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REVIEW ARTICLE

Rungen Qiu

Retrospection and Perspective of Foreign Investment Legislation in China (1979–2009)

Abstract Thirty years have passed for foreign investment legislation in China since the promulgation of the first foreign investment law in 1979. The remarkable achievements in the past 30 years under the China's reform and open policy have benefited from introduction of foreign investment to a large extent as the result of foreign investment legislation and its changes. This paper starts with a retrospection of foreign investment legislation in China since 1979, followed by a discussion on the features and motives of changes in such legislation, and makes conclusions on the experience and lessons from the legislation, which will be conducive to further improvement of foreign investment legislation in China.

Keywords China's foreign investment law, foreign investment, investment legislation

As of September 2009, there were 676,148 foreign-invested enterprises in China and the total actual foreign investment was up to USD 921.085 billion.[1] The introduction of foreign investment, its increasing expansion and the increasing improvement of its quality were closely related to the progress of China's foreign investment legislation in the past 30 years.

[1] See http://www.fdi.gov.cn/pub/FDI/wztj/wstztj/lywztj/t2008112199467.htm (last visited November 12, 2009).

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Rungen Qiu (✉)
School of Law, Nanchang University, Nanchang 330031, China
E-mail:qrg666666@126.com

1 History of Foreign Investment Legislation in the Past 30 Years

China enacted its first foreign investment law, *Law on Sino-Foreign Equity Joint Venture* in July 1, 1979 after the 3rd Plenary Session of the 11th CPC Central Committee when the decision on reform and opening up was made. Under authorization, the State Council promulgated the *Regulations on Implementation of Sino-Foreign Equity Joint Venture Law* in 1983. Three years later, in response to the needs of opening, China enacted *Law on Foreign Capital Enterprises*, and revised the foregoing regulations the same year and the next year respectively. In 1988, China regulated the form of investment by joint ventures in Guangdong and Fujian provinces and enacted *Law on Sino-Foreign Contractual Joint Ventures*. At the beginning of the 1990s, in order to eliminate the doubt of foreign investors that whether China would persist in the reform and open policy, China further encouraged foreign investors to participate in China's modernization. Therefore, in 1990, *Law on Sino-Foreign Contractual Joint Ventures* was revised and *Detailed Rules for Implementation of Sino-Foreign Invested Enterprise Law* was promulgated. The State Council also enacted *Regulations on Exploitation of on Shore Petroleum Resources in Cooperation with Foreign Enterprises*, which was revised in 2001 and 2007 respectively.

Upon promulgation of the Company Law of China in 1993, Chinese domestic companies were developing rapidly. For attracting more foreign investments, China made a breakthrough in the legal forms of enterprises, instead of their ownership. Subsequent to *Interim Guiding Provisions on the Directions of Foreign Investment* and *Catalogue for Guidance of Foreign Investment Industries of 1995*, China promulgated *Provisional Regulations of the Ministry of Foreign Trade and Economic Cooperation on Certain Issues Concerning the Establishment of Companies Limited by Shares with Foreign Investment, Provisional Regulations of the Ministry of Foreign Trade and Economic Cooperation on the Establishment of Investment Companies by Foreign Investors*, *Several Provisions on Foreign Investment in the Construction Industry* and *Detailed Rules of the Law on Implementation of Sino-Foreign Contractual Joint Venture Law.* In 1996, the establishments of Sino-foreign joint ventures were allowed in Shanghai as pilot project, and the *Interim Procedures for the Experiment in the Establishment of Chinese-Foreign Joint Venture Foreign Trade Companies* was promulgated. In the 21st century, China's economy is increasingly integrated with economic globalization, and to show its sincerity and determination to accession to WTO, China made significant amendments in its foreign investment laws and regulations such as the amendments of

Sino-Foreign *Capital Enterprises Law* in 2000, and *Sino-Foreign Equity Joint Venture Law* and *Sino-Foreign Contractual Joint Venture Law* in 2001. The main purpose of such wide range of modifications in China's foreign investment laws was to abolish the provisions in China's foreign investment law that were inconsistent with those of the WTO, and these amendments were also signals to the other WTO members that China would honor its commitments. After the accession to WTO on December 11, 2001, a series of rules and regulations have been promulgated in succession. In 2002, many rules and regulations concerning foreign investments in China were passed, including *Interim Provisions on the Administration of Foreign-Funded Rare Earth Industry*, *Provisions on the Administration of Foreign Investment in Construction of Enterprises*, *Trial Measures for the Administration of Securities Investment outside the Territory of China by Qualified Domestic Institutional Investors*, *Rules on the Establishment of Foreign-Shared Fund Management Companies*, the *Rules on the Establishment of Securities Firms with Foreign Equity Participation*, *Administration of Foreign-Funded Insurance Companies Regulations*, *Regulations in Governing Financial Institutions with Foreign Capital,* and *Measures for Foreign Investment in the International Freight Forwarding Industry*. China promulgated *Interim Provisions on the Takeover of Domestic Enterprises by Foreign Investors* in 2003, *Measures for the Administration on Foreign Investment in Commercial Fields*, *Provisions on the Administration of Foreign-Funded Advertising Enterprises* and *Interim Provisions on the Establishment of Foreign-Invested Conference and Exhibition Companies* in 2004.

Upon promulgation of the new Company Law in 2005, China also promulgated *Measures for Strategic Investment by Foreign Investors upon Listed Companies* and *Measures for the Administration of Foreign Investment in the Leasing Industry* in the same year. In 2006, *Interim Provisions on the Takeover of Domestic Enterprises by Foreign Investors*, and *Implementation Opinions on Some Issues Concerning Law Application for the Administration of Examination and Approval and Registration of Foreign-Funded Companies*, and *Approval and Registration of Foreign-Invested Companies* were enacted. All these laws, rules and regulations constitute a unified system of foreign investment laws with three basic foreign investment laws as the backbone.

It has been 30 years since China promulgated its first foreign investment law in 1979, which initiated China's foreign investment legislation. From the past 30-year progress China's foreign investment legal system was formed together with China's economic and social development during these years. The features and motives of these legislations can be drawn out of them.

2 Features of Foreign Investment Legislation in the Past 30 Years

Since the most important element of China's reform and open policy is to open to foreign investments, the 30-year reform and opening up is also the 30-year history of foreign investment legislations. The revisions and amendments of China's foreign investment laws and the continuous increase of laws and regulations in this aspect manifested three main features of the legislation on China's foreign investments.

2.1 Increasingly in Opening to Foreign Investment

After the promulgation of the first foreign investment law, *Sino-Foreign Equity Joint Venture Law of 1979*, China's foreign investment legislation has experienced three stages. The first stage is from 1979 to 1992, the second is from 1993 to 2004, and the third is after 2005.

At the first stage, China's foreign investment legislation indicated an obvious feature of being planned. It is because China's economic system had undergone three stages before 1992, i.e., "planned economy as the main body supplemented by market regulation" from 1979 to 1984; "planned commodity economy" from 1984 to 1987; and "market adjusted by the state with enterprises under market guidance" from 1987 to 1992, when the economy was virtually in planned system, which in turn rendered the planned feature of China's foreign investment laws. Though the three basic laws in regard to foreign investment were expressly named then, there was actually no provision with respect to the entry of foreign investments in Sino-Foreign Equity Joint Venture Law in its 16 articles, Sino-Foreign Capital Enterprise Law in 24 articles or Sino-Foreign Contractual Joint Venture Law in 27 articles, while the promulgation of detailed rules of the entry of foreign investments were authorized to the State Council. By carefully reading those detailed rules, it is apparent that every project of foreign investment was in strict accordance with China's policy in planned economy system. Specifically, under Article 8 of the *Detailed Rules on Implementation of Sino-Foreign Equity Joint Venture Law of 1983* and Article 8 of the *Detailed Rules on Implementation of Sino-Foreign Capital Enterprises Law of 1990*, the approval by the competent authority was required to the establishment of a Sino-foreign equity joint venture or a wholly foreign-owned enterprise. Article 6 of the *Detailed Rules on Implementation of Sino-Foreign Contractual Joint*

Venture Law of 1995 also has the similar requirement.[2] The competent departments for the approval included the Ministry of Foreign Economic Trade (reformed as the Ministry of Foreign Trade and Economic Cooperation in 1993 and the Ministry of Commerce in 2003) and the provincial governments, governments of autonomous regions, municipalities under the Central Government, separately planning cities and special economic zones authorized by the State Council as well as the relevant departments under the State Council. Therefore, the strength of the introduction of foreign investments was controlled by state functional departments and their delegated agencies according to specific situations, while the plans of introduction of foreign investment of those departments and agencies were subject to the economic development plans made by the National Planning Commission and the planning commissions of local governments. Thus, the introduction of foreign investments only remained as the legal conceptions, while the specific strength was entirely subject to economic plans.

