

## **US Exclusion from China's Approval Appendix: tension between China's overseas investment regulation and would-be US 'insourcing' objectives**

Taya Cook

Amid the lofty campaign rhetoric surrounding the 2004 presidential election flew a slogan insisting that Americans can compete with any foreign nation for jobs if they are only permitted a 'level playing field.' How that field will be created and presented to the American jobless is an open question. The suggestion is that American workers can produce as efficiently as their Chinese neighbors if only the Chinese government will enact and enforce adequate environmental and labor law regimes.<sup>1</sup> A good deal of emphasis is also placed on the elimination of trade deficits as an additional measure toward leveling the playing field.<sup>2</sup> Curiously, there is little discussion concerning encouragement of foreign direct investment (FDI) in the United States economy, as an additional measure by which to replace employment lost to East Asia.<sup>3</sup>

Many of the consequences of the globalization of the world economy are forces which, except for political interference, would replace some of the jobs that have been lost to developing economies.<sup>4</sup> Increased freedom for capitalization in China has produced a thriving pool of domestic and foreign invested Chinese enterprises. Until recently, the Chinese government has imposed heavy regulatory obstacles upon domestic enterprises seeking to invest outside of China's borders.

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<sup>1</sup> DR. ROBERT E. SCOTT, U.S.-CHINESE SECURITY ECONOMIC REVIEW COMMISSION, U.S. CHINA TRADE, 1989-2003, *available at* [http://www.uscc.gov/researchpapers/2005/05\\_02\\_07\\_epi\\_wp\\_rscott.pdf](http://www.uscc.gov/researchpapers/2005/05_02_07_epi_wp_rscott.pdf).

<sup>2</sup> Kathy Ruff, *Off Balance*, NORTHEAST PA. BUS. J., Vol. 20, Iss. 3, Feb. 1, 2005, at WLNR 2573988.

<sup>3</sup> Matthew J. Slaughter, *Insourcing Jobs: Making the Global Economy Work for America*, (Oct. 2004), *available at* [http://www.ofii.org/insourcing/insourcing\\_study.pdf](http://www.ofii.org/insourcing/insourcing_study.pdf).

<sup>4</sup> *Id.*

Now, however, China has passed legislation simplifying the overseas investment application process and removing obstacles for domestic industries wishing to invest abroad. In a new regulation, the PRC State Council has bravely entrusted application review and approval to the provinces instead of reserving decisions to the central government—the United States being one among a very few country exceptions.<sup>5</sup> This paper is written as a response to the recent regulation and in conjunction with my translation of the *Regulation Concerning Approval of Enterprises Investing Overseas in Start-up Businesses* issued in September of 2004.<sup>6</sup> The translation of the regulation is contained in full in Appendix A.

The purpose of this paper is to examine what this new regulation represents in terms of transformation of Chinese foreign investment policy. In relation to the new legislation, it asks: what is the stimulus behind the new regulation; what are the changes introduced by the new regulation; and what do those changes mean for the United States? It also suggests that as anxiety about manufacturing job loss in the United States grows, some attention should be directed to Chinese overseas investment policy and how future investment from China may be able to affect job replacement.

### *1. Basic History and Development of Chinese Overseas Investment Policy*

Since the *Reform and Opening Up* began over a quarter century ago, the Chinese government has aggressively regulated overseas investment to prevent capital flight and thereby preserve the liquidity of the Chinese economy. The task of building and

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<sup>5</sup>关于境外投资开办企业核准事项的规定, [*Regulation on Examination and Approval Items for Overseas Investment and Establishment of Overseas Enterprise*], available at [http://www.law-lib.com/law/law\\_view.asp?id=87005](http://www.law-lib.com/law/law_view.asp?id=87005).

<sup>6</sup> *Id.*

maintaining favorable balances of foreign reserve dollars fell initially upon central government bureaucracy.

In the early 1980s, applications for approval of overseas investment projects were directed to the Central Bureau of National Management (CBNM).<sup>7</sup> In 1989, the Party imposed the additional burden of applying for examination by the Central Bureau of Foreign Exchange as well as the CBNM.<sup>8</sup> The application examination involved inquiry into the source of foreign currency to be invested, foreign investment risk or feasibility assessment, and national registration.<sup>9</sup> Approval was subject to the unfettered discretion of two central agencies, neither of which functioned as a check on its companion agency's power. The guiding policy behind the '89 regulation was preservation of foreign reserve balances.<sup>10</sup> Therefore, project approval was particularly improbable.

