

THE PROFESSIONAL ‘TUG OF WAR’: THE REGULATION OF FOREIGN LAWYERS IN CHINA, BUSINESS SCOPE ISSUES AND SOME SUGGESTIONS FOR REFORM

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[This article looks at the regulatory framework governing foreign law firms in China and the unique challenges that this poses for foreign lawyers, Chinese lawyers and the Chinese regulators. The challenges are unique because of the significant gap between, on the one hand, the strict letter of the law in terms of what foreign law firms are permitted to do and, on the other hand, the liberal interpretation and enforcement of the law in practice by the relevant regulatory authority — the Ministry of Justice. The article concludes by considering various models for reform to the regulatory framework and providing suggestions as to the appropriate choices.]

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I INTRODUCTION

In keeping with its status as the world's fastest-growing emerging market, China¹ is now host to many foreign law firms. These include law firms that have a large international presence (such as those based in the United Kingdom and the United States of America), as well as law firms that include China as part of their regional presence (such as those based in Australia).² The importance of transactions involving Chinese counter-parties and Chinese assets is reflected both in the revenues that foreign law firms are generating out of their China practices and also in the size of their China-based professional resources.

The context for this article is the regulatory framework governing foreign law firms in China and the unique challenges that this poses for foreign lawyers, Chinese lawyers and the Chinese regulators. The challenges are unique because of the gap between, on the one hand, the strict regulatory restrictions on the permitted scope of business of foreign law firms and, on the other hand, the liberal interpretation and enforcement of the regulations by the regulatory authority. This has provoked a 'tug of war' between Chinese lawyers and foreign lawyers — one that flares up periodically and became particularly heated and controversial in 2006.

This article is set out in seven parts. Part II sets out the background to the current regulatory framework and places it within the context of China's World Trade Organization ('WTO') commitments concerning the permitted business scope of foreign law firms. Part III analyses the current regulatory framework as it applies to business scope issues and outlines the reaction of foreign law firms to the current regulations and the practice of foreign law firms in China to date. Part IV looks at the controversy that flared up in 2006 concerning the operations of foreign law firms and compares the perspectives held by the main protagonists — namely, the regulators, the local profession and foreign lawyers. Part V outlines the regulatory regime in respect of lawyers from the Hong Kong and Macao Special Administrative Regions ('SARs') for the light that it might throw on the future reform of regulations governing foreign lawyers. Part VI identifies certain models for further reform and Part VII draws some conclusions.

¹ For the purposes of this article, the terms 'China' and 'People's Republic of China' ('PRC') are used interchangeably and refer to Mainland China, and not Hong Kong and Macao.

² According to the Australian Trade Commission ('Austrade'), '[e]ight or more Australian law firms maintain, or operate from a foreign law firm office in China (excluding Hong Kong SAR)': Austrade, *Legal Services Overview* (2008) <<http://www.austrade.gov.au/Legal-services-overview/default.aspx>>.

II BACKGROUND TO THE REGULATION OF FOREIGN LAWYERS IN CHINA³

A *The Initial Framework*

The first rules governing offices of foreign law firms in China were the Provisional Rules of the Ministry of Justice and the State Administration for Industry and Commerce on the Establishment of Offices in China by Foreign Law Firms, which were issued on 26 May 1992 ('*Provisional Rules*').⁴ Prior to the *Provisional Rules*, there was no express basis on which foreign law firms could establish an office in China and many maintained a presence in the form of representative offices of consultancy companies pursuant to the provisions governing representative organisations of foreign companies in China.⁵

This avenue was closed by the *Provisional Rules*, which provided that foreign law firms were not permitted to engage in legal service activities in the name of a consultancy company, a commercial company or under any other name.⁶ The permitted business scope was set out in *Provisional Rules* arts 15 and 16:

Article 15

Offices of foreign law firms and their personnel may undertake the following business activities:

- (1) providing consultancy advice to clients on the laws of the country in which the lawyers of the law firm are permitted to practise and on inter-

³ For background to the evolution of the regulatory framework in China concerning foreign law firms and the impact of China's accession to the WTO, see generally Sida Liu, 'Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market' (2008) 42 *Law and Society Review* 771; Susan E Vitale, 'Doors Widen to the West: China's Entry in the World Trade Organization Will Ease Some Restrictions on Foreign Law Firms' (2001) 7 *Washington University Journal of Law and Policy* 223; Richard Qiang Guo, 'Piercing the Veil of China's Legal Market: Will GATS Make China More Accessible for US Law Firms?' (2002) 13 *Indiana International and Comparative Law Review* 147; Jane J Heller, 'China's New Foreign Law Firm Regulations: A Step in the Wrong Direction' (2003) 12 *Pacific Rim Law and Policy Journal* 751.

⁴ «司法部、国家工商行政管理局关于外国律师事务所在中国境内设立办事处的暂行规定» [Provisional Rules of the Ministry of Justice and the State Administration for Industry and Commerce on the Establishment of Offices in China by Foreign Law Firms] (PRC) Ministry of Justice and State Administration for Industry and Commerce, 26 May 1992. These *Provisional Rules* use the general term 'office' ('办事处') instead of 'representative office' ('代表机构'), which appears in both the earlier provisions as well as the current regulations.

⁵ «中华人民共和国国务院关于管理外国企业常驻代表机构的暂行规定» [Interim Provisions of the State Council of the People's Republic of China on the Administration of Resident Representative Offices of Foreign Enterprises] (PRC) State Council, 30 October 1980 ('*Interim Provisions*').

⁶ *Provisional Rules* art 3. This prohibition against involvement in legal service activities is repeated in the current provisions: see «外国律师事务所驻华代表机构管理条例» [Administrative Regulations on Representative Offices of Foreign Law Firms in China] (PRC) State Council, Order No 338, 19 December 2001, art 15 ('*Administrative Regulations*') and below Part III(A). For reference to violations of the *Provisional Rules* by foreign law firms in China, see Vitale, above n 3, 227 fn 19 (describing in particular the situation of Coudert Brothers in 1995); Shin-yi Peng and Benjamin Y Li, 'Facilitating Market Access for Taiwanese Lawyers in China' (2006) 23 *UCLA Pacific Basin Law Journal* 172, 180–1, citing Ann Davis, 'Shanghai Exit for Coudert' (1995) 17(22) *National Law Journal* A6.

- national treaties, international commercial law and international practice;
- (2) accepting instructions from clients or Chinese law firms to undertake legal matters in the countries in which the lawyers of the law firm are permitted to practise;
 - (3) acting on behalf of foreign clients and instructing Chinese law firms to undertake legal matters within China.

Article 16

Offices of foreign law firms and their personnel may not undertake the following business activities:

- (1) representation in relation to Chinese legal matters;
- (2) interpretation of Chinese law to clients;
- (3) other business activities that foreigners are not permitted to undertake under Chinese law.

The *Provisional Rules* also provided in art 17 that the offices of foreign law firms were not permitted to employ Chinese lawyers.⁷

The above business scope formed the basis for the current rules governing the ‘representative offices’⁸ of foreign law firms in China. The language of the former *Provisional Rules* was similar to the restrictions on foreign lawyers adopted in Japan,⁹ but much less specific in defining concepts such as ‘representation in relation to Chinese legal matters’¹⁰ and ‘interpretation of Chinese law to clients’.¹¹ As a result, ambiguity arose in respect of the interpretation of the *Provisional Rules*, which hindered their strict enforcement by the regulators.¹²

B *China’s WTO Commitments*

China made specific commitments to open up its market to foreign law firms as part of its accession to the WTO, including the following commitment in respect of the permitted business scope of foreign law firms in China:

Business scope of foreign representative offices is only as follows:

- (a) to provide clients with consultancy on the legislation of the country/region where the lawyers of the law firm are permitted to engage in

⁷ See below Part III(A) for the position under the current rules.

⁸ The original Chinese text is ‘代表机构’.

⁹ For discussion on Japanese regulation in this area, see 何敏 [He Min], ‘外国律师事务所在中国本土化问题的争鸣」 [The Contentions Surrounding the Localisation of Foreign Lawyers’ Offices in China] (2001) 7 *中国律师 Chinese Lawyer* 58; Misasha Suzuki, ‘The Protectionist Bar against Foreign Lawyers in Japan, China, and Korea: Domestic Control in the Face of Internationalization’ (2003) 16 *Columbia Journal of Asian Law* 385, 393–8; Leonardo Ciano and Drew Martin, ‘The Foreign Lawyer Law of Japan: Legitimate Complaints or Red Herrings?’ (2002) 76 *Journal of Inquiry and Research* 121.

¹⁰ The original Chinese text is ‘代理中国法律事务’.

¹¹ The original Chinese text is ‘向当事人解释中国法律’.

¹² See 蔡永彤 [Cai Yong Tong], ‘WTO 服务市场开放研究及相关法律问题探析 — 以法律服务市场开放为视角」 [Research on the Opening Up of the Services Market under the WTO and Analysis of Relevant Legal Questions — From the Perspective of the Opening Up of the Legal Services Market] (2004) 12(2) *山西经济管理干部学院学报 Journal of Shanxi Institute of Economic Management* 60, 63.

lawyer's professional work, and on international conventions and practices;

- (b) to handle, when entrusted by clients or Chinese law firms, legal affairs of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work;
- (c) to entrust, on behalf of foreign clients, Chinese law firms to deal with the Chinese legal affairs;
- (d) to enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs;
- (e) to provide information on the impact of the Chinese legal environment.

Entrustment allows the foreign representative office to directly instruct lawyers in the entrusted Chinese law firm, as agreed between both parties.¹³

It is important to note that China's WTO accession commitments did not include a commitment to allow foreign lawyers to practise Chinese law nor a commitment to allow foreign law firms to employ Chinese lawyers, a point that has been highlighted by Chinese commentators.¹⁴ Instead, their permitted business scope was limited to advising on the laws of foreign jurisdictions where they were qualified to practise.

The commitment to allow foreign law firm representative offices 'to provide information on the impact of the Chinese legal environment' as part of their permitted business scope was later to prove contentious. It is an inherently ambiguous concept and does not appear to have parallels in other jurisdictions. It appears that it was the result of a compromise between China, who did not want to commit to opening up the market to permit foreign lawyers to practise Chinese law, and the European Union ('EU'), who were keen to formalise the existing realities. Given that it was expressly included in the permitted business scope, EU negotiators appear to have believed that this would allow foreign law firms to offer services on Chinese law.¹⁵ This was reflected in an overview of the bilateral negotiations between China and the EU, which stated as follows:

Legal services: foreign law firms will, for the first time, be able to also offer services on Chinese law. In particular they will be able to provide information to their clients on the Chinese legal environment. Concerning other activities in Chinese law (representations before the Courts etc), the arrangements with local law firms have been improved by allowing foreign firms directly to instruct

¹³ *Accession of the People's Republic of China*, WTO Doc WT/L/432 (2001) (Decision of 10 November 2001) Annex 9 ('Schedule of Specific Commitments on Services — List of Article II Exemptions'), incorporating by reference *Report of the Working Party on the Accession of China*, WTO Doc WT/ACC/CHN/49/Add.2 (2001) (Addendum — Part II: Schedule of Specific Commitments on Services — List of Article II MFN Exemptions) II(A)(a).

