FOREIGN INVESTMENT IN CHINA'S TELECOMMUNICATIONS INDUSTRY: CURRENT OPPORTUNITIES, POTENTIAL BARRIERS, AND FUTURE PROSPECTS

*Brian Weimer, Todd Bissett, and Dan Brooks**

Abstract

Although China currently has the largest and most rapidly growing telecommunications industry in the world, foreign investment in the industry was virtually non-existent until China's accession to the WTO in 2001. In becoming a member of the WTO, China committed to opening the door to foreign investment by promulgating its *Provisions on the Administration of Foreign-Invested Telecommunications Enterprises* in December 2001. But despite the introduction of these regulations and their subsequent amendment in 2008 to lower capitalization thresholds and further simplify the application process, China's telecommunications industry has still seen relatively little foreign investment. In this paper we examine the obstacles that foreign investors face in pursuing business opportunities in China's telecom industry and assess the impact that China's proposed draft telecommunications law is likely to have on future investment prospects.

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* Mr. Weimer is a corporate partner in the communications practice in the Washington, D.C. office of Sheppard, Mullin, Richter & Hampton LLP and can be reached at bweimer@sheppardmullin.com. Mr. Bissett is a corporate partner in the Shanghai office of Sheppard, Mullin, Richter & Hampton LLP and can be reached at tbissett@sheppardmullin.com. Mr. Brooks is an associate in the Washington, D.C. office of Sheppard, Mullin, Richter & Hampton LLP and can be reached at dbrooks@sheppardmullin.com. The authors are grateful to Michael Zhang and Tony Shen, who provided invaluable research assistance and feedback on earlier drafts of this article. Mr. Zhang and Mr. Shen are associates in the Shanghai office of Sheppard, Mullin, Richter & Hampton LLP.

I. INTRODUCTION

Prior to China's accession to the World Trade Organization ("WTO") in 2001, foreign investment in Chinese telecommunications services was essentially banned.[1] With a handful of exceptions, the Chinese government had classified telecommunications services as an industry in which foreign investment was generally prohibited.[2] As a condition to its WTO membership in 2001, however, China committed to opening up its telecom industry by permitting joint ventures with foreign service providers.[3] Towards that end, China's Ministry of Information Industry ("MII") promulgated regulations in 2002 that authorized the establishment of Sino-foreign equity joint ventures in China's telecom sector for the first time since they were officially banned in 1993.[4] While these regulations did open the industry, they also created significant barriers to foreign investment in telecommunications services.[5] This has led to charges of protectionism and accusations that China has not lived up to its WTO commitments, while apologists maintain that the measures are analogous to or even superior to those that other WTO member countries have taken to protect their own telecommunications industries from excessive foreign investment.[6] More recently, China has made available for public comment a new draft telecommunications law that could further alter the regulatory landscape by systematizing the current regulatory regime, which tends to be fragmented and not entirely transparent.[7]

Part II of this paper provides an overview of the regulatory framework governing foreign investment in China's telecommunications industry both prior to and following China's entry to the WTO in 2001. Part III summarizes the current opportunities for foreign investment in China's telecommunications industry and outlines the various obstacles that foreign investors must confront when forming joint ventures with Chinese partners. Part IV addresses criticisms that China's current regulatory framework is protectionist and compares measures that the U.S.

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[1] *See Blueprint for China's Post-WTO Telecom Competition Framework*, CHINA L. & PRAC., Jan. 2002.

[2] Exceptions to this prohibition include AT&T's acquisition in 2000 of a 25% stake in Shanghai Symphony Telecommunications Co. Ltd. and the acquisition by Goldman Sachs and News Corporation of a 12.5% interest in China Netcom in 2001, as well as the so-called "Chinese-Chinese-Foreign" ownership structures. *See infra* Part II.A. In contradistinction to telecommunications services, equipment manufacturing was generally open to foreign investment even prior to China's entry to the WTO. *Id.*

[3] *See* Press Release, World Trade Organization, WTO Successfully Concludes Negotiations on China's Entry, Sep. 17, 2001, *available at* http://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

[4] *See* Arjun Subrahmanyan, *Looking Ahead: Issues in China's Telecommunications Law*, CHINA L. & PRAC., Mar. 2004. MII has since been renamed the Ministry of Industry and Information Technology ("MIIT").

[5] *See infra* Part III.

[6] *See infra* Part IV.

[7] *See infra* Part V.

has taken to limit foreign investment in its own telecommunications industry. Part V provides an overview of China's draft telecommunications law and assesses the impact that it could have on foreign investment in China's telecommunications industry in the future.

