

WTO, LEGAL FRAMEWORK FOR FOREIGN INVESTMENTS AND CHINA

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Abstract in original language:

Tento příspěvek se zabývá nastíněním právního prostředí v Čínské lidové republice z pohledu zahraničních investic. Čína se stala členem WTO v roce 2001 a má povinnost dodržovat závazky vyplývající z členství. V právní rovině to vyústilo ke změně právní úpravy v celé řadě zákonů upravujících zejména oblast obchodu, daní a ochrany duševního vlastnictví. První část příspěvku se zaměřuje na právní úpravu dopadající na regulaci zahraničních investic. Následující dvě části se stručně zmiňují o oblastech, které jsou pro zahraniční investory navýsost aktuální: daňové právo a ochrana práv duševního vlastnictví.

Key words in original language:

Zahraniční investice; joint ventures; daňové právo; ochrana práv duševního vlastnictví.

Abstract:

This contribution deals with the legal environment for foreign investments in the People's Republic of China. China became the member of the WTO in 2001 and as a member is required to perform duties and obligations. In the field of legal framework, it has resulted in new enacted laws or amendments to laws on trade, taxes and intellectual property rights. The first part of this article is focused on legal framework for foreign direct investments. The following two parts deal briefly with issues which are relevant for foreign investors: the tax law and the protection of intellectual property rights. / 这篇论文专注于外国投资在中华人民共和国（此后简称：中国）的法律环境。中国在2001年加入世界贸易组织；并作为世贸成员国，履约关税标准和相关职责。在此法律框架下，中国已经制定或修改了有关贸易、税收和知识产权的相关法律。这篇论文的第一部分重点关注外国直接投资的法律框架。之后的两个部分简要着力于与外国投资者相关的问题：税法和知识产权保护。

Key words:

Foreign investments/外国投资; joint ventures/合资; tax law/税法; protection of intellectual property rights/知识产权保护

INTRODUCTION

The level of foreign direct investments in the People's Republic of China has risen dramatically in 1980's as a result of the „open door“ policy. China has become the main destination for foreign investors willing to invest into various sectors, including investors

from European Union countries.¹ However, the appropriate legal provisions had to be enacted in order to attract foreign investors seeking for supportive laws and favorable conditions for doing business in China, and to ensure their interests and rights.

China became the 143rd member of the WTO on December 11, 2001. China as a member is required to perform duties and obligations, which include especially important regime of *national treatment*. The domestic and imported goods are treated the same without the mean of discrimination; the same is applicable to foreign investors and foreign companies in China etc.

In the field of legal framework, China's accession to the WTO has resulted in new enacted laws or amendments to economic laws, laws on intellectual property rights and tax laws.

This contribution deals with the basic overview of legal environment for foreign investments in China. It focuses on the laws on foreign investments, the forms of foreign investments such as joint ventures and foreign wholly owned enterprise. Furthermore, I am briefly dealing with two concerned issues – the tax law and the protection of intellectual property rights.

1. LAWS ON FOREIGN INVESTMENTS

The foreign investments in China enjoy protection according to the legal provisions of China's laws. On constitutional level, Article 18 of China's Constitutional Law states that *„The People's Republic of China permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic co-operation with Chinese enterprises and other economic organizations in accordance with the law of the People's Republic of China. All foreign enterprises and other foreign economic organizations in China, as well as joint ventures with Chinese and foreign investment located in China, shall abide by the law of the People's Republic of China. Their lawful rights and interests are protected by the law of the People's Republic of China.“*

The specific provision calling for foreign investments' protection is incorporated into Article 2 of the Law of the People's Republic of China on Chinese Foreign Equity Joint Ventures: *„The Chinese Government protects, in accordance with the law, the investment of foreign joint ventures, the profits due to them and their other lawful rights and interest in a joint venture, pursuant to the agreement, contract and articles of association approved by the Chinese Government. Joint ventures shall follow the provisions of the laws and regulations of the People's Republic of China in all their activities.“*