¹⁴ See, eg, the comments of 王小耘 [Wang Xiao Yun] as reported in 田享华 [Tian Xiang Hua], «上海律协:揭秘外国律所违法执业» [Shanghai Bar Association: Revealing the Illegal Practices of Foreign Law Firms] (2006) 国法网 Law.com.cn <http://www.law.com.cn/lcs/program/html/fazhijiaoliu_content.php?ItemID=10&ID=10423>. See generally 蔡永彤 [Cai Yong Tong], above n 12.

¹⁵ See Heller, above n 3, 764, citing Commission of the European Communities ('European Commission'), *The Sino-EU Agreement on China's Accession to the WTO: Results of the Bilateral Negotiations* (8 April 2003) European Commission — External Trade <http://trade.ec.europa.eu/doclib/docs/2003/april/tradoc_111851.pdf>.

individual Chinese lawyers in these firms. This will allow foreign firms to create a direct link with a Chinese lawyer of their choice, which may in practice be equivalent to full employment.¹⁶

The understanding of the EU negotiators that foreign law firms would be able to offer services in respect of Chinese law was later contradicted by the express exclusion of 'Chinese legal services' from the permitted business scope of foreign law firms in the current rules.¹⁷ Moreover, the expectation that foreign law firms would be able to establish a relationship with individual Chinese lawyers, 'which may in practice be equivalent to full employment', was also to prove misplaced.

III THE CURRENT REGULATORY FRAMEWORK

A *The Administrative Regulations and the Implementing Rules*

On 19 December 2001, the State Council passed the Administrative Regulations on Representative Offices of Foreign Law Firms in China ('*Administrative Regulations*').¹⁸ These came into effect on 1 January 2002. The relevant provision concerning business scope is art 15:

Representative offices and their representatives may only undertake the following activities not including Chinese legal services:

- (1) providing advice to clients on the laws of the country in which the lawyers of the law firm are permitted to practise and consultancy advice on international treaties and international practice;¹⁹
- (2) accepting instructions from clients or Chinese law firms to undertake legal matters in the countries in which the lawyers of the law firm are permitted to practise;
- (3) instructing Chinese law firms on behalf of foreign clients to undertake Chinese legal matters;
- (4) maintaining long-term retainer relationships through contracts signed with Chinese law firms in relation to handling legal matters;
- (5) providing information concerning the impact of the Chinese legal environment.

In accordance with the provisions of the agreements entered into with Chinese law firms, representative offices may directly make requests of the lawyers at the Chinese law firms that have been instructed.

Representative offices and their representatives may not undertake legal services activities or other profit-making activities outside the scope of paragraphs (1) and (2) of this article.

¹⁶ European Commission, above n 15, 4.

¹⁷ See *Administrative Regulations* art 5 and below Part III(A).

¹⁸ 《外国律师事务所驻华代表机构管理条例》 [Administrative Regulations on Representative Offices of Foreign Law Firms in China] (PRC) State Council, Order No 338, 19 December 2001.

¹⁹ This is different from the wording in art 15 of the *Provisional Rules*, which referred to 'international treaties, international commercial laws and international practice' ('国际条约、国际商事法律和国际惯例的咨询'). The reference to 'international commercial laws' ('国际商事法律') was omitted in the *Administrative Regulations*.

On one interpretation, the effect of the final paragraph of art 15 is that the provision of advice on the impact of the Chinese legal environment under sub-para (5) does not form part of the formal legal services that foreign law firms are permitted to provide to clients.²⁰ This appears to be inconsistent with China's WTO commitment, which included this activity expressly within the agreed business scope of foreign law firms.²¹

Further, the final paragraph excludes sub-paras (3) and (4) from the scope of 'profit-making activities'. This is also curious, given that foreign law firms would expect to charge clients for the time spent in instructing and liaising with Chinese law firms, irrespective of whether this formed part of, or was merely incidental to, the services included in sub-paras (1) and (2).²²

Similar to the position under the *Provisional Rules*, art 16 of the *Administrative Regulations* provides that a '[r]epresentative office may not employ Chinese practising lawyers, and supporting personnel who are employed may not provide legal services to clients.'

Encouragingly for foreign lawyers, the reference to 'Chinese practising lawyers' formalised their existing practice, under which Chinese lawyers employed by foreign law firms would relinquish their practising certificates in order to comply with the formalities of the rules. It also appeared to reflect a shift from the previous position adopted by the Ministry of Justice, which stated that foreign law firms could not employ Chinese lawyers (including personnel with Chinese law qualifications). This suggested that foreign law firms were not permitted to employ personnel who had previously qualified as Chinese lawyers, even if they had relinquished their practising certificates.²³

Less encouraging for foreign lawyers, however, was the prohibition on the provision of legal services by supporting personnel. On a strict interpretation, this would rule out any involvement by local professionals in client work, even if such work were undertaken under the supervision of a registered foreign lawyer. Such an interpretation would run counter to the practice adopted in many other

²⁰ See 林华 [Lin Hua], «洋律师觊觎中国市场» [Foreign Lawyers Covet China's Market] (1 December 2001) 观察新闻 [Observations and News] 49, 49–50. Lin argues that foreign law firms are in breach of the prohibition on undertaking Chinese legal services by packaging their advice as 'information on the impact of the Chinese legal environment'.

²¹ See above n 13 and above Part II(B).

²² This is perhaps less curious in the light of the traditional perception in China that the role of lawyers is limited to issuing legal opinions and representing clients in court and arbitration proceedings: «中华人民共和国律师暂行条例» [Interim Regulations of People's Republic of China Lawyers] (PRC) National People's Congress Standing Committee, Order No 5, 26 August 1980, art 2. See generally Henry R Zheng, 'The Evolving Role of Lawyers and Legal Practice in China' (1988) 36 *American Journal of Comparative Law* 473, 504. As the experience of western commercial lawyers would confirm, however, the fees generated from such activities are often negligible compared with the fees generated from contract drafting, deal negotiation and transaction management, which would include instructing and coordinating foreign counsel in cross-border transactions.

²³ «关于外国律师事务所在华设立办事处有关事宜的通知» [Notice on Relevant Matters Concerning the Establishment of Offices in China by Foreign Law Firms] (PRC) Ministry of Justice, Doc No 105, 30 October 1992 <<http://www.hflib.gov.cn/law/law/falvfagui2/xzf/FLFG/NWXZ%20SF/1188.htm>>. See also Guo, above n 3, 169, who refers to the *Provisional Rules* as '*Provisional Regulations*'.

jurisdictions,²⁴ where non-lawyers are permitted to undertake client work and communicate directly with clients so long as the ultimate responsibility for the matter is borne by a qualified lawyer.²⁵

The *Administrative Regulations* were supplemented on 4 July 2002 when the Ministry of Justice issued the Rules for the Implementation of the Administrative Regulations on Representative Offices of Foreign Law Firms in China (*Implementing Rules*).²⁶ These came into effect on 1 September 2002.

Article 32 of the *Implementing Rules* provides the following definition of the term ‘Chinese legal services’²⁷ (that is, services that registered foreign lawyers are not permitted to provide under art 15 of the *Administrative Regulations*):

The following activities shall be considered to be ‘Chinese legal services’ as provided in art 15 of the *Administrative Regulations*:

- (1) participating in litigation proceedings in China in the capacity of a lawyer;
- (2) providing opinions or certification²⁸ on specific issues concerning the application of Chinese law in contracts, agreements, articles of association or other written documents;²⁹
- (3) providing opinions or certification on actions or events to which Chinese law applies;³⁰
- (4) in the capacity of an agent, expressing an opinion on the application of Chinese law in arbitration activities;³¹
- (5) representing clients in undertaking registration, amendment, application and filing procedures and other procedures with Chinese government

²⁴ These include Australia and the United Kingdom, where non-lawyers in law firms are able to communicate directly with, and provide services directly to, clients.

²⁵ The employment of Chinese professionals by foreign law firms has proven to be a particularly sensitive issue to Chinese law firms: see below Part IV(C).

²⁶ «关于执行〈外国律师事务所驻华代表机构管理条例〉的规定» [Rules for the Implementation of the ‘Administrative Regulations on Representative Offices of Foreign Law Firms in China’] (PRC) Ministry of Justice, Order No 73, 4 July 2002, as amended by «司法部关于修改〈司法部关于执行〈外国律师事务所驻华代表机构管理条例〉的规定〉的决定» [Decision of the Ministry of Justice on the Amendment of the Rules of the Ministry of Justice concerning the ‘Administrative Regulations on Representative Offices of Foreign Law Firms in China’] (PRC) Ministry of Justice, Order No 92, 2 September 2004.

²⁷ The original Chinese text is ‘中国法律事务’.

²⁸ The term ‘certification’ (‘证明’) is not defined. On one interpretation, it refers to verifying or certifying a state of affairs, such as providing a formal legal opinion to confirm the validity of a legal agreement under PRC law.

²⁹ This appears to be directed generally towards interpreting Chinese law.

³⁰ This appears to be directed generally towards advising on the application of Chinese law to specific facts.

³¹ Prior to an amendment in 2004, this provision read as follows: ‘in the capacity of an agent, expressing an opinion on the application of Chinese law and facts that involve Chinese law in arbitration activities’ (‘在仲裁活动中、以代理人身份对中国法律的适用以及涉及到中国法律的事实发表代理意见或评论’): «关于执行〈外国律师事务所驻华代表机构管理条例〉的规定» [Rules for the Implementation of the ‘Administrative Regulations on Representative Offices of Foreign Law Firms in China’] (PRC) Ministry of Justice, Order No 73, 4 July 2002. It is likely that the amendment (see above n 26) was made in response to concerns expressed by foreign lawyers that the original wording would unduly restrict the role of foreign lawyers in arbitration proceedings.

authorities or other organisations that have administrative management functions conferred on them by other laws and regulations.³²

Article 33 of the *Implementing Rules* is also relevant in terms of limiting the scope of foreign law firms to ‘provide information about the impact of the Chinese legal environment’:³³

When providing information concerning the impact of the Chinese legal environment in accordance with sub-para (5) of the first paragraph of art 15 of the *Administrative Regulations*, representative offices and their representatives may not provide specific views or conclusions on the application of PRC law.

Article 33 of the *Implementing Rules* appears to rule out the possibility that foreign law firms may indirectly provide ‘Chinese legal services’ on the basis of *Administrative Regulations* art 15(5). This begs the question as to what purpose art 15(5) was intended to serve, particularly if it should have been treated as part of the permitted business scope of foreign law firms pursuant to China’s WTO accession commitments. If, as the last paragraph of art 15 suggests, the provision of information on the impact of the Chinese legal environment does not fall within the permitted business scope of foreign lawyers, the purpose of art 15 would apparently be limited to preparing client newsletters and reporting generally on the impact of the Chinese legal environment for marketing purposes.

Other provisions of the *Implementing Rules* that are relevant for the purposes of this analysis are art 37, which imposes restrictions on promotional material,³⁴ and art 38, which prohibits foreign law firms from using the title ‘Chinese law consultant’.³⁵ Article 39, which governs the relationship between foreign law firms and local law firms, is also significant and merits a translation in full:

Article 39

Representative offices and the law firms to which they belong must not engage in any of the following conduct:

- (1) directly or indirectly investing in Chinese law firms;
- (2) forming practice associations with Chinese law firms or Chinese lawyers to share profits or jointly undertake risks;
- (3) establishing joint offices or seconding personnel to Chinese law firms to undertake legal services;
- (4) managing, operating, controlling or enjoying equity interests in Chinese law firms.

