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CHANGE OF REGULATORY SCHEME:
China's New Foreign Investment Law and Reshaped Legal Landscape

Mo Zhang

ABSTRACT

Protection of foreign investment has long been an issue facing China. The newly adopted Foreign Investment Law (FIL) and Implementation Regulations not only unify the foreign investment regulations but also reformulate the regulatory regime that governs foreign investment in the country. In response to the mounting criticism of the practices in China that damage the interests of foreign investors, including, among others, forced technology transfer and commercial theft, the FIL is purposed to build a better environment so that foreign investment will be more effectively protected.

The FIL changes the main themes of China's regulation of foreign investment and puts new market access rules and measures in place on the foreign investment horizon. The FIL Implementation Regulations intend to fill the gaps left in the FIL. Still, many questions remain unanswered. Both the broadness and vagueness of the FIL require further clarification and specific measures in different aspects. The Supreme People's Court is expected to issue judicial interpretations on various practical matters.

The FIL is charged with the mission to even the playing field by providing fair treatment to foreign investors in the country, but the challenges encountering foreign businesses seeking establishment in China remain. The clear rules of implementation aside, an effective enforcement mechanism is essential to the achievement of the intended goals of the FIL.

ABOUT THE AUTHOR

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Introduction

On March 15, 2019, the National People's Congress (NPC), the top Chinese legislature, passed a new Foreign Investment Law (FIL) for the nation.[1] In order to help implement the FIL, the Supreme People's Court of China issued a judicial interpretation on December 16, 2019, addressing the issues related to investment contracts (2019 SPC Interpretation).[2] Ten days later, on December 26, 2019, the State Council of China adopted the Regulations of Implementation of the Foreign Investment Law (FIL

1. *Foreign Investment Law of the People's Republic of China (FIL)*, The National People's Congress of the People's Republic of China (March 15, 2019), http://www.fdi.gov.cn/1800000121_39_4872_0_7.html [https://perma.cc/GGT8-RBHH] (hereinafter FIL).

2. Interpretation on Several Questions Concerning Application of the Foreign Investment Law of China (promulgated by Sup. People's Ct., December 26, 2019, effective January 1, 2020) http://www.court.gov.cn/fabu-xiangqing-212921.html [https://perma.cc/EJ2Y-AGUG] (hereinafter 2019 SPC Interpretation).

Implementation Rules).[3] The FIL, together with the 2019 SPC Interpretation and the FIL Implementation Rules, took effect on January 1, 2020.

The promulgation of the FIL creates a uniform mechanism regulating foreign investment and ends the tripartite system of laws that had governed foreign investments for decades in China. Intended to address the common concerns from foreign businesses and governments and further boost foreign investment in China, the FIL has been hailed in the country as a landmark law to help build a stable, transparent, predictable and fair market environment.[4] The foreign critics, however, cast doubt that the FIL, as it stands, will effectively protect foreign firms' interest.[5]

Ever since China launched the economic reform in late 1970s, foreign investment has been a vital part of China's effort to vitalize its economy. The absorbance of foreign capital has not only helped modernize the country but also become a major driving force in getting China connected with rest of the world. From 1979 when China formally took a path of "reform and opening-up,"[6] foreign investment has grown at an accelerated speed in the country. After the first Sino-Foreign joint venture was formed in 1980,[7] China quickly became the largest developing country in the world to attract foreign investment in 1993, and then surpassed the United States as the top host country of foreign investment in 2002.[8] Eight years later in 2010, the total amount of foreign investment in the country exceeded $100 billion.[9] By the end of 2018, China's actual use of foreign capital reached $134.97 billion.[10]

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3. Regulations of the People's Republic of China on the Implementation of the Foreign Investment Law (promulgated by Standing Comm. Nat'l People's Cong., December 31, 2019) http://www.npc.gov.cn/npc/c30834/202001/e72e9a2fdb6d45eeab2c8893d99a0ed6.shtml [https://perma.cc/JEW8-ZAUW](hereinafter Implementation Regulations).

4. *See* Xin Hua, *Commentary: A Landmark Law in China's Opening Up*, NPC & CPPCC Annual Sessions 2019 (March 11, 2019), http://www.xinhuanet.com/english/2019–03/11/c_137885467.htm [https://perma.cc/UKE2-8ZR8].

5. *See China Fast Tracks New Foreign Investment Law as U.S. Talks Loom*, Reuters (January 29, 2019), https://www.reuters.com/article/us-china-economy-foreign-investment/china-fast-tracks-new-foreign-investment-law-as-u-s-talks-loom-idUSKCN1PO09R [https://perma.cc/S9FD-X83P]. *See also China Announces New Foreign Investment Law*, China Briefing (March 20, 2019), https://www.china-briefing.com/news/chinas-new-foreign-investment-law [https://perma.cc/7A5T-CV83].

6. *See* Tarrant Mahony, Foreign Investment Law in China: Regulation, Practice and Context (2015).

7. The first Sino-foreign joint venture in China since its reform and opening up was Beijing Air Catering Co., Ltd. (BACL), which officially started its business on May 1, 1980. *China's First Sino-Foreign Joint Venture*, People's Daily Online (November 11, 2008), http://en.people.cn/90002/95607/6531257.html [https://perma.cc/LH56-V9MY]. *See also id.* at art. 3.

8. *See generally* Xiuping Zhang & Bruce P. Corrie, Investing in China and Chinese Inv. Abroad 3–12 (2018).

9. *See China's Actual Use of Foreign Capital*, China Briefing (November 27, 2012) https://www.china-briefing.com/news/chinas-actual-use-of-foreign-capital [https://perma.cc/ST8Z-A2HT].

10. *See January-December 2018 National Absorption of Foreign Direct Investment*

Prior to the adoption of the FIL, foreign investments mostly entered China in three major forms: equity joint ventures (EJV), contractual (or cooperative) joint ventures (CJV) and wholly foreign owned enterprises (WFOE),[11] which all require direct capital investment (including technology and IP rights). Those investment forms, though different from each other, are commonly called foreign invested enterprises or FIEs. Unlike the joint venture, a WFOE does not need a Chinese partner, and it is by and of itself a limited liability company owned by the foreign investor(s) alone. Practically, the WFOEs are considered the easiest form of FIE to establish in the country although their use is subject to limitations on the basis of industrial sectors.[12]

However, the most common form by which foreign companies entered into the China market was the joint venture. Preferred by the Chinese government, joint ventures exemplify cooperation where Chinese businesses are concerned. An EJV is a limited liability company in which the parties make cash or in-kind contributions to the registered capital of the company and share profits, risks and losses in proportion to their contributions.[13] A CJV, however, has a different business structure. A major difference is that the parties to a CJV share profits not according to the portion of their respective capital contributions, but on the terms of the joint venture contract.[14] Another difference is that an EJV has Chinese legal personhood status while a CJV may be formed with or without the Chinese legal personhood status.[15]

Each of the FIE forms is governed by a different set of laws. The first one is the Sino-Foreign Joint Venture Law, which was adopted in 1979 to regulate EJVs.[16] In 1986, the Foreign Capital Enterprises Law was promulgated to allow the WFOEs to operate.[17] Two years later in 1988, the Sino-Foreign Contractual Joint Venture Law was enacted to govern CJVs.[18] When the CJV was adopted, the era of "three laws on foreign investments" in China began, meaning that all foreign investments

News, Ministry of Commerce of the People's Republic of China (January 15, 2019, 13:41 PM), http://www.mofcom.gov.cn/article/tongjiziliao/v/201901/20190102832209.shtml [https://perma.cc/GFW6-ENLQ].

11. *See* Mahony, *supra* note 6, at 173–74.

12. *See* Mahony, *supra* note 6, at 198.

13. *See* Barbara C. Potter, *China's Equity Joint Venture Law: A Standing Invitation to the West for Foreign Investment*, 14 U. Pa. J. Int'l Bus. L. 1, 12 (1993).

14. *See id.*

15. *See* Mahony, *supra* note 6, at 187.

16. The EJV Law, adopted in 1979, was amended in 1990, 2007 and 2016 respectively. The latest version of EJV law is available at https://www.66law.cn/tiaoli/64.aspx [https://perma.cc/AV2X-Q6MD].

17. The WFOE Law was amended twice in 2000 and 2016 by the Standing Comm. Nat'l People's Cong. after its promulgation in 1986 by Nat'l People's Cong., available at http://www.sohu.com/a/236454061_100009953 [https://perma.cc/3X-QB-UJ5U] (hereinafter WFOE Law).

18. The CJV Law was adopted in 1988 and then amended in 2000, 2016 (September and November) and 2017, available at http://www.npc.gov.cn/wxzl/gongbao/2016–10/12/content_2007465.htm [https://perma.cc/6M4L-276J].

in the country were confined within the four corners of the EJV, CJV and WFOE laws. For purposes of discussion, these laws are collectively labeled as FIE Laws.

Additionally, in 1995, the National Development & Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) jointly published the Foreign Investment Industrial Guidance Catalogue (Investment Catalogue). Serving as policy guidance for foreign investors, the Catalogue directs the inflow of foreign capital by dividing foreign invested projects into three categories: "encouraged," "restricted," and "prohibited," depending on the nature of targeted industrial sectors. Sectors not specifically listed in the Catalogue are considered "permitted." In order to keep abreast of changes of the sector preference and receptiveness to foreign investment, the Investment Catalogue was revised periodically and the most recent revision was the Investment Catalogue 2017.[19]

There are also some special types of FIEs. One type is called foreign invested company that is normally referred to as an FIE holding company. Another type is known as foreign invested company limited by shares. Those two types of FIEs are governed by the FIE laws, and are also subject to particular regulations. For example, according to the Provisions on the Establishment of Foreign Invested Companies issued by the MOFCOM,[20] to form an FIE holding company, a foreign investor is required to (a) have US $400 million in assets within one year prior to its application for the establishment of the holding company, (b) have at least one investment project already approved with a minimum of US $10 million paid-in registered capital, and (c) have at least three pending investment projects.[21] In addition, the registered capital for an FIE holding company shall be no less than US $30 million.[22]

The foreign invested company limited by shares is a stock FIE created under the 1995 MOFCOM's Provisional Regulations on Certain Questions to the Establishment of Foreign Invested Stock Companies Limited (1995 Regulations).[23] The stock FIE is defined in the 1995

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19. *See 2017 FIE Catalogue*, NATIONAL DEVELOPMENT AND REFORM COMMISSION (March 23, 2020, 12:05 AM), http://www.gov.cn/xinwen/2017–06/28/content_5206424.htm [https://perma.cc/H2C4-V9KP].

20. The Provisions on the Establishment of Foreign Investment Companies was first issued by the Ministry of Commerce in 1995 as Provisional Rules and then amended in 2004. Order of the Ministry of Commerce No. 2 of 2004 on the Establishment of Investment Companies by Foreign Investment (promulgated by Ministry of Commerce of the People's Republic of China, February 12, 2004, effective date March 13, 2004), http://www.mofcom.gov.cn/article/b/c/200402/20040200183441.shtml [https://perma.cc/MU8R-W9GY].

21. Alternatively, an EIF holding company can be formed if the foreign investor has already established at least 10 FIEs within the territory of China and has at least US $30 million in paid-in registered capital. *See id.* art. 3.

22. *Id.*

23. *See* Interim Provisions on Several Issues Concerning the Establishment of Foreign-Invested Company Limited by Shares (promulgated by Ministry of Com. of

Regulations as an enterprise legal person whose entire capital is made up of equal shares subscribed by both domestic and foreign shareholders with at least 25 percent foreign ownership. The formation of a stock FIE requires 2 to 200 promoters, including at least one foreign shareholder, and its capital can be raised by promotion or public offering. Shareholders are responsible for the company according to the shares for which they subscribe.

In the past forty years, the FIE laws and related regulations formed a statutory regime that governed foreign investments. The notion under which the regime was created and structured was multifaceted. First, foreign investment was viewed and treated differently from domestic investment and Chinese nationals were excluded from FIEs.[24] Second, establishment of FIEs required government review and approval, and registration was a prerequisite for an FIE to operate.[25] Third, the focus of the FIE Laws was on foreign investors and the FIE organization rather than the behavior and activities of foreign investment.[26]

In addition, since the FIE Laws were adopted at different times and were formulated on an individual basis, an inherent problem was that there was no uniform foreign investment regulation because the FIE Laws each stood out as an independent piece of law and applied differently to individual FIEs. Also, because each FIE Law contained specific rules for the establishment of a particular type of FIE, this complexity often caused confusion and made foreign investors feel that the rules were difficult to follow. Moreover, the required government review and approval frequently became bureaucratic hurdles to foreign businesses seeking presence in China. Another problem was the conflict between the FIE Laws and the Company Law. As will be discussed *infra*, the

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the People's Republic of China, October 28, 2015) http://www.mofcom.gov.cn/aarticle/b/f/200207/20020700031172.html [https://perma.cc/9PN3-NEMC] (text of the October 28, 2015 amended version).

24. Both the EJV and CJV laws define the JV as a business corporation between foreign companies, enterprises and other economic entities or individuals and Chinese companies, enterprises or other economic entities. *See* EJV Law, *supra* note 16, art. 1; *see also* CJV Law, *supra* note 18, art. 1.

25. For example, under Article 5 of the CJV Law, "For the purpose of applying for the establishment of a contractual joint venture, such documents as the agreement, the contract and the articles of association signed by the Chinese and foreign parties shall be submitted for examination and approval to the department in charge of foreign economic relations and trade under the State Council or to the department or local government authorized by the State Council (hereinafter referred to as the examination and approval authority). The examination and approval authority shall, within 45 days of receiving the application, decide whether or not to grant approval." *See* CJV Law, *supra* note 18. There are similar provisions in both the WFOE Law and EJV Law. WFOE Law, *supra* note 17; EJV Law, *supra* note 16.

26. *See* Wang Chen, *Vice Chairman of the Standing Committee of the National People's Congress, Made an Explanation on the Draft Foreign Investment Law*, China News (March 8, 2019, 4:20 PM), http://www.chinanews.com/gn/2019/03–08/8775073.shtml [https://perma.cc/4LA3-7R22].

conflict caused a two-track phenomenon in both corporate structure and governance.

Given the loopholes of the FIE Laws, the need for a new foreign investment legal system arose in order to further promote foreign investment in the country. As early as in 2011, the MOFCOM had started to draft a new law on foreign investment.[27] In 2013, in order to carry on comprehensive reform in the country and adapt to the new trend of economic globalization, China launched a new strategic initiative to build "a new open economic system" (NOES) in the nation to foster opening-up to the outside world.[28] The NOES initiative calls for relaxing control over investment access through the means of having "the same laws and regulations on domestic and foreign investment" and keeping foreign investment policies "stable, transparent and predictable."[29]

In 2015, the Central Committee of Communist Party and the State Council issued a directive on the NOES initiative to ensure its implementation so as to achieve the goal of a high level of openness and high quality of economic development in the country.[30] In the same year, the MOFCOM published a draft of FIL for public comment (MOFCOM draft).[31] The MOFCOM draft contained 11 chapters with a total of 170 articles.[32] The draft generated serious debates on the substance of foreign investment regulations that meet the need for the implementation of the NOES initiative. Interestingly, at that time, the word "foreign" used in in the MOFCOM draft denoted "foreign country," which implicated the geographic source of investment.[33]

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27. *See Foreign Investment Law: China's Confidence in Further Opening up*, China Daily: Forum (March 13, 2019, 4:44 PM) http://bbs.chinadaily.com.cn/forum.php?mod=viewthread&tid=1902585 [https://perma.cc/PFD4-2JUN].

28. The NOES initiative was the decision made at the Third Plenary Session of the 18th Central Committee of the Communist Party of China on November 12, 2013. *See generally* Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform (promulgated by Central Comm. of the Communist Party of China, January 16, 2014) http://www.china.org.cn/china/third_plenary_session/2014–01/16/content_31212602_7.htm [https://perma.cc/K2BJ-2CMU].

29. *See id.* art. VII.

30. *See Several Opinions of the Central Committee of the Communist Party of China on the Construction of a New Open Economic System*, People.cn (May 5, 2015) ://politics.people.com.cn/n/2015/0918/c1001–27601372.html [https://perma.cc/6FN6-K23D].

31. *See Public Solicitation of Opinions on the Draft of the Foreign Investment Law*, Ministry of Commerce of the People's Republic of China Department of Treaty and Law (January 19, 2015, 5:00 PM), http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml [https://perma.cc/PTS7-93WZ] (hereinafter MOFCOM Draft).

32. *See id.*

33. *See Dialogue with Fang Aiqing, Vice Chairman of the Economic Committee of the National Committee of the Chinese People's Political Consultative Conference and Former Deputy Minister of the Ministry of Commerce*, The Paper (March 9, 2019, 7:46 PM) http://finance.eastmoney.com/a/201903091064643368.html [https://perma.cc/6XRK-8EFA].

Three years later in 2018, the drafting work of FIL was elevated to the NPC's annual legislative agenda (NPC draft). On December 26, the first NPC draft was made available to the public nationwide for comments. According to the Standing Committee of the NPC, the NPC draft was premised on the notion of "proforming a new pattern of comprehensive opening up" with a "focus on promotion and protection of investment."[34] Compared with the MOFCOM draft, the NPC draft had only 6 chapters and 29 articles because it was intended to mainly "establish a basic institutional framework for foreign investment" that meets current practical needs and also leaves room for further deepening reforms.[35]

On January 29, 2009, the NPC published the second NPC draft of FIL in which 12 more articles were added.[36] Then, the NPC passed the final draft of the FIL at its annual assembly meeting in March 2019, a "fast track" move rarely seen in the Chinese legislative process. Many from the West saw the quick passage of the FIL as an echo to the pending China–U.S. trade talk,[37] and others viewed it as the need to address long-standing grievances by foreign businesses.[38] Within the country, however, it is considered as a much-needed legislation toward further opening up and developing a healthy market economy.[39]

The FIL contains 6 chapters and 42 articles. Aimed at displacing the FIE Laws, the FIL applies to all foreign investments within the territory of China upon its taking effect on January 1, 2020. But for purposes of the FIL, the territory of China does not include such regions as Hong Kong or Macau. As the special administrative regions (SARs) of China, both Hong Kong and Macau are deemed "foreign" in terms of application of law.[40] It also should be noted that the term "foreign investment"

34. Law of the People's Republic of China on Foreign Investment (Draft) [MOFCOM Draft] (promulgated by Standing Comm. Nat'l People's Cong., December 26, 2018) https://www.lawxp.com/statute/s1829126.html [https://perma.cc/W9RC-EJ2C].

