

## BOOK REVIEW

FOREIGN INVESTMENT LAW IN CHINA: REGULATION, PRACTICE AND CONTEXT.  
BY TARRANT MAHONY [BEIJING: TSINGHUA UNIVERSITY PRESS 2015, 504  
PP, ISBN 978-7-302-39589-8, PAPERBACK]

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*Abstract:*

*This book review analyzes Professor Tarrant Mahony's new textbook, Foreign Investment Law in China: Regulation, Practice and Context. The fundamental changes to the foreign investment approval process in 2015 pose challenges for educators and students working in this time of transition-- students must study the old laws and procedures even while new rules are proposed and put into practice. Professor Mahony tackles these challenges head on with an up-to-date text for the study of China's legal framework for foreign investment, presenting the materials in practical contexts. Professor Mahony's own experience practicing with major law firms in China provides background for this survey of the major laws and regulations governing the establishment, financing and operation of foreign investment enterprises in China.*

We are fortunate that many law professors in China and abroad are not only focused on the development of China's laws, but also devote themselves to the research and analysis of specialized areas of PRC law. At the same time, many of these same professors also want to be able to offer their students a general course on China's law in the important area of foreign investment, one that will be relevant in the context of today's investment transactions. The challenge has been to find an up-to-date text for the study of China's fast changing legal framework with materials presented in practical contexts that will serve students not only in the course of one semester, but also after leaving the classroom. This timely and well-organized textbook meets many of these needs.

Professor Mahony's purpose in writing this textbook is to present a survey of the major laws and regulations governing the establishment, financing and operation of foreign investment enterprises in China. This involves not only the study of laws traditionally thought of as "foreign investment law and regulation," but also many of the laws that make up the core of China's legal system, such as the General Principles of the Civil Law, the Company Law, the Contract Law, the Real Property Law, the Land Administration Law, the Labor Contract Law, the Criminal Law and more. Newer laws impacting foreign investment, such as the Anti-Monopoly Law and regulations on national security review are also included in this textbook. Professor Mahony's own experience practicing with major law firms in China provides background for

the study of establishing foreign investments generally, particularly in the area of large infrastructure projects.

The textbook starts with a very readable and well-researched history of the development of foreign investment in China since the beginning of the Open Door Policy (Chapter 1). Students will also find the footnotes in this chapter particularly useful for delving further into the steps taken to bring the legal framework for foreign investment to its present day form and the various views that were expressed by commentators and scholars at each stage. The textbook then moves on to the study of foreign investment laws and regulations in relevant contexts, with each of the succeeding chapters starting with a case study and questions most often raised by foreign investors.

The fundamental changes to foreign investment approval process in 2015 pose certain challenges for educators and students working in this time of transition—students must study the old laws and procedures even while new rules are proposed and even put into practice. Since 1979, a key characteristic of the legal framework for foreign investment in China has been the requirement of government approval, but in recent years there has been a growing recognition that China has outgrown the need to have every foreign investment reviewed and approved by government officials. There has also been an effort to eliminate the differences in the treatment for foreign and domestic investment, including the ways in which fixed asset investment projects are reviewed and verified. In 2013, China's leadership moved ahead with perhaps the most striking change to the legal framework for foreign investment—the elimination of the requirement of government approval for at least some types foreign investment, those businesses not listed on the Negative List. Starting in Shanghai, this experiment in the reform of the foreign investment approval system has now been expanded to include zones in Tianjin, Fujian and Guangdong; although many have commented on how limited the change is in reality due to the contents of the Negative List.

In “Chapter 2: Coming to China: The Initial Client Meeting,” Professor Mahony tackles these changes head on. The chapter first covers China's priorities for foreign investment in the Foreign Investment Guidance Catalogue and the foreign investment approval process used in most of Mainland China. It then introduces the changing foreign investment approval process as implemented in the Shanghai Pilot Free Trade Zone with its use of the Negative List of investments requiring government approval. This chapter also introduces the role of the major government agencies involved with foreign investment and the process of gaining approval for a foreign investment.

In early 2015, the Draft Foreign Investment Law (*the Draft FIL*) was announced as this textbook was going into print. When adopted the law will establish the principle of pre-entry national treatment for foreign investors, eliminating the requirement of government approval unless the foreign investment is in a restricted industry on a published list. Importantly, the main foreign investments laws on equity joint ventures, cooperative joint ventures and wholly foreign-owned enterprises, which have been used for decades, will be repealed and the PRC Company Law will assume primary importance for foreign investments. At this time of transition, students need to understand the value of studying the original foreign investment laws, under which hundreds of thousands of enterprises have been formed and continue to operate, even as the Company Law, the Anti-Monopoly Law and the National Security assume new prominence.

