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Inside

New Regulation on Environmental Impact Assessment for Government Project Plans

Key Points:

- ***New regulation provides more detailed procedures for reviewing environmental evaluations and follow-up monitoring***
- ***Environmental impact will be controlled at the district level***
- ***Administrative liabilities will apply in case of noncompliance***

For more than two decades, the practice of conducting environmental impact assessments (EIAs) in China was part of the country's Environmental Protection Law[1]. In October 2002 that law was upgraded to a new national Environmental Impact Assessment Law[2] (EIA Law), which is considered the most progressive legislation addressing environmental issues in China in recent years. The EIA Law explicitly states that EIA is required for both new private construction projects and government development plans. However, the provisions of the EIA Law are too general to be enforceable, especially on new project planning evaluations. The law is unclear on how local governments should approve new projects. Also, given the importance of establishing new projects, EIA for construction projects has been given more attention, which is partly why problems and issues have been found in connection with government plan EIA (PEIA). To further strengthen assessment of environmental impact, in particular to supervise governmental agencies in terms of PEIA, a new Regulation on Plan Environmental Impact Assessment (Regulation) was promulgated on August 17, 2009 and goes into effect on October 1, 2009.

The Regulation aims to prevent pollution and ecological destruction by regulating, guiding and supervising local government's environmental evaluation of project plans. It specifies which entities are obligated to conduct, review and approve the PEIAs and provides detailed procedural provisions for reviewing evaluations and follow-up monitoring. Although consultation with the public was previously required in the EIA Law, the Regulation reiterated that the public's opinion should be solicited and written into the evaluation report for special projects that may affect the community.

Following global standards, the Regulation introduces follow-up evaluations. The project planning organization is obligated to continue to monitor and evaluate environmental impacts after the project's completion. If there is substantial negative environmental impact, this organization will take corrective measures and report to the project approval authority upon their completion. The competent environmental administration is entitled to raise suggestions for revising or improving the project.

[1] Issued and effective on December 26, 1989.
[2] Issued on October 28, 2002 and effective on September 1, 2003.

Control of key pollutants, according to the Regulation, will be divided by "districts." If discharge of key pollutants within a district where a specific plan is applicable exceeds the relevant total discharge standard, EIAs for new construction projects that will create additional key pollutants within the district will not be approved. This new rule not only establishes a district control principle but also creates a close connection between PEIA and EIA for construction projects.

Liabilities of local government officials are described in detail in the Regulation, while the EIA Law focuses mainly on construction projects' noncompliance. Officials responsible for arrangement, drafting or approval of relevant plans may face penalties for projects' noncompliance.

China no longer focuses merely on construction projects' environmental evaluation; it now imposes more supervision of prior evaluations on the general environment for governments planning projects. This represents great progress for environmental protection in China. Although the Regulation seems to relate more to governmental affairs, there are obvious connections to construction projects and investment. We will continue to observe and report on implementation of the Regulation.

– Doris Chen, Runa Zheng

Further Details on the Implementation of the Mechanism for Granting Land Use Rights for Industrial Use

Key Points:

- ***Industrial land that has been allocated or leased may be granted by agreement***
- ***Local governments are authorized to make detailed measures and procedures for the pre-application for use rights to industrial land***
- ***The government may rearrange new industrial land for the original owner of the land use right (LUR) by agreement during the reconstruction of old urban areas***
- ***Industrial land for a project to be constructed by stages may be granted at one time***

On August 10, 2009 the Ministry of Land and Resources (MLR) and the Ministry of Supervision (MOS) jointly issued the Notice on Further Implementation of the Mechanism of Granting Land Use Right (LUR) for Industry Use (the Notice) to solve outstanding issues regarding LURs for industrial use (Industrial Land). Following are the main issues addressed in the Notice.