35. *See id.*

36. *See* Law of the People's Republic of China on Foreign Investment (Second Draft) [MOFCOM Second Draft] (promulgated by NPC Legislative Commission).

37. *See* Gerry Shih, *Amid Skepticism, China Fast-Tracks Foreign Investment Law To Show Goodwill to Washington*, WASH. POST (March 15, 2019, 3:18 AM) https://www.washingtonpost.com/world/asia_ pacific/amid-skepticism-china-fast-tracks-foreign-investment-law-to-show-goodwill-to-washington/2019/03/15/9506b31e-4701–11e9–9726–50f151ab44b9_story.html?utm_term=.acb9d835bd55 [https://perma.cc/949G-XBCB]. *See also* Anna Fifield & David J. Lynch, *China Fast Tracks New Foreign Investment Law to Smooth Latest U.S. Trade Talks*, FIN. REV. (January 31, 2019) https://www.afr.com/news/economy/trade/china-fast-tracks-new-foreign-investment-law-to-smooth-latest-us-trade-talks-20190131-h1apad [https://perma.cc/JP33-KEK7].

38. *See* Seow Bei Yi, *Beijing Developing Rules for New Foreign Investment Law*, THE STRAITS TIMES (April 18, 2019, 5:00 AM) https://www.straitstimes.com/business/companies-markets/beijing-developing-rules-for-new-foreign-investment-law [https://perma.cc/6XYW-V94R].

39. *See* Wang Chen, *supra* note 26.

40. *See generally* Mo Zhang, *Codified Choice of Law in China: Rules, Process and Theoretic Underpinnings*, 37 N.C. J. INT'L L. & COM. REG. 83 (2011).

in the FIL refers to foreign business investment in Chinese language other than foreign country investment used, as noted, in the MOFCOM draft. The change of Chinese wording is said to reflect a shift of the legislative focus from geographic location to the investors.[41]

Unlike the FIE laws that were vehicle-specific and prescriptive, the FIL appears to be quite method-generic and content-neutral. As a result, many provisions of the FIL are considerably vague and general. The FIL implementation rules, though anticipated to be more operative in details, are surprisingly condensed, consisting of only 49 articles.[42] In addition, the SPC Interpretation is quite narrowly tailored only to a particular issue at this point. It necessarily raises a concern that the enforcement of the FIL may be affected due to the shortage of clear guidance.

Nevertheless, the enactment of the FIL reflects an intended shift in China from micro to macro management of foreign investment. It signifies a change of the country's foreign investment legal landscape in at least two important aspects. The first aspect is that the FIL unifies the country's foreign investment laws. As a replacement of the FIE Laws, the FIL serves as the basic law on foreign investment and becomes the primary legal source of foreign investment regulations in the country.[43] With an emphasis on promotion, protection, management and legal liabilities of foreign investment, the FIL is expected to be the pillar legislation in forming a new legal framework that governs foreign investment, which is a vital part of the implementation of the NOES initiative.[44]

The second aspect is that the FIL significantly changes the regulatory scheme of foreign investment in China. On the one hand, unlike the MOFCOM's draft, the FIL intends to regulate investment activities rather than the investors themselves, which represents a transformation of business management philosophy from market subject supervision to market behavior supervision.[45] The underlying rationale is that the market subject supervision would result in discriminatory treatment among different market players while market behavior supervision will mainly involve business conduct regardless of the status of the business players.[46]

On the other hand, the FIL forms a new legal mechanism for foreign investment in the country. It alters the course of regulating foreign

41. *See* Dialogue with Fang Aiqing, *supra* note 33.

42. The draft Regulations had 44 articles, and it was published on November 2, 2019 for public comments. Notice of the Ministry of Justice on Public Comment on the "Regulations for the Implementation of the Foreign Investment Law of the People's Republic of China (Draft for Soliciting Opinions)," www.gov.cn. (November 2, 2019) http://www.gov.cn/xinwen/2019–11/02/content_5447867.htm [https://perma.cc/G9D9-7W9S] (providing full text of the draft).

43. *See* Wang Chen, *supra* note 26.

44. *See id.*

45. *See id.*

46. *See* Qiao Xinsheng, *Practical Significance of the Foreign Investment Law*, Shanghai Legal Daily (April 4, 2019, 10:28 AM) http://www.spcsc.sh.cn/n1939/n1944/n1945/n2300/u1ai190864.html [https://perma.cc/3W38-5A3V].

investment and adopts different legal approaches to help draw and manage foreign investment. By unifying the laws and streamlining the legal framework of foreign investment, the FIL contains substantial and institutional changes to China's foreign investment system established under the FIE laws. Those changes are viewed as carrying a clear message that China "continues to welcome and encourage foreign investment," and endeavors to create a more level playing field for foreign investors.[47]

This Article takes a closer look at the FIL along with the SPC interpretation and the implementation rules, and offers an in-depth analysis of the new regulatory system that governs foreign investment. The center of the discussion is on the statutory rules and approaches revamping the foreign investment regime in light of the legislative backdrop. The analysis is made on a comparative basis to address the issues that are both legally and practically important to foreign investment in China. The Article also examines matters that remain unresolved or need to be further clarified in conjunction with a review of the concerns and expectations of foreign investors.

Part I of this Article analyzes the structure of the FIL. It looks into the concept of foreign investment as defined in the FIL and the new rules for market access. The policies and ideology underlying the new foreign investment framework will be examined. Part II focuses on how foreign investment sets its foot and operates in the Chinese market under the FIL. It explores the options available to foreign investors who have or are going to have business interests in China. Part III provides an analytical review of the mechanism of foreign investment protection with an emphasis on such matters as forced technology transfer and commercial theft. The analysis also includes remedies and means to redress grievances. Part IV discusses the management measures of foreign investment. The discussion is centered on the information report system and national security review. Part V examines some major issues that remain unsolved and potential impacts on the implementation of the FIL.

In conclusion, this Article points out that while as part of China's effort to implement its NOES initiative, the FIL is expected to help build a further open, stable and transparent environment to attract more inflows of foreign investment, an effective enforcement of FIL rules remains to be seen, especially in the protection of foreign investment. It suggests that through the integration of FIE Laws into the uniform domestic regulatory system, the FIL is charged with the mission to level the playing field with fair treatment for foreign investors, but challenges still await foreign firms and corporations seeking business establishment in China.

I. Structure of the FIL and New Market Access System

As noted, the FIL is a quite compressed version of the MOFCOM draft and has only 42 articles that are divided into six chapters. Unlike

47. *See* Seow Bei Yi, *supra* note 38.

the MOFCOM draft that was intended to be a detailed piece of legislation on foreign investment, the FIL focuses mainly on four areas, namely, investment promotion (Chapter 2), investment protection (Chapter 3), investment management (Chapter 4), and legal liability (Chapter 5). Chapter 1 of the FIL contains general provisions. It not only sets forth the application, scope, and goal of the FIL, but also provides general rules and principles under which foreign investment is regulated and managed.

The stated goal of the FIL, as provided in Article 1, has multistrands, including (a) to further expand opening up to the outside world; (b) to actively promote foreign investment; (c) to protect legitimate rights and interests of foreign investment; (d) to standardize foreign investment management; (e) to facilitate the formation of a comprehensive new opening pattern; and (f) to provide impetus to the healthy development of socialist market economy.[48] The goal seems quite ambitious and is yet to be tested in the application of the FIL.

Under Article 2 of the FIL, the application of the FIL covers all foreign investment within the territory of China.[49] Once again, within the "territory" of China here means within the "mainland" of China. According to the drafting authority, the theme of the FIL is premised on the notion of openness and liberalization.[50] Such a notion is also embodied in provisions of the FIL. As provided in Article 3 of the FIL, the State adheres to the basic national policy of opening up to the outside world and encourages foreign investors to invest in China.[51] Article 3 of the FIL further provides that the State implements a high-level investment liberalization and facilitation policy.[52] With the ideology of openness and liberalization, the adoption of the FIL, as noted, is to form a stable, transparent, predictable and fair market environment.[53]

The most significant feature of the FIL is that it creates a new market access mechanism for foreign investment. This mechanism brings dramatic changes to the foreign investment regime established under the FIE laws. In the meantime, the FIL provides a statutory definition of foreign investment, aiming to clear up certain clouds over such issues as what should constitute foreign investment and who is qualified as foreign investors. Moreover, in order to help establish and improve a system of promoting foreign investment, the FIL provides certain rules that set boundaries on the government's role, which may affect foreign investment.

A. *Concept and Scope of Foreign Investment*

Foreign investment was not specifically defined in the prior foreign investment regulations because of the nature of separate and independent

48. *See id.*, art. 1.
49. *See* FIL, *supra* note 1, art. 2.
50. *See* Wang Chen, *supra* note 26.
51. *See* FIL, *supra* note 1, art. 3.
52. *See id.*
53. *See id.*

application of each of the FIE Laws. The FIL uniformly defines foreign investment as "investment activities" undertaken by foreign investors directly or indirectly in China.[54] Foreign investors are specified in the FIL to include foreign natural persons, enterprises or other organizations. The direct investment refers to in-country establishment while the indirect investment means acquisition of stocks of Chinese domestic enterprises without engaging in the enterprise management or seeking control of the enterprise.[55] In certain cases, indirect investment is also called foreign portfolio investment.[56]

In accordance with Article 2 of the FIL, foreign investment activities may take four different forms: (a) foreign investors, alone or jointly, establish foreign invested enterprises in China; (b) foreign investors obtain shares, equity, property share, or other similar rights and interests of enterprises within the territory of China; (c) foreign investors, alone or jointly, invest in new projects in China; and (d) investments made in other means prescribed by laws, administrative regulations or specified by the State Council.[57] Under this definition, foreign investment in China will mainly take the form of "establishment," "acquisition," or "expansion." Note, however, that for the purpose of the FIL, acquisition includes the purchase of stocks, shares, and rights while the expansion concerns the investment by the existing investors on new projects.

In contrast to the FIE Laws, the FIL broadens the scope of foreign investment, particularly in indirect investment. Structurally, Articles 2 (a) (b) and (c) of the FIL each singles out a particular type of foreign investment. As a catchall clause, Article 2 (d) is intended to cover in the future the areas that are left blank in the FIL. Also, unlike the FIE laws that generally required a minimum 25 percent of foreign ownership in order to qualify as foreign investment,[58] the FIL does not contain such a

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54. *See id.*

55. *See* Wang Guiguo, International Investment Law 241 (2001). Also, foreign direct investment (FID) is defined an IFM's research paper as an investment "that reflects the objective of an entity resident in one economy obtaining a lasting interest in an enterprise resident in another economy. The lasting interest implies the existence of a longterm relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise." Marie Montanjees, *Indirect Investment: Defining the Scope of the Direct Investment Relationship*, 3 Int'l Monetary Fund: Issues Paper (DITEG) (2004) https://www.imf.org/External/NP/sta/bop/pdf/diteg3b.pdf [https://perma.cc/P27G-DTPA].

56. According to a 1999 staff paper of UNCTAD (United Nations Conference on Trade and Development), portfolio investment includes investments by a resident entity in one country in the equity and debt securities of an enterprise resident in another country which seek primarily capital gains and do not necessarily reflect a significant and lasting interest in the enterprise. U.N. Conference on Trade and Development, *Comprehensive Study of the Interrelationship between Foreign Direct Investment (FDI) and Foreign Portfolio Investment (FPI)*, 4, U.NCTAD/GDS/DFSB/5 (June 23, 1999) https://unctad.org/en/Docs/pogdsdfsbd5.pdf [https://perma.cc/82HN-33EK].

57. *See id.*

58. For example, pursuant to Article 4 of the Equity Joint Venture Law, the proportion of the foreign investor's investment in an equity joint venture shall be, in

requirement. However, despite the effort to define foreign investment as specifically as possible, the FIE fails to address several issues that are important to the definition of foreign investment.

One of such issues is whether an individual Chinese citizen may form a joint venture with a foreign investor under the FIL. Under the FIE laws, the domestic partners of FIEs were limited to Chinese companies, enterprises or other economic organizations,[59] and therefore individual Chinese citizens were generally precluded from the FIEs.[60] In the MOFCOM Draft, investors are divided into foreign and domestic investors. Domestic investors include natural persons holding Chinese nationality, Chinese government and its departments or instrumentalities, and enterprises within Chinese territory and controlled by Chinese nationals or government.[61]

The FIL's definition of foreign investment does not specify who on the Chinese side may become a partner of a foreign investor nor does it prohibit individual Chinese citizens from undertaking business ventures with foreign investors. The question then is whether the individual Chinese citizens are allowed to participate in FIEs under the FIL. The Implementation Regulations clears up this cloud explicitly by providing that the "other investors" stated in Article 2 of the FIL include the natural persons of Chinese nationality, which lifts the statutory restriction on individual Chinese citizens in the FIEs.[62] In addition, under Article 48 of the Implementation Regulations, the FIL applies by reference to investments in China by Chinese citizens residing abroad.[63]

Another issue is the status of VIEs. It is unclear under the FIL's definition whether the VIEs are within the ambit of foreign investment. A VIE stands for Variable Interest Entity and it has been used in China during recent years to refer to an investment structure under which an entity (company or enterprise) so created is owned by a Chinese enterprise (legal person) or citizen (natural person), but actually controlled by foreign investors.[64] The term VIE is said to originate from the US GAAP accounting rules in response to the Enron scandal,[65] but it became popular in China as an investment means to avoid the prohibition on foreign investment in certain sectors.[66] In other words, it was employed as a

general, no less than 25 percent of its registered capital. EJV Law, *supra* note 16, art. 4.

59. *See* EJV Law, *supra* note 16, art. 1; *see also* CJV Law, *supra* note 18, art. 1.

60. One exception is contained in the implementation rules of CJV Law that permit Chinese citizen residing overseas to form a CJV. *See* CJV Law, *supra* note 18, art. 57.

61. *See* MOFCOM Draft, *supra* note 31, art. 12.

62. Implementation Regulations, *supra* note 3, art. 3.

63. Implementation Regulations, *supra* note 3, art. 48.

64. *See* Mahony, *supra* note 6, at 234–35.

65. *See* Floyd Norris, *Accounting Rules Changed to Bar Tactics Used by Enron*, N.Y. Times (January 16, 2003) https://www.nytimes.com/2003/01/16/business/accounting-rules-changed-to-bar-tactics-used-by-enron.html [https://perma.cc/UWA5-8ZS7].

66. *See* Mahony, *supra* note 6, at 234–35.

workaround to enable foreign investment to step into the prohibited sectors, or round-tripping investment in short.

Prior to the adoption of the FIL, the VIE tactics were not recognized. For example, in the 2012 case of China Small & Medium Enterprises Investment Co. Ltd. (CSM Investment) v. Chinachem Financial Services (Chinachem),[67] the SPC struck down a business arrangement under the VIE structure and held the agreements between CSM Investment and Chinachem for the arrangement invalid on the ground of concealing illegal purposes under the guise of legitimate forms. According to the SPC, the agreements that enabled Chinachem, a Hong Kong investor, to become a shareholder and exercise certain voting rights in a bank in Mainland China were aimed at circumventing the law and regulation prohibiting foreign investors from investing in the financial industry.[68]

In the draft Implementation Regulations, an attempt was made to recognize the VIE arrangement. Under Article 35 of the draft Implementation Regulations, a VIE arrangement is allowed if it meets two requirements: (a) a wholly owned enterprise, and (b) approval by the State Council.[69] This provision, however, was deleted from the adopted Implementation Regulations because of the lack of consensus about how the VIE arrangement should be regulated and what restrictions should be imposed. One critic view, for example, is that the "wholly owned" requirement significantly narrows the scope of the VIE recognition.[70] Thus, as a result of the deletion, the status of VIEs remains uncertain under the provisions of the FIL.

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67. *See* the SPC, Civil Judgment, (2012) Min Shi Zong Zi No. 30. A simplified version of the facts of the case is as follows: in late 1990's and early 2000's, CMI Investment and Chinachem entered into a series of agreements, including entrustment and loans agreements. Under the loan agreements, Chinachem agreed to provide loans to SMI Investment for subscribing shares of Mingsheng Bank. Through the entrustment agreements, SMI Investment was authorized to act as Chinachem's proxy pertaining to the shares subscribed in Mingsheng Bank, including voting rights, serving on the board of Mingsheng Bank, as well as managing and exercising all other rights and interests associated with the shares under the instruction of Chinachem. Shortly thereafter, disputes arose between Chinachem and SMI Investment over the ownership of the shares at Mingsheng and related dividends. After a twelve-year litigation battle, the case finally reached the SPC in 2012. Details of the cases and judgment are available in Wen Kah Ming & Harietta Leung, *Case Analysis of* Chinachem Financial Services Ltd v. China Small and Medium Enterprise Investment Co. Ltd., 2 CHINA L. 74 (2016).

68. *See* SPC, Civil Judgment, *supra* note 67.

69. Article 35 of the Implementation Regulations provides that the wholly owned enterprises formed overseas by Chinese natural person, legal person or other organizations which make investment within the territory of China may, subject to the review of relevant government authority and approval by the state council, be exempt from the restrictions under the special administrative measures for the market access contained in the negative list. *See* Implementation Regulations, *supra* note 3, art. 35.

70. *See The Foreign Investment Law Gets Wings: Draft Implementation Regulations Released for Public Consultation*, HOGAN LOVELLS PUBLICATION (November 5, 2019) https://www.hoganlovells.com/en/publications/the-foreign-investment-law-gets-wings [https://perma.cc/2U7P-JAVK].

A third issue is whether the "other organization" as used in the FIL includes the government of a foreign country or region or an international organization. Under the MOFCOM Draft, foreign investors are defined to embrace the government department or instrumentality of a foreign country or region and international organization. The FIL, however, is silent in this regard. Similarly, the FIL makes no mention of the status of the investors from such Special Administrative Regions (SARs) as Hong Kong and Macau. As noted, both Hong Kong and Macau are deemed foreign in China in many aspects.[71]

In order to avoid confusion, the Implementation Regulations has a special article that applies to the investors from SARs as well as from Taiwan. Under Article 48 of the Implementation Rules, except where the laws, administrative regulations, or the State Council provide otherwise, investments in the mainland by the investors from Hong Kong and Macau shall by reference apply the FIL and the Implementation Regulations. But the investment in the mainland by investors from Taiwan will be subject to the Law on Protection of Investment by Taiwan Compatriots and its Implementation Regulations; and with regard to the matters not specified in the aforementioned Law or Regulations, the FIL and the Implementation Regulations shall be applied by reference.[72]

B. *Framework of Market Access*

Under the FIE Laws, the establishment of foreign investment in the country, whether through formation of a new FIE or by acquiring an existing Chinese company, must follow a three-step process: application, approval and filing.[73] The government approval as a device to control foreign investment is mandatory, while the filing is a required post-approval procedure which includes business registration and all other matters relevant to an FIE's operation.[74] Note, however, that due to the requirement of government approval, foreign investments were treated differently from the domestic investment in terms of business establishment. In other words, no national treatment was granted to foreign investors prior to their entry into the Chinese market.

