Tian Xu* / Emanuel Schiwow**

A Changing Landscape – An Update on Foreign Investment Vehicles in China

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I. Preface

Five years ago, the authors introduced the legal framework of foreign investment vehicles in China in a short article[1]. Numerous changes in the law have occurred since then. The present article is meant to highlight the most important changes in China's foreign direct investment regime in the past 5 years and to give an insight view of the current status of this highly dynamic area of law[2].

II. Representative Office

For a large number of foreign enterprises, the establishment of a representative office («Rep. Office») has been the first step to enter the Chinese market[3]. Due to the lack of capital requirements and simplified registration procedures, Rep. Offices were, historically, the ideal vehicle for investors to establish a first presence in China[4].

Rep. Offices do not have the status of a legal person and they are limited to engaging in (i) conducting research, (ii) promoting their foreign parent company, (iii) coordinating the foreign parent companies in China and (iv) conducting other activities that are not intended to generate profit[5].

In 2010, the authorities released new rules[6] on Rep. Offices, introducing tightened requirements. The number of representatives (and therewith the maximum number of foreign employees allowed to work for the representative office) was limited to four[7] and new sanctions were introduced, including blacklisting of failing representatives[8], forfeiture of all proceeds and business-related equipment[9] and fines of up to RMB[10] 500,000[11].

The release of these rules together with a new rule on a (less favourable) tax treatment of Rep. Offices[12] can be seen as the government's attempt to discourage the establishment of Rep. Offices. It is expected that numerous foreign enterprises will replace their Rep. Office by a wholly foreign-owned enterprise («WFOE»), either by operating a Rep. Office and a WFOE in parallel or by establishing a WFOE and closing down the existing Rep. Office. It is worth mentioning that the procedures

* Tian Xu, LL.M., Attorney-at-Law in the People's Republic of China, Of Counsel, Eiger Law, Shanghai.
** Lic. iur. Emanuel Schiwow, Rechtsanwalt, Shanghai/Zurich.

1 Schiwow/Xu, Foreign investment vehicles in China – the legal framework in an overview, GesKR 4/2006, p 331 et seq.

2 Since January 1, 2006, the legal framework related to foreign investment has undergone an estimated several hundreds of changes, comprised in newly released or amended laws, regulations, circulars, notices, administrative measures, interim measures, implementing rules etc. issued by different governmental bodies of the People's Republic of China («PRC»).

3 This applies both to large companies such as UBS, Credit Suisse, HSBC etc. as well as to many small and middle-sized companies.

4 In principle, a Rep. Office is not subject to the examination and approval of the PRC Ministry of Commerce («MOFCOM») and can be easily registered at the PRC State Authority for Industry and Commerce («SAIC»), with the exception of a few industrial sectors where prior approvals are needed. For example, in the banking sector, the prior approval of China People's Bank, the central bank of China, is required before registration.

5 Article 2 of the Regulations on Administration of Registration of Representative Offices of Foreign Enterprises

6 Two new rules were released: the Notice on Strengthening Administration of Foreign Enterprises Resident Representative Institutions («Notice») dated January 4, 2010 and issued by the State Administration of Industry and Commerce («SAIC») and the Administrative Regulations on Registration of Representative Offices of Foreign Enterprises («Regulations») dated November 19, 2010 and issued by the PRC State Council, which has become effective as of March 1, 2011.

7 Article 3 of the Notice.

8 Article 4 of the Notice.

9 Article 35 of the Regulations.

10 RMB means Renmimbi, the State currency of the PRC.

11 At the time of writing, RMB 500'000 corresponded to CHF 72'000, approx.

12 Circular on Releasing the Tentative Measures for Taxation of Resident Representative Offices of Foreign Enterprises («Circular No 18») dated February 20, 2010 and issued by the State Administration of Taxation («SAT»).

for closing down a Rep. Office are often fairly time-consuming due to the involvement of various authorities[13] and thus it is advisable to establish the WFOE first so that the operations can be seamlessly continued. For new investors, it seems worthwhile to consider establishing directly a WFOE instead of a Rep. Office.

