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Comments on the Fixed Assets Investment Bill (draft)

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COMMENTS ON THE FIXED ASSETS INVESTMENT BILL (DRAFT)

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[**Note:** I here use the word "Chapter" to denote what the translator has called a "section"; and "Article" to denote what the translator has called an "item". This conforms to Chinese practice in the laws that I have seen that have been translated into English).

I. GENERAL COMMENTS

1. Ordering of Chapters:

a. This is your present ordering of chapters:

- (1) General principles
- (2) Management by the central government of fixed assets investments
- (3) Management by local government of fixed assets investment
- (4) Government investments
- (5) Industrial investments
- (6) Legal responsibilities
- (7) Addendum

b. This violates the general rule of LAW-ADMIN-SAN-FUND (that is, a general order of stating the law as it applies to behaviors of various actors; then the rules concerning implementation; then the rules concerning sanctions; then the rules concerning funding (if any)

c. So far as I can see, there are in fact no substantive rules concerning macro-level controls over fixed assets investments. No place do you say in so many words that the Central Bank (for example), may not increase the money supply without first submitting the proposed increase for discussion in the Joint Management Committee. No place do you state that the Ministry of Finance may not impose a new tax without submitting the proposal first to the Joint Management Committee for discussion. Unless you impose those rules, however, you have nothing. Unless actually required by law, the Central Bank will continue its own merry way, as will all the other Ministries -- based on foreign experience, especially Finance!

d. Nor do I see any substantive rules concerning government investments. You mention (in Article 31) a Central Government agenda. I suppose that the implication is that no Central Government ministry may make an investment in fixed assets (I suppose, over a certain

size), unless it appears on the government plan or agenda. You should say so.

e. I suggest an alternative scheme:

INTRODUCTION

(1) General principles

PART ONE. MACRO-LEVEL CONTROLS OVER FIXED ASSETS INVESTMENT

(2) Rules requiring various central government units to submit proposals for discussion to the national Joint Management Committee, and provincial autonomous regional and large municipal Departments, to the relevant joint management committee.

(3) Management by the central government macro-level controls over fixed assets investment

(4) Management by provincial, autonomous regional and large municipal governments over macro-level controls over fixed assets investment in their respective jurisdictions

PART TWO. MAKING INDUSTRIAL INVESTMENTS

[NOTE: I would omit this whole Chapter; see my comments below]

(5) Rules concerning who can make industrial investments, and by what internal procedures, and how they collect capital.

(6) Institutions and procedure for implementing this Part.

PART THREE. DIRECT GOVERNMENTAL INVESTMENTS IN FIXED ASSETS

(7) Rules forbidding direct governmental investments in fixed assets unless they appear in the central government agenda [plan?], and defining the areas within which Central Government may make investments; and rules defining the areas within which local government may make investments.

(8) The institutions and procedures for making the national agenda for central government fixed assets investments

(9) The institutions and procedures for making local government investments.

(10) Institutions and procedures for implementing this Part.

PART FOUR. LEGAL RESPONSIBILITIES ("SANCTIONS")

PART FIVE. TRANSITIONAL AND MISCELLANEOUS MATTERS

2. Grouping:

- a. Because of the nature of your Chapter headings, you have inevitably mixed up in the same Chapter Articles concerning Law and concerning Implementation. Better practice, I believe, to keep them separate, as mentioned above.
- b. I will raise these in the discussion of particular articles.

PART II. SECTION-BY-SECTION COMMENTS

CHAPTER 1. GENERAL PRINCIPLES

In general: Articles 1-4 would better be amalgamated into a single section. The function of the introductory paragraph in most Chinese legislation is to tell the reader the main purposes of the legislation, in fairly concrete terms. I suggest that the thrust of your bill has these purposes: (1) to coordinate macro-level economic measures with respect to their influence on fixed-asset investment, and to use those measures to encourage investment useful in China's development; (2) to rationalize government fixed asset investment; and (3) to develop mechanisms to implement these purposes. I doubt that it helps much to declare that the purpose of the legislation is in part "to promote the continuance of the people's economy, and its swift and healthy development" -- one could use that as a formula for every piece of economic legislation.

CHAPTER 2. MANAGEMENT BY THE CENTRAL GOVERNMENT OF FIXED ASSETS INVESTMENTS

In general: 1. This legislation rests upon the new duty of each of the relevant ministries and departments to bring changes in macro-level policies before the Joint Management Committee for discussion before actually implementing a new policy. As noted above, therefore, the legislation should specify exactly which ministries must bring what sorts of new policy initiatives before the Joint Management Committee for discussion. E.g.:

"Article x. 1. The following constitute macro-level economic policy units and macro-level policies that fall within their respective jurisdictions:

- (1) The Central Bank, with respect to the money supply;
- (2) the Ministry of Finance, with respect of tax policy, and with respect to the national budget;
- (3) the Ministry of Foreign Trade, with respect of foreign trade policies;
- (4) the Ministry of Trade and Commerce, with respect of setting prices; and
- (5) the Bureau of Legislative Affairs, with respect of bills relating to the economy that it proposes to recommend to higher authorities for enactment.