The above provision makes it clear that the operations of Chinese law firms must remain independent of foreign law firms.

³² For comments on the impact of this restriction in the area of competition law, see below Part IV(D).

³³ The original Chinese text is ‘提供有关中国法律环境影响的信息’.

³⁴ Among other things, this provides that when representative offices indicate to clients that they are able to conduct business in the PRC, they must state clearly that they do not possess the qualifications, licences or capacity to undertake PRC legal services.

³⁵ The original Chinese text is ‘中国法律顾问’.

B *The Reaction of Foreign Law Firms*

Initially, the foreign lawyers in China reacted to the *Administrative Regulations* and the *Implementing Rules* with a high level of consternation. The new regime triggered meetings of the legal committees of chambers of commerce in China, such as the American Chamber of Commerce, and letters of concern to the regulators.³⁶ One of the concerns was that the procedures followed in implementing the regulations were not WTO-compliant because, unlike local lawyers, foreign lawyers had not been provided with a draft of the regulations before they were issued and had not been given an opportunity to comment on them.³⁷ On its face, the new regime limited the activities of foreign lawyers to providing advice on foreign law only and precluded them from advising on any issue that was subject to, or governed by, Chinese law. Of particular concern was the impact of arts 32(2) and (3) of the *Implementing Rules* and the extent (if at all) to which this was mitigated by art 15(5) of the *Administrative Regulations*.

Some clarification on the interpretation of the new rules was provided by the Ministry of Justice at a meeting to which foreign lawyers were invited and which was held in Shanghai on 27 August 2002.³⁸ No official meeting notes were prepared in relation to this meeting, but the author's own notes suggest that the main concern of the Ministry of Justice was the degree to which foreign law firms were advising on Chinese law. No detailed explanation was provided as to where the line should be drawn between what was permitted and what was prohibited. On the one hand, it was made clear that the provision of authoritative and conclusive views on the application of PRC law to specific issues would fall within the prohibition. On the other hand, the provision of general advice on issues that were governed by PRC law would fall outside the prohibition. According to comments from the Ministry of Justice representative at the meeting, the basis for the latter was in fact art 15(5) of the *Administrative Regulations*, which permitted foreign law firms to 'provide information on the impact of the Chinese legal environment'. The implication in these comments was that art 15(5) was not limited to the preparation of client newsletters and other marketing activities but could form part of the advice that lawyers provide in the ordinary course of their activities and for which they could charge fees. Although this appears inconsistent with the last paragraph of art 15 of the *Administrative Regulations*, the understanding conveyed by the Ministry of Justice representative was that there was some flexibility for interpreting this provision. If this understanding is correct, it may reflect concerns on the part of

³⁶ These concerns were reflected in communications issued by the American Chamber of Commerce in China and the Law Society of England and Wales to their respective members at the time.

³⁷ Based on the author's own experience, other concerns that were expressed about non-compliance with China's WTO commitments included concerns about the application criteria for establishing a representative office, the three-year waiting period for establishing a second office, and qualification restrictions on the personnel of representative offices of foreign law firms in China.

³⁸ The information that follows is based on the author's attendance at this meeting and his personal experience while working as a foreign lawyer in Shanghai at the time.

the regulators to rebut any claims of non-compliance with China's WTO commitments.³⁹

Certain other points were also clarified. First, foreign lawyers would not be in breach of the rules by passing on advice from PRC lawyers in communications with clients, so long as they made it clear that the information was based on advice from PRC lawyers. Secondly, despite the recommendations of PRC lawyers, the rules did not prohibit foreign lawyers from drafting documents governed by PRC law, such as joint venture contracts. Thirdly, irrespective of the effect that foreign lawyers may attribute to disclaimers inserted in their advice,⁴⁰ these were not effective in terms of allowing foreign lawyers to circumvent the prohibition on providing advice on specific issues concerning the application of Chinese law. Finally, the restrictions on the relationships that foreign law firms could maintain with local law firms did not rule out flexible fee arrangements, long-term retainer arrangements (under which the foreign firm would effectively act as the 'client') or even the sharing of resources, so long as this did not result in a 'shared-office arrangement'. Instead, the intention was to keep local law firms independent of foreign law firms.⁴¹

C *The Legal Practice of Foreign Law Firms in China to Date*

In order to understand the current situation concerning foreign law firms in China, it is necessary to review the historical development of legal practice by foreign lawyers in China.

As noted above in Part II, under *Provisional Rules* art 16, foreign law firms were prohibited from undertaking the following activities: (1) representation on Chinese legal matters; (2) interpretation of Chinese law to clients; and (3) other business activities that foreigners are not permitted to undertake under Chinese law. The provisions did not define the term 'Chinese legal matters' and did not clarify the circumstances in which foreign lawyers would be considered to be engaged in the 'interpretation of Chinese law to clients'. The position taken by many foreign law firms was that this prohibited them from representing clients in court proceedings and issuing formal legal opinions (as distinct from routine legal advice).⁴² On this basis, foreign law firms believed that they could achieve compliance by instructing PRC lawyers in court proceedings, inserting disclaimers in their advice (noting that they were not permitted to issue formal legal opinions on Chinese law so that they could not be accused of holding themselves out as PRC lawyers) and arranging for formal legal opinions to be issued under the letterhead of a local Chinese law firm where the circumstances required it. In

³⁹ See above Part III(A).

⁴⁰ See below Part III(C).

⁴¹ In discussions with the author, a representative of the Ministry of Justice stated that the intention behind the new rules was not to drive out foreign lawyers; instead, the hope was that foreign lawyers would involve local lawyers in their transactions more often and stay within the spirit of the rules.

⁴² The term 'formal legal opinions' is used here to refer primarily to closing opinions in commercial transactions — namely, opinions confirming ownership of assets, the legal capacity of Chinese entities and the validity and enforceability of contractual obligations under PRC law.

other respects, foreign lawyers proceeded on the assumption that they were at liberty to advise on matters relating to Chinese law.

A notice issued by the Ministry of Justice in 1992 provided that representative offices of foreign law firms were not permitted to employ Chinese lawyers (including personnel who were qualified as Chinese lawyers) or to establish joint venture entities with Chinese law firms.⁴³ In response to this, foreign law firms took the view that they could employ local professional staff so long as they did not hold current practising certificates. The practice arose where, instead of referring to such professional staff as Chinese lawyers, foreign law firms referred to them as ‘Chinese legal consultants’.

It was on the basis of the above understanding and practice that foreign law firms built their extensive practices and resources in China. To understand the circumstances that have led to the current situation, it is important to recognise that the market in the early 1990s, when the *Provisional Rules* were issued, was fundamentally different from today’s — most local law firms were owned by the state and had not developed the expertise, experience or resources to compete directly with foreign law firms.⁴⁴ In addition, there were no local law firms with a national presence within China, let alone firms with an overseas presence, that could compete successfully with international law firms in the lucrative foreign direct investment (‘FDI’) market.⁴⁵

Given the undeveloped nature of local Chinese law firms at the time, FDI work was initially monopolised by foreign law firms. The involvement of local Chinese law firms was peripheral in nature, being limited to discrete activities such as undertaking searches with government authorities and collecting information that foreign lawyers were unable to collect by themselves. Signifi-

⁴³ «关于外国律师事务所在华设立办事处有关事宜的通知» [Notice on Relevant Matters Concerning the Establishment of Offices in China by Foreign Law Firms] (PRC) Ministry of Justice, Doc No 105, 30 October 1992, [3] <<http://www.hflib.gov.cn/law/law/falvfagui2/xzfl/FLFG/NWXZ%20SF/1188.htm>>. See also Guo, above n 3, 169. Article 40 of the *Implementing Rules* provides a list of circumstances in which foreign firms will be deemed to employ Chinese practising lawyers.

⁴⁴ The first rules governing lawyers in China were issued in 1980 and defined lawyers as ‘state legal workers’ (‘国家的法律工作者’): see Guo, above n 3, 165, citing Qizhi Luo, ‘Autonomy, Qualification and Professionalism of the PRC Bar’ (1998) 12 *Columbia Journal of Asian Law* 1, 10; «中华人民共和国律师暂行条例» [Interim Regulations of People’s Republic of China Lawyers] (PRC) National People’s Congress Standing Committee, Order No 5, 26 August 1980, art 1. Several years were to pass before private partnership firms emerged: Guo, above n 3, 166, citing Virginia Kays Veenswijk, *Coudert Brothers: A Legacy in Law — The History of America’s First International Law Firm (1853–1993)* (1994). Domestic firms are now governed by the «中华人民共和国律师法» [Lawyers Law of the People’s Republic of China] (PRC) National People’s Congress Standing Committee, Order No 76, 28 October 2007 (‘*PRC Lawyers Law*’), which was amended in 2007 and came into effect on 1 June 2008. This defines lawyers as persons who have passed the PRC Bar examination and obtained a practising certificate: arts 2, 5.

⁴⁵ There is now an express basis on which PRC law firms may establish branches overseas: «律师事务所外国设立分支机构管理办法» [Administrative Measures on Law Firms Establishing Branch Organisations Overseas] (PRC) Ministry of Justice, Order No 35, 13 January 1995. These measures also apply to PRC law firms that wish to establish branches in Hong Kong or Macao: art 13. At the date of writing, PRC law firms with offices outside Mainland China included the following: King & Wood (Hong Kong, Tokyo, Silicon Valley and New York), Grandall (Hong Kong), Jun He (Hong Kong and New York), Jincheng and Tongda (Los Angeles), Zhong Lun (Tokyo) and Chen & Co (Hong Kong).

cantly, foreign clients were happy to instruct foreign firms despite their lack of formal Chinese law capacity and the disclaimer in their advice for the simple reason that there was no other choice. The informal — albeit substantial — Chinese law expertise of foreign law firms was thus a creature born partly out of necessity and partly in response to the huge potential that the Chinese market represented.⁴⁶

The status quo was challenged significantly when the *Administrative Regulations* and the *Implementing Rules* were issued. The new regulatory regime appeared to leave very little doubt (if any) that foreign law firms could no longer advise clients on the basis of their informal Chinese law expertise. In particular, significant concerns arose in relation to the effect of art 32 of the *Implementing Rules*, under which the scope of legal advice that foreign lawyers could provide was significantly curtailed and foreign lawyers were prohibited from representing clients in dealings with government authorities.

