
17. The Trend of China's Foreign Investment Legal System

From the perspective of the China (Shanghai) Pilot Free Trade Zone

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Introduction

The China (Shanghai) Pilot Free Trade Zone (SPFTZ) was approved by the State Council in August 2013 and established on 29 September of that year (Central Government of the PRC 2013; Xinhuanet 2013). It is located in the district of Pudong in Shanghai, and is the integration of four existing special customs supervision areas (SCSAs): Shanghai Waigaoqiao Free Trade Zone, Waigaoqiao Free Trade Logistics Park, Yangshan Free Trade Port Area and Pudong Airport Comprehensive Free Trade Zone.¹

The establishment of the SPFTZ was designed to meet the needs of China's economic and legal development, and is consistent with China's long-time policy of economic reform.² China's economic growth has slowed since 2012 (Wang and Liu 2013), which has made it necessary for economic transformation and upgrading to ensure sustained, stable and rapid economic growth. The rapid reconstruction of world trade and investment rules requires China to have new ideas for its opening-up policy (Xu et al. 2013). Moreover, after years in operation, shortcomings in China's foreign investment law have emerged (Gao and Jiang 2014: 549–50), which have made reforms necessary in this area.

The SPFTZ is different from previous SCSAs. It focuses on system innovation, rather than favourable treatment (Xu et al. 2013). The areas involved include not just taxation, but have expanded into investment, trade, finance, law, and so on.³ The legal and economic reforms tested in the SPFTZ will serve as practical experience, will be mirrored and repeated in other parts of the country, will

1 The four SCSAs were established in June 1990, December 2003, June 2005 and July 2009, respectively. See SPFTZ (2013a).

2 'China' refers to mainland China only.

3 Framework Plan for the China (Shanghai) Pilot Free Trade Zone (SPFTZ Framework Plan).

eventually help China to boost the recovery, transformation and upgrading of its economy, as well as furthering its integration into the international foreign investment legal system.⁴

Pilot system reforms in the SPFTZ have been successful and some are now being used beyond the zone. This chapter looks at the direction of China's foreign investment law by examining the legal systems applied in the SPFTZ, comparing them with China's general foreign investment legal system and analysing their application in regions outside the SPFTZ.

The framework of foreign investment laws and policies in China⁵

The basic framework of China's foreign investment law and policy has been developed gradually since it adopted its open-door policy. China's current foreign investment law and policy include laws and regulations, the Guiding Catalogue for Foreign Investment Industries (the Guiding Catalogue), the Catalogue of Priority Industries for Foreign Investment in the Central-Western Region (the Central-Western Catalogue) and a series of policies.

Laws and regulations

China's current foreign investment law comprises three enterprise laws, their implementation rules, the Company Law of the People's Republic of China (the Company Law),⁶ and hundreds of administrative regulations and rules. China's first foreign investment law is the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures (the Equity Joint Venture Law), made in 1979.⁷ Subsequently, the National People's Congress (NPC) promulgated the Law of the People's Republic of China on Foreign-Invested Enterprises (the Foreign-Invested Enterprises Law)⁸ and the Law of the People's Republic of China on Chinese-Foreign-Invested Joint Ventures (the Contractual Joint Ventures Law).⁹ These laws—generally known as China's 'three investment laws'—are basic laws governing foreign investments in China.

4 Notice of the State Council on Issuing the Framework Plan for China (Shanghai) Pilot Free Trade Zone, issued 18 September 2013.

5 See Gao and Jiang (2014: 532–6).

6 Promulgated on 29 December 1993; amended on 25 December 1999 and 28 August 2004; revised on 27 October 2005; and amended again on 28 December 2013.

7 Promulgated on 8 July 1979; amended on 4 April 1990 and 15 March 2001.

8 Promulgated on 12 April 1986; amended on 31 October 2000.

9 Promulgated on 13 April 1988; amended on 31 October 2000.

To ensure the implementation of the three investment laws, the State Council promulgated three regulations or rules: Regulations for the Implementation of the Law of the People's Republic of China on Chinese–Foreign Equity Joint Ventures (Equity Joint Venture Regulations);¹⁰ Rules for the Implementation of the Law of the People's Republic of China on Foreign–Capital Enterprises (Foreign–Capital Enterprise Rules);¹¹ and Rules for the Implementation of the Law of the People's Republic of China on Chinese–Foreign Contractual Joint Ventures (Contractual Joint Venture Rules),¹² which are collectively referred to as the regulations of the three investment laws. The three investment laws and the regulations of the three investment laws constitute the basic framework of China's foreign investment law.

