

reshuffle and rejuvenate the State-owned sector in light of the central government's reform policy. According to the economic blueprint of Shanghai, the contribution of the non State-owned economy to the GDP will be increased to about 40% by 2005. Making room for market-oriented capitalisation, State investment will gradually withdraw from traditional industries such as food, drink, plastics and metal, and switch to the high-tech and pillar industries, such as fine steel, petrochemicals, automobile, electronics and information technology. By 2005, telecommunications and computer software development are expected to make up 13% of the city's GDP. Meanwhile, the city will further support four new industries — bio-pharmaceuticals, environmental protection, new materials and logistics — in the hope that they become new pillars of economic growth.²

Competitiveness analysis

According to the *Blue Book of City Competitiveness: Annual Report on Urban Competitiveness (No. 2)* (the "Report"),³ Shanghai ranks first in aggregate competitiveness among cities in mainland China. The statistics presented in the Report shows Shanghai's high rankings in market share, per capita income, aggregate production rate and employment opportunities.

The competitiveness of Shanghai human resources also ranks among the top, according to the Report. The local talents of Shanghai have a comparatively high knowledge level. They are considered more innovative, eager to learn new things and sometimes entrepreneurial. Compared with the fellows in the hinterlands, the Shanghainese present stronger legal consciousness and a heightened awareness of individual rights in their social dealings.

The enterprise competitiveness of Shanghai also ranks top in China. Surveys show that enterprises in Shanghai enjoy a higher level of management standard and are well-positioned in targeting the right market and customers. The management personnel are considered more experienced, with stronger capabilities in research and development, production control and quality control. Shanghai companies also score higher in terms of customer service and quality products.

Moreover, Shanghai is working to become an internationalised urban habitat, which is particularly appealing for western expatriates and therefore makes the city an attractive location for multinationals' regional headquarters. According to the Report, the living environment of Shanghai is rated the best in China. The living facilities and education related resources are also outstanding. In any case, it is a dynamic cosmopolitan city.

Of particular interest to foreign investors, Shanghai has probably the most friendly business environment in mainland China. In respect of the support for business, human resources and capital flow, Shanghai is considered one of the best cities in mainland China, neck-and-neck with Beijing. Shanghai's technological competitiveness ranks

2 All the figures and statistics used in this chapter, unless otherwise indicated, are available at the official websites of Shanghai municipality, including www.smert.gov.cn and www.shanghai.gov.cn. See also "Briefing on Shanghai Foreign Economy & Investment 2005" presented by Shanghai Municipal Foreign Economic Relation and Trade Commission ("SMERT") on 12 January 2005.

3 Ni Pengfei (et al), Social Sciences Documentation Publishing House, 2004.

second in China behind Beijing's, but Shanghai's agency fees are lower compared to those of Beijing. The favourable location of Shanghai is essential to its economic development, and the business facilities and infrastructure system are excellent. Coupled with a stable political situation and secure investment environment, there is a business-friendly atmosphere and law-abiding culture in Shanghai compared with some other places of China. The local government is also well regarded as a sophisticated decision-maker responsive to foreign investors' concerns with superior capability in financial management and government administration.

According to the Report, in many areas Shanghai seems to be an indisputable winner among the Chinese cities. That, however, does not mean Shanghai is near to perfect in terms of its attractiveness to foreign investors. For instance, the municipal government still needs to strive (as it has pledged) to raise the level of legislative and regulatory transparency. As indicated in the Annual White Papers of the American Chamber of Commerce, expatriates have complained that there are not enough international schools to meet the surging influx of expatriates' children. The traffic jams and electricity shortages also reflect problems with the city's infrastructure against a backdrop of the booming and heated economy in the region. Shanghai still has a long way to go in areas like protection of intellectual property rights.

Despite the above, Shanghai is playing a winning game against its rivals in China, as it positions itself as an economic engine, financial hub, logistics centre, exhibition centre and ideal friendly urban residential area. While there is always room for improvement, Shanghai has the potential and the capability to grow into an internationalised multi-functional city.

Shanghai is a magnet in attracting foreign investors as well as western expatriates. Cecilia Yang, Vice-president of Sales and Marketing at Mary Kay Cosmetics in Shanghai, commented on choosing Shanghai as a site for its China headquarters as follows:

"We chose Shanghai over Beijing and Guangzhou for our China headquarters because we view Shanghai as China's fashion capital. If you want to lead the market, you have to be in the place where the market leader is. So you need to be in Shanghai. Our products are fashionable and glamorous. Beijing is very formal and grand, but not glamorous. We need to be in a place that projects glamour. Initially Guangzhou was more open-minded and had more disposable income. Now things are changing very fast. I'm extremely impressed with the speed of improvement in infrastructure here. When I first came here in 1994, I had to rent a mobile phone because waiting for a regular phone line or buying a mobile phone took six months. Now you don't have to wait for a phone line and it's no problem to buy a mobile phone. It used to take me an hour and a half to get to the Hongqiao Airport from the Hilton Hotel. Now it takes me half an hour at most. We feel well-supported here in terms of infrastructure. Also, in Shanghai, there are pools of talent. Many applicants come in with foreign company experience already. It has not been that hard for people to accept new ways. People are very receptive. You can mould them."

Her opinion, in some ways, represents the general experience of foreign companies in Shanghai. As a traditional manufacturing base with some of the best universities in the

technology and development trend, and therefore facilitate the fast growth of the auto industry in the region.

Anting, the town where SIAC is located, now has the largest auxiliary parts and components manufacturing zone in China, home to the suppliers of GM, Ford and DaimlerChrysler. By now, there are approximately 100 automotive parts manufacturers (domestic and foreign) with a total investment of RMB35.5 billion (US\$4.3 billion), among which 46 companies belong to Shanghai Automotive Group. Having Anting as the centre of a 500 km-radius circle, the area holds large and middle-scaled automotive corporations such as Shanghai GM, Shanghai VW, Nanjing Fiat, Anhui Chery, Yangzhou Yaxing, Anhui Jianghuai and Fujian Southeast Automotive Company, etc. As planned, the Automobile Museum and Automobile Exhibition Centre will also be built in Anting in 2005. According to the Tenth Five-year Plan (2001–2005) of Shanghai, Anting will be a key marketing and distribution centre of automobiles in Asia Pacific Region.

While the auto manufacturing presents a rapid-growth trend, the development of auto-financing for individual consumers lags behind. China agreed to open its auto financing market to foreign competition as part of its commitment to enter into the WTO in late 2001. Previously, this field was dominated by State-owned banks. By now, units of auto companies such as Volkswagen, General Motors, Toyota and DaimlerChrysler have also received approval to offer auto-finance service in China. But regulations limit the ability of foreign auto-finance firms to raise capital within China to fund lending operations. Borrowing from banks is practically the only funding channel these companies are allowed now, which is the main obstacle for their growth. While at least 80% of cars sold in the US and 60% to 70% sold in Europe are financed, in China it is likely to be 10% or less.²² The reform of the funding channels and credit advisory system in China will facilitate the development of the auto industry in the country.

¶2-009 Information technology industry in Shanghai

As one of the six pillar industries in Shanghai, the information technology industry is based on information service and the production of seven categories of products, i.e. integrated circuits, telecom, computer and internet, electronic vacuum devices, new electronic components, video and audio, and software. According to statistics, the total revenue of the IT industry in Shanghai amounted to RMB438 billion (US\$53 billion) in year 2004, increasing by 47.7% compared to year 2003. Its added value was RMB84 billion (US\$10 billion) in year 2004, up 35% from the previous year.

