

THE ROLE OF THE ATTORNEY IN CHINA'S OUTBOUND INVESTMENTS

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OUTBOUND INVESTMENT OVERVIEW

As Chinese companies currently have both the capacity and desire to invest overseas, outbound investment has been increasing at a very fast pace in recent years (See Chart). Chinese companies have exhibited strong interest in entering the American market in an effort to “Go Global.” The Chinese government has issued over the past few years regulations encouraging and facilitating outbound investment in accordance with the Chinese’ 12th five-year plan. For example, since June 2011, the *Measures for the Administration of Pilot RMB Settlement for Overseas Direct Investment* and the *Circular on Issues Relevant to Cross-border Direct Investment with Renminbi* (RMB, the official currency of the PRC) now entitles certain investments made by Chinese investors (except financial domestic enterprises) outside the Peoples Republic of China (PRC) to be settled in RMB, and the income made through those investments may be repatriated to the PRC in RMB. A bank will also be able to grant a loan in RMB to a foreign enterprise or investment project if a domestic enterprise is one of the investors. Although great strides

have been made, Chinese investments still remain strongly monitored by Chinese authorities. The Chinese system can still be described as “a government approval system.” In other words, before Chinese companies are entitled to invest in the American economy, they will have to go through a lengthy process, generally involving many approvals from numerous governmental entities. Although obtaining such approval is generally not the main obstacle to the closing of a transaction (unless there is specific restrictions attached to the investment industry), obtaining all necessary approvals usually slow down the process considerably and therefore may affect the competitiveness of Chinese companies in transactions for which time is of essence.

CONCERNS OF CHINESE CLIENTS WHEN DOING BUSINESS IN THE UNITED STATES

One of the main concerns being raised by the Chinese is in regard to the corporate tax structure in the United States as well as withholding tax. Chinese need guidance regarding the best way to structure a contemplated transaction. They also seek

advisement on business structure, which State to register a company, visa issues, necessary governmental licenses and permits, procedures to purchase and sell real estate, how to identify, approach and negotiate with an American target, applicable listing rules in the US, as well as the restricted investment industries according to US regulations. Questions often posed might be, “What is the best way in which to invest in the energy and mining sector?” or “What role does the Committee on Foreign Investment in the United States (CFIUS) play and can it be problematic in the case of transactions involving Chinese investors.

Also, as US environmental law is at a more mature stage, Chinese clients will need to be advised on the best way to structure a transaction in order to comply with such regulations. Chinese clients are usually unfamiliar with such regulations, so it is important to offer an added-value service by verifying that the transaction complies with such norms. Labor law is also more developed in the US and Chinese clients will need guidance on the many labor regulations they may face.

INTRODUCTION TO CHINESE OUTBOUND INVESTMENT RULES

Overseas investments by Chinese domestic enterprises are subject to the approvals and registration with three different governmental bodies in accordance to Chinese law.

- A. State Administration of Foreign Exchange (SAFE) in charge of the administration of foreign exchange;
- B. National Development and Reform Commission (NDRC) responsible for China's economic development and industrial policy; and
- C. Ministry of Commerce (MOFCOM).

Obtaining the approval of the NDRC is the cornerstone of the process. Once NDRC approval has been obtained, other authorities, including the MOFCOM and SAFE are generally not going to object to the transaction.