Since the promulgation of the Company Law in 1993, a basic legal framework has been established by which special laws are to be applied to foreign investment companies, in addition to laws applicable to companies in general.¹³ This framework stands after several amendments to the Company Law.¹⁴ In addition, a large number of rules relating to foreign investment have been issued,¹⁵ which, together with the three investment laws, the regulations of the three investment laws and the Company Law, have formed a relatively comprehensive foreign investment legal system in China.

Guiding catalogues

The three investment laws and the regulations of the three investment laws provide guidance on the areas and industries in which foreigners may invest.¹⁶ In 1995, in order to provide further guidance for foreign investment and to ensure foreign investments are consistent with China's national economic and social development plans, the relevant departments of the State Council promulgated the Guiding Catalogue for the review and approval of foreign

10 Promulgated on 20 September 1983; revised on 15 January 1986, 21 December 1987, 22 July 2001 and 19 February 2014.

11 Promulgated on 21 December 1990; revised on 12 April 2001 and 19 February 2014.

12 Promulgated on 4 September 1995; revised on 19 February 2014.

13 Article 18 of the Company Law, promulgated in 1993.

14 The amendments of the Company Law in 1999, 2004 and 2013 did not touch the principle. The revision in 2005 broadens the extent of the principle, by including foreign invested corporations owned by shareholders.

15 For example, Measures for Strategic Investment by Foreign Investors upon Listed Companies (promulgated on 31 December 2005); Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (promulgated on 8 August 2006); Provisions on the Establishment of Investment Companies with Foreign Investment (promulgated on 10 June 2003; amended on 13 February 2004 and 17 November 2004); and so on.

16 See Article 3 of Equity Joint Ventures Regulations; Article 3 of Foreign-Invested Enterprises Law; Articles 4 and 5 of Foreign–Capital Enterprises Rules; and Article 4 of Contractual Joint Ventures Law.

investment applications.¹⁷ On 11 February 2002, the State Council promulgated the Provisions on Guiding Foreign Investment Direction,¹⁸ providing that both the Guiding Catalogue and the Central-Western Catalogue would serve as a basis for reviewing, evaluating and approving foreign investment projects and enterprises (MOFCOM 2000).

The Guiding Catalogue is a nationwide directory for foreign investments. It sets up three categories of industries: encouraged, restricted and prohibited. Those not included in the catalogue fall into a default fourth category: 'permitted' industries.¹⁹ Since its publication in 1995, the Guiding Catalogue has been revised six times—in 1997, 2002, 2004, 2007, 2011 and 2015. Looking at these amendments, the restricted industries have gradually been reduced and the encouraged industries have increased.

The Central-Western Catalogue was first published in 2000 for the implementation of the Western Region Development Strategy of the State Council, and has been revised three times, in 2004, 2008 and 2013. It was meant to improve the quality of the overall economic development of the central and western regions. The industries listed in this catalogue are those that are seen to have significant advantages in each province in terms of the environment, natural resources, human resources, production, technology and markets, and which may enjoy preferential treatment as industries in which foreign investment is encouraged.²⁰ The Central-Western Catalogue will not be discussed further in this chapter, as it is not applicable nationally.

Policies

The development of foreign investment laws in China is closely related to and results from changes in Chinese foreign investment policies. The Chinese Government has adopted a progressive opening-up policy since the beginning of the reform period. Two recent policy documents of significant guiding effect are the Twelfth Five-Year Economic and Social Development Plan (Twelfth Five-Year Plan 2011–15)²¹ and the Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform (CCCPC Decision 2013).²² The key points of these two documents are to advance and deepen China's opening-up policy, to reduce limitations

17 Article 3.2 of the Interim Provisions on Guiding Foreign Investment Direction (promulgated on 20 June 1995; expired).

18 Article 17 of Provisions on Guiding Foreign Investment Direction (promulgated on 11 February 2002).

19 Article 4 of Provisions on Guiding Foreign Investment Direction.

20 Article 11 of Provisions on Guiding Foreign Investment Direction.

21 Adopted by the fourth meeting of the Eleventh National People's Congress on 14 March 2011.

22 Adopted at the Third Plenary Session of the Eighteenth Central Committee of the Communist Party of China on 12 November 2013.

on foreign investment and to promote the unification of laws and regulations regarding foreign and domestic investors in China.²³ They have sent positive signals to foreign investors aiming to invest in China.

