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COMPARING FOREIGN INVESTMENT IN CHINA, POST-WTO ACCESSION, WITH FOREIGN INVESTMENT IN THE UNITED STATES, POST-9/11

Jordan Brandt[†]

Abstract: Ever since China instituted its “open-door policy” (*gai ge kai fang*) in 1978, the historically autarkic and largely mysterious country has morphed through external interactions with foreign countries and corporations into a hotbed for foreign investment activity. This foreign investment activity has forever changed China’s standing in the global community; today, China stands firm and elevated amongst the ranks of the globalized community as one of the leaders in attracting foreign investment.

This article examines China’s rise as an economic power through the use of its foreign investment laws. It then compares the experience of China, a communist country with 1.4 billion people, to the United States’ capitalistic model roughly one-fifth the size. This article will consider the two countries’ distinct histories of foreign investment along with their respective laws and regulations. China has a history of encouraging foreign investment in certain areas while the United States has become increasingly resistant to investment by foreigners in what it considers national security areas. While China’s burgeoning economy has benefited substantially from its foreign investment framework, China may attempt to follow the United States’ lead and impose further restrictions on where foreigners can and cannot invest in Chinese industries. Ultimately, the reader will be offered a glance into the distinctive features of the foreign investment regulatory framework of each country.

I. INTRODUCTION

Foreign investors exist in different shapes and sizes: two friends from Canada decide to devote their life savings into opening a seafood restaurant and bar in Costa Rica, which had been their lifelong dream; a newly divorced mother of three from the United States invests half her earnings in stock in a foreign oil company; or a major manufacturing company with its operations in the United Kingdom invests in opening up three new factories in various provinces of China. Foreign investment is perhaps one of the most invaluable, sought-after resources a nation could ask for. While the United States traditionally is considered the most attractive country for

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foreign investment, countries such as China recently have been realizing their potential for attracting foreign investment at an exceedingly rapid pace.

Foreign investment involves “the ownership or control, directly or indirectly, by one foreign person [e.g., individual, branch, partnership, association, government] of 10 per centum or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise. . . .”² As used today, *investment* is defined as “the placing of capital or laying out of money in a way intended to secure income or profit from its employment.”³ Every country has unique rules regarding foreign investment, with some regulations more restrictive than others. Regardless of how amenable a country is to foreign investment, each national economy has a specific framework that foreign investors must abide by in order to regulate domestic foreign investment.

The United States holds the title as the world’s largest economy;⁴ however, China is on course to becoming the largest economically attractive country in the world.⁵ The success of America’s liberalized foreign investment regulations has been the result of a system intended to foster a mutually beneficial relationship that assures national security.⁶ In contrast, China, set to overtake the United States in attracting foreign investment in the next twenty years, officially instituted a regulatory scheme not less than thirty years ago to attract foreign investment.⁷

² 15 C.F.R. § 806.15(a)(1) (2003).

³ SEC v. W.J. Howey Co., 328 U.S. 293, 297 (1946) (*quoting* State v. Gopher Tire & Rubber Co., 177 N.W. 937, 938 (Minn. 1920)).

⁴ See United Nations Conference on Trade and Development, *World Investment Report 2005: Transnational Corporations and the Internationalization of R&D*, p. xix, UNCTAD/WIR/2005, available at http://www.unctad.org/en/docs/wir2005_en.pdf (last visited Feb. 3, 2006) [hereinafter *World Investment Report 2005*].

⁵ See *id.*

⁶ See Trade Act of 1974, 19 U.S.C. § 2115 (1975).

⁷ China’s first recorded law pertaining to foreign investment was the Law on Chinese-Foreign Equity Joint Ventures (promulgated by the Nat’l People’s Cong., July 1, 1979, effective July 1, 1979), (amended 1990 and 2001), translated at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/LawsonForeignInvestment/t20060620_51033.jsp (last visited Feb. 3, 2006) (P.R.C.). Since the inception of that law, the Chinese government has passed numerous other regulations or laws pertaining to foreign investment, including: Waishangtouzi Xiangmu Hezhun Zanzing Guanli Banfa [The Interim Measures for the Administration of Examining and Approving Foreign Investment Projects] (promulgated by the National Development Reform Commission, Oct. 10, 2004, effective Oct. 10, 2004) translated at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=51153; Waishangtouzi Shangye Linghuo Xiangmu Shengbao Cailiao [Submissions of Applications Materials for Projects on Foreign Investment in Commercial Fields] (promulgated by the Ministry of Commerce, Aug. 5, 2005, effective Aug. 5, 2005) translated at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=51081. Such laws and regulations are available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/Laws2/Laws3/default.jsp?type=532 (in English), at http://www.fdi.gov.cn/pub/FDI_zcfg/zh/wstzfl/t20060719_54775.jsp (in Chinese) (last visited Feb. 3, 2006).

America's history of foreign investment dates back to 1606, 170 years before America's founding fathers declared independence from Great Britain. Investments made from 1606 to 1776 were direct investments, with overseas owners assuming full control over their American assets.⁸ The first such form of foreign direct investment was through the Virginia Company in 1606, which established the first permanent English settlement in America, in Jamestown, Virginia.⁹ In forming the Virginia Company, the Crown was under the belief that stockholders involved would benefit from discoveries of gold and silver in America.¹⁰ After failing to find any gold or silver, the Virginia company transitioned into a trading post, and, in 1613, the first "profits" appeared in the form of Virginia tobacco. During America's revolution in 1776, America was a nation of debts, relying heavily on foreign financing as domestic needs heavily increased due to funding requirements for the Revolution.¹¹ Since the Declaration of Independence was signed, foreign investment has been pursued liberally, most noticeably through alien governments and private businesses' investment in American securities in the form of stocks and bonds, leading to a substantial amount of foreign investment.¹² The U.S. federal government has refrained from designating clear federal guidelines, spotlighting the liberal attitude of the United States toward foreign investors. Due to the lack of clear federal guidelines on foreign investment, foreign investors must rely on state foreign investment guidelines and codified restrictions set out in statutes, which are flexible and encouraging toward foreign investors. For instance, an 1830 Supreme Court decision expresses the restrictions on aliens to retain ownership over land in the United States.¹³

Conversely, China hesitantly and rigidly has delineated rules to closely regulate foreign investment laws. Until 1949, no guidelines existed on how foreign investment was to be handled due to the restrictive nature of China toward foreign investors. China's first brush with foreign investment ensued when Communist leader Mao Zedong issued a foreign trade policy in which he introduced guidelines to establish state control over foreign trade and investment.¹⁴ As a result, the central government could exercise strict

⁸ See MIRA WILKINS, *THE HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES TO 1914* 11 (1989).

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ *Id.* at 28.

¹² *Id.* at 76.

¹³ *Spratt v. Spratt*, 29 U.S. 393, 409 (1830) (the principles in this case were later codified into 48 U.S.C.A. § 1501 (1887)).

¹⁴ See CHENG YUAN, *EAST-WEST TRADE: CHANGING PATTERNS IN CHINESE FOREIGN TRADE LAW AND INSTITUTIONS* 39 (1991).

scrutiny over who could invest in China.¹⁵ China's foreign investment laws have progressed rapidly, beginning with China's first joint venture law in 1979 to a surge of foreign investment-type measures and regulations from the 1980s up until the present time.¹⁶ China has realized that paying close attention to FDI can assist in promoting advanced technology, which in turn helps increase national security.¹⁷ Since China's accession to the World Trade Organization ("WTO"), limits that once restricted majority ownership have dissolved as a result of various sectors opening up to foreign investors.¹⁸ Foreign investors' interest in China has grown in both voracity and depth, with China continuing to be a hot destination for foreign investment.¹⁹ A majority of China's sectors are in the process of

¹⁵ See *id.* at 41. In a famous Report to the Second Session of the Seventh Central Committee of the Chinese Communist Party ("CCP") in March 1949 regarding trade with imperialists, Mao noted: As for the remaining imperialist economic and cultural establishments, they can be allowed to exist for the time being, subject to our supervision and control, to be dealt with by us after country-wide victory. As for ordinary foreign nationals, their legitimate interests will be protected and not encroached upon. As for the question of the recognition of our country by the imperialist countries, we should not be in a hurry to solve it now. . . . As long as the imperialist countries do not change their hostile attitude, we shall not grant them legal status in China. As for doing business with foreigners, there is no question; wherever there is business to do, we shall do it and we have already started. . . . So far as possible, we must first of all trade with the socialist and people's democratic countries; at the same time we will also trade with the capitalist countries. 4 MAO TSE-TUNG, SELECTED WORKS OF MAO TSE-TUNG 370-71 (Eng. ed., 1961).

¹⁶ The Chinese government has since adopted and promulgated numerous laws and regulations pertaining directly to foreign investment in China, including: Zhonghua Renmin Gongheguo Zhongwai Hezuo Jingying Qiyefa Shishi Xize [Rules for the Implementation of the Law of PRC on Chinese-foreign Contractual Joint Ventures] (promulgated by the Ministry of Foreign Trade and Economic Coop., Aug. 7, 1995, effective Sept. 4, 1995), translated at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=51088; Duiwai Jingji Maoyi Bu, Guojia Gongshang Yinghang Guanliju Guanyu Yinfa (Guanyu Chengbao Jingying Zhongwai Hezi Jingying Qiye de Guiding) de Tongzhi [Circular of the Ministry of Foreign Econ. Relations and Trade and the State Administration for Industry and Commerce on Issuing the Provisions for Contracted Operation of Chinese-Foreign Equity Joint Ventures] (promulgated by the Ministry of Foreign Econ. Relations and Trade and the State Admin. for Industry and Commerce, Sept. 13, 1990, effective Sept. 13, 1990), translated at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=51060; Waishang Touzi Qiye Hetong, Zhangcheng de Shenpi Yuanze he Shencha Yaodian [Principles for Approval and Essentials for Examination to Contracts and Articles of Association of Enterprises with Foreign Investment] (promulgated by the Ministry of Foreign Foreign Trade and Econ. Coop., Oct. 5, 1993, effective Oct. 5, 1993), translated at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=51068. These laws and regulations, among others, are available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/Laws2/Laws3/default.jsp?type=532 (in English), and at http://www.fdi.gov.cn/pub/FDI_zcfg/zh/wstzfl/t20060719_54775.jsp (in Chinese) (last visited Oct. 9, 2006).

¹⁷ See JAMES E. SHAPIRO ET AL., DIRECT INVESTMENT AND JOINT VENTURES IN CHINA: A HANDBOOK FOR CORPORATE NEGOTIATORS 12-13 (1991) (nearly every regulation has a clause pertaining to national security and the advancement of technology) (hereinafter SHAPIRO, DIRECT INVESTMENT AND JOINT VENTURES).

¹⁸ See, e.g., *China's WTO Commitments on Track*, CHINA DAILY, Oct. 10, 2003 (last visited Feb. 3, 2006), available at http://www.chinadaily.com.cn/en/doc/2003-12/10/content_289144.htm.

¹⁹ *Foreign Direct Investment Picks Up in December*, Shandong Business Net, Jan. 15, 2004, available at <http://www.shandongbusiness.gov.cn/english/php/show.php?id=446>.

implementing foreign investment policies or have already engaged foreign investment through Sino-foreign joint or wholly foreign ventures.²⁰

Although novel, China's transition to a policy of liberal foreign investment exhibits a successful, attractive concept for foreign investment exploration. The purpose of this analysis is to examine how the United States and China have each developed a distinct set of regulations and procedures regarding foreign investment and how each country's applicable regulations have contributed to the development and decline of each as a haven for foreign investment. The United States and China each embrace foreign investment and both are global pioneers in attracting foreign investment to their frontiers.²¹

Part II studies China's foreign investment laws and regulations, beginning with a brief history of China's foreign trade and investment system. It also discusses the formation of Sino-foreign joint ventures and wholly foreign-owned joint ventures.

Part III studies America's foreign investment history and laws. This section explores the 1606 debut of America's foreign investment history and transitions to a study of laws, beginning with the Sherman Act,²² traversing through the Securities Acts,²³ and concluding with the USA PATRIOT ACT, passed in 2001.²⁴ With China's status rising in the world economic market, the amount of foreign investment has consistently shifted from the United States to China, partially due to the influence of U.S. foreign investment law.²⁵

Part IV analyzes the two systems, comparing and contrasting their strengths and weaknesses. The U.S. focus on foreign investment has led to mutual gains and benefits for investors; however, China's development of an open market, increased transparency, and investment incentives has strategically positioned the country as the next suitable foreign investment

²⁰ World Trade Organization, Working Party on the Accession of China, Report of the Working Party on the Accession of China, Part II—Schedule of Specific Commitments on Professional Services, Legal Profession, WT/ACC/CHN/49/Add.2 (Oct. 1, 2001), available at <http://www.uschina.org/specificcommitment.doc> (last visited Oct. 9, 2006). This report shows a comprehensive list of China's specific commitments on services as well as most favored nation exemptions.

²¹ See *World Investment Report 2005*, *supra* note 4.

²² Sherman Act, 15 U.S.C. §§ 1-12 (1890, 1894). America does not have any specific federal regulations directly on point regarding foreign investment, however, the Sherman Act is the first instance of legislation implemented that pertains to foreigners involved in trade, which can be read to include investment.

²³ 15 U.S.C. §§ 77a-77mm (1933) and 15 U.S.C. §§ 78a-78mm (1934).

²⁴ USA Patriot Act of 2001, Pub. L. 107-56, 115 Stat. 272 (codified in scattered titles and sections of the U.S. Code).

²⁵ See *China Overtakes US as Top Investment Destination*, China Daily, Sept. 23, 2004, available at http://www.chinadaily.com.cn/english/doc/2004-09/23/content_377209.htm (last visited Feb. 3, 2006).

attraction.²⁶ Yet both countries face challenges in developing sophisticated foreign investment systems.

The conclusion contemplates the future of foreign investment amidst the constantly fluctuating world economic system and opines that China will emerge over the next twenty years as a global economic powerhouse.

II. CHINA'S FOREIGN INVESTMENT LAWS

A. *China's Foreign Investment Laws Are Relatively New*

China's foreign investment regime began before 1949, when only foreign merchants dominated China's foreign trade.²⁷ At the end of World War II, Western merchants handled a majority of foreign trade.²⁸ After the rise of the CCP in 1949, Chairman Mao issued five basic tenets to govern foreign trade, which consisted of: "(1) confiscating the bureaucratic capital of the Guomintang Government; (2) abolishing all the special privileges of imperialists in China; (3) protecting the industry and commerce of the national bourgeoisie; (4) establishing a state economy; and (5) imposing state control over foreign trade."²⁹ Mao's planning resulted in a statewide monopoly being imposed on all foreign trade in China.³⁰ Eventually, the Chinese government seized control over large corporations in China, including vitally important foreign companies. Minimally important, but nonetheless valuable foreign corporations, also were managed by the Chinese government, and the remaining foreign businesses were imposed with tight restrictions but were free from absolute control by the Chinese government.³¹ Foreign-owned import-export enterprises decreased by more than fifty percent under the restrictions China set upon them.³² The

²⁶ See *World Investment Report 2005*, *supra* note 4, at 59. China is constantly attracting foreign investment from all over the world—the United States, the European Community, Japan. Countries are rapidly and consistently committing various forms of investment into China.

²⁷ YUAN, *supra* note 14, at 39.

²⁸ See *id.* at 38. "From 1945-49, the United States provided 57-67% of China's total imports and took 25-45% of China's exports. The actual operations of import and export were dominated by Western merchants." For example, in Shanghai in 1949, "57% of import deposits and 53% of export deposits were provided by foreign banks. . . . From February 1947 to January 1948, 44% of import and export operations were handled by foreign firms." *Id.*

²⁹ *Id.* at 39.

³⁰ See *id.* at 51. After 1956, all of China's foreign trade came under the control of the Ministry of Foreign Trade. State trading corporations were solely responsible for carrying out foreign trade. *Id.*

³¹ *Id.* at 42 (citing LIU SUINIAN, ET AL., *ZHONGGUO SHEHUIZHUI JINGJI JIANSHI (1949-83)* [A CONCISE INTRODUCTION TO THE HISTORY OF THE CHINESE SOCIALIST ECONOMY (1949-83)] 47-49 (1985).

