained in its Part Four. Any matter not covered in Part Four is governed by the other provisions of the Law.26
Arbitration

By
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1. Introduction to arbitration in China

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3. Arbitration proceedings
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4. Setting-aside of arbitration awards
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5.1. Non-foreign-related arbitration awards

5.2. Foreign-related arbitration awards

5.3. Foreign arbitration awards
   5.3.1. Competent court
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5.4. Enforcement of inter-territorial arbitration awards
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6. Conclusion
Introduction to arbitration in China

Since the 1980s, and the inception of the “open the door to the world” policy and the consequent increases of international commercial transactions and foreign investment in China, it is not surprising to find that the number of disputes has been growing as well. To avoid or at least mitigate losses, efficient and speedy dispute resolution is essential.

An attribute traditionally associated with Chinese culture is an aversion for settling disputes by recourse to the courts. But in recent years, legal awareness has been spreading within Chinese society, which now attaches greater importance to legalistic, or “Western”, approaches to dispute settlement.

As elsewhere around the world, the primary techniques used in China for resolution of business disputes are arbitration, litigation and various techniques of so-called alternative dispute resolution (ADR) including conciliation and mediation, but they manifest unique features when utilized in China.

Almost all contracts with respect to foreign investment in China contain arbitration clauses.

Since 1995, Chinese arbitration institutions have been enjoying greater independence.

Chinese law recognizes only arbitrations conducted under the auspices of arbitration institutions, whether domestic or foreign. Accordingly, agreements for ad hoc arbitration are not enforceable by Chinese courts. On the other hand, awards of foreign ad hoc arbitrations are generally enforceable in China pursuant to the country’s treaty commitments.