Methods of Granting LURs for Industrial Use

According to the original Notice on Implementation of the Mechanism of Granting Land Use Right for Industry Use issued by the MLR and MOS on April 4, 2007, the government must grant Industrial Land by means of tender, auction or listing on a land

exchange. The MLR indicates that in some areas, however, there is misunderstanding of the scope of tender, auction, listing on a land exchange and grant agreement, and there have been mistakes in LUR grants for industrial use because industrial projects are different from commercial, tourism, entertainment and commodity residential projects, which include various subcategories and vary on standards of environmental protection, industry structure and policies, and arrangement. Therefore, the Notice further specifies the scope of the granting methods for Industrial Land:

- The government shall accept the methods of tender, auction and listing on a land exchange to confirm the price for Industrial Land that is converted and requisitioned from agricultural land through governmental approval and is purchased by the government for regranting.
- The government may accept grants for Industrial Land that has been allocated or leased provided that the use of the Industrial Land is in compliance with the city plan and is approved according to relevant laws.

Pre-Application for Granting of LURs

The system for pre-application for granting of LURs was established by the Regulation on Granting State-Owned LURs Through Tender, Auction and Listing on a Land Exchange in 2006 to help local governments understand demand in the land market. The Notice intends to promote the pre-application system further, as there have been cases of failed Industrial Land auctions due to the current economic situation in some areas. Local governments are authorized to take detailed measures and procedures for the pre-application of Industrial Land.

Issues of LURs for Industrial Use Involved in the Reconstruction of Urban Areas

In the process of reconstruction of urban areas, one key issue is whether the original owner of the LUR may continue the development of the land or the government shall take the LUR back for a new grant. The Notice points out that this issue shall be tackled according to the different categories of Industrial Land. Regarding relocation of industrial projects due to reconstruction of urban areas, the government may take the LUR back and provide new Industrial Land to the original LUR owner by agreement grant or lease after the approval of relevant authorities at the county or city level. Needless to say, such rearrangement of industrial projects must be in compliance with the general land use plan and city plan.

Performance of LUR Grant Contracts

According to the MLR's report, some industrial projects are not able to make LUR payments on time or start and complete construction on time in

some areas. The Notice emphasizes the grant contract for Industrial Land shall provide the payment time and method, delivery date of the land, and start and completion time of the construction specifically. If the grantee fails to start construction on time, it shall apply with the grantor 30 days prior to the start date for an extension of the start time, which may not be longer than one year.

With respect to industrial projects to be constructed by stages, the local land administration may determine the winner of a tender, auction or listing on a land exchange through a bid on the price of each unit area (e.g., square meter or "mu"). The grant contract of state-owned LURs shall be executed at one time and the grantee shall make the payment by lump sum. Furthermore, the usage of the land shall not be changed during the construction stages. In the event that the Industrial Land is used for commercial, tourism, entertainment or commodity residential purpose, the government shall take the land back and regrant it by tender, auction or listing on a land exchange.

In conclusion, the Notice provides more specific provisions in order to further implement the granting mechanism for Industrial Land, which should be helpful in solving common issues.

– Olivia Zhan

The Supreme Court Further Clarifies the Principle of "Changes in Circumstance"

Key Points:

- ***New guideline seeks to create strict standards and procedures to address public concerns about the abuse of the change-in-circumstances principle***
- ***In applying the principle, courts must reasonably differentiate between commercial risk and change in circumstances***

In a May 2009 Squire Sanders ***China Alert***, we analyzed a judicial interpretation (Interpretation II on Several Issues Concerning the Application of the PRC Contract Law, February 9, 2009 [Interpretation II]) published by the PRC Supreme Court allowing courts in China to amend or terminate contracts based on the principle of changes in circumstance. This principle concerns significant changes that occur after a contract has been signed that are unforeseeable at the time of entering into the contract but not attributable to *force majeure* and not considered commercial risks. It was the first time that the PRC Supreme Court officially acknowledged and interpreted the principle of changes in circumstance.