The information service industry, an integration of digital information and communication technology, has been a fast-growing industry in Shanghai. The earnings of the information service industry in 2004 stood at RMB65.56 billion (US\$7.93 billion) with an annual growth of 30%. According to official estimation, the contribution of the information service industry to the Shanghai's GDP will come up to 20% in 2005 from 10% in year 2003. As of today, there are five Shanghai-based internet service companies such as Shanda, 51job and Ctrip, etc. that have been listed on NASDAQ. Digital and multimedia communication, IP phones, mobile SMS and other technologies are

²² Jeff Meyer, "Volkswagen Finance Unit Plans to Expand Its Growth in China", *the Wall Street Journal*, 21 March 2005.

advancing the development of the information service industry. In addition, the digitisation of Shanghai's broadcasting industry is quickening its pace and becomes an important driving force to boost the development of the information service industry. Today, Shanghai has the largest cable TV network and the densest radio-communication facilities in the world.

Aiming to build a "Chinese Silicon Valley", Shanghai has also set a strategic goal to boost its integrated circuit industry during the Tenth Five-year Plan period (2001-2005). A large production base of integrated circuits concentrating on Zhangjiang High-Tech Park has been built. Along with a sealing and packaging base in Jinqiao, Songjiang Export Processing Zone and Nanhui IT Development Zone, a designing base is built centring on Zhangjiang and Caohejing High-Tech Parks. IC-related industries in Shanghai have a total investment of US\$8 billion. Six 8-inch-chip production lines are scheduled to be built, or are currently being built. In the long run, the IT industry will help Shanghai rise as the biggest centre of integrated circuit designing, production, testing and assembling in China.

The software industry plays an increasingly important role in the development of the IT industry of Shanghai. There are seven software industry bases in Shanghai, including the Pudong Software Park. The products of this industry have been used in banking, futures, business management, finance and securities, etc. According to the statement of Shanghai Information Technology Development Commission, revenue of the city's software industry is expected to grow by 50% annually with increasing foreign investment and exports in the next few years. The revenue hit about RMB30 billion (US\$3.61 billion) in 2004, compared with RMB20.1 billion in 2003. This figure also accounts for approximately 12.5% of the total revenue of the industry in China in 2003. Meanwhile, exports of Shanghai's software industry reached US\$265 million in 2003, accounting for 13.3% of China's software exports. Since many foreign giants have set up R&Ds, research and development centres and technology support centres in Shanghai, the software industry in Shanghai is becoming more globalised. So far, Microsoft Corp, SAP AG, Oracle Corp and Autodesk Inc have established R&D centres and sales offices in the city. Currently, there are about 1,400 software enterprises in the city. The Commission forecasts the city will need about 100,000 software professionals next year but only about 60,000 are expected to come into the market. What's worse, Shanghai's local universities and colleges can only provide about 5,000 software graduates annually. The shortage of software engineers is nationwide. The Ministry of Information Industry forecasts that the software engineer shortage would reach 400,000 annually in 2005 or 2006. This is believed to be an obstacle in the development of the software industry of Shanghai.

According to the blueprint of the Shanghai's IT industry, by 2007, the information service of the city will have reached the level of metropolis of developed country with a revenue of approximately RMB50 billion (US\$6 billion); the building of a "digitised Shanghai" will by then be achieved; the software industry of Shanghai will be better positioned in China; and Shanghai will be one of the most important information exchange hubs of China and Asia Pacific Region and a key manufacturing base of IC industry of the world.

Basic requirements for establishment application	<ol style="list-style-type: none"> (1) Having independent legal person status; (2) The total assets of parent company shall be no less than US\$400 million; (3) The cumulative investments by parent company in PRC shall be no less than US\$30 million; (4) Investment in or management with authorisation of more than three corporations inside and outside PRC, and undertaking the responsibility for managing and serving such corporation; (5) The foreign-invested companies in conformity with the aforesaid clauses can apply to be recognised as RHQs; (6) If applied as a management company, the RHQs shall have a registered capital of no less than US\$2 million; (7) A foreign multinational corporation which has the independent legal person status and which accords with all State provisions concerning foreign investment guidance and contributes outstandingly to the economic development of the region where it is located can apply for establishment of regional headquarters with reference to the above requirements.
Tax incentives	<ol style="list-style-type: none"> (1) RHQs with R&D function receive the same preferential treatment as high and new technology enterprises; (2) RHQs registered in Pudong Area receive Pudong preferential policies; (3) Tax refund applies to the exports of a multinational procurement centre or logistics centre set up by RHQs.
Import / export rights	The multinational procurement centre or logistics centre set up by a RHQ may apply for trading rights (import and export), and their exports are eligible for tax refunds.
Foreign exchange ("FOREX") management	RHQs that manage investment may set up a unified internal capital management system; capital management involving FOREX should be conducted in accordance with State regulations.
Visa	<p>Foreign personnel who require multiple temporary entry may apply for multiple entry visas for terms of one to five years, with less than one year per stay;</p> <p>Foreign personnel who require long-term residence in Shanghai may apply for the Foreigner Residence Permit valid for one to five years or for multiple work visas.</p>
Main legal basis	<i>Shanghai Municipality, Encouraging the Establishment of Regional Headquarters by Foreign Multinational Corporations Tentative Provisions</i> promulgated by Shanghai Municipal Government on 20 July 2002, which came into effect as of the date of promulgation.

Establishing a R&D Centre

Forms of investment	The form of foreign-invested R&D centre may be an EJV, a CJV or a WFOE established by foreign investors (including companies with an investment nature established by foreign firms) according to law, or the independent departments and branches inside the foreign enterprises.
Business scope	<ol style="list-style-type: none"> (1) A R&D centre is an institute engaging in the research and development or experimental development (including the pilot testing of research and development activities) in natural science and relevant scientific and technological fields, which may include contents such as basic research, product application research, high-tech research and social welfare research; (2) The centre may transfer its own research and development achievements, or cooperate with domestic scientific and technological institutions through entrustment or joint development to carry out the cooperation and development; (3) R&D subjects do not cover the items prohibited in the <i>Foreign Investment Industrial Guidance Catalogue</i>; (4) The centre must not engage in other technology trading of which the research and development technical achievements do not belong to the centre and production activities other than the pilot testing; (5) R&D centres shall be exclusive of training centres.
Examination and approval authority and application procedures	<ol style="list-style-type: none"> (1) Foreign firms which invest to set up a R&D centre by means of an EJV or a CJV and sole investment must be examined and approved by provincial examination and approval departments of MOFCOM; (2) SFIC together with Shanghai Municipal Development and Reform Commission, Shanghai Municipal Economic Commission, and Shanghai Municipal Science and Technology Commission are responsible for the examination and verification, examination and approval of the establishment of R&D organisations with foreign capital in Shanghai. (3) R&D organisations, when applying for establishment in Shanghai, are required to submit to the examination and approval authorities relevant materials in accordance with the relevant regulations stipulated by the State and the municipality. Research and development organisations established with foreign capital should submit to the examination and approval authorities before 31 March each year the reports on the operation and activities of the previous year.

refund in the amount of 3.5% of profits of such companies for the subsequent two years.

