

China's New Foreign Investment Law and Its Contribution Towards the Country's Development Goals

Yawen Zheng | ORCID: 0000-0003-2640-0515

Edinburgh Law School, University of Edinburgh, Edinburgh,
United Kingdom

Yawen.zheng@ed.ac.uk

Abstract

This article analyses China's new foreign investment legal regime and assesses its contribution to the country's development goals. Fulfilment of the goals entails an increase in 'good' investment flows and more effective regulation and management thereof. This article finds that the reform makes some positive progress towards the development goals. First, administrative control over foreign investments is eased, since a less burdensome report mechanism is established, while foreign investments not included on negative lists are exempt from the approval procedure. Second, a new system is established to strengthen post-entry supervision of foreign investments. Third, equal treatment of foreign investments as well as investment promotion and protection are strengthened. Fourth, the rules have become clearer and more transparent. However, due to certain regulatory flaws, problematic implementation, and a lack of ambition, the progress may be slower than intended. Therefore, the recent reform is only an incremental step towards China's development goals.

Keywords

China's development goals – China's foreign investment law – negative list – recent reform – report mechanism

1 Introduction

Since the 1978 adoption of the 'open-door' policy designed to attract foreign investments to facilitate China's development, a strikingly large number of foreign investments has come to China.¹ This incoming flow has triggered remarkable economic growth and social development over the past few decades, by creating new working opportunities, introducing advanced technologies and managerial skills, promoting legal, social and other reforms, intensifying competition, as well as enhancing efficiency and competitiveness of domestic industries.² Statistics have indicated the significant role of foreign investments in China's development. For instance, at least 40% of China's total import and export value and an average of about 18% of national tax revenue are contributed by foreign-invested enterprises each year.³ In order to continue such rapid growth while improving the quality of its development, China has set various development goals closely related to the proper utilization of inward foreign investments. These goals are a) building technological capacity, b) deepening integration into the global economy, c) promoting green development, d) protecting public security, as well as e) participating in global economic governance and rule-making.⁴

In order to achieve these development goals, China needs to ease its administrative control over foreign investments, encourage more desirable investment flows and effectively regulate and supervise them. Specifically, the goal of further integrating China into the global economy requires further openness of the Chinese market, gradual dismantlement of bureaucratic barriers and relaxation of restrictions on China's inward investments. This,

1 Until 2018, China has accumulated inward foreign direct investment stock of USD 2,762,349 million, second only to the United States. See OECD data, 'FDI Stocks (Indicator)' (2020) <<https://data.oecd.org/fdi/fdi-stocks.htm>> accessed 1 March 2020.

2 China's GDP growth has been on average 10% a year in the last three decades, while more than 500 million people have been lifted out of poverty. World Bank and Development Research Centre of the State Council of the People's Republic of China (PRC), *China 2030: Building a Modern, Harmonious, and Creative Society* (World Bank 2013) 3–4.

3 Ministry of Commerce of the People's Republic of China (MOFCOM), 'Statistical Bulletin of FDI in China 2019' <<http://images.mofcom.gov.cn/wzs/201912/20191226103003602.pdf>> accessed 4 June 2020.

4 World Bank and PRC (n 2); 'Suggestions of the Central Committee of the CPC on Formulating the 14th Five-Year Plan for National Economic and Social Development and Long-Range Objectives Through the Year 2035' (adopted by the Fifth Plenary Meeting of the 19th Central Committee of the CPC, 29 October 2020) (*People's Daily Online*, 4 November 2020) <<http://politics.people.com.cn/n1/2020/1104/c1001-31917678.html>> accessed 29 October 2020.

in turn, can improve China's investment regulatory environment and attract more foreign investment flows, which can contribute to the promotion of green development. This is insofar as foreign investments, especially green investments, can help a host State to reduce energy consumption and combat pollution.⁵ The goal of innovation in technology can also be attained by admitting high-level foreign investments. Moreover, the regulation and management of investments affect both the goals of green development and security protection. Finally, successful innovations in the investment regime can be used as a model of investment rule-making, and thus enable China to participate in global economic governance.

The fulfilment of these development goals can benefit from a proper definition of China's domestic foreign investment law. On 15 March 2019, the National People's Congress (NPC) of the People's Republic of China (PRC) passed the new Foreign Investment Law (FIL); and on 26 December 2019, the State Council issued the Regulation for Implementation of the FIL (FIL Implementation Regulation). Both entered into force on 1 January 2020.⁶ The new law, aiming to further open China's market, encourage foreign investment flows, enhance investment protection and regulate the administration of foreign investments,⁷ replaces the so-called 'three laws on foreign invested enterprises (FIEs)': the Law of the PRC on Chinese-Foreign Equity Joint Ventures (EJVL), the Law of the PRC on Chinese-Foreign Contractual Joint Ventures (CJVL) and the Law of the PRC on Wholly Foreign-Owned Enterprises (WFEL).⁸

This article assesses the recent reform and comments on its contribution to China's development goals from the country's point of view. Accordingly, some features considered helpful to the country may be inconsistent with the interests of foreign investors. Specifically, Section 2 illustrates the previous obstacles to the goals, in both pre- and post-entry phase; while Section 3 and Section 4 examine the positive and false steps towards the development goals in both phases respectively.

5 Ruhul Salim and others, 'Can Foreign Direct Investment Harness Energy Consumption in China? A Time Series Investigation' (2017) 66 *Energy Economics* 43.

6 2019 Foreign Investment Law (adopted 15 March 2019, entered into force 1 January 2020) (2019 FIL) art 42; 2019 FIL Implementation Regulation (adopted 26 December 2019, entered into force 1 January 2020) art 49.

7 2019 FIL (n 6) art 1.

8 *ibid* art 42.

2 Previous Obstacles to China's Development Goals

As one essential component of the dual-track system that regulated domestic and foreign investments separately,⁹ the previous Chinese regulations on foreign investments served the purpose of attracting foreign investments, stimulating economic cooperation and technology exchange¹⁰ in the early period of opening the domestic market. However, they no longer suit the changing circumstances, and rather constitute obstacles to the development goals; this is for two reasons: a) they subject foreign investments to unequal treatment and insufficient protection; and b) they create a defective system of post-entry supervision and management. This section reviews the obstacles in pre- and post-entry phases respectively.

2.1 *Obstacles in the Pre-Entry Phase: The Approval Requirements*

The approval procedure previously in force was conducted by the Ministry of Commerce (MOFCOM) or its local counterparts. It applied to all foreign investments and covered all essential stages of their life cycle (their establishment, dissolution or incorporation as well as extension or termination of the operating period). The aim was to ensure that the structure, operation and transaction of FIEs complied with the pertinent rules. All investors were required to submit documents including contracts, by-laws, certificates of foreign investors and financial resources.¹¹ Depending on the circumstances, the procedure – which still applies to investments related to the negative lists – normally took one to three months.¹²

Together with other approval procedures – such as the project review conducted by the National Development and Reform Commission (NDRC) on investments covered by the Catalogue of Investment Projects Subject to Government Confirmation¹³ – the approval procedure to authorise

9 Shu-Xue Jia, 'On the Improvement of China's Legal System of Foreign Direct Investment' (2015) 8(4) *Journal of Politics and Law* 293.

10 Danling Yu, *Chinese Business Law* (Palgrave Macmillan 2018) 43.

11 2016 Law of the PRC on Chinese-Foreign Equity Joint Ventures (adopted 3 September, entered into force 1 October 2016) (EJVL) art 3; 2017 Law of the PRC on Chinese-Foreign Contractual Joint Ventures (adopted 4 November, entered into force 5 November 2017) (CJVL) art 5; 2014 Detailed Rules for the Implementation of the Law of the PRC on Wholly Foreign-Owned Enterprises (adopted 19 February, entered into force 1 March 2014) (WFEL) art 10.

12 EJVL (n 11) arts 3, 13–14; CJVL (n 11) arts 5, 7, 10, 12 and 24; WFEL (n 11) arts 6 and 20.

13 2017 Measures for the Administration of the Confirmation and Recordation of Enterprise Investment Projects (effective 4 August 2017) arts 4–5; See also 2016 Catalogue of Investment Projects Subject to Government Confirmation (effective 12 December 2016)

investments' entry and alteration has led foreign investments to fulfil China's need. However, as both the economy and investments are becoming more complicated, the usefulness of the approval procedure in controlling and guiding foreign investments has been declining.¹⁴ For instance, despite constant encouragement and priority policies, foreign investments remain low in high-tech industries.¹⁵ Moreover, strictures in the approval procedure might be immaterial to, or even in tension with, China's new development goals.

One important feature of the approval procedure is the significant room for discretion – and thus arbitrariness – left to the approval authority, caused by the opacity and vagueness of the applicable rules. This feature cuts against the goal of further opening China's market and encouraging more foreign investment flows. Four issues are worth pointing out. First, explicit details, such as precise timelines, are missing from some of the procedures,¹⁶ hence authorities can delay the entry of foreign investments unreasonably. Second, the conditions for approval or rejection are broadly defined and thus subject to the interpretation of approval authorities and to the application of other unwritten or unpublished rules. These may include, the refusal to grant permission to foreign investments in industry sectors where China has committed market access.¹⁷ Third, approval authorities can attach further conditions for admission – which can be investment-specific and discriminatory – beyond what the written rules stipulate. Fourth, for Sino-foreign contractual joint ventures, Chinese partners are required to act as applicants in the approval procedure on behalf of the prospective venture.¹⁸ This requirement hinders communication between foreign investors and the competent authorities and

and 2017 Notice of the NDRC on Effectively Conducting the Relevant Foreign Investment Work Concerning the Implementation of the Catalogue of Investment Projects Subject to Government Confirmation (effective 14 January 2017).

14 World Bank (n 2).

15 See MOFCOM (n 3).

16 For example, according to 2014 Administrative Measures for the Confirmation and Recordation of Foreign-Funded Projects (effective 17 June 2014) art 14, if the project may have substantial impact on public interest, the approval authority may solicit public opinion or consult experts. However, there is no rule concerning this consultation period.

17 For example, see 2019 Implementation Regulations of EJV (effective 2 March 2019) art 4(3), one of the conditions for rejection is the failure to satisfy the requirement of China's economic development. However, there is no further published clarification of such requirements. For instances of foreign investments subject to unwritten rules, see the US Chamber of Commerce, 'China's Approval Process for Inbound Foreign Direct Investment: Impact on Market Access, National Treatment and Transparency' (2012) <www.uschamber.com/sites/default/files/legacy/reports/020021_China_Inbound_Investment_Cvr.pdf> accessed 28 October 2020.

