

# The Legal Structure of Economic and Technological Development Zones in the People's Republic of China

by  
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## INTRODUCTION

An Economic and Technological Development Zone<sup>1</sup> [hereinafter ETDZ] is a special administrative and economic region in the People's Republic of China [hereinafter PRC or China] which provides preferential treatment to attract foreign investors. The mandate to establish the ETDZs came in 1984,<sup>2</sup> following the overall success of the four experimental Special Economic Zones [hereinafter SEZs].<sup>3</sup> Since then, development of the ETDZs has been smooth and progressive. Although reports on the ETDZs have been few and often overshadowed by publicity about the Special Economic Zones, their

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1. "Economic and Technological Development Zone" [hereinafter ETDZ] is an English translation of the Chinese name "Jingji Jishu Kaifaqu". It has also been translated into "Economic-Technological Development Area" as in the case of Tianjin ETDZ, and "Economic and Technical Development Zone" as in the case of Dalian ETDZ. "Economic and Technological Development Zone," adopted in this Article, follows from the translation by Guangzhou ETDZ.

2. In April 1984, the State Council and the Chinese Communist Party Central Committee jointly sponsored a conference with participation from leaders of major coastal cities. The positive effects of the open-door policy adopted for the Special Economic Zones was discussed and a decision was made to institute a liberal foreign economic policy in fourteen coastal cities. At the conference, it was made clear that cities with adequate qualifications may establish ETDZs. GU MU, REPORT ON THE PROGRESS IN FURTHERANCE OF THE OPEN-DOOR POLICY IN THE CONSTRUCTION OF THE SPECIAL ECONOMIC ZONES AND FOURTEEN COASTAL CITIES, to the Ninth Session of the Standing Committee of the Sixth National People's Congress, January 17, 1985, reprinted in 1 QUANGUO RENMIN DAIBIAO DAHUI GONGBAO (BULLETIN OF THE NATIONAL PEOPLE'S CONGRESS) (1985), at 19-26 [hereinafter GU MU REPORT]. This general policy was carried out by the State Council through regulations promulgated on November 15, 1984, which specifically delineate the basic preferential treatment to be adopted by the ETDZs and coastal cities. Interim Regulations of the State Council on Reduction and Exemption of Enterprise Income Tax and Consolidated Industrial and Commercial Tax, promulgated on November 15, 1985, reprinted in People's Daily, Nov. 18, 1984, at 2-3, [hereinafter State Council Interim Regulations].

3. *Zhongguo Yanhai Chengshi You Duoshao Jingji Kaifaqu (How Many Economic Development Zones in China's Coastal Cities)*, People's Daily, Apr. 26, 1986, at 3 (overseas ed.).

role in overall national foreign economic policy is by no means less important.

The ETDZs represent a continuity and outgrowth of the Special Economic Zones,<sup>4</sup> but were launched on a larger scale and with legal and economic innovations. As of mid-1986, eleven ETDZs had been approved in major coastal cities and the laws and regulations governing ETDZs had undergone substantial development.<sup>5</sup> By now, most of the major ETDZs have promulgated a set of laws and regulations which, in addition to a few existing national laws and regulations specifically applicable to the ETDZs, constitute the legal framework of the ETDZs. This Article introduces the basic ETDZ legal structure and discusses the following substantive aspects of the ETDZs: ETDZ administrative structure; enterprise registration requirements; taxation; ETDZ land and labor law; foreign economic contract law; and technology import regulations. An appendix at the end of this Article presents various features of ETDZ law in tabular form.

A goal of this Article is to identify and discuss the differences among the major ETDZs, and between ETDZs, SEZs and other regions of concern to foreign investors. It is hoped that the Article will be of reference value to foreign investors and assist them in selecting investment sites and environments. Some variations in ETDZ regulations may be accounted for by the different priorities of each ETDZ. Other dissimilarities are due to increasing competition among the ETDZs to attract foreign investment. In other cases, the differences are purely a matter of the legislative technique or preference of a particular regional government. Where the variations in regulations have significant policy implications, the discussion is followed by a detailed analysis. In all other instances, further elaboration on policy considerations is omitted.

## I

### ESTABLISHMENT OF THE ETDZS

The ETDZs are substantially similar to the Special Economic Zones which were established in 1980 to attract foreign investment and technology. Similarity exists in the preferential treatment, regulatory and legislative framework, and administrative structure of the SEZs and ETDZs. This similarity reflects the Chinese government's general recognition of the success of

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4. The development of the Special Economic Zones commenced in 1980. Since then, four Special Economic Zones have been established in Guangdong and Fujian provinces. For detailed discussions on the laws and policies in the Special Economic Zones, see Moser, *Law and Investment in the Guangdong Special Economic Zones* in FOREIGN TRADE, INVESTMENT AND THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA 143 (M. Moser ed. 1985); Fenwick, *Evaluating China's Special Economic Zones*, 2 INT'L TAX & BUS. LAW. 376 (1984); Klitgaard & Rasmussen, *Preferential Treatment for Foreign Investment in the People's Republic of China: Special Economic Zones and Industrial Development Districts*, 7 HASTINGS INT'L & COMP. L. REV. 377 (1984); Nishitaten, *China's Special Economic Zones: Experimental Units for Economic Reform*, 32 INT'L & COMP. L.Q. 175 (1983).

5. See *supra* note 3.

the SEZs and its determination to further implement the basic economic policy of the SEZs.

The ETDZs differ, however, from the SEZs in several important respects. The most prominent one is the emphasis of the ETDZs on developing production enterprises and scientific and technological research institutions which directly influence China's industrial modernization. A high-ranking Chinese official distinguished ETDZs from SEZs as follows:

The SEZ is a comprehensive and diversified economic development zone. Investment may be made in all areas of industry, agriculture, animal husbandry, breeding, tourism, housing and building, high-tech research and manufacturing that bear significance in international economic cooperation and technological exchanges. Investment may also be made in other areas which our country and foreign business both find interesting. The ETDZ, on the other hand, places emphasis on production enterprises or scientific and technological research institutions with the purpose of exploring new technology, producing new products and developing new sectors of industry.<sup>6</sup>

Accordingly, preferential treatment in the ETDZ is available only for production enterprises, whereas the SEZ gives universal preferential treatment to both industry and services.<sup>7</sup>

Another difference between the ETDZs and the SEZs is that the ETDZs have an obvious geographical advantage. The four SEZs are established in South China in the two adjacent provinces of Guangdong and Fujian. Many of China's industrial bases and human resources are located in several large cities along the east coast, but in order to take advantage of the preferential treatment of the SEZs, an investor must locate its project in a limited area sometimes far away from markets and supplies. Because systems of transportation and communication have not yet been well-established, an appropriate location can be of great significance to the success of the business operation. Further, when a project located in a SEZ in Guangdong province depends on supplies and markets located in North China, many transactions must be done on an inter-provincial basis, which means more governmental bureaucracy and red tape. Since there are a greater number of ETDZs and they are fairly evenly spread among many cities along the coast where the transportation links and industrial infrastructure are better developed than other areas in China, the geographical limitations have been kept to a minimum.

Establishment of the ETDZs was approved by the central government in early 1984.<sup>8</sup> In November of the same year, the State Council issued interim regulations outlining the basic preferential tax treatment effective in the

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6. Gu Mu, *Yantai Chengshi Kaifang Zhengce (Open-door Policy in Coastal Cities)*, 2 GUOJI MAOYI (INTERNATIONAL TRADE), at 3-4 (1985) [author's translation].

7. *Id.* "Production enterprise" is a translation from the Chinese term "Shengchan Xing Qiye", which ordinarily includes manufacturing industries and most other sectors other than service sectors. Agricultural and husbandry sectors are also usually considered as "production" sectors. The phrase, however, has not been officially defined.

8. GU MU REPORT, *supra* note 2.

ETDZs and prescribing the role of regional governments in the administration of the ETDZs.<sup>9</sup> Regional governments are vested with discretion to regulate the ETDZs mainly in the area of local taxes. These and other areas where there are no compulsory or uniform national rules are where discrepancies in ETDZ laws arise. By mid-1986, the State Council permitted eleven coastal cities to allocate certain areas for the construction of ETDZs.<sup>10</sup> The eleven ETDZs total 115 square kilometers in area.<sup>11</sup>

The ETDZs will be developed gradually. The first phase of development commenced in late 1984 and early 1985 and involved a total of twenty-one square kilometers, with a starting development area of thirteen square kilometers.<sup>12</sup> The primary goal of this early stage of development was to build infrastructure and to provide energy and other basic public facilities necessary for the establishment of foreign investment. To this end, the government encouraged foreign investment early in the development process. The major ETDZs provided special preferential treatment for early investors,<sup>13</sup> in order to accelerate the pace of foreign investment. By September 1985, there were more than 100 foreign investment projects in the eleven ETDZs,<sup>14</sup> an impressive number in light of the small geographical area of the ETDZs.

The creation and development of the ETDZs in the People's Republic of China has led to the emergence of a new body of law. As economic construction of the ETDZs advanced, the legal framework of the ETDZs progressed at a corresponding rate. The leading ETDZs, such as those in Guangzhou, Dalian and Tianjin, have promulgated diverse regulations governing areas such as administration, taxation, land, labor, technology transfer, foreign economic contract law, and enterprise registration. In early 1985, the Guangzhou ETDZ promulgated seven regulations<sup>15</sup> and the Dalian ETDZ

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9. State Council Interim Regulations, *supra* note 2.

10. *See supra* note 3.

11. *Id.*

12. *Id.*

13. In the major ETDZs, foreign investors who make investments in the ETDZs during the first few years of the ETDZs are given preferential treatment in tax and land use fees. For instance, in Dalian ETDZ, early foreign investors may obtain up to a fifteen-year exemption on land use fees and a three-year exemption or reduction of income taxes, in addition to other generally available preferential treatment. Similar policies have also been adopted by Guangzhou, Tianjin and other ETDZs. For a detailed discussion, *see infra* notes 85-103 and accompanying text.

14. *Kaifagu Liyong Waizi Xiangmu Yubai (Foreign Investment Projects in ETDZs Exceed 100)*, People's Daily, Sept. 17, 1986 (overseas ed.).

15. These seven regulations were promulgated by the city government of Guangzhou on April 9, 1985. They are: Interim Regulations on the Guangzhou Economic and Technological Development Zone [hereinafter Guangzhou Interim Regulations]; Interim Regulations of the Guangzhou Economic and Technological Development Zone for Technology Import [hereinafter Guangzhou RTI]; Tentative Procedures of the Guangzhou Economic and Technological Development Zone for Land Management; Tentative Regulations of the Guangzhou Economic and Technological Development Zone for the Collection of Industrial and Commercial Taxes [hereinafter Tentative Guangzhou Tax Regulations]; Interim Regulations on Certain Matters Relating to Inland Associated Enterprises in the Guangzhou Economic and Technological Development Zone; Tentative Procedures for the Registration and Administration of Enterprises in the

promulgated five.<sup>16</sup> The Tianjin ETDZ issued four regulations in mid-1985,<sup>17</sup> and the Yantai ETDZ proposed thirteen regulations.<sup>18</sup> Other ETDZs have also enacted or are in the process of enacting similar regulations. These regulations, in addition to official policy guidance and relevant regulations promulgated by the central Chinese government, constitute the basic legal framework of ETDZs in the PRC.

## II

### LEGAL STRUCTURE OF THE ETDZS

#### A. *An Overview*

The law governing ETDZs consists of two systems. The first system encompasses the general national laws and regulations in the areas of contract, investment, foreign exchange control, tax, and labor. The second system is made up of the regulations specifically applicable in each of the ETDZs; it consists of three general categories.

First, there are the national regulations that allow special preferential treatment in the ETDZs. These include the State Council's regulations issued in late 1984 governing the reduction and elimination of the enterprise income

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Guangzhou Economic and Technological Development Zone [hereinafter Guangzhou Registration Procedures]; Tentative Procedures for Labor and Wage Management in Enterprises in the Guangzhou Economic and Technological Development Zone [hereinafter Guangzhou Labor Regulations]. The regulations are printed in ADMINISTRATIVE COMMISSION OF GUANGZHOU ECONOMIC AND TECHNOLOGICAL DEVELOPMENT ZONE, RULES AND REGULATIONS OF GUANGZHOU ECONOMIC AND TECHNOLOGICAL DEVELOPMENT ZONE VOL. 1 (1985) (copy on file at ITBL office).