- 50% exemption of stamp duty on the purchase of production premises for IC enterprises with a business term of 10 years or more for the production of IC with a diameter of over eight inches and a circuit width of less than 0.25 micrometre.
- Application eligibility for back-end research personnel working for IC enterprises.
- Import duty and import VAT exemptions for the import of self-used equipment, its accessories and accompanying technology used by IC enterprises and software enterprises.
- Import duty and import VAT exemptions for raw materials and consumables used by IC enterprises with total investment exceeding RMB8 billion or IC circuit width of less than 0.25 micrometre.
- Express 10-hour processing for the export and import of IC products.
- The favourable land use price is reserved for IC projects by 2005. Favourable rent is offered to software companies.
- IC enterprises with a business term of more than 10 years may apply for a suspension of payment for land use fee or land grant fee.

3-011 Jinqiao Export Processing Zone

Overview

The Shanghai Jinqiao Export Processing Zone ("JQEPZ"), founded in 1990, is the first State-level key development zone named as an "export processing zone" with approval of the Chinese government. JQEPZ is located in the middle of the Pudong New Area and has a planned area of 27 km². JQEPZ mainly develops export processing and high-tech industries. The Shanghai Jinqiao Administrative Commission is the administrative body, and Shanghai Jinqiao (Group) Co., Ltd. is responsible for infrastructure and construction.

The JQEPZ (South Area) ("JQEPZ(SA)") was established in September 2001 with the approval of the State Council to expand and integrate with the JQEPZ (North Area). The JQEPZ(SA) is located in the Southeast of the Pudong New Area and has a planned area of 2.8 km². JQEPZ(SA) is only 10 km from Shanghai Pudong International Airport, 38 km from Shanghai Hongqiao Airport, 19 km from Shanghai Waigaoqiao Harbor and 60 km from Yangshan Deep Water Harbour. Main industries encouraged in the EPZ include export-oriented components manufacturing, assembling industries with components purchased in domestic markets for export, and processing industries with components from abroad. Three types of enterprises may be established in JQEPZ:

- Export processing enterprises;
- Warehousing enterprises rendering production services to enterprises in the EPZ; and
- Logistics service enterprises.

In 2002, an area of 1.55km² within JQEPZ(SA) was fenced to form the Customs Supervised Area.

Incentive Policies

Tax policies applicable to enterprises in the customs-supervised area:

Tax	Tax Rate
(1) Import Duty and VAT	
Equipment for manufacturing	free
Spare parts for maintenance, mould for manufacturing	free
Construction materials and facilities	free
Raw materials, parts, package and consumption materials	free
(2) Enterprise Income Tax	15%
Manufacturing FIE with a term of over 10 years	2-year free and 3-year half (starting from the first profit-making year)
FIEs who export over 70% of their output value	10%
Construction materials and facilities	free
(3) Business Tax	free
(4) VAT	free

In addition to the above tax incentives, enterprises established in the Customs-supervised Area enjoy other benefits. These include:

- Sales to clients in other customs supervised areas or free trade zones are VAT free.
- No duty deposit or customs logbook is required when exporting overseas; thus, cash flow and work efficiency are improved.
- Round-the-clock customs service is provided. Customs clearance takes only six hours in the customs supervised area in contrast with 48 hours of other customs offices.
- Renminbi/foreign exchange conversion is not compulsory.
- The minimum registered capital of an FIE is only US\$70,000.
- VAT refund is available at the rate of 13% for water, electricity and natural gas consumed in producing export products.
- FIEs in JQEPZ can receive subsidies under relevant policies of the Pudong New Area.

The basis of calculation of Urban Real Estate Tax is similar to Real Estate Tax. The tax liability is calculated based on the original value of the property less deduction of 20% at a tax rate of 1.2%, or on the rental incomes derived from the property at a tax rate of 18%. The original value of the property refers to the cost of the property recorded in the entity's fixed assets account in accordance with the PRC tax regulations. If there is no such cost of property or the cost is not genuine, the tax authorities can assess the taxable value of the property.

Vehicle and Vessel Usage Tax

Pursuant to the PRC, *Vehicle and Vessel Usage Tax Tentative Regulations* (《中华人民共和国车船使用税暂行条例》), the tax is levied on individuals and entities that own and use vehicles or vessels within the Chinese territory. It is not applicable to FIEs, foreign enterprises, and foreign nationals, which are subject to Vehicle and Vessel Licence Tax instead.

The tax liabilities on motor or non-motor vehicles are levied based on fixed annual tax amounts per vehicle (except for freight vehicles). The fixed annual tax amount ranges from RMB1.2 to RMB320 per vehicle. Tax liabilities on mechanical or non-mechanical vessels are levied based on fixed annual tax amounts per tonnage of the vessels. The fixed annual tax amount ranges from RMB0.6 to RMB5 per tonnage of vessels.

Vehicle and Vessel Licence Tax

Pursuant to the PRC, *Vehicle and Vessel Licence Tax Tentative Regulations* (《中华人民共和国车船使用牌照税暂行条例》), the tax is levied on individuals and entities that own and use vehicles or vessels within the Chinese territory. It is only applicable to FIEs, foreign enterprises, and foreign nationals. The basis of calculation of the tax liabilities is similar to that for Vehicle and Vessel Usage Tax.

Stamp Duty

Stamp Duty is a tax on taxable documents relating to economic transactions. Applicable documents include purchase and sales contracts, processing contracts, lease agreements, loan contracts, technical contracts and other vouchers as stated in the PRC, *Stamp Duty Tentative Regulations* (《中华人民共和国印花税暂行条例》).

The types of dutiable documents, applicable duty rates, and the persons liable to pay stamp duty are as follows:

Table 9

<i>Taxable vouchers</i>	<i>Duty rate</i>	<i>Persons liable to pay stamp duty</i>
Purchase and sales contracts	0.03% of the purchase or sales price	The parties to the contract
Processing contracts	0.05% of the income from processing or other contracting work	The parties to the contract
Engineering project surveying and design contracts	0.05% of fees received	The parties to the contract
Construction and installation project contracts	0.03% of the contract	The parties to the contract
Property leasing contracts	0.1% of the lease fee. Stamp duty of RMB1 shall be paid if the payable amount is less than RMB1	The parties to the contract
Commodity transportation contracts	0.05% of the transport costs	The parties to the contract
Warehousing contracts	0.1% of the warehousing fee	The parties to the contract
Loan contracts signed between banks or other financial institutions and borrowers	0.005% of the amount borrowed	The parties to the contract
Property insurance contracts	0.1% of the insurance premiums	The parties to the contract
Technology contracts	0.03% of the stated value	The parties to the contract
Documents of transfer of property rights	0.05% of the stated value	The parties which initiated the contract
Account Books	0.05% of the total amount of the original value of fixed assets and self-owned working capital. Other account books shall have stamp duty levied at RMB5 per book	The parties which established the account books
Documentation of rights and licences	RMB5 per document	The recipients of the documents and licences

Category	Name	Focal Industries
State-level Economic and High-tech Development Zone	Caohejing High-Tech Park	micro-electronics, optical electronics, PC manufacturing, software, and new materials
	Minhang Economic & Technological Development Zone	machinery equipment, bio-pharmaceutical industry, beverage, and snack food
	Hongqiao Economic & Technological Development Zone	commercial trade and exhibition
Municipal-level Industrial Zone	Shanghai International Automobile City	automobile trading, manufacturing, R&D, and relevant exhibition, sports and tourism
	Shanghai Chemical Industry Park	petrochemicals, natural gas, fine chemicals, and macromolecule materials processing
	Jiading Industrial Zone	automobile components, optical electronics, and environmental protection equipment manufacturing
	Songjiang Industrial Zone	microelectronics, new materials, bio-pharmaceuticals, food and nutrition products
	Qingpu Industrial Zone	telecommunication, bio-pharmaceuticals, modern textile materials, and precision machinery processing
	Xinzhuang Industrial Zone	computer and telecommunication equipment, household appliance, and new materials
	Baoshan Industrial Zone	fine steel expansive processing, modern machinery manufacturing, transportation facilities for cargo containers, and ship components
	Jinshan Industrial Zone	fine chemicals, construction materials, and food processing

Category	Name	Focal Industries
	Kangqiao Industrial Zone	electronics and electric appliance, automobile components, and new construction materials
	Shanghai Comprehensive Industrial Development Zone	automobile components, machinery manufacturing, packing and printing
	Chongming Industrial Zone	ship manufacturing and repairing, and green food processing
	Zizhu Science-based Industrial Park	information, new materials, bio-engineering, and modern agriculture
	Spark Development Zone	textile fabric, pharmaceuticals, paper-making, and construction materials

Importing and exporting goods

15-007 Importing and exporting goods

This section will outline the customs clearance process for import and export transactions as well as the types of taxes to be paid on these transactions.