18 2017 Implementation Regulations of CJVL (effective 17 November 2017) act 7.

allows the approval authority to cooperate with Chinese partners in a non-transparent way, possibly leading to the imposition of favourable commercial terms for the Chinese entity at the expense of the foreign partners.¹⁹ Ultimately, the outcome of the approval process can be uncertain and unpredictable, which makes it an administrative barrier to the entry of foreign investments.

The issues triggered by arbitrariness in the approval procedure can be addressed by establishing and maintaining good relationships and personal connections with the government, which can serve as an essential source of dependable information and thus reduce uncertainties and protect investment interests. Moreover, such ties can earn foreign investors opportunities in sectors yet to open widely to foreign investments.²⁰ However, these connections typically depend on individuals rather than the organization or enterprise, and thus can lapse when key individuals change positions or lose power.²¹ Consequently, the uncertainty for business operation may be increased. Moreover, it can be costly to maintain the connections; this is especially true when involving corruption and bribery, which can be opposed by the authentic norms of relevant communities²² and may damage the reputation of enterprises²³ or even trigger severe punishments.²⁴ The wide spread of corruption can also be detrimental to the growth of investments as it distorts incentives and encourages the introduction of further regulations.²⁵

Additionally, some channels of recourse are also available to foreign investors whose investment applications are declined or unreasonably delayed by approval authorities. However, investors may be reluctant to seek recourse thereto for the following reasons. First, the broadly defined applicable legal standards make it hard to establish a violation by the approval authorities. Second, due to the lack of formal requirements, most of the reasons for declining an investment or for applying further conditions attached to approvals are conveyed orally and thus the production of solid evidence of misconduct is difficult. Third, considerable room for arbitrariness also means serious possibility of retaliation that will trigger negative effects on the business prospects of

19 US Chamber of Commerce (n 17).

20 Hongying Wang, 'Informal Institutions and Foreign Investment in China' (2000) 13(4) *The Pacific Review* 525.

21 *ibid.*

22 Thomas W Dunfee and Danielle E Warren, 'Is Guanxi Ethical? A Normative Analysis of Doing Business in China' (2001) 32 *Journal of Business Ethics* 191.

23 Fang Yang, 'The Importance of Guanxi to Multinational Companies in China' (2011) 7(7) *Asian Social Science* 163.

24 Yadong Luo, *Guanxi and Business* (World Scientific 2007) 238.

25 *ibid* 231–32.

foreign investments in China. This threat is a major concern for foreign investors contemplating whether to bring complaints against approval authorities.²⁶ Consequently, an effective remedial system is absent, and thus the situation has worsened. In order to fulfil the requirements of the development goals for deepening market opening and attracting more foreign investments, China must streamline its complicated foreign investment approval procedures and limit the discretion and arbitrariness of pertinent authorities.

2.2 *Obstacles in the Post-Entry Phase: Extra Requirements and the Lack of Effective Supervision*

The focus of previous FIE laws was more on enterprise regulation than foreign investment regulation. Accordingly, they stipulated various rules regarding the establishment, organization, management, operation and termination of FIEs,²⁷ which were different depending on the type of the enterprise and mostly granted investors less autonomy than those regulating domestic-invested enterprises. Conversely, there were fewer rules regarding the post-establishment supervision regime, which also failed to cover all types of foreign investments. Therefore, the previous regime failed to both create an investment-friendly environment to attract more foreign investments, and to effectively ensure foreign investments' compliance with the law and coordination with the development goals.

Instances of typical restrictions on FIEs can be described for illustration. First, regarding the organization of FIEs: only Chinese companies or other economic organizations could form a joint venture with a foreign company;²⁸ the chairman and the vice chairman had to be appointed by the Chinese and the foreign party of the joint venture;²⁹ the industrial property or know-how contributed as capital to an equity joint venture was subject to approval;³⁰ and an extra approval was also needed if the wholly foreign-owned enterprise intended to adopt a form of organization other than a limited liability company.³¹ Second, as for the operation, important decisions of joint ventures required the unanimous agreement of the board members;³² and an assign-

26 US Chamber of Commerce (n 17).

27 Yumei Wang, *On China's Legal System Governing Foreign Direct Investment* (Law Press 2003) 35.

28 CJVL (n 11) art 1; EJVL (n 11) art 1.

29 CJVL (n 11) art 12; EJVL (n 11) art 6.

30 Implementation Regulations of EJVL (n 17) art 27.

31 WFEL (n 11) art 18.

32 Implementation Regulations of CJVL (n 18) art 29; Implementation Regulations of EJVL (n 17) art 33.

ment of rights and obligations made by one party to the joint venture had to obtain the consent of all other parties and the approval of the authorities. In the case of equity joint ventures, the violation of pre-emptive rights of other shareholders would also render the assignment contract void.³³ Moreover, essential changes to the enterprise like the reduction of registered capital also needed approval by the authority.³⁴ These restrictions substantially interfered with business operations and increased their cost.

Despite these strict regulations, the gaps in the regulatory regime affected the efficiency of the post-establishment supervision regime, which is mainly reflected in the following aspects. First, there was no mechanism for regulatory supervision by the government, especially over wholly foreign-owned enterprises that lack the participation of Chinese parties.³⁵ Second, although there were various rules regulating different types of foreign investments besides the three laws on FIEs, such as the Provisional Regulations Governing the Establishment of Investment-type Companies by Foreign Investors, and the Provisional Regulations on Several Issues Concerning the Establishment of Foreign Investment Companies Limited by Shares, it is doubtful whether the legal regime could cover all types of foreign investments, especially when compared with the wide notion of investments embraced by China's investment treaties.³⁶ Consequently, the competent authorities either supervised foreign investments at their own discretion, or neglected post-entry monitoring, relying solely on the filter of the strict and complicated approval procedures.³⁷ Accordingly, the regulation of foreign investments at the post-entry stage was arbitrary, uncertain and non-transparent. It created room for rent-seeking strategies and led to a high rate of law violations by foreign investors.³⁸

The abovementioned problems can discourage foreign investors from choosing China as their investment destination. According to the survey undertaken by the Economist Intelligence Unit, ease of doing business and

33 CJVL (n 11) art 10; Implementation Regulations of CJVL (n 18) art 23; EJVL (n 11) art 4; Implementation Regulations of EJVL (n 17) art 20.

34 WFEL (n 11) art 21; Implementation Regulations of CJVL (n 18) art 16; Implementation Regulations of EJVL (n 17) art 21.

35 Kui Hua Wang, *Chinese Commercial Law* (OUP 2000) 131.

36 This definition is used in 122 out of the 133 accessible IIAs with China (excluding terminated ones). The content of the IIAs is available at China Law Info (Beida Fabao), 'International Treaties' <www.pkulaw.cn> accessed 10 November 2020.

37 Lin Gao, 'On the Government In-Process and Subsequent Regulation Under the Negative List Management Mode in China's Pilot Free Trade Zones' (2017) 1 International Business Research 30–40.

38 Jianwei Guo and Yuanyuan Zhao, 'Place FIEs in the "Cage" of China's Legal System' (2013) 116 Market Forum 38–42.

strong rule of law are among the three most important factors affecting investment decision-making, while arbitrary or discriminatory treatment by the host State government is the second most frequent issue relating to the rule of law. Most respondents have experienced the most significant rule of law issues in China.³⁹ In other investigations, foreign firms also experienced the difficulties caused by government intervention in business operations and investment decisions,⁴⁰ or frustration over the limited access to China's market and the government policies discriminating against them.⁴¹ Moreover, the World Bank ranked China as 78th in the ease of doing business category due to the length of the procedure required to start a business.⁴² These surveys suggest that a reform is needed to establish a clear, transparent, predictable and equal investment climate for foreign investments, which can also significantly improve the efficiency and quality of investment management and thus contribute to the development goals.

3 Positive Steps Towards China's Development Goals

The recent reform of China's domestic foreign investment law seeks to address these problems and facilitate the achievement of China's development goals. First, it establishes a report mechanism for FIEs, while exempting those in industries not included on the negative lists from the approval regime. Second, it implements equal national treatment of foreign investments in an all-round manner. Third, it adds more rules regarding investment treatment and protection. Fourth, it establishes a rather complete post-establishment supervision regime. Through these changes, China contributes to its development goals in two ways: first, it encourages investment flows by levelling the playing

39 N Jansen Calamita and Jeffrey Jowell, 'Risk and Return – Foreign Direct Investment and the Rule of Law' (2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946685> accessed 6 December 2019.

40 George Chen, 'China Probe May Curb Foreign Deals: Sources' (*Reuters*, 31 October 2008) <www.reuters.com/article/us-china-congress-companies/exclusive-in-china-the-party-push-for-influence-inside-foreign-firms-stirs-fears-idUSKCN1B40JU> accessed 4 October 2020.

41 Wendy Wu, 'China Orders Ministries to Open up More of Economy to Foreign Investors' (*South China Morning Post*, 17 August 2017) <www.scmp.com/news/china/economy/article/2107190/china-orders-ministries-open-more-economy-foreign-investors> accessed 4 October 2020; see also Sylvia Schwaag Serger and Magnus Breidne, 'China's Fifteen-Year Plan for Science and Technology: An Assessment' (2007) 4(1) *Asia Policy* 135–64.

42 World Bank, 'Ease of Doing Business' (2016) <www.doingbusiness.org/data/explore-topics/starting-a-business> accessed 15 November 2016.

field between domestic and foreign investments and by enhancing foreign investment promotion and protection; second, it strengthens its supervision authority at the post-admission stage, with the enactment of a unified foreign investment law that covers all types of foreign investments and the establishment of a post-establishment supervision regime therein. The following section discusses these positive steps.

3.1 *Simplification of Pre-Establishment Administrative Procedure*

Addressing the obstacles to China's development goals in the pre-entry stage requires the simplification of administrative procedure.⁴³ Therefore, in 2016, an interim filing regime was established to replace the approval procedures described above for foreign investments not included on the negative lists, which was much streamlined, with a significantly shorter timeframe, fewer required documents, and less room for the discretion of the authorities.⁴⁴ However, it still allowed the authorities to either accept or reject the filing application⁴⁵ and thus to decide whether the FIEs could continue their operation. Accordingly, foreign investors still needed to endure more uncertainty and burden than domestic investors.