II. The Regulatory Landscape

A. Pre-WTO

China's *Catalogue Guiding Foreign Investment in Industry* classifies industries as encouraged, restricted, or prohibited with respect to foreign investment.[8] In general, foreign-invested enterprises are permitted to establish wholly foreign-owned enterprises ("WFOEs") in encouraged industries, are limited to joint ventures in restricted industries, and are barred altogether in prohibited industries.[9] Although foreign investment was encouraged in China's communications equipment manufacturing sector even prior to China's accession to the WTO in 2001, foreign investment in telecommunications services was essentially prohibited.[10]

In an attempt to circumvent the formal prohibition against foreign investment in China's telecommunications industry, China Unicom ("Unicom") created the so-called Chinese-Chinese-Foreign ("CCF") ownership structure in 1994.[11] Under the CCF arrangement, a foreign party would enter into a joint venture with a Chinese enterprise that was either a Unicom subsidiary, a company chosen by Unicom with the approval of a Unicom shareholder, or a government organization close to the construction project's physical location, and the Sino-foreign joint venture would then enter into project contracts directly with Unicom.[12] In the mid to late 1990s, Unicom entered into forty-six CCF contracts with companies such as French Telecom, NTT of Japan, U.S. Sprint, and First Pacific of Hong Kong.[13] In 1998, however, MII determined that the CCF projects were illegal and the companies were forced to terminate the contracts.[14]

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8 Catalog Guiding Foreign Investment in Industry (amended 2007), *available at* http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=87372.

9 *See China's 2007 Foreign Investment Guide*, CHINA BUS. REV., Jan./Feb. 2008, *available at* http://chinabusinessreview.net/public/0801/cmi.html.

10 *See The Chinese-Chinese-Foreign Incident of China Unicom*, CHINA L. & PRAC., Jan. 2001; Hongchuan Liu, *The Revised Foreign Investment Catalogue: Grounds for Optimism?*, CHINA L. & PRAC., Apr. 2002. In addition to telecommunications services, foreign investment in "[r]adio stations, TV stations, [and] radio and TV transmission networks" was and remains strictly prohibited. Catalog Guiding Foreign Investment in Industry, *supra* note 8, Prohibited Industry X.4; *see also* Nancy Leigh, *Technology, Media and Telecom Sectors: Encouraged, Restricted or Prohibited?*, CHINA L. & PRAC., Apr. 2002.

11 *See The Chinese-Chinese-Foreign Incident of China Unicom*, *supra* note 10.

12 *Id.*

13 *Id.*

14 *Id.*

In contrast to the CCF arrangements—and in apparent disregard of the formal prohibition against foreign investment in telecommunications services—China affirmatively permitted two significant investments by U.S. companies in China's telecom sector in late 2000 and early 2001.[15] These were AT&T's acquisition of a 25% stake in Shanghai Symphony Telecommunications Co. Ltd. and the acquisition by Goldman Sachs and News Corporation of a 12.5% interest in China Netcom.[16] Although the approval of these transactions may appear inconsistent with earlier treatment of the CCF ownership structures, commentators have noted several differences between the CCF arrangements, on the one hand, and the AT&T and China Netcom joint ventures, on the other. First, the foreign equity shareholding percentages for the AT&T and China Netcom joint ventures (25% and 12.5%, respectively) were comparatively much lower than those in the CCF arrangements, which typically reached at least 75%.[17] Second, the AT&T joint venture was prohibited from acquiring its own infrastructure and, therefore, had "to provide some of its services over its Chinese partners' network."[18] Finally, the AT&T and China Netcom joint ventures posed only a slight threat to domestic competition, since the AT&T joint venture was geographically limited to the Shanghai Pudong New Area and the China Netcom joint venture had to go through domestic operators for household connection due to lack of sufficient "last mile" access.[19]

B. Post-WTO

In the year leading up to its accession to the WTO, China promulgated its *Telecommunications Regulations of the People's Republic of China* (the "*Telecommunications Regulations*"), which were "the first attempt at comprehensive telecommunications regulatory legislation in China."[20] Among other things, the *Telecommunications Regulations* outlined the procedure for obtaining telecommunications business permits and created a distinction between basic telecommunications services ("BTS") and value-added telecommunications services ("VATS"), each of which are subdivided into two categories.[21] Basic services include "public network infrastructure, public data transmission and basic voice communications services," whereas value-added services include "services provided through the public network infrastructure."[22] More specifically, value-added services include data and transaction

[15] *See* Colin Law & Zachary Tyler, *Telecoms: The Door Slowly Opening to Foreign Investment*, CHINA L. & PRAC., Jul. 2001. Both of these transactions occurred prior to China's accession to the WTO on December 11, 2001.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Subrahmanyan, *supra* note 4.