15-008 Import/export customs clearance process

As outlined in the flowchart below, the customs clearance process for import or export entries involves a number of steps. Importers or exporters in Shanghai, or their nominated customs broker/agent, are required through the H2000 customs clearance and declaration system to input the customs declaration information in EDI terminals installed at different local customs offices (ie Airport Customs, Pudong Customs or WGQ Port Customs, etc).

The declaration procedure can be illustrated as follows:

Intellectual property protection in China — regulations and recent status

¶6-001 Legal skeleton for intellectual property protection in China

To carry out its reform policy, China has enacted and enforced a series of intellectual property ("IP") laws and regulations since the 1980s. Prior to its accession to WTO, China undertook a legislative overhaul of its IP laws to comply with the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPs Agreement"). Table 1 provides a primary framework of IP protection in China. More details are as follows.

Patent

The People's Republic of China ("PRC") enacted its first *Patent Law* (《中华人民共和国专利法》) on 12 March 1984 and amended in 1992 for the first time. To enhance consistency with the terms of major provisions and protection standards under the TRIPs Agreement, the *Patent Law* was amended for the second time in August 2000, which took effect on 1 July 2001. In addition, for better implementation of the *Patent Law*, the PRC government amended its Implementing Rules in 2002.

The current *Patent Law* is distinguished from the previous one in four aspects:¹

- (1) patent owners have the right to prevent others from offering for sale the patented product without their consent;²
- (2) the final decision on re-examination for utility models and design applications, and that on invalidation of patents, shall be made by people's courts;³
- (3) patent owners may, before instituting legal proceedings, request that the people's court take measures against infringing acts and for property preservation;⁴ and
- (4) the conditions for granting a compulsory licence shall be further clarified and made consistent with the TRIPs Agreement.

According to the *Patent Law*, the Patent Administration Authority under the State Council is in charge of the administration of patent affairs, such as the acceptance and examination of patent applications, and the granting of patent rights.

Trademark

The first version of the *PRC, Trademark Law* ("Trademark Law") (《中华人民共和国商标法》) took effect on 1 March 1983. The *Trademark Law* was first amended on 22 February 1993 becoming effective on 1 July 1993. A second amendment was made on 27 October 2001 and took effect on 1 December of the same

1 See *Report of the Working Party on the Accession of China*, World Trade Organization, WT/ACC/CHN/49, 1 October 2001.

2 *Ibid.*

3 See Art 41 and 46 of the *Patent Law*.

4 See Art 61 of the *Patent Law*.

year. The PRC enacted the *Trademark Law Implementing Rules* on 10 March 1983, which was subsequently amended on 13 January 1988 and 15 July 1993. On 3 August 2002, the new *PRC Trademark Law Implementing Regulations* (《中华人民共和国商标法实施条例》) were promulgated, which took effect on 15 September 2002.

In order to protect the trademark owner's exclusive rights, the *Trademark Law* provides not only civil and criminal liabilities, but also administrative punishment on trademark infringement. This "dual-protection system" for the protection of exclusive rights in trademarks may prevent trademark infringements in a more timely and effective manner and protect the legitimate rights and interests of these exclusive rights.⁵

According to the *Trademark Law*, the Trademark Office of the Industry and Commerce Administrative Department under the State Council shall be responsible for the registration and administration of trademark matters.

Copyright

The first *PRC, Copyright Law* ("Copyright Law") (《中华人民共和国著作权法》) was enacted on 7 September 1990, which became effective on 1 June 1991. The amendment of the *Copyright Law* was made and took effect on 27 October 2001. The PRC implemented the new *Copyright Law Implementing Regulations* (《中华人民共和国著作权法实施条例》) on 15 September 2002 and simultaneously abolished the original *Implementing Regulations* promulgated by the State Copyright Administration on 30 May 1991.

Pursuant to Art 3 of the *Copyright Law*, computer software ("software") is a category of legitimate works protected by law. To further protect the rights and interests of the right holders of computer software, on 20 December 2001, the State Council promulgated the *Protection of Computer Software Regulations* (《计算机软件保护条例》), which became effective on 1 January 2002. Later, on 20 February 2002, the National Copyright Administration promulgated the new *Registration of Computer Software Copyright Procedures* (《计算机软件著作权登记办法》) to govern matters concerning software copyright registration.

Trade secrets

So far, the PRC has not yet promulgated a single body of law to protect trade secrets. The stipulations concerning the protection of trade secrets may be found in the *Anti-unfair Competition Law* effective on 1 December 1993, the *Criminal Law* effective on 1 October 1997 and various regulations promulgated by the State Council, the State Administration for Industry and Commerce ("SAIC"), the Ministry of Labour and Social Security, etc.

5 *Supra* note 1.

¶7-005 Required time-off

The *Labour Law* entitles employees who have worked for more than one year to annual vacation with pay, but it does not indicate the number of vacation days. A definition of the company's policy is typically covered in the employment contract.

The *Labour Law* provides for ten national holidays, but does not mandate that they be paid holidays. Common practice, however, is to do so. Those days are New Year's Day, Spring Festival (lunar new year), Labour Day and National Day.

Sick leave is not addressed by the *Labour Law*. However, Shanghai has issued specific guidelines which define the number of entitled sick leave days and percentage of wage payment on such days, both based on the length of service. An employee cannot be terminated for illness until after all leave days have expired and a medical grant is paid in addition to any severance pay to which the employee may be entitled.

¶7-006 Unions

China has a single, government-authorised trade union, the All China Federation of Trade Unions ("ACFTU") which consists of provincial, community, municipal and industry federations made up of enterprise unions. It is controlled by the Communist Party and its function has been to transmit social and political values. Historically, it has acted as mediator of government and management, rather than a defender of workers' rights. Independent unions are not recognised by the government and may not represent employees in disputes or collective bargaining.

According to the ACFTU:

- there are 906,000 trade unions with 123 million members;
- 40% of the 2 million private enterprises have trade unions;
- there are 808,000 unions in private enterprises, representing 67% of private sector employees;
- the percentage of unionised employees in the private sector has declined by 11% since 2000.

Of the estimated 400,000 foreign companies in China, about 20% have trade unions.

In August 2004, the National People's Congress initiated a campaign to inspect enforcement of the PRC, *Labour Union Law* (《中华人民共和国工会法》). Encouraged by this government action, the ACTFU announced it will "blacklist" and take legal action against any foreign company that refuses to allow its employees to unionise.