Even if they were approved after the 89 regulation, foreign investment activities were carefully monitored. If an application passed, the Chinese investing parties were required to return any profits obtained from foreign currency that had been in China before investment.<sup>11</sup> Furthermore, reporting of business financial statements was required within six months of the end of every fiscal year for the first five years of

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<sup>7</sup> *Id.*

<sup>8</sup> 境外投资外汇管理办法, 1989年2月5日国务院批准1989年3月6日国家外汇管理局发, available at [http://www.chinacourt.org/flwk/show1.php?file\\_id=8845&str1=%BE%B3%CD%E2%CD%B6%D7%CA](http://www.chinacourt.org/flwk/show1.php?file_id=8845&str1=%BE%B3%CD%E2%CD%B6%D7%CA). *Jingwai Touzi Waihui Guanli Banfa*, 1989 Nien 2 Yue 5 Ri, Guowuyuan Pijun, 1989 3 Yue 6 Ri, Guojia Waihui Guanliju Fa. [*Overseas Investment and Foreign Reserve Management Method*, approved Feb. 5, 1989 by the National People's Congress; issued Mar. 6, 1989].

<sup>9</sup> *Id.* See also, *Four Changes in China's Overseas Investment Management*, PEOPLE'S DAILY, Dec. 3, 2004, available at [http://english.people.com.cn/200412/03/eng20041203\\_166093.html](http://english.people.com.cn/200412/03/eng20041203_166093.html).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

business, and failure to follow this regulation's procedures resulted in stiff monetary fines.<sup>12</sup>

The 1995 *Supplementary Notice Concerning Overseas Investment and Management of Foreign Exchange* succeeding the '89 regulation further refined and clarified investment management practice.<sup>13</sup> This Notice did not manifest a clear intent to relax foreign investment policy generally. However, it began to permit the extension of loans for foreign investment where projects were encouraged as a matter of national policy, or where the proposed country was one in which China encouraged investment.<sup>14</sup> The Notice also permitted applications investing sums under US \$1 million to be examined by the province level Bureaus of Foreign Exchange for the first time.<sup>15</sup> Where investments exceeded US \$1 million, province level bureaus of foreign exchange were instructed by regulation to forward applications on to the Central Bureau of Foreign Exchange.

Those willing to invest in projects outside categories specifically encouraged by the central government were required to generate their own foreign currency, meaning they could not purchase foreign currency with RMB or obtain a loan.<sup>16</sup> This implied an obligation to seek international direct investment in a domestic business or joint venture as a source of foreign currency. Self generated currency could then be recycled into

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<sup>12</sup> *Id.*

<sup>13</sup>关于《境外投资外汇管理办法》的补充通知, 1995年9月14日国家外汇管理局发布

(95)汇资函字第163, available at

[http://www.chinacourt.org/flwk/show1.php?file\\_id=23531&str1=%BE%B3%CD%E2%CD%B6%D7%CA](http://www.chinacourt.org/flwk/show1.php?file_id=23531&str1=%BE%B3%CD%E2%CD%B6%D7%CA). (Guanyu<<Jingwai Touzi Waihui Guanli Banfa>> De Buchong Tongzhi, 1995 Nien, 9 Yue, 14 Ri, Guojia Waihui Guanliju Fabu (95) Huizhan Zidi 163 Hao) [Concerning <<Overseas Investment and Foreign Reserve Management Method>>Additional Notification, Sept. 14, 1995 issued by the National Bureau of Foreign Reserve Management; No. 163].

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

eventual overseas projects. Even when currency was brought in by the investors themselves, great restrictions were placed on taking funds back out. Only one percent of the average sums brought into China over the preceding three years from application could be allocated to projects overseas.<sup>17</sup>

In addition, investors were required to create a ‘guarantee fund’ to be provided to the Bureau of Foreign Exchange.<sup>18</sup> The Bureau would in turn create a kind of collateral interest bearing bank account not accessible to the investor.<sup>19</sup> The account funds plus interest were returned only after the Chinese investor returned in profits the sum equaling the initial amount of foreign capital taken out for investment.<sup>20</sup>

Concurrent with the initiation of the above mentioned protectionist measures designed to prevent casual exist of foreign reserve dollars, long term policy began to shift in favor of permitting overseas investment. Despite restraints imposed by the above Notice, the year of 1995 was pivotal for Chinese foreign investment policy. The *'95 Plan* and *2010 Long Term Goals and Explanation of Advise* revealed an intention to let the door to overseas investment swing wider.<sup>21</sup> In it, the government laid bare a plan to “actively open international markets;” “advance diversity in foreign trade;” and “deepen reform of foreign trade structures.”<sup>22</sup>

The 16<sup>th</sup> Plenary Conference of the Communist Party initiated a policy concerning the globalization of the Chinese economy. At this Conference, the Party issued a

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> 王海坤, 中国企业“走出去”十年之变, available at <http://news.sohu.com/20041027/n222709013.shtml>. (Wang Hai Shen, *Zhongguo Qiye “Zou Chuqu” Shi Nien Zhi Bian*). [Wang Haishen, *Chinese Enterprises “Going Out” Changes Over the Past Ten Years*].