Based on the trial of the interim filing regime, a new reporting mechanism is established by the new FIL⁴⁶ to implement pre-admission national treatment granted to foreign investments in sectors not covered by the negative lists.⁴⁷ Detailed rules regarding the reporting mechanism are stipulated in the Measures for the Reporting of Foreign Investment Information (Reporting Measures). All foreign investors are required to submit an initial or modified report when they establish or make material changes to their FIEs. The aim of the report procedure is to inform the competent authority rather than to obtain administrative approval or confirmation after a substantive or formal review. Hence, the report procedure has become more streamlined than the previous approval and filing regime, especially in the following aspects.

First, in contrast to the previous approval system, the report procedure is not a prerequisite for the establishment or alteration of foreign investments. Instead, foreign investors only need to submit the report together with the registration procedure with the Administration for Market Regulation (AMR) for the business licence (i.e. obtaining a business licence marks formal

43 The procedure is applicable to both establishment and post-establishment material changes of foreign investments.

44 See the Interim Measures for the Recordation Administration of the Formation and Modification of FIEs (First issued in 2016, last modified in 2018) (2018 Interim Measures).

45 *ibid* art 11.

46 2019 FIL (n 6) art 34.

47 *ibid* art 4.

establishment of the enterprise) or within 20 working days after material alteration is made.⁴⁸ Consequently, bureaucratic barriers to the establishment and alteration of foreign investment are significantly reduced.

Second, fewer documents are needed for the report than they were previously for the approval and filing procedure. In the approval procedure, the authorities needed to conduct substantial examination and to exert strict control over the establishment and operation of FIEs; accordingly, investors were required to submit documents relating to every aspect of the corporate structure, governance and operation, with the list of required documents varying according to the matter for which approval was sought.⁴⁹ Compliance with the procedure was, accordingly, difficult for foreign investors, especially when the approval of more than one matter was sought at once. Regarding the filing procedure, investors were required to submit documents evidencing some basic information of the FIEs for a formal examination conducted by the authorities, which barely involved references to their substantive features.⁵⁰ The report procedure is a step further. There is no requirement for the submission of any proof materials, while investors are only required to fill in the report form with basic information of the FIEs.⁵¹

Third, unlike other administrative procedures, there is no need to obtain any approval or receipt from the authorities in the report procedure, which is also not a prerequisite for any trading or business operation. The authorities will notify the investors if any error or omission is spotted, which must then be corrected within 20 working days.⁵²

Fourth, unlike the approval procedure requiring the submission of paper documents, the report procedure only requires the submission of an electronic report through an online system (Enterprise Registration System).⁵³ This change not only reduces the cost of document submission but also contributes to the goal of environmental protection, as it significantly reduces paper consumption.

The change has built a convenient, efficient and low-cost report procedure for the market entry of most foreign investments in China,⁵⁴ and thus

48 *ibid.*

49 See 2015 MOFCOM Service Guide of Approval Items for Foreign Investment (effective 22 July 2015).

50 See 2018 Interim Measures (n 44) art 8.

51 See Announcement No 62 [2019] of the MOFCOM – Announcement on Issues Concerning Information Report of FIEs (effective 1 January 2020).

52 2019 Measures for the Reporting of Foreign Investment Information (effective 1 January 2020) (Reporting Measures) art 11.

53 2019 FIL (n 6) art 34; MOFCOM announcement (n 51) art 1.

54 According to the MOFCOM, 96% of foreign investments are exempted from the approval procedure. See MOFCOM Regular Press Conference of the Ministry of

significantly relaxed administrative control. Therefore, it will increase the ease of doing business for foreign investors and will presumably attract more foreign investments,⁵⁵ hence contributing to the development goals that depend on China's ability to attract more investment flows.

3.2 *The Adoption of a Negative List Approach*

The scope of FIEs exempted from the approval procedure is decided by the negative list, which refers to the Special Management Measures (Negative List) for Access of Foreign Investments to China Pilot Free Trade Zone (FTZ) and the Special Administrative Measures for the Access of Foreign Investments. The former has been applied to foreign investments in the FTZ⁵⁶ as a trial project since 2013 and has been modified constantly. The latter was changed from the previous Catalogue of Industries for Guiding Foreign Investments (Catalogue), has formally applied to other foreign investments since 2017, and was formalized in the FIL.⁵⁷ These lists are crucial in the recent reform, as they operate together with the new law towards China's development goals.

The structure of the Catalogue has been changed to become a negative list. Previously, the Catalogue was divided into three lists of foreign investment industries: prohibited, restricted and encouraged industries. Both restricted and encouraged lists included industries subject to restrictions.⁵⁸ After the change, a list of encouraged industries for foreign investments is maintained, where investments are granted preferential treatment,⁵⁹ while all of the special management measures (SMM) for the admission – including restrictions and prohibitions – have now been moved to the negative list (FIE negative list).

The reform gives birth to China's first national negative list for FIEs, where previously, a negative list only applied within FTZs. The use of an FIE negative

Commerce (29 September 2017) <www.mofcom.gov.cn/xwfbh/20170929.shtml> accessed 23 October 2020.

55 After the entry into force of the FIL in 2020, China had received USD 163 billion in new foreign direct investment, overtaking the United States as the world's largest host State of new foreign investments. 'China Takes New Foreign Investment Top Spot from US' (*BBC*, 25 January 2021) <www.bbc.co.uk/news/business-55791634> accessed 26 February 2021.

56 Announcement No 37 [2017] of the MOFCOM – Announcement on Issues Concerning Recordation Administration of the Formation and Modifications of FIEs (issued 30 July 2017).

57 2019 FIL (n 6) art 4.

58 See the Catalogue for the Guidance of Foreign Investment Industries (as amended on 10 March 2015).

59 For example, for tariff preferential treatment for foreign investments in encouraged industries, see 1997 Circular of the State Council on Adjustment of Taxation Policies on Imported Equipment (effective 29 December 1997) art 1.

list increases the clarity and transparency of SMMs imposed on foreign investments in three respects. First, SMMs imposed on both domestic and foreign investments are removed from the FIE negative list as they have already been listed in the Market Access Negative List that applies equally to both investments.⁶⁰ The Market Access Negative List was first introduced in 2018, as one component of the negative list regime for market access⁶¹ and as a step towards the implementation of pre-entry national treatment granted to foreign investments. The list is divided into permitted and prohibited categories, and investments in the former are subject to specific approval procedures. A revised and shortened version was issued in 2019.⁶² Accordingly, the FIE negative list can better serve its function – to provide instructions specific to foreign investments. Foreign investors must consult both the FIE or FTZ negative list and the Market Access Negative List before entering into the market. Second, with the cancellation of the Miscellaneous Provision at the end of restricted and prohibited industries, the negative list has become an exhaustive list of SMMs for foreign investments. Therefore, it is more investor-friendly and easier for both foreign investors and the authorities to interpret. Consequently, effective implementation can be better guaranteed. Third, a timetable for the cancellation or relaxation of some SMMs has been added⁶³ and thus foreign investors are allowed to plan their investments beforehand. Clarity and transparency reduce legal barriers to market entry, and therefore they can probably encourage more foreign investment flows and contribute to the goal of opening the Chinese investment market.

The content of the negative list has also been changed for the sake of the development goals in two respects. First, the list is shortened. Specifically, the number of SMMs listed on the FIE negative list is reduced from 93 in the 2015 Catalogue to 40 in the 2019 version. Meanwhile, the 2019 FTZ negative list has also eliminated 83 SMMs as compared to the 2015 FTZ negative list. Such a change boosts China's integration into the global market as it opens China's market to foreign investments, especially high-end and intelligent manufacturing like aviation, shipping and pharmaceutical that can contribute to the goal of building technological capacity, and industries that can benefit the

60 See the Opinions of the State Council on the Implementation of the Negative List System for Market Entry No 55 [2015] of the State Council (issued 19 October 2015).

61 2018 Notice of the NDRC and the MOFCOM on Issuing the Market Access Negative List (adopted 21 December 2018).

62 See 2019 Notice of the NDRC and the MOFCOM on issuing the Market Access Negative List (2019 Revision) (issued 24 October 2019).

63 For example, see the NDRC and MOFCOM, 'Market Access Negative List' (24 October 2019) (2019 FIE negative list) number 8: Finance.

goal of environmental protection, like newly-established electric passenger vehicles manufacturing. For some of the SMMs remaining on the negative list, the wording is more specific and clearer.⁶⁴ Therefore, the change significantly limits room for the discretion of the authorities in their supervision of foreign investments.

Meanwhile, new SMMs are also added to the list, like those imposed on ground mobile surveying⁶⁵ and research institutions of humanities and social sciences.⁶⁶ These industries closely relate to the national security that China intends to safeguard, like geographical information security and cultural security.⁶⁷ Consequently, the protection of national security is largely strengthened.

Generally, the negative lists operate in connection with China's development goals. These lists now further encourage foreign investment flows, especially desirable ones, through enlargement of the scope of FIEs exempted from the approval procedure and adoption of preferential treatments, while effectively managing and restricting investments in sensitive industries through more transparent and clear rules. Consequently, it will be significantly easier for foreign investments that can contribute to China's development goals to enter the market, while those that may contradict the goals are strictly managed.

3.3 *Levelling of Playing Field and Strengthening of Investment Promotion and Protection*

The new FIL lays emphasis on the equal treatment of foreign and national investors and seeks to increase investment promotion and protection. As the first comprehensive legal basis for China's inward foreign investment, these objectives can further encourage investment flows and thus contribute to the development goals.

Unlike the three laws on FIEs that barely mentioned equal treatment, various clauses in the FIL place foreign investments on equal footing with domestic investments and cover four main aspects. First, regarding market access, in

64 For example, the wording of one of the items on the list of restricted industries is changed from 'crops' into 'wheat and corn'. See the 2015 Catalogue of Restricted Industries for Foreign Investment 1.1 and the 2019 FIE Negative List (n 63) number 1.

65 *ibid* number 30; 2019 FTZ negative list (effective 30 July 2019) number 27.

66 2019 FIE Negative List (n 63) number 29.