Enterprise-level trade union establishment

Enterprise union establishment and activities are regulated primarily by the *Labour Union Law*, amended in 2001, which covers foreign and domestic enterprises, non-profit institutions and government agencies. China's *Company Law* (《中华人民共和国公司法》) and *Collective Contracts Provisions* (《劳动和社会保障部集体合同规定》) contain some provisions that also apply.

The *Labour Union Law* states that labour unions "should be established" in enterprises with more than 25 employees. While the Law does not specify whether responsibility for union set-up is with the employees or employer, it stipulates that unions are formed by employees on a voluntary basis and organisations or individuals are prohibited from obstructing or restricting employees from establishing or joining a union.

Several local governments have published their own regulations. Shanghai is one of those which require employers to "support" employees to establish unions by providing an environment that facilitates their formation. There is an ambiguity in the *Labour Union Law* about how the process of establishing an enterprise labour union is initiated, but it is clear that once the process has begun, the employer cannot hinder the process and enterprise employees can contact and seek guidance of relevant federation for assistance. Thus, ultimately the decision as to whether or not a labour union is established rests with the employees.

Union duties, activities and funding

Enterprise unions' basic duties are to "safeguard the legitimate rights and interests of workers and staff members". They are expected to:

- represent and organise employees to participate in democratic management and democratic supervision through the workers' congress and other forums;
- implement decisions of members' assembly or congress and higher-level unions;
- educate workers about ideology and develop cultural and sports activities;
- protect the special interests of women workers.

Union officials are entitled to attend any meeting held by company management to discuss issues relating to the immediate interest of employees. The *Labour Union Law* requires enterprises with over 200 employees to have one full-time chairperson position. Union activities and operational costs are funded from employee dues at 0.5% of pay as a general practice and from employer contributions of 2% of the total monthly payroll of all employees according to law.

In practical terms, the law gives enterprise unions the right to negotiate collective agreements, process grievances and mediate labour disputes. However, they have no right to strike. All labour disputes must be handled by consultation, mediation, arbitration or court proceedings.

¶7-007 Appendix — Labour and employment law

The major national labour and employment laws and regulations are:

- *National Bureau of Statistics, Composition of Total Wages Provisions* (《国家统计局关于工资总额组成的规定》), effective 1 January 1990
- *PRC, Wholly Foreign-owned Enterprise Law Implementing Rules* (《中华人民共和国外资企业法实施细则》) promulgated on 12 December 1990 and most recently amended on 12 April 2001

For companies in China, this means that investment in leadership development and management programmes is crucial early on in the operation and will contribute to the company's ability to achieve double digit growth. Interesting for China is the fact that sending high potential local employees to an MBA or EMBA programme is insufficient to cover leadership development needs. Indeed, companies in China must consider a sophisticated portfolio of programmes including rotational assignments, leadership competencies, and succession planning. However, leadership programmes are not enough. The involvement of China general managers and the board of directors is critical in order to make any programmes work. Time spent by senior leadership and even board members with top talent in China will have a substantial financial impact in the long run because it will "produce" the future leadership team required for sustainable growth.

Talent practices

DDG companies are eager to "horde" top talents regardless of their immediate business needs and requirements. For example, they identify and convey top talent status early on, invest in development at a higher rate, and pay differentially. One of the results of this is the ability to retain top talent at a much higher rate than SDG companies (2% voluntary turnover among high potentials v 6% for SDG companies). In addition, DDG companies tend to invest above average time and effort into front-line employees and have a speedy hiring and on-boarding process for new employees. Finally, DDG companies' employees tend to have a much better understanding about their roles, individual, team, and company goals, as well as expectations of their managers.

Translated to the situation in China, it is pertinent that companies should be permanently on the lookout for strong talent, not just to fill open positions during "hiring season". Headcount budgets and workforce planning should leave a high degree of flexibility in order to accommodate "surprise" and unplanned hires. Every single employee should become an "amateur" recruiter, permanently on the lookout for the next potential hire who would fit into their company's culture and would perform well. Furthermore, the hiring process in China may have to be adjusted to the DDG environment in terms of speed and efficiency, utilising locally adapted HR information systems and technology. Finally, company leadership must plan for intense and repetitive communication in China in order to achieve a high degree of commitment and understanding among the workforce.

Performance practices

DDG companies set aggressive and focused goals and establish higher standards for rewards. For example, CEOs of DDG companies achieved only 82% of their targeted short-term incentives in 2002, although their companies achieved double digit growth. Meanwhile, CEOs of SDG companies achieved 103% of their targeted short-term incentives, indicating that the goals for the CEOs of DDG companies are more aggressive. DDG companies are very demanding on their employees, but not punitive. They recognise and reward for the degree of stretch put onto their employees and encourage appropriate risk-taking. Furthermore, DDG companies focus on the long-term performance of the whole — not just their part — by allowing risk-taking and rewards for longer-term results through equity compensation.

One of the unique characteristics of the Chinese culture is the resistance of many individuals to take risks, accept accountability, and make mistakes. Therefore, companies investing here need to pay special attention to develop and foster a company culture that encourages local employees and leaders to take risks and accept mistakes in order to grow. To achieve this goal, foreign leadership and interaction with headquarters must be exemplary in their daily interactions with employees. As for long-term performance rewards, this is a very challenging task in China due to the widespread lack of long-term planning. Foreign equity ownership of Chinese nationals is restricted and stock option programmes of mature companies seem less exciting to Chinese. Hence, to reward long-term performance, localised programmes must be developed, eg supplementary pension plans.

Organisation practices

In DDG companies, governance and decision-making processes are streamlined for speed and driven by strategic intent. DDG companies clearly identify who is involved and accountable; they also implement and execute processes and criteria consistently. DDG companies also foster small unit accountability by promoting agility and speed and fostering collaborative behaviours to keep focus on the "greater good". For example, they leave managers more freedom to determine award recipients for short-term incentives. DDG companies share similar cultural attributes and view their culture as contributing to a competitive advantage; employees in these companies exhibit more:

- confidence;
- high energy and enthusiasm;
- experimentation; and
- pride.

DDG companies are also more likely to outsource in order to gain access to outside expertise, focus on core competencies, and reduce costs of operation.

For companies starting up in China, this means that corporate headquarters abroad should expect to give local management a significant amount of freedom and flexibility in making decisions. In terms of staffing, start-up companies should seek candidates that exhibit self confidence, high energy and enthusiasm, willingness to experiment, and pride in order to prepare for a DDG environment. On the other side, local management in China should encourage collaboration and small group accountability. This fits well into Chinese culture since it does not single out individual "super stars" but promotes team effort and rewards team achievement. Furthermore, companies setting up in China should consider outsourcing non-key functions right from the beginning of operation in order to focus on value-added activities. Potential activities in the people space that could be outsourced include payroll and benefits administration, training, and recruiting.

Execution practices

DDG companies execute their people practices with far greater rigor than SDG companies. For example, they are much more frequently measuring results to determine

(3) application for the business licence from the SAIC.

In order to establish a foreign-invested travel agency, the applicant shall submit the following documents to the CNTA for the industry approval:

- application;
- feasibility study report;
- articles of association of the proposed travel agency;
- the resumes and qualification certificates of the manager and deputy manager of the proposed travel agency;
- credit standing certificate of the foreign investor; and
- facilities in relation to the proposed business.