The government approval also affected the FIE contracts. In general, if the government approval is a prerequisite to the effectiveness of an FIE contract, the contract will not take effect until the said approval

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71. Under the FIE Laws and their rules of implementation, the SARs were treated as foreign. For example, under Article 57 of Implementation Rules of the CJV Law, any company, enterprise or other economic organization or individual from Hong Kong, Macao or Taiwan regions or any Chinese citizen living abroad who wishes to establish a contractual joint venture shall go through the procedures with reference to these Rules. A text is available at http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045937.shtml [https://perma.cc/6J99-X92H].

72. *See* Implementation Rules, *supra* note 3, art. 48.

73. *See generally* Mahony, *supra* note 6, at 118–20, 250–55.

74. *See id.*, at 250–51 for a "master list" of filings.

is obtained.[75] According to the SPC, absent the required government approval, an FIE contract would be held ineffective although the contract remained valid.[76] Note that the government approval, if required for the formation of an FIE contract, will also be required for the modification of the contract under the equal dignity rule.[77]

In addition, as noted, foreign investments were subject to certain statutory restrictions specified in the Investment Catalogue. Since it was first published in 1995, the Investment Catalogue had been revised seven times as of 2017.[78] Each revision contained the changes in the category contents. The Investment Catalogue served as a barometer directing the flow of foreign investment. As discussed, foreign investors are encouraged to make as much investment as they wish in the encouraged sectors but prohibited from investing in prohibited sectors. In the restricted sectors, foreign investors are allowed to invest in restricted sectors but subject to certain restrictions such as ownership limits and special approvals.

The FIL substantially alters the existing process of foreign investment in the country and instead sets forth a new mechanism of market access for foreign investment. The new mechanism has two components: "pre-entry national treatment" and "negative list." According to Article 4 of the FIL, all foreign investments will be managed under a system of pre-entry national treatment plus a negative list.[79] The adoption of the new market access mechanism in the FIL signifies the change of policies in handling foreign investment from approval to registration and from management of investors to regulation of investment activities.

1. Pre-Entry National Treatment

Pre-entry national treatment is also called preestablishment national treatment. It grants to foreign investors a national treatment before their presence or establishment in the country. Under the FIE Laws, foreign investors are treated differently until after they have gained market access. The FIL extends such treatment to the stage prior to the actual establishment. As provided in Article 4 of the FIL, the pre-entry national treatment is a "treatment given to foreign investors and their investments at the stage of investment admission no less than that given to the domestic investors and their investments." [80]

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75. *See* Contract Law of China (promulgated by NPC Legislative Commission, effective date1999), art. 44 (hereinafter Contract Law of China).

76. *See* the SPC, 2009 Interpretation on the Application of Contract Law (II), art. 8 (a full text is available at https://wenku.baidu.com/view/92403b72a417866f-b84a8e71.html [https://perma.cc/JKU4-VWKG]).

77. *See* Contract Law of China, *supra* note 75, art. 77.

78. After its publication in 1995, the Investment Catalogue was revised in 1997, 2002, 2004, 2007, 2011, 2015 and 2017. The 2017 Catalogue is available at http://www.gov.cn/xinwen/2017–06/28/content_5206424.htm [https://perma.cc/6SX9-BPN7].

79. *See* FIL, *supra* note 1, art. 4.

80. *See id.*

National treatment is considered as the single most important standard of treatment in international investment,[81] and is also believed to be the most difficult standard to achieve given both economically and politically sensitive issues it may touch.[82] According to UNCTAD (the United Nations Conference on Trade and Development), national treatment refers to "a principle whereby a host country extends to foreign investors treatment that is at least as favorable as the treatment that it accords to national investors in like circumstances."[83] The very purpose of the national treatment standard is "to ensure a degree of competitive equality between national and foreign investors."[84]

Although it is typical that the national treatment only extends to the post-entry treatment of foreign investors, there has been a new trend that the standard is expanded to apply to pre-entry situations.[85] The FIL follows this trend. As a statutory requirement under the FIL, the country will undertake a policy of high-level investment liberalization and facilitation.[86] The underlying notion is the principle of equality under which foreign and domestic investors are on an equal footing at both pre and post entry stages.[87] In this regard, the expansion of national treatment is deemed essential to achieving "a stable, transparent, predictable and fair market environment" in the nation.[88]

A centerpiece of the pre-entry national treatment is the equal competition among all investors, foreign or domestic. For that purpose, the FIL contains several articles that are intended to maintain and promote the equality principle as a basic incentive to attract more foreign investments. For example, under the FIL, it is required that the management of foreign investment in the areas not in the negative list be made in accordance with the principle of equality between domestic and foreign investments.[89] In addition, if permission is needed for business operation in a certain industry or sector, the government authorities are required to review and examine foreign investors' application for permission under the equal conditions and procedures as applied to domestic investment, except as otherwise provided by the laws and administrative regulations.[90]

The other provisions in the FIL that are aimed at implementing the equality principle include: (a) the State policies concerning the support of enterprise development are equally applied to the FIEs;[91] (b) the

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81. *See generally* U.N. Conference on Trade and Development, *National Treatment*, UNCTAD/ITE/IIT/11 (Vol. IV), (1999), https://unctad.org/en/Docs/psiteiitd11v4.en.pdf [https://perma.cc/HS5P-XTBH].

82. *See generally id.*

83. *See generally id.*

84. *See generally id.*

85. *See generally id.*

86. *See* FIL, *supra* note 1, art. 3.

87. *See* Wang Chen, *supra* note 26.

88. *See id.*

89. *See* FIL, *supra* note 1, art. 3.

90. *See id.* art. 30.

91. *See id.* art. 9.

FIEs are equally entitled to participating in the standard setting work, and the mandatory standards established by the State are equally applicable to the FIEs;[92] (c) the FIEs have equal access to the government procurements through fair competition, and the FIEs' products and services within the territory of China are treated equally with the domestic enterprises' products and services in the government procurement;[93] and (d) like domestic enterprises, FIEs may also raise funds through public offerings, and issuance of corporate bonds or other securities.[94]

The Implementation Regulations reinforce the equality principle as between domestic and foreign investments in at least three aspects. The first aspect concerns equal application of the State policies in supporting the enterprise development. According to Article 6 of the Implementation Regulations, the government and its relevant departments shall treat FIEs and domestic enterprises equally in funds arrangement, land supply, tax reduction or exemption, qualification licensing, standard setting, project application, or human resource policies. It is also required that all policies adopted by the government to support enterprise development, and the condition, procedure, as well as time limit pertaining to application for the support be publicized. The government is mandated to treat the FIEs and domestic enterprises equally when reviewing their applications.[95]

The second aspect is about equal participation in the process of standard setting. Under Article 13 of the Implementation Regulations, the standard setting in which the FIEs' equal participation is required includes the State, industry, local, and group standard. In addition, the FIEs may, based on needs, make industry standard on its own initiative or jointly with other enterprises.[96] On the other hand, an FIE may propose for setting a standard, and may make comments and suggestions during the periods of approval of the standard-setting, drafting of the standard, technology examination, and the feedback and evaluation of the implementation of the standard. The FIEs may also engage in standard drafting, technology examination, and other relevant works as well as the translation of the standard into foreign languages.[97]

Article 13 makes it a statutory requirement that transparency and the complete publicity of the information on standard setting and revision be observed.[98] Furthermore, according to Article 14 of the Implementation Rules, any mandatory standard made by the State shall equally apply to the FIEs and domestic enterprises. Article 14 prohibits the

92. *See id.* art. 15.
93. *See id.* art. 16.
94. *See id.* art. 17.
95. *See* Implementation Rules, *supra* note 3, art. 6.
96. *See id.* art. 13.
97. *See id.*
98. *See id.*

government and its departments at all levels from imposing solely on the FIEs any technical requirements exceeding the mandatory standard.[99]

The third aspect relates to equal access to government procurements. There are three articles in the Implementation Regulations concerning the FIEs' access to government procurements. Under Article 15 of the Implementation Regulations, FIEs shall not be obstructed or restricted from freely entering into the government procurement market in the local area or in a specific industry.[100] The review and determination of the qualification of suppliers shall not be made on the basis of differentiation or discrimination against FIEs. No unreasonable conditions such as the suppliers' ownership type, organizational form, equity structure, the nationality of the investors, or the brand of product or service shall be imposed.[101] For the purpose of government procurement, the product manufactured or service provided within China by an FIE should not be differentiated from those manufactured or provided by its domestic counterpart.[102]

Article 16 of the Implementation Regulations provides that an FIE may, in accordance with the government procurement law and regulations of China, inquire or question the purchaser about a government procurement matter and file complaints with the authority supervising government procurement. After receiving the inquiry, question or complaints, the purchaser or the authority supervising government procurement shall reply or make a decision within the legally required period of time.[103] Article 17 demands strengthening the supervision of government procurement so that an action differentiating or discriminating against FIEs will be corrected and punished.[104]

In addition, Article 35 of the Implementation Regulations requires an equal treatment for FIEs in obtaining licenses for particular sectors. It is provided in Article 35 of the Implementation Regulations that where a foreign investor invests in an industry or sector which requires obtainment of a license, unless otherwise provided by law or regulations, its application for such license shall be viewed under the same conditions and procedures applicable to domestic enterprises, and no discriminatory requirements shall be allowed concerning the conditions for the license, application materials, review steps and time limits.[105]

Article 35 also provides that where an FIE applies for a type of license that meets the stated conditions and requirements, the application may be handled by simplified procedure known as "notification and promise" in accordance with the law.[106] The notification and promise refers to

99. *See id.* art. 14.
100. *See id.* art. 15.
101. *See id.*
102. *See id.*
103. *See id.* art. 16.
104. *See id.* art. 17.
105. *See id.*, art. 35.
106. *See id.*

an application and approval process in which government departments disclose specific standards or conditions, the applicant promises in writing to have met the standards or conditions and based on the applicant's promise, the administrative authority directly grants an approval.

Note, however, that under the rule of national treatment, the core of the treatment with regard to foreign investors is "no less than" or "no less favorable than" the treatment granted to domestic investors.[107] In this context, "no less" does not necessarily mean the "same." In other words, the treatment given to foreign investors could be the same or better.[108] Therefore, it is legally permissible to provide foreign investors with preferential treatment. In fact, the preferential treatment has been widely used in many countries as a useful policy tool to draw in foreign investment. In China, with the national treatment, foreign investors may still enjoy investment incentives that are not applicable to domestic investment.

According to the FIL, foreign investors and FIEs may enjoy preferential treatment when making investment in the industries, sectors and regions specified by the State for the needs of national economic and social development.[109] Under the FIL, local governments at or above the county level may within their statutory competence adopt policies and measures for promotion and facilitation of foreign investment.[110] This provision actually empowers local governments to provide foreign investors with certain preferential treatment on the basis of local needs. Article 12 of the Implementation Regulations further provides that a foreign investor or an FIE may enjoy a preferential treatment in areas such as finance, tax, banking, and land use.[111] In addition, pursuant to Article 13 of the Implementation Regulations, foreign investors who expand their investment in China with their investment income in the country shall enjoy corresponding preferential treatment in accordance with the law.[112]

On the other hand, as a continuing effort to promote foreign investment, Article 13 of the FIL provides that the State may establish special economic zones where needed or adopt pilot policy measures for foreign investment in selected regions.[113] Both "special economic zones" and "pilot policy measures" suggest that certain preferential treatments or incentives may be adopted to apply only to foreign investments. Article 10 of the Implementation Regulations defines the "special economic zone"

107. *See* WTO Glossary, *National Treatment*, https://www.wto.org/english/thewto_e/glossary_e/national_treatment_e.htm [https://perma.cc/V5UV-EM2S].

108. *See generally*, Aphiwan Natasha King, *National Treatment in International Economic Law: The Case for Consistent Interpretation in New Generation EU Free Trade Agreements*, 49 Geo. J. Int'l L. 929 (2018).

109. *See* FIL, *supra* note 1, art. 14.

110. *See id.*, art. 18.

111. *See* Implementation Regulations, *supra* note 3, art. 12.

112. *See id.*, art. 13.

113. *See* FIL, *supra* note 1, art. 13.

as a specific area established with the approval by the State for which more vigorous opening-up policy and measures for foreign investment will be implemented.[114] Further, under Article 10 of the Implementation Regulations, the pilot policy measures applied to foreign investment may be extended to other regions or nationwide under particular circumstances if proven to be feasible in practice.[115]

But, it should also be noted that the national treatment, though it is an internationally accepted rule, is subject to certain limits. It has become a common practice that the application of national treatment is paired with a "negative list," which renders the national treatment inapplicable to the "excepted areas" of foreign investment.[116] Put differently, the national treatment applies only to the investment activities in the positive areas or sectors. In addition, as some observed, certain exceptions to the national treatment exist concerning public health, safety and morals, and national security.[117]

2. Negative List

For purposes of the FIL, the scheme of "national treatment plus negative list" means that the national treatment granted to foreign investments is subject to the negative list. As defined in the FIL, the negative list refers to the special management measures that are used to control admission of foreign investment in specific areas in the country.[118] Under the FIL, the State grants national treatment to foreign investments in all areas outside the negative list. Thus, foreign investments will enjoy no national treatment in the industries or sectors contained in the negative list at the stage of entry.

As a matter of fact, the negative list was already used in China to manage foreign investments prior to the promulgation of the FIL. As noted, foreign investments in China had for many years been subject to the Investment Catalogue. In 2015, in order to promote, and enhance management of, foreign investments, the State Council issued a Notice of Special Administrative Measures for Foreign Investment Entry Admission in the Free Trade Pilot Zones, in which the term "negative list" was used to refer to the measures.[119] At that time, the Free Trade Pilot Zones (FTPZ) included Shanghai, Guangdong, Tianjing and Fujian.[120] As of October 2018, a total of 12 FTPZs were established in the

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114. *See* Implementation Regulations, *supra* note 3, art. 10.

115. *See id.*

116. *See* UNTCAD, *supra* note 81.

117. *See* FIL, *supra* note 1, art. 4.

118. *See id.*

119. *See* State Council General Office, *Notice of Special Management Measures for Foreign Investment Entry Admission in the Free Trade Pilot Zones (Negative List)* (Apr. 8, 2015), http://www.gov.cn/zhengce/content/2015–04/20/content_9627.htm [https://perma.cc/K6MU-P7YP].

120. *See id.*, art. 1. The Free Trade Zone Negative List is less restrictive than the national list and only applies to China's free trade zones.

country.[121] After its first publication, the negative list then was revised on a yearly basis.

In 2017, the negative list structure was incorporated into the last version of the Investment Guidance Catalogue, and expanded the application of the negative list to certain areas outside the FTPZs.[122] One year later in 2018, the NDRC and the MOFCOM jointly issued the Special Administrative Measures (the 2018 Negative List), which brought to an end the use of the Investment Catalogue in the country.[123] In contrast to the Investment Catalogue, the 2018 Negative List reduced the number of restrictive measures from 63 to 48.[124] It relaxed or removed restrictions on foreign investment in the agriculture, mining, and infrastructure sectors.[125] In the meantime, the Negative List that applied to the FTPZs remained effective, but in the 2018 version of the FTPZs' Negative List, the restrictive measures were reduced from 95 to 45.[126]

In December 2012, the NDRC and MOFCOM released an updated version of the 2018 Negative List.[127] In that list, the phrase of "special administrative measures" was deleted and the term "Market Access Negative List" was used instead. But what was really significant was that in their notice on the release, the NDRC and MOFCOM set forth a structure of "One Negative List for the Whole Country" for foreign investment.[128] The rule served a two-fold purpose. On the one hand, it created a uniform structure for the use of the negative list, and on the other hand, it prohibited local government authorities from altering the list or creating their own list.[129] The FIL makes the Negative List together with the

121. The newly added FTPZs include Liaoning, Zhejiang, Henan, Hubei, Chongqing, Sichuan, Shannxi and Hainan. A whole list is available at http://www.askci.com/news/chanye/20181016/1740361134344.shtml [https://perma.cc/E27U-KRTK].

122. *See* Ministry of Commerce of the People's Republic of China, *Announcement on Matters Related to the Establishment and Modification of the Foreign-Invested Enterprises* (July 30, 2017), http://www.mofcom.gov.cn/article/b/c/201707/20170702617581.shtml [https://perma.cc/JVR8-AYK5].

123. *See* National Development and Reform Commission of the People's Republic of China & Ministry of Commerce of the People's Republic of China, *Special Administrative Measures for Foreign Investment Access* (June 28, 2018), http://www.mofcom.gov.cn/article/b/f/201806/20180602760432.shtml [https://perma.cc/DY4R-CAH9].

124. *See id.*

125. *See id.*

126. *See* National Development and Reform Commission of the People's Republic of China & Ministry of Commerce of the People's Republic of China, *Special Management Measures for Foreign Investment Admission in the Free Trade Pilot Zone (Negative List) (2018 Version)* (June 30, 2018), http://www.mofcom.gov.cn/article/b/f/201806/20180602760435.shtml [https://perma.cc/B5ZT-FWD2].

127. *See* National Development and Reform Commission of the People's Republic of China & Ministry of Commerce of the People's Republic of China, *Notice on the Release of 2018 Market Access Negative List* (Dec. 21, 2018), http://www.ndrc.gov.cn/gzdt/201812/t20181228_924070.html [hereinafter 2018 Negative List].

128. *See id.*

129. *See id.*

National Treatment the statutory rules that govern foreign investment administration and management in the country.