III. Wholly Foreign-Owned Enterprise (WFOE)

Since its introduction in 1986, the WFOE has become the most popular investment vehicle for foreign investors in China as it provides investors with a maximum of flexibility and independence from Chinese business partners[14]. Companies like 3M, Siemens, Novartis and HSBC[15] are set up as WFOEs. Legally, the WFOE is set up in the form of a limited liability company («LLC»)[16]. Depending on the business scope and the location, different capital requirements apply[17].

In line with its WTO commitment, China started to open a number of industrial sectors (mainly trading and services) for WFOEs at the end of 2004[18]. As of the beginning of 2006, there has been substantial progress and further openings in the service sectors including the following major areas:

- International freight forwarding agency: as of December 10, 2005 (*i.e.* 4 years after WTO admission)[19];
- Hotels and restaurants: as of December 10, 2005 (*i.e.* 4 years after WTO admission)[20];
- Advertising: as of December 10, 2005 (*i.e.* 4 years after WTO admission)[21];
- Banking: as of December 10, 2006 (*i.e.* 5 years after WTO admission)[22];
- Travel agency: as of December 10, 2007 (*i.e.* 6 years after WTO admission)[23];
- Management consulting: as of December 10, 2007 (*i.e.* 6 years after WTO admission)[24].

In line with its WTO commitment, it is still and will remain impossible to establish WFOEs in China in sectors considered to be of strategic importance such as education, environment services, marine transportation etc.

As regards the minimum registered capital of a WFOE, the requirements vary depending on the business sectors in which the WFOE is active. For example, the capital requirements for a freight forwarding WFOE are RMB 5 million (for air freight forwarding), RMB 3 million (for sea freight forwarding) and RMB 2 million (for road freight forwarding) and an additional RMB

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13 Cancellation of registration have to be conducted with various authorities such as tax, foreign exchange, customs etc., among which the tax de-registration is the most time-consuming. There have been examples in practice where it took nearly two years to officially close down a Rep. Office.

14 The numbers of WFOE established in China from 2006 to 2010 (excluding those in financial sectors such as banking, insurance and securities) is around 123'000 according to the statistics published by the PRC Ministry of Commerce.

15 In the 80's of last century, 3M was among the earliest WFOEs established in China; with the opening of the banking sector in 2008, HSBC was among the first foreign banks having established a wholly foreign-owned subsidiary to conduct RMB business.

16 Article 18 of the revised Implementation Rules of the PRC WFOE Law, effective as of April 12, 2001.

17 The following types of WFOEs are generally distinguished: Manufacturing WFOE, Consulting WFOE, Service WFOE, and Trading WFOE (also called Foreign Invested Commercial Enterprise («FICE»). The minimum capital required for Consulting WFOEs is generally between RMB 100'000 to RMB 500'000, depending on the business objective such as targeted annual turnover and profit, whereas for Manufacturing WFOEs a minimum registered capital of RMB 1'000'000 (around CHF 140'000) is generally required (informal criterion).

18 Since the end of 2004, WFOEs have been allowed in the trading/commercial sector (including wholesale, retail, commission agency, franchise) and in a number of service sectors including architecture (subject to restrictions on the projects), warehousing, rail and road transportation etc. The possibility to establish a foreign invested commercial enterprise («FICE») triggered an investment flood in the retail sector both for household goods (*e.g.* Carrefour, Wal-Mart) and luxury products (*e.g.* Louis Vuitton, Montblanc).

19 Legal basis: The Measures for Administration of Foreign Invested International Freight Forwarding Enterprises, effective as of December 11, 2005.

20 Legal basis: Annex 9 Schedule of Specific Commitments on Services of China's WTO Accession Documents.

21 Legal basis: The Regulations on Administration of Foreign Invested Advertising Enterprises, initially promulgated in 2004 and revised in 2008. They allow for the establishment of WFOEs in the advertising sector. In fact, by July 2004, all of the global top ten advertising companies had established operations in the form of joint ventures in China. In December 2006, the British advertising company BBH launched the first advertising WFOE in China. As of 2007, leading advertising companies such as WPP Group, Interpublic Group and J. Walter Thompson all established their WFOEs in China.