16. These regulations were promulgated by the city government of Dalian on October 15, 1984. They include: Regulations of the Dalian Economic and Technical Development Zone on Preferential Treatment [hereinafter Dalian Preferential Treatment Regulations]; Procedures for the Registration of Enterprises in the Dalian Economic and Technical Development Zone; Regulations of the Dalian Economic and Technical Development Zone on Economic Contracts with Foreign Elements [hereinafter Dalian FECL]; Procedures for Labor and Wage Management in Enterprises in the Dalian Economic and Technical Development Zone [hereinafter Dalian Labor Regulations]; Procedures of the Dalian Economic and Technical Development Zone for Land Use and Management [hereinafter Dalian Land Regulations]. The regulations are printed in ADMINISTRATIVE COMMITTEE OF DALIAN ECONOMIC AND TECHNICAL DEVELOPMENT ZONE, GUIDE TO INVESTMENT IN DALIAN ECONOMIC & TECHNICAL DEVELOPMENT ZONE, at 50-61 (1985) (copy on file at ITBL office).

17. These regulations were adopted on July 20, 1985, by the Standing Committee of the Tianjin City People's Congress. They include: Regulations for the Administration of Tianjin Economic-Technological Development Area [hereinafter Tianjin Administrative Regulations]; Regulations for the Registration and Administration of Enterprises in Tianjin Economic-Technological Development Area; Regulations for Labor Management of Tianjin Economic-Technological Development Area [hereinafter Tianjin Labor Regulations]; Regulations for Land Management of Tianjin Economic-Technological Development Area [hereinafter Tianjin Land Regulations]. The regulations are printed in ADMINISTRATIVE COMMISSION OF TIANJIN ECONOMIC-TECHNOLOGICAL DEVELOPMENT AREA, A BRIEF OF TIANJIN ECONOMIC-TECHNOLOGICAL DEVELOPMENT AREA, at 27-46 (1985) (copy on file at ITBL office) [hereinafter TIANJIN BRIEF].

18. *Yantai Kaifagu Jiubei Jiaohao Touzi Tiaojian (Yantai ETDZ Establishing Improved Investment Environment)*, People's Daily, Aug. 3, 1986, at 3 (overseas ed.).

tax and the consolidated industrial and commercial tax.<sup>19</sup> The State Council regulations also delineate the basic preferential treatment given the ETDZs and the scope of each regional government's discretion in administering this treatment. These regulations constitute the foundation of the special legislative structure in the ETDZs and provide the legal basis for the emergence of many regional rules and regulations governing the ETDZs.

Second, most of the ETDZs have basic regulations which serve as constitutions for the Zones. For example, there are the "Interim Regulations of the Guangzhou ETDZ"<sup>20</sup> and the "Regulations for Administration of Tianjin ETDZ".<sup>21</sup> The scope of the regulations differs from one zone to another, but most include four basic chapters. Chapter One, typically called the General Principle Chapter, provides the basic policy of the ETDZ towards investment, the relationship of the special regulations of the ETDZ with the national laws, and other general matters. Chapter Two details the administration of the ETDZs, and focuses on the function and authority of the Administrative Commission.<sup>22</sup> Chapter Three provides for preferential treatment, particularly the tax benefits accorded foreign investors in the ETDZ. Finally, Chapter Four provides for the registration and regulation of business enterprises operating in the ETDZ. Some ETDZs also provide general regulations for labor, enterprise registration and other matters, while others prefer to enact separate regulations governing these matters. Most of the ETDZ regulations resemble the SEZ regulations promulgated in 1980 by the Guangdong Province government.<sup>23</sup>

Third, each ETDZ has several separate regulations governing specific fields. In Guangzhou, for example, there are six special regulations governing technology transfers, land, tax, joint ventures with inland businesses, registration of enterprises, and labor.<sup>24</sup> The Tianjin ETDZ has three special regulations dealing with labor, land, and the registration of enterprises.<sup>25</sup> Once again, these special regulations bear great similarity to those enacted for the SEZs.<sup>26</sup>

19. State Council Interim Regulations, *supra* note 2.

20. Guangzhou Interim Regulations, *supra* note 15, at 1.

21. Tianjin Administrative Regulations, *supra* note 17, at 27.

22. For a more detailed description of the Administrative Commission, see *infra* notes 34-37 and accompanying text.

23. Regulations of the People's Republic of China on Special Economic Zones in Guangdong Province, approved by the Fifteenth Session of the Standing Committee of the Fifth National People's Congress on August 26, 1980, *reprinted in* [Special Zones & Cities] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 70-800. The Regulations include chapters on: General Principles; Registration and Organization of Enterprises; Preferential Treatment; Labor Management; and Administration.

24. See *supra* note 15, at 11.

25. See *supra* note 17, at 33-43.

26. For similar regulations in the SEZs, see Provisional Regulations on the Registration of Enterprises in the Special Economic Zones in Guangdong Province, *reprinted in* [Special Zones & Cities] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 70-820; Provisional Regulations on Labor Management and Wages in the Enterprises in Special Economic Zones of Guangdong Province,

The similar legal frameworks of ETDZs and SEZs result from their parallel economic and policy goals of attracting foreign investment through preferential treatment not available in other geographic areas. The similarities are also due to historical reasons underlying the creation of the ETDZ legal framework. As mentioned above, the mandate to set up the ETDZs came in late 1984 and the actual construction of the Zones started in early or mid-1985. Most of the regulations in the leading ETDZs were promulgated in mid-1985, a time when only a small number of foreign investors did business there. Because of their inadequate experience in dealing with foreign investment in the ETDZs, the lawmakers naturally looked to the practice of the SEZs for guidance.

### *B. Relationship Between National Laws and ETDZ Regulations*

A fundamental issue that arises from the various ETDZ regulations is the relationship between the national laws and the laws of the individual ETDZs. The issue does not arise, however, in instances where there is harmony between the two systems. Harmony occurs when either the relevant provisions in both systems are similar or there is a clear legal basis for the ETDZ to establish its own rules. This is particularly true in the tax area.<sup>27</sup> For example, in the area of income tax, there is a uniform policy imposed by the national government applicable to and accepted by all the ETDZs, whereas local governments have the authority to determine appropriate local tax rates up to the ceiling provided.

In other areas, however, such as foreign economic contracts and technology transfers, there is no clear written authority allowing ETDZs to deviate from national laws. An example is Article 5 of the Regulations of Foreign Economic Contracts of the Dalian ETDZ which resolves choice of law issues differently from the National Foreign Economic Contract Law [hereinafter the National FECL].<sup>28</sup> The Dalian Regulation provides that parties may elect laws of other countries which are "most closely related" to the contract, but that Chinese law "shall also apply primarily."<sup>29</sup> The National FECL, on the other hand, gives much more discretion to the parties, allowing them to choose applicable laws without express limitations.<sup>30</sup> It also provides that in

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*id.* at ¶ 70-830; and Provisional Regulations on Land Administration in Shenzhen Special Economic Zone, *id.* at ¶ 73-500.

27. The regulations of the State Council adopted on November 15, 1985 expressly allow the ETDZs to adopt certain special tax and other preferential policy towards foreign investors. See State Council Interim Regulations, *supra* note 2.

28. See Dalian FECL, *supra* note 16, art. 5, at 54. For a more detailed discussion of choice of law provisions, see *infra* notes 148-151 and accompanying text.

29. Dalian FECL, *supra* note 16, art. 5, at 54.

30. Foreign Economic Contract Law of the People's Republic of China, [hereinafter National FECL] adopted at and promulgated by the Tenth Session of the Standing Committee of the Sixth National People's Congress on March 21, 1985, to be effective on July 1, 1985. See National FECL, art. 5, reprinted in [Business Regulation] CHINA L. FOREIGN BUS. (CCH

the absence of such a choice, the law of the country that bears the "closest connection" with the contract shall apply.<sup>31</sup>

The question of which law will prevail in such a situation currently remains unanswered. As a special administrative region, each ETDZ may theoretically enact its own regulations in order to fulfill the basic policy purpose underlying the establishment of the ETDZs. Article 5 of the Regulations of Guangzhou ETDZ may support this prevailing view; the article states that national law will apply only where the laws in the ETDZ do not have special provisions.<sup>32</sup> However, the Guangzhou ETDZ Regulation is the only one that expressly provides for this situation. Furthermore, some of these provisions were promulgated at an earlier date and are less liberal than the pertinent national laws.<sup>33</sup> The choice of law provisions of the Dalian ETDZ's Foreign Economic Contract Regulations are an example. Since the purpose of setting up an ETDZ is presumably to create a more liberal economic climate than in other areas in order to attract foreign investment and technology, it follows that there may not be any justification for maintaining special regional provisions which result in a *less* liberal investment environment.

### III

#### ADMINISTRATION OF THE ETDZS<sup>34</sup>

The institutional administrative structure of the ETDZs varies from zone to zone. However, most of the ETDZs have followed the general pattern initially established by the SEZs. Generally, the ETDZs have a set of regulatory institutions headed by an Administrative Commission, in addition to a group of business supporting institutions. Table 1 (see Appendix) is based on the Tianjin ETDZ and will serve to illustrate the general administrative structure of the ETDZs.

##### A. *The Administrative Commission*

Every ETDZ has an Administrative Commission which acts as its regulatory authority. The Administrative Commission generally consists of a chairman, a vice-chairman and several commissioners. In most instances, it also has a general accountant and a general economist. The Commission is

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Austl.) ¶ 5-550(5). For a brief overview of the National FECL, see Wilson, *The Legal Structures Governing Technology Transfers and Joint Ventures with the People's Republic of China*, 3 INT'L TAX & BUS. LAW. 1, at 11-18 (1985).

31. *Id.*

32. Guangzhou Interim Regulations, *supra* note 15, art. 5, at 3.

33. For instance, the Dalian FECL was adopted in October 1984 whereas the National FECL was adopted on March 21, 1985.

34. The discussion in this section, unless otherwise noted, is based on the general regulations of the major ETDZs, namely the Guangzhou Interim Regulations, *supra* note 15; the Dalian Preferential Treatment Regulations, *supra* note 16; and the Tianjin Administrative Regulations, *supra* note 17, in addition to interviews with Chinese officials working in the area of ETDZ regulation.



organized and controlled by the city government of the ETDZ, and it exercises its power within the scope of authority delegated by the city government. The Commission is often given extensive quasi-legislative and administrative powers to govern the ETDZs. It is also empowered to formulate the development plan of the ETDZ, and, once the plan is approved by the city government, to implement it. The Commission has exclusive power to administer the basic business supporting services, public utilities and other public facilities of the Zone, and to set standards for fees and charges. The Commission is also responsible for the examination and approval of investment projects and the administration of export and import activities of the Zone.

The Commission exercises its authority through a variety of departments under its leadership. The number and names of these departments vary among the ETDZs, though they are substantially similar in operation. In the Tianjin ETDZ, for example, eleven departments or offices under the Commission are responsible for the daily, routine administration of the Zone.<sup>35</sup> They include the Tax Bureau, the Bureau for Administration of Industry and Commerce, the Finance Bureau, the Policy Studying Office, the Personnel Office, the Budget and Accounting Office, the Office for Enterprise Management, the Planning Office, the Construction Quality Supervision Station, the Administrative Office, and the Economic Contract Arbitration Committee.<sup>36</sup> In the Dalian ETDZ, the departments under the Commission include the Administrative Office, the Planning Bureau, the Bureau for Administration of Industry and Commerce, the Finance and Tax Bureau, the Bureau for Service and Technology, the Public Security Bureau, and the Investigation and Research Office.<sup>37</sup>

### B. Business Supporting Institutions

Business supporting institutions of the ETDZ are quasi-official in nature and are considered to be independent business entities in their economic dealings. These institutions take the form of corporations and are set up by the city governments. They operate primarily in the areas of power and water supply, highway and site construction, housing, and communications. They also provide basic consultation and liaison services for both domestic and foreign investors. Consequently, they play a leading role in the development of the ETDZs and the creation of an amicable investment environment.

The organizational structure of these business supporting institutions takes one of two forms. The ETDZs have established either: (1) a general corporation with several supporting subsidiaries providing service in each

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35. TIANJIN BRIEF, *supra* note 17, at 24-25.

36. *Id.*

37. Wang Qiang, *Dalian Jingji Jishu Kaifaju de Touzi Huanjing (Investment Environment of Dalian Economic and Technological Development Zone)*, ECON. REP., (Hong Kong) Apr. 1, 1985, at 11.

specific area; or (2) a few independent supporting corporations each specializing in a particular field.