Unlike the previous Investment Catalogue, the Negative List divides market access administrative measures into two categories: prohibitive and restrictive measures. The prohibitive measures apply to the sectors into which an entry is prohibited in the list. Article 33 of the Implementation Regulations explicitly provides that a foreign investor shall not invest in a prohibited sector on the negative list.[130] The prohibition of entry means that no foreign investment is allowed and no admission application will be handled.[131]

The restrictive measures deal with the restricted sectors in the list. With regard to the restricted sectors, permission is required for the market entry, and certain procedures must be followed in order to obtain such permission.[132] Under Article 33 of the Implementation Regulations, to invest in a restricted sector on the negative list, a foreign investor must meet such specific administrative measures for the entry as the equity rights requirement provided in the negative list and qualifications for its senior management personnel.[133]

The sectors not on the list are not subject to any approval for market entry, and all market entities, domestic or foreign, have equal access as a matter of law.[134]

The negative list is managed by the State Council and relevant government authorities. Pursuant to Article 4 of the Implementation Regulations, the negative list for foreign investment entry is formulated by the investment department along with the commerce department under the State Council, and issued by the State Council, or by the relevant departments thereunder with an approval by the State Council. The State may adjust the negative list on a timely basis to meet the needs for furthering the opening up policy, and promoting the economic and social development.[135]

On the other hand, under Article 11 of the Implementation Regulations, the State will issue from time to time a catalogue of the sectors where foreign investments are encouraged. The purpose of such catalogue is to encourage and guide foreign investors to invest in the specific industries, sectors, and regions. The catalogue will be drafted by both the investment and commerce departments under the State Council, and issued thereby after being approved by the State Council.[136]

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130. *See* Implementation Regulations, *supra* note 3, art. 33.
131. *See* 2018 Negative List, *supra* note 127.
132. *See id.*
133. *See* Implementation Regulations, *supra* note 3, art. 33.
134. *See* 2018 Negative List, *supra* note 127.
135. *See* Implementation Regulations, *supra* note 3, art. 4.
136. *See id.*, art. 11.

C. *Application of International Treaties*

Once again, the national treatment rule does not preclude a better treatment to foreign investors in comparison with their domestic counterparts. The better treatment could be provided in the domestic law as an incentive to encourage foreign investment, and it may also be established in the international treaties. With regard to the application of a treaty, a question that often arises is what effect the treaty will have when a discrepancy exists between the treaty provisions and the domestic law. In essence, the question involves the relationship between treaty and domestic law, or more specifically the status of international treaty in the domestic legal system.

There are two theories in international law that tend to define the relationship between international treaty and domestic law. One theory is called monism or monistic approach that holds international treaties to be superior to the domestic law. The monism theory emphasizes the supremacy of international law and considers domestic law as pensioner of the international law.[137] The other theory is known as dualism or dualistic approach. Under the dualism theory, domestic law and international law are different systems, and neither legal order has the power to create or alter the rules of the other.[138]

Thus, the way to solve the conflict between international treaty and domestic law to a great extent depends on the rank of international treaty in the domestic system. Under the general legal principle, if there is a hierarchy between the norms, the superior norm prevails over inferior norm (lex superior derogat legi inferiori). If, however, the two norms are at the same level, the later norm controls (lex posterior derogat legi priori).[139] The principle of "later norm controls" is commonly called the "last-in-time" rule, meaning that the effect is given to "whichever was enacted later in time."[140]

In China, there is no provision in the Constitution or statute that prescribes the relationship between treaty and domestic law. One relevant provision is Article 142 of the 1986 General Principles of Civil Law (known as the 1986 Civil Code). Under Article 142, if any international treaty concluded or acceded to by the People's Republic of China contains provisions that differ from those in the civil law of China, the treaty provisions shall apply except for those to which China has made reservations.[141] Article 142 seems to suggest that treaty is superior to domestic law when a conflict occurs. But it is unclear whether a people's court may

137. *See* Burns H. Weston, Richard A. Falk & Hilary Charlesworth, International Law and World Order: A Problem-Oriented Coursebook 229–33 (3d ed. 1997).

138. *See id.*

139. *See generally* Erich Vranes, *The Definition of 'Norm Conflict' in International Law and Legal Theory*, 17 No. 2 Eur. J. Int'l L. 395 (2006).

140. *See* Julian G. Ku, *Treaties as Law: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 Ind. L.J. 319 (2005).

141. *See* General Principles of Civil Law (1986), art. 142.

directly apply the treaty. It is also questionable whether the treaty should still prevail if legislation enacted after the treaty appears to be in conflict with the treaty.

Nevertheless, in several other legislations, the priority of treaty application is provided the same way as Article 142 of the 1986 Civil Code.[142] In judicial practice, the SPC in a 2000 Notice requires all people's courts to give superiority of application to the treaty provisions in cases where a domestic law is inconsistent with the treaty.[143] Similarly, under 2018 NDRC and MOFCOM's Negative List, when an international treaty or agreement concluded or acceded to by China or relevant arrangement with the regions of Hong Kong, Macau and Taiwan contains different provisions, those provisions shall be followed.[144]

The FIL, however, alters Article 142 of the 1986 Civil Code pertaining to the application of treaties. Under Article 4 of the FIL, where international treaties or agreements concluded or acceded to by the People's Republic of China provide for more preferential treatments for the entry admission of foreign investments, the relevant provisions may be applied. Unlike Article 142 of the 1986 Civil Code, Article 4 of the FIL does not mandate an application of treaty if the treaty provisions differ from the domestic law with regard to the treatment granted to foreign investors.

In fact, during the drafting period of the FIL, Article 4 was heavily debated. In the early draft, Article 4 simply followed Article 142 of the 1986 Civil Code and contained the term "shall apply," which makes application of treaty mandatory if there is a conflict between the treaty and domestic law. However, many are opposed to the use of mandatory language in Article 4. A major concern was that if the application of treaty were made compulsory, it would provide foreign investors with an opportunity to challenge the domestic law, which may destruct the uniformity of the domestic law regulating foreign investment.[145]

As a result, in the final version of Article 4 of the FIL, the term "shall apply" was replaced with the term "may apply." The change is significant because it departs from Article 146 of the 1986 Civil Code by making the application of treaty optional rather than mandatory. The problem now is that Article 4 of the FIL not only is inconsistent with

142. *See*, *e.g.*, Article 95 of the Law of Negotiable Instruments, Article 268 of the Maritime Law, and Article 148 of the Law of Civil Aviation all follow *verbatim* Article 142 of the 1986 Civil Code.

143. *See* Sup. People's Ct., *Notice of the Supreme People's Court on on Several Questions to be Noted in the Trial and Implementation of Civil and Commercial Cases Concerning Foreign Affairs* (Apr. 17, 2000), http://luhongxia.chinalawedu.com/falvfagui/fg23079/3093.shtml [https://perma.cc/QZ4R-U634].

144. *See* 2018 Negative List, *supra* note 127.

145. *See* First Finance, *Foreign Investment Law Will Be Read the Second Time and Details of International Treaties Will Cause Controversy*, CHINA.COM (Jan. 29, 2019, 9:39 AM), https://finance.china.com/news/11173316/20190129/35108597_1.html [https://perma.cc/7MN6-XJ7V] (report on the scholarly debates over Article 4 during the public comments period).

Article 142 of the 1986 Civil Code, but also creates uncertainty about the effect of treaty provisions concerning the market access of foreign investments.[146]

It is interesting to note that in the Draft Implementation Regulations published for the public comments, there contained a provision concerning the application of international treaties. Article 7 of the Draft Implementation Regulations provided that the State should protect the foreign investors' investment, incomes and other lawful rights and interests within China in accordance with the laws, regulations, and the international treaties or agreements concluded or acceded to by China.[147] The provision, however, is not seen in the adopted Implementation Regulations. A reasonable conclusion is that no acceptable solution is yet found by the legislators with regard to Article 4 of the FIL.

II. Establishment of Foreign Investment Under the FIL

As noted, under the FIE Laws, government review and approval are required for the presence of foreign investment within the territory of China regardless of the nature of industrial sectors. The FIL limits government approval to the sectors specified in the Negative List. Pursuant to the national treatment rule, the establishment of FIEs in the areas outside the Negative List will no longer require government approval. In the meantime, pursuant to the FIL, the business structure of all FIEs shall be governed by the same laws as applied to domestic enterprises or business entities.

In fact, before the FIL was adopted, the change of management of foreign investment from approval to filing already took place. In its decision to amend the FIE Laws in September 2016, the Standing Committee of the NPC dropped the "approval" prerequisite in the FIE Laws for non-negative-list sectors and instead required only the "filing for record."[148] In the same year, the NDRC and MOFCOM jointly issued a public announcement to formally implement the change.[149]

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146. Interestingly, in the 2019 version of the Special Administrative Measures for the Entry Admission of Foreign Investment (Negative List), issued by NDRC and MOFCOM on June 30, 2019, the provision of the mandatory application of treaty remains intact. *See* National Development and Reform Commission of the People's Republic of China & Ministry of Commerce of the People's Republic of China, *Special Management Measures for Foreign Investment Access (Negative List) (2019 Version)* (June 30, 2019), http://www.gov.cn/xinwen/2019–06/30/content_5404703.htm [https://perma.cc/73QA-8UE7] (hereinafter 2019 Negative List).

147. *See* Draft Implementation Regulations, *supra* note 42, at art. 7.

148. *See* Xinhua News Agency, *Decision of the Standing Committee of the National People's Congress on Amending the "Fourth Law of the People's Republic of China"*, CCTV (Sept. 3, 2016, 5:09 PM), http://news.cctv.com/2016/09/03/ARTISlkzh17PYF4t-5voeMWIV160903.shtml [https://perma.cc/6J99-Z3JE].

149. *See* NDRC and MOFCOM, Public Announcement NO. 22, October 8, 2016, available at http://wzs.mofcom.gov.cn/article/n/201610/20161001404973.shtml [https://perma.cc/FYF2-6Y3Q].

A. *Avenues of Entry*

Under the framework of National Treatment plus Negative List, there are two major avenues for the entry of foreign investment into China: (a) approval and filing or (b) registration and filing. The former involves the sectors within the Negative List while the latter applies to the nonlisted sectors. As noted, according to Article 28 of the FIL and Article 33 of the Implementation Regulations, foreign investors are not allowed to make investments in the areas where foreign investment is prohibited in the Negative List. If, however, a foreign investment is made in the restricted areas in the Negative List, the conditions set forth in the Negative List for the investment must be met.[150]

When making investments in a restricted sector, a foreign investor is required to file an application for admission with a relevant administrative agency. Upon receiving the application, the administrative organ will make a decision on whether or not to grant access according to the law. If certain qualifications or the prescribed procedures are required, the administrative agency shall guide and supervise the applicant to obtain entry admission in accordance with the laws and regulations.[151]

The FIL mandates that where foreign investment is restricted in the negative list, foreign investors shall meet the conditions prescribed in the negative list for a permission of entry.[152] Again, such conditions include specific equity rights requirement and qualifications for the senior management personnel under Article 33 of the Implementation Regulations. The FIL further provides that if a government approval or filing is required for foreign investment projects, the procedures for the approval or filing must be complied with.[153] Moreover, under the FIL, when a foreign investor invests in an industry or sector where permission is required for the investment, it is imperative that the foreign investor follows the permission process.[154]

Under Article 34 of the Implementation Regulations, if a foreign investor proposes to invest in a sector listed in the negative list but fails to meet the corresponding requirements, no permission shall be granted and no registration shall be allowed. If the fixed assets investment is involved, for which an approval is required, no approval shall be issued before the requirements provided in the negative list are met.[155]

With regard to foreign investments in the areas outside the negative list, no government approval is needed. Thus, to form a FIE under the

150. *See* FIL, *supra* note 1, art. 28.

151. *See* 2018 Negative List, *supra* note 127.

152. *See* FIL, *supra* note 1, art. 28. For example, in the 2019 Negative List, it is provided that foreign investors shall not engage in investment operation activities as individual industrial and commercial households, investor of individual proprietorship, or the member of professional coop of farmers. *See* 2019 Negative List, *supra* note 146, art. 3.

153. *See id.*, art. 29.

154. *See id.*, art. 30.

155. *See* Implementation Regulations, *supra* note 3, art. 34.

FIL, the foreign investor will only need to follow a two-step process. The first step is registration. Based on the pre-entry national treatment, a foreign investor generally has three options: (a) If the foreign investor is to establish an FIE in the form of a company, the registration shall be made under the provision of Chinese Company Law; (b) If the foreign investor chooses to take a nonlegal person status, its investment may be registered as a nonlegal person business entity; or (c) if the foreign investor wants to become a shareholder by acquiring the stocks or shares of an existing company or enterprise, then no registration is needed.

The business registration for the FIEs is handled by government authority for market supervision and administration.[156] Under Article 37 of the Implementation Regulations, the FIE business registration shall be filed with the State Administration for Market Regulation under the State Council (SAMR) or the authorized department for market supervision and administration of a local government. It is required that the SAMR make public the list of duly authorized departments of market supervision and administration.[157] Procedurally, prior to the business registration, an FIE will need to have its business name registered with the commerce and industry administration.

In general, a foreign investment registration shall be made with the government authority of the place where the foreign investment is made. Once again, under the FIE Laws, there was a minimum requirement for a foreign portion of the registered capital. Both the FIL and the Implementation Regulations contain no such requirement. With regard to the currency to be used for the registered capital, the Implementation Regulations take a flexible approach. According to Article 37 of the Implementation Regulations, the registered capital of an FIE may be denominated in RMB or in a freely convertible currency.[158]

The second step is filing. After business registration, an FIE shall file for record with the authority for market supervision and administration. The filing can be made online through SAMR's e-filing platform.[159] There are two types of filing: initial filing and followup filing. Initial filing applies to newly established FIEs and is required to be made within 30 days after the registration. In order to make FIEs' registration and filing more efficient, the SAMR's online filing platform offers a so-called

156. At the national level, the business registration authority used to be the State Administration for Industry and Commerce (SAIC). In 2018, the SAIC was merged into the State Administration for Market Regulation (SAMR). Like the SAIC, the SAMR also has local branches at all government levels. More information about SAIC and SAMR is available at https://www.sohu.com/a/225429748_114988 [https://perma.cc/M8P6-GS4L].

157. *See* Implementation Regulations, *supra* note 3, art. 37.

158. *See id.*

159. E-filing is at *Convenient and One-Stop Name Registration Application Service*, State Administration of Market Supervision and Administration, http://wsdj.samr.gov.cn/saicmcdjweb/state/transferLogin?code=90000&flag=false [https://perma.cc/MHQ6-CG2R].

"single window handling" system, which enables the newly established FIEs to conduct registration and filing online simultaneously.[160]

The followup filing deals with the changes of existing FIEs. An FIE is mandated to file an update with the government authority for certain changes made to the FIE. The changes include change in total investment, registered capital, equity or cooperative rights, mergers or divisions, business scope, operating terms; early termination, the methods and term of capital contributions, return in advance of the investment of foreign partner of a CJV, or crossregion migration of enterprises.[161]

B. *Business Forms and Structures of FIEs*

As discussed, an FIE under the FIE Laws may take the form of EJV, CJV or WFOE. But pursuant to the rule of pre-entry national treatment, the FIL consolidates the laws regulating business organization and applies those laws uniformly to both FIEs and domestic enterprises. It is provided in Article 31 of the FIL that the forms of organization, organizational structures as well as activity norms shall be governed by the provisions of Company Law and the Law of Partnership Enterprises of China.[162] The implication of Article 31 is that an FIE could be formed as a legal person or nonlegal person. Also, as a measure to promote foreign investment, the Implementation Regulations allow an FIE to raise funds within or outside China through various means including public issuance of stocks, corporate bonds, or other securities, public or nonpublic issuance of other financing instruments, or taking foreign loans.[163]

However, according to Article 33 of the FIL, if a foreign investor acquires Chinese domestic enterprises or in any other ways participates in the concentration of business operators, the investor will be subject to government review and examination under the provisions of the Anti-Monopoly Law of China.[164] The FIL reinforces the existing antitrust framework and applies it to the foreign investments. The term "concentration of business operators" is used in the Anti-Monopoly Law

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160. *See id.*

161. *See id.*

162. *See* FIL, *supra* note 1, art. 31. The Company Law of China was adopted in 1993 and amended in 1999, 2004, 2005, 2013 and 2018 respectively. An English version of the Company Law (amended as 2013) is available at Ministry of Commerce of the People's Republic of China Department of Foreign Investment Administration, *Company Law of the People's Republic of China (Revised in 2013)* (Dec. 28, 2013), http://www.fdi.gov.cn/1800000121_39_4814_0_7.html [perma.cc/DA7E-MS8N]. The Law of Partnership Enterprises was promulgated in 1997 and amended in 2006, available at Ministry of Commerce of the People's Republic of China Department of Foreign Investment Administration, Partnership Enterprise Law of the People's Republic of China (Amended in 2006) (Aug. 27, 2006), http://www.fdi.gov.cn/1800000121_39_4109_0_7.html [perma.cc/58Q5-A7XP].

163. *See* Implementation Regulations, *supra* note 3, art. 18.

164. *See* FIL, *supra* note 1, at art. 33. The Anti-Monopoly Law of China was adopted in 2007, an English version of the Law is available at *Anti-Monopoly Law of the People's Republic of China*, CHINA.ORG.CN (Aug. 30, 2007), http://www.china.org.cn/government/laws/2009–02/10/content_17254169.htm [perma.cc/9BB9-6XPH].

to refer to (a) a merger of operators; (b) an acquisition of control of other operators through acquisition of equity or assets; or (c) an acquisition of control of other operators or the capability to exercise decisive influence on other operators by way of contracts or other means.[165]

Under the Company Law, an FIE may be formed as a limited liability company or a company limited by shares. Both of these business forms are characterized as "enterprise legal person."[166] Since these two forms are the only business forms provided in the Company Law, it is believed that the CJV will no longer be an FIE option. In China, a limited liability company is a business entity incorporated by no more than fifty shareholders, where each shareholder is liable for the company to the extent of the capital contribution the shareholder subscribes.[167]

By contrast, a company limited by shares, which is also called a stock company, is a company for which a shareholder is liable to the extent of the shares or stocks the shareholder subscribes. As noted, the foreign investors were allowed to form a stock FIE in China as early as in the mid 1990s. At that time, the stock FIE was defined as a foreign invested enterprise legal person whose capital stock is made up of equal value shares subscribed jointly by domestic and foreign shareholders.[168] In addition, a stock FIE was required to maintain a minimum of 25 percent foreign ownership, meaning that the total value of the shares subscribed and held by foreign shareholders exceeded 25 percent of the total registered capital of the stock FIE.[169]

But again, to form a stock FIE under the Company Law, no minimum foreign ownership is required. According to the Company Law, a company limited by shares can be established by the means of promotion or through public offering.[170] For purposes of the Company Law, the promotion refers to the subscription by the promoters for all the shares to be issued by the company, and the public offering means that the promoters subscribes only a portion of the shares to be issued and offer the rest of the shares for subscription to the public or the specified targets.[171]

As noted, the number of promoters of a stock FIE is limited to between 2 and 200. This limitation is based on Article 78 of the Company Law that applies to all stock companies.[172] In addition, the registered capital of a stock company formed by promotion is required to be the total

165. *See* Anti-Monopoly Law, *supra* note 164, at art. 20.

166. *See* Company Law, *supra* note 162, art. 2 and 3.