22 Legal basis: The Regulations on Administration of Foreign Invested Banks, effective as of December 11, 2006. HSBC and Standard Chartered were among the first foreign banks to establish their wholly-owned subsidiaries in China. Prior to that, they were operating in form of branches or Rep. Offices in China.

23 Legal basis: The Regulations on Travel Agencies effective as of May 1, 2009. Subsequently, the National Tourism Administration promulgated the Notice on Accepting the Application for Establishment of Foreign Invested Travel Agency on August 25, 2009, which became effective on September 15, 2009. According to this Notice, the capital requirement for travel agency WFOEs is no less than RMB 300'000 (around CHF 42'000) and the time for issuing the prior approval is 30 business days after the acceptance of application. However, foreign invested travel agencies are only allowed to operate inbound routes and travelling routes within China. Japan Airlines and ANA established the first two travel agencies in the form of WFOEs in China.

24 Legal basis: Annex 9 Schedule of Specific Commitments on Services of China's WTO Accession Documents. For example, Boston Consulting Group entered China by establishing a joint venture in 1993 and successfully transformed its subsidiary into a WFOE after the opening of this sector to wholly foreign-owned businesses.

500'000 is needed for each branch to be established by the WFOE[25], whereas the capital requirement for a WFOE travel agency is merely RMB 300'000[26].

Generally, before the establishment and registration of the WFOE at the competent Administration of Industry and Commerce, two types of approval procedures apply depending on the industrial sectors, *i.e.* with and without prior approval.[27] For example, the establishment of a WFOE to be engaged in wholesale and retail is not subject to any prior approval and the Ministry of Commerce («MOFCOM») and its local authorities are responsible for the examination and approval of the projects. However, establishment of WFOEs in particular industrial sectors are subject to prior approval of the regulatory bodies prior to the issue of approval of MOFCOM, *e.g.* the prior-approvals of China Banking Regulatory Commission, China Insurance Regulatory Commission and National Tourism Administration, respectively, are required for wholly foreign-owned banks, insurance companies and travel agencies.

In 2010, MOFCOM delegated the authority for approving foreign investments of over USD 300 million in encouraged and permitted categories[28] and that of over USD 50 million in restricted categories to the approval authorities at provincial levels[29] to further facilitate and simplify the approval procedures, which has been highly appreciated by foreign investors.

IV. Equity Joint Venture and Cooperative Joint Venture

Equity Joint Ventures («EJVs») and Cooperative Joint Ventures («CJVs») are designed for foreign investors who wish or are required to engage in their business in cooperation with a Chinese business partner. An EJV is set up in the form of an LLC, a CJV can be set up either as an LLC or as an enterprise without status of a legal person.

A recent progress in respect to Sino-foreign Joint Ventures was that the promulgation of rules enabling a *Chinese individual* (*i.e.* a Chinese natural person) to be a party in a newly established EJV or CJV. This is, however, limited to the Shanghai Pudong New Area on an experimental basis. Previously, only Chinese companies, enterprises or economic organizations were allowed to be a party of an EJV or CJV.[30] In practice, Chinese individuals have often set up a company to become party of the intended EJV or CJV to circumvent the restriction.

The new rule was highly applauded because it largely facilitates the participation of Chinese individuals in the foreign invested enterprises and unleashes the energy of Chinese private capital which has often been combined with abundant resources in terms of marketing and sales channels. Until the end of January 2011, 54 EJVs and CJVs were established with Chinese individual shareholders, most of them as consultancy, trading and high-tech companies.

V. Foreign Invested Company Limited By Shares

Left out in our previous article, the legal form of the Foreign Invested Company Limited by Shares («FICLS») has substantially gained importance as a foreign investment vehicle for accessing Chinese capital market in recent years.