³² *Id.* (citing SUINIAN, *supra* note 31, at 48).

government exercised stringent control over foreign, primarily American, businesses, so that all businesses were subject to the government's control.³³

In the 1950s, the Communist Chinese government was desperate to control foreign trade due to the introduction of a trade embargo by the United States and its allies following the Korean War.³⁴ As a result, it introduced two measures: the first was a complete reorganization and expansion in trade with the Soviet Bloc states, and the second introduced a form of barter trade.³⁵ Through these efforts, the government took control of all major imports and exports, significantly shrinking the presence of private establishments pursuing foreign investments in a few years.³⁶

During 1953, private trade suddenly grew and state trade rapidly declined.³⁷ The government responded by introducing the "General Line for the Transition Period," which the CCP declared would eventually transform the state capitalist economy into the socialist state economy.³⁸ Gradually, the state began to develop monopolies over basic necessities, including grain, cooking oil, and cotton, allowing the state to claim total control over most major manufactured goods in the country.³⁹ Concomitantly, the state limited the trading power of private enterprises. By the close of 1954, the state completely controlled agricultural production and exerted eighty to ninety percent control over manufactured goods.⁴⁰ As a result, private enterprises began to join state trading corporations to form

³³ *See id.*

³⁴ *Id.* at 47.

³⁵ *Id.* In its efforts to combat the imposition of this trade embargo, the Chinese successfully obtained substantial quantities of strategic goods it required in products such as rubber, tires, cotton, and fertilizer. *Id.* at 48.

³⁶ *See id.* at 48. In fact, from 1949 to 1950, private traders had controlled one-half of China's foreign trade; by 1953, only 9.4 percent of the entire volume of China's foreign trade that year had been controlled through private traders, whereas state trading agencies asserted control over 90.5 percent of foreign trade. *Id.*

³⁷ *Id.* at 49. In 1953, China instituted its first five-year plan, through which then Prime Minister and Minister of Foreign Affairs, Zhou En-Lai, citing Mao, exclaimed, "The fundamental aim of this great people's revolution of ours is to set free the productive forces of our country from the oppression of imperialism, feudalism and bureaucratic capitalism and, eventually, from the shackles of capitalism and the limitations of small-scale production." NIGEL HARRIS, *THE MANDATE OF HEAVEN: MARX AND MAO IN MODERN CHINA* 40 (1978) (citing Report on the Work of the Government 1 (Nat'l People's Cong., Sept. 23, 1954)). Private business expanded rapidly, either officially or underground, buying its way into a larger share of scarce raw materials. Government controls collapsed, having been made extremely difficult due to the mass of small private firms outside the supervision of the state, and more and more skilled laborers moved from the state sector to the private sector. *Id.* at 42.

³⁸ *Id.* YUAN, *supra* note 14, at 49. At that time, Mao declared, "The Party's general line or general task for the transitional period is basically to accomplish the country's industrialization and the socialist transformation of agriculture, handicrafts and capitalist industry and commerce over a fairly long period of time." *Id.*

³⁹ *Id.* at 49-50.

⁴⁰ *Id.* at 50-51.

state-private joint enterprises, and by 1956, all private import and export companies had become a part of state-private joint enterprises.⁴¹ Through this exercise of coercion, the government created a foundation that rendered foreign trade completely subject to China's control. "The system of state control over foreign trade had been completely replaced by state monopoly of all foreign trade."⁴²

B. From a State Monopolization System to an "Open-Door Policy"

In 1957, the government held a Chinese Export Commodity Fair to attract foreign business and introduce them to Chinese products.⁴³ Foreigners were invited to present their products to the Chinese.⁴⁴ From the late 1950s to the early 1970s, the fair served as a conduit for Chinese people and foreign firms to do business.⁴⁵ Numerous transactions occurred at the fair, contributing to China's growth in foreign trade during the 1970s.⁴⁶ National import-export corporations ("NIECs") were created. They worked under the state foreign trade plan with a particular group of commodities or services, maintaining a complete monopoly in whichever subject they dealt with.⁴⁷ The NIECs were China's main form of business dealings within the country. All trade was dealt with through NIECs, and from 1956 to 1978, between seven and seventeen NIECs alone handled imports and exports.⁴⁸

In 1978, China introduced an "open-door" (*gai ge kai fang*), which represented a turn to economic development through the adjustment and incorporation of foreign-based technology.⁴⁹ Beginning in 1979, the foreign trade system engaged in a process of decentralization. Certain provinces and municipalities (e.g., Guangdong, Fujian, Tianjin, and certain parts of Beijing) "have been granted broad economic and trade autonomy, and the Chinese ministries have been encouraged to set up their own specialized trading corporations to export the products under their respective

⁴¹ *Id.* at 51. For example, in Shanghai, private traders and the state trading corporations combined to form eight joint state-private export operations and eight joint private-private import corporations. *Id.*

⁴² *Id.*

⁴³ *Id.* at 55. The fair was held twice a year in the spring and autumn and afforded foreigners a chance to see what China had to offer and vice-versa. *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 56.

⁴⁸ *Id.* at 57.

⁴⁹ *Id.* at 74.

jurisdictions and to import the commodities and technology they need.”⁵⁰ This resulted in a larger number of provinces engaging in foreign trade autonomy. Additionally, the government created the China International Trust and Investment Corporation (“CITIC”) in July 1979, which focused responsibility in five major areas: “(1) establishing joint ventures by assisting Chinese and foreign enterprises to find appropriate business partners; (2) helping Chinese and foreign enterprises negotiate compensation trade agreements; (3) serving as China’s principal channel for investment funds from overseas Chinese and foreigners; (4) acting as an agent entrusted by foreign manufacturers and merchants in matters such as those relating to advanced technology and equipment; and (5) entering with its own capital into joint ventures inside and outside of China with its own capital.”⁵¹ Remarkably, in 1979, when China enacted its first joint venture law, foreign firms began to show an interest in engaging in joint ventures in China. Their enthusiasm was encouraged by the Chinese government, which saw the equity joint venture law as a means for China to absorb advanced technology and Western managerial skills. The law in turn encouraged China to become a major foreign exchange earner in the world’s leading market.⁵²

This decentralization period which began in 1979 and lasted until 1981 can be regarded as the first true disarmament of the old trade system.⁵³ From 1982 until 1984, the decentralization process continued to impact foreign trade. Foreign trade operations in increasingly more provinces are operated under a dual leadership between the Ministry of Foreign Economic Relations and Trade (“MOFERT”)⁵⁴ and the local government of the province.⁵⁵ The provinces could, for the first time, manage most of their local exports. Special Economic Zones (“SEZs”)⁵⁶ were established in

⁵⁰ Jamie P. Horsley, *The Regulation of China’s Foreign Trade*, in FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PEOPLE’S REPUBLIC OF CHINA 5, 6 (Michael J. Moser ed., 2d ed. 1987) (hereinafter MOSER, FOREIGN TRADE, INVESTMENT).

⁵¹ YUAN, *supra* note 14, at 75-76.

⁵² See MOSER, FOREIGN TRADE, INVESTMENT, *supra* note 50, at 115.

⁵³ YUAN, *supra* note 14, at 84.

⁵⁴ Historically, MOFERT was China’s foreign trade institute. MOFERT later transitioned into the Ministry of Commerce of the People’s Republic of China (“MOFCOM”). MOFCOM (or MOFERT, for purposes of clarity) is charged with managing the foreign trade system, approving import and export licenses, dealing with international trade agreements and technology transfers, and involving itself in applicable international trade organizations. Ministry of Commerce of the People’s Republic of China, *Main Mandate of the Ministry of Commerce*, available at <http://english.mofcom.gov.cn/mission/mission.html> (last visited Feb. 4, 2006).

⁵⁵ See YUAN, *supra* note 14, at 84-85.

⁵⁶ In the 1980s, the SEZs were created in Shenzhen, Zhuhai and Shantou in Guangdong Province and Xiamen Municipality in Fujian “to attract foreign investment from Hong Kong, Macao and overseas Chinese, to introduce advanced technology from abroad, to generate foreign exchange to aid China’s

certain provinces as pilot cities and were granted varying powers to engage in foreign trade operations. "Tax incentives, duty free imports and exports, low charge for land and labor, and relatively easy access to both domestic and foreign markets" were granted to the SEZs to create a kind of panacea that would attract foreign investment and advanced technology.⁵⁷ In April 1984, fourteen cities were designated "open coastal cities," with special areas in these cities designated Economic and Technology Development Zones ("ETDZ").⁵⁸ They were created to attract foreign investment and advanced technology, with a purpose similar to that of the SEZs.⁵⁹ ETDZs enjoyed the same benefits as SEZs, such as tax incentives and duty free imports and exports.⁶⁰ SEZs were located in underdeveloped areas, whereas ETDZs were located in already developed coastal cities.⁶¹ China began to institute reforms aimed at increasing the appeal of the equity joint venture to foreign investors. By the end of 1984, some fifty-eight central ministry and state commissioned NIECs had been approved by the State Council.⁶²

In 1984, MOFERT introduced a reform program to create a separation of administration and business in China's foreign trade.⁶³ This program redefined the authority of the departments regarding who was in command of foreign trade administration and specifically defined the rights and obligations of the business organizations:⁶⁴

Priority was also given to the implementation of the import and export agency business in order to improve the business management and economic efficiency of business organizations. Linkages between industry and trade, between technology and trade, and between exports and imports were also encouraged to benefit the industrial enterprises involved in import and export business. Finally, the report called for streamlining of the trade planning system and improvement of financial management in foreign trade. Both measures were

overall foreign exchange position, to pioneer in China's economic reform, and lastly, to show the determination of the Chinese government in transforming its economic and social structures." *Id.* at 78.

⁵⁷ *Id.* at 87.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 88 (citing WANG SHAOXI, ET AL., ZHONGGUO DUIWAI MAOYI GAILUN [AN INTRODUCTION TO CHINA'S FOREIGN TRADE] 260 (1985)).

⁶³ *Id.* at 94.

⁶⁴ *Id.*

expected to reduce the interference of various economic departments with the activities of business organizations.⁶⁵

In this respect, MOFERT's report implied that foreign trade organizations were given the authority to make decisions independent of the department above them. They were also to take full responsibility for their profits and losses, as well as their unification of administration and supervision under MOFERT.⁶⁶ MOFERT's reform program would set the tone for the future of China's foreign trade, allowing foreign trade corporations to be financially independent of their superior departments.⁶⁷

Unfortunately, at the annual meeting of the China International Trade Society in 1985, the participants agreed that although the 1984 MOFERT trade reform had been a good push for change, it was "defeated in reality."⁶⁸ It had not explicitly described how enterprises could be separated from their superior departments and the reform had not received enough support.⁶⁹ As a result, in early 1986, the Chinese Seventh Five-Year Plan was published. The primary goal of this plan was to "emphasize the cautious expansion of trading corporations' and local governments' autonomy, with a focus on improving the administrative system."⁷⁰

Between 1985 and 1987, the state began to introduce and implement economic measures, such as "taxes, import and export duties, export credits, subsidies, foreign exchange and price and exchange rates in regulating import and export operations;⁷¹ other measures were aimed at cracking down on official corruption and other crimes related to foreign economic relations and trade.⁷² Shortly thereafter, export commodity production networks controlled by NIECs were introduced to provide part of China's total volume of export commodities.⁷³ By 1986, these export production networks had become the top priority in Chinese foreign trade development.⁷⁴

⁶⁵ *Id.*

⁶⁶ *Id.* at 95.

⁶⁷ *See id.*

⁶⁸ *Id.* at 102.

⁶⁹ *Id.*

⁷⁰ *Id.* The plan laid emphasis on improvement of macro-control and streamlining of the country's administrative systems. *Id.*

⁷¹ *Id.* at 103.

⁷² *Id.*

⁷³ *Id.* at 103-4. "It was generally agreed that the network should have the following characteristics: first, on the basis of the existing export production bases, more agricultural units and industrial enterprises should be included in the new export production network in order to enlarge the existing export production bases. Second, various forms of 'horizontal economic associations' . . . should be set up which involved enterprises under different forms of ownership and at different stages of export operation, ranging from the supply of materials and parts, manufacturing, processing, research, packaging, storage, transport,

In 1987, MOFERT, with its affiliated NIECs, introduced the “contract responsibility system.”⁷⁵ It was believed that this system would help alleviate the difficulty of holding the central government responsible for the profits and losses of foreign trade enterprises and departments, and instead would hold the foreign trade enterprises and departments responsible for their actions.⁷⁶ This system was China’s last effort to reform foreign trade before MOFERT again introduced a new reform system, replacing the centralized foreign trade system with a central-local joint finance achieved through a local contract responsibility system.⁷⁷ The government hoped that the local contract responsibility system would relieve it of its growing deficits in export operations and guarantee it its share of foreign exchange revenues.⁷⁸ During this time, major foreign investments were primarily located in the resource and service sectors, most notably in hotels in large, major metropolitan and coastal areas.⁷⁹

Possibly the most interesting reform came in 1988, when the state encouraged foreign corporations to establish various forms of economic development with industrial enterprises, such as joint enterprises, partnerships, and joint ventures.⁸⁰ The state wanted in part to promote domestic technological growth and the development of managerial abilities in order to enhance domestic standards of living while promoting national security.⁸¹ “The government also sought to optimally utilize its limited foreign exchange resources by encouraging the creation of ventures in order to promote import substitution, exports, and the exploitation of resources while retaining its scarce foreign exchange.”⁸² The Chinese government was able to earn foreign exchange from any exports resulting due to its apportionment of natural resources for foreign investors, applying it toward the importation of foreign technology.⁸³

marketing, to after-sale services. Lastly, the network should be relatively independent from the domestic economic structure as a whole.” *Id.* at 104.

⁷⁴ *Id.*

⁷⁵ *Id.* at 106-7.

⁷⁶ *Id.* at 106.

⁷⁷ *Id.* at 109.

⁷⁸ *Id.* at 110.

⁷⁹ SHAPIRO, DIRECT INVESTMENT AND JOINT VENTURES *supra* note 17, at 5-6.

⁸⁰ *Id.* at 12-13.

⁸¹ *Id.* at 12-13.

⁸² *Id.* at 13.

⁸³ *Id.*

C. *China's Investment Laws Have Developed Rapidly*

Currently, the bodies in charge of regulating foreign direct investment in China include the Ministry of Commerce ("MOFCOM"), the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC"), and the National Development and Reform Commission ("NDRC"). MOFCOM is generally charged with approving foreign investment projects, except those in excess of \$100 million, in which case the state council is required to approve the project.⁸⁴ Often, however, the bureaus of foreign trade and economic cooperation ("BOFTECs") grant approval authority in order to promote regional economic growth.⁸⁵ In deciding whether to approve a foreign investment enterprise, MOFCOM must consider how the enterprise will impact the local community and China's national economic plans, while BOFTEC focuses more on the impact of the foreign investment enterprise within the local community.⁸⁶ Written requirements for establishing a joint venture or wholly foreign-owned enterprise are usually the same and usually require a feasibility study report, a joint venture contract (except for wholly foreign-owned enterprises), and articles of association, which explain in detail how the company is to be run and the different positions in the company and who holds them.⁸⁷ A foreign company also should check the investment catalogue to determine if PRC law permits investment in its specific industry, and if so, it should refer to the investment provisions specifically applicable on how to obtain the relevant investment approvals.⁸⁸ The time range for approval of foreign-invested enterprises is subject to specific regulations as stated below, running from a month to a few months, or even longer in some cases.

⁸⁴ Barbara Mok, Jiusu Zhao, Johnson G. S. Tan, and Alex Zhang, *Investment in the People's Republic of China*, Mondaq Business Briefing at Approval Authorities (October 11, 2004), available at 2004 WL 95626132 (hereinafter Mok, *Investment in the PRC*).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at *Investment Catalogue*. The four categories of foreign investment in China are: permitted, encouraged, restricted, and prohibited. A project in the first category is permitted under PRC laws; a project under any of the other categories requires Chinese-government approval. Restricted projects require approval from the authorities at different levels, projects in the prohibited category are not allowed, and any other projects usually fall in the permitted category. *The Catalogue for the Guidance of Foreign Investment Industries* (revised 2004), which lists projects per the aforementioned categories, is available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/RegulationsonForeignInvestment/t20060620_51089.jsp (last visited Oct. 9, 2006).