[21] *See* Telecommunications Regulations of the People's Republic of China, arts. 7-16 (2000), *available at* http://tradeinservices.mofcom.gov.cn/en/b/2000-09-25/18619.shtml.

[22] *Id.* art. 8. As one commentator has formulated the distinction, "[i]n basic services, an operator builds, owns and operates the network that is used for services," whereas "[i]n value-
(footnote continued)

processing, multi-party communication services (such as teleconferencing), virtual private networks, data hosting, call centers, communications storage and retransmission, Internet access, and general information services.[23]

As a condition to its WTO accession in December 2001, China committed to opening up its telecom industry by permitting joint ventures with foreign service providers in accordance with a graduated schedule.[24] Pursuant to this end, China promulgated the *Provisions on the Administration of Foreign-Invested Telecommunications Enterprises* (the "*FITE Regulations*"), which "for the first time authorized the establishment of Sino-foreign equity joint ventures in the telecommunications sector . . . ."[25] The *FITE Regulations* set out minimum registered capital requirements, foreign ownership caps, and general compliance procedures for foreign-invested telecommunications enterprises. These requirements are described in greater detail below.[26]

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added services, providers use an existing basic network to provide their own services." Subrahmanyan, *supra* note 4. Basic services also include satellite communication services. Category 1 satellite communication services include voice, video, and data transmission services based on a satellite communication network, whereas category 2 satellite communication services include the lease and sale of satellite transponders and domestic very small aperture terminal operation.

[23] *See* Nancy Leigh, *China Classifies Telecom Services*, CHINA L. & PRAC., May 2003; *see also* Subrahmanyan, *supra* note 4. In most cases, value-added services also include the operation of for-profit Internet websites.

[24] For BTS, foreign equity ownership was permitted up to 25% within three years of accession, 35% within five years, and 49% within six years; for VATS the figures were 30% upon accession, 49% within one year, and 50% within two years; and for mobile voice and data services the figures were 25% upon accession, 35% within one year, and 49% within three years. *China's Accession to the WTO: Ready and Willing . . . But Able?*, CHINA L. & PRAC., Jan. 2002. Geographic restrictions were eliminated after six years for BTS, two years for VATS, and five years for mobile voice and data services. *Blueprint for China's Post-WTO Telecom Competition Framework*, CHINA L. & PRAC., Jan. 2002.

[25] Subrahmanyan, *supra* note 4.

[26] *See infra* Part III.B-C.

III. CURRENT OPPORTUNITIES FOR FOREIGN INVESTMENT

A. Equipment Manufacturing

As noted above, equipment manufacturing is an encouraged industry.[27] Equipment manufacturing includes, for example, the manufacture of telecommunications system equipment for satellites, asynchronous transfer mode and IP data communication systems, and wireless network equipment.[28] In order to engage in equipment manufacturing, a foreign-funded equipment manufacturing enterprise ("FEME") must first obtain a network-access license.[29] The application for obtaining a network-access license requires submission of a number of documents to MIIT, including the FEME's business license, an overview of the enterprise, a certificate of the quality system certification or report on the examination, an overview of the telecommunications equipment to be manufactured, and a test report or certificate of product certification.[30] MIIT renders a decision on the application within sixty days of receipt.[31]

Because there are no foreign ownership limitations on FEMEs, they may be organized either as joint ventures or WFOEs. Contributions to the FEME may include cash, know-how, trade secrets, and patent rights. The minimum capitalization requirements for joint ventures and WFOEs in the equipment manufacturing sector are RMB 30,000 (US $4,400) and RMB 100,000 (US $14,600), respectively, and non-cash contributions may not constitute more than 20% of the registered capital.[32]

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[27] Catalog Guiding Foreign Investment in Industry, *supra* note 8, Encouraged Industry III.21. One notable exception is the "production of satellite television receivers and key parts," which is restricted. *Id.*, Restricted Industry III.15(1). In addition, the manufacture of equipment possessing the ability to deliver video content is a prohibited industry in which foreign investment is prohibited.

[28] *Id.*, Encouraged Industry III.21.

[29] *See* Telecommunications Regulations of the People's Republic of China, *supra* note 21, art. 54; Measures for the Administration of Telecommunication Equipments Entering into the Public Telecommunication Networks, art. 3 (2001).

[30] *See* Telecommunications Regulations of the People's Republic of China, *supra* note 21, art. 55; Measures for the Administration of Telecommunication Equipments Entering into the Public Telecommunication Networks, *supra* note 29, art. 8.

[31] Measures for the Administration of Telecommunication Equipments Entering into the Public Telecommunication Networks, *supra* note 29, art. 9.