[NOTE: I made these up! You should consider precisely what units and what sorts of macro-level policies you want to include]

2. Except as set forth in subsection (3) with respect to a policy mentioned in sub section (1), no macro-level unit may introduce or implement a changed or a new macro-level policy sooner than two weeks after submitting it to the Joint Management Committee for discussion.
3. Notwithstanding subsection (2), after--
 - (a) notifying the Joint Management Committee of the proposed changed or new policy and its intention to apply for a Certificate of Accelerated Policy Change or Introduction;
 - (b) applying to the Prime Minister for that certificate by a letter setting forth the reasons requiring acceleration of the implementation of a new policy; and
 - (c) obtaining the Prime Minister's Certificate of Accelerated Policy Change or Introduction,

a unit may introduce a changed or new macro-level policy at any time after receipt of the Certificate.

4. Nothing in this Act requires a unit before instituting a policy to receive approval from the Joint Management Committee.

- i. Nothing in this Act requires a unit to institute a policy recommended by the Joint Management Committee."

2. The ordering of Articles might be reconsidered. If you do not adopt the proposed new ordering of chapters, at least within this Chapter put the LAW first, and find a defensible way of grouping the other section (for example, begin with the section proposed above; follow with material about the duties and responsibilities of the Planning Commission; follow those with the organization, and powers and duties of the Joint Management Committee.

**CHAPTER 2. THE MANAGEMENT BY CENTRAL GOVERNMENT OF
FIXED ASSETS INVESTMENTS**

ARTICLE

5. I do not understand this Article as written. You might do better to combine Article 6 and article 5 in a single article that recites the powers and duties of the NPC, as follows:

"Article 5. In addition to its other powers and duties, the National Planning Committee shall:

- (1) advise the Central Government with respect to the Government's plan for making fixed capital investments;
- (2) establish the procedures for the Joint Management Committee;
- (3) review, analyze, report and make recommendations to the Joint Management Committee concerning changes in or new macro-level policies as they affect fixed asset investments;
- (4) organize the meetings of the Joint management Committee;
- (5) serve as staff for the Joint Management Committee
- (6) [etc.]"

6. See above.

7. Try re-writing as follows:

"Article 7.

- (1) In this Act, 'Joint Management Committee' means the Control of Fixed Assets Investment Macro-level Joint Management Committee.

(2) The Minister or other official in charge of each of the following units shall appoint one senior official from the Minister's unit to serve on the Joint Management Committee:

- (a) the Central Bank;
- (b) the Ministry of Finance;
- (c) the National Development Bank
- (d) [etc.].

(3) A member shall serve at the pleasure of the official who appointed that member.

(4) The member appointed from the National Planning Commission shall serve as Chairman of the Joint Management Committee.

(5) The Chairman of the Joint Management Committee or any three members of the Committee may invite related personnel from managing departments or commercial representatives to attend particular meetings.

(6) A member who cannot attend a meeting may appoint a substitute from, his or her unit to serve in his or her place for that meeting.

(7) The meeting shall meet at least monthly, or at the call of the Chair on not less than two days' notice, or at the written request of any three members, on not less than two days' notice.

(8) A quorum for the conduct of business shall consist of one-half of the members or their substitutes.

(9) [etc. Include material concerning membership and basic procedures, eg present Article 12]."

8. This is included in the suggested draft Section 7 above.

9. Ditto.

10. I would rewrite in terms of powers and duties, following along the general pattern suggested in Article 5, with respect to the Planning Commission's powers and duties. Note that this section becomes extremely important: The gist of what you want this bill to do depends upon what the Joint Management Committee is supposed to do. So think out the precise language here very carefully! For example, you do not include here the duty to consider and make recommendations to the unit concerned about changing macro-level economic policy; should you not do so?

11. Now included in suggested draft for Section 7, above.

12. This Article contains more than one idea. It lays down rules, first, for the democratic conduct of JMC affairs; then it imposes a duty of reporting to the relevant Minister of State; then it affirms the requirement of approval by the relevant Minister of a recommended policy (this last is now in the Article x suggested above). I would put this into two separate articles.

13.

14. This should be rewritten in accordance with the rules of tabulation.

15. Ditto -- duties of the Division.

16. Ditto -- a power of the Division

17. This probably belongs in the list of duties and powers of the Division in Article 14.

18. Write an article on the powers and duties of the Investment Research Institute analogous to that suggested with respect of the Joint Management Committee.

MANAGEMENT BY LOCAL GOVERNMENT OF FIXED ASSETS INVESTMENT

In general: The translation uses the term 'local government'. Surely you mean provincial, autonomous regional, and independent large municipal government, not 'local' government

19. First paragraph: Probably unnecessary; does not direct anyone to do anything, except in terms so general as not to mean very much. At any rate, the central government's responsibility is coextensive with the Joint Management Committee's duties and powers, which have already been mentioned.