The Tianjin ETDZ has used the first type of structure, and the Tianjin Economic-Technological Development Area Company [hereinafter the TEDAC] is in charge of the overall business development and operation of the Zone.<sup>38</sup> Some of the TEDAC's major responsibilities include raising funds for constructing infrastructure, making investments, setting up enterprises and engaging in foreign trade. The Board of Directors of the TEDAC is appointed by the city government, while the president of the Company is appointed by the Board of Directors. The TEDAC has set up nine subsidiaries directly responsible for TEDAC's business operations.<sup>39</sup> They are the Tianjin TEDAC Construction Company, Industrial Investment Company, Import & Export Company, Labor Service Company, Public Utility Company, Material Supply and Marketing Company, Energy Company, New Technological Development Department, and the Seaside Architectural Design Institute.<sup>40</sup>

The Dalian ETDZ, on the other hand, set up independent supporting corporations such as the Economic Development Company, Development and Construction Company, Science and Technology Development Company, Social Service Company and Labor Service Company.<sup>41</sup> Although the Dalian ETDZ lacks a general parent company similar to the TEDAC, the difference in approach is due to the local governments' business preferences, rather than to any specific policy reasons.

#### IV

#### REGULATIONS AND REGISTRATION OF ENTERPRISES WITHIN AN ETDZ<sup>42</sup>

Special regulations govern the establishment, registration and regulation of business enterprises in the ETDZs. These regulations are substantially similar to the national regulations concerning the registration of joint ventures<sup>43</sup> and regulations effective in the SEZs,<sup>44</sup> but they are tailored to fit the special regulatory structure of the ETDZs.

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38. TIANJIN BRIEF, *supra* note 17, at 24-25.

39. *Id.*; see also Table 1 in the Appendix.

40. TIANJIN BRIEF, *supra* note 17, at 24-25.

41. See Wang Qiang, *supra* note 37.

42. Unless otherwise noted, the discussion in this section is based on the general ETDZ regulations governing the registration and administration of enterprises in the major ETDZs.

43. Regulations of the People's Republic of China on the Registration of Joint Ventures Using Chinese and Foreign Investment, promulgated by the State Council on July 26, 1980, reprinted in [Business Regulation] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 6-510.

44. Provisional Regulations on the Registration of Enterprises in the Special Economic Zones of Guangdong Province, adopted at the Thirteenth Session of the Standing Committee of the Fifth Guangdong Provincial People's Congress on November 17, 1981, reprinted in [Special Zones & Cities] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 70-820.

To establish an enterprise in the ETDZs, investors must file an application with the respective Administrative Commission. If the investors are domestic enterprises, the Commission alone will usually have the authority to issue an approval. For foreign investors, however, the approval process is more complex. A complicating factor is that each city government is authorized to approve foreign investment projects only when the size and scale of the project in monetary terms falls within its jurisdictional limit. For instance, under current policy, the Tianjin city government is allowed to examine and approve only those foreign investment projects involving \$30 million or less without obtaining further authorization from the central government.<sup>45</sup> Other cities have much more limited discretion to grant approval.<sup>46</sup> Thus, the City Administrative Commission may not approve projects beyond its jurisdiction until it has obtained permission from the central government. The Commission will, however, often take the initiative and submit the project proposal to the central government and facilitate the approval process.

The forms of enterprises allowed in the ETDZs include wholly foreign-owned enterprises, equity joint ventures, and contractual joint ventures. Special Chinese laws govern the organization and requirements of equity joint ventures and wholly foreign-owned enterprises.<sup>47</sup> These laws also apply to the ETDZs. Foreign investors may also engage in compensation trade or other types of investment in the ETDZs, including stock purchases.

After obtaining approval of a project, the enterprises must register with the Bureau of Administration of Industry and Commerce. The application for registration should be filed within thirty days from the date of approval. The applicant must also submit the certificate of approval, charter of association, business license of the home country, and other documents certifying capital and credit. If the applicant is an equity or contractual joint venture, the agreement or contract of the establishment is also filed. The applicant is

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45. Wu Jinghua, *Shilun Woguo Yanhai Chengshi Jingji de Tedian (Tentative Discussion on the Economic Features of Coastal Cities of Our Country)*, 1 NANKAI XUEBAO 1 (JOURNAL OF NANKAI UNIVERSITY), at 4 (1985).

46. For example, Dalian has the authority to approve projects involving foreign investments of less than \$10 million. *Id.*

47. The Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment (may also be translated as the Law of the People's Republic of China on Sino-Foreign Joint Equity Ventures) adopted at the Second Session of the Fifth National People's Congress on July 1, 1979 and promulgated on July 8, 1979, *reprinted in* [Business Regulation] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 6-500; Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, promulgated by the State Council on Sept. 20, 1983, *id.* at ¶ 6-550; Law of the People's Republic of China Concerning Enterprises with Sole Foreign Investment, adopted at the Fourth Session of the Sixth National People's Congress on April 11, 1986, *reprinted in* [Business Regulation] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 13-506.

For a detailed discussion of the Joint Venture Law, see Torbert & Thomson, *China's Joint Venture Law: A Preliminary Analysis*, 12 VAND. J. TRANSNAT'L L. 819 (1979). A brief outline of the Joint Venture Law and its implementing regulations is found in Wilson, *supra* note 30, at 20-25.

required to fill out a written application in both Chinese and a foreign language (of the applicant's choice) which sets forth the name and address of the applicant, the scope of the business, the registered capital, and the names of the directors, president and vice-president.<sup>48</sup> Each ETDZ may have different requirements as to the specific documents to be filed.

## V

### TAXATION IN THE ETDZS

Preferential tax treatment is the key element in the efforts of the ETDZs to attract foreign investment. The basic tax structure of the ETDZs is substantially similar to that of the SEZs<sup>49</sup> except that the preferential treatment in the ETDZs applies only to industrial manufacturing and scientific or technological development projects. The basic tax policy is determined by the central Chinese government.<sup>50</sup> The discretion of each ETDZ in granting tax privileges is limited to the areas of local tax, consolidated industrial and commercial tax, depreciation, and some other less significant areas.

#### A. Income Tax

The major item covered by the uniform policy which is applicable to all ETDZs is income tax. In general, the area of Chinese income tax relevant to foreign economic interests is the foreign enterprise income tax, which covers wholly foreign-owned enterprises and other types of direct or indirect foreign investment such as contractual joint ventures, compensation trade, technology transfers, and lending.<sup>51</sup> Also of relevance is the joint venture income tax which is specifically applicable to Sino-foreign equity joint ventures and some contractual joint ventures.<sup>52</sup> For foreign enterprises that have establishments in China, the foreign enterprise income tax is generally imposed on a progressive basis ranging from twenty percent to forty percent depending on the

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48. See, e.g., Guangzhou Registration Procedures, *supra* note 15, art. 4, at 46-47.

49. See, e.g., Regulations of the People's Republic of China on Special Economic Zones in Guangdong Province, *supra* note 23; Supplementary Regulations on Tax Reduction and Exemption for Enterprises in Shenzhen Special Economic Zone, issued by the Shenzhen Municipal People's Government on May 8, 1986, reprinted in [Special Economic Zones & Cities] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 73-527.

50. See State Council Interim Regulations, *supra* note 2.

51. The Foreign Enterprise Income Tax Law of the People's Republic of China, adopted at the Third Session of the Fifth National People's Congress on December 13, 1981, reprinted in [Taxation] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 32-500 [hereinafter Foreign Enterprise Income Tax Law]; Detailed Rules and Regulations for the Implementation of the Foreign Enterprise Income Tax Law of the People's Republic of China promulgated by the Ministry of Finance on February 21, 1982, *id.* at ¶ 32-510 [hereinafter Implementing Foreign Tax Regulations].

52. The Income Tax Law of the People's Republic of China concerning Joint Ventures with Chinese and Foreign Investment (may also be translated as the Income Tax Law of the People's Republic of China Concerning Sino-Foreign Joint Equity Ventures), adopted by the Third Session of the Fifth National People's Congress and promulgated on September 10, 1980, reprinted in [Taxation] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 33-500 [hereinafter Joint Venture Income Tax Law]; Detailed Rules and Regulations for the Implementation of the Income Tax Law of the People's Republic of China Concerning Joint Ventures with Chinese and Foreign

amount of net profit.<sup>53</sup> There is also an additional ten percent local tax.<sup>54</sup> Enterprises that do not have establishments in China are subject to a twenty percent flat tax on gross income earned in China. The joint venture income tax is a thirty percent flat tax plus a ten percent local surtax on the assessed income tax.<sup>55</sup> In addition, there is a ten percent tax on profits that a foreign party to a joint venture repatriates abroad.

The tax policy applicable to the ETDZs, however, makes no distinction between the two types of taxes and imposes a flat fifteen percent income tax on all manufacturing establishments.<sup>56</sup> Furthermore, enterprises with a term of operation exceeding ten years may apply to the local tax bureau for an exemption for the first two years after the first profitable year and a fifty percent tax reduction from the third through the fifth profitable years.<sup>57</sup> Profits that are repatriated abroad by foreign businesses in the ETDZ will not be subject to any further taxation.<sup>58</sup> Additionally, foreign entities or individuals who derive dividends, interest, royalties, and rent from the ETDZ are subject to a ten percent flat rate instead of the twenty percent foreign enterprise income tax.<sup>59</sup> This ten percent tax may be further reduced or totally exempted if the term of the transaction is particularly favorable to the ETDZs.<sup>60</sup> The city government of the ETDZ has the discretion to make these decisions concerning such transactions.<sup>61</sup>

### B. *The Consolidated Industrial and Commercial Tax*

Another important general tax is the consolidated industrial and commercial tax [hereinafter the CICT]. The CICT is a turnover tax imposed on each stage of production and distribution when the taxable goods or services are transferred from one entity to another, including exports and imports.<sup>62</sup>

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Investment, approved by the State Council on December 10, 1980 and promulgated by the Ministry of Finance on December 14, 1980, *id.* at ¶ 33-510 [hereinafter Implementing Joint Venture Tax Regulations].

53. Foreign Enterprise Income Tax Law, *supra* note 51, art. 3, at ¶ 32-500(3).

54. *Id.*, art. 4, at ¶ 32-500(4).

55. Joint Venture Income Tax Law, *supra* note 52, arts. 2-3, at ¶¶ 33-500(2), 33-500(3). The taxable income of a joint venture is defined in article 2 as the "net income in a tax year after deduction of costs, expenses and losses in that year."

56. State Council Interim Regulations, *supra* note 2, ch. 2.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. The Consolidated Industrial and Commercial Tax [hereinafter the CICT] was imposed since 1958 as a result of a tax reformation which consolidated produce, turnover, retail, and stamp taxes. The Regulations of the Consolidated Industrial and Commercial Tax of the People's Republic of China (Draft) [hereinafter the CICTL], adopted in principle at the 101st Meeting of the Standing Committee of the National People's Congress on September 11, 1958, are reprinted in [Taxation] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 31-500.

The CICT is based on a tax table which sets up a tax rate ranging from 1.5 percent to 69 percent for over 100 different items.<sup>63</sup>

Under the basic tax policy for the ETDZs, however, an exemption from the CICT is available to enterprises for the importation of production equipment, raw materials, components, and transportation.<sup>64</sup> However, where the imported raw materials or components are used to manufacture products eventually marketed domestically, the exempted CICT has to be repaid.<sup>65</sup> The exemption also extends to the importation of personal belongings and basic transportation vehicles.<sup>66</sup>

### C. Other Areas of Special Tax Treatment

The majority of the ETDZs have enacted tax regulations either as independent regulations or as part of the general regulations. These tax regulations ordinarily incorporate the general tax policy discussed above and usually relate to local tax and depreciation. In addition, they often detail the tax treatment applicable within each ETDZ. Ordinarily, local tax is ten percent of the taxable income for foreign enterprises and approximately three percent for joint ventures.<sup>67</sup> Several of the ETDZs, however, have established their own special regulations. Under the regulations of the Guangzhou ETDZ, for example, investors may enjoy a seventy percent reduction of the local surtax, and where "exceptionally advanced technology" is involved, the local surtax may be exempted altogether.<sup>68</sup> The Tianjin ETDZ adopted a local tax policy that was particularly designed to encourage early investors: the regulations grant an exemption from local income tax to *all* investors who establish enterprises in Tianjin ETDZ before 1990.<sup>69</sup> Along similar lines, the regulations of the Dalian ETDZ allow "productive enterprises" a

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63. The table is attached at the end of the tax regulations. *Id.* The tax base is as follows: Commercial retailers and producers of industrial products must pay the CICT based on proceeds received from sales; importers of foreign goods and purchasers of agricultural products have to pay the CICT on the purchase price that they paid; and service industries and taxpayers engaged in communications and transportation must pay the CICT on gross business proceeds received. *Id.* at arts. 4-8.

