

## Setting up Business

### Easier Than It Looks

Foreign investors can now determine an organizational structure according to the operations of their enterprises at their own discretion. Foreigners intending to invest in China should approach the appropriate government departments to understand the legal procedures involved in setting up a business in China.

Investors may consult the People's Republic of China's embassies or consulates in their respective countries or regions for the right procedures. Alternatively, investors may directly contact the local governments' Department of International Trade Promotion, which is in charge of the promotion of foreign trade and foreign investment.

Investors in the manufacturing sector can contact the industrial park of their choice. Industrial parks typically have an Investment Promotion Department that provides one-stop services from registration to start of operations.

Potential investors can visit in person. Investors may request an invitation letter by stating their purpose, the length of their proposed stay, and the intended investment projects. Upon receiving a letter of invitation, investors can proceed to the nearest embassy or consulate to apply for an entry visa to China.

Setting up a business in China involves a lot of paperwork. Numerous consulting firms provide services to make the process easier. However, before making an investment decision, investors should be familiar with regulatory issues. While investors may choose to let the agencies or consulting firms take care of these issues, it is advisable for investors to be informed. <sup>(Top)</sup>

## Main Laws and Regulations for Foreign Investment in China

Foreign investments in China are subject to a series of laws and regulations.

### Main Foreign Investment Laws and Regulations

- Law of Chinese-Foreign Equity Joint Ventures and its implementation regulations
- Law of Chinese-Foreign Contractual Joint Ventures and its implementation regulations
- Law of Wholly-Owned Foreign Enterprise and its implementation regulations
- Law of Foreign-Invested Enterprises and its implementation regulations
- Law on the Protection of Taiwan Compatriots' Investment

### General Laws and Regulations

Apart from foreign investment-related laws and regulations, FIEs are also subject to some general laws and regulations applicable both to FIEs and to domestic companies. They include:

- Company Law
- Contract Law
- Insurance Law
- Arbitration Law

- Labor Law
- Intellectual Property Law
- Trademark Law
- Copyright Law
- The Provisional Regulations on Value-Added Tax
- The Provisional Regulations on Consumption Tax
- The Provisional Regulations on Business Tax

## International Treaties

FIEs are also subject to some international treaties.

- Bilateral Investment Treaties
- Bilateral Agreement on the Avoidance of Double Taxation (Top)

## Examination and Approval Procedures

Before doing business in China, foreign investors are required to produce certain documents. The procedures and required documents for direct investment vary according to the form of business entity involved. In general, there are some basic procedures that FIEs have to follow.

- For projects in the encouraged and permitted categories costing US\$100 million or more and projects in the restricted category costing US\$50 million or more, a report must be examined by the State Development and Reform Commission before being submitted to the Ministry of Commerce of the PRC for approval.
- For projects in the encouraged and permitted categories costing US\$500 million or more and projects in the restricted category costing US\$100 million or more, a report must be examined by both the State Development and Reform Commission and the Ministry of Commerce before being submitted to the State Council for approval.
- For projects not included in either of the above categories, a report is examined and approved by the authorities of the province, autonomous region, or municipality. (Top)

## Setting up a JV

### Stage 1:

Preliminary Approval - Project Proposal

After the foreign and Chinese partners have reached an agreement, the Chinese partner(s) should prepare and submit the project proposal for preliminary scrutiny.

Generally, the authority will give an official reply within 20 days upon receipt of the proposal and other relevant documents. The approval or rejection letter will be issued to the applicant. The foreign party in a JV should thus request a copy of this document from the Chinese partner to confirm that the approval is consistent with the agreed terms of the project.

Upon receiving the approval letter, the Chinese partner(s) should apply to register the enterprise's name with the local Administration for Industry and Commerce (AIC).

Contents of report: basic facts about the project, descriptions of technology and technical processes, conditions and quantities of energy and other resources required, an environmental impact assessment, prices of public goods or services involved, means of capital contribution and financing plans, equipment to be imported and amounts involved.

Documents required: the enterprise registration certificates of the Chinese and foreign investors, credit certificates, a letter of investment intent and an environmental impact assessment report issued by the environmental protection administration.

### **Stage 2:**

Formal Approval - Contracts, Articles of Association

The contract, articles of association and other legal documents for establishing the JV signed by both parties are submitted by the Chinese party to the provincial or municipal Bureau of Commerce for approval. After the contract and articles of association are approved, the Chinese party should apply to the provincial or municipal Bureau of Commerce for an approval certificate. Chinese law views the joint venture contract as the fundamental document for the establishment of the joint venture. The contract for an equity JV must meet the conditions in China's joint venture law and the contract for a cooperative enterprise must meet the conditions in China's cooperative enterprise law. The preliminary project approval documents are included as appendices when the contract is submitted for formal approval.

Documents required: application letter for establishing the JV; feasibility study report (if any) and approval documents for the project; application for registration of the name of the enterprise approved by the provincial or municipal AIC; written comments on the project by various government departments such as environmental protection, fire services, health and land administration; business licenses of the parties concerned and certificates of their legal representatives; contract and articles of association duly signed by the legal representatives of the JV parties; and a list of the members of the Board of Directors.