<sup>22</sup> *Id.*

mandate under the slogan, “bringing in” and “going out” in reference to international trade.<sup>23</sup> An unprecedented level of emphasis was placed upon international participation and world-wide ascension of Chinese industries. “Going out” became a new economic slogan demarking a new chapter in Chinese economic development. Moreover, subsequent reforms on restrictions of overseas investment and foreign exchange management have cited conformance with “going out” principles as their basis for alteration.<sup>24</sup>

Specifically, “going out” policy is responsible for the cancellation of guarantee funds formerly used to protect against depletion of foreign reserves.<sup>25</sup> The policy is also responsible for other changes in the management practice of foreign reserves, including *The Notification to the National Bureau of Foreign Exchange Concerning the Expansion of Overseas Investment and Reforms in Management of Foreign Exchange*.<sup>26</sup>

Another factor contributing to the liberalization of overseas investment policy is the steady influx of foreign investment within China. It is apparent that former conservative stances on capital flight have paid off; indeed, Chinese foreign reserves were gauged at \$US .9 billion at the end of 2004 over 500 million of which is located

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<sup>23</sup> *Id.*

<sup>24</sup> 国家外汇管理局关于退还境外投资汇回利润保证金有关问题的通知, 汇发〔2003〕81号, available at [http://www.chinacourt.org/flwk/show1.php?file\\_id=86902&str1=%BE%B3%CD%E2%CD%B6%D7%CA](http://www.chinacourt.org/flwk/show1.php?file_id=86902&str1=%BE%B3%CD%E2%CD%B6%D7%CA). (*Guojia Waihui Guanlijū Guanyu Tuihuan Jingwai Touzihui Hui Lirun Baozhenjin You Wenti de Tong Zhi, Huifa* (2003), No. 81.) [*Notification Concerning National Bureau of Foreign Reserve Management's Returning Guarantee Funds (2003)*].

<sup>25</sup> *Id.*

<sup>26</sup> 国家外汇管理局关于进一步深化境外投资外汇管理改革有关问题的通知, available at [http://www.chinacourt.org/flwk/show1.php?file\\_id=89432&str1=%BE%B3%CD%E2%CD%B6%D7%CA](http://www.chinacourt.org/flwk/show1.php?file_id=89432&str1=%BE%B3%CD%E2%CD%B6%D7%CA).

within China's big 4 banks.<sup>27</sup> The unprecedented liberal stance toward international investment is doubtlessly affected by China's abundant stash of US dollars.

There is yet another dimension to foreign investment practice that may factor into recent reforms. Despite strict regulation of overseas investment activity, it is and always has been possible to invest overseas surreptitiously. The practice is called "taking detours," and some estimate that there are twice or three times as many overseas investors who take detours rather than pass through official channels.<sup>28</sup> To prevent this aberrant activity, liberalized overseas investment policy permits the extension of incentives such as loans at half the normal interest rates and special funds for small and medium size businesses.<sup>29</sup> New laws not only make it possible for investors to contemplate *legal* investment activity, but also facilitate it. Part of the advantage of opening up investment (though not likely a significant impetus for the reform) is the opportunity to reign in nonconforming behavior.

On the other hand, trade agreements or international pressure does not constitute a contributing factor in the liberalization of Chinese overseas investment policy. Bilateral agreements between the US and China concern firming up loan interest rates, increasing access to US product exports, and decreasing tariff rates.<sup>30</sup> Overseas investment policy is

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<sup>27</sup>*Rapid Growth in China's Foreign Reserves is Rational*, <http://www.chinanews.cn/news/2004/2005-01-21/1200.shtml> (last visited Nov. 27, 2004). See also 年底大部入世保护措施到期 26年改革走到关键点 (*Niandi Dabu Ru Shi Baohu Cuoshi Daoqi 26 Nian Gaige Zoudao Guanjian Dian*. [By the Year's End Time for Protective Measures is Up, 26 Years of Reform Comes to a Head], at <http://business.sohu.com/20041031/n222771038.shtml>.

<sup>28</sup> 民企“走出去”何必绕道 (Minqi “Zou Chuqu,” He Bi Raodao?) [*Domestic Enterprise 'Going Out,' Why Take Detours?*], <http://news.sohu.com/20041102/n222797234.shtml> (last visited Nov. 27, 2004).

<sup>29</sup> *Id.*

<sup>30</sup> *Making China Trade a Two Way Street*, OFFICE OF THE US TRADE REPRESENTATIVE, [http://www.ustr.gov/Document\\_Library/Fact\\_Sheets/2004/Making\\_China\\_Trade\\_a\\_Two-Way\\_Street.html](http://www.ustr.gov/Document_Library/Fact_Sheets/2004/Making_China_Trade_a_Two-Way_Street.html) (last visited Nov. 27, 2004).

not a subject of bilateral trade agreements.<sup>31</sup> China's interest in advancing its worldwide competitiveness and economic ascension is the most important driver behind recent reforms.

