

# New regulations governing investment in Taiwan by mainland enterprises

By Yujing Shu, James JY Chen and Miao (Iris) He

**K&L Gates LLP**

In recent years, overseas investment by mainland Chinese enterprises has been extremely brisk with the progressive intensification of the 'go global' policy. And, with the ever closer trade links between the two sides of the Taiwan Strait, an increasing number of mainland enterprises are opting to make direct investments in Taiwan. In June 2010, the two sides of the Taiwan Strait successfully executed the Economic Cooperation Framework Agreement (ECFA). This agreement officially entered into effect on September 12 2010. On January 6 2011, the Cross-strait Economic Cooperation Committee was officially established and is tasked with negotiating and guiding ECFA related matters.

Against the background of the actual acceleration of cross-strait economic and trade cooperation, the complementary laws and regulations on investment of the two sides of the Taiwan Strait have become the focus of attention of investors. On November 9 2010, the National Development and Reform Commission (the NDRC), the Ministry of Commerce and the Taiwan Affairs Office of the State Council (TAO) jointly issued the *Measures for the Administration of Investment in Taiwan by Mainland Enterprises* (the New Measures). The objectives of the New Measures are to "further encourage, guide and regulate direct investment in Taiwan by mainland enterprises, realise mutual benefits and a win-win situation for the economies on both sides of the Taiwan Strait and promote the peaceful development of the relationship between the two sides of the Taiwan Strait".

This introduction will give an overview of the background to the issuance of the New Measures as well as the relevant conditions for the review of Taiwan investments and the preferential policies. Additionally, it will give a brief overview of Taiwan's procedures for the examination and approval of investments from the mainland.

## Background

Depending on the specifics of an investment project, overseas investments by mainland enterprises mainly involve approval by the NDRC and/or the Ministry of Commerce. The NDRC is mainly responsible for approving overseas investment projects by mainland investment entities (meaning various types of legal persons in the PRC) relating to energy development and those that use large amounts of foreign exchange. However, all Taiwan investment projects, regardless of the size of the investment, whether they are projects for energy development or whether they involve the use of large amounts of foreign exchange, are subject to approval by the NDRC or review by the NDRC and approval by the State Council. Furthermore, before giving its approval, the NDRC is required to seek the opinion of the TAO and other relevant departments.

The principal legal basis governing the foregoing is the *Tentative Administrative Measures for the Check and Approval of Overseas Investment Projects* (2004; the Project Approval Measures). The Ministry of Commerce is mainly responsible for approving the establishment of enterprises overseas by mainland enterprises or the securing by mainland enterprises of ownership or control of, or the right to operate overseas enterprises. The relevant basis is the *Measures for the Administration of Overseas Investments* (2009; the Measures).

With respect to direct investments in Taiwan by PRC investment entities, in addition to the Project Approval Measures and the Measures, and before the New Measures were issued, the NDRC together with the TAO issued the *Circular on Provisions Relevant to the Administration of the Taiwan Investment Projects of Mainland Enterprises* in 2008. Furthermore, the Ministry of Commerce issued the *Circular on Matters Relevant to Investment in Taiwan and the Establishment of Non-enterprise Legal Persons in Taiwan by Mainland Enterprises* in 2009 (collectively, the Two Circulars). These Two Circulars contain specific provisions issued by the NDRC and the Ministry of Commerce, respectively, addressing the issue of how to apply the Project Approval Measures and the Measures to direct investments in Taiwan.

The New Measures, jointly formulated by three government authorities, the NDRC, the TAO and the Ministry of Commerce,

**The objectives of the New Measures are to "further encourage, guide and regulate direct investment in Taiwan by mainland enterprises... and promote the peaceful development of the relationship between the two sides of the Taiwan Strait"**

addressing issues of the Two Circulars arising from the coordination and harmonisation of the operations of the relevant departments in the course of reviews of Taiwan investments, effectively sets forth provision in respect of such issues. They reasonably synthesise the existing Two Circulars and rationalise coordination among the relevant departments, while at the same time emphasising the government support that the NDRC, the TAO and the Ministry of Commerce can offer to mainland enterprises that invest in Taiwan.