China's first major joint venture law was the Sino-Foreign Equity Joint Venture Law, adopted in 1979.⁸⁹ The primary purpose of this law was to enable the establishment of equity joint ventures in China between foreign businesses and Chinese companies, on the "principal of equality and mutual benefit."⁹⁰ While promising to protect the rights of foreign joint venture investments, the PRC expressed that all activities of the joint venture were to be in compliance with the laws of the PRC.⁹¹ There are multiple steps any foreign venture, joint investment, or wholly foreign investment in China must complete to be in compliance.⁹² These include submitting an application, including the agreement, contract, and articles of association, to the examination and approval authorities.⁹³ Within three months, a decision is made, and if approval is granted, the equity joint venture ("EJV") must register to acquire a business license in order to commence operations.⁹⁴ The foreign partner must invest a minimum of twenty-five percent of registered capital, and shares profits, losses, and investments proportional to the registered contributions of its capital.⁹⁵ Both parties agree on the establishment of a board of directors, as required by the articles of association.⁹⁶

EJVs may enjoy preferential treatment through a possible reduction or exemption of taxes and are required to handle foreign exchange transactions in accordance with the PRC's foreign exchange control.⁹⁷ The Chinese government also permits EJVs to set up branches and subbranches outside China and to sell products on the Chinese markets.⁹⁸ An EJV may terminate its operation subject to approval by authorized authority but may otherwise maintain independent operations.⁹⁹ EJV law provides a gateway for further expansion and reformation of China's legal system and therefore succeeds in enticing foreign investment in China's economy. Disadvantages of forming an EJV include the loss of control for the foreign company, because certain

⁸⁹ Sino-Foreign Equity Joint Venture Law (adopted at the Second Session of the Fifth National People's Congress, July 1, 1979), art. 1, available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=51033 (last visited Oct. 9, 2006) (P.R.C.).

⁹⁰ *Id.*

⁹¹ *Id.* at art. 2.

⁹² See note 82.

⁹³ *Id.* at art. 3.

⁹⁴ *Id.*

⁹⁵ *Id.* at art. 4.

⁹⁶ *Id.* at art. 6.

⁹⁷ *Id.* at arts. 8-9.

⁹⁸ *Id.* at art. 10.

⁹⁹ *Id.* at art. 14.

decisions are subject to unanimity requirements, and the potential loss for protection of intellectual property rights and imported technology.¹⁰⁰

In 1980, the State Council formulated the *Interim Regulations of the People's Republic of China Concerning the Control of Resident Offices of Foreign Enterprises*.¹⁰¹ Albeit short and crude, the government formulated the provisions in order to provide foreign enterprises with an opportunity to help facilitate the "development of international economic and trade contacts" and to facilitate the administration of resident representative offices in China.¹⁰² The regulations described, in detail, what foreign investors were required to do in order to establish representative offices in China.¹⁰³ Once an application was approved, foreign enterprises could set up representative offices which operated much like local offices, where resident representative offices paid local taxes,¹⁰⁴ "industrial and commercial unified taxes,"¹⁰⁵ and abided by Chinese laws.¹⁰⁶ In their capacity, representative offices acted as liaisons between the home office and trade organizations or related industries in China. Representative offices often engaged in market research and established contacts with prospective customers and partners, as an extension of the parent company.

¹⁰⁰ Mok, *Investment in the PRC*, *supra* note 84, at Equity Joint Ventures.

¹⁰¹ Interim Regulations of the People's Republic of China Concerning the Control of Resident Offices of Foreign Enterprises (Oct. 30, 1980), available at <http://english.mofcom.gov.cn/aarticle/topic/lawsdata/chineselaw/200211/20021100053299.html> (last visited Oct. 9, 2006).

¹⁰² See *id.* at art. 1 ("The regulations hereunder are formulated with a view to facilitating the development of international economic and trade contacts and the control of resident offices in China of foreign companies, enterprises and other economic organizations (referred to hereafter as foreign enterprises)").

¹⁰³ *Id.* at art. 3 (per the original law, what was required were: "(1) An application form signed by the chairman of the board of directors or the general manager of that enterprise. The content of the application form should include such details as the name of the resident office to be set up, the name(s) of the responsible member(s), the scope of activity, duration and site of the office; (2) The legal document sanctioning the operation of that enterprise issued by the authorities of the country or the region in which that enterprise operates; (3) The capital creditability document issued by the banking institution(s) which has business contacts with that enterprise; and (4) The credentials and brief biographies of the members of the resident office appointed by that enterprise." Banking institutions wishing to open up resident offices were additionally required to produce an annual report on the "assets and liabilities and losses and profits of the head office of that enterprise, its constitution and the composition of its board of directors").

¹⁰⁴ *Id.* at art. 9.

¹⁰⁵ *Id.* at art. 10.

¹⁰⁶ *Id.* at art. 14. Were a resident office and its members to violate any part of such "Interim Regulations" or be engaged in any other such law-breaking activities, such relevant Chinese authorities maintained the power and authority to investigate such action and deal with them in accordance with the relevant provisions of the Chinese Law. *Id.* at art. 15.

In 1986, China adopted its Law of the PRC on Foreign-Invested Enterprises.¹⁰⁷ Encompassing twenty-four articles, this law was a major breakthrough for the Chinese economy because, for the first time, foreign enterprises could establish their own enterprises with their own capital.¹⁰⁸ The law's purpose was to expand "economic cooperation and technical exchange[s] with foreign countries" by permitting foreign enterprises and investors to establish foreign capital enterprises in the PRC.¹⁰⁹ By foreign capital enterprises, the PRC implied that foreign investors would exclusively invest all capital into the enterprise.¹¹⁰ A foreigner wishing to establish a foreign-owned enterprise in China has to submit an application for examination and approval to the State Council, or to an agency authorized under the State Council.¹¹¹ Within thirty days of receipt of the application, the approved foreign investor must petition the administrative management organ for industry and commerce to obtain a certificate of approval, and then apply for a business license to the proper industry and commerce administration authorities.¹¹² If approval is granted and the business license is received, the foreign enterprise may seek Chinese legal entity status under Chinese law.¹¹³ Foreign-owned ventures must pay taxes in accordance with relevant state provisions for tax payment; however, these ventures may also qualify for preferential treatment through a reduction or exemption of taxes.¹¹⁴

In 1988, the PRC adopted the Sino-Foreign Contractual Joint Venture Law of the PRC ("CJV Law").¹¹⁵ The Contractual Joint Venture ("CJV") is similar to the EJV law enacted nearly ten years before. With similar principles¹¹⁶ and similar application procedures,¹¹⁷ the PRC sought to apply the principles of contractual obligations to the formation of joint ventures.¹¹⁸

¹⁰⁷ See Law of the PRC on Foreign-Invested Capital Enterprises (1986, amended 2000) (P.R.C.), available at <http://ee2.mofcom.gov.cn/aarticle/chinalaw/investment/200411/20041100001739.html> (last visited Oct. 9, 2006).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at art. 1.

¹¹⁰ *Id.* at art. 2.

¹¹¹ *Id.* at art. 6.

¹¹² *Id.* at arts. 6-7.

¹¹³ *Id.* at art. 8.

¹¹⁴ *Id.* at art. 17.

¹¹⁵ See Sino-Foreign Contractual Joint Venture Law of the People's Republic of China (1988), available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/LawsonForeignInvestment/t20060620_51032.jsp (last visited Oct. 9, 2006) (sometimes known as the Cooperative Joint Venture Law) (P.R.C.).

¹¹⁶ The stated principles are "to expand economic cooperation and technological exchange with foreign countries and to promote the joint establishment" of CJVs within the PRC. *Id.* at art. 1.

¹¹⁷ Approval of a CJV took only 45 days, while an EJV took 90 days. *Id.* at art. 5.

¹¹⁸ *Id.* at art. 9.

A CJV also was to be treated as a Chinese legal person by law, upon its inception, so long as it met the requirements for being a legal person.¹¹⁹ CJVs had to be formed without the intent to injure the public interests of China and were supposed to be focally “export-oriented or technologically advanced.”¹²⁰ Investments in CJVs, similar to EJVs, could be made in cash or in kind, and included the “use of land, industrial property rights, non-patent technology or other property rights.”¹²¹ CJVs could, within their scope of operations, export finished products to the world market.¹²² Article 21 of the CJV law states that CJVs shall and may enjoy preferential treatment of tax reductions or exemptions.¹²³ Advantages included flexibility, as parties to a CJV could agree on disproportionate sharing of any profits made during operations of the business, as well as losses incurred.¹²⁴ The disadvantages in forming a CJV were similar to those encountered in the formation of an EJV.¹²⁵

The Chinese government further strengthened its grip on all laws concerning foreign investment during the 1990s.

D. WTO Accession Impacted Foreign Investment Laws in China

Upon China’s accession to the WTO, China agreed to abide by numerous specific commitments in areas of foreign investment.¹²⁶ The Chinese stressed how they were capable not only of adhering to such commitments, but also were determined to execute them.¹²⁷ Since China’s inception into the WTO, the Chinese government has passed laws “driven by the authorities’ desire to deepen economic reform . . . and create an even more attractive environment for foreign investment.”¹²⁸

¹¹⁹ *Id.* at art. 2.

¹²⁰ *Id.* at arts. 3-4.

¹²¹ *Id.* at art. 8.

¹²² *Id.* at art. 19.

¹²³ *Id.* at art. 21.

¹²⁴ Mok, *Investment in the PRC*, *supra* note 84, at Cooperative Joint Ventures.

¹²⁵ *Id.* In an EJV, the relationship between the investors is governed by a JV Contract (a shareholders’ agreement) and the company’s articles of association, and profits and losses are shared according to each investor’s percentage interest in the company; whereas, in a CJV, the parties may share profit in a manner unrelated to the ratio of equity ownership on terms agreed to in the JV Contract.

¹²⁶ IMF Working Paper, *China: International Trade and WTO Accession*, WP/04/36 (Mar. 2004), available at <http://www.imf.org/external/pubs/ft/wp/2004/wp0436.pdf>.

¹²⁷ *China’s Efforts on WTO Lauded*, CHINA DAILY, Feb. 18, 2003, available at 2003 WL 3052996 (during a meeting between Vice-Premier Wen Jiabao and United States Trade Representative Robert Zoellick, the vice-premier stressed how the Chinese government is determined to fulfill WTO requirements).

¹²⁸ *Id.*

China's WTO accession permitted foreign law firms to expand into all areas of China and to establish a representative office.¹²⁹ Within six years of China's accession, foreign firms were permitted to establish wholly foreign-owned subsidiaries of taxation services. The original rules had permitted taxation services only in the form of joint ventures.¹³⁰ As for advertising services, foreign-service suppliers were originally permitted to establish advertising businesses only in the form of joint ventures, with the foreign party being restricted to minority ownership.¹³¹ Two years after accession, foreign majority ownership is permitted, while four years after accession, the establishment of foreign-owned subsidiaries is permitted.¹³² Sectors, such as consulting services, inspection companies, and packaging services, received committal promises from the Chinese government giving foreigners broader authority to invest and manage companies independent of joint venture requirements.¹³³

In 2003, the Chinese government issued the *Notice of the State Administration of Foreign Exchange on the Relevant Issues Concerning the Improvement of Foreign Exchange Administration of Direct Investment by Foreign Investors*.¹³⁴ Due to evolving trends in international investment and the desire to improve the environment for foreign investment, the government allowed foreign organizations or businesses investing in China the opportunity to apply to a foreign exchange bureau to open up special

¹²⁹ See World Trade Organization, Working Party on the Accession of China, *Report of the Working Party on the Accession of China, Part II*, *supra* note 20. (Report includes a Schedule of Specific Commitments on Services that China committed to fulfill in order to accede to the WTO. Upon China's accession to the WTO, one year after accession all quantitative and geographic limitations were eliminated. *Id.* at 5. In total, China's Accession Agreement involves three documents: (1) the report of the Working Party for the Accession of China, (2) the Protocol of Accession with annexes, and (3) the schedule of China's commitments on market access for goods and services). See Press Release, WTO, WTO Ministerial Conference Approve China's Accession (Nov. 10, 2001), available at http://www.wto.org/english/news_e/pres01_e/pr252_e.htm (last visited Oct. 9, 2006) (discussing the aforementioned documents and China's WTO membership and the potential impact that will result on China's economy).

¹³⁰ See WTO, *Report of the Working Party on the Accession of China*, Part II—Schedule of Specific Commitments on Services, *supra* note 20, at 8.

¹³¹ *Id.* at c.

¹³² *Id.* at 12. Foreign service suppliers were originally permitted to establish advertising ventures in the form of joint ventures with a capital investment limit by the foreign investor set at 49 percent. Within a set time period proceeding accession, foreigners have greater rights of investment in advertising services in China.

¹³³ *Id.* (This paper provides a complete listing of the PRC's Schedule of Specific Commitments per accession to the WTO. Included in this list are all areas of foreign investment in China and the affects accession has had on the prior laws.)

¹³⁴ See Notice of the State Administration of Foreign Exchange on the Relevant Issues Concerning the Improvement of Foreign Exchange Administration of Direct Investment by Foreign Investors (2003), available at <http://www.chinataiwan.org/web/webportal/W5029562/Uadmin/A5151137.html> (last visited Oct. 9, 2006) (P.R.C.).

foreign exchange accounts in their own names.¹³⁵ Where the foreign investor invests in offshore accounts or other accounts, the bureau may issue approval documents to the foreign exchange business permitting a bank to handle transfers of funds from accounts.¹³⁶ If a foreign investor purchases stock rights of a domestic enterprise, it must pay consideration for the purchase and must register any investments or exchanges regarding transfer of the stock rights.¹³⁷ The notice also covers registration of foreign investments and foreign exchanges for foreign-funded enterprises, and adjustments of capital reduction on foreign-funded enterprises.¹³⁸

In 2005, MOFCOM approved *Measures for the Administration on Foreign Investment in Commercial Fields*.¹³⁹ These measures are applicable to any foreign-funded commercial enterprise within China that undertakes business activities.¹⁴⁰ Included in the measure are rules required for opening stores, the types of businesses which can be operated, and the process in applying for a foreign-funded commercial enterprise.¹⁴¹ Foreign investors may set up foreign invested enterprises as wholly foreign-owned enterprises to conduct certain businesses pursuant to these measures.¹⁴² MOFCOM has issued similar foreign investment guidelines with respect to advertising enterprises,¹⁴³ international maritime transportation,¹⁴⁴ foreign investment in cinemas,¹⁴⁵ and other industries.¹⁴⁶

¹³⁵ *Id.* at art. I(1).

¹³⁶ *Id.* at art. I(2).

¹³⁷ *Id.* at art. I(4).

¹³⁸ *Id.*

¹³⁹ See *Measures for the Administration on Foreign Investment in Commercial Fields* (2004), available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/MinisterialRulings/t20060620_51248.jsp (last visited Oct. 9, 2006) (P.R.C.).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at arts. 3, 8, and 10.

¹⁴² Mok, *Investment in the PRC*, *supra* note 84, at Commercial Enterprises.

¹⁴³ See *Provisions on the Administration of Foreign-Funded Advertising Enterprises* (2004), available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/InvestmentDirection/GuidanceforSpecificIndustries/t20060620_51378.jsp (last visited Oct. 9, 2006) (P.R.C.).

¹⁴⁴ See *Provisions on Administration of Foreign Investment in International Maritime Transportation* (2004), available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/MinisterialRulings/t20060620_51159.jsp (last visited Oct. 9, 2006) (P.R.C.).

¹⁴⁵ See *Provisional Regulations on Investment in Cinemas by Foreign Investors* (2004), available at http://219.235.227.226/pub/FDI_EN/Laws/InvestmentDirection/GuidanceforSpecificIndustries/t20060620_51375.jsp (last visited Oct. 9, 2006) (P.R.C.).

¹⁴⁶ For a general listing of recent guidelines and promulgated laws, see http://www.fdi.gov.cn/pub/FDI_EN/Laws/Laws2/Laws3/default.jsp?type=587 (in English); <http://www.fdi.gov.cn/pub/FDI/zcfg/zcfg2/zcfg3/default.jsp?type=62> (in Chinese) (last visited Oct. 9, 2006). Both contain a listing of foreign investment laws, regulations, and guidelines. For a more complete listing, see MOFCOM's website, <http://www.mofcom.gov.cn> (in Chinese) and <http://english.mofcom.gov.cn/English.shtml> (in English) (last visited Oct. 9, 2006); both offer China's foreign investment laws, regulations, guidelines, and updated news as per any changes in laws or regulations.