167. *See id.*, art. 3 and 24.

168. *See* Ministry of Commerce of the People's Republic of China, *Interim Provisions on Several Issues Concerning the Establishment of Foreign Invested Co., Ltd.* (Jan. 10, 1995, revised Oct. 28, 2015), http://www.mofcom.gov.cn/aarticle/b/f/200207/20020700031172.html [hereinafter MOFCOM, FIE Stock Company Regulations].

169. *See id.*

170. *See* the Company Law, *supra* note 162, art. 77.

171. *See id.*

172. *See id.*, art. 78.

share capital subscribed by all promoters as registered with the company registration authority. Before the capital for the shares subscribed by the promoters are paid in full, no shares may be offered to others for subscription.[173] For a stock company established through public offering, the registered capital must be the total paid share capital as registered with the company registration authority.[174] However, if the law, the administrative regulations or the State Council's decisions contain provisions for the amount of the actual paid registered capital and the minimum registered capital of the stock companies, such provisions shall apply.[175]

Note that under the Company Law, more than half of the promoters of a stock company must be domiciled within the territory of China,[176] while the existing regulations for an FIE stock company require at least one foreign promoter in order to establish an FIE stock company.[177] But in accordance with Article 217 of the Company Law, if the laws on foreign investment provide otherwise, these provisions shall prevail. Thus, unless the new regulations are enacted, the existing regulations governing the FIE stock companies will remain effective and applicable. An inference from the Company Law and FIE stock company regulations is that an FIE stock company must have at least one foreign investor but the number of the promoters who are foreign domiciliaries may not exceed 50 percent.

A nonlegal person FIE mainly refers to a foreign invested partnership enterprise or FIPE. Partnership enterprise is defined in the Partnership Enterprise Law (PEL) as a business organization of general partnership or limited liability partnership established by natural persons, legal persons and other organizations.[178] Under Article 2 of the PEL, a common partnership enterprise is comprised of general partners who bear unlimited and joint liabilities for the debts of the partnership enterprise, while a limited liability partnership enterprise consists of both general partners and limited partners.[179]

In a limited liability partnership enterprise, the general partners bear unlimited and joint liabilities for the debts of the enterprise, and the limited partners bear the liabilities for the enterprise's debts to the extent of their capital contributions.[180] Also under Article 3 of the PEL, a wholly state-funded company, state-owned company, listed company, public welfare–oriented institution and social organization are prohibited from becoming a general partner.[181]

173. *See id.*, art. 80.
174. *See id.*
175. *See id.*
176. *See id.*, art. 78.
177. *See* MOFCOM, FIE Stock Company Regulations, *supra* note 168, art. 6.
178. *See* Law of Partnership Enterprises, *supra* note 162, art. 2.
179. *See id.*
180. *See id.*
181. *See id.*, art. 3.

The FIPE has actually been a type of foreign investment since in 2010 when the State Council's Administrative Measures on the Establishment of Partnership Enterprise in China by Foreign Enterprises or Individuals (FIPE Measures) went into effect.[182] The FIPE Measures defines FIPE as a partnership entity established by two or more foreign enterprises or individuals, and foreign enterprises or individuals and a Chinese natural person, legal person and other organizations in China.[183] Under Article 5 of the FIPE Measures, formation of a FIPE shall be registered with the local industrial and commercial administration.[184] The FIPE registration is governed by the SAIC's Rules of Administration for the Registration of Foreign Invested Partnership Enterprises.[185]

Compared with other FIE forms, the FIPE is viewed to have several attractive aspects, including, among others, flexibility in management, governance, and distribution of profits; simplified registration process; and elimination of double taxation.[186] However, there are certain limitations on the establishment of a FIPE. For example, under the 2019 Negative List, no FIPE may be established in the investment areas where equity shares are required.[187] The investment areas as such refers to the sectors in the Negative List that require the controlling shares of Chinese company or certain ratio of shares owned by foreign investors.

III. Foreign Investment Protection: Statutory Rules and Beyond

Protection of Foreign investment is a longstanding issue facing China. On the one hand, China wants to absorb more foreign investment in order to help modernize its economy. On the other hand, there are outstanding concerns from the foreign investors about the adequacy of investment protection, especially in the areas of intellectual property rights.[188] The major issues include, among others, the forced technology

182. The FIPE Measures were adopted by the State Council on August 19, 2009, and took effect on March 1, 2010. *See* Ministry of Commerce of the People's Republic of China Department of Foreign Investment Administration, *Measures for the Administration on the Establishment of Partnership Business by Foreign Enterprises or Individuals in China* (Nov. 25, 2009), http*://www.fdi.gov.cn/1800000121_39_3593_0_7.html* [perma.cc/TSR5-4MKK]. For general discussion of the FIPE and the FIPE Measures, *see* Samuel H. Shaddox, *China's Foreign Invested Partnership Enterprise Law: The Lifeless or Sleeping Dragon?*, 22 Pac. Rim L. & Policy J. 469 (2013).

183. FIPE Measures, *supra* note 182, art. 2.

184. *Id.*, art. 5.

185. *See* The Rules of Administration for the Registration of Foreign Invested Partnership Enterprises (promulgated by the State Admin. for Indus. & Commerce, Jan. 29, 2010, effective Mar. 1, 2010), available at https://www.66law.cn/laws/103177.aspx [https://perma.cc/57E9-FFFU].

186. *See* Mahony, *supra* note 6, at 230.

187. *See* NDRC and MOFCOM, the 2019 Negative List, *supra* note 148.

188. *See* U.S. Depart. of State, 2018 Investment Climate Statements—China, https://www.state.gov/reports/2018-investment-climate-statements/china [https://perma.cc/K77T-ZWHW].

transfer to Chinese partners and the theft of commercial secrets from foreign businesses in China.[189]

As a legislative response to the concerns of foreign investors, the FIL contains a special chapter consisting of 8 articles for investment protection. Attempting to improve the country's environment for foreign investment, the FIL set forth several rules that not only provide protection of foreign investors' legitimate rights and interests but also impose restrictions on the government at both central and local levels. These rules constitute the statutory basis to safeguard foreign investors and their investment from being harmed.

Underlying the rules is the general principle of active promotion and protection of foreign investment.[190] In addition, as provided in the FIL, the State establishes multilateral and bilateral investment promotion cooperation mechanisms with other countries, regions and international organization, and strengthens international exchange and cooperation in the field of investment.[191] Internally, the FIL requires government authorities at all levels, under the axiom of facilitation, efficiency and transparency, to simplify bureaucratic procedures, enhance work efficiency, optimize government services, and improve the level of foreign investment services.[192]

A. *Rule Against Expropriation*

Expropriation is a government action that takes privately owned property against the wishes of the owners.[193] International law does not prohibit expropriation.[194] On the contrary, the government's right to take private property, as a matter of both international norm and domestic principle, is regarded to be conceded.[195] But exercise of such right is subject to certain limitations. From the international law perspective, expropriation is limited (a) for public purpose; (b) on a non-discriminatory basis, (c) under due process; and (d) with compensation.[196]

Due to its commitment to the protection of foreign investment, China has put in place a rule against expropriation. In 1990 when the 1979 EJV Law was amended, a nonexpropriation provision was added into Article 2 of the EJV Law. In that amendment, China promised not to nationalize or expropriate Sino-Foreign equity joint ventures but reserved the right to do so under extraordinary circumstances for

189. *See id.*

190. *See* the FIL, *supra* note 1, art. 1.

191. *See id.*, art. 12.

192. *See id.*, art. 19.

193. *See* U.N. Conference on Trade and Development, Expropriation: UNCTAD Series on Issues in International Investment Agreement II (2012), https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf [https://perma.cc/FTA2-3CYF] (hereinafter referred to as UNCTAD, Expropriation).

194. *See id.*, at 6–7.

195. *See* Folsom et al., International Business Transactions: A Problem-Oriented Coursebook 1077 (7th ed. 2012).

196. *See* UNCTAD, Expropriation, *supra* note 193, Introduction.

the needs of social public interests according to legal procedures with appropriate compensation.[197] The nonexpropriation rule under the amendment, however, was viewed as a simple "lip service" due to the vagueness of the social public interests and inadequate compensation.[198]

The FIL reaffirms the notion of nonexpropriation and creates a general rule against expropriation of foreign investment. Article 20 of the FIL explicitly provides that the State does not expropriate foreign investors' investment.[199] In the meantime, under Article 20 of the FIL, under extraordinary circumstances, the State may expropriate or requisition the investment of foreign investors in accordance with the law and for the needs of the public interests.[200] But Article 20 requires that the expropriation or requisition be conducted pursuant to legal procedures and a fair and reasonable compensation be made promptly.[201]

The Implementation Regulations seem to have modified Article 20 of the FIL. As provided in Article 21 of the Implementation Regulations, the State does not expropriate foreign investors' investment. Under extraordinary circumstances where the State expropriates the investment of foreign investors for public interests, the expropriation shall be made in accordance with the legal procedure and in a nondiscriminatory manner, and compensation shall be made promptly on the basis of the market value of the investment expropriated.[202]

In contrast to Article 20 of the FIL, Article 21 of the Implementation Regulations (a) drops the word "requisition" and (b) uses the "market value" to implicate "fair and reasonable" in terms of compensation. In addition, under Article 21 of the Implementation Regulations, foreign investors who disagree with the expropriation decision may seek for administrative review or file an administrative lawsuit in accordance with the law.[203]

The rule against expropriation under the FIL and the Implementation Regulations has several important features. First, no expropriation shall be made in general. Second, as an exception, an expropriation may take place if (a) there exist extraordinary circumstances; (b) the expropriation is authorized by the law; and (c) the needs of the public interests arise. Third, the expropriation, once needed, must follow the legal procedure, must be made on a nondiscriminative basis, and compensation must be made promptly according to the market value. Fourth, the legal procedure and compensation applied to the expropriation equally applies to requisition, if any.[204]

197. *See* the EJV Law (as amended), *supra* note 16, art. 2.

198. *See* Potter, *supra* note 13, at 23–24.

199. *See* the FIL, art. 20.

200. *See id.*

201. *See id.*

202. *See* the Implementation Regulations, *supra* note 3, art. 20.

203. *See id.*

204. Requisition commonly refers to a taking or seizure of property by government. *Requisition*, BLACK'S LAW DICTIONARY (6th ed. 1994). In the MOFCOM Draft,

It is important to note that the FIL and the Implementation Regulations change the compensation standard as provided in all previous laws for expropriation. As noted in the EJV laws, the compensation was required only to be "appropriate." In the Property Law, with regard to an expropriation of private premises or other real property, the standard is simply "compensation."[205] The FIL and the Implementation Regulations for the first time demand a compensation for the expropriation to be "fair, reasonable," or "at market value," and "prompt."

However, there are some issues that will arise in the application of Article 20 of the FIL. The first question is what circumstances could be characterized as "extraordinary" in order to justify an expropriation. During the review of the draft FIL, some legislators raised the same question with a concern that the undefined "extraordinary circumstances" would adversely affect protection of foreign investment as intended by the FIL.[206] But when the NPC passed the FIL, this question remained open, which gave the government leeway to deal with it on a case-by-case basis.

The second issue is how to determine the public interests in case of expropriation. Chinese scholars have long debated on this issue ever since the Property Law was drafted in the mid-2000s. Some suggested a specific approach to define the public interests in the law in order to avoid confusion and prevent abuse of it. Others, however, preferred a general approach to provide it broadly so that the different public needs in the constantly changing environment can be met.[207] Like the Property Law, the FIL follows the general approach and leaves the public interests undefined.[208]

The third issue concerns requisition. Although both expropriation and requisition involves "taking" of privately owned property by government, a requisition mainly refers to an exercise of sovereignty to secure or dispose of some property or services primarily from its subjects for

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requisition was defined as taking foreign an investor or FIE's movable or nonmovable property located with the territory of China under the provisions of the law for such emergent needs as rescues or disaster reliefs. *See* MOFCOM Draft, *supra* note 31, art. 112.

205. *See* Property Law of China (promulgated by the Fifth Session of the Tenth Nat'l People's Cong., Mar. 16 2007, effective Oct. 1, 2007), art. 42. An English version of the Property Law is available at http://www.china.org.cn/china/Legislations-Form2001–2010/2011–02/11/content_21897791.htm [https://perma.cc/ZPM2-H4P5].

206. *See Legislators: the FIE Legislation Shall Clarify the 'Extraordinary Circumstances" for Expropriation of Foreign Investments* BEIJING NEWS REPORT (De.26, 2018), http://www.bjnews.com.cn/news/2018/12/27/534228.html [https://perma.cc/74W5-RM-PW].

207. *See* Mo Zhang, *From Public to Private: the Newly Enacted Chinese Property Law and Protection of Property Rights in China*, 5 Berkeley Bus. L.J., 317, 361 (2008).

208. *See id.* at 361. There is a factor-based methodology proposed by some scholars in China to help identify public interests for purposes of expropriation. The factors to consider include: (a) scope of beneficiaries, (b) burden on the general public, (c) priority of the interests involved, and (d) availability of alternatives.

the performance of government function.[209] In China, requisition is generally defined as the mandatory use of collectively and privately owned property by an exercise of government power.[210] The requisition is authorized in the FIL but not mentioned in the Implementation Regulations. It then becomes a question whether requisition is still an allowed device in terms of taking.

B. *Forced Transfer of Technology Prohibited*

At the early stage of the economic reform beginning in late 1970s, China took a strategy known as "Market-For-Technology" to absorb foreign investment in order to help develop the country's pillar industries, the auto industry in particular. The notion underscoring this strategy was that given its huge market, China was entitled to ask for the technology, as a win-win deal, from foreign investors who wanted to obtain market shares in China.[211] Under that strategy, it was believed that foreign investors were allowed to form joint ventures in strategic sectors with Chinese state-owned enterprises on the condition of technology sharing.[212]

When the EJV Law was promulgated in 1979, it was mandated that the technology and equipment contributed by foreign investors must be really advanced technology and equipment that suit China's needs.[213] In 1983, the State Council adopted the Regulations for the Implementation of the 1979 EJV Law. Under the 1983 Regulations, a joint venture, in order to exist, must meet one or more of the following requirements: (a) it employs advanced technology and equipment . . . ; (b) it provides benefits of technical innovation . . . ; (c) it enables to expand exports of the produced products . . . ; and (d) it provides for the training of technical and operation management personnel.[214]

In addition, as provided in Article 27 of the 2001 State Council's Regulations for the Administration of the Technology Import and Export (RATIE), during the period of the technology import contract, the results of improvement to the imported technology belong to the party

209. *See* Maurice Wise, *The Judicial Nature of Requisition*, 6 Univ. Toronto, L.J. 58 (1945).

210. *See* Yao Hong, et al, Detailed Explanations of the Property Law of the People's Republic of China, 74 (2007).

211. *See* Lv Fuyuan, *Talks to the "Angry Youth" on the "Market-for-Technology"* (与"愤青"对话"市场换技术") (Feb.13, 2006), http://auto.sina.com.cn/news/2006–02–13/1114167094.shtml [https://perma.cc/N5U9-TCN2].

212. *See* Yu Zhou, *U.S. Trade Negotiators Want to End China's Forced Tech Transfers. That Could Backfire*, The Washington Post (Jan. 28, 2019), https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/28/u-s-trade-negotiators-want-to-end-chinas-forced-tech-transfers-that-could-backfire/?noredirect=on&utm_term=.929dddda9da4[https://perma.cc/HK4F-TL58].

213. *See* the EJV Law (1979), *supra* note 16, art. 5.

214. *See* Regulations for the Implementation of the Law of China on Sino-Foreign Joint Ventures (promulgated by the St. Council, Sept. 20, 1983, effective Sept. 20, 1983, as revised 2001), http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200301/20030100064563.shtml.

making the improvement.[215] This provision was viewed to also mean that local Chinese firms must own improvements they make to technology involved in foreign-contracted research.[216]

The above strategy and relevant provisions of laws have been criticized as the forced technology transfer or FTT—a practice in which a domestic government forces foreign businesses to share their technology with the domestic counterparts in exchange for market access.[217] Despite China's strong denial of any such practice in the country,[218] the complaints from foreign companies were widely spreading. In 2018, EU took a WTO action against China on the FTT. A report revealed that one fifth of EU companies operating in China said they were compelled to transfer technology to maintain access to the Chinese market in 2019.[219] The FTT issue was also on the top list of U.S.-China trade negotiations in 2019.[220]

Confronting the criticism worldwide, China made a move to address the FTT concerns by taking two steps: The first step was to amend the technology transfer regulations. On March 2, 2019, State Council issued a decree to amend, among others, the RATIE.[221] An important item in the RATIE amendment was to delete the controversial Article 27 of the RATIE that requires domestic ownership of domestic improvements to

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215. *See* Regulations for the Administration of the Import and Export of Technology (promulgated by the St. Council, Dec.10, 2001, effective Jan. 1, 2002), https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn125en.pdf [https://perma.cc/2MVW-DK7H].

216. *See* Jane Cai & Keegan Elmer, *Is the US Right to Cry Foul About Forced Tech Transfer to Do Business in China—and What is Beijing's Position*?, South China Morning Post (Jan. 10, 2019, 11:32 PM), https://www.scmp.com/news/china/diplomacy/article/2181528/us-right-cry-foul-about-forced-technology-transfer-do-business [https://perma.cc/4CUU-7FNL].

217. *See* Jake Frankenfield, *Forced Technology Transfer (FTT)*, Investopedia (May 21, 2019), https://www.investopedia.com/forced-technology-transfer-ftt-4687680 [https://perma.cc/L6ZD-747A].

218. *See China Paper Says U.S. 'Fabricated' Forced Tech Transfer Claims*, Bloomberg (May 18, 2019, 10:31PM), https://www.bloomberg.com/news/articles/2019–05–18/china-paper-says-u-s-fabricated-forced-tech-transfer-claims [https://perma.cc/3TFP-VTS3].

219. *See* John Lappin, *China Compels Technology Transfer, Say EU Firms*, Expert Investor Europe (May 24, 2019), https://expertinvestoreurope.com/china-compels-technology-transfers-say-eu-firms [https://perma.cc/W4HV-NUUA].

220. *See* Dean A. Pinkert & Hughes Hubbard, *Inside Views: U.S. Complaints About Technology Transfer in China: Negotiating Endgame*, Intellectual Property Watch (Jan. 24, 2019), https://www.ip-watch.org/2019/01/24/us-complaints-technology-transfer-china-negotiating-endgame [https://perma.cc/A5B4-7RCM]. *See also*, James Politi & Tom Mitchell, *U.S.- China Trade Talks: What Does the U.S. Want?*, Financial Times (Jan. 24, 2019), available at https://infoweb.newsbank.com/apps/news/document-view?p=WORLDNEWS&docref=news/17128104C88F5478&f=basic [https://perma.cc/F3S7-JP4T].

