

January 1995

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Thomas Maxwell

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Recommended Citation

Thomas Maxwell, Chinese Foreign Investment Laws and Policies: Evolution and Transformation, 23 Denv. J. Int'l L. & Pol'y 609 (1995)(book review).

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Chinese Foreign Investment Laws and Policies: Evolution and Transformation

Chinese Foreign Investment Laws and Policies: Evolution & Transformation

REVIEWED BY THOMAS MAXWELL*

JIA, WEI, CHINESE FOREIGN INVESTMENT LAWS AND POLICIES: EVOLUTION & TRANSFORMATION; Quorum Books; Westport, CT (1994); ISBN 0-89930-900-3; 216 pp. (hardcover). Index.

The most important thing about China is that it can afford to emerge slowly and gradually, rather than eat humble crow pie and other substances as it kowtows in tumultuous subservience to Western superiority. It's a developing country, of course, and thus "needs" the help of developed countries to accomplish its program of growth, but no more than developed countries need to be needed by China. And thus, virtually by definition, China must be considered among the global crowd of developing countries competing for capital, managerial know-how, technology, and market access from abroad, which, also by definition, are finite and somewhat discretionary, the coveted rewards accorded to only the favored few. In fact, however, the competition as it is actually being played out is just as stiff among foreign suppliers to be China's main angel as China's is to be granted this favor. In this looking-glass competition, if truth be told, the United States suffers every bit as visibly under its largely self-imposed array of handicaps as China does worrying about its exchange balance problems or the internal demographic catharsis its growth is bringing about.

Inseparable from China's economic status - towards the low end of Asian countries as measured in per capita GDP, say - is its other measure of status, military capacity. For decades, China has possessed the ability to crush any of its Asian neighbors, India excluded, almost overnight, by virtue of its army's sheer mass. Entering the twenty-first century, however, China's military has acquired some of the high-tech glitter generally associated with only two other organizations: The US and Israel. The deliberate deprovocatization of modern military language at the top of the range - "insertion" rather than "invasion", "response" rather than "counter-strike", "neutralization" rather than "destruction", etc. - are now within China's provinance as well. Everybody in the world, for instance, including especially twenty million Taiwanese, knows that Taiwan will be annexed into the PRC aegis sooner or later, because a declaration of independence by Taiwan would result in a surgically exact confiscation of it through a military action. Taiwan would not have to be destroyed by China's ultramodern military in order to save it.

* Professor of English Literature and Journalism, Red Rocks Community College; M.H.A. and B.A. University of Colorado.

As with America and Israel, this overwhelming military superiority by China may exist in quiet sublimation, more a laser pointer than a big stick. It seems to suggest an obligation, a destiny, to dominate its sphere of influence, rather than a threatening menace. Even further, China can present its military posture of restraint as key evidence that it possesses the sophistication and maturity a super-power needs to lead tomorrow's world. Thus, in negotiations with Britain over the expiration of the leasehold of Hong Kong, it is obstreperous only to the extent that understandable prudence would call for, and Taiwan can expect the same. Neither little island acquisition will get all it wants - no more unrestricted pouring forth of golden eggs from either - but China will be perceived as bending a good deal as well. Taiwan, to be more pointed, being the keeper of the official Dr. Sun Yat-Sen flame, the true vision of modern China, might very well assume the effective leadership of the country when the situation eventually stabilizes.

One other, less tangible, factor must be added to this mix: the historical preeminence of "Chinese" culture in the east-Asian quadrant. Japan, Korea, Indo-China, even the urban aspects of Indonesia, freely acknowledge in their autobiographies the admirable hegemony of China in their makings over the millenia. The organic self-sustenance of Confucianism, the godless spirituality of Buddhism and Taoism, the efficacy of mandarinist legalism, the quiet, world-class beauty of the oriental aesthetic, even the ability to assimilate into international capitalism - China, not ironically perhaps, the slowest to perform - are all attributed to this giant motherland. Of course, warlord tribalism, often unrestrained in its cruelty and destruction, a tendency to disrespect iconoclastic permutations of "Asian" culture - China's crude, banal, but effective deracination of Tibet being the current example - and a casual willingness to let bureaucratic infrastructures take on happy-go-lucky, unchallengeable lives of their own, these are also indemically "Chinese" in nature, if not in absolute origin. From on top of it all, however, emerges a voice from the cacophony that says, China is the fountainhead of Asian nobility, the place from which the assertion will come forth that Asian culture and Asian people are the equal of any that ever have been or ever will be. Condescending western characterisations of Asian behavior, such as the supposed simplistic endeavor always to "save face", or the need of Asian people to become virtually identical bees in gigantic hives - kernels of truth in those perceptions notwithstanding - will be replaced with global universals, "face" becoming "dignity", "conformity" becoming "cooperation".