Regarding the protection of foreigners' rights, foreign investors are protected by China according to their lawful rights and interests;¹⁴⁷ Article 2 of the Law on Chinese-Foreign Equity Joint Ventures states:

The Chinese Government shall protect, according to law, the investment of foreign joint ventures, the profits due to them and their other lawful rights and interests in an equity joint venture, pursuant to the agreement, contract and articles of association approved by the Chinese Government.¹⁴⁸

Through bilateral and multilateral treaties, foreigners' rights are safeguarded due to mutual and beneficial assurances stated by such treaties.¹⁴⁹ Even Articles 18 and 32 of the Chinese Constitution afford foreign investors protection in Chinese territory.¹⁵⁰

Recently, on August 8, 2006, MOFCOM, along with the State-Owned Assets Supervision and Administration Commission ("SASAC"), the State Administration of Taxation ("SAT"), the State Administration of Industry and Commerce ("SAIC"), the China Securities Regulatory Commission ("CSRC"), and the State Administration of Foreign Exchange ("SAFE") promulgated the Regulations on Mergers and Acquisitions ("M&A") of Domestic Enterprises by Foreign Investors ("M&A Regulations"), marking the authorities' efforts to better regulate such acquisitions.¹⁵¹ The M&A Regulations were drafted on the basis of the Provisional Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors,

¹⁴⁷ Law of the PRC on Foreign-Invested Capital Enterprises, *supra* note 107, at art. 4.

¹⁴⁸ Li Mei Qin, *Attracting Foreign Investment into the PRC: The Enactment of Foreign Investment Laws*, 4 SING. J. INT'L & COMP. L. 159, 181 (2000).

¹⁴⁹ For an example of a treaty, see Agreement on Encouragement and Reciprocal Protection of Investments between the government of the People's Republic of China and the government of the Kingdom of the Netherlands, Nov. 26, 2001, available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=62053.

¹⁵⁰ See XIANFA art. 18 (1982), available at <http://english.peopledaily.com.cn/constitution/constitution.html> (last visited Oct. 9, 2006) (providing, "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"); XIANFA art. 32 (1982), available at <http://english.peopledaily.com.cn/constitution/constitution.html> (last visited Oct. 9, 2006) (providing, "The People's Republic of China protects the lawful rights and interests of foreigners within Chinese territory, and while on Chinese territory foreigners must abide by the law of the People's Republic of China").

¹⁵¹ *PRC Mainland: New Rules Have Been Promulgated to Regulate Mergers and Acquisitions Conducted by Foreign Investors in Mainland China*, JOHNSON, STOKES & MASTER LEGAL UPDATE, Aug. 25, 2006, available at http://www.jsm.com/live/Portal?xml=legal_update/article&content_id=2720 (hereinafter *PRC Mainland: New Rules*).

promulgated on March 7, 2003, in an attempt to regulate foreign investors' takeover of domestic enterprises through M&A.¹⁵² "The revised law gives detailed guidelines on the requirements and [the] application process" for foreign companies wishing to engage in M&A of China's domestic enterprises.¹⁵³ Additionally, the M&A Regulations stress that approval must be received from MOFCOM if foreign investors wish to work with Chinese firms.¹⁵⁴ This point further limits foreign investors seeking to acquire interests in China by curtailing acquisitions which MOFCOM deems to fall into one of the categories mentioned below.¹⁵⁵

It should be noted that for the first time, the new regulations will give foreigners explicit authority to pay for stakes in Chinese companies in shares instead of cash.¹⁵⁶ Such a move will afford foreign investors more choice in how they wish to invest in M&A of Chinese domestic enterprises.¹⁵⁷

The new M&A Regulations create further potential risks to foreign investors. In order to achieve controlling acquisitions, or actual control of certain significant industries that are a "danger to China's national economic security," infringe upon "important local brand names" or where the M&A results in foreign investors' control of domestic enterprises in key industries, the acquisitions must be reported to MOFCOM and must obtain MOFCOM's approval.¹⁵⁸ A failure to do so could lead to termination of the transaction if requested by MOFCOM or other relevant authorities.¹⁵⁹ Thus, it may be inferred from this stringent regulation that the Chinese government is exceedingly concerned with protecting and minimizing the impact on the security of its national economy where foreign M&A is involved. MOFCOM has full discretion in setting its own boundaries as to the meaning of the terms "economic security," "key industries," and "famous brands." Thus, foreign investors must be cautious when considering what industries they decide to acquire by merger or acquisition.

Perhaps one of the most significant changes under the new M&A Regulations can be found in the section concerning Anti-Monopoly Review.¹⁶⁰ Although the Chinese government has been drafting an anti-monopoly law for the past several years, there is currently no formal anti-

¹⁵² *Id.*

¹⁵³ *China's New Law for Foreign Mergers and Acquisitions*, ANI, Aug. 26, 2006, available at <http://in.news.yahoo.com/060826/139/66zfs.html> (last visited Oct. 9, 2006).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

monopoly law in Chinese law.¹⁶¹ Under the new provisions, foreign investors involved in M&A of domestic enterprises must report to MOFCOM and the SAIC under the following circumstances: (1) any party to the M&A has a turnover in China's market exceeding Renminbi ("RMB") 1.5 billion in the current year; (2) the company has in the past acquired or transacted more than ten deals in related industries within one year; (3) any party to the M&A already has a twenty percent market share in the Chinese market; or (4) any party to the M&A will achieve a twenty-five percent market share in the Chinese market following the M&A.¹⁶² Such restrictions apply to foreign overseas M&A where any party to the M&A (1) has assets exceeding RMB 3 billion, (2) has revenue inside China of more than RMB 1.5 billion, (3) has a domestic market share exceeding twenty percent already in China, (4) will have a domestic market share exceeding twenty-five percent following the overseas M&A, or (5) will hold equity interest directly or indirectly in more than 15 Foreign-Invested Enterprises ("FIEs") in related industries in China as a result of the overseas M&A.¹⁶³ This anti-monopoly section may be a view of what the Chinese government is likely to implement in the near future in a more formalized regulation; therefore, it is quite possible that implementation of these specific rules will be closely monitored by China's regulatory bodies to see how they fare in actual practice.

The Chinese continue to implement, promulgate, reform, and reshape laws and guidelines to attract more foreign investment. The next section provides a brief overview of foreign investment regulations in America.

III. UNITED STATES' FOREIGN INVESTMENT LAWS

This section will focus on the history of the United States' foreign investment laws and regulations pertaining to foreigners. The Sherman Act of 1890 was the first legislation concerning foreign investment in the United States,¹⁶⁴ while the Federal Trade Commission Act,¹⁶⁵ the Securities Act(s),¹⁶⁶ and the Exon-Florio provision¹⁶⁷ have all expanded the rights of foreigners to invest in the United States. This section also will explore the Committee on Foreign Investment in the United States ("CFIUS")¹⁶⁸ and the

¹⁶¹ *Id.*

¹⁶² *Id.* at art. 51.

¹⁶³ *Id.* at art. 53.

¹⁶⁴ Sherman Act, 15 U.S.C. § 1-12 (1890, 1894).

¹⁶⁵ 15 U.S.C. § 45 (1914).

¹⁶⁶ 15 U.S.C. § 77a-77mm (1933) and 15 U.S.C. § 78a-78mm (1934).

¹⁶⁷ Section 721 of Pub. L. 100-418, 102 Stat. 1107.

¹⁶⁸ Exec. Order 11858, 40 Fed. Reg. 20263 (May 7, 1975).

USA Patriot Act (“UPA”),¹⁶⁹ implemented as a response to the attacks of September 11, 2001, and how they have affected foreign investment. Although not specifically related to foreign investment, the UPA afforded the U.S. government broad discretion to dissolve any business that was associated with or funded terrorism.¹⁷⁰ With this significant change, and the problems the United States faces regarding the war on terror, the budget deficit, and the Iraqi war, the United States may gradually be slipping in its place as the main hub for attracting foreign investment. Foreign investment in the United States has not yet decreased to such an extent as to dethrone America from its position as the leading foreign investment country for developed countries, but this no longer may be the case within the next twenty years.

A. *U.S. Foreign Investment Guidelines Differ from China’s Laws and Regulations*

The United States does not have clear-cut regulations regarding foreign investment laws as does the Chinese government. The history of America’s foreign investment regulations can be traced back to 1890 and the Sherman Act.¹⁷¹ The Sherman Act, codified in 15 U.S.C. § § 1-12, bans companies from forming monopolies or attempted monopolies.¹⁷² The Clayton Act, passed by Congress in 1914, prohibited the creation of mergers, joint ventures, consolidations, and the like where the acts were exclusive and the mergers, ventures, or acquisitions substantially lessened competition.¹⁷³

¹⁶⁹ USA Patriot Act of 2001, Pub. L. 107-56, 115 Stat. 272 (codified in scattered titles and sections of the U.S. Code).

¹⁷⁰ *Id.*

¹⁷¹ Sherman Act, 15 U.S.C. § § 1-12 (1890, 1894).

¹⁷² Sherman Act, 15 U.S.C. § § 1-12 (1890, 1894). The Act provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.” 15 U.S.C. § 1. The Act also provides: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.” 15 U.S.C. § 2. The Act put responsibility upon government attorneys and district courts to pursue and investigate trusts, companies, and organizations suspected of violating the Act. Despite its name, the Act was not aimed at “trusts” or “trust companies” in particular. The Act was aimed at combinations in restraint of trade, monopolies, etc., regardless of whether in the form of a trust, corporation, or any other form. The Act used the word “antitrust” because the law was initially proposed as a way to break up the Standard Oil trust.

¹⁷³ See 15 U.S.C. § 18 (2006). See also GEORGE J. STIGLER, THE ORIGIN OF THE SHERMAN ACT 10 (Center of the Study of the Economy and the State Working Paper Series, Working Paper No. 027, Aug. 1983) (providing background on the Clayton Act and the Federal Trade Commission Act); Carlos D. Ramirez & Christian Eigen-Zucchi, *Understanding the Clayton Act of 1914: An Analysis of the Interest Group Hypothesis*, 106 PUB. CHOICE 157 (Jan. 2001) (providing a further analysis of what led to the passing of the Act).

It restricted restraints on trade and provided further support for the Sherman Act.¹⁷⁴

In 1914, Congress passed the Federal Trade Commission Act, establishing the Federal Trade Commission to prevent unfair competition.¹⁷⁵ Specifically, 15 U.S.C. § 45(a) states that unfair methods of competition in commerce or any unfair acts in the practice of commerce are unlawful.¹⁷⁶ Section 3 of the Act limits its application to unfair methods of competition involving foreign nations where “methods of competition have a direct, substantial, and reasonably foreseeable effect . . . on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or . . . on export commerce with foreign nations, of a person engaged in such commerce in the United States; and . . . such effect gives rise to a claim under the provisions of this subsection.”¹⁷⁷

The Securities Act of 1933¹⁷⁸ was passed to ensure truthfulness in the sale of securities while prohibiting misrepresentation, deceit, or other acts of fraud in registering to own more than ten percent of any stock.¹⁷⁹ This Act requires that foreign investors register by providing financial information through the registration of securities.¹⁸⁰ A company must provide descriptions of the company’s assets, including property and business; a description of the security to be offered for sale; information about regulating the company; and financial statements.¹⁸¹

A year later, Congress passed the Securities Exchange Act of 1934,¹⁸² creating the Securities and Exchange Commission. The purpose of this act was to provide for “the regulation and control of such transactions (in securities) and of practices and matters related . . . to . . . perfect the mechanisms of a national market system for securities and a national system for the clearance and settlement of securities transactions and the safeguarding of securities and funds related thereto . . . in order to protect interstate commerce. . . .”¹⁸³ This act included the broad authority of the

¹⁷⁴ Ramirez & Eigen-Zucchi, *supra* note 173.

¹⁷⁵ 15 U.S.C. § 45 (2006).

¹⁷⁶ *See id.* § 45(a).

¹⁷⁷ *See id.* § § 45(a)(3)(A-B) (1914).

¹⁷⁸ 15 U.S.C. § § 77a-77mm (1933).

¹⁷⁹ *The Laws That Govern the Securities Industry, Securities Act of 1933*, U.S. Securities and Exchange Commission, Mar. 2006, available at <http://www.sec.gov/about/laws.shtml#secact1933> (act available at <http://www.sec.gov/about/laws/sa33.pdf>) (hereinafter *Laws That Govern the Securities Industry*).

¹⁸⁰ *Id.* at Registration Process.

¹⁸¹ *Id.*

¹⁸² 15 U.S.C. § § 78a-78mm (1934).

¹⁸³ 15 U.S.C. § 78b (1934).

SEC to regulate, register, and oversee brokerage firms, clearing agencies, as well as similar firms or organizations.¹⁸⁴

The Trust Indenture Act¹⁸⁵ was passed in 1939, restricting the sale of certain securities to the public.¹⁸⁶ The purpose of the Act was to regulate the public offerings of notes, bonds, and items such as certificates of interest from injuring investors, the public, and the capital markets.¹⁸⁷ Passed in 1940, the Investment Company Act¹⁸⁸ was created solely for the purpose of regulating the “organization of companies that engage . . . in investing, reinvesting, and trading in securities and whose own securities are offered to the investing public.”¹⁸⁹ Under section 8 of the Act, investment companies created under the laws of the United States must register with the SEC.¹⁹⁰ In filing with the commission, a company must file a registration statement that includes such items as a recital of the registrant’s policies, “borrowing money,” the “issuance of senior securities,” and “purchase and sale of real estate and commodities.”¹⁹¹

The Defense Production Act of 1950¹⁹² ceded authority to the president of the United States “to make an investigation to determine the effects on national security of mergers, acquisitions, and takeovers proposed or pending on or after the date of enactment of this section.”¹⁹³ The president, under Section D of the Defense Production Act, “may suspend or prohibit any acquisition, merger, or takeover of a person [or corporation] engaged in interstate [or foreign] commerce in the U.S. . . . by or with foreign persons so that such control will not threaten to impair the national security.”¹⁹⁴ Any findings made by the president under this Act are not subject to judicial review.¹⁹⁵ In assisting Congress with respect to this section, the president shall furnish a report evaluating whether any credible evidence exists showing foreign countries are strategizing to acquire U.S. companies engaged in critical technologies of which the United States is a leading producer and evaluate whether foreign governments are engaged in

¹⁸⁴ *Laws That Govern the Securities Industry*, *supra* note 179.

¹⁸⁵ 15 U.S.C. § 77aaa (1939).

¹⁸⁶ *Id.* at Trust Indenture Act of 1939.

¹⁸⁷ 15 U.S.C. § 77bbb (1939).

¹⁸⁸ 15 U.S.C. §§ 80a-1–80a-64 (1940).

¹⁸⁹ *Laws that Govern the Securities Industry*, *supra* note 179, at Investment Company Act of 1940.

¹⁹⁰ 15 U.S.C. § 80a-8(a) (2006)

¹⁹¹ *See id.* § 80a-8(b).

¹⁹² Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 (codified in scattered sections of 50 U.S.C.).

¹⁹³ 50 App. U.S.C. § 2170(a) (2006).

¹⁹⁴ *Id.* at § 2170(d).

¹⁹⁵ *See id.* at § 2170(e)(2).

industrial espionage activities aimed at obtaining commercial secrets related to these technologies.¹⁹⁶

B. Responsibility for Monitoring Foreign Investment in the United States Rests with the Committee on Foreign Investment in the United States

The Committee on Foreign Investment in the United States (“CFIUS”) was created by Executive Order 11858 in 1975.¹⁹⁷ Its purpose is to monitor and evaluate the impact of foreign investment in the United States.¹⁹⁸ At the second session of the 94th Congress, the International Investment and Trade in Services Survey Act of 1976 was signed.¹⁹⁹ This Act gave the president further authority to collect information on international investment and provide analysis of the information to CFIUS.²⁰⁰ CFIUS uses this information to further develop foreign investment policies. The president through broad powers has the authority to conduct studies and surveys as necessary on international investment.

CFIUS gained broad authority through the passage of the Exon-Florio provision in 1988. Pursuant to Executive Order 12661, the president delegated his responsibilities under section 721 of the Defense Production Act, and through section 5021 of the Omnibus Trade and Competitiveness Act of 1988.²⁰¹ As a result of the passage of the Omnibus Trade and Competitiveness Act of 1988, CFIUS can thoroughly review U.S. investment policy by ensuring that it protects national security while maintaining the credibility of an open investment policy and preserving the confidence of foreign investors.²⁰² The president can suspend or curb any foreign acquisition, merger, or takeover of any U.S. corporation that threatens the national security of the United States.²⁰³ This provision came

¹⁹⁶ See *id.* at § 2170(k)(1)(A)-(B).

¹⁹⁷ Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975).

¹⁹⁸ See *id.* at § 1(b).

