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Introduction: Investing in China

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Panel 2: Investing in China

Introduction

CURT GARBESI*

Typically, symposia of this nature, among lawyers, academics and business people tend to be dry affairs, the papers reading like an encyclopedia on the administration of the value added tax. In this sense, the following articles are atypical. Kevin Hobgood-Brown and Jinyan Li do a first-rate job of introducing the reader to the intricacies of their respective topics. China is a nation committed to changes that will rationalize its system with that of the world of trade, investment and commerce. These papers help develop an understanding of China's position at this point in history.

Mr. Hobgood-Brown sketches in some of the more significant recent legal changes in China from the viewpoint of western investors. The foreign business community and practicing bar received with relief the recently enacted contractual joint venture law—an investment format already widely in use. Similarly, the new arbitration rules bode well for future efficient dispute resolution. It is confidence inspiring that foreigners can now serve on arbitral panels. The 1979 equity joint venture law is being reviewed for possible revision, including tax provision consolidation.

Looking to the very near future, Mr. Hobgood-Brown predicts a national copyright law and computer software protection to be provided by regulations already being prepared. He also portends the conclusion of a bilateral investment treaty between the United States and China, which should further foster a confidence building legal investment climate.

One problem Mr. Hobgood-Brown mentions, communication and implementation of laws, is part of the larger problem of understanding the cultural, economic infrastructural matrix in which law operates. He remarks on a built-in “flexibility” to be found in the Chinese system, but decries its absence in the administration of the tax laws. He also discusses briefly the development of “currency swap

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centers," a euphemism for black market money changing locations. At these points in his paper he does a more important service even than providing the purely legal material in which they are interspersed. What the foreigner needs to know is not only what the laws say but also how they are administered and avoided, but also the various alternatives to the formal institutions of the law.

Ms. Li provides a comprehensive view of the taxation of foreign investors in China. This piece should be of substantial value to anyone contemplating investing there. She first sketches in a brief exposition of each of the tax laws of most interest, pointing out that these are discrete laws, not part of a tax code. She then deals with recent developments in taxation, and finally with predictions for the near term future. She briefly describes the taxes on the income of individual, joint venture, and foreign enterprises, income from consolidated industrial and commercial properties as well as real estate, vehicle and vessel license fees, land use, customs duties, and a stamp tax. She then deals with recent developments in China's tax laws as they pertain to foreign investment. Individual income levies have been reduced substantially. Transfer pricing law in the Shenzhen Special Economic Zone is discussed at some length, as well as tax incentives designed to foster particular policies, such as attracting investment to certain areas. Tax treaties, and the difficulties involved in their implementation, are also discussed.

At the point where Ms. Li discusses tax administration, she gets into an area that should be the topic for her next paper. Here she touches on the question of the discretion of local tax authorities, suggesting that this may well explain the relative lack of litigation in this area. Questions of this nature need to be explored carefully. Law in action and context is what any investor needs to understand; and people like Ms. Li can help to develop that understanding.

My focusing from time to time on context and process grows out of both direct and vicarious experiences in China. Ms. Li's mention of local discretion in the granting of exemptions and privileges, and in the authorizing of alternative methods of computing profits, reminded me of an experience of a foreign negotiator in southern China. When the subject of a tax holiday was broached, she was given to understand—in a manner obscure to most, if not all, westerners—that the level and scope of any such relief would depend on how many, how often and how opulent were the banquets hosted for certain local authorities. Such experiences give life to the law and legal institutions.

My plea, then, is for future symposia to provide us with more focus on the law in operation and context, set in the cultural matrix that alone gives it meaning.

Foreign-Direct Investment From A Western Perspective

KEVIN HOBGOOD-BROWN*

Over the last ten years, there has been a tremendous explosion of laws and regulations promulgated in China relating to foreign trade and investment. This article discusses some of these legal developments, commenting on some of the business implications from a Western business perspective.

One of the recent developments that the western business community in China views very favorably is last year's passage of the Contractual Joint Venture Law. Finally, after approximately seven thousand of these contractual joint ventures had been approved over the last seven or eight years, China had a law which lent some credibility and predictability to this very popular form of doing business. This was a very positive and eagerly awaited development.

In addition, new rules have recently been promulgated for the arbitration of international trade disputes under the China International Economic and Trade Arbitration Commission. This commission is an arbitral body under the China Council for the Promotion for International Trade. Some of the most significant developments embodied in these new rules are: (1) for the first time, foreign arbitrators are able to sit on the arbitral panel; and (2) the fee schedule is now staggered (this will make a difference where larger disputes are the subject of arbitration). The new arbitration rules are an important development which I think will encourage the resolution of international trade disputes in China.

The Equity Joint Venture Law was passed in 1979. Presently, the Chinese government is considering whether it should expand the law to include something called a "joint stock company." The characteristics of a joint stock company are unknown at this time, but are eagerly awaited by the foreign business community. There is also talk

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