[32] *See* Company Law of the People's Republic of China, arts. 26, 59 (revised 2005), *available* at http://www.chinadaily.com.cn/bizchina/2006-04/17/content_569258.htm; Rules for the Implementation of the Law of the People’s Republic of China on Foreign-Funded Enterprises, art. 27 (revised 2001), *available at* http://www.pkykwong.com/eng/pdf/rule_prc.pdf. Local regulations may require a greater amount of registered capital, and a larger capital contribution is typically required in order to facilitate the license-granting process.

In addition to the flexibility they enjoy with respect to their enterprise organization, FEMEs may also be able to take advantage of tax incentives by qualifying as a High and New Technology Enterprise ("HTE").[33] HTEs can reduce their corporate income tax by 15% and can reduce their withholding taxes as well.[34] In addition, FEMEs may be able to further reduce their tax burden by using special purpose vehicles established in countries with favorable tax treaties.

Although China has more than one hundred telecommunications plants that produce telecommunications equipment, most of the major manufacturers are FEMEs operating as joint ventures or WFOEs. These include Tianjin Motorola, Cisco, Samsung Electronics, Nokia Siemens Networks, Wuhan NEC, and Shanghai Bell.

As is the case with equipment manufacturers in the U.S., equipment manufacturers in China may be subject to enforcement actions by the U.S. Federal Communications Commission ("FCC"). In 2008, for example, the FCC fined Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") nearly $20 million for producing "satellite radio transmitters that exceeded FCC power limits and plac[ing] booster towers in unapproved locations."[35] The companies' equipment manufacturers in Asia were fined as well, although not nearly as much as Sirius and XM.

B. Value-Added Services

Value-added services are a restricted industry and foreign investment therefore requires the establishment of a FITE.[36] As shown in figure 1, the approval and registration process for FITEs in China is time-consuming and requires submission of documents to both MIIT and the Ministry of Commerce ("MOFCOM").

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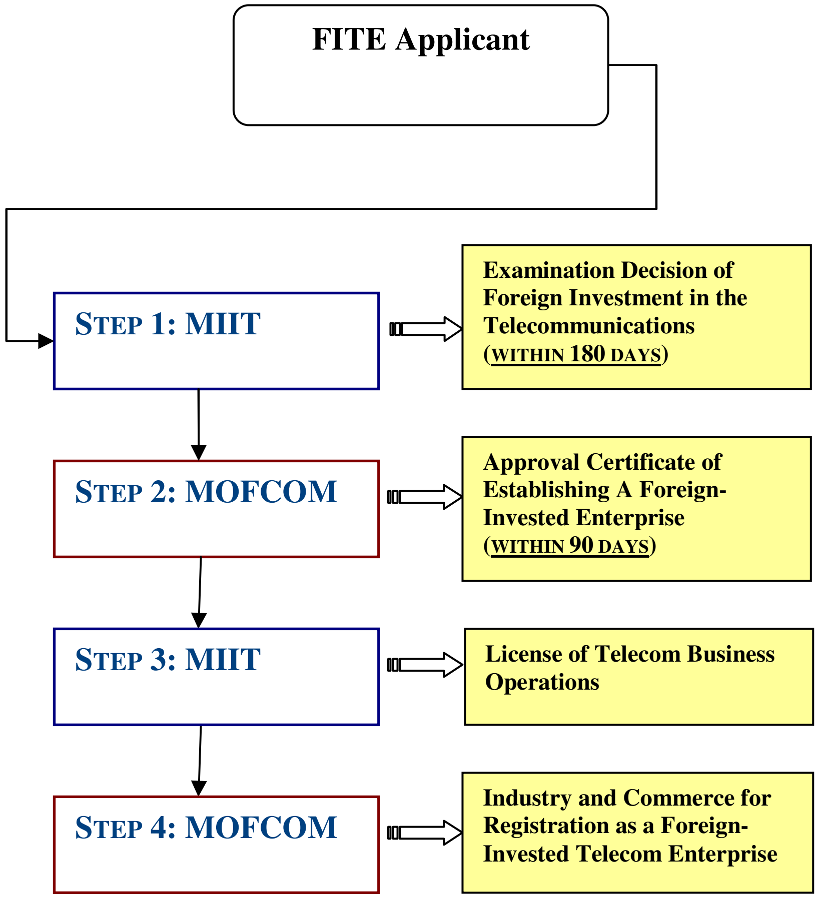
[33] *See* Administrative Measures for Determination of High and New Tech Enterprises, art. 4 (2008), *available at* http://www.ciipacn.org/hot/news_show.asp?id=225.

[34] *See* Enterprise Income Tax Law of the People's Republic of China, art. 28 (2007), *available at* http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020070327495400001563.pdf.

