

China is loosening its regulations over the foreign investments

by Zhu Wen

After two rounds of consultation, China's National Development and Reform Commission (hereinafter referred to as **NDRC**) issued the Administration Measures on the Approval and Filing of Foreign Invested Projects (**Measures**) on May 17 2014, which annulled the Interim Administration Measures on the Approval of Foreign Invested Projects (**Interim Measures**). The new Measures will be in effect from June 17 2014.

As the detailed implementation of the Catalogue of Investment Projects Subject to the Approval of Government (2013 version) (**Approval Catalogue 2013**), the Measures consistently adopt, "approval or filing". These two parallel paths to regulate the administrative procedure on foreign invested projects will break the unitary approval regime under the Interim Measures.

Another important change is the vesting of its functions and authorities to the local government from NDRC . Each tier of local government enjoys more autonomy and initiative on the introduction of foreign capital.

The Measures prescribes a list of the foreign invested projects that are subject to the approval. All the other projects that are excluded from the list only require the process of filing. This "negative list" regime was first implemented in the China (Shanghai) Pilot Free Trade Zone (**SHFTZ**). After several rounds of multilateral consultancies, NDRC for the first time introduces this regime as a nation-wide regulation.

Furthermore, in order to attract more foreign investments into a wider area of China, the Measures accorded national treatment in the pre-establishment phase, which was first stipulated by the Approval Catalogue. After June 17 2014, all the foreign invested projects, except for those are on the negative list will be subject to the same administrative procedure as their domestic ones, regardless of pre-establishment stage or the post-establishment stage.

Projects Subject to the Approval

• General Provisions

When a foreign investor intends to make a new investment in China, the first thing needed to be clearly figured out is what and how. What kind of industry allows the entrance of foreign capital? How to channel foreign capital into China and make physical establishment? The first question is majorly answered by the Foreign Investment Industrial Guidance Catalogue (**Catalogue 2011**). An investor may find the solution for the latter one in the Measures. These two official regulations altogether constitute the basic standard for guiding the administrative procedure on foreign investment.

1. NDRC's Approval

NDRC's approval is required by

- (i) encouraged projects categorized by the Catalogue 2011 that require Chinese party's majority or relative majority control and the total investment (including capital increase) no less than US\$300 million; and
- (ii) restricted projects (except for the projects invested in the real estate field) under the Catalogue 2011 that require the total investment (including capital increase) no less than US\$50 million.

2. Provincial Government's Approval

Provincial government's approval is required by

- (i) all kinds of investment projects in the real estate under the restricted category; and
- (ii) other investment projects under the restricted category with a total investment (including capital increase) under US\$50 million.

3. Local Government's Approval

The encouraged investment projects that require (a) Chinese party's majority or relative majority control; and (b) a total investment (including capital increase) under US\$300 million.

- 4. Except for the three situations addressed above, the approval procedure for the foreign investment projects under the Article 1 to Article 10 of the Approval Catalogue 2013 has to adhere to the Approval Catalogue 2013.

According to the Measures the provincial government may divide the approval purview among the local governments under its jurisdiction. Also, the provincial government will not delegate its power, which is literally vested to it by the Measures, to the lower tier government.

- **Substantial Requirements against foreign invested projects**

The foreign invested projects that can be approved will have to satisfy the following requirements:

1. In consistency with Chinese laws and regulations, the Catalogue 2011 and the Catalogue of Priority Industries for Foreign Investment in Central and Western China;
2. In consistency with the local development planning, industrial policies and standard for the entrance
3. Exploiting and utilizing the resources in reasonable and efficient way;
4. Having no adverse impact on national security and ecological safety;
5. Having no material adverse effect on the public interests; and
6. In line with the regulations over the management of capital projects and foreign debts.

- **Documentation Requirements against foreign investments**

In order to obtain the permission by the corresponding approval authority, the investors will submit:

- (i) Project Application Report;
In the case of a foreign investor acquiring a domestic target company, the Project Application Report will address (a) basic information of the acquirer and acquired; (b) acquisition arrangements; (c) financing devices; (d) operation pattern, business scope, equity structure of the post-acquisition phase; and (e) usage arrangement for the income.
- (ii) Investors' company registration document, latest audited financial statement (including balance sheet, profit statement and cash flow statement) and credit certificate issued by banks;
- (iii) Letter of intent and the board resolution of the invested company (in the case of capital increase or M&A);

- (iv) Opinion issued by the administration of urban-rural planning (only applied to the projects that obtain the land use rights by allocation);
- (v) Opinion of the preliminary approval issued by the administration of land and resources;
- (vi) Approval letter issued by the administration of environment protection on the environmental impact assessment report submitted by the investors;
- (vii) Opinion of examination issued by the administration of energy conservation;
- (viii) Confirmation letter issued by the State-owned Assets Supervision and Administration Commission and its local branch (only applied when the state-owned assets involved); and
- (ix) Other documents that should be submitted according to the laws and regulations.

● **Procedural Requirements against foreign investments**

The foreign invested projects that are subject to the approval by NDRC will be initially examined by the provincial delegation of NDRC, then submitted to NDRC by the provincial delegation along with the preliminary opinion issued by the provincial one. The corporations on the separated plan list and the ones under central management will directly submit the projects application report, altogether with the preliminary opinion issued by the provincial delegation of NDRC, to the central NDRC.

The approval procedure will be completed in 20 working days from the date of acceptance. If the approval authority cannot make the decision within 20 working days, the procedure can be conditionally extended by another 10 working days with the approval by the principal of the corresponding authority. The authority will inform the applicant with the term and reasons of extension.

The public consultation will be introduced into the decision-making procedure if the project does have material impact over public interests. For those particularly significant projects, expert advice may be sought if the authority sees fit.

Projects Subject to the Filing

Compared to the Interim Measures, NDRC is loosening its control over the foreign investments. The traditional centralization is replaced by decentralization. It is also the first time for China to adopt the filing regime involving foreign investments. According to the spokesman of NDRC, the issuance of the Measures has showed the central government's determination to adjust government's function and role in economy.

Market forces ought to be the determining factor for the legal framework regulating foreign investment. The filing regime provides the foreign investors with a time and cost effective mechanism. There is no need for the foreign investors to go through the administrative hassle to obtain permission. The filing regime provides the business community with more autonomy to decide what, where, when and how to make the investment.

The Measures require the potential investors to submit a succinct set of documents, which include:

- (i) basic information report concerning the potential project and its investors;
- (ii) investors' company registration documents;
- (iii) letter of intent; and
- (iv) board resolution of the company (in the case of capital increase or M&A).

The filing authority will no longer require the investors to submit documents with regard to market prospects, economic benefit analysis and technical proposal.

If the filing authority decides to reject the filing application, it is required to issue a written opinion and inform the investors with the reasons for rejection within 7 working days.

The new Measures represent a further step by the NDRC to optimize the regulations prescribed by the Approval Catalogue 2013. The effectiveness of the Measures will be a huge relief of burden for the potential foreign investors. By simplifying the approval and filing regime, China is creating a user-friendly legal environment for all kinds of foreign investments.