At the second stage, China's foreign investment laws were manifested as half planned and half market-oriented. The statements Deng Xiaoping made during his inspection to southern China in the spring of 1992 set the tune for China to take the road of developing the socialist market economy, which was officially adopted as the goal of China's economic system reform at the 14th National Congress of the Communist Party of China in October 1992. Consequently, the Company Law was soon promulgated in 1993, whose purpose was to cultivate market players because they were the foundation of establishing the socialist market economy. Foreign investments that entered into China's market in the form of equity joint ventures, contractual joint ventures or wholly foreign-owned enterprises were governed by the Company Law. The strength in execution of the open policy to foreign investments were gradually increased according to the legal authorization in the form of several foreign investment laws, rules and regulations, such as issuances of *Provisional Regulations of the Ministry of*

[2] The establishment of a contractual joint venture is subject to the examination and approval of the Ministry of Foreign Trade and Economic Cooperation or the department and the local government authorized by the State Council. The establishment of an equity joint venture is subject to the examination and approval of the department or the local government authorized by the State Council in any of the following circumstances: (1) Where the total investment is within the investment size subject to the examination and approval of the department or the local government authorized by the State Council as provided by the State Council; (2) where the investment is based on self-raised funds and does not request the state to balance any construction and production condition; (3) where the export quota and license issued by the competent authority are not required for export of products, or such documents are required but the consent by the competent authority has been obtained before submission of the project proposals; and (4) other circumstances as provided in laws and administrative regulations where the investment shall be subject to the examination and approval of the department or the local government as authorized by the State Council.

Foreign Trade and Economic Cooperation on Certain Issues Concerning the Establishment of Companies Limited by Shares with Foreign Investment, *Provisional Regulations of the Ministry of Foreign Trade and Economic Cooperation on the Establishment of Investment Companies by Foreign Investors*, *Several Provisions on Foreign Investment in the Construction Industry* in 1995, and *Interim Procedures for the Experiment in the Establishment of Sino-Foreign Joint Venture Foreign Trade Companies* in 1996. Apparently, certain changes occurred in the legal form of foreign-invested enterprises due to the implement of the Company Law, which allowed foreign investments to be realized in form of both company and non-company, such as wholly foreign-owned enterprises, equity joint ventures and contractual joint ventures. The tailoring to the Company Law indicated that the market factors have been considered by legislators. Another conspicuous change was two newly stipulated legal documents—the *Interim Guiding Provisions on the Direction of Foreign Investment* and the *Catalogue for Guidance of Foreign Investment Industries*, which broke through the project-based examination and approval system where the approvals of investment projects were completely relied on the understanding of the functional departments or agencies, and which began to guide foreign investments to some extent as market-orientated in China's market in accordance with the national strategies. In other words, the role of market was considered and emphasized. In particular, the amendments to foreign investment laws around 2001 put great emphasis on the fairness of foreign investments entering into China's market. All the trade-related investment laws, rules and regulations that might contain market discriminations against foreign investments were abolished or replaced, which highlighted the nature of market orientation in foreign investment laws. Undoubtedly, the planned feature of foreign investment laws cannot be denied, since the entry of foreign-invested projects was still under the control of the examination and approval authorities. It was indicated by the reform of the Ministry (Department) of Foreign Economic Trade to be the Ministry (Department) of Foreign Trade and Economic Cooperation, as the powers of the examination and approval authorities were expanded with the growth of the market force. Nonetheless, the approvals of foreign-invested projects by the examination and approval authorities should consist with the plans made by the National Planning Commission and local planning commissions. Consequently, the nature of foreign investment legislations during this period was half plan-based and half market-oriented.

At the third stage, China's foreign investment legislation showed the quasi-market nature since the total reliance on foreign investment in the market

has not completely formed and the market has to be improved,[3] while the market has become a significant force to the introduction of foreign investments and the role of foreign investment laws is to fully mobilize the market and to guide foreign investment. On the other hand, the planned factor has become invisible rather than apparent, but not disappeared. Because the authority at national level in charge of examination and approval of foreign investment projects in China's market was reformed as the Ministry of Commerce in 2003, it integrated functions of the National Planning Commission and the State Foreign Trade and Economic Commission. Therefore, the examinations and approvals of the projects were basically determined by the Ministry of Commerce according to the needs in the market. With the basic completion of reform converting state-owned enterprises to stockholding modern companies, the autonomy in private law was taken as the principle in the Company Law when it was revised in October 2005, which led to the promulgation of *Measures for Strategic Investment by Foreign Investors upon Listed Companies* and *Interim Provisions on the Takeover of Domestic Enterprises by Foreign Investors* later in 2005 and *Implementation Opinions on Some Issues Concerning Law Application for the Administration of Examination and Approval and Registration of Foreign-Funded Companies* in April 2006. According to these new provisions, foreign investments may enter into China's capital market by either equity swap or direct investment, which may be one cause of the decreased number of newly established enterprises with foreign investments and the corresponding increased quota of foreign investment in recent years.[4] Thus, foreign investment legislation

[3] The Decision of the CPC Central Committee on Several Issues Concerning Improvement of the Socialistic Market Economy System was passed at the Third Plenary Session of the 16th CPC Central Committee in October 2003, which indicated that a sound market had not been formed yet.

[4] From January to September 2009, newly established foreign-invested enterprises totaled 16,348 in China, down 21.41% year-on-year, and the actually utilized foreign investment was USD 63.766 billion, down 14.26% year-on-year. In 2008, newly established foreign-invested enterprises totaled 27,514 in China, a decrease of 27.35% year-on-year, and the actually utilized foreign investment amounted to USD 92.395 billion, an increase of 23.58% year-on-year. The total data (inclusive of banking and securities industries) related to FDI in China in 2007 were as follows: Newly established foreign invested enterprises totaled 37,888, down 8.69% year-on-year, and the actually utilized foreign investment reached USD 82.6 billion, an increase of 13.8% year-on-year, among which: From January to December, newly established foreign-invested enterprises engaged in the non-financial sector were 37,871, a decrease of 8.69% year-on-year, and the actually utilized foreign investment reached USD 74.768 billion, an increase of 13.59% year-on-year. The total data (inclusive of banking, insurance and securities industries) related to FDI in China in 2006 were as follows: Newly established foreign-invested enterprises totaled 41,485, down 5.76% year-on-year, and the actually utilized foreign investment was USD 69.468 billion, down 4.06% year-on-year, among which: From January to December, newly established foreign-invested enterprises engaged in the non-financial sector (exclusive of banking, insurance and securities) were 41,473, a decrease of 5.75% year-on-year, and the actually utilized foreign investment reached USD 63.021 billion, an increase of 4.47% year-on-year. See http://www.mofcom.gov.cn/static/column/tongjiziliao/v.htm1 (last visited November 12, 2009)

after 2005 demonstrated a quasi-market nature.

In short, the feature of China's foreign investment legislations has changed from completely planned to semi-planned and semi-market-oriented, and then to quasi-market-oriented, which indicates the increasing strength of China in opening to foreign investments.

2.2 Promoting the Forms of Foreign-Invested Enterprises

According to the initial provisions of China's foreign investment laws, the measures for foreign investors to enter China was to establish equity or contractual joint ventures based on the ownership of their Chinese partners, whereby foreign companies, enterprises and other economic organizations or individuals might cooperate with Chinese companies, enterprises or other economic organizations in equity or contractual joint ventures[5], except for wholly foreign-owned enterprises. This meant that foreign investors had to pay close attention to the ownership nature of their Chinese partners when entering into China at that time, and since it seemed that the state-owned enterprises were favored by Chinese government and it was easier to obtain the approval from the competent authorities to cooperate with them, it became a standard for foreign investors to cooperate with state-owned enterprise in China. The limited cooperation between state-owned Chinese partners and foreign investors in equity or contractual joint ventures constituted the low-level form of foreign enterprises in China at the beginning.