[35] Amy Schatz & Sarah McBride, *FCC Commissioners will Approve XM-Sirius Deal*, WALL ST. J., Jul. 24, 2008, *available at* http://online.wsj.com/article/SB121683130281477651.html.

[36] Catalog Guiding Foreign Investment in Industry, *supra* note 8, Restricted Industry V.7.

FIGURE 1: FITE REGISTRATION PROCESS



Documents to be Provided

Step 1	• Project application report • Credentials of qualifications of major Chinese investor • Credentials of qualifications of major foreign investor • Certificates
Step 2	• FITE's joint venture contracts • FITE's articles of association • Examination Decision of Foreign Investment in the Telecommunications
Step 3	• Approval certificate establishing a FITE
Step 4	• Approval certificate establishing a FITE • License of telecom business operations

In order to engage in value-added services, a FITE must also first obtain a value-added telecommunications license.[37] The license application materials include, *inter alia*, the company profile, a recent annual financial report or capital verification report, relevant materials attesting

[37] *See* Telecommunications Regulations of the People's Republic of China, *supra* note 21, art. 9.

to the company's reputation, and a commitment letter.[38] MIIT renders its decisions on license applications within sixty days of submission.[39]

The foreign ownership interest in a FITE providing value-added services may not exceed 50%.[40] In addition, FITEs providing value-added services are subject to minimum registered capital requirements of RMB 10 million (US $1.46 million) if providing services nationally and RMB 1 million (US $146,000) if providing services within a province.[41] Enterprises currently providing value-added services in China include China Netcom Broadband Corp., Beijing Honglian Jiuwu Digital Co., and Beijing Online Communication Technology, Ltd.

In recent years, many foreign companies seeking to invest in value-added services in China have done so through controlling a wholly domestically owned Chinese entity (a so-called "Captive Company") that holds the necessary licenses and approvals to run the enterprise. Although the Captive Company nominally operates the business, the majority of the profits are paid to the foreign investor via contractual arrangements such as service or management agreements. In addition, nominee or trust arrangements with the Captive Company and its shareholders may provide for transfers of the Captive Company's stock to the foreign investor in the event that changes in Chinese law were to permit direct foreign ownership of the business. While these Captive Company structures have become increasingly common in recent years, a risk remains that MIIT could challenge the structures as an arrangement to circumvent foreign ownership limitations in restricted industries because the foreign investor enjoys more than 50% of the profits and may be deemed to exercise *de facto* control over the enterprise.[42] Such a finding could enable MIIT to revoke the Captive Company's business and operating licenses, require restructuring of ownership or operations, and impose fines. Figure 2 provides an overview of the Captive Company structure.

[38] *Id.* art. 13.

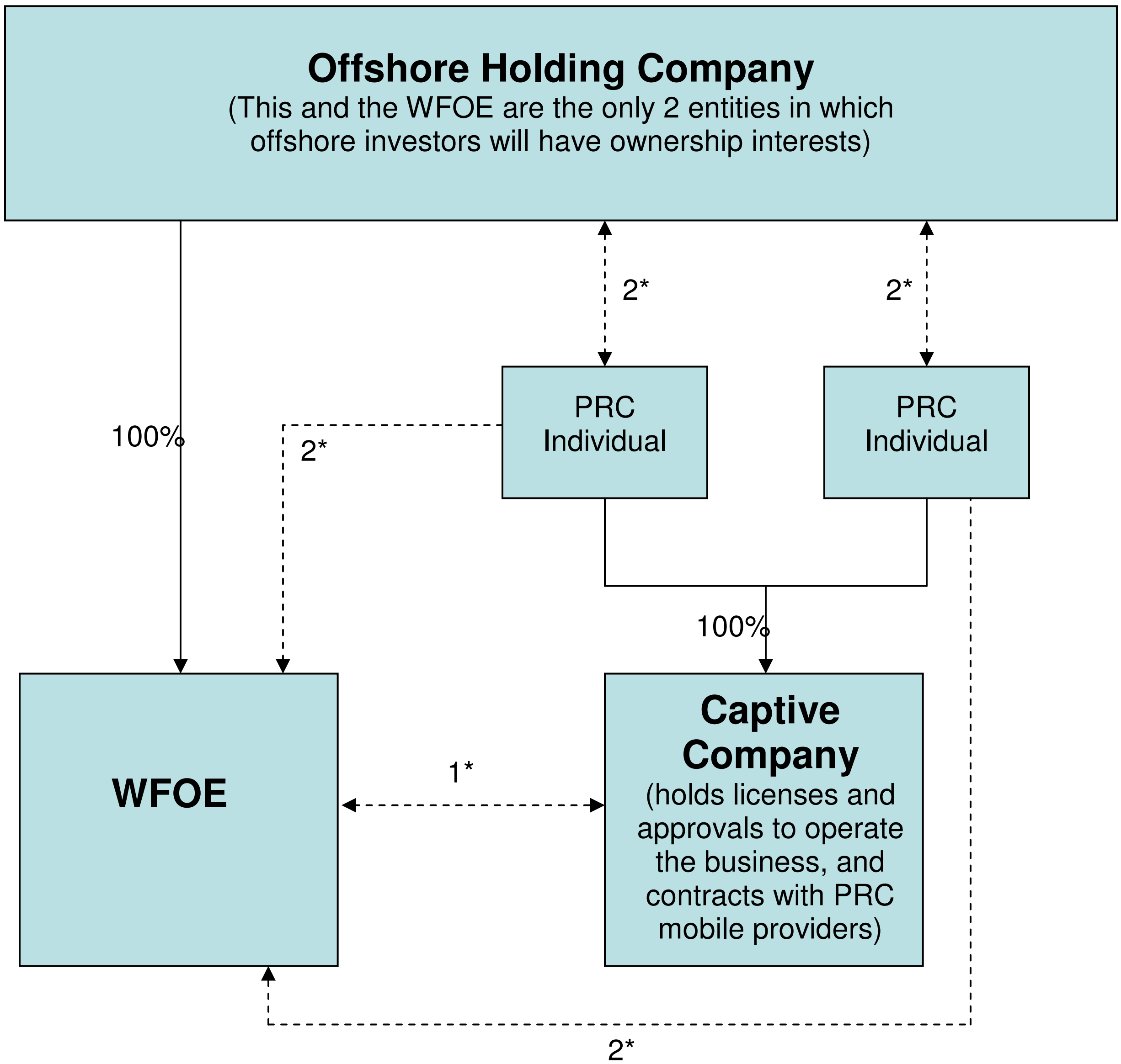
[39] *Id.* art. 14.