Foreign investment laws and policies in the SPFTZ: Framework and innovations

The economy in the SPFTZ has been performing well since its establishment (SPFTZ 2014b); however, developing the economy is not the ultimate goal of the establishment of the zone. The ultimate goal is to foster China's openness and internationalisation by testing reforms on a small scale before applying them nationally (SPFTZ Framework Plan). This section will focus on law and policy innovations in the SPFTZ after introducing the framework therein.

Framework

A series of laws and policies has been published or modified by authorities such as the National People's Congress Standing Committee (NPCSC), the State Council and the Shanghai Municipal Government to accommodate the operation of the SPFTZ (SPFTZ n.d.). The following are some of the most important examples.

1. The NPCSC adopted the Decision of the Standing Committee of the National People's Congress on Authorising the State Council to Temporarily Adjust the Relevant Administrative Approval Items Prescribed in Laws in China (Shanghai) Pilot Free Trade Zone (Decision of NPCSC on Temporarily Adjusting Administrative Approval Items),²⁴ authorising the State Council to temporarily adjust the relevant administrative approval items prescribed in the three investment laws.
2. The State Council approved and published the Framework Plan for China (Shanghai) Pilot Free Trade Zone in 2013 (SPFTZ Framework Plan),²⁵ having identified five critical missions for the SPFTZ: speeding up transformation of government functions; expanding areas for investment; fostering change in trade development modes; deepening the opening-up and innovation in the financial sector; and improving safeguard measures in the legal field.
3. The Shanghai Government issued Measures for the Management of China (Shanghai) Pilot Free Trade Zone (Measures for Management of SPFTZ)

²³ Twelfth Five-Year Plan 2011–15 and CCCPC Decision 2013.

²⁴ Adopted by the fourth meeting of the Twelfth NPCSC; came into force on 1 October 2013.

²⁵ Issued on 18 September 2013.

- in 2013,²⁶ listing clearly the management institutions and investment management measures.
4. The Shanghai Government issued Special Management Measures for the Access of Foreign Investment in China (Shanghai) Pilot Free Trade Zone in 2013 (the Negative List 2013),²⁷ and the subsequent amendment in 2014 (Negative List 2014 Amendment),²⁸ having clearly listed foreign investment projects and enterprises that are not subject to filing management.
 5. To implement the filing management system in the SPFTZ Framework Plan, the Shanghai Government issued two sets of administrative rules: Administrative Measures for the Filing of Foreign Investment Projects in China (Shanghai) Pilot Free Trade Zone (Measures for Project Filing in SPFTZ);²⁹ and the Administrative Measures for the Filing of Foreign-Investment Enterprises in China (Shanghai) Pilot Free Trade Zone (Measures for Enterprise Filing in SPFTZ)³⁰ on 29 September 2013. The former has provided details for the filing of foreign investment projects outside the negative list in the SPFTZ. The latter has provided details for the filing of foreign investment enterprises outside the negative list in the SPFTZ. For those foreign investment projects and enterprises that are listed in the negative list, approval is needed unless otherwise provided by the State Council (Information Office of the State Council 2014).
 6. The State Council published the Decision of the State Council on Temporary Adjustments to the Administrative Approval Items or Special Administrative Measures on Access Prescribed in Relevant Administrative Regulations or State Council's Documents in China (Shanghai) Pilot Free Trade Zone (Decision of the State Council on Temporary Adjustments to Administrative Approval Items),³¹ and the Decision of the State Council on Temporary Adjustments to the Administrative Approval Items or Special Administrative Measures on Access Prescribed in Relevant Administrative Regulations or Rules Approved by the State Council in China (Shanghai) Pilot Free Trade Zone (Decision of the State Council on Temporary Adjustments Special Administrative Measures)³² in 2013 and 2014 respectively, having temporarily adjusted the scope for administrative approvals and special administrative measures with regard to the administrative approval process, qualification requirements, share proportion restrictions and business scope.