However, with the initiation of China's foreign investment laws guiding the direction of foreign investments by investment catalogues and the Company Law of 1993, the examination by the functional departments did not only concentrate on the ownership nature of Chinese enterprises cooperating with foreign investors, but also focus on the cultivation of the market. As a result, the choices of partners by foreign investors were widely extended. Especially, the *Sole Proprietorship Enterprise Law of 1999* allowed individuals to evade the restrictions set in the provisions of *Sino-Foreign Equity Joint Venture Law* and *Sino-Foreign Contractual Joint Venture Law* to establish a joint venture with foreign partners in form of sole proprietorship enterprise. Furthermore, the *Partnership Enterprise Law of 1997* allowed foreign investors to establish enterprises in form of partnership and other forms of liabilities. Thus, the forms of foreign-invested enterprises in this period was not highly sensitive to the ownership nature of their Chinese partners, but attached more importance to the industrial nature that foreign investors made an investment according to the industrial guidance in China's foreign investment law at this time. In a

[5] See art. 1 of the Sino-Foreign Equity Joint Venture Law and art. 1 of the Sino-Foreign Contractual Joint Venture Law.

conclusion, the legal form of foreign-invested enterprises followed the industrial guidance when entering into China. Due to the easier policies and more choices of legal forms and Chinese partners for foreign investors, this was deemed as a higher level form of foreign-invested enterprises.

The amendments to the Company Law and the Partnership Company Law have created various forms of enterprises in China, including the limited liability company, the company limited by shares, the limited partnership, the general partnership and the sole proprietorship enterprise. Therefore, all enterprises previously in other forms of ownership have been restructured into one of the foregoing forms of enterprises, which granted new status as market players to various economic organizations, and even the individuals were able to be market players as sole proprietorship enterprise or partnership enterprise in accordance with the Sole Proprietorship Enterprise Law. As the Bankruptcy Law was promulgated, no market player can exist permanently in the market unless the players operate and manage wisely. It was possible at this time that foreign investors could have opportunity to choose the most suitable form of enterprises by establishing either equity or contractual joint ventures or wholly foreign-owned enterprises or partnership enterprises when entering into China's market since the rules of survival in this market can be easily accessed and fully understood. Thus, the entry of foreign investments into China reached high-level forms of enterprises featured by the multi-choice forms of enterprises' organization.

The improving evolution in forms of foreign investment enterprises indicates the increasing strength in the execution of open policy in China's market, and foreign investment laws are powerful motivations for these positive changes.

2.3 Wider Scope of Opening to Foreign Investments

Though foreign investment laws set no restriction on regions and industries for the entry of foreign investments, the examination and approval procedures are required when foreign investments enter China. Following the reform and open policy, China established the framework of "special economic zones in the national coastal areas," which inevitably had effect on the examination and approval in the open regions and industries. In addition, China started to introduce foreign investments mainly with preferential tax treatment. For example, *Income Tax Law Concerning Sino-Foreign Equity Joint Ventures of 1980* provided that "the enterprise income tax may be exempted for one year since the joint-venture enterprise earns profits and reduced by half for the next two years," which was later revised as "the enterprise income tax may be exempted for two years since the joint-venture enterprise earns profits and

be reduced by half for the next three years."[6] However, the preferential tax treatment varied in different regions and industries according to the tax law. The enterprise income tax rate for the enterprises located in special economic zones such as Shenzhen, Zhuhai and Shantou in Guangdong Province and Xiamen in Fujian Province were 15%.[7] In Hainan Province, the enterprises engaged in development and operation of infrastructure including harbor, port, airport, highway, railway, power station, mine and water conservancy and those engaged in agricultural development and operation might enjoy the policy that the enterprise income tax might be exempted for five years after the enterprise earned profits and reduced by half for the next five years. For the enterprises engaged in productive industries including transportation industry, their enterprise income tax might be exempted for two year and reduced by half for the next three years; and for the enterprises engaged in the service industry, their enterprise income tax might be exempted for one year and reduced by half for the next two years.[8] Foreign invested enterprises engaged in the experimental high-technology industry development zones in Beijing might enjoy enterprise income tax preference of exemption for three years and reduction by half for the next three years.[9] For Taiwan-invested enterprises located in the Taiwan Investment Zone in Xiamen, their enterprise income tax rates might be reduced to 15%. For Taiwan-invested enterprises located in the Taiwan Investment Zone in Fuzhou, the enterprise income tax rate might be reduced to 15%. But the enterprise income tax rate might be reduced to 24% for those engaged in non-productive industries.[10] The *Income Tax Law Concerning Sino-Foreign Equity Joint Ventures* set more preferential tax rates for such painstaking industries as agriculture and forestry[11] and provided that the local preferential tax treatment was subject to the decisions made by the local authorities.[12] It is

[6] See art. 5 of the Income Tax Law Concerning Sino-Foreign Equity Joint Ventures of 1980.
[7] See The Regulations of Special Economic Zones in Guangdong Province released by the Standing Committee of the National People's Congress in 1980 and the Reply of the State Council on the Establishment of Xiamen Special Economic Zone to Fujian Province ([80] Guo Han no. 88).
[8] See The Provisions of the State Council on Encouraging Investment to Develop Hainan Island (Guo Fa [1988] no. 26)
[9] See The Reply of the State Council on the Interim Regulations Concerning the Experimental New Technical Industry Development Zones in Beijing (Guo Han [1988] no. 74).
[10] See The Reply of the State Council on Establishment of Taiwan Investment Zone in Coastal Areas of Fujian Province (Guo Han [1989] no. 35).
[11] See para. 2 of art. 5 of Income Tax Law Concerning Sino-Foreign Equity Joint Ventures of 1980.
[12] Para. 2 of art. 3 of the Detailed Rules on Implementation of the Sino-Foreign Equity Joint Venture Law of 1980 provided that "where any local enterprise income tax is needed to be reduced or exempted due to special reasons, such reduction and exemption shall be subject to the decision of the government of provinces, autonomous regions and municipalities directly under the Central Government in the place where the joint venture is located."

because of the tax preference that foreign investments were centralized in the coastal areas at the beginning, and distributed in a relatively limited scope of industries.

However, at this stage of foreign investment characterized by its industrial-driven semi-planned and semi-market-oriented features, China's tax preference led foreign investments to concentrate on industries whose developments were mainly motivated by the state. The purpose of this industry investment guidance was to lead foreign investments to a wider geographic range in China. With more specific measures, foreign-invested enterprises were encouraged in special economic zones, economic and technology development zones and coastal economic and technology development zones under the industry guidance and the enterprises established in these areas and engaged in qualified industries might enjoy preferential income tax rates at 15% or 24% for a certain period of time. For example, the State Council approved to apply a more preferential tax rate at 15% for the bonded areas, including Waigaoqiao Area of Shanghai, Tianjin Port, Futian District of Shenzhen, Shajiaotou Area of Shenzhen, Dalian, Guangzhou, Xiangyu Area of Xiamen, Zhangjiagang, Haikou, Qingdao, Ningbo, Fuzhou, Shantou, Zhuhai and Yantian District of Shenzhen.[13] Enterprise income tax might be at the rate of 15% for the technology-intensive or knowledge-intensive projects in provincial capital cities and open cities along the Yangtze River, foreign invested projects with over 30 million US dollars investment and a relatively long investment return period, and foreign-invested productive enterprises in energy, transportation and port industries and projects; and the tax rate at 24% can be applied to other foreign-invested productive enterprises.[14] Hence, at this stage, both industry guidance and tax preference policy had made significant effect on expansion of the open areas in China.

When the introduction of foreign investment entered into the quasi-market-oriented period, market has become the major factors for the orientation of foreign investments, and the coverage of national planning has been reduced. There were some comparative advantages such as supporting measures by local governments, flexible accessibility of raw materials, the low labor cost and the local intelligence becoming the principal motive of foreign investments to expand into different areas and regions in China. Moreover, the national policies could also be explained as explicit market signals, which were also important

[13] See Guo Han [1991] no. 26, Guo Han [1991] no. 32, Guo Han [1992] no. 43, Guo Han [1992] no. 44, Guo Han [1992] no. 148, Guo Han [1992] no. 150, Guo Han [1992] no. 159, Guo Han [1992] no. 179, Guo Han [1992] no. 180 and Guo Han [1992] no. 181.