[40] Provisions on the Administration of Foreign-Invested Telecommunications Enterprises art. 6 (2001), *available at* http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=51304.

[41] *Id.* art. 5.

[42] Compare China's sudden declaration in 1998 that the CCF ownership structures were illegal, *supra* Part II.A.

FIGURE 2: CAPTIVE COMPANY STRUCTURE



1* - Includes exclusive strategic alliance and service agreements, which may include technical support, strategic consulting, intellectual property, equipment leasing, and other arrangements by which the WFOE may control the operations and capture the profits of the Captive Company.

2* - Arrangements by which each of the PRC individuals holds ownership in the Captive Company as nominees of WFOE, by which WFOE has an option to obtain all ownership of the Captive Company as permitted under PRC law, and WFOE may exercise all rights of the PRC individuals as owners of the Captive Company. Note that there may be more than 2 PRC individuals

C. Basic Services

Like value-added services, basic services are a restricted industry that requires foreign investors to structure their enterprises as FITEs.[43] FITEs providing basic services must first obtain a basic telecommunications license.[44] The application process is analogous to that of FITEs engaged in value-added services, but MIIT need not render a decision on the application until 180 days after submission.[45]

As with value-added services, FITEs engaged in basic services are also subject to foreign ownership limits and minimum registered capital requirements. The foreign ownership interest in a FITE providing basic services may not exceed 49%, and the minimum capitalization requirements are RMB 1 billion (US $146 million) for FITEs providing services nationally and RMB 100 million (US $14.6 million) for those providing services within a province.[46] The major foreign investor in such enterprises is subject to additional requirements. For example, it must have a license for engaging in basic telecom services in the country or region where it is registered.[47]

The *FITE Regulations* were amended in 2008 to lower the minimum registered capital requirements for FITEs engaged in basic services and to simplify the application process by eliminating the requirement that applicants provide a feasibility study report, which had been regarded as the most time-consuming part of the application.[48] While some commentators suggested that these amendments had the potential to further spur foreign investment in China's telecom sector, the industry has yet to see any noticeable foreign investment in basic services.[49]

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[43] Catalog Guiding Foreign Investment in Industry, *supra* note 8, Restricted Industry V.7.

[44] *See* Telecommunications Regulations of the People's Republic of China, *supra* note 21, art. 9.

[45] *Id.* art. 11.

[46] Provisions on the Administration of Foreign-Invested Telecommunications Enterprises, *supra* note 40, arts. 5, 6. Interestingly, the *FITE Regulations* do not require that a Chinese shareholder hold the largest equity investment in the enterprise. Thus, a 49% foreign-ownership interest in a FITE containing two Chinese investors who each hold a 25.5% ownership interest would not by itself run afoul of the regulations.