## *2. Regulation on Examination and Approval Items of Overseas Investors and Establishment of Overseas Enterprises*

This regulation introduces potentially significant changes in the practice of administrative approval of overseas investment applications, and manifests a policy consistent with the “going out” mandate. Conversely, it also reveals some lingering hesitation which casts a shadow and a question about how bold, really, the call to go out into the global economy is. More troubling, the regulation appears to be directing overseas investors away from the United States against trends that otherwise direct investors toward the US.

Where former regulations on overseas investment were couched in terms of preserving China's foreign reserves, Articles 1 and 2 of the instant law are framed in terms of facilitating investment projects.<sup>32</sup> In this regulation, the presumption against foreign investment has disappeared. However, it does not encourage *all* businesses to invest overseas. With the issuance of this regulation, the government encourages competitive Chinese enterprises to seek opportunities outside of China, with some reservation.<sup>33</sup> Finance institutions, for example, are still prohibited from leaving the borders.<sup>34</sup> This is perhaps a minor residuary protective measure when compared with the

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<sup>31</sup> *Id.*

<sup>32</sup>关于境外投资开办企业核准事项的规定 (Guanyu Jingwai Touzi Kaiban Qiye Hezhun Shixiang De Guiding) [*The Regulation on Examination and Approval Items of Overseas Investors and Establishment of Overseas Enterprises*], [http://www.law-lib.com/law/law\\_view.asp?id=87005](http://www.law-lib.com/law/law_view.asp?id=87005) (last visited XXXX).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*



significant measures toward liberalization, but it demonstrates lingering hesitation toward the implementation of more liberal economic freedom.

For the purpose of examination, applicants are separated into two groups: central enterprises and “all other enterprises.”<sup>35</sup> Central enterprises are still required to undergo examination by the Ministry of Commerce.<sup>36</sup> At the ministry level examination process, the regulation imposes additional procedural requirements including the obligation to obtain an opinion from the overseas-stationed Secretary of Economy and Commerce in the proposed country in Article 8.<sup>37</sup> Otherwise, the subjects of inquiry for both levels of bureaucratic inquiry appear quite similar.

Additionally, the regulation advances the interests of transparency and uniformity by naming the criteria upon which the provinces and Ministry of Commerce are to review investment applications. Article 5 lists the factors to be considered while approving applications including: national investment environment, national stability, proposed countries’ and the PRC’s political and economic relations, policies on overseas investment, national composition, respect for or observation of relevant international treaties, and the presence of legal guarantees protecting industry rights.<sup>38</sup> This clause should go some distance toward uniformity of administration and diminish the exercise of absolute discretion.

Article 4 of the regulation encourages province level *Departments of Commerce and Management* to approve applications from “all other enterprises” as long as they are

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

directed at countries listed in the appendix of the regulation.<sup>39</sup> The regulation's substantive provisions are silent about the treatment of applicants aimed at countries not listed in the appendix.<sup>40</sup> Central Enterprise applications are the only applications expressly directed to the Ministry of Commerce. Because the province level Bureaus of Commercial Management are "encouraged" to approve applications directed at only those countries listed within the appendix, it is unclear how the provinces are expected to treat non-listed countries.<sup>41</sup>

Article 12 states that foreign investment enterprises starting up business overseas are approved either at province level Departments of Commercial Management or at the Ministry of Commerce.<sup>42</sup> Though applications to non-listed countries are not specifically directed anywhere, if they can not be approved at the province level, they must be examined by the Ministry of Commerce. The import of this ambiguous treatment toward non-listed countries can not be fully appreciated without consulting both the contents of the appendix and former and current trends in overseas investment.

The Appendix lists most countries in the world with a few key exceptions. Unsurprisingly, neither Taiwan nor North Korea appears on the list. Somewhat more surprisingly, neither does the United States or Japan. The absence of its two top trading partner's names in the appendix is an undeniable signal as to the intended direction and meaning of Chinese overseas investment policy with unmistakable implications for the United States.<sup>43</sup> This fact implies that 'going out' policy is not as liberal and encouraging

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Paul Blustein, *China Passes US in Trade with Japan*, WASH. POST, Jan. 27, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A40192-2005Jan26.html>.

as has been represented. Apparently it is not China's intention to permit approval of investment applications directed at the US as casually as it will now approve applications directed at almost any other nation in the world including both developed and developing countries.