[14] See The Circulars of the State Council Concerning Further Opening Such Cities as Nanning, Chongqing, Huangshi, the Three Gorges of Yangtze River Economic Development Zone and Beijing (Guo Han [1992] no. 62, Guo Han [1992] no. 93, Guo Han [1993] no. 19, Guo Han [1993] no. 92 and Guo Han [1995] no. 16).

market factors considered by foreign investors. For instance, due to China's "rise of the central area" strategy made in 2006 and the provisions on the establishment of demonstration zones for transferring industries into the central and western areas in 2008, a huge sum of foreign investments have swiftly entered into these regions. The multi-level region mode has become the most distinguished feature in this period. At this stage of China's market, the consideration about the prospects of potential market was usually important for investors. Take Jiangxi for example, Jiangxi Province was at the top in the aspect of introduction of foreign investments among the central area of China for three consecutive years since 2005, by taking full advantages of its geographic location, within both the Yangtze Delta and the Pearl River Delta, and by the efforts made by Jiangxi Provincial CPC Committee and Government to correspond to the national industrial transfer policy. With promulgation of the new Tax Law in 2008, though the tax preferences for foreign-invested enterprises were terminated, it did not result in large-scale withdrawal of foreign investments. On the contrary, in the first ten months of 2008, the amount of actual utilized foreign investments increased to $81.096 billion, with 35.06% year-on-year increase rate when compared with $82.658 billion in 2007. This phenomenon indicated that the policy and law regarding tax preference for foreign-invested enterprises is becoming less important than the attraction of foreign investments at market-oriented stage. It can be predicted that when China is nationally open to the world in true sense, the market will be the most important factor, and the foundation of the completely open market is the China's foreign investment laws and their development. In other words, the development of foreign investment laws and the changes in its features have demonstrated an expansion of the scope of introduction of foreign investments in the past 30 years.

The three main features of foreign investment legislation in the past 30 years are not isolated but complementary with each other, which can be a summary of the changes in foreign investment legislation from different perspectives. This summary may help us better understand the approach of foreign investment laws and predict the trend of the legislation in this aspect. Moreover, the changes in foreign investment laws are not rendered manually by the legislators at will, but triggered by the inherent development motives. Those motives are generated by the changes during the process of state economic system reform under the principle of state economic sovereignty.

Reservations were generally held to issues about "market" at the beginning of China's reform and open policy in 1978. In March 1979, Chen Yun proposed a reform mode of China's economic system, which was known as "dominated by the planned economy while supplemented by market regulation." This creative

thought was widely influential and cited by almost all important literatures at that time. With guidance of this thought, the first foreign investment law was promulgated in July 1979. However, since the market was identified as supplementary, the legal form of foreign-invested enterprises was limited to joint ventures, in which Chinese parties must take the dominant position. Because there were only 16 articles in the Sino-Foreign Equity Joint Venture Law, all detailed and practical provisions have to be found in the detailed rules on its implementation drafted by the State Council. In 1983, four years after the establishment of Sino-foreign equity joint ventures as experiment, *Detailed Rules on Implementation of Sino-Foreign Equity Joint Venture Law* was promulgated. The *Decision of the CPC Central Committee on Reforms of the Economic System* was passed at the Third Plenary Session of the 12th CPC Central Committee in October 1984, in which the theory of the socialist planned commodity economy was explicitly presented in China for the first time, and therefore the legislations of foreign investment laws entered into the "planned commodity economy" stage at the same time. Under the effects made by the urgent needs to develop the newly-presented commodity economy, foreign *Capital Enterprises Law* was promulgated in 1986, which encouraged foreign investors to participate in the growth and development of China's commodity economy by making wholly owned investments. Since the planned commodity economy was based on the public-owned economic environment, the degree of opening to foreign investors was still limited to the boundary of planned feature. After the 13th CPC National Congress, when "the system of the socialist planned commodity economy should be one with inherently combined the planning with the market" was proposed in October 1987, China's legislation regarding foreign investments entered into "the stage of the state regulating the market, and the market leading the enterprises." The role of market was increasingly emphasized. The *Sino-Foreign Contractual Joint Venture Law* was promulgated in the following year, and *Sino-Foreign Contractual Joint Venture Law* was revised later in 1990. Subsequently, *Detailed Rules on Implementation of Sino-Foreign Capital Enterprises Law* was passed in 1991. By then, the three basic laws concerning foreign investments were all promulgated and revised, and together constituted the framework of China's foreign investment laws. Due to the restriction in the economic system at that time, "theoretical rather than practical detailed provisions" were set in foreign investment laws, and thus, though there were legal supports for the introduction of foreign investments, the strength and scope of the introduction were limited, and foreign-invested enterprises adopted the legal form as enterprise were mainly based on the nature of ownership of the enterprises. In a nutshell, the features of foreign investment laws in this period can be identified as "low strength in

opening, narrow scope of opening and low level forms of enterprises."

In 1992, the proposal on "establishment of the socialist market economic system" was presented and passed at the 14th CPC National Congress, which marked a major transformation in China's economic system. Based on this proposal, China promulgated a series of laws and regulations, including the Company Law and its several amendments since 1993, which constituted the basic legal framework of the socialist market economy system.[15] Eventually, changes happed in the field of foreign investment laws. In 1995, many regulations were published, including *Interim Guiding Provisions on the Direction of Foreign Investment*, *Catalogue for Guidance of Foreign Investment Industries*, *Provisional Regulations of the Ministry of Foreign Trade and Economic Cooperation on Certain Issues Concerning the Establishment of Companies Limited by Shares with Foreign Investment*, *Provisional Regulations of the Ministry of Foreign Trade and Economic Cooperation on the Establishment of Investment Companies by Foreign Investors*, *Several Provisions on Foreign Investment in the Construction Industry* and *Detailed Rules on Implementation of Sino-Foreign Contractual Joint Venture Law*. The foregoing three basic laws concerning foreign investments were revised in 2000 and 2001 respectively. Particularly, the revisions during this period mainly focused on directing foreign investments with the catalogue of industrial guidance for foreign investors and the forms of enterprises was adopted in the industrial guidance. The reason for these changes was to meet the demands of the establishment of market economy superficially, but the reason underlying was to adjust China's economic system. Because of these changes, the role of market became apparent in China. The changing process in foreign investment laws were gradual, along with the "increasing strength in opening, wider scope of opening and higher level forms of enterprises."

The Third Plenary Session of the 16th CPC Central Committee passed the

[15] The Law on Tax Collection and Management, the Interim Regulations on Consumption Tax, the Interim Regulations on Business Tax, the Regulations on Customs Duty, the Interim Regulations on Enterprise Income Tax, the Income Tax Law of Foreign-Invested Enterprises and Foreign Enterprises, the Individual Income Tax Law, the Provisional Regulations on Deed Tax, the Interim Regulations on Real Estate Tax, the Provisional Regulations on Stamp Tax, the Provisional Regulations on Vehicle and Vessel Usage Tax, the Interim Regulations on Land Increment Value Tax, the Fixed-Assets Investment Regulation Tax, the Provisional Regulations on Banquet Tax and the Provisional Regulations on Resources Tax in 1992; the Law against Unfair Competition, the Product Quality Law and the Law on Protection of Consumer Rights in 1993; the Law on the Administration of Urban Real Estate, Sino-Foreign Trade Law and the Labor Law in 1994; the Commercial Bank Law, the Note Law and the Insurance Law of 1995; the Partnership Enterprise Law in 1997; the Securities Law and the Regulations on Implementation of the Land Administration Law in 1998; and the Sole Proprietorship Enterprise Law and the Contract Law in 1999.

Decision of the CPC Central Committee on Several Issues Concerning Improvement of the Socialistic Market Economic system in October 2003. After launching the establishment of socialist market economic system, the reform of China's economic system commenced entering into a higher level towards the a more developed and modern economic system, which is a decision with historical significance made and led by the Communist Party of China in the new era. Consequently, China's laws and regulations related to the market economy have witnessed the new opportunity of development. Started with revising the Company Law and the Securities Law in 2005, the amendments were made to a series of laws and regulations regarding the market economy. The Partnership Enterprise Law was revised and the *Bankruptcy Law* was promulgated in 2006, and then the *Enterprise Income Tax Law* was revised in 2007, which integrated the two previously separated income tax systems. The promulgations and amendments of these laws can be regarded as remarkable improvement in the development of China's market economy, which promoted foreign investment laws to a higher level. The Ministry of Commerce published the *Measures for Strategic Investment by Foreign Investors upon Listed Companies* in 2005 and the *Interim Provisions on the Takeover of Domestic Enterprises by Foreign Investors* in 2006. In April 2006, the *Implementation Opinions on Some Issues concerning Law Application for the Administration of Examination and Approval and Registration of Foreign-funded Companies* was issued by the State Administration for Industry and Commerce, the Ministry of Commerce, the General Administration of Customs and the State Administration of Foreign Exchange jointly. This round of adjustment in economic policies brought gradual perfection to China's market economy system, facilitated the amendment and revision of the market-orientated foreign investment laws, and finally led this field of laws to "more increased strength in opening to and much wider scope of opening to foreign investors, and much higher level forms of enterprise," since foreign-invested enterprises was qualified to establish equity or contractual joint ventures, partnerships or wholly foreign-owned enterprises in various legal forms such as limited liability companies, companies limited by shares, limited partnerships, general partnerships or sole proprietorship. Hence, foreign investment laws provided opportunity for foreign investors to choose the organizational form of their enterprises in China based on the market needs and directions, which can be a feature of this stage of foreign investment laws.