¹⁹⁹ International Investment and Trade in Services Survey Act of 1976, 22 U.S.C. § § 3101-3108 (1976), Pub. L. 94-472, sec. 2, 90 Stat. 2059 (Oct. 11, 1976); Pub. L. 98- 573, tit. III, sec. 306(b)(2), 98 Stat. 3009 (Oct. 30, 1984); Pub. L. 101-533, § 6(A)(a), 104 Stat. 2348 (Nov. 7, 1990).

²⁰⁰ See *id.* at § 3101(2)(a)(7)(b).

²⁰¹ Committee on Foreign Investments in the United States, Exon-Florio Provision, U.S. Dept. of the Treasury, available at <http://www.treas.gov/offices/international-affairs/exon-florio/> (last visited Oct. 9, 2006).

²⁰² *Id.*

²⁰³ The president is to take into account five factors in order to determine whether or not a foreign acquisition is detrimental to the national security of the United States. The factors are: (1) domestic production needed for projected national defense requirements; (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services; (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet

into effect long before 9/11 and before terrorism became as major a threat as it is today.

In 1993, the Byrd Amendment was passed, requiring the president to investigate cases where an acquisition is controlled by a foreign government and where a person engaged in interstate commerce in the United States could affect U.S. national security.²⁰⁴ At the same time, Executive Order 12860 expanded CFIUS membership to include the director of the Office of Science and Technology Policy, the assistant to the president for national security affairs, and the assistant to the president for economic policy. Ten years later, the Department of Homeland Security also was included in the CFIUS.²⁰⁵ The president, in ceding authority to CFIUS, now receives reports and recommendations submitted by CFIUS concerning foreign mergers or acquisitions that may be deemed suspect or contrary to Exon-Florio provisions.

Recently, the CFIUS process was put to the test by the purported Dubai Ports (“DP”) World Transaction, which would have permitted DP World, a commercial entity based in the United Arab Emirates (“UAE”), to purchase London-based Peninsular and Oriental Steam Navigation Co. for \$6.85 billion. This essentially would have given DP World control of port operations in the United States. In the aftermath of 9/11 and with the ensuing “War on Terror,” many Americans expressed outrage at the proposed idea of having a Middle Eastern company in charge of port security at some of the United States’ busiest ports. Members of both political parties intensely questioned the administration’s judgment in permitting such a proposal and vowed to delay, if not scuttle, such a deal.²⁰⁶

However, after being put through the rigorous CFIUS process, it was determined that DP World “played by the rules, has cooperated with the United States, and is from a country that is a close ally in the war on terror.”²⁰⁷ Twelve federal agencies and the government’s counterterrorism experts closely and carefully scrutinized the transaction to ensure it posed no

the requirements of national security; (4) the potential effects of the transaction on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and (5) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security. *Id.*

²⁰⁴ National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315 (1992).

²⁰⁵ Exec. Order No. 12860, 58 Fed. Reg. 47201 (Sept. 3, 1993).

²⁰⁶ Jonathan Weisman, *Port Deal to Have Broader Review*, WASHINGTON POST, July 10, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/26/AR2006022600737.html>.

²⁰⁷ Press Release, Office of the Press Secretary of the White House, Fact Sheet: The CFIUS Process and the DP World Transaction (Feb. 22, 2006), available at <http://www.whitehouse.gov/news/releases/2006/02/20060222-11.html>.

threat to national security.²⁰⁸ In addition, a White House press release stated that Dubai was the first Middle Eastern entity to join the Container Security Initiative (a multinational program to protect global trade from terrorism) and the first Middle Eastern entity to join the Department of Energy's Megaports Initiative (a program designed to stop illicit shipments of nuclear and other radioactive material).²⁰⁹

Despite these findings by the federal government, DP World eventually handed over port operations to an American company. Although the CFIUS in practice determined the takeover deal did not pose any substantial problems regarding security or port access, DP World divested itself of the operations of U.S. ports in order to preserve the strong relationship between the UAE and the United States.²¹⁰

C. *The President Maintains a Broad Scope of Authority over Foreign Investment*

The International Emergency Economic Powers Act ("IEEPA") provides the president with the authority to stop foreign acquisitions or eliminate current or prospective foreign direct investment.²¹¹ The IEEPA entitles the president to investigate, regulate, or prohibit any acquisition, holding, use, transfer . . . or transactions involving any property in which a foreign country or national (corporation included) has any interest.²¹² Upon exercising any authority under this Act, the president shall transmit a report to Congress explaining why the president exercised this authority, what actions were necessary, and what actions are to be taken against which countries.²¹³ Section C of the Act authorizes the president to confiscate any property of foreign persons, organizations, or countries where that individual has aided or abetted in any hostile attacks during wartime.²¹⁴

The Export Administration Act of 1979 permits the president to eradicate any current or prospective foreign direct investment that threatens national security, natural resources, or achievements of foreign policy objectives.²¹⁵ This Act was created to benefit the United States while

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Lizza Porteus, *Bush Worried Collapsed Ports Deal Could Send Wrong Message to Allies*, FOXNEWS, Mar. 10, 2006, <http://www.foxnews.com/story/0,2933,187437,00>.

²¹¹ International Emergency Economic Powers Act, 50 U.S.C. § 1701-1707 (1977).

²¹² *See id.* § 1702(a)(1)(A-B).

²¹³ *See id.* § 1702(b).

²¹⁴ *See id.* § 1702(a)(1)(C).

²¹⁵ 50 U.S.C. §§ 2402-2405 (repealed 2001) (reauthorized through Export Administration Act of 2001). The Export Administration Act of 2001 is similar in certain respects to the Export Administration

maintaining control of the export of goods detrimental to the health of U.S. citizens and improving the U.S. trade balance.²¹⁶ Specifically, sections 2404 and 2405 authorize the president to prohibit any exportation of goods that challenge either U.S. foreign policy or where the exportation is contrary to the national security of the United States.²¹⁷

There are two primary federal statutes that govern reporting requirements by foreign investors about investments in the United States—the IITSSA (mentioned above) and the Agricultural Foreign Investment Disclosure Act (“AFIDA”).²¹⁸ Under the IITSSA, foreign investors in a U.S. business enterprise who own ten percent or more of the voting interest²¹⁹ must report to the Bureau of Economic Analysis (“BEA”) of the Department of Commerce (“DOC”), which is in charge of administering the IITSSA.²²⁰ The reporting requirements involve submitting certain forms to the BEA, including: (1) a BE-13 Initial Report of Acquisition of U.S. Business by Foreign Entity;²²¹ (2) a BE-14 Report by U.S. Person Who Assists or

Act of 1979, as it has the overall purpose of providing authority to control exports. For example, the President “may, in accordance with the provisions of this Act, prohibit, curtail, or require a license, or other authorization for the export of any item subject to the jurisdiction of the United State or exported by any person subject to the jurisdiction of the United States . . . the purposes of (such) national security export controls are . . . (2) to stem the proliferation of weapons of mass destruction, and the means to deliver them . . . ; (3) to deter acts of international terrorism; (4) to restrict the export of items that could contribute to acts of international terrorism so as to prove detrimental to the national security of the United States, its allies, or countries sharing common strategic objectives with the United States.” Export Administration Act of 2001, H.R. 2581, 107th Cong. at tit. II, § § 201(a)(1),(b)(2)(3)(4) (2001).

²¹⁶ 50 U.S.C. § 2401 (repealed 2001).

²¹⁷ See *id.* §§ 2404-05 (repealed 2001).

²¹⁸ The author briefly notes here the requirements for Foreign Private Issuers (“FPI”) under the Sarbanes-Oxley Act of 2002, Section 404. As mandated by the Act, each company, other than registered investment companies, must include in their annual internal control report (1) a statement of management’s responsibility for establishing and maintaining adequate internal control over financial reporting for that company, (2) a statement identifying the framework used by management to evaluate the effectiveness of this internal control, (3) management’s assessment of the effectiveness of this internal control as of the end of the company’s most recent fiscal year, and (4) a statement that its auditor has issued an attestation report on management’s assessment of the company’s internal control over financial reporting. Under the new rules, management must disclose any material weakness and will be unable to conclude that the company’s internal control over financial reporting is effective if there are one or more material weaknesses in such control. Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7262, sec. 404(a) and (b). Filing requirements are pursuant to sections 13(a) or 15(d) of the Securities Exchange Act of 1934. 15 U.S.C. §§ 78(m) or 78(o)(d) (1934) (additional exhaustive information on the implementation of the Act and the Act’s requirements is available at <http://www.sec.gov/rules/final/33-8238.htm#ia>) (last visited Oct. 9, 2006).

²¹⁹ U.S. Dept. of Commerce, *Inward Investment Reporting Requirements*, Office of the Chief Counsel for Intern. Commerce, Dec. 17, 1998, available at <http://www.osec.doc.gov/ogc/occic/invest.html> (unless the investment is under \$1 million, is less than 200 acres, or is real estate intended for personal use).

²²⁰ 50 U.S.C. § 3101. For a simplified chart form of the reporting requirements, see <http://www.bea.gov/bea/surveys/documents/form-trans-2005.pdf> (last visited Oct. 9, 2006).

²²¹ A BE-13 form must be filled out by a U.S. enterprise when a foreign person establishes or acquires (directly or indirectly) 10 percent or more of the voting stock of that enterprise. A BE-13 report also is required if a U.S. business enterprise is acquired by an existing U.S. affiliate of a foreign person and

Intervenes in an Acquisition of a U.S. Business by a Foreign Entity;²²² (3) a BE-605 Quarterly Report;²²³ (4) a BE-15 Annual Report;²²⁴ and (5) a BE-12 Benchmark Survey.²²⁵ In certain cases, such as where investment in the

then merged into the operations of that existing affiliate. Exceptions include residential land used solely for personal use and not for profit; a business enterprise where the total cost of acquisition was less than \$3 million and the acquisition involved less than 200 acres of U.S. land; or a business enterprise where the total assets of the purchased company were less than \$3 million or where the company owned less than 200 acres of U.S. land. To claim an exemption, the foreign person must file an Exemption Claim, Form BE-13. UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, CURRENT REPORTING REQUIREMENTS FOR FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, 1, 2 (April 2004), available at http://www.bea.gov/beat/surveys/2004fdius_rept_req.pdf. Form available at <http://www.bea.gov/beat/surveys/be13.pdf> (last visited Oct. 9, 2006).

²²² Such a report is required only where the U.S. person (including intermediaries, brokers, or others) assists or intervenes in a sale to, or a purchase by, a foreign person of a U.S. affiliate, or where a U.S. person enters into a joint venture with a foreign person in order to establish a U.S. business enterprise. The U.S. person must report only the foreign investment that is known, or report any information that would lead the U.S. person to believe the investor is a foreign person. Exemptions to filling out Form BE-14 mirror those for Form BE-13. It must be noted that no Form BE-14 need be filed by a U.S. person who files a Form BE-13. Form BE-14, Rev. 8/2006, U.S. Dept. of Commerce, Bureau of Economic Analysis, available at <http://www.bea.gov/beat/surveys/be14.pdf> (last visited Oct. 9, 2006).

²²³ A BE-605 Quarterly Report (nonblank) must be filled out for every nonblank U.S. business enterprise in which a foreign person had a direct and/or indirect voting ownership interest (or the equivalent) of at least 10 percent at any time during the quarter. For a BE-605 bank, this report is required from every U.S. affiliate that is a bank, or U.S. bank holding company, including all of the banking and nonbanking subsidiaries and units of the bank holding company, both incorporated and unincorporated, in which a foreign person had a direct and/or indirect voting ownership interest (or the equivalent) of at least 10 percent at any time during the quarter. It should be noted that both BE-605 forms may be exempted from having to be filed by the U.S. affiliate where each of the following items for the affiliate (not the foreign parent's share) is \$30 million or less: (1) total assets, (2) annual sales or gross operating revenues, and (3) annual net income (loss after provision for U.S. income taxes). BE-605 reports must be filed within twenty days after the close of each calendar or fiscal quarter, except that the report for the fourth quarter may be filed forty-five days after the end of that quarter. UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, *supra* note 221, at 2, 3.

²²⁴ There are two types of BE-15 Forms—the BE-15 Long Form (“BE-15(LF)”) and the BE-15 Short Form (“BE-15(SF)”). The BE-15(LF) must be completed by each nonbank majority-owned U.S. affiliate (a “majority-owned” U.S. affiliate, according to the requirements, is one in which the combined direct and indirect ownership interest of all foreign parents of the U.S. affiliate exceeds 50 percent) with total assets, sales or gross operating revenues, or net income greater than \$125 million (positive or negative). A BE-15(SF) must be completed by (a) each nonbank majority-owned U.S. affiliate with total assets, sales or gross operating revenues, or net income greater than \$30 million, and no one of these three items greater than \$125 million (positive or negative), and (b) each nonbank minority-owned U.S. affiliate (a “minority-owned” U.S. affiliate is one in which the combined direct and indirect ownership interest of all foreign parents of the U.S. affiliate is 50 percent or less) with total assets, sales or gross operating revenues, or net income greater than \$30 million (positive or negative). *Id.* at 3, 4. Forms available at <http://www.bea.gov/beat/surveys/documents/be15lfweb.pdf> (Long Form) (last visited Oct. 9, 2006) and <http://www.bea.gov/beat/surveys/documents/be15sfweb.pdf> (Short Form) (last visited Oct. 9, 2006).

²²⁵ A BE-12 Benchmark Survey is a comprehensive survey of such foreign investment in the United States, and under the IITSSA, it must be conducted at least once every five years. Again, there are different BE-12 forms which may have to be filed—a BE-12 Long Form (“BE-12(LF)”), a BE-12 Short Form (“BE-12(SF)”), a BE-12 Bank Form, or a BE-12X claim for not filing a BE-12 Form. Such forms are required for each U.S. business enterprise in which a foreign person owned or controlled, directly and/or indirectly, a 10 percent-or-more voting ownership interest (or the equivalent) at any time during the enterprise's fiscal

form of banking affiliates is involved, distinct but similar forms need to be filled out, such as a Form BE-605 for banking. All of the reports mentioned in this section are pursuant to the IITSSA. In addition, the Act states that whoever fails to report shall be subject to civil penalties, including monetary fines, injunctive relief,²²⁶ or, where one willfully fails to report, possible prison time.²²⁷

The Agricultural Foreign Investment Disclosure Act (“AFIDA”) requires that where agricultural land is “acquired by or has title transferred to a foreign individual or where a foreign individual holds any interest, other than a security interest, in agricultural land, the individual must submit a report to the Secretary of Agriculture within ninety days of the transaction.”²²⁸ Section 3501 sets out what specifically is required to be reported by the foreign person, including the person’s legal name and address,²²⁹ his citizenship if he is an individual,²³⁰ the type of interest in agricultural land acquired or transferred,²³¹ the legal description and acreage of such agricultural land,²³² among other requirements.²³³ If the Secretary of Agriculture determines that a person either has failed to submit a report in accordance with the Section 3501 provisions or has knowingly submitted either an incomplete or misleading report, then that person shall be subject to civil penalties as determined appropriate by the secretary.²³⁴ Such an amount shall not exceed twenty-five percent of the fair market value, on the date of the assessment of such penalty, of the interest in agricultural land with respect to the violation.²³⁵ Within thirty days after the end of each six-month period beginning after the effective date of Section 3501, the secretary transmits to each state department of agriculture or the relevant state agency a copy of each report submitted to the secretary during the six-month period that involved agricultural land located in the relevant state.²³⁶

year that represents a benchmark survey. For specific requirements under the various different forms, *see* *Id.* at 4-6.

²²⁶ *Id.* at 2, 3.

²²⁷ *Id.* at 6.

²²⁸ Agricultural Foreign Investment Disclosure Act of 1978, 7 U.S.C. § 3501 (2000).

²²⁹ *Id.* § 3501(a)(1).

²³⁰ *Id.* § 3501(a)(2).

²³¹ *Id.* § 3501(a)(4).

²³² *Id.* § 3501(a)(5).

²³³ *Id.* § 3501(a)-(f).

²³⁴ 7 U.S.C. § 3502(a).

²³⁵ *Id.* § 3502(b).

²³⁶ 7 U.S.C. § 3505.

