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Abstract

In Australia, even in a law library, it is often hard to find many Chinese books, materials or resources. As a Chinese lawyer, I was excited when I received for review the book named China's International Transactions: Trade and Investment published by LBC Information Services 2000 since the book introduced and discussed the aspects of Chinese legal system relevant to international trade and investment. I was really interested in it and my gratitude should be expressed to the editor of the book, Professor KCDM Wilde, for drawing together these materials.

Cover Page Footnote

Chen Xuebin, Lawyer (First Class), senior partner of Jt International Law Firm, Visiting Scholar with Law School, Bond University, is very grateful to Professor John Farrar, for his instructive discussion and guidance.

SOME COMMENTS ON *CHINA'S INTERNATIONAL
TRANSACTIONS: TRADE AND INVESTMENT*

*By Chen Xuebin**

In Australia, even in a law library, it is often hard to find many Chinese books, materials or resources. As a Chinese lawyer, I was excited when I received for review the book named *China's International Transactions: Trade and Investment* published by LBC Information Services 2000 since the book introduced and discussed the aspects of Chinese legal system relevant to international trade and investment. I was really interested in it and my gratitude should be expressed to the editor of the book, Professor KCDM Wilde, for drawing together these materials.

We need to read the book seriously and concentrate on international transactions. I am very pleased to do so, because I could not agree more with Prof Wilde's intention of the book simply as a necessary reflection of the historical inevitability of China as a major force in the international transactions of the 21st century, and because it is hoped that within its scope this work will at least partially assist in replacing the contemporary fear and jealousy of China's achievement with the reality of sound international business and understanding.¹

It is remarkable that China has made great achievements in development of its economy in the last two decades. With Chinese economic reforms and opening to the world, more and more businessmen from other countries trade with

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1 Wilde KCDM (ed), Preface to *China's International Transactions: Trade and Investment*, LBC Information Services (2000) vii.

Chinese or invest in China. By the end of February 2000, the number of the enterprises with foreign capital approved to set up in China have been 344,288, the amount of the contracting foreign capital has been USD 620.317 Billion, and the amount of foreign capital accepted actually has been USD 311.537 Billion.² In 1999, the value of output exported has increased to USD 194.9 Billion, 6.1% more than that in 1998,³ among which that exported by the enterprises with foreign capital including the Chinese-Foreign Joint Ventures has been almost equal to that of other Chinese enterprises.⁴

The present work, as The Hon Sir Laurence Street said in his 'Forward', can be regarded as a significant contribution to the development of awareness and understanding of the manner in which China's legal system relates to international transactions, especially the Chapters on *Trade and Investment Negotiation with the Chinese* by Dr Bee Chen Goh and *Protection of Intellectual Property* by Kui Hua Wang. In a sense, the work is a valuable resource with the potential to contribute to the smooth flow of business within the vast market place in which Chinese commerce is conducted.⁵

It is also understandable that lack of material resources and communication problems affects some of the Chapters. Hence in *Securities Law* Peter McDermott did not mention *The Guarantee Law of the People's Republic of China* adopted by the Standing Committee of the Eighth National People's Congress at the Fourteenth Meeting on 30 June 1995, which would be so important to his article. Notes used in the papers seem as if the article might have been written in 1994. If so, it sounds natural. However, in essence, the Guarantee Law effective as 1 October 1995 categorises five different means of creating security: a Guarantee, a Mortgage (of movable and immovable property), a Pledge, a Lien and a Deposit even if until then there was no national law governing the taking and enforcing of guarantee or security in China.

2 See Xinhua News Agency, *People's Daily* (Overseas Edition) 23 March 2000, 1.

3 See Premier Zhu Rongji, *Work Report of Chinese Government—on the 3rd Session of the 9th People's Congress*, 5 March 2000, *People's Daily* (Overseas Edition) 17 March 2000, 1.

4 See Ng & Shum *Asia Development*, No 18, 5 Oct 1999, 1.

5 The Hon Sir Laurence Street, 'Foreword' in Wilde KCDM, *Ibid* at v.

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As well, I am sorry to point out the similar out of date material existing in *Investment Factors* where Consultant Chang Hung Tai cited 16 of the most relevant pieces for foreign investors which are seen almost before April 1988 although 200 laws and regulations have been put in place since 1979. These laws and regulations concern three major types of investment that China wishes to attract: equity joint ventures, contract joint ventures and enterprises that are funded exclusively with foreign capital.⁶ As we look over some laws and regulations put in place after 1988, we find to a certain extent great changes and development haven taken place in China's international investment area. For example, since *The Company Law of the PRC* came into force on 1 July 1994, which provides the framework to make consistency for all commercial operations, this law has been applied to limited liability companies established with foreign investment except otherwise provided in the laws concerning Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and wholly foreign-owned enterprises.⁷ We need not discuss such a topic in detail as in China acceptance of foreign investment is facilitated when foreign investors abide by the host economy's laws, regulations, administrative guidelines and policies, just as domestic investors should.⁸ For the sake of reference, we may list some relevant Chinese laws and regulations for investment as follows:

1. *Regulations for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* (Promulgated by the State Council on 20 September 1983).
2. *Certain Regulation on the Subscription of Capital by the Parties to Chinese-Foreign Equity Joint Ventures* (Approved on 30 December 1987 by the State Council and jointly promulgated on 1 January 1988 by the Ministry of Foreign Economic Relations and Trade and the State Administration for Industry and Commerce).