67 National cultural security consists of four main aspects: security of language, values, lifestyle, as well as customs and manners, which can be influenced or threatened by foreign culture, and thus damaging the soft power of a State. Lin Han, 'Chinese Cultural Security in the Information Communication Era' (February 2014) Focus Asia no 6 <<https://isdpeu/content/uploads/publications/2014-lin-han-chinese-cultural-security-information-communication-era.pdf>> accessed 10 August 2020.

addition to the grant of pre-admission national treatment to foreign investments not being included on the negative lists as mentioned above, article 30 of the FIL also explicitly requires the authorities to examine the licensing applications of foreign investors under the same conditions and procedures as those for domestic investors. Second, concerning the management of foreign investments, the complaints that industry standards have disadvantaged FIEs⁶⁸ can be solved, as FIEs' right to equally participate in the formation of these standards is guaranteed. Meanwhile, the compulsory standards enacted by the State should be applied equally to both foreign and domestic investments.⁶⁹ Moreover, the FIL stipulates that the views of foreign investors must be collected when subsequent rules applying to their investments are formulated.⁷⁰ However, considering that China often allows a very short comment period for the public,⁷¹ the lack of a requirement for a timeframe may impede the functioning of this rule. Additionally, FIEs are equally covered by the policies supporting the development of enterprises as are domestic enterprises.⁷² Third, equal participation and fair competition of FIEs in government procurement activities are also guaranteed. Fourth, as for the organization and operation of FIEs, the Company Law and the Partnership Enterprise Law, which previously applied only to domestic-invested enterprises, have extended to FIEs,⁷³ thus doing away with any restrictions resulting from the separate regime.⁷⁴ These provisions can effectively level the playing field and ensure fairer competition between domestic and foreign investments, thus improving China's foreign investment climate.

However, the implementation of national treatment in an all-round manner also removes the previous preferential treatments for foreign investments and thus raises a concern on the compatibility of the change with the fair and equitable treatment (FET) that is widely stipulated in China's investment treaties. Although the specific definition of the treatment is controversial due

68 Ashurst Corporate Briefing, 'The New PRC Foreign Investment Law' (20 March 2019) <www.ashurst.com/en/news-and-insights/legal-updates/the-new-prc-foreign-investment-law/> accessed 16 July 2019.

69 2019 FIL (n 6) art 15.

70 *ibid* art 10.

71 US Department of State, '2020 Investment Climate Statements: China' <www.state.gov/reports/2020-investment-climate-statements/china/> accessed 20 October 2020.

72 2019 FIL (n 6) art 9.

73 *ibid* art 31.

74 *ibid* art 16.

to its broad wording,⁷⁵ various tribunals have held that one of the key elements is the protection of legitimate expectations,⁷⁶ created by the conduct of the host State and relied upon by the investor to make investing decisions.⁷⁷ Accordingly, the change of legal framework may violate investors' legitimate expectation of a stable and predictable legal framework⁷⁸ – especially if their legal rights acquired under the previous laws are significantly affected – and thus breach the FET obligation.⁷⁹ Such a scenario can trigger investment claims, undermining the reform's attempt to entice foreign investments.

Nevertheless, any expectation that the laws would remain unchanged after the establishment of an investment is not legitimate,⁸⁰ especially since China's foreign investment legal regime has changed frequently over the past decades. Moreover, the proposed reform has been tried and adjusted in the FTZs, and the cancellation of preferential treatments has been gradually implemented in various aspects like tax,⁸¹ along with the abolishment of inferior national treatment, with the aim of achieving a fair competitive environment for both domestic and foreign investments. Therefore, foreign investors that have acted with due diligence should not rule out changes like those entailed by the recent reform.

The problem remains with specific commitments made to foreign investors by local authorities in contract or undertakings under the previous legal regime. For instance, the Implementation Regulation of EJVLA authorized provincial governments to grant foreign investors preference in land use.⁸² Such commitments may form the basis of legitimate expectations, and thus their cancellation can violate the FET.⁸³ Therefore, it is advisable to leave the com-

75 United Nations Conference on Trade and Development, *Fair and Equitable Treatment: A Sequel* (UN 2012) 1.

76 For example, *Técnicas Medioambientales Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) 154.

77 Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 280.

78 For example, *Enron Corporation and Ponderosa Assets v Argentina*, ICSID Case No ARB/01/3, Award (22 May 2007) 264–66.

79 Newcombe and Paradell (n 77) 286.

80 *Parkerings-Compagniet v Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007) 335.

81 See 2008 Notice of the State Administration of Taxation Regarding the Dealing with Relevant Matters After the Cancellation of Several Former Tax Preferential Policies on Foreign-Invested Enterprises and Foreign Enterprises (effective 5 March 2008).

82 2019 Implementation Regulation of EJVLA (effective 2 March 2019) arts 46–47.

83 Tribunals have held that regulatory changes did not violate the FET in the absence of specific commitments. Therefore, it can be inferred that FET is more likely to be violated

mitments unaffected by the reform until their expiry dates. As for undertakings that are difficult to observe after the change, the *Vivendi v Argentina II* tribunal suggested that a government can seek to renegotiate their terms in a transparent and non-coercive manner after the implementation of new policies.⁸⁴ Moreover, the adoption of transitional measures can also reduce the impact of the regulatory change on existing investment projects and contribute to the consolidation of existing foreign investments.

The climate is further improved by the inclusion of two chapters regarding investment protection and promotion. Beyond the generic statements that China encourages, protects, and promotes foreign investments,⁸⁵ these two chapters also stipulate certain detailed measures, which can be divided into the following categories.

First, in order to promote foreign investments, the FIL promises the establishment of an international cooperation mechanism and special economic zones or particular regions subject to pilot policies and measures,⁸⁶ the provision of incentives or other encouragements,⁸⁷ and the improvement of government services facilitating foreign investments.⁸⁸

Second, certain major recurring concerns of foreign investors regarding investment protection are addressed. Since outright expropriation is the worst-case scenario for foreign investors,⁸⁹ the FIL guarantees that China will only expropriate foreign investments under special circumstances, for the purpose of public interest, in a non-discriminatory manner, under legal procedures, and with fair and reasonable compensation based on the market value and paid in a timely manner.⁹⁰ These requirements reiterate those regulating the expropriation of property,⁹¹ and the standard of compensation is clearer than those regarding expropriation of other assets.⁹² Accordingly, the protection

with specific commitments made by the authorities. For example, *Metalpar and Buen Aire v Argentina*, ICSID Case No ARB/03/5, Award on the Merits (6 June 2008) para 186.

84 *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, ICSID Case No ARB/97/3 (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentina*) Award (20 August 2007) para 7.4.31.

85 2019 FIL (n 6) arts 3, 5 and 7.

86 *ibid* arts 12–13.

87 *ibid* art 14.

88 *ibid* arts 18–19.

89 Pat K Chew, 'Political Risk and US Investments in China: Chimera of Protection and Predictability?' (1994) 34 *Virginia Journal of International Law* 615.

90 2019 FIL (n 6) art 20; FIL Implementation Regulation (n 6) art 21.

91 2011 Regulation on the Expropriation of Property on State-Owned Land and Compensation (effective 21 January 2011) arts 2–3, 19.

92 2007 Property Law of the PRC (adopted 16 March, entered into force 1 October 2007) arts 42, 44 and 121.

against direct expropriation is strengthened. However, both 'special circumstances' and 'public interest' remain vague⁹³ and allow expansive explanation. Moreover, due to the high possibility of events like embargoes, changes of legal regime and denial of justice, which can also deprive investors of their investments without due compensation, the risk of expropriation remains high⁹⁴ despite the passage of the new rules.

Similarly, investors also fear changes in laws that increase the cost to business operations, especially those related to the election and turnover of prefecture-level city officials who have both authority and incentive to design and implement new policies,⁹⁵ as well as the obligation to accept unfavourable modifications of contractual terms.⁹⁶ Accordingly, the FIL prohibits authorities from promulgating normative measures that derogate from investment treatments stipulated by laws or from changing investment policies due to adjustment of government officials, and requires that contractual amendments imposed by the authorities can only be made when necessary, in accordance with their statutory powers and applicable procedures, and against compensation for the investor's losses.⁹⁷

Third, the protection of intellectual property rights (IPRs) is enhanced, as the new law promises to strengthen their protection, through intensifying the punishment of infringement, reinforcing the enforcement of pertinent laws, and establishing diversified mechanisms for the resolution of disputes over IPRs.⁹⁸ Moreover, government agencies are prohibited from forcing the transfer of technology and divulging trade secrets to which they have had access while performing their duties.⁹⁹ These rules – at least on their surface – address the widespread concerns over forced technology transfer and the leak of sensitive commercial information¹⁰⁰ and thus encourage more investment flows – especially those from technology companies. However, China's tactics to force technology transfer and divulge trade secrets go far beyond administrative methods by government agencies. For instance, foreign investors'

93 The US Department of State (n 71).

94 Global Economy, 'China: Expropriation Risk' <www.theglobaleconomy.com/China/Expropriation_risk/> accessed 20 October 2020.

95 Danglun Luo, KC Chen and Lifan Wu, 'Political Uncertainty and Firm Risk in China' (2017) 7(2) *Review of Development Finance* 85.

96 Chew (n 89).

97 2019 FIL (n 6) arts 24–25; FIL Implementation Regulation (n 6) art 28.

98 *ibid* art 23.

99 2019 FIL (n 6) arts 22–23.

100 For example, see the Office of the United States Trade Representative, 'Section 301 Report into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation' (2018) <<https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>> accessed 20 July 2019.

Chinese partners of the joint ventures can also require the provision of technology. Accordingly, concerns have been raised that the prohibitions may do little more to address the problem than pay lip service.¹⁰¹

Ultimately, the FIL appears to tackle certain major concerns of foreign investors in China. Together with the investment promotion mechanism, this reform is in regulatory alignment with, and can contribute to, the goal of creating an improved regulatory environment for foreign investors. The extent to which this goal can be attained depends in part on the practical issues mentioned.

3.4 *Establishment of a Post-Establishment Supervision Regime*

The establishment in the new FIL of a post-establishment supervision regime is another positive step towards the attainment of the development goals. The supervision regime can effectively ensure foreign investments' compliance with applicable regulations and their coordination with the development goals, which becomes more necessary with the abolishment of extra pre-admission approval procedures that inevitably weakens pre-establishment control over foreign investments.

The FIL establishes the framework of the post-establishment supervision regime, which consists of two main components: supervisory inspection by competent authorities,¹⁰² and a duty for foreign investors to submit information annually online (via the National Enterprise Credit Information Publicity System) after their establishment.¹⁰³ Although the latter only intends to collect information rather than establishing an independent supervision regime, it can increase the efficiency of the inspection, through allowing the authorities to track the dynamic of FIEs and help to identify investments that need special attention. Investors failing to cooperate with the inspection or to fulfil the reporting obligation will incur legal liabilities and face the negative consequences of being recorded in the credit information system.¹⁰⁴ Therefore, the regime is likely to promote legal compliance.