Professor Mahony provides a good foundation for the study of these issues in “Establishing a Presence in the PRC: Investment Vehicles Available to Foreign Investors,” (Chapter 3). Here Professor Mahony begins with the representative office and then moves on to the equity joint venture, cooperative joint venture, wholly foreign-owned enterprises, followed by foreign invested commercial enterprises, research and development centers, holding companies and regional centers, all part of the expanded reach of the foreign investment laws. Moving beyond the more traditional forms of foreign investment, Professor Mahony also introduces the foreign invested company limited by shares, the foreign invested partnership, and the controversial variable interest entity with examples from recent cases.

In “Operating a Foreign Invested Enterprise,” (Chapter 4), students study the financial and governing structures of the investment vehicle, along with labor issues, technology and trademark licensing. Amendments to the Company Law in 2014 eliminated requirements of minimal capitalization for companies, but the issues of amount and timing of capital contributions for foreign invested projects still exist where government review and approval is required. In addition, the basic question of what can be contributed to the registered capital of a company can still be troublesome when dealing with non-currency property. Although Article 27 of the Company Law requires that in-kind contributions be valued in terms of currency and then lawfully transferred to the new company, questions persist regarding what is required for technology and know-how that will be needed for the venture’s production. In discussing the board of directors and management structure of a joint venture, Professor Mahony identifies a number of key issues that are crucial to a successful joint venture and points out the differences in

the regulations applying to joint ventures and the requirements of the PRC Company Law. He also draws on recent cases and his own experience to bring the relevance of these issues closer to home. This chapter also explores topics that have become more sensitive to foreign investors in China recent years, such as criminal liability for actions taken by board directors or management and restrictions on leaving China when the investment enterprise encounters financial troubles.

Acquisitions are a major part of the foreign investment scene. In “Expanding in China: FIE and Foreign M&A Transactions,” (Chapter 5) covers foreign acquisitions of domestic Chinese enterprises and other foreign invested enterprises, as well as strategic investment in listed companies. This chapter takes the students into the details of acquisition structures, the importance of due diligence, the requirements imposed on the transaction by regulations, and the major roles anti-monopoly and national security reviews now play in examining foreign acquisitions. The Anti-Monopoly Law of 2008 and the growing body of supporting regulations form an area of law in which specialized legal advice is increasingly needed. Yet the foreign investor and its in-house counsel must also be aware of how the requirements of the Anti-Monopoly Law may impact an proposed investment at the earliest stages of planning.

“Building the Project: Land, Bidding and Taking Security,” (Chapter 6), introduces the legal system for land use and building ownership in China. Obtaining land use rights in the correct legal form is essential if the invested enterprise is to be able to mortgage land use rights and buildings ownership rights when obtaining financing. This chapter also introduces the rules on the creation, perfection and enforcement of mortgages and other secured interests as found in the PRC Security Law and the PRC Real Property Law. Another area of law important to large-scale projects is introduced through the PRC Bidding Law and its implementing regulations.

A bonus for students is the Appendix on the “Development of the Legal Profession and Professional Education in China,” where information can be found on opportunities for business lawyers in China, the system of legal education in China, and foreign programs for the study of law.

It is inevitable that some of the regulations cited in this textbook have already been revised or replaced since it went to print. The revised versions of certain materials mentioned, such as the Foreign Investment Guidance Catalogue of 2015 and the Special Administrative Measures for Foreign Investment Access in Pilot Free Trade Zones (and the Negative List) of April 2015, are easily handled on an ad hoc basis.

While we wait for Professor Mahony's updated edition of this text, I would like to suggest that more attention be paid to the PRC Environmental Protection Law and its importance to the foreign investor as it takes its project through the approval process and into full operation. An environmental impact assessment (*EIA*) is part of the examination and review process for all fixed asset investment projects. Policy initiatives in recent years have emphasized the need for more rigorous review of EIAs. In some cases, investors have found their EIAs rejected and have had to revise their project plans in order to meet the requirements, as seen in the case of the expansion of BMW Brilliance Automotive joint venture in Shenyang. More recently, amendments to the PRC Environmental Protection Law have required greater public disclosure of the EIA documents and expanded the requirements for the public consultation in the preparation of the EIA. This area of law and procedure, as with other areas covered by Professor Mahony, are critical to the successful handling of the foreign investment project.

In closing, I should add that I have been using Professor Mahony's textbook this semester in my course on "Foreign Investment Law in China" at Georgetown University Law Center. While we have not yet finished the semester, I can report that I am not the only one who appreciates Professor Mahony's skill in presenting the complexities China's rapidly changing legal system. My students have also told me how useful they find this textbook. I would add that practitioners who find themselves newly assigned to China project work would also find this book very worthwhile.