The CNTA will make the decision as to whether to approve the application within 60 days from the receipt of the required documents. If the decision is positive, the Foreign-invested Travel Agency Business Operation Examination Opinions will be issued by the CNTA. The applicant can then apply for the approval certificate from the MOFCOM. In addition to the Foreign-invested Travel Agency Business Operation Examination Opinions, all other application documents are similar to those required for setting up an FIE. Where the approval is granted, the applicant will be issued an approval certificate on the strength of a Travel Agency Operation Permit from the CNTA.

Having obtained the approval certificate and the Travel Agency Operation Permit, the applicant can then apply for business registration with the SAIC and obtain a business licence.

¶8-016 Approval procedures for foreign-invested advertising enterprise

The industrial governing authority of foreign-invested advertising enterprises is also the SAIC. Under the PRC laws, the establishment of a Sino-foreign advertising joint venture and that of a wholly foreign-owned advertising enterprise shall be processed in accordance with different procedures.

As far as the establishment of a Sino-foreign advertising joint venture in Shanghai is concerned, the Chinese party to the JV shall submit the required materials to the Shanghai AIC. The Shanghai AIC shall issue an opinion after the preliminary examination and report the same to the SAIC for examination and approval. Where approval is granted, the Examination and Approval of a Project of a Foreign-invested Advertising Enterprise Opinions will be issued by the SAIC. The Chinese party shall then submit the required documents to the SFIC for the approval certificate. Lastly, the Chinese party shall, based on the two certificates, complete the registration of the enterprise with the Shanghai AIC.

In contrast, the establishment of a wholly foreign-owned advertising enterprise in Shanghai shall be approved by the central level competent authorities, ie first by the SAIC and then by the MOFCOM. Meanwhile, the investor shall go through the formalities for the registration of the enterprise with the SAIC in Beijing after both approvals are granted.

¶8-017 Approval procedures for foreign-funded medical institutions

Foreign investors are required to set up foreign-funded medical institution in the form of equity joint venture or contractual (cooperative) joint venture. The applicant shall first file an application with the Shanghai Health Administration for establishing a Sino-foreign equity joint venture medical institution in Shanghai. The Shanghai Health Administration will, upon preliminary approval, forward the application documents to the Ministry of Health ("MOH") for final approval. Among which, the establishment of a Sino-foreign joint venture traditional Chinese medicine institution shall also be approved by the State Administration of Traditional Chinese Medicine. After obtaining the approval from the industrial governing authority, the applicant should apply for the approval certificate from the MOFCOM, and then go through registration procedures and obtain the business licence. After the Sino-foreign equity joint venture medical institution is established, it shall apply to Shanghai Health Administration for Medical Institutions Practising Licence.

¶8-018 Approval procedures for Sino-foreign telecommunications enterprises

A foreign investor intending to engage in telecommunication business in Shanghai is required to set up a telecommunication equity joint venture with a Chinese party. To establish an equity joint venture to provide value-added telecommunication services within Shanghai, the applicant shall obtain an industrial approval as well as an investment approval from the Ministry of Information Industry ("MII") and the SFIC respectively. All other telecommunication equity joint ventures require the approval from MII and MOFCOM. The Chinese party will be responsible for applying for the approvals.

¶8-019 Approval procedures for Sino-foreign international trading companies

Foreign investors may set up international trading companies in Shanghai in the form of an equity joint venture. The Chinese party to the proposed joint venture shall submit the required documents, via the SFIC, to the MOFCOM for examination. The MOFCOM will decide whether to issue an official reply and an approval certificate within 90 days. Then, within one month from the date of the approval, the applicant shall go through the registration procedures with the SAIC.

¶8-020 Approval procedures for foreign-invested commercial enterprises

Under the PRC laws, the basic principle is that the establishment of a foreign-invested commercial enterprise in Shanghai shall be examined and approved by the MOFCOM. The foreign investor intending to establish a foreign-invested commercial enterprise in Shanghai shall report and submit the required application documents to the SFIC. The SFIC shall conduct preliminarily review of the document and report to the MOFCOM within one month from the date of receiving all of the application documents. The MOFCOM is required to make the decision of approval or disapproval within three months from the date of receiving all of the application documents and grant the approval certificate upon approval. Where the application is rejected, the MOFCOM shall state the reasons for the rejection.

lodge complaints by logging on the gateway website² of the Shanghai Municipal Government. Furthermore, Shanghai has enacted many preferential policies to attract and retain foreign businesses.

¶9-016 Which vehicle to use

Since the Success Company is primarily interested in establishing and expanding business contacts and promoting its products, as opposed to directly engaging in production or distribution of its products at this stage, it appears that a representative office is the most appropriate vehicle for the Success Company to achieve its business objectives.

¶9-017 Legal nature of representative offices

Representative offices of foreign companies are not independent legal persons under PRC laws, and accordingly, the foreign parent companies bear legal responsibility for all activities of their representative offices.

Representative offices may engage in liaison and promotional activities as well as research and technical exchange on behalf of their headquarters, but are prohibited from engaging in direct profit-making activities. The distinction between "direct" and "indirect" profit-making activities has not yet been clarified under any law or regulation in the PRC or binding court interpretation. Nonetheless, guidelines can be inferred from interpretations issued by the State Administration for Industry and Commerce ("SAIC") and various PRC tax authorities, and based on practical experience.

The following business activities are generally acknowledged by practitioners as acceptable indirect profit-making activities:

Promotion of goods and services

Representative office personnel may distribute promotional materials and make promotional contacts with potential customers in China for the goods or services of their foreign headquarters. Representative offices may also arrange for advertising and other promotional services with enterprises in China.

Sales liaison and negotiation

Representative offices may provide price lists and discount information to customers in China, as well as transmit offers, counteroffers, purchase orders, confirmations and other communications between customers and the representative office's foreign headquarters. Representative office personnel may also negotiate terms and conditions with customers in China under the guidelines and directions provided by its foreign headquarters.

² www.shanghai.gov.cn

¶9-018 Advantages of setting up a representative office

If a company intends only to conduct liaison activities via the new establishment, a representative office would be a simple and straightforward option, due to the following advantages.

Quick establishment

Generally speaking, to establish a representative office in China, a foreign company must complete a few legally required procedural steps, such as the submission of the application to the government department, registration with the relevant authorities and completion of certain other legal formalities. For many years, foreign companies interested in establishing a representative office had to obtain approval from the local counterpart of the Ministry of Commerce ("MOFCOM"), and then register with the local Administration for Industry and Commerce ("AIC"). However, the representative office establishment procedures were streamlined with the cancellation of the MOFCOM or Commission of Foreign Trade and Economic Cooperation ("COFTEC") approval. Starting from 1 July 2004, nine types of companies, including manufacturing, trading, consultancy and investment companies may submit an application through an agent to the Shanghai AIC for registration in Shanghai. Normally, it should take no more than one or two months to complete all the application procedures and have the representative office up and running.

Low investment commitment

Comparing with setting up a joint venture ("JV") or a wholly foreign-owned enterprise ("WFOE"), the establishment of a representative office in Shanghai requires only a small capital contribution. Essentially, no capital investment is required to set up a representative office, but working capital which includes the lease of an office facility with a minimum one-year lease term.