## Conditions for mainland entities that invest in Taiwan

Pursuant to the New Measures, a mainland investment entity that wishes to invest in Taiwan is required to satisfy the following conditions: (1) being an enterprise with legal personality lawfully

## AUTHOR BIOGRAPHIES

### YUJING SHU



Yujing Shu is experienced in corporate, M&A, international business, foreign investment, intellectual property rights, and real estate and finance law. Her practice during the last 18 years has covered pharmaceutical, finance, IT, education, graphic design, aerospace, non-profit, and real estate. Prior to receiving her Juris Doctor in the US, Shu practiced general commercial law in the PRC, where she has been admitted to the bar since 1988. She has related study and practice experience in the UK, the US and Hong Kong.

Shu was involved in a number of high-profile transactions, including advising multinational corporations on OEM, intellectual property and related licensing matters regarding the distribution of products into the Chinese market. She also represented and advised one of the largest private foundations and universities on a representative office and campus establishment and registration in China.

Shu is fluent in both Mandarin and English and has attained bar memberships in both Washington and the PRC.

### JAMES J.Y. CHEN



James Chen is a partner at K&L Gates. Chen represents issuers and borrowers in a variety of corporate finance transactions. His experience includes public offerings and private placements of equity, debt, convertible and other securities, export credit facilities, bank loans, securitisation of accounts receivable, trade financing and derivative transactions. Chen also has experience in representing clients in their international financing transactions and cross-border mergers and acquisitions.

Chen also has vast experience in the PRC, having represented issuers and underwriters in several IPO and B share listings. He acted for foreign investors in the negotiation and documentation of more than 30 joint ventures and foreign wholly owned projects, including the US\$4 billion expansion projects for a paper manufacturer in the PRC.

Prior to joining K&L Gates, Chen spent: two years as an in-house legal adviser to a government agency in charge of Taiwan's international military procurements; three years as a chief legal officer with a major Asian conglomerate in Singapore; and more than eight years in private practice with an international firm in New York, Hong Kong and Singapore.

Chen is fluent in both English and Mandarin. He has attained bar membership in both New York and Taiwan.

### MIAO (IRIS) HE



Iris He is a corporate associate in the firm's Beijing office. She has experience in a variety of cross-border and investment transactions. Her main areas of practice include mergers and acquisitions, foreign direct investment, and regulatory compliance of foreign investment enterprises in China. She spent one year

in the firm's Seattle office where she gained extensive experience in IP licensing and anti-competition law compliance. Her clients cover a wide range of industries, including manufacturing, software, telecommunications, education, commercial franchise and new energy, among others.

He was involved in a number of high-profile transactions, including advising a US investor on its financing of a leading publicly traded company offering broadband and cable TV services through VIE structure in PRC.

Prior to joining K&L Gates, He practiced as an assistant attorney with Microsoft Corporation in China. He is also a member of the New York State Bar Association and is fluent in both English and Chinese. She has also presented on a topic on Chinese New Antimonopoly Law at the University of Washington Law School in 2009.

registered and operating in mainland China; (2) having the industry background, funds, technology and management capabilities for the project in which it is applying to invest; and (3) being conducive to the peaceful development of the relationship between the two sides of the Taiwan Strait and not jeopardising the safety or unity of the state.

### Review of investments to be made in Taiwan by mainland enterprises

The New Measures specify that investment projects that satisfy the NDRC's Project Approval Measures are to be handled in accordance with the Project Approval Measures. In accordance with the Ministry of Commerce's Measures, the investment in and establishment of enterprise and non-enterprise legal persons in Taiwan by mainland enterprises is subject to the approval of the Ministry of Commerce. It should be noted that since the Project Approval Measures specify that all Taiwan investment projects – regardless of the size of the investment – require NDRC approval, Taiwan investment projects that require Ministry of Commerce approval, in theory and in practice, fall under the jurisdiction of the NDRC's Project Approval Measures and would first require approval of the NDRC before submission to the Ministry of Commerce for approval.