That the new regulatory regime did not drive the final nail into the coffin for the informal Chinese law practice of foreign law firms is attributable to several factors. First, the Chinese practice of foreign firms had become a force to be reckoned with and was inextricably identified with foreign investors and with foreign investment in China generally. The importance of foreign lawyers, and the need to avoid jeopardising investor confidence in China, led the Ministry of Justice to recognise the Realpolitik involved. Secondly, although the local Bar had played an active role in the drafting of the new regulations, the regulation of foreign lawyers in China falls squarely within the jurisdiction of the Ministry of Justice, and the local Chinese Bar does not have any enforcement role or direct influence. This contrasts with the position in other jurisdictions in Asia, such as Japan, where foreign lawyers are required to join the Japan Federation of Bar Associations.⁴⁷ Thirdly, although China had not committed to allowing foreign law firms to practise Chinese law as part of its accession to the WTO, foreign governments had lobbied strongly in favour of opening up the market.⁴⁸ Given the entrenched position of foreign law firms in China and the considerable influence that they wielded, both in their own right and also through foreign

⁴⁶ The frustration felt by Chinese lawyers at the willingness of foreign clients to instruct foreign law firms despite the regulatory restrictions is reflected in comments by 吕红兵 [Lü Hong Bing], the President of the Shanghai Bar Association in 2006, as reported in 田享华 [Tian Xiang Hua], above n 14: 'Many companies only believe in foreign law firms; they don't believe in Chinese law firms. They would prefer to pay rates of US\$600 per hour or more to foreign law firms than to pay rates of US\$300 per hour to local law firms'. The author's own experience indicates that over the past five years or so a trend has emerged for multinational clients to favour local firms in certain areas of practice, such as advice on employment law. This is in line with the natural development of the local profession in China. In addition, the large local law firms in China are now actively competing with foreign law firms in the FDI market and in cross-border transactions.

⁴⁷ See the website of the Japan Federation of Bar Associations (2002) <<http://www.nichibenren.or.jp/en/>>. See generally Suzuki, above n 9, 407. See also the comments of 吕红兵 [Lü Hong Bing] as reported in 田享华 [Tian Xiang Hua], above n 14: 'because foreign law firms are not members of the Bar Association, the Bar Association would like to supervise them but does not have any power. As a result, foreign law firms exist in a regulatory vacuum'.

⁴⁸ For example, the efforts of the EU negotiators: see above n 16.

governments and international lobby groups, it was not easy for the regulatory authorities to take a rigid stand against the forces of liberalisation.⁴⁹

Lastly, but equally significant, was the practical difficulty of identifying whether certain activities were permitted or prohibited and enforcing the rules accordingly. By way of illustration, consider the difficulties of determining whether a foreign law firm is in compliance with the rules when undertaking the following activities: (1) reviewing the structure of a proposed transaction and identifying legal issues that may be relevant from a Chinese law perspective; (2) drafting opinions on Chinese law in a suitable form for Chinese counsel to issue; (3) reporting on and explaining information or advice that has been sourced from the Chinese regulatory authorities or from Chinese counsel; (4) participating in negotiations in which Chinese legal issues are discussed; and (5) drafting contracts and transactions documents that are governed by Chinese law.⁵⁰

Enforcement action has ensued where foreign law firms clearly operate outside the permitted scope. By way of example, these include circumstances where the Chinese personnel of foreign law firms have held themselves out as Chinese lawyers in arbitration proceedings and witnessed documents that should have been witnessed by Chinese lawyers.⁵¹

The tension between the need to recognise the Realpolitik involving foreign law firms and the need to enforce compliance with the regulatory regime is reflected in the ongoing ‘tug of war’ between local and foreign firms. This came to a head in 2006.

IV THE 2006 CONTROVERSY

A The Background

The first shot across the bow in the 2006 controversy was fired by the Shanghai Bar Association (‘SBA’) in a document entitled ‘Notification of Legal Services Risks (No 1)’, which was issued on 1 December 2005.⁵² In this document, the SBA noted the prohibition in the *Administrative Regulations* on foreign law firms undertaking Chinese legal services and warned that any breach of the

⁴⁹ These forces are reflected in the attempts to achieve greater market access for the international trade in legal services under the *General Agreement on Trade in Services* (‘GATS’): *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3, Annex 1B (entered into force 1 January 1995). A discussion of this is beyond the scope of this article.

⁵⁰ Anecdotal evidence suggests that the local Bar had lobbied hard to include drafting contracts governed by Chinese law in the scope of prohibited activities under the *Administrative Regulations*. For further comments on the practical difficulties in drawing the line between permitted and prohibited activities, see Liu, above n 3, 780–1.

⁵¹ For a reference to the fine imposed on Coudert Brothers for appearances by Chinese assistants in arbitration proceedings, see 宋伟 [Song Wei], «外国律师中国执业状况调查:业务受限生意兴隆» [Investigation into the Practice of Foreign Lawyers in China: Practice Is Restricted but Business Is Flourishing] (2006) 邦道律师事务所 George Wu & Partners Law Firm <<http://www.bdlawoffice.com/english/ShowArticle.asp?ArticleID=1134>>.

⁵² 市律协宣传部 [Shanghai Bar Association], «法律服务风险提示(一)» [Notification of Legal Services Risks (No 1)] (2005) (‘SBA Notification (No 1)’) (on file with author).

Administrative Regulations, including the prohibition on advising on Chinese law, should be regarded as an unlawful and invalid act. Not only did this constitute unfair competition and a civil wrong,⁵³ so the document claimed, it was also likely to result in significant latent losses to companies and individuals who had obtained the services in question.⁵⁴ Further, the income earned by any firm in breach of the regulations would constitute unlawful income and, depending on the severity of the circumstances, such unlawful activities could be suspected of violating Chinese criminal law.⁵⁵ The document concluded by calling on the public to monitor the situation and to report suspected unlawful activity directly to the SBA.⁵⁶

This was followed by a memorandum from the SBA dated 17 April 2006 (*'SBA Memorandum'*),⁵⁷ which was subsequently submitted to the Ministry of Justice.⁵⁸

The *SBA Memorandum* asserted that the legal services offered by foreign law firms in China had far exceeded what was permitted and that the situation had become increasingly severe, posing a threat to the 'justice and economic safety of China'.⁵⁹ Eight illegal activities were alleged against foreign law firms:⁶⁰

- 1 'Hiring large numbers of licenced Chinese lawyers as assistants to provide legal services' in breach of the prohibition on supporting personnel providing legal services to clients;⁶¹
- 2 providing 'Chinese legal services, including ... drafting and interpreting contracts under Chinese law; providing interpretations, opinions and consulting services concerning Chinese laws by using letters, emails and oral

⁵³ One Chinese lawyer is reported as suggesting that a class action could be taken by local law firms against foreign law firms on the ground that foreign law firms had engaged in unfair competition: 田享华 [Tian Xiang Hua], above n 14.

⁵⁴ *SBA Notification (No 1)*, above n 52.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Shanghai Lawyers Association, 'The Situation of Illegal Business Activities Practiced by the Foreign Law Firms in Shanghai Is Severe: The Foreign Law Services Market Needs Regulating' (Shanghai Lawyers Association News Brief No 9/150, 17 April 2006). Note that 'Shanghai Lawyers Association' and 'Shanghai Bar Association' can be used interchangeably. The author has obtained an unofficial English translation of this memorandum from the website China Law Blog, *A Blog about Chinese Law and the Legal Issues of Doing Business in China* <<http://www.chinalawblog.com/>>, which obtained it from a Chinese lawyer. It has not been possible to verify the translation against the original document, however the contents are consistent with the details as reported in other sources: see, eg, 田享华 [Tian Xiang Hua], above n 14. For further commentary on the *SBA Memorandum* and the circumstances surrounding it, see Liu, above n 3, 795–801. Liu's article (referring to it as a 'brief'), which examines data from in-depth interviews conducted with lawyers in Beijing and Shanghai, explores the blurred boundary between foreign and local law firms in China, particularly in relation to the competitive dynamic that this has generated, and provides insights into the consequences for the practice and career patterns of Chinese corporate lawyers.

⁵⁸ See 田享华 [Tian Xiang Hua], above n 14.

⁵⁹ *SBA Memorandum*, above n 57, 2.

⁶⁰ *Ibid.* 2–3. For further details on these activities, see the comments of Chinese lawyers as reported by 田享华 [Tian Xiang Hua], above n 14.

⁶¹ *SBA Memorandum*, above n 57, 2. The prohibition is contained in *Administrative Regulations* art 16.

- communications; and being directly involved in negotiations regarding investments, and mergers and acquisitions' ('M&A') projects;⁶²
- 3 providing due 'diligence services';⁶³
 - 4 engaging 'in litigation and arbitration in China ... [and controlling] the whole procedure of litigation by [using] Chinese lawyers in courts only';⁶⁴
 - 5 handling 'registration, applications, and filing ... with Chinese government agencies';⁶⁵
 - 6 offering 'legal services concerning Chinese law by establishing or actually controlling Chinese law firms';⁶⁶
 - 7 disseminating 'illegal and misleading propaganda, the purpose of which is to offer legal services concerning Chinese law', and 'claiming to be experts in Chinese law';⁶⁷ and
 - 8 evading taxes and violating Chinese foreign currency controls by collecting revenue from multinationals overseas.⁶⁸

The *SBA Memorandum* concluded by repeating the call for the public to monitor the situation, report on illegal activity and work together to 'purify the [Shanghai] foreign legal services market, thereby improving the legal environment.'⁶⁹

The SBA discussed the issues again in its 2006 Work Summary.⁷⁰ This is revealing in terms of the light it throws on the main objectives of the campaign in 2006. The main objectives appear to have been to warn foreign firms not to stray too far away from the rules, to act as a deterrent to foreign law firms, to increase public awareness of the issues and to support the local profession. That it would be difficult at this stage to achieve more ambitious objectives was reflected in the following comments:

⁶² *SBA Memorandum*, above n 57, 2. The *SBA Memorandum* did not identify the basis on which drafting contracts and participating in negotiations were in breach of the rules. These activities are not expressly prohibited by the *Administrative Regulations* or the *Implementing Rules*.

⁶³ *SBA Memorandum*, above n 57, 2. The term 'due diligence' services appears to be referring to the services that lawyers provide when they undertake a comprehensive investigation of the legal issues concerning a company or a business.

⁶⁴ *Ibid.* This appeared to be a reference to the practice adopted by foreign law firms of undertaking watching briefs on behalf of clients in litigation and arbitration proceedings in China. The reference to '[using] Chinese lawyers in courts only' suggests sensitivities on the part of the local profession concerning the perceived marginalisation of Chinese lawyers by foreign lawyers.

⁶⁵ *Ibid.* 3.

⁶⁶ The *SBA Memorandum* did not detail the circumstances in which foreign law firms were establishing and controlling Chinese law firms. Such Chinese law firms have been described as 'puppet law firms': see 田享华 [Tian Xiang Hua], above n 14. See also Liu, above n 3, 783.

⁶⁷ *SBA Memorandum*, above n 57, 3. This probably refers to the ways in which foreign law firms promote their Chinese law expertise in marketing materials.

⁶⁸ Under art 26(2) of the *Administrative Regulations*, the fees that the PRC offices of foreign law firms receive from clients must be settled in China (for example, the fees must be paid into the bank accounts of the PRC offices in China).

⁶⁹ *SBA Memorandum*, above n 57, 4.