¶9-019 Disadvantages

A representative office also has disadvantages, particularly in terms of restrictions on the scope of business: a representative office cannot engage in direct profit-making activities. The following activities would likely be considered as direct profit-making activities, and therefore would likely be deemed to be beyond the permitted business scope of a representative office:

- buying and reselling imported or domestic goods that are not intended for the representative office's own use;
- receiving payment for goods sold or services provided to a Chinese entity or individual;
- providing services for which the representative office, its foreign headquarters, or another foreign company receives payment from a Chinese entity or individual;
- concluding business contracts (contracts related to the permitted operations of the representative office, such as office leases or equipment purchases, are excluded);

关于发布上海市外商投资产业导向的通知

¶10-002

各区、县人民政府，市政府各委、办、局：

为了更加积极、合理、有效地利用外资，指导外商投资方向，按照市政府的统一部署，上海市发展和改革委员会、上海市对外经济贸易委员会、上海市经济委员会会同本市各有关部门，根据国家有关外商投资法律、政策的规定，以及 2002 年 2 月 11 日国务院批准颁布的《指导外商投资方向规定》和 2002 年 3 月 11 日原国家计委、国家经贸委和外经贸部发布的《外商投资产业指导目录》，结合上海的实际，共同研究制订了上海市外商投资产业导向。经市政府同意，现将《上海市外商投资重点产业目录》（附件一）、《上海市外商投资产业布局导向》（附件二）发送给你们，即日起执行，并请向外商做好宣传引导工作。

“十五”期间，上海将大力发展信息、金融、商贸流通、汽车制造、成套设备制造、房地产等六大支柱产业，积极发展生物医药、新材料、环境保护、现代物流等四大新兴产业，优化发展石化、钢铁等两大基础产业，着力发展装备工业和船舶制造业，加速发展现代服务业，加大跨国公司地区总部和研究开发机构引进力度，加快构筑适应国际大都市要求的新型产业体系。按照构筑新型产业体系的要求，引导外资项目向各级各类开发区集聚，形成以浦东新区等国家级开发区为先导，主要产业基地为支撑，市级工业园区和现代物流园区等市级开发区为延伸的布局，加快推进产业集聚发展，促进产业布局合理化。

本市公布的上海市外商投资重点产业目录中，有部分属于国家限制性行业，对这些行业在市场准入、股比限制、进口设备免税、项目审批等方面仍按国家有关

ISSUE OF THE SHANGHAI MUNICIPALITY, FOREIGN INVESTMENT INDUSTRIAL GUIDANCE CIRCULAR

¶10-002

To the people's governments of all districts and counties and all commissions, offices and bureaux of the municipal government:

The *Shanghai Municipality, Foreign Investment Industrial Guidance* has been jointly studied and formulated in the light of the actual situations in Shanghai and in line with unified municipal planning and the relevant State laws and policies on foreign investment by the Shanghai Municipal Development and Reform Commission, the Shanghai Foreign Economic Relations and Trade Commission, the Shanghai Economic Commission and the relevant municipal departments, and in accordance with the *Guiding the Direction of Foreign Investment Provisions* promulgated by the State Council on 11 February 2002 and the *State Development Planning Commission, State Economic and Trade Commission and Ministry of Foreign Trade and Economic Cooperation, Foreign Investment Industrial Guidance Catalogue* promulgated on 11 March 2002 for a more effective, reasonable and efficient deployment of foreign investment and guidance of the direction of foreign investment. With the approval of the municipal government, the *Shanghai Municipality, Foreign Investment in Key Industries Catalogue* (Appendix I) and the *Shanghai Municipality, Foreign Investment Industrial Structure Guidance* (Appendix II) are promulgated with immediate effect. You are tasked with the publicity and guidance work to foreign companies.

During the 10th Five-year Plan, Shanghai Municipality will vigorously develop six major pillar industries, namely information, finance, commercial and trade, manufacture of automobiles, manufacture of complete set of equipment, and real property; actively develop four new major industries, namely biological pharmaceuticals, new materials, environmental protection and modern logistics; optimise the development of two fundamental industries, namely petrochemical and iron and steel industries; exert efforts in developing equipment and vessel manufacturing industries; accelerate the development of the modern service industry; intensify efforts to attract regional headquarters of multinational corporations and research and development institutions, and accelerate the establishment of a new industrial system that meets the needs of an international metropolis. In line with the requirements for the establishment of a new industrial system, Shanghai shall guide foreign investment projects to congregate in development zones at various levels and of various types, thereby developing a structure in which national-level development zones such as Pudong New Area will assume a spearhead role, major industrial bases will assume a supporting role, and municipal development zones such as municipal-level industrial parks and modern logistics parks serve as extension arms, to accelerate and promote the congregation and development of industries, and promote the rationalisation of industrial structure.

Some of the industries in the *Shanghai Municipality, Foreign Investment in Key Industries Catalogue* announced by the Municipality are State-restricted industries. The market entry, restrictions on ratio of shareholding, tax exemption for imported equipment,

上海市外商投资企业审批条例

¶10-003

(一九九六年九月二日发布, 自一九九六年十月一日起施行。)

第一章 总则

第一条 为了扩大对外开放和经济技术合作, 便于中外投资者在上海市设立外商投资企业, 根据《中华人民共和国中外合资经营企业法》、《中华人民共和国中外合作经营企业法》和《中华人民共和国外资企业法》等法律、法规, 结合本市实际情况, 制定本条例。

第二条 本条例所称的外商投资企业, 是指中外合资经营企业, 中外合作经营企业、外资企业。

本市外商投资企业的设立以及设立后合同、章程的修改, 适用本条例。

第三条 鼓励外国投资者在本市设立下列外商投资企业:

- (一) 采用先进技术、设备或者科学管理方法的;
- (二) 能提高产品档次, 开拓国际市场的;
- (三) 能促进本市现代化建设的。

申请设立外商投资企业有下列情况之一的, 不予批准:

- (一) 危害国家安全或者损害社会公共利益的;
- (二) 污染环境或者损害人体健康的;
- (三) 违反法律、法规规定的。

第四条 上海市人民政府(以下简称市人民政府)应当根据国家颁布的指导外商投资方向的规定和外商投资产业指导目录, 结合本市的实际情况, 制定和公布

SHANGHAI MUNICIPALITY, EXAMINATION AND APPROVAL OF FOREIGN INVESTMENT ENTERPRISES REGULATIONS

¶10-003

(Promulgated on 2 September 1996, and effective as of 1 October 1996.)

PART ONE: GENERAL PROVISIONS

Article 1: These Regulations are formulated in accordance with laws and regulations such as the PRC, Sino-foreign Equity Joint Ventures Law, the PRC, Sino-foreign Cooperative Joint Ventures Law and the PRC, Wholly Foreign-owned Enterprises Law, and in the light of the actual circumstances of Shanghai Municipality, in order to widen the scope of opening up to the outside world, to broaden foreign economic and technical cooperation and to facilitate the establishment of foreign investment enterprises in Shanghai Municipality by Chinese and foreign investors.

Article 2: For the purposes of these Regulations, the term "foreign investment enterprises" shall mean Sino-foreign equity joint venture enterprises, Sino-foreign cooperative joint venture enterprises and wholly foreign-owned enterprises.

These Regulations shall apply to the establishment of foreign investment enterprises in Shanghai Municipality and to any amendment of their contracts and articles of association after establishment.

Article 3: Foreign investors are encouraged to establish the following foreign investment enterprises in Shanghai Municipality:

- (1) those that use advanced technology or equipment, or scientific management methods;
- (2) those that can enhance product grades and explore the international market;
- (3) those able to advance the modernisation of Shanghai Municipality.

Applications will not be approved if the establishment of the foreign investment enterprise:

- (1) jeopardises State security or harms the public interest;
- (2) pollutes the environment or endangers human health; or
- (3) violates laws and regulations.