Interpretation II is a response to the global financial crisis, and there are concerns as to whether the principle will be abused by China's courts as a way to protect China-based companies. On April 27 the Supreme Court issued a Circular requiring local

courts to report any change or termination based on the principle of change in circumstance to the High Court for approval, and how to interpret "significant change," "commercial risks" and "change in circumstances" is still ambiguous and controversial. Under such circumstances, the Supreme Court issued the Guideline on Several Issues on Hearing Civil and Commercial Contract Disputes Cases on July 7, 2009 (the Guideline) to clarify the questions.

According to the Guideline, the Supreme Court requires all lower courts to apply the principle of changes in circumstance while reviewing the following aspects:

1. The current world financial crisis was not a sudden change or completely unavoidable. The global economy has gone through a process of gradual changes, during which time the parties involved should have foreseen the market risk to some extent. Therefore, the courts must strictly review the allegation of "unforeseeable," especially in cases involving products whose markets fluctuate geatly by nature, such as oil, metal and financial products.
2. Courts must differentiate between "commercial risk" and "change in circumstances." Commercial risk is an inherent risk existing in transactions, such as price fluctuation, that is not abnormal. In judging whether a change is a "change in circumstances," the court must consider (i) whether the risk is significantly beyond reasonable anticipation, (ii) whether such risk can be prevented or controlled and (iii) whether the nature of the transaction is "high risk, high profit."
3. Courts should try to pursue justice *de facto*, instead of a mere exemption of obligation, by guiding the parties to renegotiate the agreement or reach a settlement. If a court decides to apply the principle of change in circumstances, the decision must be reported to and approved by the High Court.

Thus, to address the public's concerns about the abuse of the principle of change in circumstances as well as provide guidance to lower courts in the principle's application, the Supreme Court tried to create strict standards and procedures under the Guideline.

In addition to the principle of change in circumstances, the Guideline clarifies other important issues. One is the 30-percent line drawn by Interpretation II for adjustment of liquidated damages. The Guideline provides that courts should not apply the 30-percent standard as a fixed rate, but must evaluate the actual situation and balance the interests among the parties to accomplish "true fairness" and prevent "fairness on the surface."

– Lindsay Zhu

President Obama Rules in Key Import Safeguard Case

Key Points:

- ***On September 11, President Obama imposed 35 percent tariffs on China's tire exports to the United States***
- ***This marks the first time the United States has invoked the China-specific import surge mechanism***

On September 11, President Obama decided to place safeguard tariffs on China's exports of car and truck tires to the United States. This marks the first time that the United States has invoked the general product safeguard in China's WTO accession agreement. It is widely believed that invocation of the safeguard in the tires case will lead to additional China safeguard petitions in the United States, as well as petitions in third-country markets such as the EU and India.

When China entered the WTO in 2002, it agreed to a special safeguard (often called the 421 Safeguard or the general product safeguard). Under the terms of this China-specific safeguard any WTO member can restrict imports from China if the imports are increasing and are causing "market disruption." Unlike other trade remedy laws, the 421 safeguard requires no showing of "unfair" behavior, such as price discrimination or subsidies, by producers from China. The safeguard expires at the end of 2013. Under US law, the petition is first reviewed by the US International Trade Commission (ITC), which determines whether US manufacturers have been injured by imports. If the ITC finds injury, the petition then moves on to the White House, which may reject the petition if the president determines that invocation would not be in the "national economic interest."

Until now, the United States had never invoked this general product safeguard. During the first term of President George Bush, he and the independent ITC rejected several 421 safeguard petitions, finding that invocation would not be "in the national economic interest of the United States" to limit fairly traded goods or that US manufacturers had not been injured by the subject imports.

Last May, the Steelworkers Union filed the first 421 safeguard petition of the Obama Administration, seeking limits on imports of consumer tires from China. Squire Sanders was soon hired to represent China's tire producers via stakeholder trade associations. In late June, the ITC ruled 4 to 2 that US tire manufacturers have been harmed by imports from China. The White House, with the advice of the US Trade Representative, had until September 17 to decide whether to invoke the safeguard and, if so, to establish the size of the tire tariffs or quotas. Late on the Friday (September 11) before the deadline, the White House announced a decision to impose a 35 percent tariff on tire imports in the first year, 30 percent in the second year and 25 percent in the third year.