The evolution of FICLS has undergone the following important phases:

- In 1995, the FICLS was introduced as an alternative investment vehicle to the existing EJV, CJV and WFOE with a view to upgrading the scale of the foreign investment[31]. Nevertheless, it was not clear for a long time whether this vehicle could be used for the purpose of entering the Chinese stock market since initially an FICLS was only permitted to be listed in an overseas stock market[32].

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25 Legal basis: The Measures for Administration of Foreign Invested International Freight Forwarding Enterprises, effective as of December 11, 2005.

26 Legal basis: The Notice of National Tourism Administration on Acceptance of Application for Establishment of Foreign Invested Travel Agencies, effective as of September 15, 2009.

27 The same applies for establishment of joint ventures.

28 As a part of China's economy plan, the principles guiding foreign investment are set out in the PRC Foreign Investment Industrial Guidance Catalogue in 2007 («PRC Guidance Catalogue») and further provisions. Foreign investment projects are divided into four categories: encouraged, permitted, restricted, prohibited. Depending on the category of an investment project, a foreign company may or not be allowed to engage in a certain business field. Also, the category determines which investment vehicle is approved for the respective business field (certain activities can be undertaken by a foreign investor only if it teams up with a Chinese partner). In April 2011, the PRC State Council has announced several amendments to the PRC Guidance Catalogue. The revised PRC Guidance Catalogue is expected to become effective later in 2011.

29 The Notice of Ministry of Commerce on Delegation of Approval Authority (Shang Zi Fa [2010] No. 209).

30 According to Article 1 of the Sino-Foreign Equity Joint Venture Law, initially promulgated in 1979, revised on March 15, 2001, only companies, enterprises and economic organizations are permitted to be a party of EJV. The same is provided under Article 1 of the Sino-Foreign Cooperative Joint Venture Law, initially promulgated in 1988, revised on October 31, 2000.

31 Legal basis: The Provisional Regulations on Several Issues regarding the Establishment of Companies Limited by Shares with Foreign Investment, effective as of January 10, 1995.

32 Article 23 of the Provisional Regulations on Several Issues regarding the Establishment of Companies Limited by Shares with Foreign Investment.

- From 2001 to 2003, a number of regulations were promulgated which have enabled an FICLS to acquire non-tradable shares, state-owned shares and shares in a domestic listed company[33] and even opened the possibility for foreign investment to take part in restructuring of state-owned enterprises[34].
- From 2006 onwards, a number of regulations have been revised to simplify the procedures for foreign acquisitions of listed companies or otherwise adapt them to match the general procedures for foreign takeovers of domestic companies, all of which will possibly further facilitate the use of FICLS as an increasingly effective foreign investment vehicle to access the Chinese stock market[35].

Like its domestic counterpart under the applicable PRC Company Law, FICLS features a division of shares with equal value and its establishment by means of promotion or offer, which is akin to a domestic company limited by shares, and a requirement for foreign equity of no less than 25 %[36]. However, compared with its domestic counterpart, an FICLS has substantially higher requirements with respect to the registered capital[37].

For investors without the intention to go public, the form of FICLS loses ground to that of EJV and CJV and in the recent years also to WFOEs due to its substantially higher capital requirement, despite its flexibility and higher transferability[38]. By contrast, the form of a FICLS is suitable for companies attempting to access the Chinese capital market. In practice it is not only chosen to be the initial investment vehicle, though the number of initial incorporation of FICLS is insignificant compared with other types of vehicles[39], but also increasingly as an intermediary vehicle before getting listed[40]. As an example, Alcatel successfully transformed Shanghai Bell into an FICLS, which was the first FICLS in the telecommunication sector in China.

VI. Foreign Invested General Partnership and Limited Partnership

Partnerships were introduced into the legal framework of China in 2007 with the promulgation of the PRC Partnership Enterprise Law («Partnership Law»)[41]. The law distinguishes (i) general partnerships («GPs»)[42], (ii) special general partnerships («SPGs»)[43] and (iii) limited partnerships («LPs»)[44].

GPs are formed by general partners who bear unlimited joint and several liability for the debts of the partnership[45]. Both natural and legal persons can be partners of a GP[46].