D. *9/11 Has Had a Substantial Impact on Foreign Investment in the United States via the USA Patriot Act and Other Restrictions*

Following the attacks of 9/11, Congress enacted the United and Strengthening America Act by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“USA Patriot Act”) of 2001. This Act was meant to deter and punish terrorist acts in the United States and around the world and to enhance law enforcement investigatory tools, among other purposes.²³⁷ The Act provides the FBI director (or designee of the director) the authority to investigate any tangible items that the FBI suspects are in any way related to terrorism.²³⁸ Under guidelines set forth in the Act, the FBI has broad discretionary powers to instigate an investigation against any venture, business, or organization that is deemed to be related to terrorist efforts.²³⁹ The Act strengthened the authority of the federal government to investigate any company in the United States whose investment is strictly foreign or foreign companies that have formed joint ventures with U.S. businesses.

The Act gives the government broad authority to investigate any investment company or investment funds.²⁴⁰ The government may, to counter money laundering, subject all forms of investment funds to several regulatory requirements under the Act.²⁴¹ Under the Act, the Department of Treasury is allowed to investigate any funds where reasonable grounds exist to suspect money laundering. The treasury has no limitations on its authority.²⁴² Record keeping and bookkeeping may be required of any financial institution receiving foreign investment, and where any institution supported by foreign investment is found to be involved in money-laundering schemes, the secretary of treasury may prohibit the institution from continuing operations.²⁴³

In addition to the restrictions and prohibitions placed on the above-mentioned acts, the United States further restricts foreign investment in certain areas. Section 310 of the 1934 Communications Act contains restrictions on the holding and transfer of broadcast and common carrier

²³⁷ USA Patriot Act of 2001, Pub. L. 107-56, 115 Stat. 272 (codified in scattered titles and sections of the U.S. Code).

²³⁸ USA Patriot Act of 2001 § 215.

²³⁹ *Id.*

²⁴⁰ *Id.* at § 311 (codified at 31 U.S.C. § 5318A (2000)).

²⁴¹ James T. Barrett & Matthew C. Dallett, *The USA Patriot Act: Compliance Issues for Mutual Funds and Private Investment Funds*, Palmer & Dodge LLP (Mar. 25, 2002), <http://www.eapdlaw.com/newsstand/detail.aspx?news=2> (last visited Sept. 28, 2005).

²⁴² USA Patriot Act of 2001, *supra* note 237, § 311(a)(5).

²⁴³ *See id.* at § 311(b)(5).

radio communication licenses.²⁴⁴ In addition, foreign governments or representatives, including corporations, are not permitted to grant or hold license ownership in fixed radio stations (or broadcast or common carriers) of which more than twenty percent of the capital stock is owned or voted by a foreign entity.²⁴⁵ However, certain exceptions do exist permitting aliens licensed by foreign governments to operate amateur radio stations licensed by their foreign government in the United States.²⁴⁶

Atomic energy commercial licenses may not be issued to aliens or corporations, foreign or domestic, if there is reason to believe that the company is owned, controlled, or run by an alien, foreign corporation, or foreign government.²⁴⁷ Additionally, under the Energy Policy Act, foreign companies applying for financial assistance may face substantial restrictions.²⁴⁸ Shifting from the energy sector to the banking sector, all directors of national banks must be U.S. citizens,²⁴⁹ and aliens may not acquire title to territorial lands unless included in any existing treaty as pertaining to the rights of citizens.²⁵⁰ This point was emphasized in *The Society for Propagation of Gospel v. New Haven*,²⁵¹ where the Supreme Court held that, under the Treaty of Peace, Vermont could not convey away foreign-owned lands.²⁵² Although almost two hundred years old, this law still holds true; to regulate foreign-owned land legally in states, states must set rules and regulations pertaining to the maintenance of the land.²⁵³ The state has the exclusive power to question the propriety of any alien corporation's ownership of land.²⁵⁴ However, where land is acquired for

²⁴⁴ 47 U.S.C. § § 151-614, 310 (Communications Act of 1934) (1996).

²⁴⁵ *Id.* Twenty-five percent if the ownership is indirect subject to a public interest waiver.

²⁴⁶ *See id.* at § 310.

²⁴⁷ 42 U.S.C.A. § 2133(d) (2000).

²⁴⁸ Under the Energy Policy Act, to receive financial assistance, a company must show that its participation will be in the economic interests of the United States, as evidenced by investments in the United States in research, development, and manufacturing, and be a U.S.-owned company or a company incorporated in the United States whose parent is incorporated in a country that (1) affords to U.S.-owned companies opportunities comparable to those afforded to any other company to participate in such JVs, (2) affords U.S.-owned companies local investment opportunities comparable to those afforded any other company, and (3) affords adequate and effective intellectual-property rights to U.S.-owned firms. 42 U.S.C. § 13525 (2000).

²⁴⁹ 12 U.S.C.A. § 72 (2000).

²⁵⁰ 48 U.S.C.A. § 1501 (1887).

²⁵¹ *The Society for Propagation of Gospel v. New Haven*, 21 U.S. 464 (1823).

²⁵² *Id.*

²⁵³ *See Omnium Inv. Co v. North American Trust Co.*, 68 P. 1089 (1902); *see also Oregon Mortg. Co. v. Carstens*, 47 P. 421 (1896); *State ex rel. Morrill v. Superior Court for Stevens County*, 74 P. 686 (1903); *Northwestern Tel. Exch. Co. v. Chicago, M. & S. P. R. Co.*, 79 N.W. 315 (1899).

²⁵⁴ *See Omnium Inv. Co v. North American Trust Co.*, 68 P. 1089 (1902).

agricultural use, the reporting requirements under the Agricultural Foreign Investment Disclosure provide a separate statutory provision.²⁵⁵

In the area of fishing operations, foreign-controlled enterprises are not permitted to engage in certain operations involving coastal trade.²⁵⁶ Foreign-built (or rebuilt) vessels are prohibited from engaging in coastwide trade either directly between two points in the United States or via a foreign port.²⁵⁷ Additionally, foreigners may not hold more than a minority of shares comprising ownership in companies owning vessels that operate in U.S. fisheries.²⁵⁸ Certain corporate organizational requirements also exist regarding the registration of flag vessels intending to fish in U.S. Exclusive Economic Zones.²⁵⁹ Regarding foreign carriers in U.S. waters, "the Federal Maritime Commission is authorized to investigate where a foreign government, foreign carrier, or other persons providing maritime-related services engage in activity that adversely affects U.S. carriers in U.S. ocean borne trade and do not exist for foreign carriers of that country in the United States under the laws of the United States or as a result of acts of United States carriers or other persons providing maritime or maritime-related services in the United States."²⁶⁰ Sanctions issued under these statutes could

²⁵⁵ 7 U.S.C. § 3501 (1978). Under these regulations, any foreign person (implicitly included in the definition of *foreign person* is a corporation) who acquires or transfers any interest in agricultural land shall submit a report to the secretary of agriculture within a specified time period. Requirements for the report are set out in the statute and include the name and address of the foreign person/corporation, the type of interest in the land acquired, the agricultural purposes of the land, and other related information.

²⁵⁶ 46 U.S.C. § 2101 (2002) (Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987). In addition to the provisions mentioned in the context of this article, the following legislative provisions, among others, restrict public procurement contracts: (1) the Cargo Preference Act of 1904 (10 U.S.C. § 2631) requires that all items procured for or owned by the military departments be carried exclusively on U.S.-flag vessels; (2) Public Resolution No. 17 (1934), requiring that 100 percent of any cargoes generated by U.S. government loans be shipped on U.S.-flag vessels; (3) the Cargo Preferences Act of 1954, requiring that at least 50 percent of all U.S. government-generated cargoes covered be carried on privately owned U.S. flag commercial vessels if they are available at fair and reasonable rates; and (4) the Alaska Power Administration Sale Act of 1995, which while removing the prohibition on the export of Alaska crude oil, retained the preexisting U.S. flag vessel carriage requirement of such exports. European Commission, *U.S. Barriers to Trade and Investment Report for 2005*, 89 (Mar. 2006).

²⁵⁷ 46 U.S.C. § 876, Merchant Marine Act of 1920 (Jones Act) (1920).

²⁵⁸ *Id.*

²⁵⁹ Presidential Proclamation 5020, signed by President Ronald Reagan on March 10, 1983, established the U.S. Exclusive Economic Zone ("EEZ"). The EEZ extends up to two hundred nautical miles (370 km) from the U.S. coastline. About fifteen percent of this area lies on the geologic continental shelf and is shallower than two hundred meters. Within its EEZ, the United States has sovereign rights over all living and nonliving resources. Other nations may exercise freedom of vessel navigation and over flight within the U.S. EEZ. USEEZ: Boundaries of the Exclusive Economic Zones of the United States and territories, Ocean Planning Information System (OPIS), National Oceanic and Atmospheric Administration, Coastal Services Center, June 19, 2006, available at http://coastalmap.marine.usgs.gov/GISdata/basemaps/boundaries/eez/NOAA/useez_noaa.htm (last visited Oct. 9, 2006).

²⁶⁰ 46 App. U.S.C. § 1710a, § 10002(b) (2002) (Foreign Shipping Practices Act) (1988).

affect foreign-owned investments established in the United States, although they most frequently affect cross-border provisions of services.

In the area of aviation, the U.S. government, under the Federal Aviation Act, has reserved trade and navigation along coastal waters along with the exercise of U.S. international air route rights. The latter are reserved to national airlines controlled by U.S. citizens and owned 75 percent or more (voting stock) by U.S. citizens.²⁶¹ Where a U.S. citizen flies and his or her flight is funded by U.S. government funds, the U.S. citizen must fly on a flight performed by U.S. carriers.²⁶²

IV. COMPARATIVE ANALYSIS OF U.S. AND CHINESE FOREIGN INVESTMENT LAWS AND REGULATIONS

This section compares the two countries' foreign investment systems. Since the systems are unique (Chinese laws are clear cut regarding foreign investment; U.S. laws are implied through other laws and regulations), a summary of foreigners' rights to invest in each country is followed by a comparison of foreign investment principles in the two countries.

A. *Foreign Investors Are Continuing to Flock to China*

Since China's accession into the WTO, foreign investment in China has steadily increased, with most of the focused investment coming through the services sector.²⁶³ Between 1985 and 1995, the annual average of foreign direct investment ("FDI") in China was approximately 11,887, while in the United States it was 44,109.²⁶⁴ In 2004, Chinese inward (as opposed to outward) FDI was 60,630, reflecting roughly a thirty-seven percent increase in FDI in the past nine years, whereas U.S. inward FDI was 95,859. In 1995, the inward rate of FDI stocks in China was 134,869, compared with 535,553 of the U.S.; in 2003, the inward rate of FDI stocks in China was

²⁶¹ 49 U.S.C. § 40102(a)(15)(A)-(C) (2004).

²⁶² 49 U.S.C. § 40118 (Fly America Act), referred to in § 5 of the International Air Transportation Fair Competitive Practices Act of 1974, 49 U.S.C. § 1517, Pub. L. 93-624, Jan. 3, 1975, as amended by § 21 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 43 (Feb. 15, 1980).

²⁶³ For a good example of how foreign investment in China boomed during the 1980s through 1994, see Exhibit 1 of WANG YONGJUN, INVESTMENT IN CHINA, A QUESTION AND ANSWER GUIDE ON HOW TO DO BUSINESS 4 (1997).

²⁶⁴ United Nations Conference on Trade and Development, Division on Investment, Technology and Enterprise Development, *World Investment Report 2005, Transnational Corporations and the Internationalization of R&D, Country Fact Sheet: United States*, U.N. Doc. UNCTAD/WIR/2005 (2005), available at http://www.unctad.org/sections/dite_dir/docs/wir05_fs_us_en.pdf. The monetary amount is estimated in millions of dollars, while other amounts are in percentages.

501,471 compared with 1,553,955 for the U.S.²⁶⁵ Both countries continue to be the most attractive locations for FDI in their respective regions;²⁶⁶ however, it is important to remember that Chinese legislation regarding foreign direct investment is fledgling and in some aspects, the country is still considered to be developing. China is still considered the area for which FDI prospects are the brightest and most appealing, according to the United Nations Conference on Trade and Development, *Global Investments Prospects Assessment*.²⁶⁷ Disparities remain because developing countries continue to rank China behind the United States in terms of attracting FDI. The United States continues to remain the largest expected source country worldwide, both for developing and developed countries as distinct groups.²⁶⁸ According to the UNCTAD Inward Performance Index,²⁶⁹ China ranks forty-fifth for FDI growth while the United States is ranked at one hundred and fourteen.²⁷⁰ Although these rankings may change due to imbalances in marketplaces, this year's performance index is relatively stable, reflecting the stability of the structural variables that make up the index.²⁷¹

As evidenced by the *Provisions of the State Council on the Encouragement of Foreign Investment*, foreigners are encouraged to invest capital into the Chinese economy. The provisions emphasize introducing and promoting advanced technology, improving product quality, and

²⁶⁵ *Id.*

²⁶⁶ United Nations Conference on Trade and Development, June 13-18, 2004, *Prospects for FDI Flows and TNC Strategies, 2004-2007*, U.N. Doc. TD/(XI)/BP/14, p. 5, (2004), available at <http://www.unctad.org/Templates/Download.asp?docID=4853&intItemID=2068&lang=1>.

²⁶⁷ United Nations Conference on Trade and Development, June 13-18, 2004, *Prospects for FDI Flows and Transnational Corporate Strategies and Promotion Policies, 2004-2007: Global Investment Prospects Assessment (GIPA); Research Note 1: Results of a Survey of Location Experts*, U.N. Doc. TD/(XI)/BP/5 (2004), available at <http://www.unctad.org/Templates/Download.asp?docID=4746&intItemID=2068&lang=1>.

²⁶⁸ United Nations Conference on Trade and Development, June 13-18, 2004, *Prospects for FDI Flows and Transnational Corporate Strategies and Promotion Policies, 2004-2007: Global Investment Prospects Assessment (GIPA) Research Note 2, Findings of Second Worldwide UNCTAD Survey of Investment Promotion Agencies*, U.N. Doc. TD/(XI)/BP/8 (2004), available at <http://www.unctad.org/Templates/Download.asp?docID=4837&intItemID=2068&lang=1>.

²⁶⁹ The United Nations Conference on Trade and Development Inward Performance Index measures the extent to which host countries receive inward FDI. In ranking countries, the Index uses the amount of FDI a country receives relative to its economic size, calculates as the ratio of a country's share in global FDI inflows to its share in global GDP. A value greater than one indicates that the country attracts more FDI in proportion to its economic size, a value below one shows that it receives less. This information is available in the *World Investment Report 2005*, *supra* note 4, at 23.

²⁷⁰ *Id.* at Annex table A.I.13.

²⁷¹ *Id.* at "Overall Analysis, The Largest TNCs, The World's Top 50 Financial TNCs, Global FDI Growth Set to Resume FDI Performance and Potential" ("[T]his index shows how the structural variables move in relation to each other. Comparing the rankings by the Potential Index with those of the Performance index gives an indication of how each country performs against its potential").

expanding and developing foreign exchange and the national economy. An amendment made to Article 100 of the *Regulations for Implementation of the Law of the People's Republic of China on Chinese-foreign Equity Joint Ventures* adjusted the duration of a joint venture where the project required long construction periods and large amounts of investment from thirty to fifty years.²⁷² Foreign investors who reinvest their profits for at least five years in order to expand enterprises focusing on exporting products or advancing technology are refunded their total amount of enterprise income tax paid on the reinvested portion.²⁷³ The government explicitly states that autonomy shall be guaranteed to enterprises with foreign investment and that the management of such enterprises shall be supported. When a foreign company wishes to invest in China, it must do so for the benefit of the development and advancement of technology in China.

The application procedures for the establishment of any form of foreign invested enterprise are straightforward. Usually, the process involves applying either to MOFCOM or a relevant municipal, state, or regional office with the required documents for approval. Once approval is granted, which usually occurs within ninety days from the date of receiving the documents, a foreign investor usually has thirty days to apply for all relevant certificates and licenses to operate the business. Upon receipt of these documents, a foreign invested corporation is established. Usually within thirty days of its establishment, the corporation must register with the relevant taxation authorities. As long as the established enterprise is not involved in any activity detrimental to the advancement of the Chinese government, and is not prohibited or restricted by law, the process of establishing a foreign-invested enterprise is relatively simple. However, there may be limitations on the type of company permitted,²⁷⁴ limitations on the type of investment and time limits for contributing investments,²⁷⁵ foreign exchange controls,²⁷⁶ limitations on establishing trade unions,²⁷⁷ and

²⁷² Regulations for Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, amend. 100 (Fagui Huibian) (Sept. 20, 1983, amended Dec. 21, 1987).