⁷⁰ 市律协宣传部 [Shanghai Bar Association], «外事委员会2006年工作总结» [2006 Work Summary by the Foreign Matters Committee] (2007) (on file with author).

there are certain difficulties and obstacles in carrying out this work. Not only is it necessary to undertake sufficient investigation at the legal level, it is also necessary to strengthen communications and cooperation with government; as a result, the completion of this task will require a long and arduous process.⁷¹

Implicit in the above comments is an acknowledgment that the concerns and objectives of the Ministry of Justice and its bureaus around China are not synonymous with the concerns and objectives of the local profession as voiced by the local Bar associations.⁷²

The issues were also discussed in a report issued by the Beijing Bureau of Justice on 27 September 2006.⁷³ The report reflects the difficult balancing act on the part of the regulators and also the need for them to take account of market access and international sensitivities. Significantly, the report acknowledged that regulators had fallen behind developments on the ground. The report went on to identify the need for reform in certain areas. First, reform was needed in relation to the regulations themselves, 'which were expressed in general terms and allowed too much scope for manoeuvre by foreign law firms'.⁷⁴ The report also pointed to the employment of Chinese personnel to undertake Chinese legal services and the use of disclaimers to circumvent the restrictions as two of the most prominent examples. The Beijing Bureau of Justice also alleged that foreign law firms often used client confidentiality as an excuse not to provide the regulatory agencies with information that was necessary for them to supervise effectively.⁷⁵ Secondly, reform was required in relation to the coordination and information sharing between the regulatory authorities, 'which were unable to

⁷¹ Ibid. It was reported in December 2007 that there had not been any official response from the Ministry of Justice to the *SBA Memorandum*. This was accompanied by the suggestion that the activities of foreign firms would be seen as a barometer for the further liberalisation of the market: see 袁铭良 [Yuan Ming Liang], «抓一手最好的律师: 2007年国际律师行中国指南» [Grabbing the Best Lawyers: 2007 Guide to International Law Firms in China] (2007) <<http://bbs2.ustc.edu.cn/cgi/bbscon?bn=Economic&fn=M4764E51E&num=7189>>. See also 宋伟 [Song Wei], above n 51, who suggests that the lack of a response from the authorities is due to the sensitivities involved.

⁷² The local Bar associations around China are all members of the All China Lawyers Association ('ACLA'), which was founded in 1986 pursuant to art 19 of the now repealed «中华人民共和国律师暂行条例» [Interim Regulations of People's Republic of China Lawyers] (PRC) National People's Congress Standing Committee, Order No 5, 26 August 1980, and describes itself as 'a social organization ... and a self-disciplined professional body for lawyers at national level which by law carries out professional administration over lawyers': ACLA, *Law Committees* (2000) <<http://www.chineselawyer.com.cn/html/union/englishunion/briefintroduction.html>>. The author is not aware of any formal position taken by the ACLA in relation to the 2006 controversy surrounding foreign lawyers in China.

⁷³ 北京市司法局律师工作管理处干部 [Lawyer Management Cadre, Beijing Bureau of Justice] (prepared by 段耀州 [Duan Yao Zhou] and 陈玲 [Chen Lin]), «关于外国、香港律师事务所驻京代表处执业情况的调研报告» [Investigative Report into the Practice Situation of Representative Offices of Foreign and Hong Kong Law Firms in Beijing] (2006) ('*Beijing Bureau of Justice Investigative Report*').

⁷⁴ Ibid part 2(2).

⁷⁵ For an analysis of this issue, see Patricia Ginsberg, 'An Ethical Dilemma of American Attorneys in China: The Conflict between the Duty of Confidentiality to Clients and the Requirement of Disclosure to the Chinese Government' (1999) 12 *International Law Practicum* 47.

perform a guiding role in the relationship between local and foreign law firms ... because of the arrangements that are entered into behind the scenes'.⁷⁶

In its recommendations, the Beijing Bureau of Justice suggested that reform should be cautious, that measures should be adopted to support the healthy development of the local profession,⁷⁷ that the content and scope of the terms 'interpreting Chinese law' and 'providing information on the impact of the Chinese legal environment'⁷⁸ should be clarified, that local lawyers should be supported, that enterprises should be encouraged to instruct local lawyers and that the role of the local Bar associations should be developed.⁷⁹

B *The Perspective of the Regulators*

In articles and speeches published by officials at the Ministry of Justice,⁸⁰ it appears that the response of the regulators has been influenced by the need to strike a balance between the interests of foreign and local lawyers and to recognise the Realpolitik involved. This involves an acceptance that foreign lawyers operate at the margin of what is permitted and what is prohibited, and that enforcement in practice is limited to circumstances in which foreign lawyers clearly cross the line.⁸¹ Underpinning the approach are the following realities: (1) the positive contribution that foreign firms have made to foreign trade and investment in China, including the way in which they have 'assisted foreign companies to understand Chinese law' and the Chinese investment environment;⁸² (2) the need to develop the local profession and to strengthen the competitiveness of local law firms; (3) the need to open up the market in a manner that is cautious and that 'proceeds from the national interest';⁸³ and (4) the global trend towards liberalisation in the legal services market and the need to avoid 'blind protectionism'.⁸⁴

In light of these realities, the regulators have cautioned against rushing into liberalisation and allowing foreign firms to localise too soon. He Min has expressed the position as follows:

⁷⁶ *Beijing Bureau of Justice Investigative Report*, above n 73, part 2(2).

⁷⁷ Such measures, the report suggested, included the compulsory participation of local lawyers in major projects: *ibid* part 4(1).

⁷⁸ *Ibid* part 4(2). The original Chinese text reads '解释中国法律' and '提供有关中国法律环境影响的信息' respectively.

⁷⁹ This, the report suggested, included providing training to foreign and Hong Kong law firms on professional ethics and discipline: *ibid* part 4(1).

⁸⁰ See, eg. 何敏 [He Min], above n 9.

⁸¹ See above n 51.

⁸² See 何敏 [He Min], above n 9, 59. See also 李仁真 [Li Ren Zhen], «WTO 与中国法律服务市场的对外开放» [The WTO and the Opening Up of China's Legal Services Market] (2004) 11 *中国司法 Justice of China* 25, 26; Hongming Xiao, 'The Internationalization of China's Legal Services Market' (2000) 1(6) *Perspectives* [Zhimin Wen trans] part 4 <http://www.oycf.org/oycfold/httpdocs/Perspectives2/6_063000/internationalization_of_china.htm>; Liu, above n 3, 798–9.

⁸³ 何敏 [He Min], above n 9, 59. See also 李仁真 [Li Ren Zhen], above n 82.

⁸⁴ 何敏 [He Min], above n 9, 61.

Cooperation and partnerships between law firms from two different societies ... should be considered carefully particularly in the current circumstances where the overall level of the development of the PRC legal profession is not high, their competitiveness is weak and the market for legal services is not standardised ...

If the restrictions on the localisation of foreign firms were lifted, foreign firms would attract many young lawyers to their offices in China on the strength of their brand advantage, their superior expertise, their technical training and high salaries. This would pull the rug from under the domestic firms that are doing international work and that are just emerging amongst the fierce competition in the market for international legal services ... and would not be beneficial in the current stage to strengthening the competitiveness of the local profession and developing the human capital necessary for an outstanding local profession ... In the circumstances, if cooperation or partnerships between Chinese and foreign firms were allowed, this would result in foreign firms achieving a monopoly of part of the local legal services market and would not be beneficial to the growth of small to medium-sized local firms.⁸⁵

In terms of the way forward, the regulators have suggested the following three stages in line with the experience in other jurisdictions: (1) allowing foreign firms to enter the market to practise foreign law and allowing foreign lawyers to sit the Bar examination and practise local law;⁸⁶ (2) allowing local firms to employ foreign lawyers to practise foreign law;⁸⁷ (3) allowing foreign firms to employ local lawyers or to enter into joint ventures or partnerships with local firms. This, it has been suggested, reflects the reality that

[a]t present, China has entered the first stage, and is considering the feasibility and practicalities of the second stage. The third stage must be achieved progressively in accordance with the actual requirements of China's economic development and the market in legal services post-WTO.⁸⁸

C The Perspective of the Local Profession

It appears that for many local lawyers the concerns relate partly to matters of principle, including the need to ensure that foreign law firms comply strictly with the rules,⁸⁹ and partly to economic interests and market share, particularly in the lucrative FDI market.

The concerns have prompted some colourful and strident criticism of foreign law firms, who have been accused of playing an 'edge ball'⁹⁰ by engaging in

⁸⁵ Ibid 59–60. See also Xiao, above n 82, part 4, who refers to the 'brain drain' that would result from allowing foreign law firms to hire Chinese lawyers.

⁸⁶ This is currently limited to lawyers qualified in Hong Kong and Macao and to their employment in local law firms: see below Part V for the relevant provisions.

⁸⁷ See below Part V for more information in relation to the employment of lawyers from Hong Kong and Macao by Chinese law firms.

⁸⁸ 何敏 [He Min], above n 9, 61.

⁸⁹ One lawyer, 王小耘 [Wang Xiao Yun], has stated, 'it appears that foreign lawyers do not feel that they have anything to fear from breaking the law': 宋伟 [Song Wei], above n 51.

⁹⁰ An 'edge ball' is a ping-pong term to describe the situation where the ball shaves the edge of the table and is consequently very difficult to return. See 田享华 [Tian Xiang Hua], above n 14.

Chinese legal services behind the scenes but using Chinese law firms as ‘fronts’ to translate, verify, sign and issue legal opinions prepared by the foreign law firms.⁹¹ This has provoked a ‘war that should never have arisen’, one in which foreign law firms have ‘stormed the beaches’.⁹²

It also appears that the response from the local profession is based on the view that the regulatory regime was set up to ensure that foreign lawyers and local lawyers would each stick to their own roles. By way of example, in lucrative cross-border transactions, the role of the foreign lawyers would be to advise on foreign law and the role of the local lawyers would be to advise on Chinese law.⁹³ Two issues have proven to be particularly sensitive. The first is the success with which foreign firms have attracted Chinese professionals (both law graduates and qualified lawyers) away from the local firms.⁹⁴ This has been a cause of resentment for many local firms and appears to have exacerbated the dispute between local and foreign firms, particularly in view of the huge influx of foreign investment in recent years and the corresponding need for firms to build their professional resources.⁹⁵ The second is the extent to which foreign law firms have ‘snatched’ clients away from local law firms by advising on Chinese law based on their claim — albeit justified in many respects — to be experts in Chinese law.⁹⁶

Another theme that runs through the views of the local profession is the need to preserve China’s sovereignty.⁹⁷ This has been expressed in terms of national security, where the continuing activities of foreign law firms outside the permitted scope ‘will affect the development of domestic firms and will change the environment for their survival, to the point where it will threaten the impartiality of local law and economic security’.⁹⁸

⁹¹ See *ibid.*

⁹² 林华 [Lin Hua], above n 20, 49.

⁹³ See 田享华 [Tian Xiang Hua], above n 14, reporting comments of 吕红兵 [Lü Hong Bing], President of the Shanghai Bar Association.

⁹⁴ See, eg. Liu, above n 3, 792, on the effects of recruitment of middle-level associates.

⁹⁵ The author’s own experience indicates that over the past five years or so, a reverse trend has emerged as many Chinese professionals have moved from foreign law firms to Chinese law firms in response to the greater career opportunities at Chinese law firms. It has been suggested that local firms have not always done their best by local lawyers: see 蔡永彤 [Cai Yong Tong], above n 12, 62. Cai notes the eagerness of many domestic law firms for instant success and their exploitation of law graduates, which has encouraged an exodus of talent to foreign firms. Liu’s empirical research suggests that the exodus of Chinese lawyers to foreign law firms has made local law firms less willing to invest in their training: Liu, above n 3, 792.