A Chinese foreign venture is an enterprise which is established in China according to the laws of China and in which foreign investors share in part or in whole rights of controlling the

¹ The main investors from EU countries in order to the value of realized investments are the United Kingdom, Germany and France. These 3 countries are considered as „Top 15 Investors in China“. According to the statistics data of 2007, the United Kingdom: 5834 realized projects in value of 14,781 billion USD; Germany: 5886 projects in value of 14,176 billion USD; France: 3 539 projects in value of 8,271 billion USD (see http://www.fdi.gov.cn/pub/FDI_EN/Statistics/AnnualStatisticsData/AnnualFDIData/FDIStatistics,2007/t200904_17_104763.htm). In 2007, the foreign direct investment from European Union has been realized in 2384 projects of total value of 3,83838 billion USD (see http://www.fdi.gov.cn/pub/FDI_EN/Statistics/AnnualStatisticsData/AnnualFDIData/FDIStatistics,2007/t200904_17_104784.htm). Further information and statistics available at http://www.fdi.gov.cn/pub/FDI_EN/default.htm.

enterprise, depending on the proportion of the capital invested in the venture. It has the following legal characteristics:²

- It is established in China, according to the laws of China.
- Part or all of the capital is invested by foreigners.
- Foreigners enjoy part or in whole the power to control the venture.

The National People's Congress adopted in July 1979 the first law dealing with the foreign investments in China – the Law of the People's Republic of China on Chinese Foreign Equity Joint Ventures. Later, in 1986 the Law of the People's Republic of China on Foreign Wholly Owned Enterprises and in 1988 the Law of the People's Republic of China on Chinese Foreign Contractual Joint Ventures were promulgated. At that time, there was no other form of enterprise legislation in China.

In context, the contracts such as Chinese foreign equity joint ventures and Chinese foreign contractual joint ventures performed in China are not eligible for choice of law made by the parties. The mandatory rules must be applied. Therefore, under Article 126 (2) of the Contract Law³, the Chinese laws exclusively apply to the contracts performed in China. The application of Chinese laws is required and no foreign law may touch any part of the contractual obligations. Otherwise, the choice of law made by the parties will be invalid and unenforceable.

In 1993, China has promulgated the Company Law of the People's Republic of China. The foreigner investors may newly establish their investments in form of company limited by shares. Nowadays, there are many such companies in China.

For overview, in 1997, the new foreign investments in China were performed most often by foreign wholly owned enterprises with 45, 2 %, followed by foreign equity joint ventures with 43, 5 % and contractual joint ventures with 11, 3 %.⁴

² Zhao, X.: The Ventures Laws and the Corporations Law in China – Comparisons, Conflicts and Suggestions for Reform. 4 Canberra L. Rev. 81 1997-1998, pp. 82.

³ Article 126 of the Contract Law:

„The parties to a contract involving foreign interests may choose the law applicable to the settlement of their contract disputes, except as otherwise stipulated by law. If the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied.

The contracts for Chinese-foreign equity joint ventures, for Chinese-foreign contractual joint ventures and for Chinese-foreign cooperative exploration and development of natural resources to be performed within the territory of the People's Republic of China shall apply the laws of the People's Republic of China.“

⁴ Mentioned in lecture „Chinese Foreign Investment Law“, given by Prof. Zeng Huaqun, Law School, Xiamen University, September 23, 2008. ZENG, H: Chinese Foreign Investment Laws: Recent Developments towards a Market Economy. World Scientific and Singapore University Press, 1999.

1.1 THE LAW ON CHINESE FOREIGN EQUITY JOINT VENTURES

Article 4 of the Law on Chinese Foreign Equity Joint Ventures provides that equity joint ventures shall take the form of a limited liability company. The Regulations for the Implementation of the Law of the People's Republic of China on Chinese Foreign Equity Joint Ventures provides in Article 2 that an equity joint venture is a legal person in China and is subject to the jurisdiction of Chinese laws.