6 Chang Hung Tai, 'Investment Factors' in Wilde KCDM (ed), Ibid at 24-25.

7 *The Company Law of the People's Republic of China*(1994), Article 18.

8 APEC, *Non-Binding Investment Principles*, Investor Behaviour.

3. *Implementation of the Right of Autonomy of Foreign Investment Enterprises in Their Use Of Personnel* (Approved by the State Council in 25 April 1988, promulgated on 5 May 1988).
4. *Regulations for Contracted Operation of Chinese-Foreign Equity Joint Ventures* (Promulgated by the Ministry of Foreign Economic Relations & Trade and the State Administration of Industry & Commerce on 15 October 1990).
5. *The Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures* (Adopted by the Second Session of the Fifth National People's Congress on 1 July 1979 and revised in accordance with 'Resolution on Revision of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures' of the Third Session of the Seventh National People's Congress on 1 April 1990).
6. *Detailed Rules for the Implementation of the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises in China* (Approved by the State Council of the People's Republic of China on 28 October 1990; Promulgated by the Ministry of Foreign Economic Relations and Trade on 12 September 1990).
7. *Income Tax Law of the People's Republic of China for Enterprises with Foreign Investments and Foreign Enterprises* (Adopted on 9 April 1991 at the Fourth Session of the Seventh National People's Congress).
8. *Detailed Rules and Regulations for the Implementation of the Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises* (Issued by the State Council of China on 30 June 1991).
9. *Regulations of the People's Republic of China on the Control of Financial Affairs of Foreign-Funded Enterprises; Accounting Regulations of the*

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People's Republic of China for Enterprises with Foreign Investment (Both Promulgated on 24 June 1992 by The Ministry of Finance of the People's Republic of China).

10. *Circular on Question Concerning the Handling of Tax Related to Foreign Exchange Business of Enterprises with Foreign Investment* (State Administration of Taxation: 21 April 1994 Coded Guo Shui Fa [1994] No 107).
11. *Circular on Questions Related to Provisional Regulations Concerning Taxations Including Value-Added Tax, Consumption Tax and Business Tax Applicable to Enterprise with Foreign Investment and Foreign Enterprises* (State Council: 22 February 1994, Coded Guo Fa [1994] No 10).
12. *Regulations of the People's Republic of China on Company Registration* (Promulgated by the State Council of China on 24 June 1994).
13. *Provisional Regulations on Investment-Oriented Companies in China Established by Foreign Businesses* (Promulgated by the Chinese Ministry of Foreign Trade and Economic Cooperation [MOFTEC] on 4 April 1995).
14. *Provisional Regulations on Direction Guide to Foreign Investment* (Jointly promulgated in 1995 by the State Planning Commission, the State Economic and Trade Commission and the Ministry of Foreign Trade and Economic Cooperation).
15. *Provisional Regulations on the Establishment of Foreign-Funded Joint Stock Companies Limited* (The Chinese Ministry of Foreign Trade and Economic Cooperation [MOFTEC] promulgated the Provisional Regulations on the Establishment of Foreign-Funded Joint Stock Companies Limited on 10 January 1995 which came into force on the same day of the promulgation.)

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16. *Detailed Rules on the Implementation of the Law of People's Republic of China on Chinese-Foreign Contractual Joint Ventures* (The Rules were approved by the State Council on 7 August 1995 and have been commanded by Wu Yi, minister of MOFTEC being put into effect as of their promulgation on 4 September 1995).
17. *Regulations Concerning the Setting Up of Foreign-Funded Construction Enterprises (FFCEs)* (Jointly adopted by the Ministry of Construction and the Ministry of Foreign Trade and Economic Cooperation in September 1995).
18. *Provisional Measures Governing the Establishment of Chinese-Foreign Joint Foreign Trade Corporations on a Trial Basis* (Issued by the Ministry of Foreign Trade and Economic Cooperation on 30 September 1996).
19. *Procedures For Liquidation Of Foreign-Funded Enterprises* (Approved by the State Council on 15 June 1996 and Promulgated by the Ministry of Foreign Trade and Economic Cooperation MOFTEC on 9 July 1996).
20. *Provisions for the Alteration of Investors' Equities in Foreign-Funded Enterprises* (Promulgated by the Ministry of Foreign Trade and Economic Cooperation and the State Administration of Industry and Commerce on 28 May 1997).
21. *Supplementary Provisions Regarding Investment Contributions by Parties to a Chinese-Foreign Equity Joint Venture* (Adopted by the State Council and jointly promulgated by the Ministry of Foreign Trade and Economic Cooperation and the State Administration for Industry and Commerce on 29 Sept 1997).
22. *Provisions on Electric Power Projects Invested by Foreign Businessmen* (Issued by Ministry of Electric Power Industry on 20 March 1997).
23. *Rules on Procedures for Examination and Approval of Foreign*