[47] *Id.* art. 9. The *FITE Regulations* define "major foreign investor" as the "one that makes the largest contribution among all the foreign investors and has a share of more than 30% of the total investment made by all the foreign investors. *Id.*

[48] *See* Fraser Mendel & Shan Liu, *Amended Regulations Could Open Telecoms Sector*, CHINA L. & PRAC., Oct. 2008. Prior to the 2008 amendments, the registered capital requirement for FITEs engaged in basic telecom services were RMB 2 billion (US $292.8 million) for FITEs offering national services and RMB 200 million (US $29.3 million) for FITEs offering services within a province. *Id.*

[49] *See id.*

IV. PROTECTIONIST CRITICISMS

While the foreign ownership limitations and minimum capitalization requirements imposed on FITEs offering telecommunications services are consistent with China's WTO commitments, they have led some commentators and American officials to accuse China of protectionism and were lambasted in a recent report by the Office of the U.S. Trade Representative, which assessed the lack of opportunities for foreign service suppliers in China's telecommunications sector as "striking."[50] The report argued that the foreign equity limitations "severely diminish commercial opportunities in the sector" and that the minimum capitalization requirements for FITEs providing basic services are "excessively high."[51] The report also criticized investment approval procedures as non-transparent and lengthy, and lamented a general "lack of clarity regarding which services a foreign-affiliated firm is permitted to offer."[52]

While China's restrictions on foreign investment in its telecommunications industry may rightly be labeled "protectionist" to some extent, the United States has created its own barriers to foreign investment in its telecommunications industry and has subjected transactions involving Chinese companies to a somewhat heightened degree of scrutiny.[53] The Exon-Florio Amendment to the Defense Production Act of 1950 enabled the President "to block corporate mergers, acquisitions and takeovers that threaten U.S. national security."[54] Such transactions typically include those that "could result in 'foreign control' of enterprises engaged in interstate commerce in the U.S."[55] The Committee on Foreign Investment in the United States ("CFIUS") is responsible for implementing the provisions of the Exon-Florio Amendment.[56] Under the Exon-Florio Amendment review procedures, CFIUS first conducts a 30-day review of the

[50] *See China's 2007 Foreign Investment Guide*, *supra* note 9; Alan Beattie, *U.S. Report Faults China for Unfair Trade Rules*, FIN. TIMES, Apr. 1, 2010, *available at* http://www.ft.com/cms/s/0/4a9ae9ae-3d19-11df-b81b-00144feabdc0.html; OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2010 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 76 (2010), *available at* http://www.ustr.gov/about-us/press-office/reports-and-publications/2010.

[51] 2010 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS, *supra* note 50, at 76-77.

[52] *Id.* at 76-77. In particular, the report noted that "MIIT seems to classify certain value-added corporate data services . . . as value-added when offered domestically, but as basic . . . when offered internationally." *Id.* at 77.

[53] *See* David Marchik, Mark Plotkin & David Fagan, *National Security Regulation of Foreign Investments and Acquisitions in the United States*, CHINA L. & PRAC., June 2005.

[54] *Id.* The Exon-Florio Amendment is codified at 50 U.S.C. app. § 2170 (2006).

[55] *Id.*

[56] *Id.* CFIUS is chaired by the Secretary of the Treasury and is composed of eleven other member agencies, including the Departments of State, Defense, Commerce, Justice, and Homeland Security. *Id.*

transaction in question.[57] If it decides that the transaction poses no credible threat to national security, it will decide not to open an investigation and the transaction will generally proceed.[58] If, on the other hand, CFIUS determines that a threat to national security does exist, it will conduct an investigation for an additional 45 days and the President will issue a decision within 15 days thereafter.[59] Parties facing resistance from CFIUS generally "prefer to withdraw a transaction rather than be faced with the stigma of a presidential decision to disapprove a transaction."[60]

Although CFIUS review procedures apply generally, CFIUS is "less likely to offer flexibility when it comes to Chinese investment [because] the U.S. government considers Chinese investment to present special concerns."[61] These "special concerns" include the fact that the Chinese government often has significant ownership interests in Chinese companies, concerns that the Chinese government is engaged in espionage efforts within the U.S., the large trade deficit that the U.S. has with China, concerns regarding Chinese companies' compliance with U.S. export laws, and the loss of many U.S. manufacturing jobs to China.[62]

A case in point was the attempt by Hutchison Whampoa Ltd. of Hong Kong ("Hutchison Whampoa") and Singapore Technology Telemedia PTE Ltd. ("ST Telemedia") to acquire control of Global Crossing Ltd. ("Global Crossing"), a fiber-optic network operator.[63] When Global Crossing filed for bankruptcy protection in January 2002, the company's creditors agreed to sell a 61.5% stake to Hutchison Whampoa and ST Telemedia for $250 million.[64] When CFIUS initially refused to endorse the transaction due to concerns about possible links between Hutchison Whampoa and the Chinese military, the parties proposed instead to make Hutchison