In summary, there are changes in foreign investment laws at every stage of development, along with the contemporary improvement in China's economic system. Thus, the reform in the economic system was a dominant motive to the changes happened in the field of foreign investment legislations in China.

3 Experience and Lessons from China's Foreign Investment Legislation in the Past 30 Years

3.1 Experience from China's Foreign Investment Legislation in the Past 30 Years

In view of the 30-year evolution in China's foreign investment legislation and its diverse features and motives at different stages, some significant experiences are as follows:

3.1.1 Unswervingly Implement the Principle of State Economy Sovereignty

The principle of state economy sovereignty is based on the doctrine of judicial sovereignty, a state power endowed in the *Charter of Economic Rights and Duties of States* released by the UN in 1974 as the result of the developing countries' great efforts. As prescribed in this Charter, the state economy sovereignty can be embodied as five separate powers for each country, including the freedom and independence to make a choice of its economic system, the freedom and independence to control and dispose of its natural resources, the freedom and independence to control and supervise its economic activities, the freedom and independence to levy or expropriate foreign properties within its territory and the freedom and independence to engage in international affairs and make decisions. The legislations and implements of foreign investment laws are important part of the freedom and independence to administer its economic activities based on the principle of the economy sovereignty because it endows the power to a state to administer and supervise any foreign investment and the economic activities within its territory, which can be practiced by legislation and implementation of pertinent laws. Since the power of the state to control and supervise foreign investments within its territory is based on the choice made by the state of the economic system, foreign investment legislation can be regarded as an independent part of economic sovereignty of the state. Meanwhile, the state's control and supervision power is also related to the freedom and independence to make a choice of its economic system, which explains why the economic system reform can be the dominant motive of the changes in foreign investment legislation. Those two powers under the principle of economy sovereignty embraced each other and jointly regulate China's foreign investment legislation. Thus, unswervingly implement the principle of economy sovereignty is important experience for China's foreign investment legislation and should be virtually embodied in the related legislation. For instance, *Regulations on Implementation of Sino-Foreign Equity Joint Venture Law of 1983* adopted the proactive guidance and only allowed a foreign-invested joint venture to operate

within six major industries including energy.[16] There was no specific provision setting the boundary of the industries that foreign investments were allowed to engage in, which was construed that foreign investments were prohibited in all the other industries. The adherence to the principle of state economy sovereignty was clearly interpreted in foreign investment laws. However, the Articles 4 and 5 in *Detailed Rules on Implementation of Sino-Foreign Capital Enterprises Law of 1990* explicitly prohibited foreign investments engaged in publishing, domestic commerce, postal service, telecommunications and other industries were either prohibited or restricted by the state, which included public utilities, transportation, real estate, trust investment and leasing. By analyzing these provisions, it could be construed that it was permissive for wholly foreign-owned enterprises to engage in any industries except for those prohibited or restricted explicitly in laws, and the approach of projects-based examination and approval was adopted by China's foreign investment laws. It is an expansion of the scope of opening under the principle of economy sovereignty. The *Sino-Foreign Contractual Joint Ventures Law* did not include any provision regulating specific industries due to the existence of special laws which could be directly applied to the issue of restrictive industries and all project-based cooperation between foreign investors and Chinese partners were subject to special laws. In short, at the very beginning, the legislations of these foreign investment laws was closely following the development of foreign investments, which was indicated by persisting the principle of economy sovereignty and widening scope of opening to foreign investments legislatively. Upon the presentation of the socialist market economy, China's investment laws adopted classification approach to catalogue different industries to guide foreign investors when they entered China. The industries were categorized into four categories, as the encouraged, permitted, restricted and prohibited. Any foreign-invested projects that did not fall into the encouraged, restricted and prohibited industries should fall into the "permitted" category. Basically, the amendments to *Regulations on Implementation of Sino-Foreign Equity Joint Venture Law* and *Detailed Rules on Implementation of Sino-Foreign Capital Enterprises Law* adopted the same provisions.[17] Meanwhile,

[16] Art. 3 of the Sino-Foreign Equity Joint Venture Law: A joint venture that is established in the territory of China should facilitate China's economy, improve the scientific and technical level of the country and be conducive to the socialistic modernization construction. The main industries where the establishment of joint ventures are allowed are as follows: (1) energy development industry, building materials industry, chemical industry and metallurgical industry; (2) machine manufacturing industry, apparatus and instruments industry and the manufacturing of equipment for exploitation of offshore oil; (3) electronic industry, computer industry, and communication device manufacturing; (4) light industry, textile industry, food industry, pharmaceutical and medical appliance manufacturing industry and packing industry; (5) agriculture, animal husbandry and livestock breeding; and (6) tourism and service industry.

[17] Seep para. 2 of art. 3 of the Regulation on Implementation of Sino-Foreign Equity Joint Venture Law of 2001 and art. 4 of the Detailed Rules on Implementation of Sino-Foreign Capital Enterprise Law of 2001.

key industries opened subject to the special laws and regulations, such as *Provisional Measures for the Administration of Foreign-Invested Insurance Companies in Shanghai* in 1992, *Several Provisions on the Establishment of Foreign-Invested Construction Enterprises and the Circular on Several Issues Concerning Attracting Foreign Investment by BOT* in 1995, *Provisional Measures for the Administration of Sino-Foreign Equity and Contractual Medical Joint Ventures*, the *Interim Measures for the Administration, Examination and Approval of Wholly Foreign-Owned Shipping Companies*, the *Interim Measures for the Examination, Approval and Administration of Foreign Investment in the Railway Freight Transport Industry* and *Interim Provisions on Sino-Foreign Investment in Cinemas* in 2000, and *Regulations Governing Financial Institutions with Foreign Capital* in 2002. All of these laws were embodiments of the market regulations and implement of the principle of state economy sovereignty. After all, both the issuance and revision of any industrial catalogue and the promulgation of any special laws are instinctive powers in the principle of state economy sovereignty. Throughout the development of foreign investment laws in China, the unswervingly adherence to the state's economy sovereignty is the most significant experience in the field of China's foreign investment legislations in the past 30 years.

3.1.2 Adherence to Opening to Foreign Investments in the Reform of the National Economic System to Promote Mutual Developments

China's foreign investment legislation is originated from the national strategy of reform and opening up. After making this strategic policy at the Third Plenary Session of the 11th CPC Central Committee in 1978, China promulgated its first foreign investment law in 1979. Subsequently, the Third Plenary Session of the 12th CPC Central Committee proposed and passed to develop the planned commodity economy, and Sino-Foreign *Capital Enterprises Law* and *Sino-Foreign Contractual Joint Venture Law* were enacted. At the 3rd Plenary Session of the 14th CPC Central Committee, the statement to establish the socialist market economic system was agreed, and then China issued a series of regulations and catalogue to guide foreign investments and also revised three basic laws in the field of foreign investments. After the 3rd Plenary Session of the 16th CPC Central Committee, the proposal of establishing a perfect socialist market economic system was passed, and foreign investment laws began to fully collaborate with other market economic laws. The tax laws and regulations applied to foreign investments were repealed and the establishment of foreign-invested companies was subject to the Company Law and the Partnership Enterprise Law. In summary, every adjustment in the strategy of the national economic system was accompanied by a new round of promulgations or

revisions of foreign investment laws and regulations. The changes in foreign investment laws fully reflect the synchronies between the opening to foreign investments and the reform of the national economic system. This mechanism ensured that the opening was not conducted passively. The increased pressure from the market due to the opening to foreign investments can be great motives for further and deeper reform and creating mutual development between the reform and opening up, which is experience that should be learned in the field of foreign investment legislation for future development.