On this basis, the New Measures clarify the application procedure for approvals by the NDRC and the Ministry of Commerce and rationalise the coordination of relationships among each of the relevant departments. With respect to NDRC approval, the New Measures expressly provide that local enterprises are required to submit their applications to the local provincial-level reform and development commission, which will forward it to the NDRC for approval after its preliminary review. Enterprises under the central government, on the other hand, submit their applications directly to the NDRC for approval. When conducting its review, the NDRC is required to seek the opinion of the TAO. Copies of the NDRC's approval documents are sent to relevant departments such as the Ministry of Commerce and TAO. When the Ministry of Commerce is reviewing a Taiwan investment project that has already been approved by the NDRC, it is not required to seek the opinion of the TAO anew.

With respect to the Ministry of Commerce approval procedure, the New Measures expressly specify that when a local mainland enterprise wishes to invest in and establish an enterprise or non-enterprise legal person in Taiwan, the competent commerce department at the provincial level of the place where the enterprise is located forwards the application to the Ministry of Commerce after its preliminary review. An enterprise under the central government, on the other hand, submits its application directly to the Ministry of Commerce. After receipt of the application, the Ministry of Commerce seeks the opinion of the TAO. After securing the consent of the TAO, the Ministry of Commerce gives its approval and issues a Certificate for Overseas Investment of an Enterprise or Certificate for an Overseas Organisation of an Enterprise.

The mainland enterprise then carries out the relevant procedures – such as those for the approval of personnel that are to go to Taiwan and foreign exchange registration – on the strength of the investment project and/or enterprise (or organisation) establishment approval document issued by the relevant department

and the Certificate for Overseas Investment of an Enterprise or Certificate for an Overseas Organisation of an Enterprise. Once the enterprise or non-enterprise legal person invested in and established in Taiwan carries out registration procedures in Taiwan, the mainland enterprise is required to submit the relevant registration document to the NDRC, the Ministry of Commerce and the TAO for the record within 15 working days.

### Policy incentives

With respect to policy incentives, the New Measures specify that if a mainland enterprise secures relevant certification such as a service provider, it is eligible for the treatment offered under the relevant agreement signed between the two sides of the Taiwan Strait. At present, the principal basis for policy support and incentives for cross-strait economic cooperation are Ecfa and relevant annexes. Pursuant to Ecfa, within six months of the implementation of the agreement, the two sides of the Taiwan Strait will launch negotiations on trade in goods, trade in services and other forms of economic cooperation, accelerate liberalisation and eliminate restrictive measures.

Through its annexes, Ecfa also specifies an 'early harvest list' in respect of trade in goods and trade in services. Implementation of these early harvest items will begin within six months after entry into effect of Ecfa. Annex 4 of Ecfa specifies the competent department and the liberalisation measures for early harvest in respect of trade in services. Taiwan has undertaken to liberalise services relating to research and development, conferences, exhibitions, special product designs, movie screenings, brokerages, sports and other leisure activities, air transport computerised positioning systems as well as banking and other financial services (excluding securities, futures and insurance). Once the relevant investing enterprises have secured a Service Provider Certificate in accordance with Annex 5 to Ecfa, they will be eligible to enjoy development undertakings in the above-mentioned relevant sectors.

### Government support

The New Measures also emphasises the role of the NDRC, the Ministry of Commerce and the TAO in strengthening the guidance of and services to investment in Taiwan by mainland enterprises. The three departments will provide effective guidance to enterprises through the outbound investment cooperation consulting service system, investment guidelines and other such means. Additionally, the three departments will strengthen the training of mainland enterprises that invest in Taiwan – in particular training on policy, personnel and the investment environment – so as to enhance the focus and practicability of enterprises' investments in Taiwan.