26 Issued on 29 September 2013.

27 Issued on 29 September 2013.

28 Issued on 30 June 2014.

29 Issued on 29 September 2013; came into force on 1 October 2013.

30 Issued on 29 September 2013; came into force on 1 October 2013.

31 Issued on 21 December 2013.

32 Issued on 4 September 2014.

7. In accordance with the SPFTZ Framework Plan, 18 measures have been taken for further opening-up in six service industries, including finance, shipping, trade, professional services, culture and social services in the SPFTZ. To implement these measures, authorities such as the China Banking Regulatory Commission, the People's Bank of China (PBC) and the Ministry of Transport have subsequently issued a series of rules to trial innovation measures in those areas.³³

The laws, regulations and policies listed above are essential in at least two aspects: clearly outlining the ultimate goal for the establishment of the SPFTZ and listing details for the implementation of the trial measures.

Innovations

Pre-establishment national treatment plus negative list

One innovation highlight in the SPFTZ is the adoption of the pre-establishment of national treatment plus the negative list, which is a fundamental change to the management of foreign investments in China. This management mode is confirmed by CCCPC Decision 2013, which has provided that a 'uniform market access system will be established. On the basis of the negative list system, all market players can equally enter areas outside the negative list. The mode of pre-establishment national treatment plus negative list for the management of foreign investment will be explored.'

In principle, this gives foreign investors no less favourable treatment than domestic investors at the admission stage in investing in the host country, except as otherwise listed on the negative list. In other words, for areas on the negative list, foreign investors are given not national treatment, but special administrative treatment. In contrast, for those areas not on the negative list, foreign investors are given national treatment.

The Negative List 2013, as the first negative list in China, has attracted great attention at home and abroad since its publication. The filing system used for the management of foreign investment has greatly shortened the time required for approval and improved the degree of investment enhancement (Information Office of the State Council 2014).

³³ For instance, Announcement of the Ministry of Transport on the Implementation on a Trial Basis in the China (Shanghai) Pilot Free Trade Zone of Implementing Measures for Increasing the Foreign Investment Measures for Increasing the Foreign Investment Percentage in the International Shipping and International Shipping Management Businesses, promulgated on 27 January 2014.

In 2014, the Shanghai Government amended the Negative List 2013 in order to further enhance opening-up, increase transparency and converge with generally accepted international rules (Information Office of the State Council 2014). Compared with the Negative List 2013, the Negative List 2014 Amendment has the following four features. First, it has further eased market access restrictions, through expanding the scope for the items to be filed and reducing restrictions on the entry of foreign investment. For example, it has removed the item that restricts foreign investment in cotton (seed) processing, and removes the requirement of adopting contractual joint ventures or equity joint ventures when investing in the development and application of new or related technologies to improve crude oil extraction efficiency. Second, it has increased transparency by providing more details in the negative list. For example, it has provided that prohibited foreign-invested special teas include 'white tea, yellow tea, oolong tea, dark green tea, compressed tea and others'. In contrast, in the Negative List 2013, special teas referred to the vague 'famous tea and dark green tea and others'. Third, it has further detailed the meaning of national treatment. For instance, since domestic investors are prohibited from investing in areas such as the sex industry and gambling, national treatment logically means the same thing for foreign investors in those areas. Fourth, it has clearly stated that different administrative measures apply to investments within or outside the negative list.³⁴

Foreign investment projects and the enterprise filing system

The SPFTZ Framework Plan states that the management mode of foreign investment will be reformed. More specifically:

[F]or areas outside the negative list, in line with the principle of consistency in policies for both foreign-investment enterprises and domestic enterprises, the approval system for foreign-investment projects will be replaced with the filing system unless the State Council maintains that approval is required also for domestic investment projects, which will be administered by Shanghai Government. The approval of contracts and bylaws of foreign-investment enterprises will be replaced with the filing system and administered by Shanghai Government. The afterwards formalities will be followed according to the relevant national provisions. (SPFTZ Framework Plan)

Therefore, the filing system includes two categories: foreign investment projects and foreign investment enterprises.