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[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *See Judge Approves Sale of Stake in Global Crossing to ST Telecom*, N.Y. TIMES, Jul. 2, 2003, *available at* http://www.nytimes.com/2003/07/02/business/judge-approves-sale-of-stake-in-global-crossing-to-st-telecom.html. In addition to the Exon-Florio Amendment, the U.S. State Department has relied on the U.S. International Traffic in Arms Regulations ("ITAR") in blocking transactions involving Chinese companies. One important example was the proposed privatization of Asia Satellite Telecommunications Holdings Ltd. ("AsiaSat") in 2007, which would have made General Electric and CITIC Group co-owners of the satellite company. In refusing to authorize the plan, the State Department cited concerns that the transaction could lead to the transfer of satellite technology to China. *See AsiaSat CEO "Not Surprised" by U.S. Government's Decision to Halt Privatization Plans*, SATELLITE NEWS, Apr. 30, 2007.

[64] *See Judge Approves Sale of Stake in Global Crossing to ST Telecom*, *supra* note 63.

Whampoa a passive investor by transferring its ownership interest to a "group of four distinguished U.S. citizens who would exercise [Hutchison Whampoa's] voting and corporation governance rights."[65] After commencing a 45-day investigation of the revised proposal, Hutchison Whampoa withdrew its bid and the 61.5% stake in Global Crossing was eventually sold to ST Telemedia alone.[66]

V. LOOKING AHEAD: CHINA'S DRAFT TELECOMMUNICATIONS LAW

In the fall of 2009, China made available for public comment a draft of its proposed telecommunications law.[67] While China's transparency in making the draft law available for public comment was lauded, commentators have criticized the draft law for leaving the barriers to foreign investment largely in place.[68] For example, the law would codify the current ownership restrictions on FITEs providing basic and value-added services—provisions that the United States has labeled "troubling" and that the Telecommunications Industry Association has argued will "limit foreign telecommunications providers from fully engaging in the Chinese market given the barriers to acquiring majority interest in their investments and difficulties in finding appropriate joint venture partners."[69] The draft law also does not alter the current minimum capitalization requirements, which commentators have argued are "excessive" and pose barriers to entry.[70] Thus, although the draft telecommunications law would have the advantage of systematizing China's telecommunications regulations, it would leave the current regulatory framework governing foreign investment largely in place.

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[65] Henry C.K. Liu, *Trade in the Age of Overcapacity*, ASIA TIMES, Jul. 8, 2005, *available at* http://www.atimes.com/atimes/Global_Economy/GG08Dj01.html.

[66] *See id.*; *Global Crossing Sale Clears One U.S. Hurdle*, N.Y. TIMES, Sep. 20, 2003, *available at* http://www.nytimes.com/2003/09/20/business/company-news-global-crossing-sale-clears-one-us-hurdle.html.

[67] 2010 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS, *supra* note 50, at 77.

[68] *See, e.g.*, *id.*; Comments on China's Draft Telecom Law Filed on Behalf of the Telecommunications Industry Association (TIA), the U.S. Information Technology Office (USITO), and the Information Technology Industry Council (ITI), Nov. 3, 2009, *available at* http://www.tiaonline.org/gov_affairs/fcc_filings/documents/comments_on_china%20_telecom_law_final.pdf [hereinafter *TIA Comments*].

[69] People's Republic of China Telecommunications Law (Draft to Solicit Comments), *available at* http://china.usc.edu/App_Images//Unofficial_Translation_China_Draft_Telecommunications_Law.pdf; 2010 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS, *supra* note 60, at 77; *TIA Comments*, *supra* note 68.

[70] *TIA Comments*, *supra* note 68.

VI. CONCLUSION

Although China has come a long way in opening its telecommunications industry to foreign investment, significant barriers still exist. Foreign investors have greatest flexibility in the equipment manufacturing sector, in which they can operate as either joint ventures or wholly foreign-owned enterprises and can take advantage of tax incentives. Greater obstacles exist for providers of basic and value-added telecommunications services, who must adhere to strict foreign ownership limits, minimum capitalization requirements, and lengthy application procedures. Basic services in particular have not seen any major foreign investment since China's accession to the WTO in 2001. Although China's new draft telecommunications law would systematize China's telecommunications regulations, it would not alter the current restrictions on foreign investment. Thus, foreign investors seeking to access China's telecommunications market will likely have to continue adhering to the current regulatory framework for the foreseeable future.