3.1.3 Persistence in Market-Orientated Foreign Investment Legislation and Balance the Functions of Market and Planning

At the very beginning, China's foreign investment legislation rooted in the thoughtful idea of reforming the national economic system with the purpose to burst the bonds set by the planned economic system with the market factors. Though the choices of words of this idea changed from "planned economy as the main body supplemented by market regulation" to the "planned commodity economy," and then to "the state regulates the market and the market directs the enterprises." Eventually, it was still hard for China's national economic system to get rid of its planned feature. However, the changing of words still manifested the increasingly significance of the role played by the market. At this stage, foreign investment legislation changed as a result of the increasing market factors. From the early stage of the legislation in the field of foreign investments, only equity joint venture could be the form of foreign-invested enterprises and then gradually, the direct foreign investments and contractual joint ventures were both permitted. Legislation in this field was so positive at the early stage that foreign investments could only engage in the industries that were explicitly allowed and specified, and then gradually, the legislation in this field was becoming more passive and only industries that were explicitly and specifically prohibited or restricted by the laws and regulations were off-limit to foreign investors. In addition, the function of market was realized and emphasized. It may be true that foreign investment legislation was market-orientated even when the national economic system was planned. The changes made the legislation of foreign investments more market-orientated resulting from balancing the approaches and functions of the market and planning in the national economic system. In other words, the significance of planning is fading while that of the market is prospering. When foreign investment legislation entered into its second and third stages in China, the function of the market was overly important since the goal of the reform to the national economic system was stated as to "establishing the socialistic market economic system." Under the effect of this goal, market orientation was increasingly emphasized. At the second stage,

foreign investment legislation began to highlight the market, which could be reflected in the catalogue for foreign investments. An important signal sent by China's legislators was foreign investors in China should rely more on the market demand, which could be reflected in the revision of the catalogue for foreign investments. The major changes in foreign investment legislation in this period were in the following aspects: First, the basic laws regarding foreign investments repealed the approach of listing the industries in which foreign investors were allowed to engage and adopted the way that "in accordance with the national regulations on guiding foreign investments and the catalogue of industries for foreign investments."[18] Second, the provisions incompatible to the market in the three basic laws regulating foreign investments were revised.[19] Third, several regulations were repealed.[20] The market factors were heavily considered in these amendments. At the third stage, the market-orientated factors were further emphasized. Various laws regulating the market economic system in China were revised to improve the market. Naturally, foreign investment legislations at this stage were also changed to be more market-orientated. Nonetheless, at the second and third stage, the significance of planned economy was decreasing while that of the market was increasing. In balancing the functions of market and planning, the government often preferred to rely on the market, which became another important experience drawn from the past 30-year legislations of foreign investments.

3.2 Lessons from China's Foreign Investment Legislation in the Past 30 Years

Though China's foreign investment legislation has followed the directions of the

[18] See para. 2 of art. 3 of the Regulation on Implementation of Sino-Foreign Equity Joint Venture Law of 2001 and art. 4 of the Detailed Rules on Implementation of Sino-Foreign Capital Enterprise Law of 2001.

[19] Para. 1 of art. 9 of the Sino-Foreign Equity Joint Venture Law revised as Para. 1 of art. 10 provides: "The raw materials, fuels and other materials required by a joint venture within its approved business scope may be purchased in domestic or foreign market on the fair and reasonable basis." Art. 15 of Sino-Foreign Invested Enterprise Law was revised as: "The raw materials, fuels and other materials required by a foreign-invested enterprise within its approved business scope may be purchased in domestic or foreign market on the fair and reasonable basis." Art. 19 of the Sino-Foreign Contractual Joint Venture Law was revised as: "A joint venture may import the materials it needs and export its products within its approved business scope. The raw materials, fuels and other materials required by a joint venture within its approved business scope may be purchased in domestic or foreign market on the fair and reasonable basis."

[20] The Ministry of Foreign Trade and Economic Cooperation passed no. 13 Decree of the Ministry on November 16, 2001, repealing 249 departmental regulations for the first time. On December 19, another 100 departmental regulations were repealed in accordance with no. 30 Decree of the Ministry. Most of those regulations involved foreign-invested enterprises.

market, those changes have not made the legislation perfect in the current situations due to its internal inconsistence within the legal system regulating foreign investments and the incompatibility between this legal system and those legal systems regulating other fields, which can be the lessons that China should learn for its future development.

3.2.1 Internal Inconsistence in Regulating Sino-Foreign Investments Impairs the Promotion of Introducing Foreign Investments

The law system regulating foreign investments in China was made of separate laws and regulations applied to different legal forms of enterprises. This way of constitution was greatly valuable at the early stage in China's planned economic system, which caused the stableness of the national economic system during its reform. However, the positive influence of this kind of constitution which is still in existence is now fading. First, after several amendments, the three basic laws regulating foreign investments in China overlap each other without sufficient coordination. By taking a close look at these three basic laws, it can be found that more than half of the articles resemble, even though there are only 16 articles, 24 articles and 27 articles in content respectively. Furthermore, there are inconsistencies even in the overlapped articles between these three laws. For instance, provisions regarding the time limitations of the examination and approval are different, which may cause unequal treatment among different legal forms of foreign-invested enterprises. Besides, the repetition is also wasting legislative and judicial resources since it makes the application of these laws more difficult and confusing. Second, due to the poor legislative techniques adopted to draft these three basic laws regulating foreign investment, the necessary provisions were absent, which rendered excessive legislative power and the fragmentation of legislative authority. All these laws and regulations regarding foreign investments made the system of foreign investment laws too complicated and confusing to comply with for foreign investors. Though the competent authorities have revised or abolished some departmental rules, such as 349 regulations that were repealed by the Ministry of Commerce (former Ministry of Foreign Trade and Economic Cooperation) in 2001, the inconsistence and incompatibility in foreign investment legislation was not improved fundamentally since the legislative authority was fragmented. Third, the lower-level laws were used to replace the higher-level and basic laws in legal system of foreign investment laws. In the field of foreign investment legislation, there would be countermeasures (i.e., provincial and departmental rules) whenever there were new laws and regulations because foreign investments are

always regarded as vanity projects of local governments. Since the most concerned issue for foreign investors is the stableness of government policies, local governments therefore have to take advantages to use their legislative authority to draft local rules and regulations.[21] Though it is plausible that the local governments drafted those rules and regulations to attract larger foreign investments into their regions, those rules and regulations are usually applied as replacement of the higher-level laws. This is because the disputes that Sino-foreign invested joint ventures and wholly foreign-owned enterprises are always settled in local courts. The local rules and regulations and the demands of the local governments were very influential factors during the procedure in local courts. Thus, the functions of higher-level laws were weakened in practice. In summary, the internal inconsistencies in the legal system of foreign investment laws have been impairing the application of foreign investment laws, especially the three basic laws regulating foreign investments, although the necessity of the fully application of the basic laws for the justice purpose is obvious, since more foreign investors will be attracted by a transparent and unified legal system to regulate foreign investments.

3.2.2 Incompatibility between the Legal System Regulating Foreign Investments and Other Legal Systems

The conflicts between foreign investment laws and other domestic laws, such as the Company Law and the Partnership Enterprise Law demonstrated the incompatibility in the following aspects.

[21] On September 21, 1998, the Government of Henan Province released the Measures of Henan Province for Encouraging Foreign Investment, providing for more preferences in addition to those in the national regulations. Tax preferences were adopted as major measures. Art. 7 of the Measures prescribed that among foreign-invested productive projects with the operational period over 10 years, the major industrial projects with foreign investment over USD 10 million and consistent to the provincial industrial restructuring direction may enjoy special preferences after special study by the provincial and city governments and the jurisdiction of prefectures, in addition to the tax preference of "income tax exempted for two years and reduced for three years" as provided by the state. Local legislations on foreign investment formulated by Shanghai Municipal Government include regulations such as the Regulations on the Examination and Approval of Foreign-Invested Enterprises, the Measures for the Administration of Land Use by Foreign-Invested Enterprises, the Regulations on the Liquidation of Foreign-Invested Enterprises, the Several Provisions on Encouraging Foreign Investment in Pudong New District, the Complaints by Foreign-Invested Enterprises and Handling Measures, the Several Provisions on Works Concerning Consulting and Agency of Foreign-Invested Projects, the Measures for the Material Procurement and Product Sale by Foreign-Invested Enterprises, the Measures for the Administration of Prices Concerning Foreign-Invested Enterprises and the Measures for Foreign-Invested Enterprises' Enjoying Preferential Treatment for Technology-Intensive and Knowledge-Intensive Projects.

(1) Differences in the registered capital requirements. First, there is no requirement on the percentage of the initial capital contribution ratio in foreign investment laws and regulations, while the Company Law requires twenty percent of the registered capital contribution to be the initial contribution. There is no requirement on the ratio of cash capital contribution in foreign investment laws and regulations, while in the Company Law the highest ratio is 30%. Should these forgoing two requirements be imposed on foreign investors? If yes, then should the article referring to 15% initial capital contribution ratio in the *Detailed Rules on Implementation of Sino-Foreign Invested Enterprise Law* be applied? If yes, that means the lower-level law replaces the application of the higher-level law. If not, it will make the rule meaningless and may impair the application of the entire Company Law.