*3. What does the omission from the approved list imply for the United States?*

It is unclear whether the policy behind this regulation is simply concerned with careful monitoring of the number of enterprises investing in the United States, or whether it is a subtle method of redirecting and engineering the path of future Chinese investing enterprises. In the past, the limited overseas investment that was permitted was often directed toward both the United States and Japan.<sup>44</sup> Current investment trends also demonstrate domestic Chinese enterprises partiality toward the Japanese market.<sup>45</sup>

There are no official Chinese reports on the quantity of domestic Chinese enterprises invested in Japan or the United States, but there is evidence of the beginnings of robust investment activity. Recent years have produced several instances of Chinese companies buying up casualties of the long economic recession in Japan.<sup>46</sup> For several reasons, Japan is an obvious destination for investing Chinese enterprises. The combination of Chinese consumer's preference for Japanese products and the two countries close proximity make Japan a particularly attractive investment destination.<sup>47</sup>

Though the trend toward Chinese enterprises buying up Japanese companies began only recently, many of such investment projects have proved highly successful.<sup>48</sup>

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<sup>44</sup> *Sino-Economic and Trade Relations*, available at <http://edu.sina.com.cn/en/2002-08-08/4756.html> (last visited on XXXX).

<sup>45</sup> J. Sean Curtin, ASIA TIMES ONLINE, Aug. 17, 2004, available at <http://www.atimes.com/atimes/China/FH17Ad05.html> (last visited on Nov. 27, 2004).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

On the Japanese side, Chinese investment is not only welcome, but comprises an integral part of a strategic effort to rejuvenate the Japanese economy. The Japanese External Trade Organization is charged with the obligation of implementing policy encouraging Chinese FDI.<sup>49</sup> In fact, Japan aims at doubling its 2001 FDI levels by 2006, thereby raising the total figure to US \$119.3 billion.<sup>50</sup>

For similar reasons, domestic Chinese enterprises have demonstrated interest in the US economy as well. For example, Haier's recent growth and innovation is credited to its having invested in the United States market.<sup>51</sup> Moreover, the *Gong Shang Shi Bao* reports that currently the main impetus behind Chinese domestics investing overseas is the opportunity it presents for obtaining new technology or entry into higher-level business industries.<sup>52</sup> The United States' ready availability of technology and a highly skilled labor pool make it well suited for investors breaking into higher technology industries.

Increasing diversity of Chinese industrial development and presence in higher level technologies creates additional mutually advantageous opportunities for Chinese investors in the United States. Careful attention and engineering of Chinese overseas investment has evolved a pattern of investment that concentrates overseas activity among four major areas including, greenfield investment (joint ventures and solely funded subsidiaries), transnational M&As, R&D, and strategic integration.<sup>53</sup> Weiwen He, former commercial counselor of the Chinese General Consulate in New York has reiterated the

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> He Weiwen, *A Survey of China's Overseas Investment*, CHINA DAILY ONLINE, available at [http://english.people.com.cn/200402/26/eng2200400226\\_135898.shtml](http://english.people.com.cn/200402/26/eng2200400226_135898.shtml) (last visited Nov. 27, 2004).

<sup>52</sup> 企业“出走海外”艰辛路, (*Qiyee "Chu Zou Hai Wai" Jianxin Lu*) [*Enterprises Leaving for Overseas, a Treacherous Road*], available at <http://business.sohu.com/20041104/n222839740.shtml>.

<sup>53</sup> He, *supra* note 24.

importance of China's already manifest intention to "make the world market its center stage" and develop competitive multinational enterprises.<sup>54</sup> In doing so, he underscores the importance of investment in developed countries for their role as chief commodity markets and as sources of technology.<sup>55</sup>

The pace and direction of the budding Chinese transnational enterprises has consequence for the United States for several reasons. One primary rationale is pointed out by economist Matthew Slaughter, who characterizes the converse of offshoring, 'insourcing.'<sup>56</sup> Slaughter has studied the impact of insourcing and the potential it offers for leveling the proverbial "global playing field." His compilation of data from the Bureau of Economic Analysis (BEA) and individual insourcing companies produces a story both promising and alarming—promising for its potential to restore what has been lost by globalizing markets; alarming because current rates of insourcing can not be guaranteed in the future.<sup>57</sup> Slaughter's report points out that, while millions of jobs have been outsourced, insourcing accounted for 5.4 million US workers' jobs in 2002.<sup>58</sup> That amounted to nearly 5 percent of all private sector employment and 6 percent of all private sector compensation.<sup>59</sup> Trade deficits are the most often cited reason for underemployment,<sup>60</sup> but Slaughter's report reveals that 20 percent of total US goods exports are produced by insourcing companies.<sup>61</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Slaughter, *supra* note 1, at 1. (Insourcing indicates foreign owned enterprises with US subsidiaries. Data from the report excludes US companies with 10 percent or higher foreign ownership and thereby ensures that findings are conservative representations).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 3.

<sup>59</sup> *Id.* at 11.

<sup>60</sup> SCOTT, *supra* note 1.

<sup>61</sup> Slaughter, *supra* note 3 at 9.