The CICT was initially imposed on both domestic and foreign business entities. Since 1973, however, the CICT imposed on domestic industries has been replaced with "gongshang shui" (the industrial and commercial tax). The industrial and commercial tax includes the CICT and taxes on housing, land, and vehicle license plates. It usually represents a heavier tax burden than the CICT. See Dong Shizhong, *Waiguo Touzizhe Laihua Touyi Youguan Wenti Jieda (Questions and Answers for Foreign Investors in China)*, 6 GUOJI MAOYI (INTERNATIONAL TRADE), at 72 (1985).

64. See State Council Interim Regulations, *supra* note 2, § 2, paras. 5-6.

65. *Id.*

66. *Id.*

67. Foreign Enterprise Income Tax Law, *supra* note 51, art. 4, at ¶ 32-500(4); Joint Venture Income Tax Law, *supra* note 52, art. 3, at ¶ 33-500(3).

68. Tentative Guangzhou Tax Regulations, *supra* note 15, art. 8, at 31.

69. Tianjin Administrative Regulations, *supra* note 17, art. 34, at 32.

local tax exemption for three years from October 15, 1984 and a fifty percent reduction for the next five years.<sup>70</sup>

As a part of the general preferential treatment, some of the Zones allow for accelerated depreciation to provide further tax incentives. Ordinarily, depreciation is taken under the straight-line method during the product's useful life as specified by the Foreign Enterprise Income Tax Law and Joint Venture Income Tax Law. These laws specify a useful life which ranges from five to twenty years.<sup>71</sup> Under Guangzhou ETDZ's tax regulations, advanced equipment costing more than 100,000 yuan may be allowed a thirty percent per-unit cost initial depreciation allowance, followed by amortization of the balance over the useful life of the equipment.<sup>72</sup> To accelerate depreciation, other regulations in Guangzhou, Dalian, and Tianjin ETDZs also allow a shorter useful life, in particular for fixed assets.<sup>73</sup>

#### D. The PEFI — Further Tax Incentives

An important recent development concerning taxation in the ETDZs is a promulgation by the State Council on October 11, 1986, entitled "Provisions on Encouragement of Foreign Investment" [hereinafter PEFI]. The PEFI provides for additional tax incentives for "exporting" and "technologically advanced" foreign investment companies.<sup>74</sup>

The PEFI applies to all three major types of direct foreign investment in the PRC, *i.e.* equity joint ventures, contractual joint ventures, and wholly foreign-owned enterprises.<sup>75</sup> It defines an "exporting enterprise" as a manufacturing enterprise which produces goods primarily for export and has a foreign exchange surplus (upon deducting from its annual revenues, foreign exchange expenditures, and profits repatriated abroad).<sup>76</sup> A "technologically advanced enterprise" is defined as a manufacturing enterprise in which a foreign investor provides advanced technology which develops new products, upgrades or replaces existing products to increase exports and foreign exchange earnings, or provides for import substitution.<sup>77</sup> It should be noted that both definitions refer to manufacturing enterprises as opposed to service-sector enterprises. Moreover, for purposes of determining eligibility under

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70. Dalian Preferential Treatment Regulations, *supra* note 16, art. 12, at 51.

71. Implementing Foreign Tax Regulations, *supra* note 51, art. 18, at ¶ 32-510(18); Implementing Joint Venture Tax Regulations, *supra* note 52, art. 13, at ¶ 33-510(13).

72. Tentative Guangzhou Tax Regulations, *supra* note 15, art. 11, at 33. One U.S. dollar is approximately 3.7 yuan at the current exchange rate.

73. *See, e.g.*, Guangzhou Interim Regulations, *supra* note 15, art. 20(5)(c), at 8; Dalian Preferential Treatment Regulations, *supra* note 16, art. 13, at 51; Tianjin Administrative Regulations, *supra* note 17, art. 31, at 32.

74. The Provisions are reprinted in [Business Regulation] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 13-509 and cited therein as State Council Regulations Concerning Encouragement of Foreign Investment, promulgated on October 11, 1986 [hereinafter PEFI].

75. *Id.*, art. 2, at ¶ 13-509(2).

76. *Id.*

77. *Id.*

the PEFI, the focus for exporting enterprises is on the presence of a foreign exchange surplus, while for technologically advanced enterprises emphasis is placed on the quality of the technology and the potential to obtain foreign exchange earnings.<sup>78</sup> Since foreign investment enterprises in ETDZs are mostly high-tech and production enterprises, the PEFI is of particular importance to the ETDZs.

The PEFI grants exemptions to both exporting and technologically advanced enterprises from the ten percent income tax on profits remitted abroad by the foreign party to the enterprise.<sup>79</sup> Since the ETDZs already grant such an exemption to *all* foreign investment enterprises, this PEFI provision does not provide any additional benefits to ETDZ enterprises.<sup>80</sup> The PEFI, however, does grant a fifty percent reduction in the tax rates to exporting enterprises whose annual export earnings exceed seventy percent of their gross revenues.<sup>81</sup> This tax benefit is available indefinitely after tax holidays under other laws expire, as long as the enterprise continues to qualify under the above formula.<sup>82</sup> The fifty percent reduction rule, however, does not apply to exporting enterprises in ETDZs where the income tax is already subject to a fifteen percent ceiling. For these enterprises, the PEFI reduces the fifteen percent tax rate to ten percent.<sup>83</sup> Technologically advanced enterprises enjoy only a three-year extended tax holiday period under the PEFI after tax holidays under other laws expire. During those three years technologically advanced enterprises are granted a fifty percent tax rate reduction but for technologically advanced enterprises in the EDTZs, the tax rate is reduced from fifteen percent to ten per cent.<sup>84</sup>

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78. The PEFI states that the eligibility of exporting enterprises is to be re-examined annually and if the foreign exchange surplus requirement is not met, taxes and fees which were reduced or made exempt in the previous year must be made up in the following year. PEFI, *supra* note 74, art. 18, at ¶ 13-509(18). The PEFI does not specify, however, if technologically advanced enterprises are to be similarly re-examined annually. *Id.* Thus, the question of whether a favorable determination for a technologically advanced enterprise is indefinitely effective or only until the technology is no longer considered "advanced" is left unanswered. The tax provisions in the PEFI, however, indicate that annual re-examination of such high-tech enterprises is not contemplated. Under the PEFI, tax benefits for high-tech enterprises are limited to three years while tax benefits for exporting enterprises continue indefinitely. PEFI, *supra* note 74, art. 9, at ¶ 13-509(9). Since qualification as a technologically advanced enterprise only provides a short-term benefit, re-examination is probably not required.

Under Article 18 of the PEFI, local foreign, economic, and trade departments and other relevant government departments are to jointly determine whether an enterprise qualifies as an exporting or technologically advanced enterprise. In addition, Article 18 specifies that the determination is to be made in accordance with the "enterprise contract". Although the term "enterprise contract" is not defined, it probably refers to the equity or contractual joint venture agreement that governs the establishment of the enterprise. Since a wholly-owned foreign enterprise would not have a similar contract, it is unclear as to how a determination would be made in such a case.

79. PEFI, *supra* note 74, art. 7, at ¶ 13-509(7).

80. See *supra* note 58 and accompanying text.

81. PEFI, *supra* note 74, art. 8, at ¶ 13-509(8).

82. *Id.*

83. *Id.*

84. Xinhua News Agency, press release, Jan. 3, 1986.



## VI ETDZ LAND LAW

Under Chinese law, ownership of land is vested with the state or collectives.<sup>85</sup> Individuals and foreigners may not own land in China, but by following specific procedures foreign investors can obtain permission to use land on a contractual basis, upon payment of a fee. Most ETDZs have enacted land regulations which follow a pattern similar to those of the SEZs.<sup>86</sup> Table 2 (see Appendix) illustrates the similarities and differences of land regulations in the major ETDZs and compares them with SEZ land regulations.

### A. *The Application Process*

The power to regulate and administer land use is often vested with the Administrative Commission of the ETDZ through its zoning office. To obtain the land use privilege, an entity must apply to the Administrative Commission or the zoning office, as the case may be. Once the application is approved, the zoning office will negotiate a land use contract with the applicant on behalf of the government. The contract must specify the area, location, use, and term of use of the land. It must also detail the requisite deposit, fees, and penalties. The zoning office will then issue a land use certificate which serves as the official license. Some ETDZs, Dalian for instance, require that a blueprint for construction be produced six months from the effective date of the certificate and that actual construction begin within nine months of such date.<sup>87</sup> Failure to meet this requirement may result in revocation of the certificate.<sup>88</sup> These provisions are modeled after similar provisions in the land regulations of the SEZs.<sup>89</sup> The land regulations of the Guangzhou and Tianjin ETDZs do not contain such provisions.

### B. *Prices, Fees, and Terms of Land Use*

The substantive aspects of land use regulations generally concern the term and price. As shown in Table 2 (see Appendix), the price of land does not vary much among the ETDZs. The term of land use usually ranges from twenty to fifty years depending on the nature of the business operation. Educational and scientific establishments are treated most preferentially and are

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85. See Constitution of the People's Republic of China, art. 10, adopted by the Fifth Session of the Fifth National People's Congress on December 4, 1982, reprinted in [Business Regulation] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 4-500(10).

86. See, e.g., Provisional Regulations on Land Administration in Shenzhen Special Economic Zone, *supra* note 26; Measures on Readjusting Land Use Fees and Preferential Reduction of and Exemption from Land Use Fees in Shenzhen Special Economic Zone, promulgated by the Shenzhen Municipal People's Government on December 25, 1984, reprinted in [Special Zones & Cities] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 73-519.

87. Dalian Land Regulations, *supra* note 16, art. 7, at 60.

88. *Id.*

89. See Provisional Regulations on Land Administration in Shenzhen Special Economic Zone, *supra* note 26, art. 9, at ¶ 73-500(9).

given a term of fifty years in all the major ETDZs. Service sector projects, on the other hand, may only have a twenty-year term.

Upon expiration, the land use contract and certificate may be renewed with government approval. In addition, in order to maintain some stability in the system, the regulations generally provide limitations on the range of land use fees. In the Guangzhou ETDZ, for instance, each time the fee is adjusted it must remain within thirty percent of the previous level.<sup>90</sup> Similarly, in the Dalian ETDZ, the regulations provide that no adjustment will be made within the first five years of use and later adjustments may be made only once every three years and then only within thirty percent of the previous level.<sup>91</sup>

In addition to the land use fee, some ETDZs also impose a lump-sum duty called the site development fee. Under the land regulations of the Dalian ETDZ, for example, the site development fee includes land expropriation fees, rehabilitation fees, and costs incurred to provide the basic support facilities for the land users.<sup>92</sup> The site development fee, however, does not include costs that the land user may incur in connecting the on-site facilities to the public gas and power facilities located off-site.<sup>93</sup> In Dalian, the site development fee ranges from 165 to 190 yuan per square meter depending on the area and nature of the business establishment involved.<sup>94</sup> The Tianjin ETDZ charges a similar site development fee,<sup>95</sup> but Guangzhou land regulations do not provide for any fee.

Preferential treatment to foreign investors is an important part of the ETDZ land regulations. Generally, all the land regulations grant exemptions from land use fees to educational, scientific, cultural, and medical establishments in addition to other non-profit establishments set up for the benefit of the general public. The ETDZs also use land fee waivers to attract early investors. Dalian ETDZ, for example, grants various exemptions and reductions of land fees to investors who set up their enterprises prior to 1987.<sup>96</sup> The land regulations of the Guangzhou ETDZ contain similar provisions.<sup>97</sup> Furthermore, to accelerate the development of the ETDZs, some land regulations encourage investors to participate in public utility or business-support construction in exchange for preferential terms for land use. For instance, under the land regulations of the Tianjin ETDZ, a foreign investment enterprise may be given a reduction of or an exemption from land use fees for five to ten years if it is involved in projects concerning the supply of water, gas, electricity or heat, or in the construction of drainage systems or roads.<sup>98</sup> The

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90. Tentative Procedures of the Guangzhou Economic and Technological Development Zone for Land Management, *supra* note 15, art. 17, at 25.

91. Dalian Land Regulations, *supra* note 16, art. 15, at 61.

92. *Id.*, art. 16, at 61.

93. *Id.*, art. 20, at 61.

94. *Id.*, art. 16, at 61.