Investments on Inventory Assets (Issued by Ministry of Electric Power Industry on 9 December 1997).

24. *Partnership Business Law of the People's Republic of China* (Adopted at the 24th Meeting of the Standing Committee of the National People's Congress on 23 February 1997).
25. *Category of Industries Guiding Foreign Investments (1997 Revised)* (Approved by State council on 29 December, Issued by State Planning Commission on 31 December 1997 and take effect as of 1 January 1998).

There are four articles in the work introducing Hong Kong and Taiwan Trade and Investment Factors, so it is necessary to refer to the following laws and regulations of the People's Republic of China concerning these factors:

1. *Regulations of the State Council of the People's Republic of China for Encouraging Taiwan Compatriots to Invest in the Mainland* (Adopted on June 25, 1988 at the 10th Executive Meeting of the State Council, and Promulgated on 3 July 1988 by Decree No 7 of the State Council of the People's Republic of China).
2. *Regulations of the State Council of the People's Republic of China for Encouraging Taiwan Compatriots to Invest in the Mainland* (Adopted on 25 June 1988 at the 10th Executive Meeting of the State Council, and Promulgated on 3 July 1988 by Decree No 7 of the State Council of the People's Republic of China).
3. *Law of the People's Republic of China on the Protection of Taiwan Compatriots' Investment* (Adopted by the 6th Meeting of the Standing Committee of the 8th National People's Congress on 5 March 1994).
4. *The Supreme People's Court the Provisions on the People's Court's Recognition of the Verdicts on Civil Cases Made by Courts of Taiwan Province* (Approved at the No 957 Session of the Judicial Committee of

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the Supreme People's Court on 15 January 1998 to be effective as of 26 May 1998).

5. *Regulations on Encouragement of Investments from Overseas Chinese and Hongkong and Macau Compatriots* (Promulgated by the State Council in its No 64 decree issued on 19 August 1990).
6. *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990 and be effective as 1 July 1997).

The People's Republic of China not only encourages Taiwan compatriots to invest in the mainland, but also encourages overseas Chinese to do business and invest in the motherland. Besides the above regulations, *The Law of the People's Republic of China of the Protection of the Rights and Interests of Returned Overseas Chinese and Relatives of Overseas Chinese* effective on 1 January 1991 is another demonstration.

It was good to attach some appendices to the work. Attachment of *The Private International Law of the People's Republic of China (Model Law)* to the book⁹ is needed due to development of Chinese private international law. The only thing is the third draft was replaced by the fourth draft which was discussed and amended by 1997's Annual Conference of China Private International Law.¹⁰

There is another appendix containing the Foreign Trade Act.¹¹ As far as I know, the *Foreign Trade Law of the People's Republic of China* was adopted at the Seventh Meeting of the Standing Committee of the Eighth National People's Congress on 12 May 1994 and effective on 1 July 1994, not promulgated 5 February 1993.

9 Wilde KCDM, Ibid at 223.

10 Editor-in-Chief Cao Jianming, *International Economic Law & Private International Law (Mandarin)*, Law Press (1998) 325.

11 Wilde KCDM, ibid at 252.

The department in charge of foreign economic cooperation and trade under the State Council takes charge of all foreign trade work in the whole country¹² has been called the Ministry of Foreign Trade and Economic Cooperation, ie MOFTEC, not MOEA. Since there is a Chapter introducing Chinese trade factors,¹³ besides the Foreign Trade Law, I prefer the following references as the most relevant laws and regulations regarding international trade:

1. *Provisional Rules on Foreign Trade Agency System* (Promulgated by Decree No 1 of the Ministry of Foreign Economic Relations and Trade on 29 August 1991).
2. *Customs Law of the People's Republic of China* (Adopted at the 19th Meeting of the Standing Committee of the Sixth National People's Congress on 22 January 1987, promulgated by Order No 51 of the President of the People's Republic of China on 22 January 1987, and effective as of 1 July 1987).
3. *Regulations of the People's Republic of China on Import and Export Duties* (Promulgated by the State Council on 7 March 1985, amended and promulgated by the State Council on 12 September 1987, amended and promulgated for a second time on 18 March 1992 according to the Decision of the State Council on Amending the Regulations of the People's Republic of China on Import and Export Duties).