³⁴ The Negative List 2013 only identifies that the filing system applies in fields outside the list. It does not clarify whether the approval system still applies in fields in the negative list.

The filing system is a breakthrough in China's existing foreign investment laws and regulations. To ensure the legitimacy and effectiveness of the filing system, the NPCSC formulated its Decision to Temporarily Adjust Administrative Approval Items before the establishment of the SPFTZ, authorising the State Council to temporarily adjust relevant administrative approval items prescribed in the three investment laws, which have expanded the legislative power of the State Council. Accordingly, the State Council successively issued its Decision on Temporary Adjustments to Administrative Approval Items in December 2013 and on Temporary Adjustments to Special Administrative Measures in September 2014, which have together temporarily adjusted a series of administrative approval items and special administrative measures on access, in respect to qualification requirements and restrictions on share proportions and business scope in 23 administrative regulations approved by the State Council.

For the establishment of or changes in foreign investment enterprises, the management mode provided in China's foreign investment laws requires approval from relevant commerce departments before registering at relevant industrial and commercial administration departments. The periods for approval are three months, 45 days and 90 days respectively in the three investment laws.³⁵ In contrast, the SPFTZ has substituted the approval requirement for items outside the negative list with the filing system and greatly shortened the time required. In accordance with Article 7 of the Measures for Enterprise Filing in the SPFTZ, 'the filing management agency shall conduct filing within 1 working day after the investor (or foreign-investment enterprise) having completed the online application'. That is, only one day is needed for such items to be filed.

Reform and innovation in dispute-resolution mechanisms

Judicial system

Since a judicial institution with high-quality professionals is needed to deal with disputes within the SPFTZ, the Free Trade Zone Court (the FTZ Court) under the Shanghai Pudong New District People's Court (the Pudong Court) was established with the approval of the Shanghai Higher People's Court on 5 November 2013 (Wei and Li 2013). The FTZ Court has jurisdiction over commercial, intellectual property and real estate cases that are related to the SPFTZ and is under the jurisdiction of the Pudong Court. Its jurisdiction might be adjusted in accordance with the development and operation of the SPFTZ

³⁵ Article 3 of Equity Joint Ventures Law; Article 6 of Foreign-Invested Enterprises Law; and Article 5 of Contractual Joint Ventures Law.

(Tian 2013).³⁶ In addition to dispute resolution, the FTZ Court is also responsible for researching the application of the law in cases regarding the SPFTZ (Wei and Li 2013).

On 27 May 2014, Pudong Court launched 'a dispute resolution mechanism (DRM) on commercial cases linking litigation with non-litigation DRMs in the SPFTZ' (commercial DRM in SPFTZ) (Wang 2014). This means that for cases under the jurisdiction of the FTZ Court—with the consent and selection of the parties—the Pudong Court may designate a mediation agency before the case is accepted or authorise a mediation agency after the case is accepted to mediate before hearing, and examine and ascertain the enforceability of the mediation agreement. Mediation agencies that can be designated or authorised include commercial mediation organisations, industry associations, chambers of commerce or other organisations with mediation functions (Wang 2014).

The commercial DRM in the SPFTZ has the following special features (Wang 2014): first, the whole process of mediation is based on the full autonomy of the parties—that is, the parties can choose to start or continue the mediation process, to reach a mediation agreement and to apply for judicial confirmation of the mediation agreement. Second, the mediation is authorised by the Pudong Court and performed by specialised commercial mediation organisations with abundant experience and knowledge in areas of investment, trade, finance and intellectual property. Third, the rules applied during the mediation are professional rules of the respective mediation organisations. Fourth, the mediation process is formal, as the Pudong Court and the mediation organisations together have clearly defined a series of procedures such as the implementation period, judicial confirmation, challenges and confidentiality. Fifth, the mediation and trial processes are separate and independent procedures which means the mediation record will not be transferred to the FTZ Court and the compromises reached during the mediation process will not become the basis for the decisions of the FTZ Court. Sixth, it can save time and litigation fees, as the participation of mediation organisations can speed up solutions, and the Pudong Court can provide a discount on litigation fees.