Some might argue that because Chinese overseas investment is small next to global gross transnational direct investment in the US economy (registering at \$35 billion in at the end of 2002),<sup>62</sup> it is not worthy of attention. However, that figure observed in a vacuum does not reveal the potential of Chinese FDI.<sup>63</sup> When viewed in relation to the \$3 billion high in 1991, that figure, and its potential for growth, takes on significance.<sup>64</sup> Moreover, the above cited changes in overseas investment policy promise a dramatic increase in Chinese FDI in coming years.

The pattern of Chinese overseas investment strategy is also significant in relation to Slaughter's report on insourcing. China's strategic development in greenfield investment and M&As is significant because within the US insourcing phenomenon, greenfield and M&A investment activity are primary contributors to job creation.<sup>65</sup> The third area of development, R&D, though not a more significant source of employment in terms of volume, is, according to several empirical studies, the most significant factor behind US output growth during the past century.<sup>66</sup>

Slaughter cites several additional reasons why overseas investors should be interested in developed economies like the United States. In 2003, the US GDP weighed in at over \$11 trillion and constitutes the worlds' largest economy.<sup>67</sup> Many multinational companies locate operations within the United States solely to serve its enormous consumer market.<sup>68</sup> Some consumer goods are not easily exported, or trade agreements

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<sup>62</sup> He, *supra* note 37.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Slaughter, *supra* note 3 at 3-4.

<sup>66</sup> *Id.* at 6.

<sup>67</sup> *Id.* at 5.

<sup>68</sup> *Id.*

make production more convenient in the US.<sup>69</sup> Moreover, the United States' existing cultural support of innovation, skilled employee base, and deep capital markets all present reasons for transnational companies structuring business between overseas to locate certain operations within the US.<sup>70</sup>

With the liberalization of overseas investment policies typified in the instant regulation, transnational development of business structures has become widely possible for private Chinese enterprises. Consistently, there has been a dramatic increase in project approval and project investment aimed outside of China.<sup>71</sup> Meanwhile, the continued economic ascension of Chinese industry can be counted on. World Bank reports estimate that by 2020, China will attain the ranks of the world's second largest trade nation behind the United States, and triple the size of its 1992 economy.<sup>72</sup>

The scale upon which Chinese enterprises are being encouraged to invest overseas contrasted with the reticent attitude toward investment in the US manifest in the instant regulation is a matter for US attention. Though overseas investment policy is not a specific item within US China bilateral trade agreements, transparency has been a continual concern for the United States and other WTO member countries.<sup>73</sup> Paragraph 334 in the Working Party Report manifests the commitment to make available all laws, regulations, and measures concerning or influencing trade in goods or services, TRIPS, or

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 5.

<sup>71</sup> 9家新批境外企业对外投资超千万美元, available at <http://news.sohu.com/20041101/n222776571.shtml>. (*Jiu Jia Xin Pi Jingwai Qiye Dui Wai Touzi Qiao Qian Wan Mei Yuan*). [Nine Newly approved Overseas Enterprises Invest Over Ten Million \$US].

<sup>72</sup> 王海坤, *supra* note 13.

<sup>73</sup> Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOBAL STUDIES L. REV. 98 (2003).

foreign exchange control in at least one official WTO language.<sup>74</sup> Interests in transparency recognize that express contractual terms can not anticipate the possibility of every trade inequity. The commitment to translate trade related laws and regulations extends to this piece of legislation.

Much concern is directed at ways in which to alter of trade relations with China to favor United States employment and manufacturing;<sup>75</sup> conversely, little concern is being devoted to Chinese overseas investment practices or attracting FDI in the United States.<sup>76</sup> However, this paper demonstrates that overall FDI in the United States plays a critical role in providing US employment. Additionally, it argues that Chinese overseas investment is taking on greater significance, particularly with the advent of new overseas investment policy. However, the overseas investment regulation examined herein singles out and disadvantages the United States as a destination for overseas investment without apparent reason. This paper argues that measures should be taken to ensure that the United States is not disadvantaged by current changes in China's foreign investment policy.

### *Conclusion*

There have been significant changes in Chinese overseas investment policy within recent years. Guarantee accounts have been abolished; financing is increasingly available; and most recently, the Ministry of Commerce have given the provinces the green light to unilaterally approve of projects directed to most of the world's countries. The increasing instances of Chinese domestic enterprises taking business and investment projects overseas creates opportunities for increased economic integration and distribution of

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<sup>74</sup> *Id.*

<sup>75</sup> See generally SCOTT, *supra* note 1.

<sup>76</sup> See Slaughter, *supra* note 3.



wealth outside of China. However, the manner in which the Chinese government encourages its citizens to invest overseas will impact the path that distribution takes.

Though the United States may be an attractive destination for investing Chinese enterprises, government investment policy is tacitly, if not overtly, directing its investors elsewhere. The nature China's highly regulated market economy permits significant impact on enterprise development. As the US explores its options for dealing with ever widening trade deficits and employment loss to China, some attention should be directed to the liberalization of Chinese foreign investment policy and whether or not that policy disadvantages the United States in relation to other developed nations. If there is any viable region where the playing field between the United States and China might conceivably be leveled, surely insourcing presents such an opportunity.