### **Stage 3:**

Business License

The JV should register with the local AIC and apply for a business license within 30 days upon receipt of the approval certificate. The local AIC will issue a business license within 10 working days to projects that have passed the examination. The date the business license is issued will be considered the official date of establishment of the enterprise.

Having acquired the business license, the JV should complete such procedures as applying for an official seal and enterprise code, opening bank account, and registering for tax payment and customs declaration with the local departments for public security, technical supervision, taxation, customs, finance, foreign exchange administration, banking, insurance and goods inspection.

(Top)

## Setting up WOFEs

### Stage 1:

#### Preliminary Approval - Project Proposal

The application procedures for setting up WOFEs are simpler. A project proposal should be prepared by the foreign investors and submitted directly to local authorities. The foreign investor may appoint a local agent to liaise with the government. The foreign investor should thus sign an authorization letter stipulating the agent's scope of services, responsibility and fees.

Generally, the authority will give an official reply within 30 days upon receipt of the proposal and other relevant documents. The approval or rejection letter will be issued to the foreign investor. Having received a favorable reply, the foreign investor in a WOFE may apply to the local AIC to register the company's name.

Content of report: objectives of the WOFE, business scope, scale of operation, products to be produced, technology and equipment to be used, land area required, conditions and quantities of water, electricity, gas and other resources required, and requirements for public facilities.

### Stage 2:

#### Formal Approval - Articles of Association

After the foreign investor receives a written reply from the relevant government authorities, a formal application supported by all the required documents should be filed with the local Ministry of Commerce at the county, municipal or provincial level. After receiving formal approval, the foreign investor should apply to the Ministry of Commerce at the county, municipal or provincial level for an approval certificate by presenting all the necessary documents.

Documents required: application letter for establishing the WOFE; feasibility study report (if any); articles of association; list of the legal representatives or members of the Board of Directors; foreign investor's legal papers and credit report; list of materials to be imported; written replies from the local approval authorities at county level or above; application to register the name of the enterprise approved by the provincial or municipal administration AIC; comments on the project by various government departments such as environmental protection, fire services, health and land administration. In cases where two or more foreign investors are involved, copies of the contracts signed by them should be submitted to the approval authority for the record.

### Stage 3:

#### Business License

Upon collection of the approval certificate, an application for a business license should be filed with the provincial or municipal AIC within 30 days. The local AIC will issue the business license to projects that have passed the examination within 10 working days. The date the business license is issued will be considered the official date of establishment of the enterprise.

Having acquired the business license, a JV should complete such procedures as applying for an official seal and enterprise code, opening a bank account and registering for tax payment and customs declaration with the local departments for public security, technical supervision, taxation, customs, finance, foreign exchange administration, banking, insurance and goods inspection. <sup>(Top)</sup>

## Setting up Representative Offices

A representative office may not engage in profit-making activities. However, it may engage in any of the following functions: conducting research and providing data and promotional materials to potential clients and partners; conducting research and surveying for its parent company in the local market; liaising with local and foreign contacts in China on behalf of its parent company; acting as a coordinator for the parent company's activities in China; making travel arrangements for parent company representatives and potential Chinese clients; and other business activities that do not generate profits.

### Stage 1:

Appoint an Agent

The applicant appoints an agent, which must be a Foreign Enterprise Service Company or "FESCO" in mainland China. The local agent must be authorized by Ministry of Commerce of the PRC to handle representative office applications.

### Stage 2:

Submission of Applications

On behalf of applicant, the Chinese agent submits all required documents to the provincial Ministry of Commerce.

Documents required: application letter signed by the Chairman of the Board or General Manager; the incorporation documents of the company; the previous year's financial statement; original bank reference letter attesting to the company's financial status; letter appointing the chief representative signed by Chairman of Board or General Manager with company stamp, as well as the chief representative's resume, copies of his/her identification card, passport and photos; and a copy of the leasing agreement for the representative office. Other documents may be requested by the authorities.

### Stage 3:

Business Certificate

Having obtained the approval permit from the provincial or municipal Bureau of Commerce, the foreign investor should proceed promptly to the provincial or municipal AIC for registration and acquire a business certificate.

### Stage 4:

Post-Registration Formalities

Other formalities to be handled by the resident representative:

- Complete residence application procedures with local public security bureau by presenting registration certificate, representative certificate and approval certificate.
- Apply to open a bank account by presenting registration certificate and approval certificate to local foreign exchange administration.
- Apply to customs for permission to import office equipment, daily necessities and vehicles for use by the representative office and its personnel.
- Complete tax payment registration procedures at the local tax office.
- Appoint Foreign Enterprises Service Company or "FESCO" to recruit local staff. (Top)

## Intellectual Property

### Trademarks

Application for Trademark Registration

Applications for trademark registration are handled in accordance with China's Trademark Law and its implementation regulations.