⁹⁶ This has been described as ‘snatching the food-bowl from Chinese lawyers’: 宋伟 [Song Wei], above n 51.

⁹⁷ This argument often stems from the perception that the activities of lawyers involve the ‘execution of public duties’: see Guo, above n 3, 154, quoting Canadian Bar Association, *Submission on the General Agreement on Trade in Services and the Legal Profession: The Accountability Disciplines as a Model for the Legal Profession* (2000) 1 <<http://www.cba.org/cba/submissions/pdf/00-30-eng.pdf>>. See also 蔡唱 [Cai Chang], «中外法律服务承诺比较研究» [A Comparative Study of Commitments in Respect of Legal Services by China and Foreign Countries] (2003) 10(6) 湖南商学院学报 *Journal of Hunan Business College* 106, 107. Similar concerns have been expressed in Japan, particularly in relation to the loss of ‘pure’ Japanese law firms: Suzuki, above n 9, 396–7.

⁹⁸ 林华 [Lin Hua], above n 20, 51.

The sovereignty issue has also been identified by a representative of a local court:

China regards the lawyer system as a part of a country's sovereignty and, before reform and opening up, treated lawyers as state personnel ... Since undertaking Chinese legal services is considered to be within the scope of China's sovereignty, foreign firms have been prohibited from this business.⁹⁹

D *The Perspective of Foreign Lawyers*

The author's own experience suggests that most foreign law firms have learnt to live within the grey area created by the current regulatory regime. Although the situation is not ideal and the threat of a crackdown by the regulatory authorities is always present, foreign law firms have benefited from the regulatory ambiguities and have been prepared to make adjustments — including working more closely with the local profession — in order to stay within the unofficial 'permitted boundaries'. Many foreign firms consider that it would be counter-productive to call vociferously for further reform, at least at this stage, and have therefore made a decision not to rock the boat.

There appears to be little doubt, however, that most (if not all) foreign law firms would support liberalisation of the market. Given the extent to which they have developed their Chinese law expertise and resources, the economic motivations are obvious. There is also an argument that the current restrictions are not in the interests of Chinese lawyers or the Chinese legal system. The restrictions are particularly harsh on young Chinese lawyers since they are not able to be employed formally as lawyers in foreign firms and must therefore weigh up the benefits (such as training and remuneration) against their indeterminate status when employed by foreign firms. In line with the justifications for liberalisation generally, foreign lawyers argue that allowing foreign firms to employ Chinese practising lawyers would be beneficial to the local profession in terms of improving standards and modern management techniques, and would also increase the trend for Chinese lawyers to flow back to local firms, thereby strengthening the local profession.¹⁰⁰

⁹⁹ 方建伟 [Fang Jian Wei], «试论入世后中国法律服务业的开放» [Examining the Opening Up of China's Legal Services Sector after WTO Accession] (2004) 行政与法 [Administration and Law] 121, 122. Fang suggests that allowing foreign lawyers to sit the Bar examination is not possible in the foreseeable future 'because of the great differences in terms of the legal systems between east and west ... and the fact that China regards the legal profession as part of a country's sovereignty.' However, Fang accepts that the trend towards further reform cannot be reversed: 'China's legal profession must develop and cannot rely on government protection; the key is for the legal profession to strengthen itself and its competitiveness.'

¹⁰⁰ For the comments of one foreign-qualified lawyer in this regard, see 陶景洲 [Tao Jing Zhou], «现代律师事务所的扩展、合并及中外律师事务所的合作» [The Expansion and Merger of Modern Law Firms and Cooperation between Chinese and Foreign Law Firms] (2002) 1 中国律师 *Chinese Lawyer* 24, 28. See also 何敏 [He Min], above n 9, 61. It is interesting to consider the experience in Singapore, where many local firms consider that full liberalisation would have an adverse impact on the development of the local profession. One of the reasons cited by local firms is that international firms would attract Singaporean lawyers on the basis of the higher salaries, but they would still be getting them on the cheap compared with lawyers from other jurisdictions. In such circumstances, the local firms would not be able to offer com-

In support of their argument for liberalisation, foreign law firms could also point to the realities associated with international legal practice. These include the fact that in some areas of law (for example, cross-border M&A transactions and structured finance) firms that have an international presence will always dominate. Consequently, the emphasis should not be on excluding foreign law firms from this market in China. Instead, the emphasis should be on creating an environment in which law firms, whether domestic or international, can compete effectively in their respective markets.¹⁰¹ This means that some large Chinese firms will acquire an international presence and profile, which will enable them to compete effectively with foreign firms in the international areas of practice.¹⁰² On the other hand, Chinese firms that are purely domestic in nature will focus on their own practice areas, most of which do not attract competition from foreign firms. Therefore, for these Chinese firms, the restrictions on the activities of foreign law firms are unnecessary.¹⁰³

Ironically, the lack of strict enforcement of the restrictions and the maintenance of the status quo has strengthened the hand of foreign law firms, since the trend towards liberalisation now appears irreversible and the regularisation of the current practice appears inevitable. As one commentator described it:

The globalisation of legal services, as driven by economic globalisation, is an indisputable fact. The localisation of the representative offices of foreign law firms in China is a new demand for the increasingly complex legal services [that are required] as China operates within the framework of an integrated global economy.¹⁰⁴

One area in which the professional tug of war has been resolved in favour of local law firms — at least on a formal basis — is merger control filings under China's Anti-Monopoly Law issued by the Standing Committee of the National People's Congress on 30 August 2007 ('AML').¹⁰⁵ To date, the involvement of foreign law firms in the area of competition law has mainly revolved around advising clients on international competition law and practice, drafting filings, assisting in the formulation of arguments and strategies, and undertaking

petitive salaries and this would result in most of the lucrative Singaporean law work in areas such as finance law going to the international firms: Committee to Develop Singapore's Legal Profession, *Final Report of the Committee to Develop the Singapore Legal Sector (2007)* ('*Rajah Report*') 69, 89 <[http://notesapp.internet.gov.sg/_48256DF200173A1F.nsf/LookupMediaByKey/GOVI-79LDSM/\\$file/Justice%20V%20K%20Rajah%20report.pdf](http://notesapp.internet.gov.sg/_48256DF200173A1F.nsf/LookupMediaByKey/GOVI-79LDSM/$file/Justice%20V%20K%20Rajah%20report.pdf)>. The author would argue, however, that China is in a different position in view of the extensive Chinese law expertise that foreign law firms already have.

¹⁰¹ See Suzuki, above n 9, 396–7, arguing this in relation to the Japanese market.

¹⁰² See above n 45 and accompanying text.

¹⁰³ This reality, as it relates to domestic law firms in Singapore, was acknowledged in a review of the legal profession commissioned by the Singaporean government, which was conducted by Justice V K Rajah: *Rajah Report*, above n 100, 89.

¹⁰⁴ 何敏 [He Min], above n 9, 61. See below Part VII.

¹⁰⁵ «中华人民共和国反垄断法» [People's Republic of China Anti-Monopoly Law] (PRC) National People's Congress Standing Committee, Order No 68, 30 August 2007. This law, together with the «中华人民共和国反不正当竞争法» [People's Republic of China Law against Unfair Competition] (PRC) National People's Congress Standing Committee, Order No 11, 2 September 1993, forms the core of China's evolving body of competition law.

compliance audits. At this stage, advisory work constitutes the principal source of revenue for foreign law firms, since the contentious matters are off limits to them.¹⁰⁶

Although foreign law firms have been extensively involved in the above activities and have bolstered their resources for this purpose,¹⁰⁷ they are prevented from lodging merger control filings or representing clients in notification proceedings as a result of the policy adopted by the Ministry of Commerce ('MOFCOM'). This policy is reflected in the Guidelines on Anti-Monopoly Filings where Foreign Investors Acquire Domestic Enterprises, which were issued by MOFCOM on 8 March 2007 ('*Filing Guidelines*').¹⁰⁸

Article 1 of the *Filing Guidelines* provides that a notifying party¹⁰⁹ may file a notification by itself in its own name, or engage a Chinese law firm to file the notification on its behalf by a lawyer who is qualified as a Chinese lawyer. By implication, this rules out any involvement by foreign law firms in the filing process. This contrasts with the situation before the *Filing Guidelines* were issued, when foreign law firms were permitted to make the filings and represent the client in meetings with MOFCOM.

The specific reason behind the decision to limit this activity to Chinese lawyers is not apparent. It may reflect a desire on the part of MOFCOM to protect the market for the benefit of local law firms and to encourage local lawyers to develop their own expertise in competition law. It may also reflect the need to achieve compliance with the restrictions on foreign lawyers under art 32(5) of the *Implementing Rules*.¹¹⁰ In any event, it will require greater involvement by local lawyers in cross-border M&A transactions and closer cooperation between foreign and local law firms. Although of itself this is not a bad thing, it is likely that foreign law firms will endeavour to maintain a dominant role in the drafting of merger control filings for their international clients and that an informal tug of war will continue to be waged behind the scenes. The formal exclusion of foreign law firms from merger control filings is unfortunate, since the development of competition law in China is a prime example of an area in which foreign law firms have a constructive role to play, particularly in relation to international competition law and practice.

Encouragingly, there is a trend towards local law firms importing competition law expertise, as reflected in the strategic alliances entered into between foreign

¹⁰⁶ Contentious matters would include applying under *AML* art 53 for administrative review or undertaking an administrative lawsuit if there is an objection to a decision made by an anti-monopoly law enforcement agency.

¹⁰⁷ This includes relocating competition law experts from Europe and the United States to Hong Kong and Mainland China: see, eg, 'China: Law Firms Prepare for Tough New Anti-Monopoly Laws', *Asianlaw* (online), April 2008. <<http://www.asialaw.com/Article/1970752/Channel/16707/China-Law-firms-prepare-for-tough-new-anti-monopoly-laws.html>>.

¹⁰⁸ «关于外国投资者并购境内企业反垄断申报指南» [Guidelines on Anti-Monopoly Filings where Foreign Investors Acquire Domestic Enterprises] (PRC) Ministry of Commerce, 8 March 2007.

¹⁰⁹ The original Chinese text is '申报人'. In principle, the notifying party is the acquirer, although it may also be the party being acquired subject to the specific circumstances.