Arbitration system

On 22 October 2013, the Shanghai International Arbitration Centre (SHIAC) established the SPFTZ Court of Arbitration, in order to provide convenient arbitration services, consultation, filing and hearings relating to arbitration (Liu 2013). The first hearing by the SPFTZ Court of Arbitration took place on 26 November 2013 (Yao 2013).

³⁶ The FTZ Court has received 380 cases a year since its establishment on 5 November 2013 (SPFTZ 2014a).

In January 2014, SHIAC started the formulation of the SPFTZ Arbitration Rules, which were issued on 8 April 2014 and came into force on 1 May that year. As the first set of arbitration rules in the SPFTZ, they represent another breakthrough in the improvement of the legal environment in the zone (Ye 2014). The SPFTZ Arbitration Rules, made according to generally accepted international practices and the Arbitration Law of the People's Republic of China, consist of 10 chapters and 85 articles (Wen 2014). The innovative points of the SPFTZ Arbitration Rules include the following. They have:

- improved the use of provisional measures and introduced an emergency arbitration mechanism
- established an open roster system, so parties can choose people outside the list
- linked arbitration with mediation by providing mediators before the arbitration tribunal is formed
- added procedures for small claims, which apply to disputes involving no more than RMB100,000
- provided details with regard to consolidation of arbitration, joinder of other parties under the same arbitration agreement and joinder of third parties
- emphasised the system of evidence during arbitration
- included an amiable arbitration system (Ye 2014).

Special taxation policy

The innovation in taxation monitoring policy in the SPFTZ can be summarised as an 'easing [of] control on the first line, effective and efficient control on the second line and full freedom inside the SPFTZ'. The first line refers to the border to entry into the SPFTZ; the second line refers to the border between the SPFTZ and other regions of China (Information Office of Shanghai Government 2013). 'Easing control on the first line' means easing controls on goods imported and exported across the borderline—using the clearance mode called 'entering the SPFTZ before customs declaration' (Information Office of Shanghai Government 2013). 'Effective and efficient control on the second line' means imposing effective and efficient supervision on the border between the SPFTZ and other parts of China, including but not limited to improving inspection and quarantine measures, exploring measures of pre-filing for export and import goods, verification management and follow-up supervision, as well as levying import value-added tax and consumption tax (SPFTZ 2013b). 'Full freedom inside the SPFTZ' refers to a trial 'allowing enterprises to deliver goods in batches and make a centralised customs declaration, and to transport their own

goods themselves' (Information Office of Shanghai Government 2013). The aim of the trial of this policy is to transform Shanghai into an international hub port (Information Office of Shanghai Government 2013).

Though the main purpose of the SPFTZ is to trial innovations rather than the implementation of favourable policies, some preferential taxation treatments—such as reductions in customs duty and permission for payment installations for corporate income tax—still exist for those enterprises inside the SPFTZ that meet the requirements.³⁷

The breakthrough and impact of foreign investment law in the SPFTZ on China's foreign investment legal system

China has a uniform foreign investment legal system although there exist special rules or policies applicable to the Central-Western and other regions. The foreign investment laws in the SPFTZ, however, are quite different—not only because of their limited geographical application, but also because many new reform measures are being tried.

Breakthroughs

Guiding catalogue versus negative list

Both the Guiding Catalogue and the negative list identify the industries in which foreign investors can invest, but in different ways. There are four categories of industries in the Guiding Catalogue regime: permitted, encouraged, restricted and prohibited. The first three categories allow foreign investors to invest, although investments in restricted industries must be in line with conditions in the Guiding Catalogue. The negative list identifies the industries in a different way—while industries listed therein are either restricted or prohibited to foreign investors, those outside the list are accessible for foreign investment.