## Appendix A

### *Regulation on Examination and Approval Items for Overseas Investment and Establishment of Overseas Enterprises*<sup>77</sup>

Issued by the Ministry of Commerce 2004; No. 16  
Oct. 9, 2004

#### Article 1

To facilitate the development of extra territorial investment, according to the Administrative Enabling Law of the People's Republic of China and the Decision of the State Council on Setting up Administratively Examined and Approved Projects Needing to Be Reserved, and other related regulations, the following is established.

#### Article 2

The Country supports and encourages any and all enterprises which have comparative advantages to establish companies extra territorially.

#### Article 3

“Enterprises set up through overseas investment” indicate or comprise those domestic enterprises established by incorporating (sole proprietorships, joint ventures, or cooperatives); obtained by purchase, annexation, participating stock, injecting capital; or exchanging stock holder's rights in setting up an enterprise abroad; or enterprises possessing full rights of ownership or administration rights.

#### Article 4

The Ministry of Commerce approves of domestic enterprises investing in businesses established overseas with the exception of finance enterprises. The Ministry requests every province, autonomous region, municipality, and city level People's Government Departments of Commercial Administration and Management (hereinafter “Provincial Level Department(s) of Commercial Management”) to approve of domestic enterprises' applications for outside investment businesses set-up in countries listed in the appendix other than applications made by Central Enterprises. The Ministry of Commerce shall make appropriate adjustments according to the circumstances of the countries listed in the appendix.

#### Article 5

Concerning domestic enterprises setting up investment in enterprises abroad, the Ministry of Commerce and Province Level Departments of Commercial Management shall implement examination and approval of applications according to the following factors:

1. National investment environment
2. National safety [stability]
3. The proposed countries' & [the PRC's] political and economic relations

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<sup>77</sup>商务部令 2004 年第 16 号 《关于境外投资开办企业核准事项的规定》, available at [http://www.law-lib.com/law/law\\_view.asp?id=87005](http://www.law-lib.com/law/law_view.asp?id=87005).

4. Guiding policies on overseas investment
5. National [regional] reasonable composition
6. Respect for or observation of relevant International Treaties
7. Legal guarantees protecting industry rights

Industries pursuing foreign investment shall be responsible for their own financial and technological resource viability.

#### Article 6

Those domestic enterprises investing abroad which involve the following situations shall not be approved: violation of national sovereignty, safety or public societal benefit; violation of national laws, regulations and policies; projects having the possibility of leading to a national violation of an international obligation/treaty; involve export of restricted technologies and goods; countries where there are unstable political systems or that present severe security risks; violation of hosting countries' or regions' laws and customs; and businesses engaging in multinational crimes.

#### Article 7

Approval Procedures:

1. A Central Enterprise manager shall submit an application to the Ministry of Commerce; other enterprises shall submit applications to the Province Level Departments of Commercial Management.

2. After the Ministry of Commerce or the Province Level Departments of Commercial Management receive all application materials, where application materials are not complete, or do not conform with the legally requisite format, enterprises shall be informed once of the need to submit further information within five working days from the date of receipt of the application. Those applicants who are not informed within the stated period shall be accepted. All completed and conforming applications and amended applications shall be accepted.

3. Province Level Departments of Commercial Management and Central Enterprises shall consult the Office of Economic and Commercial Secretary. The Secretary shall respond within five working days from the date of the requisition for an opinion letter.

4. Province Level Departments of Commercial Management shall, within their delegated jurisdiction, make a decision concerning the approval of the foreign investment applications within 15 working days of the date of approval. Those which require approval from the Ministry of Commerce, within five working days from the date of receipt, the Department shall perform a preliminary assessment and after approval, shall report to the Ministry of Commerce.

5. The Ministry of Commerce shall decide whether the application is approved within 15 working days of their receipt from the Province Level Departments of Commercial Management.

6. The Ministry of Commerce and Province Level Departments of Commercial Management shall produce written certification of approval to those applicants who are approved and produce written notice of non approval to applicants failing approval.

#### Article 8

1. Application materials: application materials which applicants shall submit consist of:
  - (1) Application forms: (main content consisting of the enterprise name, registered capital, investment amount, scope of management, operation period, form of organization, and structure of stock holder's rights)
  - (2) Extra territorial enterprises' articles of association, and related agreements and or contracts
  - (3) Department of Management of Foreign Exchange's written assessment of the source of foreign capital for investment (whether remitting from domestic foreign exchanges or purchasing foreign exchanges). The opinion letter of the Secretary of Economy and Commerce in foreign countries is necessary only for central enterprises.
  - (4) Domestic business license and proof of possession of requisite legal qualifications and proof of quality.
  - (5) All other documents required by regulation or by law or otherwise decided by the State Council
2. Materials submitted by the Province Level Departments of Commercial Management to the Ministry of Commerce consist of:
  - (1) A preliminary assessment and opinion by the concerned department
  - (2) An opinion letter by the office of the Secretary of Economy and Commerce
  - (3) All application materials submitted by the enterprise.