To ensure effective operation of the report mechanism, the commerce departments are required to inspect the authenticity of the reports in the following ways: namely, the random inspection, the inspection according to tip-offs, the inspection according to the suggestions of or information

101 Associated Press, 'China Approves Law Against Forced Tech Transfers to Appease US' (*Market Watch*, 14 March 2019) <www.marketwatch.com/story/china-approves-law-against-forced-tech-transfers-to-appease-us-2019-03-14> accessed 10 October 2020.

102 2019 FIL (n 6) art 32.

103 *ibid* art 34; FIL Implementation Regulation (n 6) art 14; MOFCOM announcement (n 53).

104 *ibid* arts 37–38.

TABLE 1

Approaches	Objects of the inspection
Random check	Enterprises and their investors selected randomly.
Inspection according to tip-offs	Enterprises or their investors reported in written submissions by citizens, legal persons or other organizations alleging facts and evidence of breaches.
Inspection according to the suggestions of or information provided by relevant departments or judiciary organs	Enterprises or their investors indicated by competent departments or judicial organs for inspection or supervision after finding their violations over the course of performing their duties.
Inspection <i>ex officio</i>	Enterprises or their investors failing to observe the report procedure, found responsible for false report, refusal to cooperate with supervision and inspection, and refusal to implement the decision of administrative penalty made by a competent department of commerce.

SOURCE: TABLE CREATED BY THE AUTHOR.

provided by relevant departments or the judiciary organs, and the inspection *ex officio*.¹⁰⁵ The specifics of each type of inspection are seen in Table 1.¹⁰⁶

These conditions can ensure that the enterprises singled out for examination are chiefly those that require particular attention; this will improve inspecting efficiency.

Moreover, in order to facilitate the post-establishment management on foreign investments, information regarding the FIE's effective controller is required in the reports.¹⁰⁷ The inquiry provides the authorities with complete background data on FIEs. It can thus arguably help the authorities to prevent Chinese nationals from making illegal 'round trip' investments under the

105 FIL Implementation Regulation (n 6) art 20.

106 *ibid* art 21.

107 See MOFCOM announcement (n 56).

disguise of foreign investments in order to obtain preferential treatments.¹⁰⁸ Since these investments make little contribution to China's development goals but occupy the resources for the needed foreign investments, the new obligation can effectively hinder this practice.

The achievement of development goals relies heavily on post-establishment supervision, especially the goals of protecting national security and participating in global economic governance. Overall, the inspection of the reports can ensure effective operation of the mechanism, through which the authorities are able to effectively manage foreign investments after their entry into the market, hence ensuring their coordination with China's development goals.

3.5 *Guarantee of Implementation*

The recent change has designed a regime that can contribute to the development goals. However, its effectiveness relies on proper implementation by the competent authorities. Two issues, namely legal conflicts and inconsistent execution, may hamper the effective implementation of the new regime.

The recent reform only covers the three laws on FIEs, while other rules remain unchanged. Some provisions in other subsidiary regulations, rules and notices are now difficult to reconcile with the change.¹⁰⁹ This problem can only be tackled through an overall sorting out and realignment of relevant laws and regulations, which can hardly be completed in one stroke. However, as a national law enacted by the PRC, the FIL enjoys a position in the hierarchy second only to the Constitution Law of the PRC, trumping all other lower rules and regulations.¹¹⁰ Therefore, conflicting rules will be invalid, unless they can be extensively or restrictively interpreted based on the rules of the new law during this period, and thus effective implementation of the change can be ensured.

The problem of inconsistent execution is raised for the following reasons. First, some municipal authorities may misunderstand the applicable rules.¹¹¹

108 Alan Xu, 'From Approval to Filing: A New Era for Foreign Investment in China' (*Hong Kong Lawyer*, 26 January 2017) <www.hk-lawyer.org/content/approval-filing-new-era-foreign-investment-china> accessed 20 October 2020.

109 For example, some local rules still require FIEs to obtain approvals for their establishment. See 1992 Measures of Jilin Province for the Approval Administration of FIEs (effective 28 February 1992) arts 6–7.

110 See 2015 Legislation Law of the PRC (entered into force 15 March 2015).

111 For example, some local AMR still requires MOFCOM registration during the company registration procedure, which is contrary to FIL art 34. See Sven-Michael Werner and Esther Ma, 'China Corporate Newsletter – Changes of the Administrative Management for FIE' (*Bird and Bird*, February 2020) <www.twobirds.com/en/news/articles/2020/>

Second, the reform may encounter bureaucratic resistance,¹¹² because some authorities could be unwilling to reduce and phase out government roles and activities in relation to foreign investments, where they enjoy less room for discretion and might lose rent-seeking opportunities and control over foreign investments.

This problem is addressed in the FIL in the following ways. The transparency of laws, regulations and policies is improved through their publication online – while unpublished ones cannot be utilized as legal bases – as well as through the establishment of a foreign investment service system providing consultation regarding laws, policies and other pertinent information.¹¹³ Accordingly, it will be easier for foreign investors to detect authorities' violation of the law, and then seek relief through the following three channels provided in the FIL. First, foreign investors can form or voluntarily join a chamber of commerce or association, which can protect their rights and interests.¹¹⁴ Second, they can file complaints to the working mechanism, which addresses the concerns of investors and coordinates pertinent policies and measures. Third, they can also apply for an administrative reconsideration or bring an administrative lawsuit.¹¹⁵ The reviewing agency or the court¹¹⁶ will deal with the investor's claims and decide with a view to guaranteeing effective enforcement of the law. Foreign investors can select the channel according to various factors like the seriousness of the violation and the prospects of the business.

Moreover, with the establishment of a report mechanism, more clearly defined rules, and stricter investment protection stipulated in the FIL, the room for arbitrariness and retaliation by the competent authorities is significantly limited. The situation is further improved by the FIL Implementation Regulation, which expressly prohibits suppression and retaliation against complainants.¹¹⁷ Moreover, compared to the previous three laws on FIEs,

china/china-corporate-newsletter-changes-of-the-administrative-management-for-fie> accessed 29 February 2020.

112 'Mixed Messages: A Missed Opportunity to Improve the Environment for Foreign Companies in China' (*Economist*, 1 October 2016) <www.economist.com/news/business/21707954-missed-opportunity-improve-environment-foreign-companies-china-mixed-messages> accessed 20 July 2019.

113 2019 FIL (n 6) art 11; FIL Implementation Regulation (n 6) arts 7 and 9.

114 2019 FIL (n 6) art 27.

115 *ibid* art 26.

116 For available reviewing agency, see 2017 Administrative Reconsideration Law of the PRC (adopted 1 September 2017, entered into force 1 January 2018) arts 12–15; for courts in charge of the claims, see 2017 Administrative Litigation Law of the PRC (adopted 27 June, entered into force 1 July 2017) arts 14–18.

117 FIL Implementation Regulation (n 6) art 31.

clauses regarding potential legal liabilities of authorities who infringe upon the legal interests of FIEs or do not perform the duty properly are added to the FIL¹¹⁸ and the implementation regulation,¹¹⁹ which can also improve the efficiency of the remedial system.

Therefore, the issues likely to hamper the implementation of the recent change can be tackled under the new regime, which can guarantee that the new law will operate as planned, and thus contribute to the achievement of the development goals.

4 False Steps Towards China's Development Goals

Although the recent reform has made some positive progress towards the development goals, some imperfections and shortcomings can be identified. There are three major issues in the recent reform: namely, unclear or incomplete rules, a problematic implementation environment, and a general lack of ambition. This section assesses these problems in turn and discusses their possible solutions.

4.1 *Regulatory Flaws*

Some new rules in the recent change are ambiguous or incomplete. Therefore, such rules will fail to guide adequately both the competent authorities' enforcement and foreign investors' performance and expectations. Consequently, this ambiguity may weaken the reform's capacity to ensure compliance with the pertinent regulations and the alignment of China's investment policy to its development goals. The vaguest and most imperfect rules that urgently need detailed regulations or further clarifications are the rules governing the inspection regime, the rules regarding other procedures that foreign investors may need to undergo, and the SMMs imposed on restricted investments stipulated on the negative lists.

The rules governing the supervision regime in both the FIL and the Reporting Measures are either vague or problematic. One provision stipulated in the FIL requires foreign investors to accept the supervisory inspection legally conducted by the competent authorities,¹²⁰ without specifying how to conduct the supervision, what to inspect and where there might be potential liabilities. Such uncertainty can impede the achievement of the goals,

¹¹⁸ 2019 FIL (n 6) art 39.

¹¹⁹ *ibid* arts 41–43.

¹²⁰ *ibid*.

as foreign investors may thus refrain from entering China's market; simultaneously, authorities can hardly conduct efficient supervision without the guidance of unified rules.

The supervision regime in the Reporting Measures is inherited from the one in the filing regime; so are the problems, which are in the following aspects. The first one relates to the lack of detailed rules regulating the random check. The only guideline provided is the so-called 'double random, one open' principle – to randomly assign inspectors and select enterprises for inspection, and to publish the issues being inspected along with the results.¹²¹ These rules are insufficient to guarantee a unified and transparent approach, as authorities are free to establish a specific selection process in an unpredictable way. Therefore, a standardised selection approach is necessary to guarantee proper implementation of the random check and to increase the willingness of examinees to cooperate with the check, hence benefitting the functioning of the supervision regime and the achievement of the goals.

Second, like the inspection in the filing regime, there are no rules regulating the frequency of the random check. So far, except for some results of inspection undertaken under the reporting mechanism, most of the published results after the entry into force of the Reporting Measures came from inspections conducted under the previous filing regime, including those uploaded in November 2020, while for the rest there is no relevant information.¹²² Accordingly, it is uncertain now whether the apparently robust rules can be a problem in practice. However, the random check conducted in the filing regime implies that the lack of detailed rules could trigger considerable variation in practice between different regions. From 12 July 2017 to 30 August 2019, there were 459 published positive results of the random check,¹²³ from only 33 cities (including both prefecture and county-level);¹²⁴ Suzhou alone contributed around 37% of the records, while Fuzhou and Huzhou counted for more than 15% and 9% respectively. Conversely, some major host cities of FIEs,

¹²¹ *ibid* art 21.

¹²² The results of the inspection are available at MOFCOM United Platform of Service System, 'Disclosure of Credit Information of Foreign Investments' <<https://wzxxbg.mofcom.gov.cn/WebProBA/app/infoPub/creditPos>> accessed 28 February 2021.

¹²³ The records did not specify the types of investigation. However, since other types of investigations were required to publish only negative results (the 2018 Interim Measures (n 44) art 22), they should be the results of the random check.