¹¹⁰ See above Part III.

firms and local law firms¹¹¹ and the employment of foreign experts by local law firms. However, even local law firms are inhibited in terms of developing their practices in this area as a result of their own regulatory framework, which does not formally recognise the status of foreign qualified lawyers who are employed within Chinese law firms.¹¹² As a result, such employees cannot be referred to as 'foreign lawyers' and more general terms such as 'foreign consultants' have to be used instead.¹¹³

V DEVELOPMENTS IN RELATION TO LAWYERS FROM HONG KONG AND MACAO

Developments in relation to law firms and lawyers from Hong Kong and Macao may throw some light on the direction of future reform in this area. Law firms from the Hong Kong and Macao SARs are governed by separate regulations issued by the Ministry of Justice on 20 February 2002 and effective on 1 April 2002: The Administrative Measures on Representative Offices of Law Firms from the Hong Kong and Macao Special Administrative Regions in the Interior ('*Hong Kong and Macao Administrative Measures*').¹¹⁴

The *Hong Kong and Macao Administrative Measures* substantially mirror the *Administrative Regulations*, which govern the representative offices of foreign law firms in China. The permitted business scope for Hong Kong and Macao law firms, as set out in art 15 of the *Hong Kong and Macao Administrative Measures*, is the same as the business scope in respect of foreign law firms in the *Administrative Regulations*¹¹⁵ except for the inclusion of the following additional provision:

In accordance with association¹¹⁶ agreements entered into between the Hong Kong or Macao law firms to which they belong and interior¹¹⁷ law firms, representative offices and their representatives may cooperate with the lawyers at

¹¹¹ One example is the strategic alliance between King & Wood and the Australian law firm, Gilbert + Tobin. For further details, see Gilbert + Tobin Lawyers, *King & Wood* (2007) <<http://www.gtlaw.com.au/gt/site/articleIDs/DB2D55C64C0BA247CA25738D0079C26A?open&ui=dom&template=domGT>>.

¹¹² *PRC Lawyers Law* art 12 provides that personnel of PRC law firms who have not obtained a lawyer's practising certificate may not engage in legal services business in the name of a lawyer. The effect of this is that a lawyer who is qualified in a foreign jurisdiction and who does not hold a PRC practising certificate cannot be held out as a lawyer if employed by a local law firm.

¹¹³ The terms 'legal consultant' ('法律顾问') and 'lawyer' ('律师') are referred to in *PRC Lawyers Law* art 29. For reference to similar issues that have arisen in Japan and South Korea, see Suzuki, above n 9, 390, 392.

¹¹⁴ «香港、澳门特别行政区律师事务所驻内地代表机构管理办法» [Administrative Measures on Representative Offices of Law Firms from the Hong Kong and Macao Special Administrative Regions in the Interior] (PRC) Ministry of Justice, Order No 70, 13 March 2002.

¹¹⁵ See *Administrative Regulations* art 15.

¹¹⁶ The term 'association' is the word adopted in the English version of the Closer Economic Partnership Arrangements: see below n 119. The literal translation of the Chinese term for 'association' ('联营') is 'joint operation'.

¹¹⁷ The word 'interior' ('内地') is used instead of 'Chinese' to reflect the fact that Hong Kong and Macao are part of the PRC.

the associated interior law firms and carry out the relevant associated business.¹¹⁸

The basis for permitting law firms from Hong Kong and Macao to enter into associations with (Mainland) PRC law firms is the Closer Economic Partnership Arrangements ('CEPAs'), which are free trade agreements entered into between each SAR and the Mainland.¹¹⁹

Taking the CEPA between Hong Kong and Mainland China as an example, Mainland China made the following commitments:

- (1) To allow Hong Kong law firms (offices) that have set up representative offices in the Mainland to operate in association with Mainland law firms, except in the form of partnership. Hong Kong lawyers participating in such associations may not handle matters of Mainland law;
- (2) To allow Mainland law firms to employ Hong Kong legal practitioners [defined as solicitors and barristers of Hong Kong]. Such practitioners who are employed by Mainland law firms must not handle matters of Mainland law; and
- (3) To allow the 15 Hong Kong lawyers who have already acquired Mainland lawyer qualifications to intern and practice on non-litigation legal work in the Mainland [in accordance with the PRC Lawyers Law].¹²⁰

Such associations are governed by the Administrative Rules on Associations between Interior Law Firms and Law Firms from the Hong Kong Special Administrative Region and the Macao Special Administrative Region ('*Administrative Rules on Associations*')¹²¹ issued by the Ministry of Justice on 27 November 2003 and effective on 1 January 2004. These provide that law firms

¹¹⁸ *Hong Kong and Macao Administrative Measures* art 15(3).

¹¹⁹ *Mainland and Hong Kong Closer Economic Partnership Arrangement*, signed 29 June 2003 (entered into force 1 January 2004) ('*Mainland and Hong Kong CEPA*'); Trade and Industry Department (HK SAR), *CEPA* (2005) <http://www.tid.gov.hk/english/cepa/legaltext/cepa_legaltext.html>; *Closer Economic Partnership Arrangement between China and Hong Kong, China*, WTO Doc WT/REG162/N/1 S/C/N/264 (2004) (Communication circulated by the Committee on Regional Trade Agreements). *Mainland and Macao Closer Economic Partnership Arrangement*, signed 17 October 2003 (entered into force 1 January 2004) ('*Mainland and Macao CEPA*'); Government Printing Bureau (Macao SAR), *Mainland and Macao Closer Economic Partnership Agreement (CEPA)* (2009) <<http://www.imprensa.macao.gov.mo/edicoes/en/dse/cepa>>; *Closer Economic Partnership Arrangement between China and Macao, China*, WTO Doc WT/REG/163/1 (2004) (Communication circulated by the Committee on Regional Trade Agreements).

¹²⁰ This extracts three of the six commitments in *Mainland and Hong Kong CEPA* Annex 4 table 1 ('The Mainland's Specific Commitments on Liberalization of Trade in Services for Hong Kong') sector 1(A)(a).

¹²¹ «香港特别行政区和澳门特别行政区律师事务所与内地律师事务所联营管理办法» [Administrative Rules on Associations between Interior Law Firms and Law Firms from the Hong Kong Special Administrative Region and the Macao Special Administrative Region] (PRC) Ministry of Justice, Order No 83, 27 November 2003, as amended by «司法部关于修改〈香港特别行政区和澳门特别行政区律师事务所与内地律师事务所联营管理办法〉的决定» [Ministry of Justice Amendment of 'Administrative Rules on Associations between Interior Law Firms and Law Firms from the Hong Kong Special Administrative Region and the Macao Special Administrative Region'] (PRC) Ministry of Justice, Order No 109, 6 March 2008.

may enter into associations¹²² under which they may pool their resources, market their services under the name of the association, collect and distribute fees, bear costs and assume liabilities — all in accordance with the terms of the joint operation contract.¹²³ Each law firm in a joint operation is limited to undertaking the approved legal services that are permitted by the *Administrative Rules on Associations* (specifically, Hong Kong lawyers cannot practise PRC law).¹²⁴

An association takes the form of a contractual arrangement and may not be undertaken through a partnership or an incorporated entity.¹²⁵ During the term of the association, the legal status, name and finances of each law firm must be kept independent and each law firm must independently assume civil liability.¹²⁶ This appears to rule out any profit-sharing arrangement under which one law firm is able to share a percentage of the profits generated by the other firm in joint transactions. The benefits of the association model include the ability to provide a one-stop shop service to clients, to share resources and to bill clients jointly.

Under the rules, the Hong Kong law firm and the Mainland law firm must each satisfy certain criteria. In the case of the Hong Kong law firm, it must have been operating for at least three years, the sole proprietor or all of the partners must be Hong Kong practising lawyers, its main scope of operation must be the provision of local legal services in Hong Kong, and it must have obtained approval to establish a representative office in Mainland China.¹²⁷ In the case of the Mainland law firm, it must have been established for at least three years and it must have no fewer than 20 full-time lawyers.¹²⁸

The other two general CEPA commitments¹²⁹ — namely, to allow Mainland firms to employ Hong Kong and Macao legal practitioners and to allow Hong Kong and Macao lawyers who have acquired Mainland law qualifications to practise Chinese law matters — are also noteworthy. The former is a first step towards allowing Mainland firms to employ foreign qualified lawyers generally and confers a formal status on Hong Kong lawyers who are employed by Mainland firms. The lawyers are referred to as ‘legal consultants’ and are issued either a Hong Kong legal consultant certificate or a Macao legal consultant certificate.¹³⁰ The latter is a first step towards allowing foreigners generally to sit

¹²² *Administrative Rules on Associations* art 2.

¹²³ *Administrative Rules on Associations* art 9.

¹²⁴ *Administrative Rules on Associations* art 12.

¹²⁵ *Administrative Rules on Associations* art 3.

¹²⁶ *Administrative Rules on Associations* art 3. On this basis, each firm is liable to third parties for any negligent or unlawful act, although it is possible for the parties to apportion liability for meeting any compensation claims between themselves in accordance with the association agreement: art 17.

¹²⁷ *Administrative Rules on Associations* art 5.

¹²⁸ *Administrative Rules on Associations* art 6.

¹²⁹ See *Mainland and Hong Kong CEPA* Annex 4 table 1; *Mainland and Macao CEPA* Annex 4 table 1.

¹³⁰ See «香港法律执业者和澳门执业律师受聘于内地律师事务所担任法律顾问管理办法» [Administrative Measures on Hong Kong Legal Practitioners and Macao Legal Practitioners Who Are Employed by Interior Law Firms to Act as Legal Consultants] (PRC) Ministry of Justice, Order No 82, 30 November 2003, art 4. Note that there appears to be no express basis on which Taiwanese lawyers may sit the PRC Bar examination or on which Taiwanese law firms may

the qualification examination and qualify as Chinese lawyers. At present, however, only Chinese citizens who are permanent residents of Hong Kong and Macao are expressly permitted to sit the examination.¹³¹

Lawyers from Hong Kong and Macao who have acquired the qualifications to practise Chinese law are permitted to undertake 'non-litigation Chinese legal matters and representation activities in marriage and inheritance cases involving Hong Kong or Macao.'¹³²

The concerns over allowing foreign lawyers (non-citizens) to sit the lawyers' qualification examination and practise local law are shared in other jurisdictions in Asia. In particular, there are similar concerns about the involvement of foreign lawyers in litigation. For example, one writer has suggested that the reluctance on the part of domestic lawyers in Korea to open Korea's legal markets to foreign lawyers was partly 'based on a negative view of litigation and the high likelihood that an influx of foreign lawyers would result in making Korea a more litigious culture.'¹³³

In China, it has been suggested that 'the major concern is that some litigation in China inevitably involves political issues. It is for this reason that the Chinese government has taken a conservative approach and maintains this exclusionary policy.'¹³⁴ It is also possible that there are concerns about the extent to which involvement by foreign lawyers in litigation proceedings would give them access to sensitive information, some of which might fall into the category of state secrets. Sensitivities concerning the involvement of non-Mainland Chinese lawyers in litigation proceedings would also arise if foreign law firms were permitted to employ Chinese lawyers to provide advice on PRC law as part of their formal legal services, or to enter into partnerships with Chinese lawyers.

establish representative offices in Mainland China. *Administrative Provisions* art 34 envisages that Taiwan will form a separate tariff zone and thus be regulated differently. See generally Peng and Li, above n 6, 189–90. According to one report, 30 Taiwanese lawyers will be allowed to practise in the Mainland after passing the annual Bar examination in September 2008, following an announcement by the Ministry of Justice in April 2008 that it will relax the restrictions: see Rashid Yosufzai, *Taiwan Lawyers to Practise in Mainland China* (2008) ALB Business Legal News <<http://asia.legalbusinessonline.com/news/breaking-news/31588/details.aspx>>.