SPGs are subject to a similar set-up as GPs, however this legal form is designed for professional service institutions offering services requiring special skills and professional knowledge, like law firms and accounting firms[47]. The Partnership Law allows for shielding co-partners from liability arising from gross negligence or wilful misconduct by one partner or a group of partners[48].

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33 The regulations include the Several Opinions on Issues Regarding Foreign Investment in Listed Companies, effective as of November 5, 2001, and the Notification on Issues Regarding Transfer of State-Owned Shares and Legal Person Shares to Foreign Investors, effective as of November 4, 2002.

34 The Temporary Regulations on Restructuring State-Owned Enterprises by Using Foreign Investment, effective as of January 1, 2003.

35 The Notice on Transformation of Foreign Investment Shares in an FICLS into B Shares, effective as of July 30, 2008, simplified the procedures by changing the approval procedures at the China Securities Regulatory Commission («CSRC») into a registration. Furthermore, the Interim Provisions on the Takeover of Domestic Enterprises by Foreign Inverstors was further amended on June 22, 2009 to be consistent with the PRC Antitrust Law.

36 However, one an initially unlisted FICLS is listed on a Chinese stock exchange, the requirement for foreign equity is reduced to no less than 10 % according to the Several Opinions on Issues Regarding Listed Companies Involving Foreign Investment (effective as of November 5, 2001).

37 The minimum registered capital of an FICLS is RMB 30 million, whereas under the PRC Company Law of 1993, the minimum registered capital for a domestic company limited by shares was RMB 10 million which has been reduced to RMB 5 million by the latest company law in 2006.

38 Except when otherwise provided in the articles of association, a regular shareholder of FICLS (excluding promoters, supervisor, senior management who are subject to lock-in periods) can transfer his shares at his own discretion as to the time and transferee whereas the shareholders of EJV, CJV and WFOE are obliged to respect the preemptive right of the other existing shareholders.

39 According to the statistics publicized by the PRC Ministry of Commerce, the number of FICLS directly incorporated in China in 2010 is 51 (excluding the foreign investment in finance sector (banking, securities and insurance)), which represents an increase of almost 150 %, compared with 2009. The number of EJV and WFOE directly incorporated in China in 2010 is 4,970 and 22,085, respectively.

40 One important requirement for transforming an EJV to an FICLS is that the EJV must have been profitable for three consecutive years according to Article 15 of Provisional Regulations on Several Issues regarding the Establishment of Companies Limited by Shares with Foreign Investment.

41 The PRC Partnership Enterprise Law became effective as of June 1, 2007. Foreign invested partnerships are also subject to the Measures for the Administration of the Establishment of Partnership Enterprises in China by Foreign Enterprises or Individuals («Measures on Foreign Partnerships») dated November 25, 2009 and issued by the State Council, which became effective as of 1 March 2010.

42 Article 2 Partnership Law.

43 Article 55 Partnership Law.

44 Article 2 Partnership Law.

45 Article 2 Partnership Law.

46 Liability can be limited indirectly, *e.g.* by using an LLC as partner. The same applies for LPs and SGPs. According to Article 3 of Partnership Law, state-owned enterprises, state-owned companies, listed companies or other enterprises for public interest may not be general partners.

47 Article 55 Partnership Law.

48 Article 57 Partnership Law. According to Article 59 of Partnership Law, a risk reserve fund must be maintained in order to protect the rights of third parties/the clients.

The distinctive feature of an LP is that it is composed of 2 to 50 partners of which at least one is a general partner and the others are limited partners[49]. The general partners bear unlimited liability like the general partner in a GP or and SPG[50]. The limited partners bear liability for the debts of the partnership up to the maximum amount of their capital contribution[51].

Partnerships can be set-up by natural or by legal persons[52]. Like other foreign-invested enterprises, they are subject to China's foreign investment industry policies, thus depending on the industry certain restrictions may apply[53]. No minimum capital is required for a partnership.

