Law and Foreign Investment in China
Professor Lucille Barale

Course Syllabus for Fall 2015
Thursdays 3:30-5:30 pm, McDonough Hall 203

I. Introduction

This course surveys the major laws and regulations of the People’s Republic of China (PRC) encountered by a foreign investor engaging in a manufacturing project and related cross-border transactions in China. The course is designed from the perspective of a practicing lawyer and is intended to give you first-hand experience with China’s foreign investment laws and regulations.

II. Course Content

The following topics are planned for this semester:

1. Entering the China market: identifying the legal framework for China’s policies on foreign investment; reviewing China’s WTO obligations with respect to foreign investors and China’s most recent Foreign Investment Guidance Catalogue; recognizing the limits of published rules; framing the client’s business goals within government policies and regulations; working with two case studies.

2. Choosing the legal form for an investment project in China: identifying basic features of equity joint ventures (EJVs), cooperative joint ventures (CJVs), and wholly foreign-owned enterprises (WFOEs) and the reasons for choosing one form of investment over another; focusing more specifically on the equity joint venture; reviewing key terms of the BMW-Brilliance Equity Joint Venture Contract.

3. Structuring the foreign investment enterprise (FIE) and drafting a term sheet: establishing legal person status, limited liability and capital structure of the FIE in view of the requirements of China’s Company Law; formulating the purpose, scope and scale of the venture; understanding rights of majority investors and protection of minority investors; determining the composition of the board of directors and management; drafting a term sheet to outline the key terms of a joint venture.

4. Letters of Intent and Contracts: using letters of intent (LOIs) and memoranda of understanding (MOUs) to launch joint venture discussions; identifying legal issues confronting the investor prior to forming a joint venture contract; determining the binding and non-binding obligations in early-stage joint venture documentation; recognizing the mandatory application of PRC law and choice of law options; using LOIs and MOUs with term sheets.
5. **The Foreign Investment Approval Process**: reviewing the process of establishing an EJV from project concept through feasibility study and joint venture contract to business license; identifying the legal sources for foreign investment approval procedures; identifying the main governmental authorities responsible for approving foreign investments and their limits of authority; comparing the government approval process in Shanghai Pilot Free Trade Zone with the system used by the National Development Reform Commission and the Ministry of Commerce in Beijing, reviewing China’s draft Foreign Investment Law and the changes to the foreign investment approval process that may be coming in future years.

6. **Land use rights and ownership rights for FIEs**: identifying the legal basis for land use rights and asset ownership rights; determining the type of land use rights most suitable for the investment; legal procedures for acquisition or transfer of land use rights; identifying the type of assets in which the FIE may have ownership rights; case studies.

7. **Environmental law and requirements for the FIE**: identifying the environmental requirements applicable during the foreign investment approval process; determining the type of environmental impact statement needed, procedures for its preparation and the applicability of the “three synchronies” requirement; case studies.

8. **Technology transfer and licensing**: understanding the different formats for technology transfer and licensing; determining whether technology transfer is required as part of an approved foreign investment; identifying requirements of PRC regulations that may affect the technology contract; determining when government approval or registration is required for technology import; understanding choice of law options for technology contracts; reviewing the technology related obligations in the Wanxiang-Ener 1 Joint Venture Contract.

9. **Foreign exchange system and the FIE**: understanding the quasi-convertible RMB; identifying the key government regulators; understanding the types of bank accounts that the FIE may have and their permitted functions; determining the types of payment which may be made from each account and when government approval is needed.

10. **Financing the FIE**: identifying regulatory requirements for the FIE to obtain RMB or foreign exchange loans; identifying the types of assets which the FIE may use as security for a loan and the legal form of security applicable under PRC law; understanding how the investors in an FIE may be incur obligations for FIE loans; analyzing relevant clauses of the Wanxiang-Ener 1 Joint Venture Contract.

11. **Acquisition of an existing Chinese owned business (Part I)**: identifying the different types of acquisitions regulated by China’s rules on mergers and acquisitions (M&A Rules); understanding how the approval process for a foreign
acquisition of a Chinese-owned enterprises differs from the approval process of an EJV, CJV or WFOE; determining how the requirements of China’s M&A Rules impact the structuring of the acquisition.

12. Acquisition of an existing Chinese owned business (Part II): understanding when merger control review under the PRC Anti-monopoly Law is required for a foreign investment; overview of the review process and the role of regulators; reviewing key decisions issued by regulators; examining China’s national security review for foreign investments; understanding how the traditional foreign investment approval process relates to antitrust and national security review.

13. Dispute resolution: comparing the methods for dispute resolution available for foreign investment disputes; identifying the legal basis for arbitration and requirements imposed by PRC law on the arbitration agreement; recognizing the factors that permit a dispute to be resolved outside of Mainland China; identifying the advantages of disadvantages of domestic and foreign arbitration; reviewing model arbitration clauses and clauses used in certain joint venture contracts.

14. Exiting the foreign invested project: identifying options for exiting during the term of the joint venture or at the end of the term of years; understanding the government approval process for early termination, disposal of investment interest with continuation of the joint venture, termination the venture at the end of the term of years or extension the venture term, and the requirements imposed on the investors in each case.

III. What should you aim to achieve in this course?

The goal of this course is provide you with basic provide proficiency in legal issues encountered by foreign investors in China. A thorough education in the laws and regulations identified for this course would, of course, require several years. Nevertheless, we can lay the foundation for effective understanding of PRC law, regulations, administrative procedures in a number of important areas affecting international trade and investment. More specifically, you should achieve:

• ability to spot issues, identify problems, and cope with the uncertainty of the legal environment for foreign investment in China;

• grasp of the fundamentals in the areas of law described above; and

• direct experience with a broad range of laws involved in establishing a foreign investment project in China.

IV. Our Methods and Materials

We will be working primarily with original sources of law, reading PRC laws and regulations in English. No knowledge of Chinese language is required. All PRC legal
materials for this course will be posted on the Courseware site for “Law and Foreign Investment in China.”

We will also be using the textbook “Foreign Investment Law in China: Regulation Practice and Context” by Tarrant Mahony, published by Tsinghua University Press 2015. This textbook recently became available to us. I am pleased to confirm that this textbook arrived in our Georgetown Law Bookstore on August 31, 2015.

Selected joint venture contracts that were made available by the foreign investors through public registries or websites will also be part of our course materials, as well as case studies based on current or recent projects and transactions in China. Joint venture contracts and case studies will be posted with the reading assignments for class.

Working with translations of the law has distinct disadvantages. Often, there are various English translations for key terms used in PRC law and regulations. We will do our best to address questions encountered. If references become confusing, please let me know.

Chinese texts are readily available for those who wish to use original language versions. Please let me know if you would like to use the Chinese texts of laws and regulations assigned for reading.

I use slides to accompany each lecture, and post my slides to the Courseware site for “Law and Foreign Investment in China” after each class.

V. Evaluation

Class Participation (10%). Full attendance and active participation are crucial to achieving the goals of this course. Students who make extensive use of their laptops in class are usually so busy taking notes that they are not able to engage adequately in class discussion. You need to be more than a note-taker in this class. I will be looking for your thoughtful questions and analytic insights in each class. You can expect to be called on to answer questions in class.

Assignments (20%)  
You will be asked to draft a term sheet for the establishment of a joint venture based on a case study. You will also be asked to work with case studies and respond to questions typically asked of lawyers involved in planning a China project.

Final Exam (70%)  
There will be a 24-hour take-home final examination at the end of the course.

VI. Communication

I enjoy meeting with students and discussing any aspect of the course. I am available to meet with students by appointment. Please send me an email to set up a meeting.