The clarification and further detailing of the foregoing aspects that the New Measures provide will have an important impact on cross-strait economic cooperation and exchanges. With the progressive refinement and implementation of the framework agreement, an increasing number of mainland enterprises will carry out approval procedures and secure more government support based on the New Measures when investing in Taiwan.

### Relevant Taiwan regulations

In addition to the New Measures issued by the mainland side, the Taiwan side has also been issuing and revising relevant regulations since 2003 with increasingly closer cross-strait trade links.

## The clarification and further detailing of the foregoing aspects that the New Measures provide will have an important impact on cross-strait economic cooperation and exchanges

These include the issuance of provisions on: the scope of industries in Taiwan in which mainland enterprises are permitted to invest; specific operations involved in the establishment of subsidiaries, branches and offices in Taiwan by mainland enterprises; and, on the examination procedures therefor. The organisation in charge of the relevant examinations is the Investment Commission under the Ministry of Economic Affairs of Taiwan (the Investment Commission).

Investments in Taiwan by mainland investment entities are subject to review by the Investment Commission, with the focus of such reviews being the business projects that mainland enterprises wish to operate in Taiwan. If a business project falls within the scope of industries that the Ministry of Economic Affairs has opened to investment by mainland enterprises, the Investment Commission will grant permission. Once a mainland enterprise has secured the permission, it is required to carry out company establishment registration with the Commerce Department of the Ministry of Economic Affairs or the local competent commercial affairs authority on the strength of the letter of permission. Taiwan administers the industries in which mainland enterprises are permitted to invest in by the so-called 'positive listing' method. That is to say that mainland enterprises are not permitted to invest in any industries other than those published by the Ministry of Economic Affairs in the List of Projects by Industry in Which Persons from Mainland China May Invest. However, with the entry into effect of Ecfa, as well as closer cross-strait exchanges, expansion of the scope of the list at the appropriate time is imminent.

# 大陆企业赴台湾地区投资新规定介绍

舒玉晶、陈政扬和何淼

高盖茨律师事务所

近年来，随着“走出去”政策的日益深化，中国大陆企业在境外投资方面十分活跃。伴随著海峡两岸贸易往来的日趋紧密，越来越多的大陆企业选择在台湾地区进行直接投资。2010年6月，海峡两岸成功签署了《海峡两岸经济合作框架协议》（下称“框架协议”）。该框架协议已于2010年9月12日正式生效。2011年1月6日，协商督导框架协议相关事务的两岸经济合作委员会也正式成立。在两岸经贸合作正式提速的大背景下，两岸投资配套的法律法规成为投资者关注的热点。2010年11月9日，中华人民共和国国家发展改革委员会（下称“发改委”）、商务部、国务院台湾地区办公室（下称“国台办”）共同发布了《大陆企业赴台湾地区投资管理办法》（下称“新办法”）。新办法旨在进一步鼓励、引导和规范大陆企业赴台湾地区的直接投资，实现两岸经济互利共赢，推动两岸关系和平发展。本介绍概述了新办法出台的背景以及相关赴台投资的审核条件和政策优惠，同时还对台湾方面针对大陆投资需要进行的审批进行了简述。

## 新办法出台的背景

对于大陆企业进行的境外投资，根据具体投资项目的不同，主要会涉及发改委和/或商务部的审批。发改委主要针对大陆投资主体（指中国境内各类法人）有关能源开发和大量用汇的境外投资项目进行核准。而对于前往台湾地区投资的项目，无论是否属于能源开发或大量用汇项目，无论投资额为多少，一律需由发改委核准或经发改委审核后报国务院核准，并且发改委在核准前应征求国台办及其他有关部门的意见。相关法律依据主要为《境外投资项目核准暂行管理办法》（2004，下称“项目核准办法”）。商务部主要针对大陆企业在境外设立企业或取得企业的所有权、控制权、经营权等权益的行为进行核准。相关依据为《境外投资管理办法》（2009，下称“管理办法”）。