So far foreign invested partnerships as an investment vehicle have been mostly used by foreign investors in respect to private equity funds. In May 2010, the first foreign invested partnership enterprise, Strait Industry Investment Fund, was established in Fujian Province, which involves Taiwan Fubon Xingji Investment Company as the foreign partner and Chinese National Development Investment Co. Ltd. and Fujian Development Investment Co. Ltd. as Chinese partners. This fund has funds of RMB 20 billion which will be invested in infrastructure projects in China. In the same year, the global private equity fund Carlyle Group established its first «co-brand» RMB fund (equivalent to USD 100 million) in form of a foreign invested partnership together with its Chinese partner Shanghai Fosun High-Tech Group in Shanghai.

The introduction of the foreign invested partnership is a breakthrough in China's foreign investment laws and it was welcomed by the fast growing private equity industry of China. It features the following major advantages:

- It allows for direct involvement of Chinese natural persons in foreign invested projects on a nationwide basis[54].
- Its establishment is subject to fast and simplified procedures, *e.g.* no approval from MOFCOM is needed[55] and there is no minimum capital requirement and thus no need for capital verification. In Shanghai, the registration takes approximately two weeks after the registration authority accepts the application.
- It has a flexible management body, because one or several partners (excluding limited partners) can be appointed to handle the daily matters on behalf of the partnership[56].
- No enterprise income tax will be imposed at the partnership level, *i.e.* partners will be subject to their own individual or enterprise tax at partner level[57].
- Foreign general partner can even invest by providing labour or services instead of funds[58].

VII. Acquisitions of Domestic Enterprises by Foreign Investors

In the past few years, it has become increasingly popular for foreign investors to enter the Chinese market through acquisition of the equity or assets of a purely domestic enterprise[59]. Generally, an acquisition[60] of domestic companies by foreign investors can be structured as follows[61]:

- Acquisition of (i) the existing equity interest or (ii) the increased equity share in a Chinese company by an offshore foreign investor/buyer from an onshore seller with the result that the on-shore seller is transformed to a foreign invested enterprise; or
- Acquisition of the assets from an onshore seller by (i) an offshore foreign investor/buyer or (ii) an onshore buyer established by the foreign investor with the result that the purchased assets are operated by a foreign invested enterprise established by the offshore foreign investor.

Both private companies and state-owned enterprises («SOEs») can be acquired as target companies[62].

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49 Article 61 Partnership Law.

50 Article 60 Partnership Law.

51 Article 2 Partnership Law.

52 Article 2 Partnership Law.

53 Whether a foreign investor may invest in certain industrial sectors and what the requirements for the investment in such sectors are largely depends on the intention of the state in promoting or inhibiting the foreign investment in such particular sector. For example, if it is indicated in the PRC Guidance Catalogue that a certain industrial sector is limited to EJV or CJV or Chinese Majority or Chinese Relative Majority, then a foreign invested partnership enterprise is not permitted in this sector. See also footnote 28.

54 Article 2 of the Measures.

55 Article 10 of the Measures.

56 Article 26 Partnership Law.

57 The Notification of State Council on Issues Related to Taxation of Individual Enterprises and Partnerships, effective as of June 20, 2000.

58 Article 16 Partnership Law. However, limited partners may not invest with labor or services.

59 As the inbound M&A activities increase, another trend not to be overlooked is the increasing outbound M&A activity of Chinese companies abroad. Driven by fast growth in the domestic market, China has become the fifth largest global outbound investor with a total volume of USD 56.6bn in 2009, according to a survey conducted by KPMG. With the expected revaluation of the RMB, this trend might further increase.

60 M&A activities by foreign investors are usually structured as acquisitions, not as mergers. While the law of China foresees two merger types for *domestic* companies – merger by absorption and merger by new establishment – cross-border mergers involving both Chinese and foreign legal entities are not permissible at this stage.

61 Article 2 of the Regulations on Acquisition of Domestic Enterprises by Foreign Investors, effective as of June 22, 2009, issued by MOFCOM («Acquisition Regulations»).