95. Tianjin Administrative Regulations, *supra* note 17, art. 23, at 31.

96. Dalian Land Regulations, *supra* note 16, art. 17, at 61.

97. Guangzhou Interim Regulations, *supra* note 15, art. 20(5)(b), at 8.

98. Tianjin Land Regulations, *supra* note 17, art. 11, at 46.

land regulations of the Dalian ETDZ contain a more generous fifteen-year exemption.<sup>99</sup>

### C. Effect of the PEFI on ETDZ Land Law

As a special incentive to exporting and technologically advanced enterprises,<sup>100</sup> the recently promulgated PEFI imposes a ceiling on land use and site development fees.<sup>101</sup> Under the PEFI, where development and land use fees are combined, the annual fees may range from five to twenty yuan per square meter.<sup>102</sup> If the enterprise develops the site on its own or pays a one-time lump sum for development, the annual land use fee may not exceed three yuan per square meter.<sup>103</sup> The PEFI limitations apply to all ETDZs and other geographic areas, with respect to enterprises that qualify as exporting or technologically advanced enterprises.

The promulgation of the PEFI in October 1986 elicited significant response on the part of regional governments; many have already promulgated rules to reduce land use and site development fees. The fees listed in Table 2 (see Appendix) are those in effect at the time of this writing. There is, however, a growing trend to further reduce those charges. Thus, it is likely that the information contained in Table 2 will be somewhat outdated by the time this Article is published. Particularly, the rates listed in Table 2 should be consulted with caution.

## VII

### LABOR LAW IN THE ETDZS<sup>104</sup>

All the major ETDZs have enacted labor regulations to provide the basic legal framework for the regulations of labor and management relationships. These labor regulations, like the land regulations discussed above, follow a general pattern substantially similar to those of the SEZs. Table 3 (see Appendix) provides a detailed comparison of the labor regulations of the three major ETDZs and SEZs.

#### A. Employee Recruitment

ETDZ labor regulations generally give a foreign employer the right to select and dismiss employees, subject to certain limitations. The ETDZ regulations assume an employer-employee relationship on a contractual basis

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99. Dalian Land Regulations, *supra* note 16, art. 17, at 61.

100. For a discussion on qualifying as an "exporting" or "technologically advanced" enterprise, see *supra* notes 76-78 and accompanying text.

101. See PEFI, *supra* note 74, art. 4, at ¶ 13-509(4).

102. *Id.* One U.S. dollar is approximately 3.7 yuan under the current exchange rate.

103. *Id.*

104. Unless otherwise indicated, the following discussion concerning labor law in the ETDZs is based on the Labor Regulations of Dalian, Guangzhou and Tianjin ETDZs. See *supra* notes 15-17.

within a tightly-controlled regulatory framework. The regulatory authority for labor affairs in the ETDZs is a quasi-governmental entity called the Labor Service Corporation. For an initial fee, the Corporation helps enterprises recruit employees, negotiate employment contracts on behalf of employees, and oversees social insurance and employee welfare matters.

The ETDZ labor regulations usually allow enterprises to directly recruit employees through the use of exams, without the participation of the Labor Service Corporation. Prior to the PEFI, the enterprise had to obtain approval from the Administrative Commission before recruiting employees in this manner.

With the promulgation of the PEFI, however, two important labor law reforms were instituted. First, the PEFI now allows foreign investment enterprises to recruit employees on their own without prior Commission approval.<sup>105</sup> The PEFI requires enterprises to report recruitment to the local labor authority for the "record," but apparently eliminates the necessity of obtaining prior approval.<sup>106</sup> This rule, however, applies only to recruitment conducted within the region where the foreign investment enterprise is located. In the case of ETDZs, the permissible region probably includes the entire city that set up the ETDZ. According to labor regulations promulgated by the Ministry of Labor in November 1986, if a foreign investment enterprise wishes to recruit technicians or executives in other regions, it must obtain approval from the labor authorities of *both* the region where it is located and the region where the recruitment is proposed.<sup>107</sup>

Secondly, the PEFI requires Chinese entities to which a potential recruit belongs to provide support and to permit his transfer to the foreign enterprise.<sup>108</sup> Although prior law authorized foreign investment enterprises to independently recruit employees, the lack of a labor market and the general unwillingness of Chinese entities to release their employees often made such recruiting difficult. The new PEFI should enable foreign investment enterprises to carry out direct recruitment with greater ease.

### B. Wages

Some ETDZs specifically regulate the wages paid to ETDZ employees, while others do not. Under the labor regulations of the Guangzhou ETDZ, the wages for employees must be 120 percent to 150 percent of the wages paid by similar state-owned enterprises.<sup>109</sup> The Dalian ETDZ, in contrast, allows the level of compensation to be determined through contract negotiation in accordance with job classifications and the nature of the particular business

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105. PEFI, *supra* note 74, art. 15, at ¶ 13-509(15).

106. *Id.*

107. Provisions on Autonomy in Personnel Management and Employee's Wages and Fees for Insurance, promulgated by the Ministry of Labor in November 1986, *reprinted in People's Daily*, Nov. 27, 1986, at 1 (overseas ed.). See art. 1, para. 1.

108. PEFI, *supra* note 74, art. 15, at ¶ 13-509(15).

109. Guangzhou Labor Regulations, *supra* note 15, art. 11, at 53.

operation.<sup>110</sup> The labor regulations of the Tianjin ETDZ contain provisions similar to those of Dalian, but also authorize the Administrative Commission to establish a minimum wage level through separate regulations.<sup>111</sup> National labor regulations,<sup>112</sup> however, provide for a uniform minimum wage standard which is 120 percent of the average wages of similar state-owned enterprises.<sup>113</sup> This standard is to be applied in the ETDZs as well, and supercedes the above ETDZ provisions. Finally, in all the ETDZs, regulations require that an amount equal to one-third of the employees' wages be paid to the Labor Service Corporation as social insurance, which in turn funds state-provided subsidies to employees.

### C. Dismissal of Employees

ETDZ labor regulations generally allow an employer to dismiss an employee on the ground that changes have occurred in production or technology, or that the employee failed to follow instructions. An employer, however, may not dismiss a female employee who has been pregnant for six months or more, or during her post-natal leave period.<sup>114</sup> The employer also may not dismiss an employee undergoing treatment for an illness or injury incurred in the course of employment.<sup>115</sup>

Moreover, in cases where employees are dismissed for reasons other than misbehavior, the employer must render compensation to the discharged employee while the employee finds another job.<sup>116</sup> The amount of compensation is generally based on the employee's seniority, but standards vary among the ETDZs. Under the Dalian ETDZ Labor Regulations, for example, the amount of compensation is one month's salary for each year of employment.<sup>117</sup> For employment less than a year, the compensation is one month's salary.<sup>118</sup> For dismissal during a trial period of employment, the amount of compensation is half of a month's wages.<sup>119</sup> The Dalian Regulations further provide that if dismissal is caused by the employer, he must pay the dismissed

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110. Dalian Labor Regulations, *supra* note 16, art. 5, at 58.

111. Tianjin Labor Regulations, *supra* note 17, arts. 12 and 15, at 40-42.

112. *See supra* note 107.

113. *See supra* note 107, art. 2, para. 1.

114. Dalian Labor Regulations, *supra* note 16, art. 11, at 58; Tianjin Labor Regulations, *supra* note 17, art. 22, at 42. Guangzhou ETDZ does not expressly provide for this.

115. *Id.*; Tianjin Labor Regulations, *supra* note 17, art. 22, at 42.

116. Guangzhou Labor Regulations, *supra* note 15, art. 7, at 52; Dalian Labor Regulations, *supra* note 16, art. 12, at 59; Tianjin Labor Regulations, *supra* note 17, art. 22, at 42.

117. Dalian Labor Regulations, *supra* note 16, art. 12, at 59. Article 12 states in part:

The enterprise shall pay a certain amount of compensation to the discharged staff members and workers according to the length of service in the enterprise: one month's personal wages for each full year's work, one month's personal wages for those who have worked for less than a year and one half of one month's personal wages for probationers. Those who are discharged for the sake of the enterprise shall be paid three to six months' personal wages in addition to the dismissal compensation.

118. *Id.*

119. *Id.*

employee an additional amount equivalent to three to six months' salary.<sup>120</sup> The Labor Regulations of Guangzhou ETDZ contain a similar "one year employment equals one month's pay" equation,<sup>121</sup> but further provide that if the employee has worked for over ten years, the amount of compensation for dismissal increases to one and a half month's salary for each year of employment over the tenth year.<sup>122</sup> This provision is identical to that in the national labor regulations applicable to equity joint ventures.<sup>123</sup>

The ETDZ Labor Regulations are generally unclear as to whether such compensation is required only when the employee is dismissed *prior* to expiration of the employment contract, or whether compensation is also necessary where dismissal is due to the contract's expiration. Under the Guangzhou ETDZ Labor Regulations, it appears that compensation is necessary only when dismissal occurs prior to the contract's expiration, because the Regulations are silent as to compensation for dismissal at the end of the employment term.<sup>124</sup>

All of the ETDZ Labor Regulations contain some due process provisions concerning dismissed employees. For instance, the Labor Regulations of the Guangzhou ETDZ require employers to give one-month's advance notice to the employee.<sup>125</sup> Other Regulations do not contain any prior-notice provisions, but they allow an employee who objects to his dismissal to request that the local labor authorities initiate arbitration or conciliation proceedings.<sup>126</sup> The decision of these authorities may ultimately be subject to judicial review.<sup>127</sup>

120. *Id.*

121. Guangzhou Labor Regulations, *supra* note 15, art. 7, at 52. Article 7 states:

A staff member or a worker dismissed by a development zone enterprise before the expiration of his or her contract shall be given one month's notice in advance and shall be paid compensation according to his or her length of employment in the enterprise. The standards for compensation are as follows:

— For length of employment under ten years (including those under one year), one month's basic wage for each full year's work.

— For length of employment over ten years, one and a half month's basic wage for each full year for the eleventh year and onwards.

122. *Id.*

123. Provisions for the Implementation of the Regulations on Labor Management in Joint Ventures Using Chinese and Foreign Investments, promulgated January 19, 1984, *reprinted in* [Business Regulation] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 6-522(7).

124. *See supra* note 121.

125. *Id.*

126. *See, e.g.,* Dalian Labor Regulations, *supra* note 16, art. 16, at 59. Article 16 states in part:

If the staff members or workers who have been discharged by an enterprise have objects [sic], they are allowed to argue their cases against the enterprise; if the matter cannot be resolved through argument, they may request mediation or arbitration by the labor management department in the development zone; if either of the parties considers the arbitration award to be unfair, it may file a suit in the people's courts.

127. *Id.* *See also* Guangzhou Labor Regulations, *supra* note 15, art. 17, at 55.

#### D. Employee Resignation

All of the ETDZ Labor Regulations provide for resignation by employees prior to the expiration of their employment contracts. However, specific provisions vary from zone to zone. Under the Labor Regulations of the Tianjin and Dalian ETDZs, employees may as a matter of right resign without having to show cause. In contrast, the Guangzhou ETDZ Labor Regulations require employees to show justification or "special circumstances" in order to resign.<sup>128</sup> Moreover, employees may only resign if the contract does not specifically prohibit resignation.<sup>129</sup> Labor Regulations in all the ETDZs also establish penalties for employees who resign after obtaining special training financed by the employer.<sup>130</sup> In the Dalian and Tianjin ETDZs, for example, an employee trained by the enterprise for three months or more may not resign within one year following the conclusion of the training.<sup>131</sup> If the employee resigns nonetheless, he must pay the employer the training costs.<sup>132</sup> The Guangzhou Regulations limit the penalty to the one-year period.<sup>133</sup> In addition, the Regulations generally require the employee to give one-month's notice to the employer prior to resignation.<sup>134</sup> The Regulations do not specifically require the employer to provide compensation to an employee who resigns. Moreover, the wording of the compensation provisions seems to suggest that such compensation is not available. This interpretation is consistent with a national labor law governing equity joint ventures which expressly eliminates the possibility of compensation.<sup>135</sup>

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128. Guangzhou Labor Regulations, *supra* note 15, art. 8, at 52. Article 8 states:

Where before completion of their contracts, staff and workers of development zone enterprises, due to special circumstances, resign, they shall submit their resignations to the enterprise one month in advance and the enterprise shall permit such resignations, except where the contracts clearly stipulate that resignation is not permitted.

129. *Id.*

130. See, e.g., Guangzhou Labor Regulations, *supra* note 15, art. 8, at 52; Dalian Labor Regulations, *supra* note 16, art. 12, at 58; Tianjin Labor Regulations, *supra* note 17, art. 24, at 42-43.

131. Dalian Labor Regulations, *supra* note 16, art. 12, at 58; Tianjin Labor Regulations, *supra* note 17, art. 24, at 42-43.

132. *Id.*; Tianjin Labor Regulations, *supra* note 17, art. 24, at 42-43.