¹²⁴ The numbers of China's prefecture-level cities and county-level cities are 294 and 363, respectively, in 2017, and 293 and 375, respectively, in 2018. Twelve more county-level cities were added in 2019. National Bureau of Statistics (NBS), 'National Data' <<http://data.stats.gov.cn/adv.htm?m=advquery&dcn=C01>> accessed 15 August 2020.

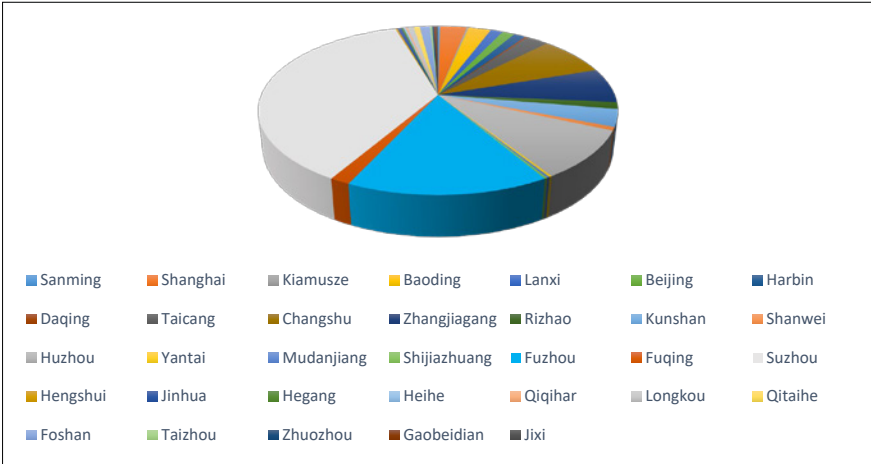


FIGURE 1
SOURCE: FIGURE CREATED BY THE AUTHOR USING DATA FROM THE MOFCOM UNITED PLATFORM OF SERVICE SYSTEM (N 122).

like Guangzhou and Shenzhen,¹²⁵ had published no results of supervision.¹²⁶ Figure 1 shows the percentage of records contributed by each city.

Additionally, the number of FIEs being checked indicates that the authorities generally failed to supervise foreign investments properly.¹²⁷ In order to effectively conduct the random check, it is advisable to regulate the frequency in two respects. One is to regulate the frequency of an examination authority conducting random checks to guarantee reasonable and effective supervision. The other is to limit the frequency of a single examinee being examined, so as to avoid meaningless repeat review within a short period of time.

Third, the rules regulating the publication of the results are either incomplete or imperfect in the following aspects. One is the lack of rules specifying the timing and format of the publication. The same problem in the filing regime resulted in the publication of some results after more than 6 months of the examination with various contents. There were three categories of results

125 'Guangzhou and Shenzhen Most Favored Investment Destinations in China' (*Newsqd*, 2 March 2018) <www.newsqd.com/news/2018-03/02/content_180969262.htm> accessed 25 October 2020.

126 See MOFCOM United Platform of Service System (n 122).

127 For comparison, there have been 456,578 records of establishment and alteration filed up until 27 August 2019. The records are available at MOFCOM United Platform of Service System, 'Publicity of Filings of Foreign Investments' <<http://wzzxbs.mofcom.gov.cn/WebProSP/app/infoPub/entpRecord>> accessed 27 August 2019.

in the publication platform: positive and negative credit information of FIEs, as well as negative credit information of foreign investors. However, except for two results published in the negative credit information of FIEs, all other results were published in the positive category, including those reporting the failure of conducting the filing procedure after altering the FIEs and their correction after the random check. The inclusion of such results in the positive category was misleading. Meanwhile, some records only reported the date and the form of the check without specifying the results, and some other records even left the results of the check blank. Such inconsistency can only be sorted through unified and detailed implementation rules.

Moreover, unlike random checks that are required to publish all results, other inspections are only required to publish negative outcomes.¹²⁸ These publication requirements are not transparent enough to allow investors and stakeholders to assess the implementation of the examination process and to monitor the activities of registered enterprises and their investors. Conversely, to publish all results – including the positive ones of inspection according to tip-offs, inspection according to the suggestions of reports, and inspection *ex officio* – would considerably improve the transparency of the inspection procedures. Meanwhile, the publication of positive outcomes could serve as vindication for examinees of examination excluding random check, since they are selected to some extent upon a suspicion of illegality, which might encourage other investors to comply with the law. All results can be published together without indicating the category of inspection, as examinees other than those of random checks may prefer not to reveal it.

The publication of the results is an important component of the post-entry inspection regime, as it can strengthen the deterrence of the inspection, promote compliance with the law and enable public supervision of the management process. Therefore, proper design of publication rules can ensure the effectiveness of the post-entry inspection and thus contribute to the development goals.

The other issue that needs clarification is the regime governing national security review and anti-monopoly review. Even foreign investments in sectors not included on the negative lists may still be required to undergo these control mechanisms if they raise security or antitrust concerns.¹²⁹ The lack of clarity mainly derives from the following aspects. First, the scope, content and criteria of the reviews are not specified. Although the Measures for Security Review of

¹²⁸ 2018 Interim Measures (n 44) art 26.

¹²⁹ 2019 FIL (n 6) arts 33 and 35.

Foreign Investments were issued according to the FIL in December 2020,¹³⁰ key issues of national security review remain under-defined. The factors for consideration are not provided, and the scope of review¹³¹ is broad enough to cover transactions that have little nexus with national security, narrowly defined, like value-added telecommunication service.¹³² Meanwhile, the ambiguous wording also allows the authority to target any transactions at their discretion, and thus fails to address the concern that the process can be used as retaliation against foreign investors.¹³³ The obscurity is further exacerbated by the lack of transparency. There are no rules requiring the publication of decisions or reports; therefore, any insight into the operation of the mechanism is hard to come by. The anti-monopoly review suffers from similar problems. Foreign investors have already complained about the unequal application of the procedure under the existing mechanism,¹³⁴ as most of the conditional clearance and prohibition decisions relate to foreign investors, raising the suspicion that administrative powers may be misused to distort the competition between domestic and foreign investments.¹³⁵ Moreover, the interpretation of the substantive rules is unclear in spite of several years of implementation, while the limited scope of the decisions being disclosed also provides little help to their understanding.¹³⁶ Unfortunately, the vague wording of the new laws does not address these problems. Accordingly, the lack of clarity of the review procedures can countervail the positive effect of the recent reform in encouraging investment flows.

Second, the connections between different procedures are also unclear. In addition to national security review and anti-monopoly review, investors may

¹³⁰ *ibid* art 1.

¹³¹ *ibid* art 4.

¹³² 'China Enacts New Foreign Investment Security Review Measures' (Baker MacKenzie, 4 January 2021) <www.bakermckenzie.com/en/insight/publications/2021/01/china-enacts-new-foreign-investment-security> accessed 25 February 2021.

¹³³ Amanda Lee, 'China Tightens "National Security" Review for Foreign Investments, Sparking Fears of Trade War Retaliation' (*South China Morning Post*, 13 May 2019) <www.scmp.com/economy/global-economy/article/3010002/china-tightens-national-security-review-foreign-investments?exp_signup=opt-ggl-sign-in> accessed 15 October 2020.

¹³⁴ Guochen Wang, 'The Possible Influence of Mainland China's "Foreign Investment Law"' (2019) 183 *Economic Outlook Bimonthly* 68.

¹³⁵ Sidney Leng, 'China's Updated Anti-Monopoly Law Aimed at Further Protecting Foreign Firms Criticised for not Doing Enough' (*South China Morning Post*, 9 January 2020) <www.scmp.com/economy/china-economy/article/3045224/chinas-updated-anti-monopoly-law-aimed-further-protecting> accessed 15 October 2020.

¹³⁶ Markus Masseli, 'The Application of Chinese Competition Law to Foreign Mergers: Lessons from the Draft New Guidelines' (2012) 3(1) *Journal of European Competition Law* 102.

need to obtain permits for entering certain industrial sectors.¹³⁷ However, there is no indication regarding the sequencing of the procedures, nor are there any rules regarding the influence of the result of one procedure on another. These review procedures serve the function of protecting security and governing the economy. Without clear rules, however, foreign investors may fail to apply for the pertinent approval. Errors of this kind might result in undermining the protection of national security, or in unreasonable delays for the investment's entry into China, thus nullifying the positive step towards easing administrative procedures entailed by the recent reform. Therefore, detailed guidelines for handling and coordinating the different procedures are necessary for the fulfilment of China's development goals through reformed management of foreign investment flows.

A final unclear aspect lies on the negative lists regarding two aspects. One is the failure in specifying which actual SMMs are imposed on foreign investments in a number of restricted industries.¹³⁸ Therefore, the approval authorities enjoy wide discretion to decide the conditions for approval. Accordingly, the oversight of key investments largely relies on the competence of the authorities. Since proper implementation of the negative lists is essential to achieving the development goals, it is necessary to specify the measures imposed on restricted investments in different industrial sectors as well as which departments are responsible for formulating these restrictions. An example that can be followed is the negative list attached to the US–Uruguay Bilateral Investment Treaty¹³⁹ that specifies the measures imposed on different sectors, the applicable norms and the competent level of governments. This method can significantly increase transparency and unify the administrative measures imposed on a particular sector, provide instructions for both foreign investors and competent authorities, and thus ensure effective management of the negative lists.

Another unclear aspect on both negative lists is the administrative regime regarding national security, public order, and financial prudence. These measures are stipulated in the applicable regulations and imposed by authorities other than the commerce departments, which might be the reasons for their being omitted from the lists. Consequently, in order to ascertain the applicability of the specific measures imposed on their investments, foreign investors

137 2019 FIL (n 6) art 30.

138 For example, see 2019 FIE Negative List (n 63) number 10 and 2019 FTZ Negative List (n 65) number 7: Manufacturing of satellite telecasting ground receiving facilities and key components.

139 United States–Uruguay BIT (signed 11 April 2005, entered into force 31 October 2006) annex III.

must search every related law. Most applicable rules are hidden in various normative legal documents and only have rough rules on the issues; this circumstance makes it very burdensome for investors to assess the investment environment and will probably frustrate their motivation for entering China's market. To remedy this scenario, the FIL, as a unified foreign investment law, should either include all applicable rules for a certain class of investments, or provide a clear regulatory roadmap. This would considerably improve transparency and facilitate investment, thus fulfilling the requirements of the development goals.