Although both the Guiding Catalogue and the negative list have the same function, as outlined above, they have several differences. First, the Guiding Catalogue has a broader scope of application than the negative list. The negative

37 See Circular on Relevant Import Tax Policies for the China (Shanghai) Pilot Free Trade Zone (issued on 15 October 2013); Notice of the Ministry of Finance and the State Administration of Taxation on Enterprise Income Tax Policies for External Investment with Non-Monetary Assets and Other Asset Restructuring Activities of Enterprises in China (Shanghai) Pilot Free Trade Zone (issued on 15 November 2013); and so on.

list applies only in the SPFTZ, while the Guiding Catalogue applies nationwide and excludes the SPFTZ. Second, they are different in form. The Guiding Catalogue lists encouraged, restricted and prohibited industries; those that are not included in these three fall into the category of permitted industries. In contrast, the negative list does not outline permitted or encouraged industries, nor does it distinguish restricted industries from prohibited ones. However, a close look at the Negative List 2013 and Guiding Category (2011 version) will find that the Negative List 2013 is almost a duplication of the restricted and prohibited industries listed in the Guiding Catalogue 2011 (Ding 2013). Third, the preconditions for the application of the Guiding Catalogue and negative list are different. While the negative list is based on giving national treatment to foreign investors and their investments before they enter the SPFTZ, the Guiding Catalogue does not have such a precondition.

Approval system versus filing system

A series of approvals is needed during the establishment and operation of foreign investment enterprises. For instance, one category under the approval system is the approval of the articles of association and/or agreement for the foreign investment enterprise from the Ministry of Commerce (MOFCOM), the provincial commerce department and the National Economic and Technological Development Zone (collectively referred to as commerce departments). Another category is the approval of foreign investment projects by the National Development and Reform Commission (NDRC) and its delegated authority (collectively referred to as development and reform departments).

The filing system on trial in the SPFTZ is based on the negative list. In short, while for foreign investment projects or enterprises that are outside the negative list filing is required, for those within the negative list, approval is required (SPFTZ Framework Plan).

There are four major differences between the approval system and the filing system. First, the agencies approving foreign investment enterprises or projects are commerce departments and development and reform departments. In comparison, the agency in charge of filing for foreign investment enterprises or projects is the SPFTZ Administration Committee. Second, the timing and concept of supervision are different. The approval system intends to review whether foreign investors can enter the Chinese market, which is an ex ante approval, demonstrating the idea of control of market supervision. In comparison, the filing system largely eases the ex ante supervision but focuses on ex post supervision, reducing government control of the market. Third, the scope of the approval system is much broader than that of the filing system. For instance, under the approval system, any establishment of or changes in

foreign investment enterprises require prior approval.³⁸ In contrast, only the establishment of or changes in foreign investment enterprises that are within the negative list require approval before investing in the SPFTZ. Fourth, as mentioned above, the filing system in the SPFTZ has greatly shortened the time required to complete the relevant procedures.

Post-establishment national treatment versus pre-establishment national treatment

After years of reform, foreign investment enterprises have gradually been given national treatment under China's foreign investment legal system (Gao and Jiang 2014: 545–6). However, the national treatment mentioned here applies only when foreign investment enterprises have already been established. In contrast, the national treatment on trial in the SPFTZ extends to the phase before investment enterprises are established in China. There are some other key differences. First, the degrees of liberalisation are different. Pre-establishment national treatment implies a further commitment on investment liberalisation, as the discretion of the host country on investment review is reduced and the transparency of investment is increased. Second, the degrees of supervision are different. Post-establishment national treatment supervises foreign investors and their investment before and after they enter China, while pre-establishment national treatment reduces supervision on the entry of foreign investment but focuses more on the operation of foreign investment.

Impact

Expansion of the filing system

The SPFTZ changed the management mode for foreign investment projects from the blanket approval system to a combination of limited approval and a general filing system (Information Office of the State Council 2014). The promotion of this combination is highlighted by the NDRC in the Measures for the Administration of Confirmation and Recording of Foreign Investment Projects (Administration Measures),³⁹ which have detailed the scope and mode of the approval and filing of foreign investment projects. The NDRC has revised the Administration Measures, but the management mode has been left untouched.⁴⁰

38 See Notice of the Ministry of Commerce on Decentralising the Examination and Approval Power for Foreign Investment (issued on 10 June 2010).

39 Issued on 17 May 2014; came into force on 17 June 2014.

40 The Administration Measures are partly modified by the Decision of the National Development and Reform Commission on Amending the Relevant Clauses of the Measures for the Administration of the Confirmation and Recording of Overseas Investment Projects and the Measures for the Administration of the Confirmation and Recording of Foreign-Funded Projects (issued on 27 December 2014).