Trade policy observers widely view the tires safeguard decision as the first key harbinger of the Obama Administration's China trade policy. Invocation marks a departure from prior practice and will likely lead to additional safeguard petitions in the United States and other markets. Squire Sanders' trade practice team in Washington DC and China will continue to monitor potential cases.

– David Spooner

Articles, Publications and Other Media

WSJ.com and Reuters quoted **David M. Spooner** September 2 regarding the closely watched US tire import issue now before the US Trade Representative and President Barack Obama. Mr. Spooner was also quoted in by *21st Century Business Herald* and the June/July issue of *Tyre Asia* on this topic and appeared on xinhuanet.com television August 6 to discuss it. He was quoted August 6 by Chinadaily.com.cn regarding the nomination of Governor Jon Huntsman as US ambassador to China.

FT.com quoted **James M. Zimmerman** September 2 about concerns that China's government is cracking down on foreign companies. The article was picked up by CNN.com and several Chinese-language publications. In addition, *The Press-Enterprise* quoted Mr. Zimmerman August 31 about California vintners exploring the China market.

Charlie R. McElwee II appeared on "Market Watch" on National Public Radio September 1 to discuss China's investment in low-emissions vehicles.

Caijing magazine quoted **Amy L. Sommers** September 3 regarding a high-profile bribery case.

Squire Sanders released the following *China Alert* in September: **China Initiates National Essential Drug System**.

Past Events

On September 3 **Amy L. Sommers**, partner in Squire Sanders' Shanghai office, joined a panel – **Foreign Corrupt Practices Act in China: Compliance Strategies Given China's Unique Cultural and Governmental Intricacies** – to discuss the risks of violations of the US Foreign Corrupt Practices Act (FCPA) in China, interplay between the FCPA and China's antibribery laws and best practices for preventing violations. The panel addressed which risk factors increase the exposure of companies conducting business in China to possible FCPA violations, how the US and Chinese governments are enforcing their respective antibribery laws against US companies and the best practices for companies to utilize in developing anticorruption compliance programs and due diligence efforts for their China operations. The panel discussion was followed by an interactive question and answer session.

On September 10, **Rainer Burkardt** presented "Capitalizing in Central and Eastern Europe" during Day One of the **China Outbound Investment 2009** in Beijing. The event discussed hurdles China-based companies

have in growing their outbound foreign investment. In his session, Mr. Burkardt provided a glimpse into Central and Eastern Europe with a focus on investment in Germany.

Daniel F. Roules and **Amy L. Sommers** co-hosted a roundtable discussion at the Counsel to Counsel forum in Shanghai on September 16. The complimentary forum, "**Corporate Counsel Eye on the Ball: Reducing Risks of Foul Play in a Bad Economy**," presented best practices for focusing time and energy on areas of corporate law that pose the greatest risks. Discussion topics included effective monitoring tools and techniques; costly mistakes to avoid during internal investigations in China; and how outside law firms can provide greatest value to meet challenges.

Upcoming Events

On September 18 **Rainer Burkardt** will discuss "Corruption and Fraud Risk Management in Procurement Departments in China" at the **BME China Sourcing Conference** in Shanghai. The conference focuses on recent purchasing trends and the future outlook for buying operations in China. On September 19 he will lead the workshop " Producers and Vendors Liabilities Under P.R. China Laws – The Legal Framework."

On September 25 **Amy L. Sommers** and **Song Zhu** will present on intellectual property (IP) protection concerns for China business strategies as part of a special luncheon session of the Greater Cleveland Partnership in Squire Sanders' Cleveland office. The discussion, "**Savvy China Strategies Start With IP Protection**," will cover topics such as how US companies can prevent the infringement of their IP rights by China-based business partners and employees, as well as whether it's worthwhile for US-based companies to register their IP in China.

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