133. Guangzhou Labor Regulations, *supra* note 15, art. 8, at 52.

134. See *supra* note 130.

135. See *supra* note 123. Article 8 of the Provisions states:

Should workers and staff members resign on account of special conditions, the resignation shall be submitted to the joint venture through the trade union one month in advance. The joint venture should give its consent to the workers and staff members who have put forward acceptable reasons, *but compensation may not be granted* [emphasis added].

## VIII

## FOREIGN ECONOMIC CONTRACT LAW IN THE ETDZS

Chinese contract law basically consists of two systems. The first is represented by the Economic Contract Law of the People's Republic of China enacted in December 1981<sup>136</sup> and over a dozen individual contract regulations and statutes<sup>137</sup> which have been reinforced by the recent General Principles of Civil Law.<sup>138</sup> This system applies to domestic contracts, regulating economic relations among Chinese entities. It is based on the concept of a planned economy and has a strong regulatory effect.

The second system is represented by the National FECL enacted in March 1985 together with a few similar regional or special regulations.<sup>139</sup> Primarily designed to regulate international commercial transactions, the National FECL and related regulations are largely based on the concept of freedom of contract and other international commercial practices. The Foreign Economic Contract Law of the Shenzhen SEZ [hereinafter the Shenzhen FECL] adopted in January 1984 is the forerunner in China's foreign economic contract regulatory system.<sup>140</sup> It was followed by similar contract regulations enacted by the Dalian ETDZ in October 1984,<sup>141</sup> and the National FECL in 1985.

Among the ETDZs established so far, Dalian is the only one that has its own separate foreign economic contract regulations. In comparison with the National FECL, the Dalian FECL is much more specific and detailed, and covers a broader range of contract issues. It is also more liberal than

136. The Economic Contract Law of the People's Republic of China [hereinafter ECL], adopted at the Fourth Session of the Fifth National People's Congress on December 13, 1981, *reprinted in* [Business Regulation] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 5-500.

137. There have been numerous regulations governing special types of contracts. These include the Regulations on Property Insurance Contracts, adopted by the State Council on September 1, 1983; the Regulations on Sales Contracts for Agricultural and other Related Products, adopted by the State Council on January 23, 1984; the Regulations on Sales Contracts for Industrial and Mineral Products, adopted by the State Council on August 8, 1983; the Regulations on Contracts for Project Feasibility Research and Design, adopted by the State Council on August 8, 1983; the Regulations on Contracts for Processing Products, adopted by the State Council on December 10, 1984; and Interim Rules for Joint Ventures Between Domestic Enterprises, adopted jointly by the State Planning Commission, the State Economic Commission, the Ministry of Finance, the People's Bank of China and the Construction Bank of China. In addition, regulations on loans and other contracts have already been considered by the legislature. *See, e.g., Fifteen Economic Statutes Have Been Promulgated in Our Country This Year*, Xinhua News Agency, press release, Sept. 12, 1986; *see also* MacNeil, *China Needs Only One Legal System*, *Asian Wall St. J. Weekly*, Dec. 9, 1985, at 14.

138. General Principles of Civil Law of the People's Republic of China [hereinafter Civil Code], adopted by the Fourth Session of the Sixth National People's Congress on April 12, 1986, *reprinted in* *People's Daily*, Apr. 17, 1986, at 2-3 (overseas ed.).

139. National FECL, *see supra* note 30.

140. Regulations of Shenzhen Special Economic Zone on Economic Contracts Involving Foreigners [hereinafter Shenzhen FECL], approved by the Standing Committee of the Sixth Guangdong Provincial People's Congress on January 11, 1984, and promulgated by the Guangdong Provincial People's Government on February 7, 1984, *reprinted in* [Special Zones & Cities] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 73-505.

141. Dalian FECL, *supra* note 16.



Shenzhen's FECL in several important areas. Table 4 (see Appendix) presents a detailed comparison of the three FECLs.

### A. Formation of a Contract

The most striking feature of the Dalian FECL is its detailed provisions concerning elements required for the establishment of a contract. Neither the National FECL nor the Shenzhen FECL contain similar provisions. The National FECL and Shenzhen FECL provide only that a contract is established when the parties sign a written agreement. They provide no further rules concerning offer and acceptance. The Dalian FECL, on the other hand, specifically provides that an offer becomes effective when it reaches the offeree and a contract is established when the acceptance reaches the offeror.<sup>142</sup> It further provides that the modification or withdrawal of an offer is effective only when notice of such modification or withdrawal reaches the offeree before the offeree dispatches the acceptance. Alternatively, the withdrawal of an acceptance is effective only when it reaches the offeror prior to or at the same time the offeror receives the acceptance.<sup>143</sup> These rules appear to be the first official written restatement of Chinese contract practice concerning offer and acceptance.

### B. Scope of Application

The scope of the Dalian FECL, however, is identical to that of the Shenzhen FECL. Both the Dalian and Shenzhen FECLs apply to contractual relations involving foreign parties as well as those involving equity joint ventures, contractual joint ventures and wholly foreign-owned subsidiaries located in an SEZ or ETDZ.<sup>144</sup> This approach was initially modeled after a draft of the National FECL,<sup>145</sup> which was later modified at the suggestion of

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142. *Id.*, arts. 11 and 14, at 55.

143. *Id.*, arts. 13 and 15, at 55.

144. Article 2 of the Dalian FECL, *supra* note 16, reads as follows:

Scope of application of the present regulations:

1. Contracts between Chinese enterprises or other economic organizations in the development zone and foreign enterprises or other economic organizations or individuals in the development zone;
2. Contracts between Chinese-foreign joint ventures, Chinese-foreign cooperative enterprises, or enterprises wholly owned by investors in the development zone (hereinafter development zone enterprises);
3. Contracts between development zone enterprises and foreign enterprises or other economic organizations or individuals; and
4. Contracts between development zone enterprises and Chinese enterprises or other economic organizations.

Article 2 of the Shenzhen FECL is substantially similar.

145. See HONG SHEN, REPORT ON THE FOREIGN ECONOMIC CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA to the Tenth Session of the Standing Committee of the Sixth National People's Congress. A summary of the report is printed in a Xinhua News Agency news release on March 16, 1986.

some legal experts.<sup>146</sup> The current National FECL applies only to contractual relations involving foreign parties.<sup>147</sup> Under the FECL, equity and contractual joint ventures, and wholly foreign-owned enterprises are regarded as Chinese legal entities and are subject to domestic Chinese Economic Contract Law.

### C. Choice of Law

Another area that deserves discussion is the choice of law provisions contained in the various FECLs. Although in practice the Shenzhen SEZ allows contracting parties to choose applicable foreign laws, the Shenzhen FECL does not contain any express choice of law provision. The absence of such a provision may signify a concern that an express provision would encourage parties to choose foreign laws. In contrast, the Dalian FECL adopts a more liberal approach by expressly allowing parties to choose applicable foreign laws.<sup>148</sup> However, the Dalian FECL also contains two important qualifications: (1) the foreign law chosen must be the most closely related to the contract; and (2) where the parties fail to designate their choice in the contract, Chinese law shall apply.<sup>149</sup> Similar qualifications are not found in the National FECL.

Under the National FECL, parties may choose applicable foreign laws for settling disputes, and where the parties fail to make a choice, the law that is most closely related to the contract shall apply.<sup>150</sup> However, the National FECL expressly limits the applicability of foreign laws to dispute settlement while the Dalian FECL contains no such qualification.<sup>151</sup>

### D. Waiver and Statute of Limitations

Other noticeable differences between the Dalian FECL and the National and Shenzhen FECLs include a waiver provision and a statute of limitations provision. Under article 32 of the Dalian FECL, where one party fails to object to the other's proposal to postpone performance and fails to assert his/her right to damages, the same party may not request damages for loss resulting from the delay. Neither the National nor Shenzhen FECLs contain any similar provisions.

The Dalian FECL also provides for a one-year statute of limitations period calculated from the time at which the parties knew or should have known that their rights were violated.<sup>152</sup> Shenzhen's FECL does not contain any provisions concerning statute of limitations, while the National FECL

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146. *Id.*

147. National FECL, *supra* note 30, art. 2, at ¶ 5-550(2).

148. Dalian FECL, *supra* note 16, art. 5, at 54.

149. *Id.*

150. National FECL, *supra* note 30, art. 5, at ¶ 5-550(5).

151. *Id.*

152. Dalian FECL, *supra* note 16, art. 44, at 57.

provides for a four-year limitation period for international sales contracts, leaving provisions for other contracts to separate statutes.<sup>153</sup>

## IX

### ETDZ TECHNOLOGY IMPORT REGULATIONS

Regulations concerning the import of technology to the Shenzhen SEZ were initially promulgated by the government of Guangdong Province on January 11, 1984.<sup>154</sup> The city government of Guangzhou followed with similar regulations on March 6, 1985 to regulate the import of technology to the Guangzhou ETDZ.<sup>155</sup> Approximately two months later on May 24, 1985, the State Council promulgated the national version of technology import regulations applicable nationwide.<sup>156</sup> Currently, the Guangzhou ETDZ is the only one that has its own laws governing technology import.

The regulations of the Guangzhou ETDZ concerning technology import [hereinafter the Guangzhou RTI] are substantially similar to the National and Shenzhen RTIs. Generally, all three RTIs require that the imported technology be "advanced and applicable." However, the Guangzhou RTI contains definitions for "advanced" and "applicable" which are not found in either the Shenzhen RTI or National RTI.<sup>157</sup> "Advanced" is defined as technology that is: more advanced than similar technology currently available in China, and (1) used or developed by advanced industrial countries, or (2) able to help certain domestic industries or products become competitive with world standards.<sup>158</sup> It defines "applicable" as technology that can: (1) be used in scientific research production in the ETDZ, and (2) help technological innovation in China and be "suitable to the concrete situation of China."<sup>159</sup> Thus the "applicability" requirement apparently involves an inquiry into the practical value of the technology. For example, the RTI will probably bar the importation of technology which, although very advanced, cannot be put to any practical use or application in China either because of the nature of the technology or because there is a lack of necessary personnel or infrastructure.

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153. National FECL, *supra* note 28, art. 39, at ¶ 5-550(39).

154. Provisional Regulations of Shenzhen Special Economic Zone Governing the Import of Technology, approved by the Standing Committee of the Sixth Guangdong Provincial People's Congress at its Fifth Session on January 11, 1984, and promulgated by the Guangdong Provincial People's Government on February 8, 1984, *reprinted in* [Special Zones & Cities] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 73-510 [hereinafter Shenzhen RTI]. For a general discussion of technology transfers to the People's Republic of China, see Wilson, *supra* note 30.

155. Guangzhou RTI, *see supra* note 15.

156. Regulations on Administration of Technology Import Contracts of the People's Republic of China, promulgated by the State Council on May 24, 1985, *reprinted in* [Business Regulation] CHINA L. FOREIGN BUS. (CCH Austl.) ¶ 5-570 [hereinafter National RTI].

157. Guangzhou RTI, *supra* note 15, art. 5, at 12.

158. *Id.*

159. *Id.*

Similar to the Shenzhen RTI, the Guangzhou RTI further requires that the technology have an obvious economic benefit to China.<sup>160</sup> The National RTI does not contain similar provisions. Technology that may be imported to the Guangzhou ETDZ includes technology under a patent or pending patent, know-how, and advanced software.<sup>161</sup> The Shenzhen and National RTIs are substantially similar to the Guangzhou RTI in this respect, but they do not expressly include computer software.

The Guangzhou and Shenzhen RTIs both require the licensor to teach the licensee the transferred technology within the effective term of the contract.<sup>162</sup> Although the National RTI does not have similar provisions, it does require that the term of the licensing agreement should equal the time that the licensee needs to master the technology.<sup>163</sup> In both the National and Guangzhou RTIs, there are provisions that limit the maximum term of a license agreement to ten years.<sup>164</sup> Under the Shenzhen RTI, the maximum term is five years.<sup>165</sup> However, all three RTIs allow for exceptions to the general rules, subject to special approval.

Like the National RTI, the Guangzhou RTI contains implied warranty provisions which guarantee that the licensor is the lawful owner of the technology.<sup>166</sup> In addition, the Guangzhou RTI specifically provides, unlike the Shenzhen and National RTIs that the licensor shall reimburse the licensee for all expenses it may incur if a third person sues it for patent infringement in connection with the transferred technology.<sup>167</sup> Implied warranty provisions in the Guangzhou and National RTIs also require the licensor to guarantee that the technology provided is "complete", "correct" and "effective" and is capable of fulfilling the technical objectives of the contract.<sup>168</sup> Although these provisions are not expressly set forth in the Shenzhen RTI, they can be implied from other similar provisions.<sup>169</sup> The Guangzhou and Shenzhen RTIs also entitle the licensee to modify or terminate a license agreement where the relevant patent is invalidated or the application for a patent is rejected.<sup>170</sup> In the above situation, the licensor shall also be liable for losses the licensee sustains as a result.<sup>171</sup> The National RTI does not contain similar

160. *Id.*; Shenzhen RTI, *supra* note 154, art. 5, at ¶ 73-510(5).