221. *See* the State Council, Announcement of the Issuance of Decree No. 709, March 18, 2019, http://www.gov.cn/guowuyuan/2019–03/18/content_5374742.htm [https://perma.cc/JKE6-TALD]. *See also Morgan Lewis' Lawflash Alert: China Introduces Amendments to Address Fear of Forced Technology Transfer*, JD Supra (Mar.25, 2019), https://www.jdsupra.com/legalnews/china-introduces-amendments-to-address-21378 [https://perma.cc/Y5D9-BUVZ].

foreign technology. According to the decree, the deletion of Article 27 of the RATIE was to help optimize the environment for foreign technology transfer in the country.[222]

The second step was to outlaw the FTT through imposition of a statutory ban on the FTT in the FIL. Article 22 of the FIL prohibits administrative agencies and their staff from using administrative means to force any technology transfer. Instead, according to Article 22 of the FIL, the State encourages technical cooperation based on the principle of voluntariness and commercial norms in the process of foreign investment.[223] To implement Article 22 of the FIL, Article 24 of the Implementation Regulations further prohibits any administrative agency, including an organization authorized by law or regulations to administer public matters, and their staff from compelling directly or in a disguised form a foreign investor or an FIE to transfer technology through administrative licensing, inspection, penalty, coercion or other administrative means.[224]

Article 22 of the FIL also requires that the conditions for technical cooperation be determined by equal negotiation between the parties to the investment in accordance with the principle of fairness.[225] More generally, Article 22 of the FIL commits the State to protect the intellectual property rights of foreign investors and FIEs, to safeguard the legitimate rights and interests of the IP rights and related rights holders, and to hold the IP rights infringer legally accountable strictly under the law.[226]

The ban on the FTT is indeed the latest effort China made to address the fear of foreign companies doing business in China. In the MOFCOM Draft, the FTT was not mentioned, and there was only a short article simply stating that the State protects the intellectual property rights of foreign investors and foreign invested enterprises according to the law.[227] Note, however, that the ban imposed under Article 22 of the FIL on the FTT is limited to the administrative measures and applicable to administrative agencies and their staff.

Nevertheless, Article 22 of the FIL is viewed in China as a strong measure for the protection of foreign investment.[228] But concerns from foreign businesses remain. Some expressed concerns about the effectiveness of Article 22 because they believed that the FTT is not an issue of statute but a matter of practice.[229] Others viewed Article 22's focus

222. *See* the State Council Decree No. 709 (promulgated by the St. Council, Mar. 2, 2019, effective Mar. 2, 2019), art. 38., http://www.gov.cn/zhengce/content/2019–03/18/content_5374723.htm [https://perma.cc/6YVT-TRUW].

223. *See* the FIL, art. 22.

224. *See* the Implementation Regulations, *supra* note 3, art. 24.

225. *See* the FIL, art. 22.

226. *See id.*

227. *See* the MOFCOM Draft, *supra* note 31, art. 116.

228. *See* See He Lifeng, *No Forced Tech Transfer by Administrative Measures*, Answers to Reporters at the NPC Press Conference, Xin Shidai Xin Qixiang (新时代新气象)(Mar.6, 2019, 10:46 AM) https://news.ifeng.com/c/7komQUDbS0e [https://perma.cc/R6YT-JTTE].

229. *See* Keegan Elmer, *Will China New Forced Technology Transfer Law Satisfy*

on administrative methods as an implication that government officials may still be free to use other tactics to pressure companies to hand over know-how.[230] Also a criticism is that Article 22 may deter lower-level members of the bureaucracy, but it may not change anything substantial on the ground.[231]

C. *Anti–Commercial Theft Measures*

Commercial theft or stealing of intellectual property is a quite common phenomenon in the arena of international business transactions, and it has been deemed as a massive threat to the U.S. economy. China is categorically labeled as the primary culprit.[232] According to U.S. federal law enforcement officials, China "relies on an army of domestic computer hackers, traditional spies overseas and corrupt corporate insiders in U.S. and other companies."[233] It is also claimed that "Chinese thefts of U.S. commercial software and technology are relentless, growing and hitting on multiple fronts—with hackers penetrating corporate and government email and digital networks, and Chinese operatives recruiting U.S. executives and engineers to spill juicy secrets."[234]

Facing the mounting criticism on the commercial theft, China on the one hand denied all charges, and on the other hand has to take certain measures to cope with this matter. Reflected in the FIL are the provisions that tend to prevent commercial theft. There are three articles in the FIL that have the function of anti–commercial theft. The first one is Article 22. In addition to its ban on the FTT, Article 22 of the FIL is also considered as a bar on Chinese JV partners from stealing IP and commercial secrets from their foreign counterparts.[235] But since Article 22

U.S. Concerns?, SOUTH CHINA MORNING POST (Dec. 26, 2019, 9:45 PM), https://www.scmp.com/news/china/diplomacy/article/2179556/will-chinas-new-forced-technology-transfer-law-satisfy-us [https://perma.cc/VJ3L-A2WU]. *See* Julie Wernau, *Forced Tech Transfers Are on the Rise in China*, *European Firms Say*, THE WALL STREET JOURNAL (May 20, 2019, 5:24 PM), https://www.wsj.com/articles/forced-tech-transfers-are-on-the-rise-in-china-european-firms-say-11558344240 [https://perma.cc/3DW9-K3MJ].

230. *See China Approves Law Against Forced Tech Transfer to Appeases U.S.*, MARKET WATCH (Mar. 14, 2019), https://www.marketwatch.com/story/china-approves-law-against-forced-tech-transfers-to-appease-us-2019–03–14 [https://perma.cc/LZ6M-WC27].

231. *See* Austin Lowe, *China's Foreign Investment Law Fails to Address U.S. Concerns*, LAWFARE (Mar. 7, 2019, 8:00 AM), https://www.lawfareblog.com/chinas-foreign-investment-law-fails-address-us-concerns [https://perma.cc/K5J5-9CPF].

232. *See* Conor Mercadante, *Secrets, Secrets: The Trump Administration and Chinese Intellectual Property Theft*, COLUMBIA BUSINESS LAW REVIEW (Aug. 13, 2019), https://cblr.columbia.edu/secrets-secrets-the-trump-administration-and-chinese-intellectual-property-theft [https://perma.cc/TU9Y-MPT7].

233. *See* Del Q. Wilber, *China "Has Taken the Gloves Off" in the Thefts of US Technology Secrets*, L.A. TIMES (Nov. 16, 2018, 3:00 AM), https://www.latimes.com/politics/la-na-pol-china-economic-espionage-20181116-story.html [https://perma.cc/PEH6-SQMF].

234. *See id.*

235. *See* Alexander C. Koty, *China's New Foreign Investment Law*, CHINA BRIEFING (Mar. 20, 2019), https://www.china-briefing.com/news/

is a general provision of IP protections, it remains questionable whether Article 22 may effectively resolve the commercial theft problem with regard to Chinese JV partners.

The second article that prohibits government officials from disclosing business secrets is Article 23. Under Article 23, the administrative agencies and their staff shall keep confidential the business secrets of foreign investors and foreign invested enterprises known to them during the performance of their duties, and shall not disclose or illegally provide these business secrets to others.[236] Article 23 seems quite specific on the protection of commercial secrets, but once again like the ban on the FTT in Article 22 it has a focus on the administrative conducts and applies only to the government organs and their staff.

There is a similar provision in the Implementation Regulations. According to Article 25 of the Implementation Regulations, where there is a need for an administrative agency to request a foreign investor or an FIE for materials or information involving trade secrets, the materials or information so provided shall be constrained within the scope necessary for the administrative agency to perform its duty, and the access to the materials or information should be strictly restricted and anyone irrelevant to performing such duty shall not have access to the said materials or information. In addition, Article 25 requires all administrative agencies to establish and improve an internal administration system and adopt effective measures to protect the foreign investors or FIEs' trade secrets obtained during performing of their duties.[237]

The third article is Article 39, which provides statutory assurance for the application of Articles 22 and 23 of the FIL. According to Article 39, if a staff of an administrative agency abuses his power, neglects his duty or engages in malpractice in the promotion, protection or management of foreign investment, or leaks or illegally provides others with trade secrets known to him during the course of performance of his duties, the staff will be punished under the law.[238] Article 39 also makes the administrative staff criminally liable if a crime is found to be committed in this regard.[239]

D. *Complaint and Settlement Mechanism*

A new feature in the FIL is the establishment of a grievance-redressing vehicle called Complaint and Settlement Mechanism (CSM). As a part of the effort to protect foreign investment, the CSM under the FIL is designed to provide a handy process for the FIEs and foreign investors to express their concerns and report their complaints. In accordance with Article 26 of the FIL, the State shall establish a CSM for the

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chinas-new-foreign-investment-law [https://perma.cc/S4QA-RM3V].

236. *See* the FIL, art. 23.

237. *See* the Implementation Regulations, *supra* note 3, art. 25.

238. *See* the FIL., art. 39.

239. *See id.*

FIEs to promptly handle the issues that are raised by the FIEs or foreign investors and to coordinate and improve relevant policies and measures involving foreign investment.[240] Article 26 further provides that if an FIE or its investors believe that the administrative action of an administrative agency or its staff infringes upon their legitimate rights or interests, they may apply to the CMS for a coordinated solution.[241]

Under Article 26, the CSM has two basic functions: (a) to handle, and provide solutions to, the concerns of foreign investment, and (b) to coordinate on the policy issues and foreign investment management measures. However, it is unclear in the FIL what the CSM looks like and how it is organized and operates. There is also a question about how the CSM will differ from the existing rules and procedures. The underlying concern is whether the CSM may offer any realistic and practical recourse to foreign investors that receive unfair treatment by the government authorities.[242]

To deal with these questions and concerns, the Implementation Regulations provides a two-faceted CSM to handle complaints filed by foreign investors or FIEs: central joint conference and local designated authority. According to Article 29 of the Implementation Regulations, an interministry joint conference system established by the State Council is responsible for (a) coordinating and promoting the work handing the complaints made by FIEs to the central government, and (b) guiding and supervising the work concerning complaints made by the FIEs to the local government. At the local level, the government of a county or above is required to designate an authority to accept complaints filed by the FIEs or their investors within the local area.[243]

Moreover, under Article 30 of the Implementation Regulations, where an FIE or its investor believes that its lawful rights and interests are infringed upon by an administrative agency and its staff, and applies for a coordinated resolution through the CSM, the relevant authority may make factual inquires to the administrative agency and its staff against whom the complaint is made, and the latter shall be cooperative. The applicant shall be notified in writing of the result of coordination.[244] In addition, Article 31 of the Implementation Regulations forbid any entity or individual from suppressing or retaliating the FIE or foreign investor who files the complaint or seeks for a coordinated solution through the CSM.[245]

240. *See id.*, art. 26.

241. *See id.*

242. *See* Bao Zhi, et al, *China Issues a New Consolidated Law on Foreign Investment*, GLOBAL COMPLIANCE NEWS (May 9, 2019), https://globalcompliancenews.com/china-issues-new-consolidated-law-foreign-investment-20190318 [https://perma.cc/M6ZE-XQTS].

243. *See* the Implementation Regulations, *supra* note 3, art. 29.

244. *See id.*, art. 30.

245. *See id.*, art. 31.

In addition to the CSM, there are other channels available to the FIEs and foreign investors for legal remedies or reliefs. First, Article 31 of the Implementation Regulations allow an FIE or its investor to report problems to the government and relevant departments through other lawful means other than CSM.[246] Second, pursuant to Article 26, the FIE or its investors may also apply for administrative reconsideration or file an administrative lawsuit whenever their legitimate rights or interests are harmed.[247] Article 30 of the Implementation Regulations also provide that when an FIE or its investor seeks a coordinated solution for certain matters through the CSM, its option to apply for administrative review or to initiate an administrative litigation shall not be affected.[248]

Administrative review is a process in which an administrative organ at the same or a higher level, at the request of an individual or unit, conducts a review on the act of an administrative agency that is alleged to have infringed upon the legitimate rights or interests of such individual or unit. According to the Administrative Reconsideration Law of China (ARL),[249] a citizen, legal person or any other organization who considers that his or its lawful rights and interests have been infringed upon by a specific administrative act may apply for administrative reconsideration to an administrative organ which accepts the application for administrative reconsideration, and makes a decision.[250] The ARL equally applies to foreigners, stateless persons, or foreign organizations that request an administrative reconsideration in China.[251]

Administrative litigation in China is governed by the Administrative Litigation Law (ALL).[252] It is a litigation brought by a citizen, legal person or other organization believing that its lawful rights and interests have been infringed upon by an administrative act of an administrative agency or its staff.[253] Under the ALL, the people's court at trial level has a general jurisdiction over administrative cases in the first instance.[254] An administrative case shall be filed with the people's court of the

246. See id.

247. *See* the FIL, art. 26.

248. *See* the Implementation Regulations, *supra* note 3, art. 30.

249. Administrative Reconsideration Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999), https://www.cecc.gov/resources/legal-provisions/administrative-reconsideration-law-chinese-and-english-text [https://perma.cc/PLM8-LPXT].

250. *See id.*, art. 2.

251. *See id.*, art. 41.

252. Administrative Litigation Law (2015 amended version)(promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1. 2014, effective May 1, 2015), http://www.chinafile.com/ngo/laws-regulations/administrative-litigation-law-of-peoples-republic-of-china-2015-amended-version [https://perma.cc/7KNE-T5HZ].

253. *See id.*, art. 2.

254. *See id.*, art. 14. In China, first instance refers to trial, while the second instance means appeal. Under the ALL, there are certain cases over which the Intermediate People's Court (art. 15), the High People's Court (art. 16), or even the SPC (art. 17) may conduct the trial at the first instance.

place where the administrative agency that first took the administrative act is located. But for a case involving administrative reconsideration, the people's court at the location of the reconsidering agency has the jurisdiction.[255]

Unless the administrative reconsideration is required, a party may directly file an administrative case with a people's court. Alternatively, the party may first apply to the administrative agency for reconsideration and then bring the case to a people's court if not satisfied with the reconsideration decision.[256] If an administrative reconsideration shall first be requested, a court proceeding may be sought after the administrative reconsideration is complete if the party is not satisfied with the reconsideration decision.[257]

Note, however, that when an application for administrative reconsideration is submitted and accepted, or if an administrative reconsideration is required prior to an administrative suit, no administrative litigation may take place during the statutory period of time for administrative reconsideration.[258] On the other hand, if an administrative case is brought before a people's court, and the people's court takes the case, no administrative reconsideration may be conducted.[259]

An interesting part in the FIL is Article 27, which allows the FIEs to establish or join the chambers of commerce or associations. Under Article 27, the FIEs may establish or voluntarily join the chambers of commerce or associations according to the law. It is required that the chamber of commerce and association conduct their relevant activities in accordance with the laws, regulations and its articles of association to safeguard the legitimate rights and interests of its members.[260] But it remains to be seen how the chamber of commerce or association so established or joined may serve as a safeguard of the interests of the FIEs.

Under Article 7 of the Implementation Regulations, the chambers of commerce or associations should be consulted for comments or suggestions during the process of drafting the law, regulations or local rules concerning foreign investments.[261] In accordance with Article 32 of the Implementation Regulations, an FIE may decide on its own to join in or withdraw from a chamber of commerce or an association, unless otherwise provided by the law or regulation, and nobody may interfere.[262]

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255. *See id.*, art. 18. Also upon an approval from the SPC, High People's Courts may, on the basis of the actual situation of their work, designate several intermediate courts with jurisdiction areas for administrative cases crossing administrative regions.

256. *See id.*, art. 44.

257. *See id.*

258. *See* the ARL, *supra* note 249, art. 16.

259. *See id.*

260. *See* the FIL, art. 27.

261. *See* the Implementation Regulations, *supra* note 3, art. 4.

262. *See id.*, art. 32.

E. *Rule on Government Actions*

In addition to the bans on the forced FTT and unauthorized disclosure of business secrets, the FIL contains two particular rules that govern government actions, especially at local levels. The first rule deals with local policies and measures that may affect the FIEs and foreign investors. Article 24 of the FIL requires that the governments at all levels and their relevant departments be in compliance with the laws and regulations in formulating normative documents concerning foreign investment.[263]

It is specifically provided in Article 24 that without being duly authorized by the laws or administrative regulations, the government at all levels may not (a) derogate from the legitimate rights or interests of the FIEs or increase their obligations; (b) set conditions for market access and exit; or (c) interfere with the normal production and operation of the FIEs.[264] The main theme of Article 24 of the FIL is to maintain the uniformity of the application of the law pertaining to the FIEs and to prevent local government interference with FIEs in their own jurisdiction.

The Implementation Regulations provide a compliance review mechanism for the regulatory or normative documents involving foreign investments adopted by the governments, central or local alike. In accordance with Article 26 of the Implementation Regulations, the regulatory documents made by the government and its relevant departments concerning foreign investment shall be subject to the State Council's review of their legal compliance.[265] In addition, pursuant to Article 26, if a foreign investor or an FIE believes that a regulatory document made by a central government department or a local government and its departments based on which an administrative action is taken does not comply with the law or regulations, it may request for a compliance review while applying for administrative review or conducting an administrative lawsuit.[266]

The second rule involves the commitments made by the local governments to the foreign investment. Under Article 25 of the FIL, local governments and their departments shall honor their policy commitment made to foreign investments or FIEs under the law, and shall fulfill various types of contracts legally concluded.[267] The very purpose of Article 25 is to ensure the continuity of the local policies made in favor of foreign investment and fulfillment of contract obligations regardless of change of government structure and personnel. The Implementation Regulations define the "policy commitment" as the written commitment made by local governments at all levels and their relevant departments within the legal authority regarding the support policies, preferential treatment

263. *See* the FIL, art. 24.
264. *Id.*
265. *See* the Implementation Regulations, *supra* note 3, art. 26.
266. Id.
267. *See* the FIL, art. 25.

and convenience conditions applicable to foreign investors and the FIEs' investment in the region.[268]

In case, however, the local governments have a need to change the policy commitments or contract terms, the change may take place if it meets the conditions provided in Article 25. First, the change must be made for the State or public interests; second, the statutory limits and procedures must be followed; and third, a compensation must be made to the foreign investors and FIEs for the losses they suffered as a result of the change.[269] Article 25 does not specify how the compensation should be made. But rather, it is provided in the Implementation Regulations.