The foreign party must contribute at least 25 % of the registered capital of an equity joint venture.⁵ The equity joint venture is not allowed to reduce its registered capital⁶ and the parties share profits, risks and losses in proportion to their contributions to the registered capital.⁷

The process of establishing the equity joint venture involves the examination and approval of the Ministry of Foreign Trade and Economic Cooperation („MOFTEC“).⁸ To form an equity joint venture, the Chinese party must submit the necessary documents such as project proposal and preliminary feasibility study report, and these documents will be then transmit to the examination and approval to the MOFTEC. After examination and approval of the preliminary feasibility study report the parties undertake a final feasibility study and negotiate and execute the equity joint venture agreement and articles of association. Afterwards, the parties must submit an application for establishment, the equity joint venture agreement and articles of association, a list of candidates for the chairman, vice chairman and other members of the board of directors. They also must submit the official opinions from the department in charge of the Chinese party and the government of the People's Republic of China at the provincial level where the equity joint venture is to be located.⁹ The time limit for decision to be made is three months.¹⁰

Within one month after receipt of the approval certificate, the applicants are required to carry out the procedures of registration at the administrative bureau of industry and commerce at the provincial level where the equity joint venture is to be located. The equity joint venture is formally established upon the issuance of a business license from the registration authority.¹¹

The law provides only some general provisions on the internal structure of the equity joint ventures.¹² The board of directors is the highest organ of an equity joint venture.¹³ The board

⁵ Article 4 of the Law of the People's Republic of China on Chinese Foreign Equity Joint Ventures.

⁶ Ibid., Article 22.

⁷ Ibid., Article 23.

⁸ Ibid., Article 8.

⁹ Ibid., Article 9.

¹⁰ Ibid., Article 10.

¹¹ Ibid., Article 11.

¹² Yabo, L.: *New Forms and Organizational Structures of Foreign Investment in China Under the Company Law of the PRC.* 7 *Transnat'l Law.* 1994, pp. 335.

of directors must consist of at least three members and the appointment is based on the parties' investments in the joint venture.¹⁴ Since 1990 there is no limitation on appointment of the chairman and either Chinese or foreign parties may be appointed as the chairman.¹⁵

The Law on Equity Joint Ventures provides the limit for the duration of the joint venture. In 1986, the Implementation on Equity Joint Ventures Law was amended and allows the period of more than fifty years, instead of limitation to thirty years as provided in 1983.¹⁶

1.2 THE LAW ON CHINESE FOREIGN CONTRACTUAL JOINT VENTURES

Article 2 of the Law on Chinese Foreign Contractual Joint Ventures provides that a contractual joint venture is a Chinese legal person if it meets the requirements of the Civil Law. As a result, the contractual joint ventures in China may be divided into two categories: a contractual joint venture which is a legal person, and a contractual joint venture which is not legal person. In practice, the most of contractual joint ventures in China operate as a legal person exclusively in form of a limited liability company.¹⁷ The contractual joint venture which is not operating as a legal person is similar in legal form to the partnership organization pursuant to Article 52 of the General Principles of the Civil Law.¹⁸

Most provisions in the Contractual Joint Ventures Law are similar to those in Equity Joint Ventures Law. The difference is that a contractual joint venture is more flexible for foreign direct investments. A contractual joint venture may take a form of a separate legal entity or contractual „co-operative“ agreement between Chinese and foreign parties.¹⁹

There is no provision on minimum percentage of capital contribution provided by foreign investors. The investors enjoy the freedom to negotiate among themselves on allocation of profits, not in proportion to their capital contributions as in the case of the equity joint ventures.²⁰

¹³ Article 33 of the Regulations for the Implementation of the Law of the People's Republic of China on Chinese Foreign Equity Joint Ventures.

¹⁴ *Ibid.*, Article 34.

¹⁵ Yabo, L.: *New Forms and Organizational Structures of Foreign Investment in China Under the Company Law of the PRC*. 7 *Transnat'l Law*. 1994, pp. 336. Article 6 of the Law of the People's Republic of China on Chinese Foreign Equity Joint Ventures.