161. Guangzhou RTI, *supra* note 15, art. 6, at 12-13.

162. *Id.*, art. 24, at 18; Shenzhen RTI, *supra* note 154, art. 10, at ¶ 73-510(10).

163. National RTI, *supra* note 156, art. 8, at ¶ 5-570(8).

164. *Id.*; Guangzhou RTI, *supra* note 15, art. 16, at 16.

165. Shenzhen RTI, *supra* note 154, art. 19, at ¶ 73-510(19).

166. Guangzhou RTI, *supra* note 15, art. 23, at 17-18.

167. *Id.* at 18.

168. *Id.*, art. 24, at 18; National RTI, *supra* note 156, art. 6, at ¶ 5-570(6).

169. Shenzhen RTI, *supra* note 154, arts. 5, 12, at ¶¶ 73-510(5), 73-510(12).

170. *See* Guangzhou RTI, *supra* note 15, art. 23, at 18; Shenzhen RTI, *supra* note 154, art. 12, at ¶ 73-510(12).

171. *Id.*; Shenzhen RTI, *supra* note 154, art. 12, at ¶ 73-510(12).

provisions. Finally, all three RTIs expressly require that the licensee maintain confidentiality during the term of the licensing agreement and impose liability on the licensee for unauthorized disclosure.<sup>172</sup>

The Guangzhou and National RTIs also contain a list of prohibited licensing agreement provisions. Prohibited provisions include those requiring a licensee to accept terms unrelated to the technology, restricting a licensee's further development or improvement of the transferred technology, restricting a licensee's acquisition of similar technology from other sources, requiring non-reciprocal arrangements for the exchange of improved technology by both parties, restricting the quantity, variety and market price of the products manufactured by the transferred technology, unreasonably restricting a licensee's export market, and requiring a licensee to pay for a patent that is not used or that has lost its effectiveness.<sup>173</sup> The Shenzhen RTI does not itemize the prohibited provisions, rather, it provides in article 18 that "unreasonable restrictions or unfair provisions shall not be imposed on either party to a contract."<sup>174</sup> However, an interpretation of article 18 of the Shenzhen RTI issued by the government of Guangzhou Province makes it clear that the article includes the above-listed items.<sup>175</sup>

Both the Shenzhen and Guangzhou RTIs further outline the procedure for obtaining approval for a licensing agreement from the relevant authorities. Under the Guangzhou RTI, the licensee must submit a letter of intent and a feasibility study report to the ETDZ Administrative Commission.<sup>176</sup> The Commission reviews the submitted documents and issues a standard form for the technology transfer application.<sup>177</sup> The parties may then proceed to negotiate and sign the agreement. The agreement, together with a duly filed technology transfer application, must be submitted to the Commission for official approval.<sup>178</sup> The licensor's business license and personal identification including the foreign negotiators' power of attorney, must also be submitted at this time.<sup>179</sup> The Shenzhen RTI contains almost identical provisions in this regard,<sup>180</sup> but the National RTI does not detail the procedure. Instead, a separate set of rules promulgated on October 1, 1985 by the

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172. Guangzhou RTI, *supra* note 15, art. 26, at 18; Shenzhen RTI, *supra* note 154, art. 13, at ¶ 73-510(13); National RTI, *supra* note 156, art. 7, at ¶ 5-570(7).

173. National RTI, *supra* note 156, art. 9, at ¶ 5-570(9); Guangzhou RTI, *supra* note 15, art. 20, at 17.

174. Shenzhen RTI, *supra* note 154, art. 18, at ¶ 73-510(18).

175. Announcement for the Promulgation of "Interim Regulations of the Shenzhen Special Economic Zone for Technology Import," People's Government of Guangdong Province, January 23, 1984.

176. Guangzhou RTI, *supra* note 15, ch. 5, at 18-20.

177. *Id.*

178. *Id.*

179. *Id.*

180. Shenzhen RTI, *supra* note 154, art. 15, at ¶ 73-510(15).

Ministry of Foreign Trade and Economic Relations outlines a substantially similar procedure applicable nationwide.<sup>181</sup>

The three RTIs differ primarily in the length of time it takes for the relevant authorities to process the applications. Under the Shenzhen RTI, the government is required to issue its determination within three months of the application.<sup>182</sup> Under the Guangzhou RTI, the Commission must issue its decision within forty days,<sup>183</sup> while the National RTI provides for a sixty-day consideration period.<sup>184</sup> To ensure efficiency, the National RTI further provides that the licensing agreement shall automatically become effective as if it were approved, should the authorities fail to issue their decision within sixty days.<sup>185</sup>

### CONCLUSION

The creation and development of ETDZs has expanded the horizons of China's foreign economic policy as well as opened new areas in Chinese law concerning international economic relations. The emergence of various regulations promulgated by the ETDZ authorities currently provide the basic legal and economic framework for investors. As the volume of business transactions increases in the ETDZs, many practical legal issues will arise and the legal structure of the ETDZs is likely to undergo further expansion during the next few years.

Although many individual regulations apply in the Zones, there is presently only one set of uniform national regulations that directly deals with the ETDZs. As the importance and scale of the ETDZs increase, there will probably be more uniform national regulation. These developments will hopefully lead to an improved legal and economic environment for foreign investment. In the interim, general national laws need to be consulted for issues not directly covered by the special regulations of the ETDZs, and the experience of the SEZs may also help resolve legal issues that arise in the development of China's ETDZs.

The success of the existing ETDZs has already led the Chinese government to establish additional new ETDZs. In September 1986, upon approval of the State Council, the city of Shanghai set up two ETDZs, bringing the number of ETDZs in the PRC to a total of thirteen.<sup>186</sup> It is likely that additional ETDZs will emerge in the next few years. Expansion of the ETDZs will increase business opportunities for foreign investors and enhance the significance of ETDZs in the Chinese economy.

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181. Procedures for the Examination and Approval of Technology Import Contracts, promulgated by the Ministry of Foreign Trade and Economic Relations on October 1, 1985, reprinted in STATE COUNCIL BULLETIN, Oct. 20, 1985, at 963-66.

182. Shenzhen RTI, *supra* note 154, art. 16, at ¶ 73-510(16).

183. Guangzhou RTI, *supra* note 15, art. 28, at 19-20.

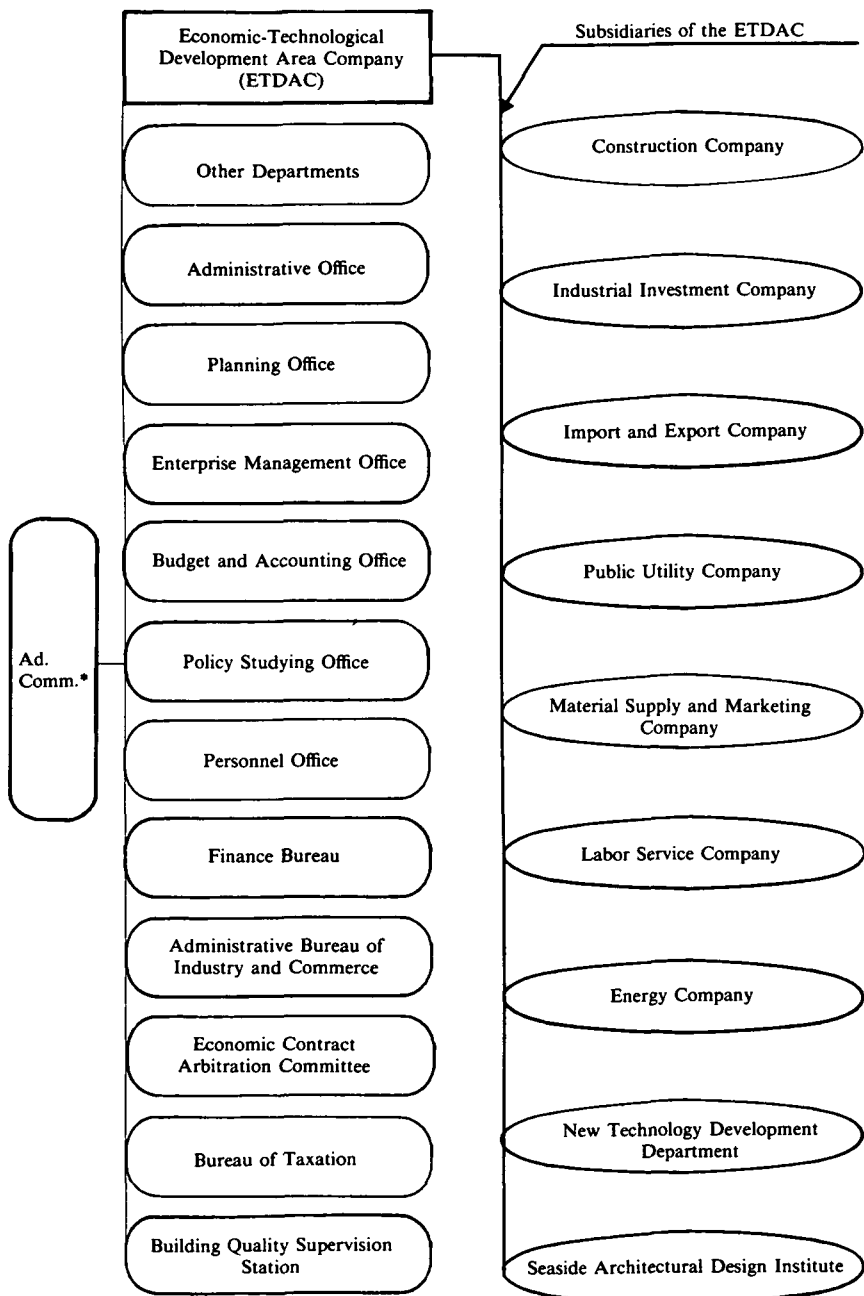
184. National RTI, *supra* note 156, art. 4, at ¶ 5-570(4).

185. *Id.*

186. Xinhua News Agency, press release, Sept. 4, 1986.

APPENDIX

TABLE 1: INSTITUTIONAL STRUCTURE OF THE ETDZS



\*Administrative Commission.

TABLE 2. COMPARISON OF LAND LAWS

	SEZs	Guangzhou ETDZ	Tianjin ETDZ	Dalian ETDZ
Procedure to acquire land:				
1. approval & regulatory authority	Zoning office of Shenzhen city government	Ad. Comm. and Zoning office	Ad. Comm.	Ad. Comm. and Zoning office
2. conclusion of contract with the government	no provision	required	no provision	required
3. Land Use Certificate	required	required	required	required
Commencement of project requirements:				
1. 6 months after effective date of the certificate	Project design and construction plan should be available.	no provision	no provision	Project design and construction plan should be available.
2. 9 months after effective date of the certificate	Construction shall be commenced.			Construction shall be commenced.
3. penalty	Unless otherwise approved by the authority, certificate may be revoked.			Unless otherwise approved by the authority, certificate may be revoked.
Term of land use (in years):				
1. industry	30	30		40
2. storage	no provision	30		no provision
3. tourism	30	30	to be determined individually	30
4. commerce/service	20	20		20
5. housing	50	50		50
6. education, science & technology	50	50		50
7. husbandry/other agricultural business	20	no provision		20



TABLE 2. COMPARISON OF LAND LAWS (CONT'D.)

	SEZs	Guangzhou ETDZ	Tianjin ETDZ	Dalian ETDZ
Land use fee (yuan/square meter):*				
1. industry	1-1.6**	2	to be provided separately	1-1.3
2. storage	1-1.6	12		1-1.3
3. tourism	12-18	9		13-15
4. commerce/service	13-21	12		13-15
5. housing	5-9	8		5-7 exemption
6. education, science & technology	special preferential terms	1		0.3-0.4
7. husbandry/other agricultural business	0.2-0.3	no provision		no provision
Penalty for failure to pay or later payment:	no provision	daily penalty: 0.5% of the amount due	no provision	no provision
Adjustment of the land use fee:	adjustment may be made every 3 years up to 30% of the fee.	1. the fee may be adjusted up to 10% of the provided rate in accordance with the conditions of the land; 2. the fee may be later adjusted up to 30%.	no provision	1. no adjustment within the first 5 years. 2. the price will be adjusted up to 30% every 3 years.
Site development fee:	imposed, but not specifically provided.	no provision	no provision	156-159 (yuan)
Preferential treatment:	exempted	no provision	may be exempted	no provision
1. educational, scientific and medical facility	may be exempted completely or for 5 years.	may be exempted	may be exempted	no provision
2. project involving advanced technology	exempted	may be exempted	may be exempted	no provision
3. non-profit business				

TABLE 2. COMPARISON OF LAND LAWS (CONT'D.)