The western nation or western bloc that fails to acknowledge this cumulative lack of desparation on China's part is setting itself up for a rude disenfranchisement from the mainstream of the twenty-first century. If, for instance, the shameless headiness of NAFTA parlance, choreographed and rationalized undisguisedly by the United States, condemning every bit of protectionism no matter how small, like fussy gardeners nuking every weed that even dreams of raising its head, casually attributing

all human rights abuses and ecological destruction to restraints on "free trade" - yes, those were the conclusions of the Hemispheric Trade Conference held in Denver in early July 1995, no exaggeration - were to become the order of the day in western approaches to commerce with China, the predictable results of oblivious overkill will ensue. Instead, we must understand, appreciate, and be responsive to China's commitment to gradualism, recognizing that there are monumental cultural issues at stake for all of Asia that in the long run will be at least as telling as the economics of it all.

Technically scholarly and professionally oriented though it be, *Chinese Foreign Investment Laws and Policies* contains the understated but clear message for readers (among whom will be potential foreign investors and their legal counsel) that the canny would-be player must understand present-day China in its complex evolutionary context, and perceive with sensitivity the directions China's tendencies of change - Jia is not reluctant to reference policies promulgated as far back as 1911 and even before - seem to suggest. Not just seem, really; Jia's implied contention is that China invites the world to extrapolate tendencies which, if all parties have the wisdom and patience to let the Tao play itself out according to its needs and nature, shall come about. In one of the few normative intrusions Jia places in his book, he concludes a simple introductory passage, "Therefore, a gradualist approach should be adopted." Letting ordinary syntax rather than rhetoric make his point, Jia clearly suggests there is no option to a gradualist approach. Those who ride illusory waves of Commerce Department hyperventilation about the wonders of "free trade" risk missing key observations and consequently being at the wrong place at the wrong time.

The nice thing is, if you follow Mr. Jia's presentation as it is, rather than how ideologically one might wish it to be, the good news about China's foreign investment climate beats the bad news all to heck. China is not abusing its favored position of being able to afford gradualism by engaging in prodigal nonsense. Socialist ideology still obtains there, nominally (Oh, how very flexibly ambiguous Marx and Lenin and Mao can be when it comes to turning a buck on the world market!), but psycho ideologues currently have little voice in code, policy, or practice. (A fact that Jia does not mention is that two of Deng Xiaoping's children are wealthy, influential westerners who no doubt regard the Cultural Revolution the way Floridians regard Hurrigan Andrew. Deng himself is anything but naive.) Jia's essential point is that China's development is circumscribed by an impressive, growing, and recognizable body of law which is usually lived up to reasonably well, is potentially enforceable in its entirety, and is predictable in its consequences. What is more, there are "experimentation" processes underway in China, some nearly twenty years old, somewhat casual yet rarely exactly extra-legal, which allow for creative, test-driveable business arrangements to emerge and possibly pass into more general currency if they get the job done, but with few bend-over punishments if they don't pan out as authorities wish they might.

It could be fairly argued that this reviewer chews a good deal more of the cultural and geopolitical dimensions of the subject than Jia actually bites off in his book. To be accurate, most background references Jia makes in the text of his work are limited to introductory clauses to sentences, such as, "In 1975, when Deng Xiaoping reemerged from his political obscurity . . ." His quick references to the "Cultural Revolution" must evoke our already knowing - and how many readers will know? - that this includes Mao's Holocaustean "Great Leap Forward", one of the most disasterous incidents of genocide by stupidity in the history of our species, since the phrase "Great Leap Forward" is never mentioned. Likewise, similarly, his references to the passing along of coastline success to the "loser" hinterland - the coastline being given favored economic status - as proposed by Beijing's master plan leave unexpressed the fact that the process is provoking a city vs. plain conflict which, in sheer numbers, is utterly unprecedented in history. The number of people, for example, who are expected to migrate to China's cities in the near future is greater than the entire population of the United States, this despite central governmental control practices to prevent same which no American would tolerate for a minute. Government measures to support agricultural prices, the primary carrot (vs the stick) method of discouraging urban migration, consuming taxes as they do, are about as popular in the cities as an outbreak of cholera. Not so similarly, but in the same vein, Jia gives very little treatment to the role increasingly played in the Chinese economy by Chinese entrepreneurs, many of whom operate as freelance wild-catters, a role which could very well become as decisive as the bourgeois revolution in Europe and America in the 19th century; nor is there treatment of the considerable levy of official and unofficial racketeering, which slaps every China-partner smack in the face first when they realize paying a considerable transaction fee to the official bank with every currency exchange is unavoidable, and continues at regular intervals all along the way thereafter.