¹⁶ *Ibid.*, pp. 336-337.

¹⁷ Zhao, X.: *The Ventures Laws and the Corporations Law in China – Comparisons, Conflicts and Suggestions for Reform*. 4 *Canberra L. Rev.* 81 1997-1998, pp. 86.

¹⁸ *Ibid.*, pp. 86-87.

¹⁹ Yabo, L.: *New Forms and Organizational Structures of Foreign Investment in China Under the Company Law of the PRC*. 7 *Transnat'l Law*. 1994, pp. 337.

²⁰ Article 2 of the Law of the People's Republic of China on Chinese Foreign Contractual Joint Ventures.

At the end, we shall mention that the investors in short-term co-operative contracts with Chinese partners within China prefer this kind of joint venture, rather than the equity joint venture.²¹

1.3 THE LAW ON FOREIGN WHOLLY OWNED ENTERPRISES

The Law of the People's Republic of China on Foreign Wholly Owned Enterprises permits foreign investors to hold a 100 % ownership in their private enterprises.

What's according to the legal character of a foreign wholly owned enterprise („WFOE“), the provision is almost the same as that in the Law on Chinese Foreign Contractual Joint Ventures. It stipulates that an enterprise formed with foreign capital, which is also a legal person under Chinese Civil Law („GPCL“), shall acquire the status of a Chinese legal person.²²

The Implementation Law provides that the organizational form of a WFOE shall be limited liability company. The foreign investor is liable to the extent of his capital contribution.²³ There is no minimum registered capital requirement.²⁴ A WFOE is not allowed to reduce the registered capital during its period of operation.²⁵ Any increase or transfer of registered capital is subject to approval by the examination and approval authority and the procedure is carried out with an administrative bureau of industry and commerce.²⁶

The application procedure for approval and registration of a WFOE is similar to that of an equity joint venture. The MOFTEC has a full authority to grant permission, but in some cases it is granted to the government on provincial level or the government in a special economic zone („SEZ“).²⁷

The WFOE is not limited on the period of its operation, unlike in case of the equity joint ventures. The Implementation Law provides that the period of operation may be determined by the foreign investor in the application for establishment of a WFOE in accordance with the specific situations of different industries and enterprises, and must be approved by the authority.²⁸

²¹ Yabo, L.: *New Forms and Organizational Structures of Foreign Investment in China Under the Company Law of the PRC*. 7 *Transnat'l Law*. 1994, pp. 337-338.

²² Article 8 of the Law on Foreign Wholly Owned Enterprises.

²³ Article 19 of Detailed Provisions for Implementation of the Wholly Foreign-Owned Enterprises Law.

²⁴ *Ibid.*, Article 21.

²⁵ *Ibid.*, Article 22.

²⁶ *Ibid.*, Article 23.

²⁷ *Ibid.*, Article 8.

²⁸ *Ibid.*, Article 73.

We shall consider a fact that the WFOE is required to export most of its products and is only allowed to sell its products on Chinese market under the sale proportion permitted by the government.²⁹ It is remarkable that the price of products sold on Chinese market should not violate the Chinese regulations with respect to price control.³⁰

1.4 THE COMPANY LAW

Since the Company Law was enacted in 1993, the investments of foreign investors may take newly form of foreign-invested companies limited by shares. This area is regulated by the Interim Provisions on Several Questions for Establishing Foreign-Invested Companies Limited by Shares („FICLS Provisions“) from 1995, and the Several Opinions on Foreign Investment in Listed Companies („FICLS Opinions“) from 2001.³¹

The Company Law has started a „new decade“ in foreign investments in China. It has also brought difficulties. Such problematic provision is provided in Article 218 of the Company Law: *„This Law shall be applicable to foreign-invested limited liability companies and joint stock limited companies. Where the laws on enterprises with foreign investment provide otherwise, such provisions shall apply.“*

The three foreign ventures in China – foreign equity joint ventures, foreign contractual joint ventures and foreign wholly owned enterprises – operated in China as independent legal system.³² As the Company Law was promulgated, China has faced an issue how to harmonize the ventures laws and the Company Law.³³ Until now it has not been clearly solved yet.