²⁷³ Guowuyuan Guanyu Guli Waishang Touzi de Guiding [Provisions of the State Council on the Encouragement of Foreign Investment], art. 10 (Fagui Huibian) (Oct. 11, 1986), available at http://219.235.227.226/pub/FDI_EN/Laws/GeneralLawsandRegulations/AdministrativeRegulations/t20060620_50999.jsp.

²⁷⁴ Zhonghua Renmin Heguo Waizi Qiyefa Shishi Xize [Rules for Implementation of the Law of the People's Republic of China on Foreign Capital Enterprises], ch. 3, art. 18 (Fagui Huibian) (approved Oct. 28, 1990) (amended Apr. 21, 2001), available at <http://www.sinocp.com/english/Laws,Rules/law030918.htm> (foreign-capital enterprises are limited liability companies, unless otherwise approved by the government).

²⁷⁵ *Id.* at ch. 4.

²⁷⁶ *Id.* at ch. 8.

²⁷⁷ *Id.* at ch. 11.

limitations on taxation (from which foreign-capital enterprises receive certain exemptions).²⁷⁸

B. Culture Has an Impact on Foreign Investment

The Chinese government is concerned with attracting certain types of foreign investment in specific industries in order to benefit the domestic economy. The U.S. system protects its national security while awarding foreign investment projects to foreigners. The United States, facing a budget crisis with a debt of more than \$500 billion, logically should be willing to welcome any kind of foreign investment in its economy, so long as the investment does not compromise national security. The United States welcomes various sorts of foreign investment despite the limitations set forth on it by the Exon-Florio provision. In fact, with its liberalized and free trading system, the United States seeks to benefit not only itself but also reciprocate in kind by engaging in mostly bilateral trade agreements with other countries. By engaging in reciprocal trade agreements, U.S. firms seek to invest in all types of markets to benefit both themselves and foreign investors.²⁷⁹ As one of the most attractive FDI countries in the world, the United States seeks to express its investment ideals through bilateral and multilateral trade agreements. In committing to agreements, guidelines are set out appropriating how a foreign investor from a specific country may invest in America.

As codified in statute, the president has the authority to determine whether a bilateral trade agreement will mutually promote economic benefits for the United States. This is similar to the Chinese government's strategy, though the principle of mutuality is not explicitly stated. Similarly, both countries are bound by WTO regulations pertaining to foreign investment provisions and must enforce these measures in domestic law when applicable. However, the American economic system, apart from encouraging reciprocity in trading, has a capitalistic focus that is evident by its influence on foreign countries. The Chinese are more export and manufacturing oriented, using cheap labor to produce goods for retail sale in other countries. Foreign investment in China is usually in the form of capital or other tangible goods so that goods may be produced cheaply in China and exported for resale in other countries. In the United States, foreign investors invest in manufacturing and export-oriented areas and in

²⁷⁸ *Id.* at ch. 7.

²⁷⁹ Henry J. Graham, *Foreign Investment Laws of China and the United States: A Comparative Study*, 5 J. TRANSNAT'L. L. & POL'Y 253, 276 (1996).

production, labor, and product resale within the United States. The rampant operation of foreign-owned car factories or electronics factories exemplifies the culture of foreign investment in the United States. In China, a visitor generally would be hard pressed to access a product manufactured by a foreign company, although the outskirts of a larger Chinese city or major industrial area might be home to a plant manufacturing products for export.

China has more than 250,000 enterprises fueled by foreign investment, representing \$550 billion in such investment.²⁸⁰ By 2020, China expects to have a GDP of approximately \$4 trillion, due mostly in part to the impact of foreign investment on China's rapidly expanding economy.²⁸¹ Chinese Commerce Minister Bo Xi Lai stressed the importance of attracting foreign investment, stating "China will modify the administration and strengthen protection [of] intellectual property rights to create a better investment environment."²⁸² In fact, 450 of the world's largest 500 multinational corporations already have invested in China, furthering the belief that foreign investors are far more interested in China than they are in any other country.²⁸³ At this rate, the Chinese economy will flourish in the next few decades, especially since the Chinese continue to be open to and encourage foreign investment in different areas,²⁸⁴ such as banking,²⁸⁵ retail trade, and franchise management.²⁸⁶ The Chinese government stresses its ability to abide by its commitments to improve its laws and regulations on foreign investment and to produce a stable, transparent, and efficient administrative atmosphere.²⁸⁷

The only clear limitations on foreign investors wishing to invest in China are in areas specifically prohibited for reasons of national security. Additionally, the *Catalogue for the Guidance of Foreign Investment Industries* ("Catalogue") sets out in which industries China encourages,

²⁸⁰ *Attracting Foreign Investment China's Long-standing Policies*, PEOPLE'S DAILY ONLINE (Dec. 3, 2004), available at http://english.peopledaily.com.cn/200412/03/eng20041203_166074.html.

²⁸¹ *Id.*

²⁸² China to Continue Attracting Foreign Investment Actively: Minister, XINHUA ECON. NEWS (Dec. 3, 2004), available at 2004 WL 91259213.

²⁸³ *Id.*

²⁸⁴ *Foreign Investment in China*, THE U.S.-CHINA BUSINESS COUNCIL (Mar. 15, 2005), available at <http://www.uschina.org/statistics/2005foreigninvestment.html>.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Vice-Premier: Better Environment for Overseas Investors*, CHINA DAILY (July 17, 2003), available at http://www.chinadaily.com.cn/en/doc/2003-07/17/content_245901.htm (China's Vice Premier Wu Yi stressed that a favorable environment is becoming more important as investors, both domestic and foreign, are looking to invest in China, and that China will provide foreign investors with a stable and transparent policy encouraging foreign investment).

restricts, or prohibits foreign investment.²⁸⁸ The Catalogue is an indicator of which industries a foreign investor should take into account while considering whether investing in China will be worthwhile. For example, the Chinese government encourages, among other things, the improvement of low- and medium-yielding fields,²⁸⁹ the exploitation of oil and gas deposits,²⁹⁰ the development and application of new technologies that can increase the recovery factor of crude oil,²⁹¹ and the storage and processing of food, vegetables, fruits, fowl, and livestock products.²⁹² In the United States, foreign investment restrictions exist in certain areas mentioned previously and in areas that are a direct threat to U.S. sovereignty. The president, the secretary of treasury, or CFIUS may investigate any existing or proposed foreign investment company that poses a threat to national security and close it down. China's foreign investment policy does not specifically address threats to national security, but one may infer that, if a similar situation were to arise in China, the Chinese authorities would have the power to close down businesses.

C. *Financing Issues in the United States, Post-9/11, Are Increasingly Scrutinized*

Recently, the Patriot Act has come under intense scrutiny because of allegations that the Act gives the U.S. government too much authority and infringes on civil rights. President Bush has acknowledged that the Act, a genesis of his constitutional authority, is an all-access pass to spy on suspected terrorists, those with purported links to terror, and any American citizens in the interests of national security.²⁹³ Some have termed the aforementioned practice "domestic spying" while the president and the White House have defended its use under the tenets of domestic security and the constitutional power granted to the president.

The NSA constantly eavesdrops on billions of communications around the world, and although domestic spying is illegal, the NSA can obtain

²⁸⁸ *Catalogue for the Guidance of Foreign Investment Industries* (revised 2004), *supra* note 88. (The catalogue is exhaustive and covers, among other industries, farming, forestry, mining, quarrying, manufacturing, metallurgy, production and supply of power, gas and water, public health, sports, and social welfare. In China, an investment may be encouraged, permitted, restricted, or prohibited; however, the Catalogue only discusses encouraged, restricted, and prohibited investments.)

²⁸⁹ *Id.* at I(1).

²⁹⁰ *Id.* at II(2) (fields with low osmosis).

²⁹¹ *Id.* at II(3).

²⁹² *Id.* at III(1)(1).

²⁹³ *Bush Says He Signed NSA Wiretap Orders*, CNN.COM (Dec. 17, 2006), <http://www.cnn.com/2005/POLITICS/12/17/bush.nsa/> (last visited Oct. 9, 2006).

warrants with the permission of a special act called the Foreign Intelligence Surveillance Act.²⁹⁴ Many citizens and legislators are concerned about the continued implementation of the Patriot Act as some of the aforementioned provisions directly impact people's lives. However, irrespective of its criticisms and restrictive provisions, the controversial provisions surrounding the Patriot Act were renewed by the House and Senate and later signed by the president. After the renewal, Attorney General Alberto Gonzales stressed that Patriot Act legislation further "closes dangerous loopholes in our ability to prevent terrorist financing."²⁹⁵ By working with businesses and U.S. citizens, the Patriot Act has significantly advanced the financial war by helping the Treasury Department better track and identify terrorist funds.²⁹⁶ Additionally, Treasury has the power to designate foreign jurisdictions or institutions of "primary money laundering concern" and may take regulatory actions to protect the U.S. financial system, "including requiring U.S. financial institutions to terminate correspondent relationships with the designated entity or jurisdiction."²⁹⁷

Following 9/11, in addition to imposing restrictions on certain foreign investments, the U.S. Treasury Department has (apart from CFIUS) created the Office of Terrorism and Financial Intelligence ("FTI"), which is tasked with safeguarding the financial system against illicit use and combating rogue nations, terrorist facilitators, and money launderers.²⁹⁸ Established on April 28, 2004, FTI is comprised of six offices and networks that cooperate to target financial threats where military action is not appropriate.²⁹⁹ In creating this financial weapon to combat terrorist financing, investment, and other terrorism funding, the U.S. government has further armed itself to curb the financed war on terror. Since 9/11, the TFI has blocked over 1,600 terrorist-related accounts and transactions around the world, frozen the assets of numerous terrorist supporters, and has stopped investment into terrorist activities by denying access to the U.S. financial system to terrorist sponsored vehicles.³⁰⁰

²⁹⁴ *Id.*

²⁹⁵ *House Approves Patriot Act Renewal*, CNN.COM (Mar. 8, 2006), <http://edition.cnn.com/2006/POLITICS/03/07/patriot.act/> (last visited Oct. 9, 2006).

²⁹⁶ John W. Snow, *Statement of Treasury Secretary John W. Snow on Renewal of the U.S. Patriot Act*, U.S. Dept. of Treasury (Mar. 9, 2006), available at <http://www.ustreas.gov/press/releases/js4104.htm> (last visited Oct. 9, 2006).

²⁹⁷ *Id.*

²⁹⁸ U.S. Dept. of the Treasury, *Terrorism and Financial Intelligence* (June 7, 2006), available at <http://www.treas.gov/offices/enforcement/> (last visited Oct. 9, 2006).

²⁹⁹ U.S. Dept. of the Treasury, *Office of Terrorism and Financial Intelligence Fact Sheet*, available at http://www.treas.gov/press/releases/reports/tfi_factsheet.pdf (last visited Oct. 9, 2006).

³⁰⁰ *Id.*

Further, “Section 311 of the Patriot Act authorizes the Treasury to use financial force against foreign jurisdictions, banks, or classes of transactions that are of ‘primary money laundering concern,’ to isolate the designated entity and protect the U.S. financial system from tainted capital running through the entity.”³⁰¹ Since 2003, the Treasury has designated seven banks as being of concern under the Patriot Act, including Banco Delta Asia in Macau, VEF Bank and Multibanka in Latvia, and Inforbank in Belarus.³⁰² Such designations have not only increased the United States’ attentiveness to financial institutions around the world, but also have resulted in other countries focusing more on financial transactions and investments coming in and out of their countries. Thus, the Patriot Act has served as an important tool in identifying financial activities that are detrimental to the safety of the United States.

D. *China Is Continuing to Fulfill Its WTO Commitments*

China has undergone substantial reforms since its inception into the WTO in 2001. According to China’s schedule of commitments, most of the key areas that China was prescribed to open up already are flourishing, including industries such as insurance and banking. Other areas, however, remain problematic, such as intellectual property protections, import and export issues, and compliance with market access requirements.³⁰³ To identify areas in which China has fulfilled its commitments or problem areas that still exist since China’s accession to the WTO, areas of trading rights, intellectual property protections, investment, and China’s financial sector—specifically, banking and investment services—briefly will be analyzed.

The Chinese government was originally scheduled to phase in two key commitments concerning trading rights³⁰⁴ by December 11, 2004: (1) full liberalization of trading rights, i.e., right to import and export; and (2) full liberalization of distribution services. Currently, China is in compliance with all of its basic trading rights commitments and has made such rights available to Chinese enterprises, Sino-foreign JVs, wholly foreign-owned enterprises, and foreign and Chinese individuals.³⁰⁵ The Chinese

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ U.S. Trade Representative, *2005 Report to Congress on China’s WTO Compliance* (Dec. 11, 2005), available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/asset_upload_file293_8580.pdf (last visited Oct. 9, 2006).

³⁰⁴ The concept of “trading rights” encumbers two elements—the right to import and export goods into and out of China. It has nothing to do with the right to trade inside China or to engage in certain types of retail services.

³⁰⁵ U.S. Trade Representative, *supra* note 303, at 11.

government fell behind during the phase-in period and did not make full trading rights available to foreign invested enterprises or JVs where the majority shareholders were foreigners. In order to alleviate this issue, in April 2004, the National People's Congress issued a revised Foreign Trade Law providing for trading rights to be automatically available through a registration process for all domestic and foreign entities as well as individuals, effective on July 1, 2004.³⁰⁶ The new rules implemented by MOFCOM became effective as of the date of implementation. Since then,³⁰⁷ China has maintained full compliance with its WTO commitments regarding trading rights in most areas.

China has a history of intellectual property violations that existed well before China acceded to the WTO. However, by adhering to the Trade Related Aspects of Intellectual Property Rights Agreement ("TRIPS"), China must conform to internationally accepted norms and standards to enforce intellectual property rights held by other countries. Overall, China has rapidly advanced its mechanisms for enforcing its framework of laws and regulations and implementing rules in compliance with TRIPS. Although the mechanisms exist, enforcement is still disappointingly low.³⁰⁸ One trade association representative went so far as to state that "the appropriation of intellectual property in China has occurred on such a massive scale that it has impacted international prices, disrupted supply chains, changed business models, and probably permanently altered the balance between tangible and intangible values contained within commercial products."³⁰⁹ Although intellectual property rights infringement remains rampant, the Chinese government has implemented a series of measures to curb such widespread infringement.³¹⁰

In the area of investment, China has assumed obligations under the Agreement on Trade-Related Investment Measures ("TRIMS"), which

³⁰⁶ *Id.* at 11.

³⁰⁷ *Id.* at 13. The only major outstanding area concerns books, newspapers, and magazines. As a result of accession, trading rights for books, newspapers, and magazines automatically should have been available to the aforementioned categories of individuals and enterprises. However, China continues to wholly reserve this right and supports this stance under Article XX of GATT 1994 (general exception for the protection of the public morals).

³⁰⁸ *Id.* at 63.

³⁰⁹ *Id.*

³¹⁰ *Id.* Such measures are numerous and include: (1) increasing criminal prosecutions for IPR violations, (2) reducing exports of infringed goods by issuing regulations to ensure timely transfer of cases for criminal investigations, (3) improving national police coordination by establishing a coordinating group in the Ministry of Public Security responsible for overall research, planning, and coordination of all IPR criminal enforcement, (4) expanding an ongoing initiative to aggressively counter piracy of movies and audiovisual products, (5) developing measures to rid trade fairs of fake goods, and (6) joining the WIPO Internet-related treaties.

prohibits any investment measures that promote disparate treatment of foreign imports; thus, China is obligated to refrain from setting restrictions on imports.³¹¹ Since accepting TRIMS, the Chinese government has revised its laws and regulations to eliminate any inconsistencies with WTO requirements; however, laws remain that still “encourage” investment or transfer in certain areas, where some foreign companies have expressed that the “encourage” language amounts to actually requiring such investment or transfers.³¹² The Chinese government has manifested its intent to adhere to TRIMS, although in practice certain investment factors that do not conform to the TRIMS standard still are considered by government officials when developing laws applicable to imports and exports, such as export performance and local content.³¹³

China’s commitments in the areas of banking and insurance have developed rapidly. Immediately after accession, the People’s Bank of China (“BOC”) issued regulations governing foreign-funded banks along with rules in conformity with WTO requirements.³¹⁴ However, such rules were extremely tenuous and made it difficult for foreign banks to facilitate offices and branches in China and to expand in China. Following several meetings between WTO members and the BOC, certain restrictions were alleviated and in July 2004, the China Banking Regulatory Commission issued the Implementing Rules for the Administrative Regulations on Foreign-Invested Financial Institutions, removing restrictions on the number of bank branches foreign banks could open in China.³¹⁵ Foreign banks currently are allowed to conduct domestic currency business in twenty-five business cities; there are now over one hundred and seventy foreign banks with branches or representative offices in China.