On 28 December 2014, the NPCSC adopted its Decision on Authorising the State Council to Temporarily Adjust the Relevant Administrative Approval Items Prescribed in Laws and Regulations in China (Guangdong) Pilot Free Trade Zone, China (Tianjin) Pilot Free Trade Zone, China (Fujian) Pilot Free Trade Zone and Expanded Areas of China (Shanghai) Pilot Free Trade Zone (Xinhuanet 2014). The State Council has therefore been authorised to temporarily adjust relevant administrative approval items regarding foreign investment enterprises provided in the three investment laws and the Law of the People's Republic of China on Protection of Investments by Taiwan Compatriots in the regions mentioned above. This decision has replaced the approval system for foreign investment enterprises with the filing system, which has now been expanded in China. On 8 April 2015, the State Council published Special Administrative Measures for the Access of Foreign Investment in China's Pilot Free Trade Zones (the Negative List), which applies to all the pilot free trade zones in Shanghai, Guangdong, Tianjin and Fujian.⁴¹

Replication of customs monitoring measures

Experience with these reforms has been gained since the establishment of the SPFTZ, and some are now mature enough to be replicated in Shanghai, other regions or even the whole country. In the first half of 2014, Shanghai Customs, with the authorisation of the General Administration of Customs (GAC), announced that 14 customs monitoring measures—including declaration after entering the zone and allowing enterprises to transport their own goods within the zone—could be replicated and used outside the SPFTZ (GAC 2014). In July 2014, customs agencies in Tianjin, Chongqing and Xi'an launched a trial of these measures to identify any problems that may arise from their expansion (China Customs Statistics 2014). On 13 August 2014, GAC announced further expansion of these measures in three stages: replicated in 51 SCSAs in the economic belt along the Yangtze River from 18 August 2014; replicated in all the SCSAs in China from 3 September 2014; and replicated in regions that are not SCSAs from 18 September 2014 (China Customs Statistics 2014).

Implementation of generally accepted international rules

The foreign investment management mode of pre-establishment of national treatment plus the negative list have become a trend in the development of rules for international investment. The trial of this mode in the SPFTZ is in line with this trend, and is also consistent with China's reform of the approval system. In addition to the trial in the SPFTZ, there are many signs that this mode may become the future for China's foreign investment management mode.

41 Issued on 8 April 2015; came into force on 8 May 2015.

For instance, during the Fifth China–US Strategic and Economic Dialogue in July 2013, China agreed to negotiate with the United States on the basis of this mode (Sun et al. 2013). MOFCOM signed two free trade agreements, with Hong Kong and Macao special administrative regions, in December 2014, which for the first time adopted this mode on the Chinese mainland (Ma and Li 2014). In January 2015, MOFCOM issued a draft of the Foreign Investment Law of the People's Republic of China, which has also adopted this mode (MOFCOM 2015).

The SPFTZ Arbitration Rules have done more towards adopting advanced systems in international commercial arbitration. For example, they have improved in the area of provisional measures, added an emergency tribunal system and adopted an open roster system of arbitrators.⁴²

Conclusion

Responding to challenges arising at home and abroad and in order to improve the foreign investment legal system and deepen reforms of the market economy, the Chinese Government in September 2013 set up a pilot zone in Shanghai. Some generally accepted international rules have been implemented in the SPFTZ, such as the foreign investment management mode of pre-establishment of national treatment plus a negative list, a filing system for foreign investment projects and enterprises, and taxation monitoring policies. In addition, innovative DRMs have also been introduced, such as the launch of the commercial DRM in the SPFTZ, and the formulation of the SPFTZ Arbitration Rules in 2014.

The systems adopted in the SPFTZ for foreign investment differ greatly from those applied previously in China, demonstrating the efforts of the Chinese Government to integrate into the international economic market and adopt generally accepted international rules. The SPFTZ, which has been established for just more than a year now, has achieved a great deal by creating many innovative systems that are to be replicated in other parts of the country. Some of the systems have already been replicated in Shanghai and, in some cases, nationwide. This has demonstrated the value of the SPFTZ in exploring a new economic mode, and in leading reform in China.

42 See more in the section regarding the reforms and innovations of the arbitration system; or see Ye (2014).

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