Article 28 of the Implementation Regulations restates Article 25 of the FIL in a more specific way. On the one hand, Article 28 requires local governments to fulfill the policy commitments made to foreign investors and the FIEs, and perform various types of contracts concluded thereby. Under Article 28, no breach or recession of contract shall be allowed on the rounds of administrative division adjustment, government change, institutional or functional adjustment, and replacement of relevant responsible persons.[270]

On the other hand, Article 28 of the Implementation Regulations clarifies the compensation standards. Under Article 28, if policy commitments or contractual agreements need to be changed due to national or social public interests, the change should be made in accordance with statutory authority and procedures.[271] It is required in Article 28 that foreign investors and FIEs be compensated for the losses resulting from the change promptly in a fair and reasonable manner in accordance with law.[272]

F. *Validity of Foreign Investment Contracts*

Contract in China is defined as an agreement establishing, modifying and terminating the relations of civil rights and obligations between a natural person, legal persons or other organizations of equal status.[273] In its 2019 Interpretation pertaining to application of the FIL, the SPC interprets the investment contract as an agreement formed by foreign investors—foreign natural persons, enterprises, or other organizations, in relation to direct or indirect investment in China.[274] It includes such agreement as the establishment of an FIE contract, share transfer

268. *See* the Implementation Regulations, *supra* note 3, art. 27.

269. *See* the FIL, art. 25.

270. *See* the Implementation Regulations, *supra* note 3, art. 28.

271. *See id.*

272. *See id.*

273. *See* Hetong Fa (合同法)[Contract Law](promulgated by Order No.15 of the President of the People's Republic of China, Mar. 15, 19999, effective, Oct. 1, 1999), art. 2,http://www.china.org.cn/china/LegislationsForm2001–2010/2011–02/12/content_21908031.htm [https://perma.cc/QM79-RCHN] [hereinafter "the Chinese Contract Law"].

274. *See* the 2019 SPC Interpretation, *supra* note 2, art. 1.

contract, equity transfer contract, property share or other similar rights transfer contract, and new investment project contract.[275]

As noted, when making an investment in China, the foreign investor or FIE is subject to the negative list under the provisions of the FIL. Both the application of the FIL and implementation of the negative list may affect the validity of an investment contract concluded by a foreign investor or an FIE. If an investment contract is found invalid, it will not be enforced. There are several situations where the validity of an investment may become an issue in light of the FIL and negative list. In general, an investment contract could involve a sector within or outside the negative list.

The first situation concerns an investment contract in a sector not covered by the negative list. As discussed, prior to the adoption of the FIL, a governmental approval was required for an EIF contract to take effect. Under the FIL, however, no such approval is needed for an FIE contract not covered by the negative list. Thus, according to the SPC, if an investment contract formed in a field other than the negative list and the parties claim that the contract is invalid or not effective on the grounds that the contract has not been approved or registered by the relevant government authority, the claim shall be dismissed.[276] This rule also applies to the investment contract that was formed before the FIL took effect and no government approval was obtained, if no judgment to the contrary was made by a court prior to the effective date of the FIL.[277]

The second situation involves an investment contract in the area within the negative list. Since the negative list contains both the prohibited and restricted sectors, the validity of an investment contract in this regard will be handled differently. Under the SPC interpretation, where a foreign investor invests in a prohibited area of the negative list and the parties make a claim that the investment contract is invalid, the court shall rule in favor of the claim.[278]

On the other hand, if a foreign investor invests in a restricted area, and the parties request a court to render an investment contract invalid on the ground that the special administrative measures for the restrictive entry are violated, the request will be upheld.[279] However, in a case where the parties take necessary measures to meet the requirements of the special management measures before an effective court judgment is made, the validity of the investment contract concerned shall not be affected if the parties so claim.[280]

The third situation relates to the change of the negative list. As noted, the negative list is revised or updated from time to time. Thus,

275. *See id.*
276. *See id.*, art. 2.
277. *See id.*
278. *See id.*, art. 3.
279. *See id.*, art. 4.
280. *See id.*

what may occur is that before an effective court ruling is made, an invested area by an FIE or a foreign investor, which used to be prohibited or restricted, is no longer within the negative list due to the negative list revision. Under this circumstance, in accordance with SPC, if the parties claim that the investment contract is valid, the court shall rule to grant the claim.[281]

Note that for purposes of the FIL, the SPC has expanded the application of its 2019 Interpretation in two dimensions. In terms of the contents of the investment contracts, the 2019 Interpretation also applies to the contract disputes involving the rights foreign investors obtain from making or receiving gifts, property divisions, business mergers, or corporate splits.[282] With regard to the nature of cases, the 2019 Interpretation is applicable by reference to the disputes arising from investments made within the Mainland by Hong Kong or Macau investors, Chinese citizens residing overseas, or Taiwanese investors.[283]

IV. Foreign Investment Management and National Security Review

Foreign investment management refers to the measures and processes by which the government exercises supervision and control over foreign investment. Unlike the previous FIE laws that had only sporadic rules of management, the FIL contains a special chapter consisting of eight articles that establish a new framework for the management of foreign investment. Again, the new legal framework is based primarily on the negative list and the principle of equality between domestic and foreign investment. In addition, all FIEs and their business activities are subject to information report requirements and national security review.

A. *Management of Foreign Investment in General*

Again, the negative list consists of prohibited and restricted areas with regard to the market access by the foreign investment. Under Article 28 of the FIL and Article 33 of the Implementation Regulations, no foreign investment is allowed in the prohibited areas specified in the negative list.[284] In the restricted areas, the entry of foreign investment must meet the conditions set forth in the negative list.[285] For the foreign investment in the areas outside the negative list, it will be managed the same way as domestic investment under the principle of equality.[286] Put differently, the principle of equality does not apply the negative list that covers foreign investment only.

281. *See id.*, art. 5.
282. *See id.*, art. 1.
283. *See id.*, art. 6.
284. *See* the FIL, *supra* note 1, art 28.
285. *See id.*
286. *Id.*

If, however, a foreign investor invests in a prohibited area, the investor will be ordered to cease all investment activities and restore to the pre-investment situation by disposing of related shares, assets or taking other necessary means within a specified time limit. If there is any illegal income, it will be confiscated.[287] For a foreign investment made in the restricted area in violation of the access management measures, the investor will be ordered to make corrections to meet the prescribed conditions within a certain time limit. Failure to take correct actions will result in the same penalty imposed on the foreign investment made in the prohibited area.[288]

In addition, according to the FIL, foreign investment will need to obtain investment project approval or file on record for such project if so required.[289] Moreover, if a license is required in a certain industry or sector, the foreign investors must apply for the license in order to make investments in such industry or sector.[290] But as noted, under the National Treatment principle, when applying for a license, a foreign investor's application shall be reviewed and handled in accordance with the conditions and procedures equally applied to the domestic investment, unless otherwise provided by the law.[291]

The FIL also set forth a rule of legal compliance that mandates FIEs and foreign investors to observe the laws. For example, under Article 32 of the FIL, the FIEs in their production and operation in China shall abide by the law and administrative regulations concerning labor protection and social insurance, and shall handle such matters as taxation, accounting, foreign exchange, etc. in accordance with the laws, regulations and other relevant government decrees.[292] In this respect, the FIEs are also required to accept the supervision and inspection by relevant government authorities.[293]

B. *Information Reporting System*

A notable component of the foreign investment management under the FIL is the requirement for information reporting. According to Article 34 of the FIL, a new foreign investment information reporting system will be established, and the foreign investors or FIEs are required to submit investment information to the competent commerce departments through the enterprise registration system (ERS) and the enterprise credit information publicity system (ECIPS). Both the ERS and the ECIPS are important vehicles for the government to oversee and manage foreign investment.

287. *Id.*, art. 36.
288. *Id.*
289. *Id.*, 29.
290. *Id.*, art. 30.
291. *Id.*
292. *Id.*, art. 32.
293. *Id.*

Under Article 39 of the Implementation Regulations, the content, coverage, frequency, and specific procedure of the foreign investment information report shall be determined and issued by the commerce department in conjunction with market supervision and administration and the other relevant departments, based on the principles of necessity, efficiency, and convenience.[294] It is required in Article 39 that the investment information submitted be true, accurate and complete.[295]

The ERS is a business registration platform administered by the State Administration of Industry and Commerce (SAIC), now the SAMR.[296] The business registration in China is regulated and governed by Regulations on the Administration of Enterprise Legal Person Registration (Legal Person Registration Regulation)[297] and the Administrative Measures for the Registration of Partnership Enterprises (Partnership Registration Measures).[298] The Legal Person Registration Regulation and the Partnership Registration Measures require that a legal person enterprise or a partnership enterprise be registered with the administrative authority for industry and commerce.[299]

Pursuant to Article 2 of the Legal Person Registration Regulation, the enterprises qualified as legal persons that are required to register include: (1) enterprises owned by the whole people; (2) enterprises under collective ownership; (3) jointly operated enterprises; (4) Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and wholly foreign owned enterprises established within the territory of the People's Republic of China; (5) privately operated enterprises; and (6) other enterprises required by the law to register as legal persons.[300]

As an effort to reform the business registration system, the State Council of China adopted a "five-in-one business license" registration scheme in July 2016 in order to reduce administrative approvals for startups and improve the overall business environment.[301] The "five-in-one

294. *See* the Implementation Regulations, *supra* note 3, art. 39.

295. *See id.*

296. The SAMR was formed in 2018 as a result of structural reform of government. The SAMR consolidated several former government agencies and departments, including, among others the State Administration of Industry and Commerce (SAIC); State Administration of Quality Supervision, Inspection and Quarantine; State Food & Drug Administration; and State Intellectual Property Office. More information is available at http://www.samr.gov.cn/jg [https://perma.cc/2C2F-K9ZH].

297. *The Regulations on the Administration of Enterprise Legal Person Registration* was issued by the State Council on June 3, 1988, and amended in 2011, 2014, 2016 and 2019, available at https://www.sohu.com/a/306765891_712455 [https://perma.cc/62Q4-XSAV] (hereinafter referred to as Legal Person Registration Regulation).

298. *The Administrative Measures for the Registration of Partnership Enterprises* was adopted by the State Council on November 19, 1997, and was amended in 2007 and 2014, at http://www.shndlaw.com/post/112 [https://perma.cc/3BWP-ET9X].

299. *See id.*, art.4*; see also* the Legal Person Registration Regulation, *supra* note 297, art. 4.

300. *See* the Legal Person Registration Regulation, *supra* note 297, art. 2.

301. *See State Council calls for speeding up business registration reform*, The State Council The People's Republic of China (July 5, 2016), http://english.www.

business license" covers business license, tax registration, organization code, public security and social security. In addition, the State Council urged to open an online business registration and establish an information-sharing platform between all the related departments.[302]

To implement the State Council's call for online business registration, the SAIC in 2017 put in place a new electronic business registration system.[303] The system operates as a single platform for corporations to complete the process of business registration. The system consists of electronic business license, online unified identity, electronic signature system, record tracing and electronic archives. According to the SAIC, the new system is to help streamline the application process of business registration and provide a one-stop solution to the applicants.[304]

The ECIPS is a national information system managed by the SAMR and its local branches at the provincial level. It provides public access electronically to official registration data for all legal entities in China. The registration data also contains names of key individuals such as the legal representative, private shareholders and key staff defined as a board member, CEO, supervisor, general manager, and legal representative. The information available in the system contains three categories: enterprise credibility information, list of business operation anomalies, and list of enterprises with serious illegal and dishonest acts.[305]

Launched in 2014, the ECIPS is purposed to help make corporate information easily accessible and transparent.[306] With the ECIPS, enterprises are expected to file a copy of their annual reports to disclose such information as shareholders and capital contributions, changes in equity and licenses, IP registration, administrative penalties, etc. except for sensitive business information, including revenues, debt, profits, and total assets.[307] When making the report, the enterprises are responsible for the authenticity and legality of the information disclosed.[308]

Any enterprise that fails to disclose annual report or other required information within the specified time period or commits fraud in the disclosure will be listed in the category of business operation anomalies. An

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gov.cn/policies/latest_releases/2016/07/05/content_281475386658204.htm [https://perma.cc/QAG6-T7M7].

302. *See id.*

303. The website for online business registration is http://wsdj.saic.gov.cn/sai; *see also China Implements Electronic Business Registration System*, TMF Global Reach (May 22, 2017), https://www.tmf-group.com/en/news-insights/articles/2017/may/china-online-business-registration [https://perma.cc/5ZUA-AUV5].

304. *See* TMF Global Reach, *supra* note 303.

305. *See* the National Enterprise Credit Information Publicity System at http://www.gsxt.gov.cn/index.html.

306. *See China Lunches Nationwide Company Credit Information System*, O'Melveny (November 4, 2014), https://www.omm.com/resources/alerts-and-publications/publications/china-launches-nationwide-company-credit-informa [https://perma.cc/ZRJ2-4Z6K].

307. *See id.*

308. *See id.*

enterprise that fails to fulfill their disclosure obligations for three years will be placed in the category of enterprises with serious illegal and dishonest acts. As a penalty, an enterprise in either of the two categories will be barred from government projects, including government procurement and land transfer,[309]

> Under Article 37 of the FIL, if a foreign investor or FIE fails to submit investment information, it will be ordered to make corrections within a specified time limit. If no corrections are made during the time limit, a fine of RMB100,000 to 500,000 Yuan will be imposed. Pursuant to Article 38 of the FIL, any violation of laws or regulations by foreign investors or FIEs will be investigated and dealt with by the relevant government authority, and such violation will be cited and recorded in the ECIPS.

Note, however, that with regard to the information report requirement for the FIEs and foreign investors, Article 34 of the FIL further provides that the contents and scope of the foreign investment information report shall be determined under the principle of necessity.[310] According to Article 34 of the FIL and Article 34 of the Implementation Regulations, if the investment information can be obtained through the interdepartment sharing system, it shall not be required to be submitted again.[311] A question then is whether the information report under Article 34 of the FIL will differ from the reporting system currently in place in terms of contents and scope. A related question is what will constitute a necessity.

C. *National Security Review*

The national security review is a process of government scrutiny of foreign investment. A study shows that the national security review has become not only an increasingly important apparatus of the foreign investment policy but also an indicator of the balance between openness to foreign investment and protection of national interests.[312] Despite its controversial nature, the national security review on foreign investment is not new in China. It began in 2008 when the Anti-Monopoly Law was adopted.

Under Article 31 of the Anti-Monopoly Law, where a foreign investor participates in the concentration of undertakings by merging and acquiring a domestic enterprise or by any other means, which involves national security, the matter shall be subject to review on national security in addition to the review on the concentration of undertakings.[313] At

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309. *See id.*

310. *See* the FIL, *supra* note 1, art. 34.

311. *See id.*

312. *See* Xingxing Li, *National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and U.S. Laws and Practices*, 13 BERKELEY BUS. L.J., 255, 259 (2016).

313. *See* the Anti-Monopoly Law, *supra* note 164, art. 31.

that time, the national security review focused mainly on foreign investment related M&As.

In March 2011, the State Council issued a circular detailing the national security review procedure for the acquisition by foreign investors of domestic Chinese companies.[314] The circular provided for establishing a national security review system to conduct a statutory check on the acquisitions of Chinese companies by foreign investors where such acquisitions could affect national security, economic stability, social order, or research and development capabilities relating to key technologies.[315] In the same year, the MOFCOM adopted a set of rules to implement the State Council circular.[316]

Four years later in 2015, the State Council adopted the Trial Measures for National Security Review of Foreign Investment in FTPZs.[317] The Trial Measures expanded the national security review system from the foreign related M&A to the foreign investment in general but limits their application to FTPZs in Shanghai, Tianjin, and Guangdong and Fujian.[318] The Trial Measures clarify the standards for conducting security reviews of the foreign investment that affects or may affect national security, national security capabilities, and sensitive investment entities, M&A targets, industries, technologies, and geographies.[319]

In the same year, China promulgated its first National Security Law (NSL).[320] Under Article 59 of the NSL, a national security review system would be established to conduct national security review of foreign commercial investment, special items and technologies, internet information technology products and services, projects involving national security matters, as well as other major matters and activities, that impact or might

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314. *Establishing a Security Review System for Foreign Investors to Acquire Domestic Enterprises*, The General Office of the State Council, https://investment-policy.unctad.org/investment-laws/laws/229/china-circular-on-security-review-system-of-merger-and-acquisition-by-foreign-investors [https://perma.cc/L84U-JTX2].

315. *See id.*

316. *See Provisions on Implementing the Security Review System for Foreign Investors to Acquire Domestic Enterprises*, MOFCOM, http://english.mofcom.gov.cn/article/policyrelease/aaa/201112/20111207869355.shtml.

317. *See Trial Measures for National Security Review of Foreign Investment in FTPZs*, the State Council (April 8, 2015), http://www.gov.cn/zhengce/content/2015–04/20/content_9629.htm [https://perma.cc/AZG8-5K2J].

318. *See id.*

319. *See id.*, art. 1. As specified in the Trial Measures, the Investment by foreigners in military-related fields, or in key agricultural products, energy, infrastructure, transportation, culture, information technology and equipment manufacturing that concern national security will be reviewed (art. 1). In terms of the contents, the review will evaluate the influence of foreign investment on national security, economic stability, social order, cultural morality, Internet safety and the development of key technology concerning State security (art. 2).

320. The National Security Law was adopted by the Standing Committee of the NPC on July 1, 2015, a translated version is available at https://www.chinalawtranslate.com/en/2015nsl [https://perma.cc/9YT6-P6GS].

impact national security.[321] Apparently, Article 59 of the NSL has a much broader target other than simply on the foreign investment.

The FIL elevates the national surety review from the scattered provisions to a unified statute that specifically governs the foreign investment nationwide. This move is hailed in China as a significant and necessary step to safeguard the entry of foreign investment into the Chinese market, which signifies a new era of national security review of foreign investments in China.[322] From the Western viewpoint, however, the national security review is regarded as to provide the government with free rein to intervene in a wide range of investment activity, particularly in an area that may be construed as politically sensitive or threatening.[323] Some express a concern that the national security review may erect new barriers to foreign investment.[324]

The debates on the purpose of the national security review aside, the national security review provision in the FIL is quite vague in language and too general in scope. Article 35 of the FIL simply states that the State establishes a foreign investment security review system to conduct security review of foreign investment that affects or may affect the national security.[325] Article 40 of the Implementation Regulations copies verbatim Article 35 of the FIL. Since it remains unclear how the national security review is to be conducted, including the contents, coverage, conditions, procedures, review authority and time limits of review, there arise some concerns about fairness and appropriateness of such review.