The China Insurance Regulatory Commission (“CIRC”) has continuously issued regulations regarding the operation of foreign insurance companies in China. Such regulations are in conformity with WTO commitments; however, problems still remain regarding capitalization requirements, transparency, and branching.³¹⁶ Certain regulatory requirements are hard to define—not only on paper but even after consultations with CIRC officials. Because the regulations may not be clear and are subject to multiple interpretations, certain businesses have been

³¹¹ *Id.* at 49.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* at 76.

³¹⁵ *Id.*

³¹⁶ *Id.* at 78.

granted the right to establish multiple branches or representative offices at a government official's discretion. However, the foreign-invested insurance industry continues to grow, and the CIRC has lifted all geographical restrictions on life insurers.³¹⁷

From the brief analysis above, it is clear that China has made advances regarding its WTO commitments. It is also clear that there are areas in which it may take weeks, months, and possibly years for China to fully conform to its previously imposed obligations. Overall, the future of foreign investment in these and other areas following China's WTO accession continues to look increasingly promising, and investment undoubtedly will continue to flow in from abroad.

E. *The Future of Foreign Investment in China and America*

How will foreign investment in China and the United States adjust in the future? Will policies change to permit or restrict more or less foreign investment? The Chinese government continues to actively ease restrictions on previously restricted areas and has implemented legislation that attracts foreign investment from most areas, though a few areas are still subject to tight regulation.³¹⁸ In 2004, the Chinese government adjusted its policies to permit provincial governments to approve "encouraged" or "permitted" projects worth under \$100 million—\$70 million higher than the previous limit.³¹⁹ In July 2004, the Chinese government reduced the paperwork required, dispensing with the indispensable project feasibility report. It required that the applications contain basic information about the proposed project.³²⁰ The NDRC, the authority responsible for approving large-scale foreign investment, promised that such ratification measures would promote a more favorable environment for foreign investment in China.³²¹ If the Chinese government continues to delegate responsibility to provincial

³¹⁷ *Id.* at 79.

³¹⁸ *China Set to Restrict Foreign Property Investment*, CHINA DAILY (July 17, 2006), available at http://www.chinadaily.com.cn/china/2006-07/17/content_642827.htm (last visited Oct. 9, 2006). Chinese authorities created a policy to restrict foreign investment in the real estate market in response to concerns about excessive foreign investment in this sector.

³¹⁹ Zhi Ming, *Making Foreign Investment Easier*, CHINA DAILY (Dec. 1, 2004), available at <http://www.china.org.cn/english/BAT/113628.htm>.

³²⁰ *Id.*

³²¹ *Procedures for Overseas Investment Simplified*, HC366 WATER (Nov. 30, 2004), available at <http://www.water.hc360.com/english/jty/news/985.htm>. See also *China Simplifies Investment Procedures*, ASIA PULSE (Nov. 30, 2004), available at 2004 WL 99285647; *Procedures for Overseas Investment Simplified*, BUSINESS DAILY UPDATE (Nov. 30, 2004), available at 2004 WL 97096868; *China Adjusts Regulations for Approving Foreign-Invested Projects*, XINHUA NEWS Agency (Nov. 30, 2004), available at 2004 WL 91258944.

governments in approving projects concerning higher capital investments, China may see foreign investors flocking to its cities to establish businesses. Since foreign investment is expected to reach \$4 trillion by 2020, a decline in foreign investment in China in the near future seems unlikely.

Problems have arisen regarding foreign investment in China, and some countries feel some of the regulations are contradictory or too arbitrary. In practice, the government does abide by the rules. However, China's foreign investment laws are bureaucratic, enabling legislation that simply explains the required procedure for obtaining approval to formulate a joint venture or establish a wholly foreign-owned entity.³²² In other words, the laws explain the minimum requirements of a JV agreement and the proper authorities to contact. However, they neglect to comprehensively explain the required approval process or the existence of the opportunity to modify a submission to satisfy the sometimes complicated terrain of China's system.³²³ Investors take on substantial risks investing in China, as clear-cut solutions do not exist for solving problems such as labor-management issues.³²⁴ The Japanese and South Korean governments have requested that China fix these problems by upgrading legislation. Specifically, Japan and South Korea have argued that the absence of clear-cut guidelines regarding these situations can create a serious impediment to economic cooperation.³²⁵ These countries' interests are at stake, specifically Japan's, with a contribution of approximately \$46.1 billion through 31,000 Japanese-funded projects in China through foreign investment.³²⁶ To ameliorate this problem, all three governments have agreed to conduct deeper discussions on these issues in order to achieve appropriate solutions.

Since 9/11, the U.S. government has become more stringent regarding foreign investors. Exon-Florio permits the president, through CFIUS, to stop foreign investment that is detrimental to national security. The United States had an FDI of \$1,351 billion between 1980 and 2002, while China transformed its FDI from \$25 billion in 1990 to \$448 billion in 2002.³²⁷ In fact, foreign investment has, in some areas, increased drastically over the

³²² Email from Owen D. Nee, managing partner, Coudert Brothers LLP, Shanghai office, to Jordan Brandt, law student, California Western School of Law (Dec. 6, 2004, 08:47:03 PST) (on file with author).

³²³ *Id.*

³²⁴ *China Should Upgrade Its Legislation on Trade*, ASAHI EVENING NEWS (Dec. 1, 2004), available at <http://www.asahi.com/english/opinion/TKY200412010117.html>.

³²⁵ *Id.*

³²⁶ *Japan a Major Source of Foreign Investment in China*, ASIA PULSE (Dec. 6, 2004), available at 2004 WL 99286603.

³²⁷ U.N. Conference on Trade and Dev., *World Investment Report 2003, FDI Policies for Development: National and International Perspectives*, Annex table B.3 (July 2003), available at <http://www.globalpolicy.org/soecon/ffd/fdi/2003/wirlight.pdf> (last visited Jan. 8, 2007).

past few years. In 2003, foreign investors invested \$536 billion in U.S. securities, the highest number to date.³²⁸ This is in contrast to the belief that the U.S. market for foreign investment would dramatically decrease, due to factors such as the Iraqi war and the war on terrorism. In 2003, the U.S. received foreign investment of approximately \$86.6 billion, making it the largest recipient of foreign investment.³²⁹

However, the United States still retains an enormous budget deficit of around \$8.5 trillion dollars that increases daily.³³⁰ This, combined with the fact that the United States continues to outsource jobs, creates an economic windfall domestically. However, foreign investment has not stopped, even with these domestic economic issues. Foreign official acquisitions in the United States reached a record \$1,440.1 billion in 2004, an increase in roughly \$551.0 billion from 2003.³³¹ This is due again to the increase in net foreign official purchases of U.S. Treasury securities and U.S. corporate bonds.^{332, 333} These facts tend to show that FDI in the United States is similar to the FDI of China and is not slowing any time soon. The outlook for U.S. foreign investment is bright. As of December 9, 2004, the U.S. dollar continues to hold its own against primary rival currencies, causing some to

³²⁸ U.S. Dept. of Commerce, *News Release: U.S. International Investment Position at Yearend, 2003*, Bureau of Econ. Analysis (June 30, 2004), available at <http://bea.gov/bea/newsrelarchive/2004/intinv03.htm> (last visited Jan. 8, 2007).

³²⁹ *China Uses US\$53.5 BLN in FDI in 2003, Up 1.44% On-Yr*, ASIA PULSE (Feb. 13, 2004), available at 2004 WL 68558130.

³³⁰ *The Debt to the Penny*, Bureau of the Public Debt (Dec. 8, 2004), available at <http://www.publicdebt.treas.gov/opd/opdpenny.htm> (last visited Oct. 9, 2006).

³³¹ Christopher A. Gohrband & Elena L. Nguyen, *U.S. Net International Investment Position at Yearend, 2004*, Bureau of Econ. Analysis BEA 05-31 (June 30, 2005), available at <http://bea.gov/bea/newsrelarchive/2005/intinv04.htm> (last visited Oct. 9, 2006).

³³² *Id.* According to statistics from the Bureau of Economic Analysis, at year-end 2004, foreign-owned assets in the United States from 2003 to 2004 increased from \$9,797,689 million to \$11,537,015 million (with direct investment at current cost; \$10,669,008 million to \$12,515,028 million with direct investment at market value); foreign holdings of U.S. securities other than U.S. Treasury securities increased from \$3,408,113 million to \$3,987,797 million; foreign official assets increased from \$1,567,124 million to \$1,981,992 million; and U.S. currency held by foreigners increased from \$317,908 million to \$332,735 million, to give some examples. *Id.* For a table of the amount of assets owned by foreigners in the United States from 2002-3, see Table 1, International Investment Position of the United States at Yearend, 2003 and 2004, available at <http://bea.gov/bea/newsrelarchive/2005/intinv04.xls> (last visited Oct. 9, 2006).

³³³ *Id.* at Direct investment in the United States: U.S. currency (for a table of the amount of assets owned by foreigners in the United States from 2002-3, see Table 1, International Investment Position of the United States at Yearend, 2003 and 2004, available at <http://bea.gov/bea/newsrelarchive/2005/intinv04.xls>) (last visited Oct. 9, 2006).

believe that, although the United States is facing huge budget and trade deficits, the prospects for future growth looks good.³³⁴

With the passing of China's new law pertaining to mergers and acquisitions by foreign investors, it should be noted that the Chinese government may be relaxing certain restrictions on foreign investment—for example, permitting share swapping—while at the same time suiting up to increase restrictions in certain areas of M&A. The implementation of a share-swapping system may be seen as an attempt to further open China's markets to international competition: “share swapping can efficiently reduce costs of mergers and acquisitions. If it's [M&A by foreign investors are] done all in cash, foreign companies will face big financial burdens. The new regulation will improve China's investment environment.”³³⁵

Some view the share-swapping system as an improvement in China's foreign investment regime, noting that the inclusion of such a system will increase China's conformity with international practice.³³⁶ This system should allow for greater access by foreign investors as China's market further realizes its potential by competing in the international realm.

In contrast, MOFCOM has conferred upon itself strong discretionary powers to restrict investment from occurring where it deems such investment to be a “danger to China's national economic security,” infringing on “important local brand names” or where the M&A results in foreign investors' control of domestic enterprises in key industries.³³⁷ However, the Chinese government is not entirely transparent about what constitutes a transaction detrimental to economic security. Therefore, MOFCOM confers a heavy burden on the parties involved in transactions to make such determinations.³³⁸ The inclusion of mandatory anti-monopoly provisions “may reflect heightened anxiety in China about the escalating

³³⁴ *Slumping Dollar Rallies; Analysts Say the Buck's Rise Against the Yen and Euro Reflects a Healthier Outlook for the Economy than for Japan and Europe*, L.A. TIMES (Dec. 9, 2004), available at 2004 WL 55954432.

³³⁵ Economic and Commercial Section, PRC in Gothenburg, *China Revises Regulations on Foreign Mergers and Acquisitions* (Aug. 25, 2006), available at <http://gothenburg2.mofcom.gov.cn/aarticle/chinanews/200608/20060802977593.html>.

³³⁶ *New M&A Rules Met with Mixed Reactions*, THE STANDARD (Aug. 10, 2006), available at http://www.thestandard.com.hk/news_detail.asp?pp_cat=22&art_id=24749&sid=9249466&con_type=1 (last visited Oct. 9, 2006).

³³⁷ *PRC Mainland: New Rules*, *supra* note 151.

³³⁸ *China's New M&A Regulations*, J. BUS. LAW SOC. (Oct. 17, 2006), available at http://iblsjournal.typepad.com/illinois_business_law_soc/2006/10/chinas_new_ma_r.html (last visited Mar. 5, 2007).

engagement in the market of both foreign multinationals and private equity investors.”³³⁹

The introduction of the new measures may be both a blessing in disguise and a blatant hamper on foreign investors' acquisition of domestic enterprises. Through the anti-monopoly provisions, the government may be attempting to initiate a “dry-run” of how its introduction of anti-monopoly provisions would operate in its regulatory and legislative system. Additionally, MOFCOM can deem any investment “detrimental to the national security of the economy” and stop the investment from continuing. Yet with the introduction of share swapping, the Chinese government may be signaling that it is attempting to relax certain methods of payment for stakes in domestic Chinese companies, thereby giving foreign investors more options in investing in the Chinese domestic market.

V. CONCLUSION

A compelling argument for the imposition of restrictions on foreign investment in the United States is the belief that foreign nationals or corporations will exert undue influence on U.S. society. Notwithstanding the fact that American retail stores contain products produced in foreign countries, those who wish to restrict foreign investment should look to the benefits of encouraging foreign investment. When foreign companies choose to invest in U.S. businesses, they bring with them better technology and sometimes a more efficient use of resources. In producing a more efficient and technologically adept product, Americans as consumers are rewarded with an improved product, usually at a lower cost.³⁴⁰ Although this may not always be true, a majority of foreign investors investing in U.S. businesses invest with hopes for improvement, innovation, and advancement in technology, to substantially profit. To achieve these goals, a foreign investor considers it more desirable to see his product succeed, rather than fail.

Foreign investment in both China and the United States continues to increase rapidly. In the long run, China's GDP will continue to increase based on foreign investment, resulting in substantial economical gains.

³³⁹ Shu-Ching Jean Chen, *China Issues New M&A Rules Requiring Anti-Monopoly Probes*, IN-HOUSE COUNSEL ONLINE (Aug. 14, 2006), available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1155303327794> (last visited Oct. 9, 2006).

³⁴⁰ Cecil E. Bohanon & T. Normal Van Cott, *Foreign Investment Helps America*, Foundation for Econ. Educ., Inc., Vol. 41, No. 3 (1991), available at <http://www.libertyhaven.com/personalfreedomissues/freespeechorcivilliberties/foreignhelps.html> (last visited Oct. 9, 2006) (for a scenario of foreign investment in the United States, see <http://www.libertyhaven.com/personalfreedomissues/freespeechorcivilliberties/foreignhelps.html>).

Foreigners will continue to flock to China with capital, seeking to benefit themselves, while China will reap the benefits of the capital, advancement, and prestige. Although some believe the amount of foreign investment in China is excessive and will yield poor results, foreign investment has in fact led to a greater competitive capability in local industries.³⁴¹ The United States also will continue to flourish and receive foreign direct investment, although perhaps not on the same level as China.

Foreigners' rights to invest in China were recently curbed by China's new M&A regulations on foreign investment.³⁴² The introduction of China's anti-monopoly provisions and MOFCOM's discretionary powers along with the inclusion of the share-swapping regulations will heavily affect the flow of foreign investment into China in the near future. Foreign investors will be afforded new financing options and will have more opportunities to invest in China. As one attorney stated, the process of applying for the establishment of a foreign-invested enterprise "used to be much more arduous and many sectors of the economy were closed, but post-WTO, it is definitely getting easier [to access the economic market through foreign investment]."³⁴³ The United States already limits who can invest in certain areas of industry, and these restrictions will probably become only tighter with time.

³⁴¹ *MOC Refutes Too Much Foreign Investment in China*, SINOCAST CHINA BUSINESS DAILY NEWS, Nov. 24, 2004, available at 2004 WL 87984548.

³⁴² See *Experts: Reform Won't Shrink*, CHINA DAILY, Dec. 26, 2006, available at <http://www.china.org.cn/english/BAT/193883.htm>. In addition to the M&A Regulations, the Standing Committee of the National People's Congress (NPC), during their 25th session on December 24, 2006, tabled a draft "Enterprise Income Tax Law," through which the tax rate for both foreign and domestic companies would be unified at corporate income tax rates of 25 percent. Currently, China's tax system provides for a general corporate income tax rate of 33 percent for domestic companies and a preferential rate of 24 or 15 percent for foreign invested companies. The revised tax system will level the playing field for domestic enterprises and FIEs and will be a relief to domestic enterprises and FIEs currently conducting services or distribution operations in China originally not eligible for the FIE reduced tax rate. Experts in China believe that the tax unification will not result in big decreases in foreign investment but rather, will optimize China's foreign investment environment and that the preferable tax regime is just one of the factors that attract foreign investors to China. It is expected that the new income tax rate will take effect in 2008 if the bill is adopted by the NPC in March 2007 but the new draft law may still change before being adopted.

³⁴³ Email from Owen D. Nee, *supra* note 322.