Compared to that of the approval regime, the clarity and completeness of the rules are considerably improved in the recent reform. However, they are still very vague and opaque. Therefore, further improvements are needed to bring the recent positive progress towards the development goals into full fruition.

4.2 *Issues that May Hinder Implementation of the Recent Change*

Some issues that might have hindered implementation of the approval regime in the past are solved in the recent reform. For instance, the legal grounds based on which the authorities can find a violation are now more defined. However, some issues existing in the new law and China's legal system will probably hinder the implementation of the reform and, in turn, the fulfilment of the development goals. The most notable issues in this regard are the risk of fragmented implementation triggered by multi-tiered regulatory oversights by various authorities under the new regime, the unstable regulatory and institutional environment, as well as the unreliability of the available remedies.

In China, foreign investments are subject to concurrent supervision by multiple regulatory agencies, which include but are not limited to the MOFCOM and the NDRC and their local counterparts. Along with the supervision scheme, various regulations, rules, orders and guidelines have been issued, which are expansive and change constantly. Such regulatory overlap not only increases compliance costs for foreign investors and significantly delays administrative processes, but also impedes the efficiency of supervision due to unclear division of responsibility and the lack of cooperation between the authorities.¹⁴⁰ Moreover, the entanglement of multiple competences can undermine the effort of the recent change to simplify the administrative procedures, as new approval requirements can be imposed by other authorities despite

¹⁴⁰ Xingxing Li, 'An Economic Analysis of Regulatory Overlap and Regulatory Competition: The Experience of Interagency Regulatory Competition in China's Regulation of Inbound Foreign Investment' (2015) 67(4) *Administrative Law Review* 685.

the removal of the MOFCOM approval.¹⁴¹ Unfortunately, besides the mere requirement that authorities should act in accordance with their conferred duties,¹⁴² the new law makes no dedicated effort to improve the situation.

The picture is further complicated because local executive authorities can enact detailed implementation rules provided that they are not against higher level laws and regulations.¹⁴³ They can also issue normative documents (circulars, notices, etc.) to further specify applicable laws and regulations. These regulatory powers of local authorities inevitably cause inconsistent implementation of national laws, through the application of different detailed regulations adopted locally,¹⁴⁴ some of which imposed more restrictions on foreign investments than national laws under the previous foreign investment legal regime.¹⁴⁵ Although the latter problem is addressed in the FIL in the manner discussed above, the issue of inconsistent implementation can worsen with the provisions in the new law that have intentionally vague wording, which enable local authorities to interpret and adapt laws according to their needs and conditions.¹⁴⁶ Such inconsistency may then cause two further problems. One is that authorities may fail to properly implement pertinent laws or even act against the object and purpose of the recent reform, like selective enforcement of rules to the detriment of foreign investor interests; the other is the impact on the transparency of the applicable rules, which can hinder business confidence and generate confusion for foreign investors.¹⁴⁷ Therefore, inconsistent implementation can be an obstacle to market access and thus frustrate the effort of the recent reform to contribute towards China's development goals.

¹⁴¹ *ibid.*

¹⁴² 2019 FIL (n 6) art 7.

¹⁴³ Legislation Law (n 110) art 73.

¹⁴⁴ For instance, starting a business needs to follow different procedures in different cities of China, while the timeframes of these procedures vary from 28 days to 55 days in the 30 cities under investigation. World Bank, 'Doing Business: Starting a Business – China' <www.doingbusiness.org/en/data/exploretopics/starting-a-business/china> accessed 16 August 2020.

¹⁴⁵ For example, art 14 of the Regulations of Shanghai Regarding Application and Approval of Equity Joint Ventures, Chinese-Foreign Contractual Joint Ventures and Wholly Foreign-Owned Enterprises (effective 1 August 1986) required foreign investors to entrust an agent permitted by the approval authority to apply for approval. Whereas the Implementation Regulation of EJV allowed investors to apply directly.

¹⁴⁶ Alexander Chipman Koty, 'China's New Foreign Investment Law' (*China Briefing*, 20 March 2019) <www.china-briefing.com/news/chinas-new-foreign-investment-law/> accessed 18 August 2019.

¹⁴⁷ US Department of State, '2019 Investment Climate Statements: China' (2019) <www.state.gov/reports/2019-investment-climate-statements/china/> accessed 19 August 2019.

However, the large number of foreign investments in China is widely spread across different sectors and can raise different issues, for instance in connection with national security and anti-monopoly actions. Each possible concern falls under the supervision of a different authority¹⁴⁸ and thus it is difficult to streamline the supervision regime. Moreover, China is a country with a vast territory; the levels of economic and social developments vary across its regions, while each has its own speciality regarding culture, customs and people. Therefore, local legislative power is necessary for the enactment of rules and normative documents that suit a particular region and thus guarantee effective governance and enforcement of national laws.¹⁴⁹ Under such circumstances, the unification of enforcement is not realistic. However, the following regulatory adjustments might improve coherence in the enforcement of the new investment regime and keep the level of fragmentation within a reasonable limit, hence guaranteeing the achievement of the legislative objectives.

First, rules regulating the issuance of normative documents should be adopted. Although the FIL Implementation Regulation requires that legitimacy examination of regulatory documents relating to foreign investment should be conducted,¹⁵⁰ there are no rules regulating the procedure and the competent authorities. Moreover, issues like the supervision of issuing authorities, the procedure to issue normative documents, and the competence of authorities should also be specified. These documents are considered quasi-regulations and play an essential role in State governance. Therefore, in order to guarantee the effectiveness of the new rule, it is advisable to enact a comprehensive law regulating all pertinent issues.

Second, the coordination between various regulatory authorities should be enhanced. Regarding the departments at the national level, centralised coordination should be strengthened in two ways. One is to delegate authority to the agencies through narrower statutory mandates and more careful definition of roles and responsibilities. The other is to authorise central institutions to act as centralised coordinators and monitor the performance of various departments in order to ensure that they act in line with the regulatory goals.¹⁵¹ Conversely,

148 For example, investments in the automobile industry are subject to the supervision of the Ministry of Industry and Information Technology, alongside with the supervision of other departments. See 2008 Regulation on the Major Functions, Internal Divisions and Staffing of the Ministry of Industry and Information Technology (issued 11 July 2008) s 2(4).

149 Mingyao Li and Rubin Wang, 'Problems and Suggestions of Local Legislation with the Enforcement of New Legislation Law in China' (2017) 2(3) Local Legislation Journal 44.

150 2019 FIL (n 6) art 26.

151 Li (n 140).

the coordination between local authorities can be realized through agreements entered between different regions.¹⁵² This practice would effectively mediate legal conflicts and achieve coherence within the coordinating area, hence reducing the barriers for investment and trade flows.¹⁵³

Third, more channels should be available for citizens and foreign investors to challenge the rules implemented locally. Currently, courts can only review the normative documents when they are the basis of a specific administrative act being challenged.¹⁵⁴ However, in 2018, only about 0.28% of administrative claims involved such review.¹⁵⁵ Administrative reconsideration is also available, but two further limitations are imposed on the competence of the administrative reviewing bodies: one is similar to that of administrative litigation, as the rules must be the basis of a challenged specific administrative act; the other is that the rules are not enacted by the departments or commissions under the State Council and local people's governments.¹⁵⁶ Moreover, recommendations for reviewing rules can be submitted in writing to the Standing Committee of the NPC.¹⁵⁷ However, the Committee is difficult to reach for most people. Consequently, public supervision of local rules is considerably limited after their entry into force.

Fourth, the supervision of rule-making by the authorities should be strengthened. Although both the NPC and its specialized committee or Standing Committee have the authorization to review rules enacted by administrative authorities,¹⁵⁸ due to the lack of specific procedure regulations and the vast number of various rules, such review is ineffective and needs to be improved through both legal and institutional change. One solution could be the establishment of a professional legal review authority.¹⁵⁹

¹⁵² For example, 2016 Framework Agreement on Legislative Cooperation Between the Three North-Eastern Provinces (signed July 2006). See Ministry of Justice of the PRC, 'Legislative Cooperation Between the Three North-Eastern Provinces Has Completed 22 Legislation Projects' (5 September 2012) <www.moj.gov.cn/news/content/2012-09/05/660_148383.html> accessed 10 June 2021.

¹⁵³ Chang-lin Rao, 'Legislative Cooperation Among Local Governments and its Realization' (2012) 3 *Journal of China University of Mining and Technology (Social Sciences)* 53.

¹⁵⁴ Administrative Litigation Law (n 116) art 53.

¹⁵⁵ Ministry of Justice of the PRC, '2018 Statistics of Nationwide Administrative Reconsideration and Administrative Lawsuit Cases' (2019) <www.moj.gov.cn/organization/content/2019-05/09/560_234638.html> accessed 19 August 2019.

¹⁵⁶ Administrative Reconsideration Law (n 116) art 7.

¹⁵⁷ Legislation Law (n 110) art 99.

¹⁵⁸ *ibid.*

¹⁵⁹ Jiayu Chen, 'On the Effective Supervision of Local Legislation in China' (2017) 38(9) *Journal of Chifeng University (Soc.Sci)* 68.

Despite proper enforcement of the recent change, foreign investors still need to face the uncertainty inherent in an unstable regulatory and institutional environment. The birth of China's foreign investment legal regime was led by the 'open-door' policy and remains heavily policy-oriented ever since, which is reflected in the following aspects. First, the enactment and modification of laws are influenced by policies. Second, law enforcement is also instructed by policies. Third, administrative policies themselves play an essential role similar to laws in the management of foreign investments.¹⁶⁰

However, policies are indeterminate and unstable for three reasons. First, China's policy-making environment is complex and multi-layered. Second, both the domestic and the global economy change continuously, which triggers new challenges to which policies must respond¹⁶¹ or creates new circumstances under which policies need to be adjusted so as to fulfil the development goals.¹⁶² Third, the change of government officials generally causes the implementation of new policies.¹⁶³

Although the latter reason is addressed in the FIL Implementation Regulation,¹⁶⁴ the other two are left intact. Consequently, China's economic governance is conducted under an unstable regulatory and institutional environment with unpredictable regulatory changes and inconsistent enforcement.¹⁶⁵ Foreign investors have a hard time navigating this scenario, since they need to understand not only China's complicated legal regime but also the prevailing policies and the trend of their changing, in order to minimize legal and political risk.

The situation can be worse, as the FIL explicitly allows China to adopt countermeasures against any States adopting discriminatory measures against

160 A typical example is the Catalogue, which basically codifies China's policies for foreign investment industries. Moreover, various policies exist as guidelines for administrative procedures. See Wenbo Gu, 'A Comparative Study on Foreign Investment Legal System in China' (2010) 5(3) *Frontier of Law in China* 452.