For example, under Article 35 of the FIL, the security review decision, once made, is final.[326] It is then important to have a review procedure that contains a right to be heard. Under the provisions of the FTPZs, the review authority may ask the investors to provide written commitment to revise their investment plan and make decisions accordingly if their investment is found to have a negative effect on national security but such effect could be eliminated under certain conditions.[327] The question is whether the FTPZs' procedures could be applied for purposes of the FIL and its Implementation Regulations.

V. Unfinished Business and Remaining Issues

Enactment of the FIL, as noted, serves a two-fold purpose: to unify foreign investment legislation, and to create a better environment

321. *See id.*, art. 59.

322. *See* Zhang Guoxun & Wang Dakun, *Foreign Investment Law Opens a New Era of National Security Review of Foreign Investment in China*, Sohu (Mar. 22, 2019), http://www.jintiankansha.me/t/Oj4P3b2KQn [https://perma.cc/6KVK-BEZ9].

323. *See* Lowe, *supra* note 231.

324. *See* Par Nyren, *the Missed Opportunity in China's Foreign Investment Law*, the Diplomat (Apr. 5, 2019), https://thediplomat.com/2019/04/the-missed-opportunity-in-chinas-foreign-investment-law [https://perma.cc/AJ8D-WVX8].

325. *See* the FIL, *supra* note 1, art. 35.

326. *Id.*

327. *See* the Trial Measures, *supra* note 317, art. 3 (iii).

for foreign investment in the country. The FIL is viewed in China as a significant piece of legislation on foreign investment that will provide stronger protection for foreign investors.[328] But the enthusiasm outside China appears to be moderate and cautious.[329] While the FIL establishes a new legal platform for foreign investment, it leaves many important issues unresolved.

One of the issues is the determination of the identity of foreign investors. The basic question involved is what investor can be classified as "foreign." An answer to this question will not only help ascertain the source of foreign investment, but also help distinguish between foreign and domestic investments. In general, there are two major approaches to identify foreign investors in China. The first approach is called nationality standard, which focuses on origin of the investors. The nationality of a foreign investor can be either the place of business registration if the investor is an entity or legal person, or the citizenship if the investor is a natural person.[330]

For example, in the FIE Laws, foreign investors were specified to mainly include "foreign companies, enterprises, other economic organizations, or individuals."[331] It is commonly believed in China that the foreign investors under the FIE Laws were determined according to their nationality, primarily the place of business registration.[332] A criticism, however, is that in many cases, the place of registration may not necessarily reflect the true status of the investors because under the registration approach,

328. *See China Focus: China adopts foreign investment law*, Xinhua News (March 15, 2019), http://www.xinhuanet.com/english/2019–03/15/c_137897089.htm; see also China Passes Landmark Foreign Investment Law, Caixin (Mar. 15, 2019), https://www.caixinglobal.com/2019–03–15/china-passes-landmark-foreign-investment-law-101393025.html [https://perma.cc/LM9Q-DHEF].

329. *See* Nyren, *supra* note 324.

330. *See* Yang Weidong & Guo Kun, *Determination of Functional Nationality of Legal Person Investors—in Light of ICSID Arbitration System and Practices*, 64 Wuhan U. J. (Phil. & Soc. Sci.) 99, 100–103 (2011), available at https://max.book118.com/html/2017/1224/145698296.shtm [https://perma.cc/E5TZ-5UX8]; *see also* Wu Guanzheng, *Standard of Determination of Natural Person "Foreign Investors"*, 7 Chutian Fazhi Econ. & L. 101 (2017), available at http://www.doc88.com/p-9495628375138.html [https://perma.cc/9FND-4K6L].

331. *See e.g.* the EJV Law, *supra* note 16, art. 1. It provides that in order to expand international economic cooperation and technical exchange, the People's Republic of China permits foreign companies, enterprises, other economic organizations or individuals (hereafter referred to as "foreign joint vensutures") to joint with Chinese companies, enterprise or other economic organizations (hereafter referred to as "Chinese ventures") in establishing joint ventures in the People's Republic of China in accordance with the principle of equality and mutual benefit and subject to approval by the Chinese Government. A similar concept was also contained in both the Foreign Cooperative Joint Venture Law and the Wholly Foreign Owned Enterprise Law.

332. *See* Guo Xiaoli, *Innovation on the Standards of Foreign Investor Identification—Based on the Actual Control Standard Employed in the Foreign Investment Law Draft*, 6 J. Hubei U. Econ. (Human. & Soc. Sci.) 92 (2016), available at http://www.cnki.com.cn/Article/CJFDTotal-HBRW201606039.htm [https://perma.cc/7H4Z-QTGK].

an investor is considered foreign if its place of registration is in a foreign territory regardless of the identity of the actual investor.[333]

The second approach is known as control theory. This approach concentrates on the person or entity that is in a controlling position, and identifies a person as a foreign investor according to the status of the person who ultimately controls the firm making the investment.[334] In this context, the control is also called the control of capital, meaning that the controlling person is the person who actually determines the flow of the capital. In contrast to the registration approach, the control theory takes a further step beyond the registration and holds the nationality of the controlling person as the nationality of the investing firm.

Between these two approaches is a mixed methodology that combines both nationality and control. In the MOFCOM Draft, foreign investor is specified as (a) a natural person who does not hold Chinese nationality; (b) an enterprise established under the law of other country or region; (c) a government of other country or region or its department or instrumentality; (d) an international organization.[335] In addition, pursuant to the MOFCOM Draft, a domestic enterprise that is controlled by any of the above person or entity shall also be deemed as a foreign investor.[336] Under the MOFCOM Draft standard, the identity of a foreign investor is to be ascertained by nationality of the investor and the controlling status of the investor.

The FIL provides no standard or criterion under which an investor can be classified as foreign and the FIL's definition of foreign investment carries no indication of the identity of a foreign investor. There has been a concern that due to lack of a unified standard, confusion will remain in identifying foreign investors. As a practical matter, either the registration approach or the control theory will need to be clearly addressed. Take control theory for example. A question often asked is what would constitute control. In the existing legislation, however, standards vary.

In 2006, when MOFCOM issued the Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors (M&A Provisions), a threshold of 25 percent of registered capital is used as a determinant of a foreign investor.[337] Under Article 9 of the M&A Provisions, if the proportion of registered capital contributed by foreign investors in the foreign-invested enterprise established following merger and acquisition is more than 25 percent, such enterprise shall be entitled to treatment for foreign-invested enterprises.

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333. *See id.*

334. *See id.*, at 92–93.

335. *See* MOFCOM Draft, *supra* note 31, art. 11.

336. *See id.*

337. The 2006 M&A Provisions was promulgated by MOFCOM on September 8, 2006. The Provisions were revised by the MOFCOM and reissued on June 22, 2009, an English version of the 2009 Provisions is available at http://hk.lexiscn.com/law/law-english-1–503892-T.html [https://perma.cc/G4ZF-EYWQ].

Under the Company Law, however, the controlling position refers to 50 percent or more of the total capital of a limited liability company, 50 percent or more of the total share capital of a company limited by shares, or if less than 50 percent, the voting rights corresponding to the capital contribution or shares thereof are sufficient to exert a material influence on the resolutions of the shareholders' meeting or the general meeting.[338] In addition, the Company Law defines as an actual controlling person a person who is not a shareholder of a company but who is able to actually control the acts of the company through investment relations, agreements or other arrangements.[339]

As noted, the FIL requires the FIEs to be subject to the provisions of the Company Law. Given the difference between the Company Law and the existing FIE laws and regulations in corporate structures, it is unclear how the identity of foreign investors is to be determined under the FIL. A bottom-line question is whether a Chinese national who owns or controls a foreign entity may be qualified as a foreign investor for purposes of the FIL.

Another issue involves remittance of foreign exchange. Pursuant to Article 21 of the FIL, foreign investors' capital contributions, profits, capital gains, asset disposal proceeds, IP license fees, liquidation proceeds, legally obtained damage award and compensation within the territory of China can be freely remitted inward or outward.[340] Article 22 of the Implementation Regulations further provides that no entity or individual may illegally impose restrictions on the type of currency, amount, or frequency of remittances inbound or outbound.[341] These provisions are interpreted as allowing a free transfer of foreign exchange into and out of China.

However, China is a country where its currency is not freely convertible. The flow of foreign exchange is restricted under a system known as "closed" capital account, meaning that no money can be moved in or out of the country except in accordance with strict rules.[342] The foreign exchange control in the country is regulated under the Regulation on the Administration of Foreign Exchange (Foreign Exchange Regulation),[343] and managed primarily by the State Administration of Foreign Exchange (SAFE).

338. The Company Law, *supra* note 162, art. 216 (2).

339. *Id.*, art. 216 (3).

340. *See* the FIL, *supra* note 1, art. 21.

341. *See* the Implementation Regulations, *supra* note 3, art. 22. Under Article 22, the free remittance also applies to salaries and other lawful incomes earned by foreign employees, or employees from Hong Kong, Macau, or Taiwan working in an FIE.

342. *See* Dezan Shira, *Pre Investment Capital Planning for China's Foreign Exchange Control*, China Briefing (Feb. 13, 2018), https://www.china-briefing.com/news/pre-investment-capital-planning-for-chinas-foreign-exchange-control [https://perma.cc/QQM6-PEDT].

343. The Foreign Exchange Regulation was adopted by the State Council on January 29, 1996 and amended on August 1, 2008, available at http://www.fdi.gov.cn/1800000121_39_675_0_7.html [https://perma.cc/5FK8-RHVG].

Under the Foreign Exchange Regulation, except for regular international payment and transfer that are not subject to restrictions,[344] the flow of foreign exchange is controlled under either current account or capital account. Current account covers goods, services, incomes and regularly transferred transactions involved in the balance of international payments, while capital account refers to transactions involved in the balance of international payments which may cause changes to foreign assets and loan level, including capital transfer, direct investment, security investment, derivatives and loans etc.[345]

With regard to foreign investment, it is required that foreign investors register with foreign exchange control agencies when making investments.[346] The foreign exchange disbursements under capital accounts shall be, against valid documents, paid with self-owned foreign exchange or foreign exchange brought from financial institutions engaged in the settlement and sale of foreign exchange in accordance with provisions on the administration of the sale and purchase of foreign exchange under the State Council.[347]

The profit remittance by FIEs is deemed as regular international payment. Although no restrictions are imposed under the Foreign Exchange Regulation, there is also a requirement for authenticity and compliance. For example, if the amount of profit remittance exceeds $50,000, FIEs are required to make up for losses in previous years in accordance with the requirements of laws and regulations such as the Company Law, and to provide banks with such documents as resolutions of the board of directors on the profit distribution, audited financial statements, and proof of tax payment in China.[348]

The FIL is purposed to provide more protection for foreign investment. With that effort, the focus of Article 21 of the FIL is apparently on the "free" remittance of foreign exchange in and out. But the FIL is not intended to displace or replace the existing foreign exchange control measures. Given the complexity of the existing legal structure of foreign exchange controls and difficulties posed by the remittance requirements and procedures, it remains to be seen how Article 21 of the FIL is to be implemented to the effect of free remittance and how the practical obstacles facing foreign investors and FIEs with respect to foreign exchanges are to be removed.

Another issue concerns the required transition of the existing FIEs during grace period. Under Article 42 of the FIL, the existing FIE laws were all repealed on January 1, 2020, when the FIL took effect.[349]

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344. *Id.*, art. 5.

345. *Id.*, art. 52 (3) & (4).

346. *Id.*, art.16.

347. *Id.*, art.22.

348. *See Notice on Further Promoting Foreign Exchange Management Reform and Perfecting the True Compliance Audit*, THE SAFE (Jan. 26, 2017), http://www.safe.gov.cn/safe/2017/0126/6821.html [https://perma.cc/6YXC-9SGD].

349. *See* the FIL, *supra* note 1, art. 42.

Article 42 further provides that after the repeal of the FIE Laws, the FIEs already formed under the FIE laws may within five years after the effective day of the FIL continue retaining their original forms of business organizations.[350]

Pursuant to Article 44 of the Implementation Regulations, within five years after the effective day of the FIL, an existing FIE may elect to transform its business form and organization structure under the Company Law or the Law of Partnership Enterprises and change its business registration accordingly, or to maintain its original business form or organization structures.[351]

However, it is important to note that Article 44 of the Implementation Regulations seems to make it impossible for an FIE not to transform after the grace period. It explicitly provides that beginning from January 1, 2025, the market supervision and management authority will deny the application for other registration matters from the FIE that has not adjusted their business form and organizational structure and changed registration correspondingly.[352] In the meantime, all relevant information about the denial will be made public.[353]

Under Article 45 of the Implementation Regulations, the specific rules on registration of the change of existing FIEs' business form or organizational structure shall be made and announced by the State market supervision and administration authority.[354] But the question is how the FIEs may transform during the five-year grace period of transition.

There are at least three issues that are involved in the transition.

The first issue is the corporate structure of the FIEs. As discussed, the FIEs under the FIE Laws takes the business form of EJV, CJV or WFOE. Since the FIL requires FIEs to be subject to the Company Law or Partnership Law in their formation and operation, the CJV will not be an option anymore. A practical question is how the existing CJVs are to be dissolved. In addition, there has been another foreign investment known as Sino-Foreign Joint Exploration and Development of Natural Resources (JED). The JED commonly operates on a contract basis. It is unclear if the JED is also included in the transition period.

The second issue relates to the changes of corporate governance rule. Under the FIE Laws, the corporation's highest authority is the board of directors,[355] while according to the Company Law, it is the shareholder meeting.[356] For the decisions on major issues, the FIE Laws require a unanimous vote,[357] but only two thirds of the votes by voting

350. *Id.*

351. *See* the Implementation Regulations, *supra* note 3, art. 44.

352. *Id.*

353. *Id.*

354. *Id.*, art. 45.

355. The EJV Law, *supra* note 16, art. 6, and the Implementation Rules of the EJV Law, art. 33.

356. *See* the Company Law, *supra* note 162, art. 36.

357. *See* the Implementation Rules of the EJV Law, art. 36.

shareholders are needed under the Company Law.[358] In addition, the transfer of corporate shares under the FIE Laws requires the consent of all other shareholders.[359] The Company Law, however, only provides a simple majority of the votes by other shareholders for the transfer.[360] All these changes would not only need procedures to follow externally but also require organizational adjustment of the FIEs internally. Also, it is a question whether there is a need to amend the registration of the FIEs.[361]

The third issue involves the contracts under which the JVs are created. The current JV contracts are all formed under the FIE Laws and many of them may have a more-than-five-year remaining term. The transition within five years means that the existing JV contracts may have to either be modified or terminated because after the transition period, the JVs are required to operate under the FIL legal framework.

Under Chinese Contract Law, modification of a contract requires a mutual consent of the parties[362] and the termination can be made by consent or on other grounds. Both contract modification and termination require the action of the parties.[363] What is unclear in this regard is how the existing JV contracts should be dealt with especially when a dispute over the modification or termination for the purpose of FIL arises.

The next question necessarily raised is the law applicable to the FIEs during the transition period. According to the FIL, the existing FIE Laws become null and invalid, but the FIEs established under the FIE Laws may remain intact for five years. The focal point of this question is whether the FIEs may still be governed by the FIE Laws that are already repealed during the grace period. A related question is what is the law that governs a JV if its parties could not reach an agreement on the corporate form, governance structure and operation norms of the JV in the process of transition.

The question of applicable law may further involve the settlement of disputes arising from the disagreement on the JV contract modification. As some in China predicted, if one party of a JV challenges the validity of the stock transfer clause in the JV contract on the basis of the Company Law when the parties fail to reach an agreement to modify the JV contract after the five-year period, an issue that has to be dealt with is what law should apply.[364] Some also questioned whether the requirement

358. *See* the Company Law, *supra* note 162, art.

359. *See* the Implementation Rules of the EJV Law, art. 36.

360. *See* the Company Law, *supra* note 162, art.71.

361. For general discussion on the impacts of FIL on the existing FIE corporate governance and related issues, see Mark Schaub et al., *China Foreign Investment Law: How Will It Impact the Existing FIEs?*, King & Wook Mallesons (Jun. 3, 2019), https://www.chinalawinsight.com/2019/06/articles/foreign-investment/china-foreign-investment-law-how-will-it-impact-the-existing-fies [https://perma.cc/E38V-L3EH].

362. *See* Chinese Contract Law, adopted by the NPC on March 15, 1999, art. 77, available at http://www.china.org.cn/china/LegislationsForm2001–2010/2011–02/12/content_21908031.htm [https://perma.cc/XAF2-28YQ].

363. *See id.*, art. 91 & 94.

364. *See* Kaiding Wang et al., *Into A New Era: Changes and Challenges in the*

of choice of Chinese law for the FIE contracts would become inapplicable when the FIE laws are abrogated.[365]

Conclusion

The FIL marks the beginning of a new stage of the foreign investment legislation in China. As part of the State's NOES initiative, the FIL is expected to help create a foreign investment environment in the country that is open, fair and transparent. The principles and rules contained in the FIL constitute the main theme of the legal regime that governs foreign investment. The framework of pre-entry national treatment and negative list serve as the mainstay of the regulatory scheme, and the measures for promotion and protection of foreign investment form the primary legal basis on which the foreign investment is to be handled in the nation for the years to come.

However, there remain uncertainties with regard to the enforcement of FIL. First, the contents of the FIL in general are quite broad and many provisions of the FIL are very vague and subject to further clarification. Second, as discussed, there are many issues that are left unanswered and certain areas that are kept open, especially in the protection of foreign investment. Third, there is a lack of effective enforcement mechanisms to implement the FIL in the way it is intended, particularly when local government interests are at stake.

The Implementation Regulations and the SPC Interpretations offer certain guidance for the application of the FIL. But the role and function of them are limited due to their brief and incomplete nature. It is still hoped from investors both at home and abroad that more detailed implementation rules and judicial interpretations will be formulated. Nonetheless, by unifying the regulatory system of foreign investment, the FIL is missioned to provide fair treatment for foreign investors and FIEs. In the meantime, there remain challenges that the foreign investors seeking business establishment in China have to face.

Legal Regime for Foreign Investment in China, King & Wood Mellasons (March 18, 2019), https://www.chinalawinsight.com/2019/03/articles/foreign-investment/into-a-new-era-changes-and-challenges-in-the-foreign-investment-legal-regime-of-china [https://perma.cc/B84E-XYRH].

365. *See id.* Under Article 126 of the Contract Law, the FIE contracts to be performed with in the territory of China shall apply the law of China. This provision excludes the parties' choice of applicable law in these contracts. The argument is that since the FIEs are the concepts provided in the FIE Laws, the repeal of the FIE Laws will cast doubt on whether Article 126 of the Contract Law will remain applicable.