2. TAX LAW

The foreign investors are concerned with Chinese tax law. China’s accession to the WTO has resulted in new enacted laws or amendments to existing tax laws.³⁴

²⁹ Ibid., Article 45.

³⁰ Ibid., Article 48.

³¹ Zhu, Y.: Concise Chinese Law. Law Press, 2003, pp. 355, 363. Also mentioned in lecture „Chinese Foreign Investment Law“ given by Prof. Zeng Huaqun, Law School, Xiamen University, September 23, 2008.

³² Zhao, X.: The Ventures Laws and the Corporations Law in China – Comparisons, Conflicts and Suggestions for Reform. 4 Canberra L. Rev. 81 1997-1998, pp. 81.

³³ Ibid., pp. 81, 98.

³⁴ Chaowu, J.: Chinese Tax Law. Law Press, 2004, pp. 10.

If we compare the current tax system with the past system of taxes, we will find out that in 1980`s there were only 8 types of taxes in China and after the tax reform in 1994 the total number of taxes increased to 29 types of taxes. Today, there are 24 types of taxes which are included into 6 categories:

Turnover taxes. These taxes are levied on the sales revenue, operational revenues and the price or quantity of import and export goods in the process of production, circulation or service provision. The turnover taxes are the value added tax, the business tax, the consumption tax and the customs duties.

Before 2008 the Chinese taxation system distinguished the income tax rate for domestic and foreign funded enterprises. There was need to unify the income tax rates for domestic and foreign funded enterprises because until 2008 the foreign funded enterprises enjoyed „supra-national tax treatment“. Instead, such enterprises enjoy nowadays the national treatment, pursuant to the WTO rules.³⁵

We shall conclude that the investments do not bring to investors as much profit as before. We also remark that there is a trend to shut down the factories in developed cities on coast and move such factories more and more inland into rural areas in order to reduce costs and hire cheaper labor.

3. PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

The People`s Republic of China did not have a comprehensive intellectual property law system until 1980`s. The intellectual property law in China was commenced in the late 1970`s and was result of the „opening-up“ policy.³⁶

With its admission to the WTO, China has had to be concerned with its successful implementation of WTO treaties, including the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement.³⁷ That is the result of the unified legal protection of the intellectual property rights within the WTO member states. China promulgated the Trademark Law in 1982, the Patent Law in 1985 and the Copyright Law in 1990.

The principle of protection of intellectual property rights is included in the General Principles of the Civil Law of the People`s Republic of China of 1986 („GPCL“).³⁸ Article 94 of GPCL

Income taxes. These taxes are levied on the income of individuals and entities. This category includes the individual income tax and the enterprise income tax.

Resource taxes. These taxes reflect the exploitation of various natural resources and the development of urban land. This category covers the resource tax and the urban land use tax.

Property taxes. These taxes are levied on the properties owned by individuals and entities. This category consists of the house tax and the urban real estate tax.

Special purpose taxes. It includes the banquet tax, the urban maintenance and construction tax, the farmland occupation tax, the fixed asset investment orientation tax, the land value added tax, the oil tax and the vehicle purchase tax.

Conduct taxes. This category covers the vehicle and vessel use tax, the vehicle and vessel license plate tax, the vessel tonnage tax, the stamp tax, the deed tax , the animal slaughter tax and the securities trading tax.

³⁵ Mentioned in lecture „Chinese Tax Law“, given by Prof. Liao Yxin, Law School, Xiamen University, September 25, 2008.

³⁶ Zhu, Y.: Concise Chinese Law. Law Press, 2003, pp. 120.

³⁷ Zhu, Y.: China`s Civil Law. Law Press, 2003, pp. 103.