The Trademark Office under the State Administration for Industry and Commerce (SAIC) is the government authority for the registration of trademarks in China. Trademark Affairs Offices set up in various major cities are trademark agents designated by the state and are under the supervision of SAIC. The Trademark Review and Adjudication Board, also under SAIC, is responsible for handling disputes related to trademarks.

Foreign-Invested Enterprises (FIEs) may apply for trademark registration in China either directly or through trademark agents. Foreign enterprises wishing to do the same should appoint agents designated by the state to handle trademark registration for foreign parties.

The period of validity of a registered trademark is 10 years, counted from the date of approval of the registration. The period of validity of each renewal is 10 years, counted from the day immediately following the expiration of the preceding validity period.

Documents required for trademark registration: Application for Trademark Registration, power of attorney (if any), and five copies of the reproductions of the trademark. If color is claimed, five copies of the color reproductions of the trademark, and one copy of the black and white design thereof. The reproductions of the trademark must be clear and easy to be pasted up and should be printed clearly on smooth durable paper or submitted as photographs, the length and width of which should be less than 10 cm but more than 5 cm each.

Application for License of Registered Trademark and Transfer of Trademark

To license a trademark, both the licensor and licensee should submit an Application for License of Registered Trademark to the Trademark Office, while the application procedures are to be completed by the licensee. Upon approval granted by the Trademark Office, a certificate of approval will be issued to the licensee and the license will be announced.

To transfer a trademark, the transferee should complete the procedures for the transfer with the Trademark Office by presenting the relevant supporting documents or legal documentation. When transferring the exclusive right to use a registered trademark, the transferor should transfer simultaneously the same or similar trademarks registered by him for the same or similar goods.

### Patents

Applications for patent registration are handled in accordance with China's Patent Law and its implementation regulations.

For invention patents, early announcement of the application can be made upon request. For utility model and design patents, examination is only carried out as a kind of formality.

The State Intellectual Property Office is responsible for handling and examining patent applications and granting patent rights in accordance with the law nationwide.

FIEs applying for patents may either submit their applications directly or appoint designated patent agents. Due to the technical complexity involved in patent application, FIEs are advised to appoint designated agents in order to better protect their rights. Foreign enterprises applying for patents in China should appoint an agent authorized by the State Intellectual Property Office to deal with foreign applications.

### **Protection of Intellectual Property Rights**

To provide effective protection for foreign investors, the Chinese government has put forth great effort to improve its intellectual property system in the past few years. Applications for patents increased from 170,682 in 2000 to 828,328 in 2008.

China's intellectual property legislation stipulates that infringements of intellectual property rights (IPRs) are dealt with by administrative procedures and legal proceedings.

In terms of civil liabilities, the infringer may be ordered to stop the infringing act, eradicate the damage done, and make public apologies or compensate for damages. Administrative measures and criminal liabilities include warnings, orders to stop the infringing act, confiscation of unlawful gains, fines, and compensation for damages.

When an IPR infringement dispute arises, the interested parties may resort to mediation. If mediation is not a preferred option, or if mediation has failed, or if one of the interested parties refuses to abide by the outcome of mediation, legal proceedings may be instituted in the people's court. The interested parties may also request the relevant administrative approval for actions. <sup>(Top)</sup>

### **Environmental Protection**

In recent years, the Chinese government has assigned greater importance to environmental protection. The government has called for factory clusters that are major polluters to move out of the city to rural areas. To improve environmental conditions, the government has imposed strict requirements on enterprises that make investments in cities.

Foreign-invested enterprises have to abide by the regulations on environmental protection promulgated by the State Environmental Protection Agency and the former Ministry of Foreign Trade and Economic Cooperation, i.e., the Law of Environmental Protection of the People's Republic of China, the Stipulation of Environmental Protection for Construction Projects, and the Notification on Strengthening Environmental Protection for Foreign Invested Enterprises.

#### **The regulations can be summarized as follows:**

- 1 Foreign investors in China must abide by the laws, regulations and stipulations for the environmental protection of the country. They must prevent and treat pollution, and adhere to the management and supervision of the environmental protection departments. Foreign-invested projects must follow all technology policies and relevant requirements for the environmental protection of the country.
- 2 Importation of raw materials, products, manufacturing techniques and equipment that cause pollution is strictly prohibited.

- 3 All foreign-invested projects with an environmental impact must abide by the country's regulations for construction projects and must carry out a ratification of the environmental impact assessment. The department of foreign trade and economic cooperation and other governmental agencies shall not ratify the establishment of the foreign-invested enterprise unless the environmental impact assessment is ratified.
- 4 Foreign-invested projects must proceed by following the ratified environmental impact assessment and the "Guideline for Environmental Protection Designs for Construction Projects." After the completion of the project, waste discharge must meet the national waste discharge standard. Waste discharge rationing practices must also be followed where applicable.
- 5 Before manufacturing can commence officially, enterprises must abide by the stipulated procedure for examination and inspection by the environmental agencies. Only projects graded as satisfactory according to the national standard can begin operations. (Top)