Article 4: The Shanghai Municipal People's Government (the "Municipal People's Government") shall formulate and publish a Shanghai guide for the direction of foreign investment and a Shanghai foreign investment industrial guidance catalogue in accordance with the *Guiding the Direction of Foreign Investment Provisions* and the *Foreign*

上海市关于鼓励外商投资设立研究开发机构的若干意见

¶10-007

(上海市发展和改革委员会、上海市对外经济贸易委员会、上海科学技术委员会于二〇〇三年九月十五日发布,自发布之日起施行。)

第一条 (目的和依据)

为鼓励在本市设立外商投资研究开发机构(以下简称“外资研发机构”),贯彻实施“科教兴市”战略,进一步扩大对外开放,提高利用外资的质量和水平,促进上海新一轮经济增长,根据国家有关规定,特制定本若干意见。

第二条 (含义)

根据国家有关规定,外资研发机构的形式可以是外国投资者以合资、合作、独资方式依法设立的独立法人的研发机构,也可以是设在外商投资企业内部的非独立法人的独立部门或分公司。研发机构是指从事自然科学及其相关科技领域(特别是高科技和社会公益性领域)的研究、开发和实验发展(包括为研发的中间试验)的机构,研发内容包括基础研究、应用研究、产品开发等方面,但不得从事《外商投资产业指导目录》禁止类项目,也不得从事非本研发成果的其他技术贸易和除中试外的生产活动。

第三条 (适用范围)

在本市范围内设立的外资研发机构,包括香港特别行政区、澳门特别行政区、台湾地区的投资者来沪设立的研发机构,适用本若干意见。

第四条 (管理部门)

上海市外国投资工作委员会会同上海市发展和改革委员会、上海市经济委员会、上海市科学技术委员会负责对本市外资研发机构的审核、审批工作。外资研发

SHANGHAI MUNICIPALITY, ENCOURAGING FOREIGN INVESTMENT IN THE ESTABLISHMENT OF RESEARCH AND DEVELOPMENT ORGANISATIONS SEVERAL OPINIONS

¶10-007

(Issued by the Shanghai Development and Reform Commission, the Shanghai Foreign Economic Relations and Trade Commission and the Shanghai Science and Technology Commission on 15 September 2003 and effective as of the date of issue.)

Article 1: (Purpose and Basis)

These Opinions have been formulated in accordance with the relevant provisions of the State in order to encourage the establishment of foreign-invested research and development organisations (hereinafter, “foreign-invested R&D organisations”) in this municipality, implement the strategy of “promoting prosperity of the municipality through science and education”, further expand the opening up to foreign investment, improve the quality and level of utilisation of foreign investment and promote a new round of economic growth in Shanghai.

Article 2: (Meaning)

According to the relevant provisions of the State, a foreign-invested R&D organisation can be a research and development organisation with independent legal person status established by foreign investors in the form of equity joint venture, cooperative joint venture or wholly foreign-owned enterprise in accordance with law, or an independent department or branch without independent legal person status within a foreign-invested enterprise. “Research and development organisation” means an organisation engaged in the research, development and experimental development (including intermediate experiments for R&D purposes) of natural sciences and their related scientific and technological areas (particularly areas of high technology and public welfare), and its a scope of research and development may include basic research, application research and product development, but it shall not engage in the prohibited projects under the *Foreign Investment Industrial Guidance Catalogue*, nor shall it engage in technology trade with the R&D achievements of other parties and production activities other than intermediate experiments.

Article 3: (Scope of Application)

These Opinions shall apply to foreign-invested R&D organisations established within this municipality, including those established by investors from Hong Kong Special Administrative Region, Macao Special Administrative Region and Taiwan region.

Article 4: (Regulatory Authority)

The Shanghai Foreign Investment Commission shall be in charge of the examination, verification and approval of foreign-invested R&D organisations in this municipality jointly with the Shanghai Development and Reform Commission, the Shanghai Economic

进行审批、审核和确认，并将结果报市外资主管部门备案：

- (一) 投资总额在三千万美元以下的国家鼓励类项目；
- (二) 投资总额在三千万美元以下的国家允许类项目；
- (三) 本款第(一)项和第(二)项所涉及的项目合同、企业章程的变更。

管委会接受市发展改革部门的委托，对进入加工区的不需要全市综合平衡的内资项目进行核准和管理，并将结果报市发展改革部门备案。

第五条 (企业设立管理)

申请在加工区内设立企业，所提交的申请材料齐全、符合法定形式的，工商行政管理部门应当自受理之日起三个工作日内办理完成核准、登记手续。

法律、行政法规规定应当前置审批的事项，由市工商行政管理部门、市外资主管部门分别对内、外资企业设立实行集中办理，并应当自受理之日起五个工作日内完成前置审批手续。

第六条 (规划管理)

管委会接受规划行政管理部门的委托，按照经批准的详细规划，审批建设项目选址意见书、建设用地规划许可证和建设工程规划许可证等规划许可事项，并负责相应的许可实施监督检查，依法制止和处理违法建设活动。管委会应当在完成建设项目规划审批后的15日内，报规划行政管理部门备案。

管委会违反规定实施规划审批委托事项的，委托部门可以按照本办法第十七条的规定，责令其改正，或者依法予以撤销。违法审批行为未改正前，委托机关可以收回委托的审批权。

经批准的详细规划以及用地性质不得随意变更。有变更需要的，管委会应当向原组织编制的规划行政管理部门申请，由该部门论证认可并组织修编后，报原审批部门审批。

investment projects that enter the processing zone and to file the results with the municipal foreign investment administrative department:

- (1) State-encouraged projects of total investment amount below US\$30 million;
- (2) State-permitted projects of total investment amount below US\$30 million; and
- (3) changes in contracts and articles of association of the projects mentioned in Items (1) and (2) of this Paragraph.

The MC shall be entrusted by the municipal development and reform department to carry out approval and administration of Chinese-funded investment projects entering the processing zone that fall outside the scope of municipal general balance, and file the results with the municipal development and reform department.

Article 5: (Administration of Enterprise Establishment)

The industry and commerce administrative department shall complete approval and registration formalities within three working days from acceptance of the application for enterprise establishment in the processing zone if the application materials are complete and comply with the statutory format.

Matters which require preliminary examination and approval in accordance with the provisions of the laws and administrative regulations shall be handled by the municipal industry and commerce administrative department and the municipal foreign investment administrative department on a centralised basis for Chinese-funded enterprises and wholly foreign-owned enterprises respectively. The preliminary examination and approval formalities shall be completed within five working days from acceptance of an application.

Article 6: (Administration of Planning)

The MC shall be entrusted by the planning administrative department to carry out examination and approval of planning licensing matters such as proposal on location selection of construction project, construction land planning permit and construction project planning permit based on the approved detailed plans; and take charge of supervision and inspection of the relevant licensing, prevent and deal with illegal construction projects in accordance with the law. The MC shall file a record with the planning administrative department within 15 days from examination and approval of a construction project plan.

Where the MC violates any provision in its entrusted examination and approval of planning issues, the entrusting department may order the MC to rectify pursuant to Article 17 hereof, or revoke the appointment in accordance with the law. The entrusting department may recall the powers of examination and approval until the illegal examination and approval items are rectified.

The approved detailed plans and the nature of land use shall not be changed arbitrarily. Where there is a need for change, the MC shall apply to the original planning administrative department for argumentation and compilation of revision, and then apply to the original examination and approval department for examination and approval.