12 *The Foreign Trade Law of the People's Republic of China (1994)*, Article 3.

13 Chang Hung Tai, 'Trade Factors', *Ibid* at 1-18.

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4. *Law of the People's Republic of China on Import and Export Commodity Inspection* (Adopted at the Sixth Meeting of the Standing Committee of the Seventh National People's Congress on 21 February 1989, and effective as of 1 August 1989).
5. *Anti-Dumping and Countervailing Rules of the People's Republic of China* (Issued by the State Council of the People's Republic of China on 25 March 1997).

Other most important laws and regulations relating to China's international transactions are included but not limited as follows:

1. *Maritime Code of the People's Republic of China* (Adopted at the 28th Meeting of the Standing Committee of the Seventh National People's Congress on 7 November 1992, promulgated by Order No 64 of the President of the People's Republic of China on 7 November 1992, and effective as of 1 July 1993).
2. *Law of the People's Republic of China on the People's Bank of China* (Adopted on 18 March 1995, at the Third Session of the Eighth National People's Congress of the People's Republic of China).
3. *Law of the People's Republic of China on Commercial Banks* (Adopted at the 13th Meeting of the Standing Committee of the Eighth National People's Congress on 10 May 1995).
4. *Negotiable Instruments Law of the People's Republic of China* (Adopted at the 13th Meeting of the Standing Committee of the Eighth National People's Congress on 10 May 1995).
5. *Insurance Law of the People's Republic of China* (Adopted at the 14th meeting of the Standing Committee of the Eighth National People's Congress on 30 June 1995).

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6. *Securities Law of the People's Republic of China* (Adopted at the sixth Meeting of the Standing Committee of the Ninth National People's Congress, 29 December 1998 and effective as of 1 July 1999).
7. *Arbitration Law of the People's Republic of China* (Adopted at the Ninth Meeting of the Standing Committee of the Eighth National People's Congress on 31 August 1994).

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8. *Arbitration Rules of the China International Economic and Trade Arbitration Committee* (Revised and adopted by the China International Chamber of Commerce on 4 September 1995).
9. *Rules of Arbitration of the China Maritime Arbitration Commission* (Promulgated by the China Council for the Promotion of International Trade on 1 October 1995).

I have already listed many Chinese laws and regulations above. It is also well worth mentioning the *Contract Law of the People's Republic of China*, which was adopted at the Second Session of the Ninth National People's Congress on 15 March 1999. The new Contract Law as a workable law came into force as of 1 October 1999 and provides in Article 428: 'the Economic Contract Law of the People's Republic of China, the Law of the people's Republic of China on Economic Contracts Involving Foreign Interests and the Law of the People's Republic of China on Technology Contracts shall be invalidated simultaneously'.¹⁴ With the first part of the Law laying out the general principles of contract law and the second specifically regulating fifteen types of contracts, the new Contract Law significantly improves both the transparency and certainty of contract law in China. Not only does it abolish the differentiation between foreign and domestic contract law, but it is also introduces the concept of a 'general contract'.¹⁵ It unifies the concept of contracts and represents a further step in the development of the rule of law in China which has travelled along the route of the reform for past two decades. The new Contract Law as such represents a successful achievement which will bring China into the new millennium better prepared for the rigours of global economic life.¹⁶

In the past foreigners were uneasy about investing in mainland China and

14 *The Contract Law of the People's Republic of China* (1999), Article 428.

15 Dr John Mo of City University in Hong Kong, cited in Bradley MJ, Deacons Graham & James, *Debt Recovery & Insolvency Law in China*, THC Press Ltd (1999) 18.

16 Chen Xuebin, *China Enacts a New Contract Law for the New Millennium*, Dec 1999-Jan 2000 *The Culture Mandala: Millennium Special*, Vol 4 No1, 17.

disputes were rarely settled to foreigners' satisfaction, but now in China the situation has been much improved, and there is more certainty. Part of this, as Prof Wilde points out, is because of changes in the way China resolves disputes, especially in international arbitration. It is now common among foreign lawyers to specify the China International Economic and Trade Arbitration Commission as the adjudicator of commercial disputes. The commission is popular. In 1995, it arbitrated over 900 cases—about half of these were foreign investment conflicts.¹⁷

I would like to thank Prof Wilde for editing the present work and giving us the opportunity to discuss the progress that has been made in the People's Republic of China in recent years. The present work shows the necessity for Western scholars and lawyers to continue to monitor these developments.

¹⁷ Wilde KCDM, *Ibid* at 261-262.