¹³¹ See «取得内地法律职业资格的香港特别行政区和澳门特别行政区居民在内地从事律师职业管理办法» [Certain Provisions on Residents of the Hong Kong Special Administrative Region and the Macao Special Administrative Region Participating in the National Justice Examination] (PRC) Ministry of Justice, Order No 81, 27 November 2003, effective from 1 January 2004, as amended by «司法部关于修改〈取得内地法律职业资格的香港特别行政区和澳门特别行政区居民在内地从事律师职业管理办法〉» [Ministry of Justice Amendment of 'Certain Provisions on Residents of the Hong Kong Special Administrative Region and the Macao Special Administrative Region Participating in the National Justice Examination'] (PRC) Ministry of Justice, Order No 105, 1 December 2006.

¹³² The scope of the reference to 'representation activities in marriage and inheritance cases involving Hong Kong or Macao' is not clear. On one interpretation, this operates as an exception to the prohibition on participation in litigation matters.

¹³³ Suzuki, above n 9, 405. South Korea is currently planning extensive reforms that would open up the legal services market to foreign law firms: Hyung Tae Kim, 'Legal Market Liberalization in South Korea: Preparations for Change' (2006) 15 *Pacific Rim Law and Policy Journal* 199.

¹³⁴ Xiao, above n 82, part 4.

VI MODELS FOR FURTHER REFORM

One argument in support of liberalisation is that, although countries have a legitimate interest in imposing qualification requirements on those who are permitted to practise domestic law, they should not distinguish between foreign and local firms for that purpose. To date, China has officially withstood the pressure to liberalise its markets, even though the reality on the ground has created its own de facto liberalisation.

At the same time, this de facto liberalisation also imposes limitations on the reform options that are available. In theory, of course, it would be open to China to reverse the de facto liberalisation and move towards strict enforcement of the restrictions on foreign law firms. However, in the author's view, the role of foreign law firms in China has become too entrenched to make this a feasible option. It would also be seen as a retrograde step, one that would not appear consistent with China's move towards global economic integration.

If it is correct to assume that the option of reversing the de facto liberalisation is not on the table (despite possible protests to the contrary from local lawyers), the following options would remain:

- 1 to allow 'associations' between foreign and Chinese law firms along the lines of the model adopted in relation to Hong Kong and Macao law firms;¹³⁵
- 2 to allow joint ventures between foreign and Chinese law firms along similar lines to the joint venture model adopted in Singapore¹³⁶ or the 'specific joint enterprise' model previously adopted in Japan;¹³⁷

¹³⁵ As previously noted, this would not allow profit sharing: see above n 126 and accompanying text.

¹³⁶ Under the current joint venture model in Singapore, joint law ventures ('JLV') are permitted to practise in commercial law areas (not including litigation) and the constituent law firms may share the profits of the JLV. However, the foreign law firm may not employ Singaporean lawyers and Singaporean lawyers may not become an equity or profit-sharing partner in the foreign firm. In response to the recommendations of the *Rajah Report*, above n 100, annex B, the Singaporean government has decided to liberalise the legal services sector. The reforms include allowing the foreign law firm in an existing JLV to share up to 49 per cent of the profits of the Singaporean law firm and allowing 'qualifying foreign law firms' to employ Singaporean lawyers directly. For further details, see Ministry of Law (Singapore), 'Government Accepts Key Recommendations of Justice V K Rajah's Committee on the Comprehensive Review of the Legal Services Sector' (Press Release, 7 December 2007) [7](iii); Singapore, *Parliamentary Debates*, 26 August 2008, vol 84 (K Shanmugam, Minister for Law) (second reading speech for the Legal Profession (Amendment) Bill 2008 (Singapore)).

¹³⁷ This model permitted foreign lawyers and Japanese lawyers 'who possess separate and respective offices to co-handle in the same facilities all matters, other than certain prohibited areas such as litigation cases, and to share revenues and profits derived therefrom': Ciano and Martin, above n 9, 123 fn 11. Pursuant to amendments to the *Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers* (Japan) Act No 66 of 1986 [Ministry of Justice (Japan) trans], which came into effect on 1 April 2005, foreign lawyers may now employ Japanese lawyers and establish an enterprise jointly operated by a registered foreign lawyer and a Japanese lawyer or corporation under a partnership contract: arts 2(xv), 49-3. However, business scope restrictions still apply: art 4. For the Japanese legislation, see Ministry of Justice (Japan), *Gaikokuho-Jimu-Bengoshi* ('Gaiben', *Registered Foreign Lawyers*) (2006) <<http://www.moj.go.jp/ENGLISH/information/gjb.html>>.

- 3 to allow foreign law firms to employ Chinese lawyers and thereby offer advice on Chinese law as part of their formal services. For policy reasons, this would probably need to coincide with or follow a decision to allow local law firms to employ foreign lawyers and develop their own multi-jurisdictional practices; or
- 4 to allow foreign lawyers to form partnerships with Chinese lawyers, which would constitute full liberalisation as it would remove, at least for regulatory purposes, any remaining distinction between foreign and Chinese law firms.

Given that one of the primary objectives of a law firm association is to pool resources, it is unlikely that the first model would be attractive to foreign law firms that already have substantial expertise and resources in relation to Chinese law. It would enable them to offer formal Chinese law advice on a 'one-stop shop' basis. However, an important question would be whether foreign law firms would be willing to tie themselves to a local law firm in circumstances where there was significant overlap between the services that each firm provided (and therefore a high likelihood that a tug of war would ensue) and where a profit-sharing arrangement was not possible.

The second joint venture model is likely to be more attractive to foreign law firms, since it would probably allow a certain degree of profit sharing. However, it is subject to the same query in terms of the overlap between services. This might present difficulties for foreign law firms in terms of identifying potential partner firms and might encourage them to create an 'internal' joint venture out of their existing resources (that is, by hiving off their Chinese law resources into a separate local firm) instead of choosing an existing Chinese law firm as the joint venture partner. Although such an internal joint venture would probably work for foreign law firms (assuming that there were no qualification requirements¹³⁸ for the Chinese law firm that would favour the large established firms), it would not directly benefit the local profession by strengthening the existing Chinese law firms.

Another point to bear in mind is that the joint venture model has not proven to be an unqualified success in other jurisdictions:¹³⁹ it serves a limited purpose and inevitably bows to pressure for further liberalisation.

If the above concerns are valid, there appears to be a strong argument (at least as far as foreign law firms are concerned) to move directly to either the third or

¹³⁸ Such as the qualification requirements in respect of Hong Kong and Macao law firms that wish to enter into an association with a local PRC law firm: see above Part V.

¹³⁹ One of the reasons for this is the cost associated with maintaining a joint venture. In Singapore, the *Rajah Report*, above n 100, 87, acknowledged that the restrictions on economic union and profit sharing had impeded the growth of JLVs. In addition, the joint venture model often represents a less than ideal halfway house in terms of career opportunities for employees. In Japan, for example, anecdotal evidence suggests that the former Specific Joint Enterprise model was not very attractive to Japanese lawyers, since the tie-up with one international law firm made it difficult for them to arrange overseas secondments with other international law firms, limiting their career development options.

fourth option.¹⁴⁰ However, it is unlikely that the regulators will allow reform to occur before the local profession has been given an opportunity to become more competitive. As noted above in Part IV(B), it is likely that the next step will be to allow local firms to employ foreign lawyers to advise on foreign law.¹⁴¹

One variation on the third option, which might achieve a balance between the interests of the various constituencies, would be to reserve certain areas, such as litigation, to Chinese law firms. This would satisfy the concerns about the political sensitivities and the perception that only Mainland Chinese lawyers are culturally equipped to practise in such areas and would be similar to reforms adopted in Singapore.¹⁴²

VII CONCLUSION

In establishing its regulatory framework to govern the operations of foreign law firms, China has proceeded in a manner that is consistent with the approach adopted in many other jurisdictions. However, owing to historical factors and pressures to liberalise in the context of China's accession to the WTO, a situation has arisen in which foreign law firms are actively involved in advising on matters relating to Chinese law. This has led to a de facto liberalisation of the domestic legal services market, which exposes discrepancies in the interpretation of the regulations governing foreign law firms and creates uncertainty in terms of the enforcement of those regulations.

Understandably, Chinese law firms have not responded favourably to the de facto liberalisation. On the basis of their claims that foreign law firms have not complied with the regulations to which they are subject, Chinese law firms have lobbied hard to keep foreign law firms within the boundaries that they consider to be acceptable.

Mindful of the significant contribution that foreign law firms have made to the Chinese economy and the global trend towards liberalisation of the legal services market, the regulators to date appear to have decided not to clamp down hard on the activities of foreign law firms and to hold the concerns of the Chinese law firms at bay. The preferred approach appears to be to accept the Realpolitik and to give the Chinese law firms time to become more competitive before taking further steps towards liberalisation of the legal services market.

As seen in the area of competition law, however, even where foreign lawyers have a legitimate role to play — one that is within the spirit of the rules — they

¹⁴⁰ It is interesting to note that the recent developments in Japan introduced both of these options at the same time, giving foreign law firms a choice between the two: see above n 137 for the relevant legislation.

¹⁴¹ Interestingly, one commentator has suggested that the legal services market could first be liberalised in Shanghai, because of its status as a financial centre, along similar lines to the way in which foreign lawyers have been attracted to London: 蔡永彤 [Cai Yong Tong], above n 12, 62.

¹⁴² Under these reforms, qualifying foreign law firms will not be permitted to engage in litigation or domestic areas of law such as criminal law, retail conveyancing, family law and administrative law: see above n 136. This reflects comments in the *Rajah Report*, above n 100, 97, that '[t]here is no reason to allow [foreign law firms] to engage in any aspect of litigation, at least certainly not in the initial phase of liberalisation.'

are often impeded by practical obstacles thrown in their path by the regulatory authorities. Once again, tension between the need to strengthen the local profession, on the one hand, and the reluctance to clamp down hard on foreign lawyers, on the other, has resulted in a less than ideal halfway house, where cooperation exists between foreign and local lawyers, but is often beset by a professional tug of war.

Developments concerning lawyers from Hong Kong and Macao are encouraging for three reasons. First, the ability for Chinese law firms to employ lawyers from Hong Kong and Macao is a step towards the recognition of multi-jurisdictional practices within Chinese law firms and, ultimately, towards the employment of Chinese lawyers by foreign law firms. Secondly, the ability for Hong Kong and Macao lawyers to sit the PRC Bar examination and to practise Chinese law bodes well for the possibility that foreign lawyers might be permitted to sit the PRC Bar examination and qualify as Chinese lawyers at some point in the future. Thirdly, the ability for law firms from Hong Kong and Macao to form associations with Chinese law firms is a step towards recognising closer relationships such as profit-sharing joint ventures.

In terms of models for future liberalisation, this article has suggested that associations or joint ventures between Chinese and foreign law firms are not the most appropriate choice, particularly in view of the extent to which foreign law firms have already built up their Chinese law expertise and resources. Instead, China should either allow foreign law firms to employ practising Chinese lawyers or proceed to full liberalisation under which foreign lawyers could form partnerships with Chinese lawyers. If sensitivities concerning the involvement of foreign law firms in areas of practice such as litigation remained, such areas could be reserved to Chinese law firms in line with the practice adopted in other jurisdictions.