Second paragraph: Unnecessary; this material properly covered by statement of powers and duties of the Local Planning Bureau.

20. What is needed, again, is a clear statement of precisely what you want the local planning bureau to do. The bill does that by specifying its powers and duties.

21. Under the proposed reorganization of the bill, this Article would belong not here but in Chapter 2 of the proposed new bill (see above). As translated, the section goes further than (as I understand it) you intend, for it requires the provincial government to "unify implementation methods in its administrative area". I had understood that the theme was coordination through consultation and advice in the Joint Management Committees, not in coercive directives by the Committee to the various operating

Departments.

22. Belongs in the statement of the powers and duties of the local planning bureaus.

23. Ditto.

24. This belongs not here, but under powers and duties of the national planning commission. In any event, needs more detail. What does "supervise and examine the local investment situations and investment management" mean operationally? Spell out the behaviors you expect from the national planing commission in this respect.

CHAPTER 4. GOVERNMENT INVESTMENTS

In general: This needs a clear statement of the law involved. As I understand it, it comes to this: No government ministry, department or unit may make a fixed capital investment except pursuant to this Act. The rest of the Chapter should then describe precisely the procedures by which government (national and provincial and local) develops a plan for government capital investments, the areas of the economy within which government ma make investments (e.g., infrastructure; new or 'pioneer' industries; 'bottleneck' industries (e.g., electricity); and so forth); sources of national and of provincial and local government funds for investment; etc.

25. Very unclear. The problem, I take it, is this: Most investments in China are made by government industries or by local governments (in rural or township enterprises). It is the intent of the legislation to guide these investments entirely by macro-level economic controls. Central government makes a few direct investments: Infrastructure (road, hospitals, schools, government building, etc.); it also makes direct investments with government funds in various specific sectors where nobody else seems to want to invest (for example, electricity generation). Local government also makes investments in these, but also a lot of investment in various sorts of light industry and other relatively small enterprises. The proposal is that when making investments in areas like light industry (where other investors are available as well as government), macro-level controls should be enough. With respect to other areas where government is the only possible investor (roads, sewer, public schools, and 'bottleneck' industries) government may only invest according the a plan. If I am right in that understanding, you need to spell it out in much greater detail. In particular, you need clear definitions of areas subject to planning, and those subject only to macro-level controls. Or even better: You need clear general principles, leaving it to the Joint Management Committee from time to time to make explicit which industries are included or excluded.

a. The same holds for local government investments.

26. I do not understand. Vague 'principles' like this really never help in solving problems; at most they express the enthusiasm of particular leading cadre.

27. Why is this section in the bill? What does it accomplish?

28. The first paragraph seems unnecessary; what is its legal effect? At any rate, this would seem appropriate in the powers and duties of the Development Bank, probably in its own legislation.

29. Does not belong in this bill, but in the Banking Bill or an amendment to it. At any rate, so momentous a change as this requires much, much more detail.

30. See note to Article 25.

31. Does this not belong in the first Chapter (Principles)?

32. I doubt that this belongs in the law. Surely it is the task of the Planning Commission to develop these policies, changing them over time as circumstances require.

33. I do not understand the thrust of this section. Are you trying to say that government may not make fixed assets investments out of current taxation or out of inflated money?

I do not understand how the Planning Commission can limit government borrowing .

34. See note to Article 25.

35. See note to Article 32.

36. These sorts of good intentions really have no place in legislation. If you really means that "we must establish rigorous investment policies" then your bill must set up a process and institutions to make sure that government does set up those policies. If government really means to establish "the principle of person decision and personal accountability", don't write about what you intend to do; lay down rules that precisely allocate duties and powers to stated role occupants, and provide incentives and sanctions to makes sure that they behave as they should to bring about personal decisions and personal accountability. In the same way, if you really want to implement a principle that those who have caused financial loss must be responsible for the losses, don't say merely that such a person "will be instigated"; say that such a person shall be liable to pay the losses from his own personal funds. (But I can't believe that that is what you mean -- it makes little sense.)

CHAPTER 5. INDUSTRIAL INVESTMENTS

In general: I do not understand why this chapter is here; surely other legislation deals with the protection of investment, who may invest, etc. I would omit the entire chapter.

37. What about privately owned or joint venture investments?

38. This is all presently in the law; this adds nothing.

39. See note to Article 36. Don't write about good intentions; create structures and procedures to make sure that government carries out these good intentions!

40. If the real thrust of this section is that government may not advance funds to industries for purposes of investment, say so. Otherwise I do not see much point to this section.

41. Surely this belongs in the Enterprise Law, not here. At any rate, from who does an industry have to get permission to begin work, or permission to begin development and production? By what criteria? All this seems quite i'n contradiction to the notions of the market that underpin the Reforms.

42. Ditto

43. See note to Article 39.

44. This translation is very unclear. I do not understand this Article as we have it in English.