Readers who will not, or cannot, read between the lines, or who fail, more importantly, to peruse Jia's extensive endnotes, will be left nevertheless with a document which can serve as a very useful introduction to foreign investment in China, facilitating detailed research immensely. As such, the book's lack of outline-type structure might be considered irritating. In the midst of any given passage, for instance, a casual glance will not very well inform you whether the law under discussion at that moment is how it used to be, how it used to be after they sort of fixed it, or how it is today. Equally questionable to some, especially to counsel charged with construction analysis and contract generation, is Jia's practice of providing cogent charts of primarily economic and financial sorts, but few of a conceptual sort.

The book's best chart is conceptual, however, and represents a condensation of the book's overall content. Jia identifies seven areas of consideration he calls "tidal changes in the legal treatment of foreign direct investment." By tidal changes he means gradual, evolutionary changes to-

ward "liberalization" in policy, liberalization meaning normalized, rationalized free markets. These are expressed as "from and to" concepts, two points defining a line for each, suggesting directions which one might logically expect to hold course into the future. These seven areas are, or correspond to, standard regimes in international business law, beginning with, 1) joint ventures, modern China's first forays into international commerce, proceeding through, 2) wholly foreign-owned ventures, a development which rational analysis informed China's leaders was not only unavoidable but desirable under certain conditions, 3) China's internal regional policies, a tidal change within tidal changes and a happening *Jia*, if anything, underestimates, 4) taxation, moving toward more predictable, investment-friendly, rational normalization, 5) foreign exchange management, a subject *Jia* feels is quite weakly developed in China (even while citing China's relatively under-control inflation), 6) technology transfer and intellectual property protection, a subject *Jia*, speaking in an optimistic tone at any rate, acknowledges the Chinese have yet to tackle all the way to the turf, and 7) banking, a subject the Chinese have just barely addressed. A chapter is devoted to each area, chronologically organized to emphasize evolutionary progress. Several times Mr. *Jia* refers to a truth dating to times immemorial: "Make foreign things serve China." This concept expresses the foundational colloration of all the tendencies he speaks of and must be regarded as a perpetual caveat.

All of these areas in Mr. *Jia*'s estimation indicate "Go" signals, each a trend in that direction in other words, some more strongly established than others. Viewed in this light, it makes sense that Mr. *Jia* essentially avoids the word "risk" altogether. Some lawyers assess risk, others attempt to manage it, others, like Mr. *Jia* in his guise as author, prefer to let the facts speak for themselves. Americans especially must go with the flow as their country adjusts to the establishment once again of a two-superpower planet earth, though with a rival not quite so antagonistic this time. This adjustment is liable to evoke a panoply of self-righteousnesses on America's part that even a fleet of corporate lawyers couldn't begin to shake a stick at. America, for instance, might choose to regard participation by American firms in Chinese "experimentation" as tantamount to accepting or paying corrupt considerations (spelt with a capital "B"). Also, China might very well choose to demure from "normal" currency exchange marketplaces until the practice of devaluation-as-economic-warfare is outlawed by binding convention, which might take decades and which might impact American investors more than most others. To go on, the process by which valuable proprietary intellectual properties quickly mutate into commodity status in the public's mind, a condition of minimal protectability, and then into utility status, a condition of no protectability, if unstoppable in China, as it often appears to be, could spell disaster for many of America's most powerful corporate houses (generating tons of billable legal hours, admittedly). Or how about a prolonged political crisis when Deng passes on, or nasty, nasty scenes when Hong Kong, Macao, and eventually Taiwan go over, or Chinese bal-

listic missiles being shipped to all ends of the earth (remember their foreign-exchange problems?), or even a pan-Asian vendetta taking shape impelled by centuries of humiliation by western powers; all these spell risk for foreign investors, if risk is what's being looked for.

For better or for worse, Jia leaves those problems for other authors to consider. Like a proper legal representative, he is offering us options under the law. Take heart that there is a body of law, this book asserts, take note of its growth and development, be cautious and realistic, but be also agile and creative. Chinese courts? What courts, a not unknowing cynic might answer, But one suspects Jia would reply: any court is better than no court, how much better, a matter only continued practice will decide. Finally, be aware that seed when sown may be small, but its harvest may be bountiful.

And way between the lines he says this: China is as glad to be rid of the Soviet Union as we are. The Chinese know what bears do in the woods and what corporations do in their board rooms. What they are not so sure about - a question which the Soviet millstone has kept them from asking - is whether we in the west have any memory of what it used to be like before people became consumers and citizens became voters. Any lawyer who does not have some retrospective sensitivity to this trend, still an anathema to the Chinese, has got a rough, grating row to hoe.