Second, the registered capital can be decreased or increased upon examination and approval for foreign investors, while under the Company Law, the registered capital can be decreased or increased based on the resolution of shareholders.[22] Therefore, does it mean that the resolution made by shareholders of foreign-invested enterprises regarding the reduction of its registered capital may be nullified? If so, that means the lower-level regulations issued by the State Council prevail over the higher-level basic law. The confusing legal system will definitely not attract larger foreign investments, especially the wholly foreign-owned enterprises. If not, it makes the provisions in foreign investment regulations meaningless.

Third, foreign investment laws imposed strict restrictions on capital transfer, while the Company Law is quite open with that issue.[23] How should foreign investors deal with these conflicts? Moreover, Chinese partners in foreign invested joint ventures also have to suffer the unfairness compared with other Chinese enterprises. Thus, there is no contribution at all made by these confusing and conflicting laws and regulations in improving China's market. There might be some negative influence rendered by requiring at least 25% capital contribution from foreign investors in the Sino-foreign joint ventures. For example, in a merger and acquisition initiated by foreign investors in the form of equity swap, the absent of the maximum percentage on Sino-foreign capital contribution may cause losses of state-owned assets operated by the state-owned enterprises.

(2) Inconsistence in the forms of corporate organization. First, foreign

[22] See art. 19 of the Regulations on Implementation of Sino-Foreign Equity Joint Venture Law, art. 21 and art. 22 of the Detailed Rules on Implementation of Sino-Foreign Capital Enterprise Law, art. 16 of the Detailed Rules on Implementation of Sino-Foreign Contractual Joint Venture Law, and art. 178 of the Company Law.

[23] See art. 4 of the Sino-Foreign Equity Joint Venture Law, and art. 72 of the Company Law.

investment laws limit the form of equity and contractual joint ventures only to the limited liability company, while wholly foreign-owned enterprises may be formed as limited liability companies or other forms upon examination and approval.[24] However, the forms of corporate organizations in the Company Law include limited liability companies and companies limited by shares, and limited partnerships and general partnerships in the Partnership Enterprise Law. Could these provisions be construed as that foreign investors are not allowed to establish equity and contractual joint ventures in the forms of companies limited by shares or partnerships, general or limited? Or foreign investor may establish companies limited by shares, including one-man companies, or partnerships, general or limited alone? Moreover, since foreign investment laws fail to prescribe any requirement regarding corporate governance structure within the limited liability companies, should the Company Law be applied to foreign investors? Second, as to the board of directors, the Sino-Foreign Contractual Joint Venture Law only denies the power of the board to hold a meeting under certain circumstances, while the Company Law prescribes two kinds of circumstances under which the board would lost its power to hold meetings.[25] But what should be applied to the situations when the board of Sino-foreign equity joint venture fails to hold meetings?

(3) Incompatibility in finance. Under foreign investment laws, the percentage of reserves drawn from the after-tax profits of Sino-foreign equity joint ventures should be set by its board of directors, while that of foreign-invested enterprises is 10% as statutory reserves. Under Company Law, it is also required to reserve 10% of profits as statutory provident fund.[26] Therefore, the limited liability companies are subject to different financial requirements simultaneously. Will this double-application situation provides green channels to the Sino-foreign joint ventures and create unfairness in the market among market players with the same nature?

(4) Conflicts in liquidation. Article 181 of Company Law stipulated that in case of serious difficulties in the sustaining of limited liability companies, the courts can dissolve the company upon request, while there is no similar provision

[24] See art. 16 of the Regulations on Implementation of Sino-Foreign Equity Joint Venture Law, art. 14 of the Detailed Rules on Implementation of Sino-Foreign Contractual Joint Venture Law, and art. 18 of the Detailed Rules on Implementation of Foreign Capital Enterprises.

[25] See art. 32 of the Regulations on Implementation of Sino-Foreign Equity Joint Venture Law, and art. 41 of the Company Law.

[26] See art. 76 of the Regulations on Implementation of Sino-Foreign Equity Joint Venture Law, art. 58 of the Detailed Rules on Implementation of Sino-Foreign Capital Enterprise Law, and art. 167 of the Company Law.

in the Sino-Foreign Equity Joint Venture Law.[27] Then, if Sino-foreign equity joint venture limited companies fail to survive in the market, shall the court apply the same or similar provision to them?

(5) Contradictions in property ownership within contractual joint ventures. Article 2 of the Sino-Foreign Contractual Joint Venture Law stipulates: "In the establishment of contractual joint venture, Chinese and foreign parties shall, complying with the provisions of this law, specify the conditions for investment or cooperation, the distribution of earnings or products, the sharing of risks and losses, the approach of operation and management and the property ownership at the termination of the contractual joint venture in their contractual joint venture contract. Contractual joint ventures that meet the conditions to be independent legal entity under Chinese law shall acquire the status as Chinese legal entity according to pertinent law." Then, shall it be applicable if one of the parties, especially the Chinese party prescribes the minimum earning? Shall it be permitted to mutually agree in joint venture contract that one party should assume liabilities beyond the conditions of the cooperation? The answer is "yes" under the *Detailed Rules on Implementation of the Law on Contractual Joint Ventures*,[28] but the answer is "no" under the Company Law, so there are obvious conflicts.

From the forgoing analysis, there are many conflicts in diverse aspects within foreign investment laws and the Company Law regarding the establishments of the enterprises. Article 218 of the new Company Law provides: "Limited liability companies and companies limited by shares invested by foreign investors shall be governed under this Law. In case there are different provisions in other laws

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[27] Art. 183 of the Company Law: "Where a company meets any serious difficulty during its operation or management so that the interests of the shareholders will be subject to heavy loss if it continues to exist and it cannot solved by any other means, the shareholders who hold 10% of the voting rights or more of all the shareholders of the company may plead the court to dissolve the company." Para. 1 of art. 90 of the Regulations on Implementation of Sino-Foreign Equity Joint Venture Law provides: "A joint venture may be dissolved in the following situations: (1) termination of duration; (2) inability to continue operations due to heavy losses; (3) inability to continue operations due to the failure of one of the contracting parties to fulfill the obligations prescribed by the agreement, contract and articles of association; (4) inability to continue operations due to heavy losses caused by force majeure such as natural disasters and wars, etc. (5) inability to obtain the desired objectives of the operation and at the same time to see a future for development; or (6) occurrence of other reasons for dissolution prescribed by the contract and articles of associations.

[28] Art. 14 of the Detailed Rules on Implementation of Sino-Foreign Contractual Joint Venture Law provides: "The contractual joint venture that is accorded with Chinese legal person status by law is a limited liability company. Unless otherwise stipulated in the contractual joint venture contract, each party is responsible for the venture within the limit of the investments or cooperation conditions it contributes. The contractual joint venture is liable to the venture's debts with all of its assets."

specifically applicable to foreign investments, those provisions shall prevail." Does it mean that the so-called more specific "different provisions" in foreign investment laws should be applied when the Company Law and foreign investment laws contain provisions regulating the similar aspects with different requirements, or should it be entire replacement among these different provisions? For example, in terms of holding the board meeting, the Company Law prescribes two circumstances under which it would be nullified if the board holds meetings and under which the board fails to hold meetings, while the Sino-Foreign Equity Joint Venture Law only prescribes the former circumstance in the Company Law. Should the requirement in the Sino-Foreign Equity Joint Venture Law entirely or partially replace similar provisions in the Company Law? If it should entirely replace, there would be an absence of regulation regarding the case where the boards of joint venture fail to hold board meetings. If it should partially replace, the Company Law could still be applied. There is still no actually consensus reached on this issue, which will impair the authoritativeness of laws.

The similar problem also exists in the legal procedures of liquidating enterprises. In another example, due to inconsistencies in forms of corporate organizations, foreign-invested enterprises could bear different liabilities by taking advantages of the conflicts in laws, such as the priority of the provisions regulating the contractual joint ventures, which may render unfair treatment to market players. The legal fairness or national treatment among market players is the foundation of the improvement of the market, where market players are able to freely choose the forms of their enterprises including companies, partnerships or sole proprietorships. The current reality is obviously the opposite, since foreign-invested enterprises exist mainly in the form of limited liability companies, or equity or contractual joint ventures or direct investment upon approvals. In fact, equity or contractual joint ventures or direct investments are just ways to establish enterprises rather than the forms that enterprise can adopt, while market requires the market players to choose their forms of enterprises based on different risk preferences. Consequently, the conflicts between foreign investment laws and other laws regulating market in China indicate that foreign investment laws need comprehensively revising, which is also required by the improvement of the market economic system in China.