针对中国境内投资主体对台湾地区的直接投资，除上述项目核准办法和管理办法以外，在新办法出台前，发改委会同国台办于2008年发布了《关于大陆企业赴台湾地区投资项目管理有关规定的通知》，而商务部则于2009年发布了《关于大陆企业赴台湾地区投资或设立非企业法人有关事项的通知》（统称“两个通知”）。这两个通知是发改委和商务部分别针对在台湾地区进行直接投资时如何适用项目核准办法和管理办法所做的具体规定。

新办法由发改委、国台办以及商务部三个政府机构联合制订，针对两个通知在协调性以及赴台投资审核过程中各部门操作衔接上产生的问题进行了有效规范。其将原有的两个通知进行了合理的整合，理顺了部门间的协调关系，同时强调了发改委、国台办以及商务部三个部门对大陆企业赴台投资所能进行的政府支持。

## 大陆赴台投资主体的条件

根据新办法，大陆投资主体赴台湾地区投资，应符合以下条件：（1）在大陆依法注册、经营的企业法人；（2）具备投资所

申报项目的行业背景、资金、技术和管理实力；（3）有利于两岸关系和平发展，不危害国家安全、统一。

## 大陆企业赴台投资的审核

新办法规定，符合发改委项目核准办法的投资项目应依照项目核准办法办理。大陆企业赴台湾投资设立企业或非企业法人的，依照商务部的管理办法由商务部核准。值得注意的是，由于项目核准办法规定赴台投资项目，不分限额，均应报发改委核准，因此无论理论上还是实践中，需经商务部核准的赴台投资同时满足了发改委项目核准办法的管辖，因此需先经发改委核准后报商务部核准。

在此基础上，新办法明确了发改委和商务部核准时的申报流程，理顺了各部门间的协作关系。在发改委的核准程序方面，新办法明确规定地方企业应向所在地省级发改委提出申请，由省级发改委初审后，报国家发改委核准。中央企业直接向国家发改委申请核准。国家发改委在审核时征求国台办的意见。国家发改委的核准文件抄送商务部、国台办等有关部门。已经国家发改委核准的赴台投资项目，商务部核准时不再征求国台办的意见。

对于商务部的核准流程，新办法明确规定大陆企业赴台投资设立企业或非企业法人的，地方企业由所在地省级商务主管

## 新办法旨在进一步鼓励、引导和规范大陆企业赴台湾地区的直接投资，推动两岸关系和平发展

部门初审后向商务部提出申请，中央企业直接向商务部提出申请。商务部收到申请后，征求国务院台办意见。在征得国台办同意后，商务部进行核准，并颁发《企业境外投资证书》或《企业境外机构证书》。大陆企业凭相关部门的投资项目和企业设立（含机构）核准文件、《企业境外投资证书》或《企业境外机构证书》，办理相关人员赴台审批、外汇登记等相关手续。赴台湾地区投资设立的企业或非企业法人在当地注册后，大陆企业应于15个工作日内将有关注册文件报国家发改委、商务部和国台办备案。

## 政策优惠

在政策优惠方面，新办法明确了大陆企业如获得服务提供者等相关认证后，可享受两岸签署的相关协定项下给予的待遇。目前海峡两岸经济合作方面的政策支持和优惠的主要依据是框架协议及相关附件。根据框架协定的约定，在协定实施六个月内，海峡两岸将就货物贸易、服务贸易以及其他经济合作展开磋商，加速开放，消除限制性措施。框架协议还通过附件的形式对有关货物、服务贸易约定了“早期收获”。这些早期收获将在框架协议生效后六个月内开始实施。框架协定的附件四规定了服务贸易早期收获部门和开放措施。其中台湾方面在研究发展服务、会议服务、展览服务、特制品设计服务、电影放映服务、经纪服务、运动及其他娱乐、空运电脑定位系统以及银