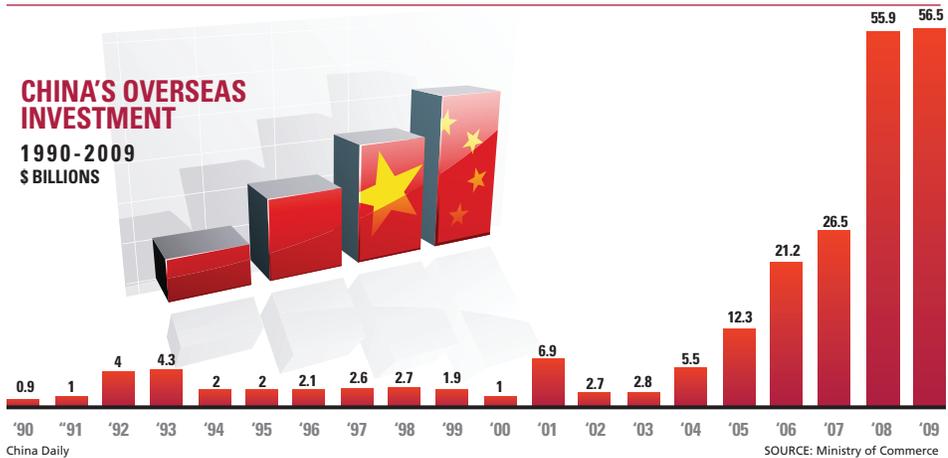
of exploration and exploitation of crude oil and mines (considered as Resources OIP) for which the amount of investment made by the Chinese party reaches \$300 million or more (in U.S. Dollars) , the verification and approval of NDRC will be required. If a domestic enterprise invests in a Resources OIP, and if the amount of the investment made by the Chinese party is more than \$30 million but less than \$300 million, the approval documents from the Department of Development and Reform at the provincial level shall be obtained as well as the Registration Approval Form for Local Major Overseas Investment Projects issued and stamped by the Department of Utilization of Foreign Capital and Outbound Investment under NDRC.

In addition, the relevant approvals must also be obtained from MOFCOM. MOFCOM regulations clearly state as a precondition that the projected Overseas in-

therefore this requirement shall be examined carefully.

In addition to these three governmental entities, the State-owned Assets Supervision and Administration Commission (SASAC) may also impose restrictions on state-owned enterprises as it is in charge of supervising and managing their overseas investments⁴. SASAC requires that state-owned enterprises do not invest in non-principal industries overseas unless necessary for any specific reason. In that specific scenario, SASAC's approval must be obtained prior to making such investment⁵. The China Securities Regulatory Commission (CSRC) will also have to approve transactions involving companies which are listed on one of the two Chinese stock exchanges.

Finally, it shall be noted that the above summary does not apply to financial institutions, which are subject to specific rules. It shall also be noted that the Special Administrative Region of Macao and Hong Kong and the autonomous region of Taiwan are also subject to different rules.



First, every overseas investment must be registered with SAFE. Second, it is necessary to obtain NDRC's approval for investment in Overseas Investment Projects¹ (OIP). Last, an application must be made to transfer the foreign currency abroad.

For example, and according to the *Interim Measures for the Administration of Verification and Approval of Overseas Investment Projects (Measures)*, for an OIP in the field

vestment² must not: "(1) Endanger the sovereignty, security and social public interest of the State, or violates the laws and regulations of China; or (2) Impair China's relationship with other countries (regions); or (3) [be] likely to violate the international treaties China has acceded to; or (4) Involve any technology or commodities of which the export is prohibited."³ The concept of security and social public interest of the State has been broadly interpreted and

OUTBOUND INVESTMENT: A FOUNTAIN OF OPPORTUNITIES FOR AMERICAN LAWYERS

As it can be understood from all the different legal requirements established by the Chinese and American authorities, there are currently plenty of opportunities, if not a necessity, for further collaboration between Chinese and American lawyers in order to better serve client's interest in cross-border transactions and more specifically to help Chinese clients to successfully invest in the "American Dream."

¹ Ventures that investment subjects take to obtain overseas ownership, right to operation and management, and other related rights and interests by ways of input of money, securities, physical items, intellectual property or technology, equity interest, creditor's right, and other assets, rights and interests, or provision of guaranty

² Define as: acts of establishing non-financial enterprises or obtaining the ownership, controlling right, business operation right, and other right of non-financial enterprises by way of new establishment and merger and acquisition, by enterprises legally established in China.

³ Article 9, Measures for the administration of Overseas Investment, Decree No.5 [2009] of the Ministry of Commerce

⁴ Central enterprises overseas investment supervision and management of the Interim Measures (SASAC Order No. 28)

⁵ Article 10 of Interim Measures for the Supervision and Management of Overseas Investment of Central Enterprises, Order No.28 of the State-owned Assets Supervision and Administration Commission of the State Council



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