	SEZs	Guangzhou ETDZ	Tianjin ETDZ	Dalian ETDZ
4. public utility and other business supporting facilities	exempted	no provision	exemption: 5-10 years	exemption up to 15 years of land fee and exemption of site development fee.
5. construction period	no provision	exemption: 2 years for industry, otherwise 1 year.	no provision	Investments made prior to 1987 may enjoy up to 30% reduction of the site development fee and exemption for 3 years.
6. early investors	no provision	Investors that provided advanced technology in 1985 or 1986 may have land fee reduced or the collection postponed.		

\*The rates listed in this table are those effective prior to the PEFI. Following the PEFI, some regional governments reduced the rate and therefore these rates should be consulted with caution. One U.S. dollar equals approximately 3.7 yuan under the current official exchange rate.

\*\*These rates are based on the adjustment of land use fees promulgated by the government of Shenzhen City on Dec. 25, 1984. Prior to the adjustment, the rates were based on the Provisional Regulations on Land Administration in Shenzhen SEZ, see *supra* note 26, which charged a land use fee ranging from 10 yuan for industrial sites to as high as 200 yuan for service sites.

TABLE 3. COMPARISON OF LABOR LAWS

	SEZs	Guangzhou ETDZ	Tianjin ETDZ	Dalian ETDZ
Employment contract: Recruitment:*	required through Labor Service Corporation	required 1. through Labor Service Corporation 2. through test by employer	required 1. through Labor Service Corporation 2. by employers upon the approval of the Ad. Comm.	required 1. through Labor Service Corporation 2. by employer upon the approval of the Ad. Comm.
Fee to the Labor Service Corporation:	no provision	no provision	required	required
Trial period:	3-6 months	1-3 months	not more than 6 months	3-6 months
Employee: 1. age	16 or above	16 or above	16 or above	16 or above and may not be a full time student
2. foreign employee	no provision	no provision	no provision	must be approved
Payment: 1. labor service fee (including wages, bonus, social insurance)	the amount to be provided in the employment contract. 70% shall go to wages, 5% to the bonus and 25% to social insurance.	no provision. 20% of the total payroll shall go to wages. In addition, each employee must pay 2% of his wages to social insurance. 120% -150% of similar state-owned enterprises. Wages should be increased to match the rate of inflation.	the amount to be provided in the employment contract. 25% of this fee shall go to social insurance. Ad. Comm. establishes minimum wages. to be agreed by the union and the employer.	the amount to be provided in the employment contract. 70% shall go to wages, 5% to the bonus and 25% to social insurance. no provision 5%-15%
2. wage level**	no provision			
3. annual increase***	5%-15%			

TABLE 3. COMPARISON OF LABOR LAWS (CONT'D.)

	SEZs	Guangzhou ETDZ	Tianjin ETDZ	Dalian ETDZ
Resignation during the effective term of employment contract:	<p>1. allowed in special situations</p> <p>2. after training by the employer for 3 months or more, employee may not resign within one year unless he pays compensation.</p>	<p>1. allowed in special situations</p> <p>2. one month prior notice</p> <p>3. may be prohibited by the employment contract</p> <p>4. after training by the employer for 3 months or more, employee may not resign within one year unless he pays compensation.</p>	<p>1. one month prior notice</p> <p>2. after training by the employer for 3 months or more, employee may not resign within one year unless he pays compensation.</p>	<p>1. one month prior notice</p> <p>2. after training by the employer for 3 months or more, employee may not resign within one year unless he pays compensation.</p>
Dismissal:	permitted	permitted	permitted	permitted
Compensation for dismissal:	<p>based on seniority: employer pays one month's salary for each year the employee has worked for the employer.</p>	<p>based on seniority: employer pays one month's salary for each year the employee has worked for the employer. If the employee's seniority is over 10 years, for each year after the 10th year, the employee receives 1.5 month's salary.</p>	<p>to be provided for by the Ad. Commn.</p>	<p>based on seniority: employer pays one month's salary for each year the employee has worked for the employer. If the dismissal is due to the fault of the employer, the employer shall pay an additional 3-6 month's wages.</p>

\*These provisions are those provided in the labor regulations of the major ETDZs. They are apparently superseded by the PEFI and the recently promulgated national labor regulations that allow foreign investment enterprises to hire employees on their own.

\*\*The above-mentioned national labor regulations provide a uniform minimum standard of 120%.

\*\*\*The above-mentioned national labor regulations expressly provide that the increase in wages is not compulsory. Where an enterprise is not profitable, there can be no annual increase.

TABLE 4: COMPARISON OF FOREIGN ECONOMIC CONTRACT LAWS (FECLs)

	Shenzhen SEZ FECL	National FECL	Dalian ETDZ FECL
Scope of Application:	Any contracts between domestic enterprises located in Shenzhen Special Economic Zone and foreign enterprises or foreign individuals, equity and contractual joint ventures; contracts among foreign enterprises or individuals, equity and contractual joint ventures, in Shenzhen Special Economic Zone. (Art. 2)	Any contracts between foreign and domestic enterprises except for those on international transportation. (Art. 2)	Any contracts between domestic enterprises located in Dalian ETDZ and foreign enterprises or foreign individuals, equity and contractual joint ventures; contracts among the foreign enterprises or individuals, equity and contractual joint ventures in Dalian ETDZ; contracts between the equity and contractual joint ventures and foreign enterprises located in the Dalian ETDZ and other domestic enterprises. (Art. 2).
Form of Contract:	Writing is required. (Art. 7) Letters, telegrams or telexes are sufficient writing. Confirmation is optional. (Art. 7)	Writing is required. Letters, telegrams or telexes can be considered as agreement. Confirmation is optional. (Art. 7.)	Writing is required. Letters, telegrams or telexes can be considered as agreement. Confirmation is optional. (Art. 10).
Invalid Contracts:	1) Contracts violating PRC law; 2) Contracts detrimental to the Sovereignty of China; 3) Contracts contrary to public or social interest; 4) Contracts induced by duress or fraud. (Art. 6)	1) Contracts violating PRC law; 2) Contracts contrary to public or social interest; 3) Contracts induced by duress or fraud.	1) Contracts violating PRC law; 2) Contracts detrimental to the Sovereignty of China; 3) Contracts contrary to public or social interest; 4) Contracts induced by duress or fraud. (Arts. 17, 18).

TABLE 4: COMPARISON OF FOREIGN ECONOMIC CONTRACT LAWS (FECLs) (CONT'D.)

	Shenzhen SEZ FECL	National FECL	Dalian ETDZ FECL
Requirements for the negotiation of contracts:	Parties are required to submit to each other the following: 1) duplicate of registration; 2) certified balance sheet; 3) notarized statement of financial guarantee; 4) notarized power of attorney. (Arts. 9 & 10).	no provision	no provision
Offer:	no provision	no provision	Effective when it reaches the offeree (Art. 11).
Withdrawal or change of offer:	no provision	no provision	Effective where the notice reaches the offeree before he dispatches acceptance. (Art. 13).
Effect of acceptance:	no provision	no provision	Effective when it reaches the offeror. (Art. 14).
Guarantee for contract:	Compulsory. (Arts. 12 & 13).	Optional. (Art. 15).	Optional. (Art. 23).
Choice of Law:	No express provisions.	Except for contracts involving equity and contractual joint ventures, and the development of natural resources in cooperation with foreign companies, parties may choose a law other than Chinese law for dispute settlement (Art. 5.)	Except for contracts involving equity and contractual joint ventures, and the development of natural resources in cooperation with foreign companies, parties may choose for dispute settlement a foreign law that has a close connection with the contract. (Art. 5).
Failure to choose:	no provision	The law most closely related to the contract will apply. (Art. 5)	Chinese law will apply. (Art. 5).
Penalty for late delivery or payment:	Breaching party shall pay 0.1% of the total per day. (Art. 21).	Breaching party shall pay interest for delay in payment. Interest in such a situation can be provided by contract. (Art. 23).	Breaching party shall pay interest for delay in payment. Interest in such a situation can be provided by contract. (Art. 23).

TABLE 4: COMPARISON OF FOREIGN ECONOMIC CONTRACT LAWS (FECLS) (CONT'D.)

	Shenzhen SEZ FECL	National FECL	Dalian ETDZ FECL
Self-help:	Party can suspend its performance if the other party fails to fulfill its obligations. Performance should be resumed if the other party provides guarantees or assurances.	Party can suspend its performance only if there is adequate evidence that the other party would default, but he must inform the other party immediately. Performance shall be resumed if the other party provides adequate assurances or guarantees. Suspension of performance without adequate evidence of the other party's likely default is a breach. (Art. 17).	Where one party performed part or all the obligation and the other fails to render corresponding performance, the party may suspend performance and retain the property and demand damages. Performance should be resumed if the other party provides assurances or guarantees for the performance. (Art. 25).
Damages:	Breaching party shall compensate the other party's loss. (Art. 21). No provision limiting damages.	Damages shall equal the loss of the non-breaching party as a consequence of the breach. It shall not exceed those damages which the breaching party could have foreseen at the time the contract was made. (Art. 19).	Breaching party shall compensate the other party's loss. (Art. 26). No provision limiting damages.
Pre-agreed damages:	no provision	Parties may include in the contract the penalty for breach (Weiyujin) and the way in which damages are to be calculated. However, if it far exceeds or is far less than the actual loss, the aggrieved party can petition an arbitrator or a court to make adjustments in the amount due. (Art. 20).	no provision

TABLE 4: COMPARISON OF FOREIGN ECONOMIC CONTRACT LAWS (FECLs) (CONT'D.)

	Shenzhen SEZ FECL	National FECL	Dalian ETDZ FECL
Security Deposit:	If one party makes a pre-paid deposit as guarantee for performance, it cannot recover the deposit if it breaches. If the party who receives the deposit breaches, the breaching party shall pay the amount of the deposit plus an additional like amount. (Art. 14).	no provision	If one party makes a pre-paid deposit as guarantee for performance, it cannot recover the deposit if it breaches. If the party who receives the deposit breaches, the breaching party shall pay the amount of the deposit plus an additional like amount. (Art. 29).
Mitigation:	No express provision.	Party not in breach shall take prompt steps to prevent aggravation of loss. Failure will bar him from recovery of the damages for the loss aggravated. (Art. 23).	No express provision.
<i>Force Majeure</i> :	<i>Force majeure</i> principally means: 1) Serious natural disasters; 2) Wars; 3) Other unavoidable incidents agreed upon by contract. (Art. 24)	<i>Force majeure</i> means events that parties cannot foresee at the time contract is made and the occurrence and consequence of which cannot be avoided and overcome. Parties may specify specific events of <i>force majeure</i> in contract. (Art. 24).	<i>Force majeure</i> principally means: 1) Serious natural disasters; 2) Wars; 3) Other unavoidable incidents agreed upon by contract. (Art. 33)
Assignment & delegation:	Both the agreement of the other party and approval of relevant authorities must be obtained. (Art. 28).	Agreement must be obtained. Approval by the authorities is necessary only where contract in question was approved when it took effect (Art. 26 & 27).	Both the agreement of the other party and approval of relevant authorities must be obtained. (Art. 38).
Statute of limitations:	This is regulated by other law. (Art. 30).	Four years for contracts for the sale of goods. No provision for other contracts (Art. 39).	One year. (Art. 44).



TABLE 4: COMPARISON OF FOREIGN ECONOMIC CONTRACT LAWS (FECLs) (CONT'D.)

	Shenzhen SEZ FECL	National FECL	Dalian ETDZ FECL
Language of contract:	If more than one language is used, the Chinese version shall prevail. (Art. 40).	no provision	no provision
Effect of supervening laws:	no provision	Contracts involving equity and contractual joint ventures with foreign companies, and the development of natural resources in cooperation with foreign enterprises will not be affected by subsequent changes in Chinese law. (Art. 40).	Unless expressly provided for in the new law, contracts are not affected. (Art. 21).
Administration of contracts:	Contracts shall be registered with Bureau of Industrial and Commerce Administration, and the relevant revenue service. (Art. 31). Contract regulatory agency may supervise the implementation of contracts, conciliate disputes, and impose fines. (Art. 32). Bank of China supervises contracts through the regulation of foreign exchange. (Art. 33).	no provision.	no provision