行及其他金融服务（不包括证券期货和保险）方面均做出了开放承诺。相关投资企业在依据框架协定的附件五取得《服务提供者证明书》后可享受在上述相关行业内的开发承诺。

### 政府支持

新办法还着重强调了发改委、商务部、国台办在加强大陆企业赴台投资中的引导和服务作用。三部门将通过对外投资合作资讯服务系统、投资指南等渠道，为企业提供有效指导。同时，三部门还将加强对大陆企业赴台投资的培训工作，特别是政策、人员和投资环境等方面的培训，提高企业赴台投资的针对性和可操作性。

新办法在上述各方面所做的明确和细化都将对海峡两岸的经济合作交流产生重要影响。随著相关框架协定的逐步细化和实施，越来越多的大陆企业将依据新办法在赴台投资时进行相关核准、获得政府更多支持。

### 台湾相关法规简述

除大陆方面出台的新办法，随著两岸经贸来往日渐密切，台湾方面也已于2003年起陆续增修相关法规，就允许大陆企业在台投资的产业范围及其在台设立子公司、分公司或办事处的具体操作及审核程序做出了规定。主管相关审核的机关均为台湾经济部下的投资审议委员会（下称“投审会”）。

大陆地区投资主体在台投资须经投审会审核，其审查重点为大陆企业欲于台湾经营的业务项目。若该业务项目是在台湾经济部开放大陆企业来台投资的产业范围内，投审会将给予许可。在取得审核许可后，大陆企业需再凭许可函向台湾经济部商业司或地区主管商业事务机关办理各项公司设立登记。台湾方面允许大陆企业在台投资的产业是采取所谓“正面表列”的方式进行管理，即除台湾经济部《大陆地区人民来台投资业别项目表》所公布的产业之外，均不许大陆企业在台投资。然而随著两岸框架协定的生效及密切交流，该项目表适时扩大开放范围将指日可待。

## 作者简介

### 舒玉晶



舒玉晶律师目前在高盖茨律师事务所驻北京代表处工作。她在公司、并购、国际商务、外商投资、知识产权、房地产、金融等领域有相当丰富的经验，业务范围涵盖医药、金融、电子科技、教育、图像制作、航空航天、非营利、房地产等行业。

舒律师在就读美国法学院之前，曾在中国执业并于1988年取得中国律师执业资格。她在英国、美国、香港等地都有相关的学习和执业经验，取得美国华盛顿州律师资格后，相继在本律师事务所西雅图、香港、北京等分支机构工作。

舒律师精通英语与国语/普通话。

### 陈政扬



陈政扬律师目前在高盖茨律师事务所台北代表处工作。陈律师擅长国际企业金融与证券发行、跨国企业并购，对中国业务有丰富的执业经验，曾代理中国的发行公司与承销商在海外融资上市，并多次代理外商投资公司在中国的企业并购、合资或外商独资案件包括一项为中国纸商扩建业务项目。

陈政扬律师曾担任新加坡在纽约证交所上市的企业集团法务长以及在纽约、香港及新加坡分执。陈律师精通英语及华语，也取得台湾及纽约州律师资格。

### 何淼



何律师目前在高盖茨律师事务所北京代表处工作。她在并购、外商投资、公司合规、知识产权许可、以及反垄断等领域拥有经验，业务范围涵盖通信、制造、软件、教育、商业特许经营、以及新能源等行业。

何律师的代表案例包括代表美国投资者投资一家通过VIE结构向中国提供宽带和有线电视服务的上市公司。

何律师曾在本所西雅图代表处执业一年，也曾在微软公司担任律师助理。何律师精通英语和普通话，取得美国纽约州律师资格。2009年何律师在美国华盛顿大学法律学院进行了题为“中国的新反垄断法”的演讲。