4 Perspective of China's Future Foreign Investment Legislation

It can be drawn from 30-year development in foreign investment laws that the motive of foreign investment legislation is the reform in the economic system.

The anxious need to establish a stable market economic system also raises the requirement of the revising in foreign investment laws. The following question is how we should revise them. Since China's next object in the process of establishing a stable market economic system is to form a unified and perfect market, China's whole legal system shall facilitate this process and so as to the laws regulating foreign investments. A unified and perfect market requires fair treatment among the market players and uniformed investment policies; the market players then desire the consistence between the legal system of foreign investment, and the Company Law and the Partnership Enterprise Law; and the prerequisite of the unified investment policies is the unified foreign investment legislative activities. Thus, China's foreign investment legislation is amended comprehensively from the three basic laws. The experience and lessons drawn from the legislative history shall be remembered. The author's general idea for this comprehensive amendment to foreign investment laws is that the existing three basic laws regulating foreign investments shall be incorporated into one fundamental law and most of the current provisions should be repealed or abolished. The only fundamental law in this field should regulate all important issues in foreign investment. However, the basic issues, such as establishment procedure of enterprise, the organizational form of the enterprises, the finance conditions, the requirement for the accounting system, the requirement and procedure of dissolving and liquidating, shall be incorporated into the Company Law. Other issues, such as tax, foreign exchange control, import and export control and trade union shall be governed by the special law, such as the tax law, Sino-foreign exchange control law, the customs law and the trade union law. The most basic and important issues that need to be in the unified basic foreign investment law shall at least include the following aspects: the definition of foreign investment, the access of foreign investment including the percentage and volume of the investments, guidance to foreign investments, the form of the investments, the time span of the investments, and the examination and approval procedures for investment, the treatment to foreign investments, the administration and supervision of foreign investments, the levy and expropriation imposed on foreign investment, the legal protection for foreign investors and available dispute resolutions. All drafting and revising shall be based on legal logic and market orientation.

First, it is vital for the stable and unified market to acquire fairness among all market players. The conflicts within the three basic foreign investment laws and other external laws contain some unfair treatments to foreign invested enterprises incorporated under China's foreign investment laws. To avoid these unfair treatments, it is necessary to set standards for the establishment of the enterprises as the market players in foreign investment laws which need to be collaborated

with the counterparts in the Company Law and the Partnership Enterprise Law, excluding the parts regulating sole proprietorships because of their unlimited liabilities. It would be a reasonable result based on the legal logic. Moreover, the functions of the three basic foreign investment laws are fading in regulating the establishment of foreign-invested enterprises. All the three basic laws assume that foreign-invested enterprises shall be limited liability companies, and Article 218 in the Company Law makes the law applicable to foreign-invested limited liability companies and companies limited by shares, except as otherwise prescribed in foreign investment laws. Therefore, most foreign investors enter China in the form of companies, and equity or contractual joint venture and direct investment are just ways to establish companies and make investment, with limited effects on attracting foreign investments, which can be demonstrated by the actual data. For example, according to the statistics released by the Ministry of Commerce in 2007, almost 70% of foreign investments in China were in the form of limited liability companies funded by direct foreign investment. Meanwhile, the equity joint venture limited liability companies accounted for 18%, and the contractual joint venture limited liability companies only accounted for 1.7%.[29] Almost 90% of foreign investments are in the form of companies, therefore, what is the practical significance of the three basic laws in regulating the establishment of enterprises, the management structure, the requirement on finance and accounting system, the procedure of the dissolution and liquidation? All provisions in these aspects can be replaced by the Company Law with pertinent requirements. In addition, the Company Law also provides company limited by shares for foreign investors as a choice for the form of their enterprises, however, according to the three basic foreign investment laws there are limited liability companies, which seems degenerated. Hence, how these provisions could be applied without raising more disputes due to the conflicts with the counterparts in the Company Law? Even the contractual joint venture was chosen to be the form of an enterprise without intent to incorporate; it could be realized with partnership as its form. The market players in the market economy include individuals, partners and companies, and the forms of liability include limited liability and unlimited liability, which can be combined and form limited liability companies, companies limited by shares, limited partnership, general partnership, one-man companies and sole proprietorships. Obviously, among the three fundamental laws regulating the market players, i.e., the Company Law, the Partnership Enterprise Law and the Sole Proprietorship Enterprise Law, the last one excludes foreign investors to adopt. The current provisions regarding M&A also provide a new approach for foreign investors to

[29] See http://www.fdi.gov.cn/pub/FDI/wztj/1ntjsj/wstzsj/2007nzgwztj/t20081110990 70.htm (last visited November 12, 2009).

form foreign joint ventures. Upon approval of the M&A initiated by foreign investors, the former domestic enterprise shall be renamed as the Sino-foreign equity joint venture company accordingly, which would weaken the significance of the Sino-foreign Equity Joint Venture Law. Wholly foreign-owned enterprises accounts for the largest share of foreign investments and can be established under the Company Law. All these facts indicate that the provisions regulating the market players in foreign investment laws can be replaced in whole by the Company Law and the Partnership Enterprise Law.

Second, the unified foreign investment law shall be drafted after abolishing the three basic laws. Since the fairness among the market players required by the market is equal treatments for foreign investors, and the true equal treatment is the national treatment. However, it means that the national treatment shall be offered at the moment of the entry of foreign investors into the market, which is different from the meaning of national treatment in the field of international investment and trade. Since the national treatment to foreign investment is on economic sovereignty, no country in the world would give up the power to it. Thus, the unified foreign investment legislation is necessary. Actually, the provisions in the unified foreign investment law depend on the national market and the degree of its openness. Therefore, the legislative activities shall harmonize with the processing of the reform and opening up. The unified foreign investment law should at least contains all provisions regarding the definition of foreign investment, the access of foreign investment, the treatment of foreign investment, the administration and supervision of foreign investment, the procedure of levy and expropriation, the legal protection to foreign investors and available dispute resolutions, since the administration and supervision on the activities conducted by foreign investors is an important part of state economic sovereignty. The most significant provisions are those regarding the access of foreign investment. Meanwhile, the scope of the access should always be adjusted based on the changing national economic policies. Harmonizing the contradictions between the stability of law and the mobility of economic policies, the percentage and volume of foreign investment, and the procedures of the examination and approval of investment regarding the entry of foreign investment shall be specified in the foreign investment law, while the guidance for, the forms and the time span of foreign investments shall be regulated in the administrative regulations issued by the State Council. Then, the Ministry of Commerce shall be responsible for drafting the specific catalogues to guidance in the industries for foreign investors, and local congresses and governments at different levels can issue local rules and regulations subject to the administrative rules and regulations by the State Council. All the other departments and commissions subordinated to the State Council do not have the authorities to

issue any departmental rules or regulations regarding foreign investment, which may avoid more confusing laws and regulations. Under the current circumstances, the detailed rules and regulations issued by various departments make the implementation complicated, especially in the priority of the implement. Therefore, it has practical significance to unify the legislations of foreign investment laws. As for the provisions regarding the treatment, administration and supervision of foreign investments, the State Council may issue more detailed administrative rules and regulations within the necessary scope, since these detailed rules can be applied nationwide. However, the definition of foreign investment, the procedure of levy and expropriation, the legal protection to foreign investors and available dispute resolutions shall be stipulated in the unified foreign investment law. Then, foreign investment law will serve as the basic and fundamental law in the field of foreign investments in China. Foreign investors may have equal opportunities in China's market compared with other players except as otherwise provided. This revolution is necessary to establish a unified and stable national market in China, which is expected in China's future legislation in the field of foreign investment.

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Author

Rungen Qiu, LL.D (East China University of Political Science and Law), is an associate professor at School of Law, Nanchang University. He mainly studies international securities law crossing international financial law and private international law. He has published 3 books and more than 20 articles, including *The Mode of Regulation of Cross-Border Trade of Securities and China's Choice* (2005), 经济全球化背景下中国银行业经营体制的重构 (Management System's Reconstructing of Chinese Banks on the Background of Economic Globalization, 2005), 不方便法院原则实施条件比较与借鉴 (On Comparison and Use of the Doctrine of Forum Non Conveniens, 2009). Moreover, he won the governmental academic award in Jiangxi Province (2007).