62 In case of SOE, special provisions apply. According to the PRC Enterprise State-owned Assets Law, effective as of May 1, 2009,

Similar to the establishment of a foreign invested enterprise, acquisitions of domestic enterprises by foreign investors are also subject to the examination and approval of MOFCOM and the registration with SAIC. However, compared with the rules for direct investment, the procedures and requirements for acquisitions are more stringent in many aspects such as capital contribution, equity debt ratios etc.[63]. Furthermore, qualifying transactions are subject to an additional examination by the Anti-Monopoly Commission subordinated to the State Council[64]. At that stage, it is examined whether the acquisition will lead to any excessive market concentration that will impede the fair competition. This mechanism has been further strengthened with the adoption of the PRC Anti-Monopoly Law[65] and proven to be «destructive» in practice.[66]

Recently, the PRC State Council has introduced a national security review regime with regard to the acquisition of Chinese companies by foreigners in the sectors of military equipment, key agricultural products, energy, infrastructure, transport, technology and equipment[67]. In these sectors[68], the acquisition of a Chinese company by a foreign investor is subject to heightened scrutiny and to a special approval process[69].

the Interim Provisions on Restructuring State-owned Enterprises, effective as of January 1, 2003, and the Acquisition Regulations, acquisition of SOE features several special procedures such as involvement of the State-owned Assets Supervision and Administration Commission («SASAC»), public trading in an equity trade centre, obligatory evaluation of the state-owned equity, national security review etc.

63 Article 16 and Article 19 of the Acquisition Regulations.

64 According to the Regulations of Standards for Business Operators Market Concentration Declaration, effective as of August 3, 2008, issued by State Council, if either (i) the global turnover of the parties to the transaction exceeds RMB 10 billion and at least two parties achieved RMB 400 million each during the last financial year or (ii) the Chinese turnover of the parties to the transaction exceeds RMB 2 billion and at least two parties achieved RMB 400 million each during the last financial year or (iii) the State Council has evidence that the transaction will impede the fair competition, the transaction is subject to market concentration examination.

65 Effective as of August 1, 2008.

66 An infamous example of the application of the Anti-Monopoly Law is the decision of the MOFCOM dated March 18, 2009, whereby the MOFCOM rejected Coca Cola's merger control application for the acquisition of China's Huiyuan Juice Company, a major beverage producer.

67 Legal basis: the Notice of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors dated March 3, 2011 and issued by the PRC State Council (hereinafter «Notice on National Security Review»).

68 It is one of the drawbacks of Notice on National Security Review that the sectors involved are described vaguely.

69 Foreign investors are therefore required to verify whether an envisaged transaction falls within the scope of the National Security Review and, eventually, submit it to the approval proceedings set out in the Notice on National Security Review. Unfortunately, the approval process set out therein has not been aligned with the ordinary approval process. The exact steps of procedure remain as unclear as the substantive standards by which the governmental committees involved would carry out the review.

VIII. Conclusion

The legal framework for foreign investment in China remains a highly dynamic area of law which has been undergoing constant and remarkable changes which reveal in particular the following trends:

- The Rep. Office no longer serves as an ideal investment vehicle even for the purpose of exploring the Chinese market as it is more strictly scrutinized and clearly discouraged.
- As a result of China honouring its WTO commitment, an increasing number of industrial sectors have been opened for foreign investment. Wholly foreign-owned enterprises have replaced joint ventures to become the vehicle of first choice for many foreign investors, particularly in commercial area and service sectors, due to the flexibility that a foreign investor can enjoy in the management and operation.
- With China broadening the participation of individual investors in the foreign investment field, stock markets, private equity and venture capital are playing an increasingly active role where foreign investors are using FICLS and foreign invested partnerships to achieve their goals.
- Foreign investors who do not want to start from scratch may consider acquiring an existing Chinese enterprise, whereas investors with substantial global market share or in sectors believed by China to be vital for its national security should conduct thorough research before embarking on the transaction.

While all these changes prod foreign investors to reconsider whether their investment vehicles will continue to serve their best interests, China is demonstrating its willingness to embrace more foreign investment and making efforts to catch up with its western counterparts in terms of creating more investment vehicles. But it no longer expects its foreign investors to jump on the bandwagon; instead, it expects them to jump on the right wagon.