#### Article 9

After a Central Enterprise is approved, the Ministry of Commerce shall issue a PRC Certificate of Approval for Outside Investment (hereinafter "Certificate of Approval"). The Province Level Department of Commercial Management may issue certification for and in behalf of the Ministry of Commerce for all other enterprises.

According to approval certification, domestic enterprises are subject to additional procedures in respect of foreign exchange, banking, customs, foreign affairs and other such related matters.

#### Article 10

Domestic Enterprises receiving approval shall report statistical material according to national regulations; attend the overseas investing enterprises annual uniform examination; and participate in the overseas investment appraisal of comprehensive achievement.

Approved enterprises shall report and file with the Ministry of Commerce after they have registered locally and report and register with the Office of the Secretary of Economy and Commerce.

#### Article 11

If matters listed in the application on Paragraph one of Article 8 of this regulation experience changes, such changes must be reported to the original approving institution for approval.

#### Article 12

Commercial enterprises investing in overseas enterprises must obey all related laws and regulations. Commercial enterprises investing overseas in overseas enterprises must be approved by the Province Level Departments of Commercial Management or above departments. Those foreign investing enterprises going overseas to set up businesses obtaining approval Ministry of Commerce shall be approved by the Ministry of Commerce. All other foreign investing enterprises going overseas to set up businesses shall be approved at the Province level Departments of Commercial Management. All related specific requirements shall be separately issued by the Ministry of Commerce.

#### Article 13

Methods allowing electronic online filing and online approval and certification by the Ministry of Commerce will be later made available and sent out.

#### Article 14

The Province Level Departments of Commercial Management shall not commit the approval of overseas investment applications to lower level Departments of Commercial Management, neither shall they increase the approval circuits, application materials or approval context.

#### Article 15

For domestic enterprises going to Hong Kong, Macao special autonomous regions to set up businesses, the related application approval rules apply.

#### Article 16

Previous procedures inconsistent with the rules of this law are herein superceded.

#### Article 17

The Ministry of Commerce shall interpret this law.

#### Article 18

This law is effective on the date of issuance.

## Appendix B

The Name List of the Countries in Which the Ministry of Commerce Entrusts the Province Level Departments of Commercial Management to Examine and Approve Establishment of Overseas Enterprises:

### Asia (38)

Thailand  
Kuwait  
Sri Lanka  
Maldives  
Malaysia  
Pakistan  
Turkey  
Mongolia  
Uzbekistan  
Kyrgyzstan  
Armenia  
Philippines  
Kazakhstan  
South Korea  
Turkmenistan  
Vietnam  
Laos  
Tajikistan  
Saudi Arabia  
Azerbaijan  
Indonesia  
Oman  
Israel  
United Arab Emirates  
Lebanon  
Cambodia  
Bangladesh  
Syria  
Yemen  
Qatar  
Bahrain  
Iran  
Brunei  
Cyprus  
Jordan  
Myanmar

### Europe (37)

Sweden  
Germany  
France  
Belgium  
Luxembourg  
Finland  
Malta  
Norway  
Italy  
Denmark  
Netherlands  
Austria  
Britain  
Switzerland  
Poland  
Bulgaria  
Hungary  
Czech Republic  
Slovak Republic  
Portugal  
Spain  
Greece  
Russia  
Ukraine  
Moldova  
Belarus  
Albania  
Croatia  
Estonia  
Slovenia  
Lithuania  
Iceland  
Romania  
Yugoslavia  
Macedonia  
Bosnia and Herzegovina  
Latvia

Africa (42)

Ghana  
Egypt  
Morocco  
Mauritius  
Zimbabwe  
Zambia  
Algeria  
Gabon  
Mali  
Libya  
Angola  
Cameroon  
Nigeria  
Sudan  
Congo Kinshasa  
South Africa  
Cape Verde  
Ethiopia  
Congo/Brazzaville  
Botswana  
Sierra Leone  
Mozambique  
Kenya  
Djibouti  
Benin  
Uganda  
Mauritania  
Guinea  
Guinea-Bissau  
Madagascar  
Central African Republic  
Tanzania  
Togo  
Lesotho  
Eritrea  
Cape Verde  
Equatorial Guinea  
Seychelles  
Comoro  
Liberia  
Nigeria  
Tunisia

Americas (14)

Canada  
Mexico  
Brazil  
Bolivia  
Argentina  
Uruguay  
Ecuador  
Chile  
Peru  
Jamaica  
Cuba  
Barbados  
Trinidad Tobago  
Guyana

Oceania (4)

Australia  
New Zealand  
Papua New Guinea  
Fiji