³⁸ Chapter V of GPCL, Articles 94 – 97.

ensures the right of copyright.³⁹ However, the GPCL serve as a basic provision of Chinese civil law in the field of intellectual property rights and as the legal source of copyright law serves the Copyright Law of the People's Republic of China. Article 95 of GPCL calls for the protection of the patent rights.⁴⁰ To ensure such rights, the Patent Law of the People's Republic of China was promulgated. Article 96 of GPCL ensures the rights to the trademark.⁴¹ The trademarks are protected by the Trademark Law of the People's Republic of China.

In current China, many intellectual property cases arise only because of the lack of knowledge of intellectual property rights among Chinese society. There are many cases in practice dealing with the rushing registration made by another party. As an example serve a recent case **Sony Ericsson Mobile Communications (China) Co. Ltd v. TRAB of SAIC**.⁴² To conclusion why I have mentioned this issue: to warn foreigner investors, to confirm that all intellectual property rights shall be registered in adequate time within the authority in order to avoid rushing registration made by another party.

Not only on the case above mentioned, but in general, we shall conclude that Chinese competent authority as the Trademark Review and Adjudication Board of The State Administration of Industry and Commerce („TRAB“) makes from time to time a mistake in facts and applies law wrongfully. The completely different opinion of TRAB and courts on applicable legal provisions is very controversial in Chinese practice of intellectual property protection. Therefore, the important role is to be given to the second instance authority in intellectual property cases – to the intermediate courts.

CONCLUSION

Since 1980`s China has become a „giant“ country in receiving foreign direct investments. This process is a result of „open door“ policy. China has been changed dramatically in the

³⁹ Article 94 of GPCL: „Citizens and legal persons shall enjoy rights of authorship (copyrights) and shall be entitled to sign their names as authors, issue and publish their works and obtain remuneration in accordance with the law.“

⁴⁰ Article 95 of GPCL: „The patent rights lawfully obtained by citizens and legal persons shall be protected by law.“

⁴¹ Article 96 of GPCL: „The rights to exclusive use of trademarks obtained by legal persons, individual businesses and individual partnerships shall be protected by law.“

⁴² Court decision made in September, 2008. For reference, see the case. In brief, Mr. Liu Jian-jia applied for registration of the „SOAI“ trademark to the Trademark Bureau and he obtained the registration that directed to the ninth commodity category like DVD, amplifier, SPE speaker and telephone. Song Ericsson Mobile Communications Co. Ltd and Sony Ericsson Mobile Communications (China) Co. Ltd applied to repeal the registration of the trademark. TRAB (the Trademark Review and Adjudication Board of The State Administration of Industry and Commerce) made a decision in behalf of Mr. Liu Jian-jia. Finally, Beijing First Intermediate People`s Court made a decision that the trademark SOAI shall not be registered. The act of Mr. Liu Jian-jia was considered as a rushing registration under Article 31 of the Trademark Law: „No trademark application shall infringe upon another party's existing prior rights. Nor shall an applicant register in an unfair means a mark that is already in use by another party and has certain influence.“ According to the court, SOAI mark was already accepted by public and used by customers of Sony Ericsson. In fact, SOAI is a trademark that has been used in China by corporation.

field of economic development, as well as in legal framework. The appropriate legal provisions had to be enacted in order to attract foreign investors seeking for supportive laws and favorable conditions for doing business in China.

The first law dealing with the foreign investments was adopted in 1979 (the Law on Chinese Foreign Equity Joint Ventures). As a result of successful attraction of foreign investors, the laws regulating two new forms of investments were promulgated in 1986 and 1988, i.e. the Law on Foreign Wholly Owned Enterprises and the Law on Chinese Foreign Contractual Joint Ventures. The „second generation“ of legal framework in China dates back to 1993, the Company Law was promulgated.

Naturally, the foreign investors are concerned with Chinese tax law and intellectual property protection. In this context, since 2008 the foreign funded enterprises do not enjoy supra-national tax treatment anymore, but national treatment as a result of harmonization with the WTO rules. In the area of intellectual property law, China has amended its intellectual property laws in line with its commitments, which accords with WTO treaties, including the TRIPS Agreement. However, the practice and the enforcement of intellectual property laws are facing challenges.

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