161 Pitman B Potter, 'Foreign Investment Law in the People's Republic of China: Dilemmas of State Control' (1995) 141 *The China Quarterly* 155.

162 Jane L Menzies and Stuart Orr, 'The Impact of Political Behaviours on Internationalisation: The Case of Australian Companies Internationalising to China' (2010) 3(1) *Journal of Chinese Economic and Foreign Trade Studies* 24.

163 Luo, Chen and Wu (n 95).

164 FIL Implementation Regulation (n 6).

165 The development of China's foreign investment policy has seen its shifting back and forth between openness and restriction. Pitman (n 90). A recent example can be the unpredictable modification of rules governing China's stock market and its inconsistent enforcement. See Weifeng Zhong, 'China Needs Clear Market Rules and Consistent Enforcement' (*Inside Sources*, 12 January 2016) <www.insidesources.com/china-needs-clear-market-rules-and-consistent-enforcement/> accessed 25 October 2020.

China's outward foreign investments.¹⁶⁶ The issuance of the Provisions on the Unreliable Entity List in September 2020 is considered a recent example against the United States in this regard.¹⁶⁷ it allows China to add foreign entities on the Unreliable Entity List and impose on them sanctions, like the prohibition from trading and investing in China.¹⁶⁸ Another example is the adoption of the Measures for Counteracting the Unjustified Extraterritorial Application of Foreign Laws and Other Measures in January 2021, which aims to block the application of foreign measures that prohibit or restrict Chinese citizens and entities from engaging in normal economic, trade and related activities with another State or its citizens and entities.¹⁶⁹ The Measures allow authorities to impose penalties on entities that fail to comply with the blocking orders or to report targeted foreign measures,¹⁷⁰ and permit court proceedings brought against these entities for compensation by other citizens or entities.¹⁷¹ Accordingly, foreign investors subject to foreign measures, like the US sanctions involving Chinese entities, may face a dilemma.¹⁷² Although neither of the measures has been applied in practice, China's power to utilize countermeasure as a weapon against investments from States whose trade and investment relationship with China are affected by domestic policies is apparent. Since domestic policies are generally unstable and playing an essential role in shaping international relations,¹⁷³ the possibility of adopting countermeasures can also trigger more uncertainty of investment treatment and protection under the new law.

Moreover, China's recent trade bans against Australian goods are believed to be in retaliation for Australia's initiation of an international investigation into the origins of the coronavirus.¹⁷⁴ Accordingly, they may suggest that counter-

166 2019 FIL (n 6) art 40.

167 Adrianna Zhang, 'China Releases Details on Its Own Unreliable Entity List' (*Voice of America*, 22 September 2020) <www.voanews.com/east-asia-pacific/voa-news-china/china-releases-details-its-own-unreliable-entity-list> accessed 18 October 2020.

168 Order No 4 [2020] of MOFCOM on Provisions on the Unreliable Entity List (effective 19 September 2020) art 10.

169 *ibid* arts 1–2.

170 *ibid* art 13.

171 *ibid* art 9.

172 Christopher F Corr and others, 'China Establishes New Mechanism to Counteract "Unjustified" Extraterritorial Application of Foreign Measures' (*White and Case*, 4 February 2021) <www.whitecase.com/publications/alert/china-establishes-new-mechanism-counteract-unjustified-extraterritorial> accessed 20 February 2021.

173 Douglas C Foyle, *Counting the Public in: Presidents, Public Opinion, and Foreign Policy* (Columbia UP 1999) 22.

174 Paul Karp, 'China's Trade Bans are Retaliation to Covid-19 Inquiry, More than Half of Australians Say' (*Guardian*, 25 May 2020) <www.theguardian.com/australia-news/>

measures can be utilized against issues beyond investment treatment as the FIL stipulates and beyond those permitted by the World Trade Organization (WTO).¹⁷⁵ Consequently, the intended facilitation of market entry in the recent reform may not be fully enforced or achieved, and foreign investors may thereby be discouraged from investing in China's market.¹⁷⁶ Therefore, in order to encourage more foreign investments and work towards the development goals more effectively, China needs to increase transparency, continuity and stability of economic policies, through limiting the discretion and arbitrariness of policy-making. Moreover, it is advisable to gradually reduce the dependence of laws on policies, in order to create a more stable and consistent regulatory environment.

The unreliability of available remedies is a third point worth exploring: it will deter foreign investors from seeking legal recourse and reduce the effectiveness of judicial remedies in correcting the violation of the new law by the authorities, thus eroding the contribution of the recent change to the development goals. The following problems can make the remedies unreliable.

As mentioned above, foreign investors can resort to either administrative reconsideration or administrative litigation if they consider that specific administrative acts violate the law and infringe upon their lawful interests.¹⁷⁷ Moreover, administrative litigation can also be brought if investors are unsatisfied with the administrative reconsideration decision.¹⁷⁸ However, there are three main problems with these remedies. The first problem is the considerable length of the procedure. It may take 90 days to obtain an administrative reconsideration decision¹⁷⁹ or six months to receive an administrative judgment.¹⁸⁰ Therefore, foreign investors may choose to endure some violations by the authorities, like the requirements to conduct approval procedures for foreign investments not covered by the negative lists, in order to save time and loss. To

2020/may/26/chinas-trade-bans-are-retaliation-to-covid-19-inquiry-more-than-half-of-australians-say> accessed 18 October 2020.

175 Countermeasures permitted by WTO are limited to those against States violating WTO obligations and are adopted following the required procedures. Understanding on the Rules and Procedures Governing the Settlement of Disputes (15 April 1994) 1869 UNTS 401, art 22.2.

176 The data collected from China has shown that economic policy uncertainty has a negative effect on investment behaviour. Yizhong Wang, Carl R Chen and Ying Sophie Huang, 'Economic Policy Uncertainty and Corporate Investment: Evidence from China' (2014) 26 *Pacific-Basin Financial Journal* 227.

177 2019 FIL (n 6) art 26.

178 Administrative Reconsideration Law (n 116) art 5.

179 *ibid* art 31.

180 Administrative Litigation Law (n 116) art 81.

address this problem, a speedy channel to handle complaints regarding minor or manifest violations of authorities can be established, which allows investigation and decision within a short period of time.

Second, the success rate of remedies is low. According to the data collected by the Ministry of Justice, in 2018 only about 15.11% of China's administrative reconsideration applications succeeded, while about 62.86% of them were rejected and about 20.7% of them were terminated due to mediation or other reasons. Regarding administrative lawsuits, only 28,403 claims were granted or partially granted, while 100,651 were rejected. Additionally, 50,722 cases did not enter the stage of substantial hearing due to dismissal of the complaint, *nolle prosequi*, termination of proceedings and mediation.¹⁸¹ Perhaps most cases failed because the contentious administrative act is lawful. However, the low success rate still casts doubt on the effectiveness of the remedial regime and the capability of judicial organs to ensure proper implementation of the law when facing the powerful governments.¹⁸²

There are two solutions to this problem. One is to increase the transparency of the relief channels. Currently, judgments of administrative lawsuits are published online,¹⁸³ but court verdicts on cases in preliminary court proceedings are not available. There is also no unified statutory requirement for the publication of administrative reconsideration decisions.¹⁸⁴ The lack of transparency blocks public knowledge about the outcome of the remedy-seeking processes and thus triggers the doubt that authorities may operate in relative obscurity. Accordingly, the publication of all the verdicts and decisions may not only promote public understanding of the remedial channels and defeat the doubt but also improve the effectiveness of the procedure through the strengthening of public supervision. The other solution is to deepen the standard of review employed in the remedial procedures. Both administrative reconsideration organs and courts are required to respect the discretion of the authority being challenged and be prudent to its administrative acts and decisions; hence they mainly review the legality of the procedural matters in the acts and will only

181 Ministry of Justice of the PRC (n 155).

182 Some commentators believe that China's judiciary is too weak to get in the way of the powerful Chinese government: Zhong (n 165). Judicial independence is also questioned considering the close relationship between courts and governments. US Department of State (n 147).

183 Judgements are published on Supreme People's Court, 'China Judgements Online' <<http://wenshu.court.gov.cn/>> accessed 20 August 2019.

184 The only requirement regarding transparency of administrative reconsideration is stipulated in art 4 of the Administrative Reconsideration Law (n 116), which requires administrative reconsideration authorities to follow the principles of openness. However, there are no further detailed rules about what should be published and how to do it.

change the administrative decisions when they are manifestly improper.¹⁸⁵ This is an important reason for the low success rate of remedy-seeking. Therefore, appropriate deepening of the standard of review will plausibly increase the success rate and the effectiveness of the remedial channels, which can help to build the trust of foreign investors in the implementation of the recent reform and thus fulfil the goal of encouraging foreign investments.

Third, the FIL confirms that the decision of national security review is final, which means that the remedies are not available to foreign investors who fail the review. Consequently, the concern that the security review can be an excuse for domestic favouritism, arbitrary treatment or persecution is reasonable. Therefore, it would be preferable if investors could impugn such decisions, perhaps seeking judicial review by the State Council – the authority supervising MOFCOM and the other authorities participating in the review. The applications could be heard by an *ad hoc* division within the Council and the decision of the reconsideration would be final. This procedure would be coherent with the law on the judicial review of administrative measures¹⁸⁶ and could also to some extent address the concern regarding the screening regime.

Additionally, the FIL allows foreign investors to seek remedies bringing complaints under a working mechanism or through a chamber of commerce or association.¹⁸⁷ However, their procedures, timelines, competent agencies and possible results are not clear. Accordingly, some commentators are worried that the new procedures will become unattractive to foreign investors.¹⁸⁸ Therefore, it is essential to provide pertinent information in the FIL or the implementing measures, to allow foreign investors to fully assess each avenue of redress and make their choices.

It can be concluded that issues that may hinder the implementation of the recent reform and the fulfilment of the development goals exist in both the new laws and in China's legal system as a whole. Therefore, proper enforcement of the reform would depend on the perfecting of the reform itself and on systematic adjustments of other laws and policies on which the reform and its goals depend.

185 *ibid* art 28(3)e; Administrative Litigation Law (n 116) art 70(6).

186 See Administrative Reconsideration Law (n 116) art 14.

187 2019 FIL (n 6) arts 26 and 27.

188 Keith Bradsher, 'China Law Responds to US Investment Demands: Critics Say It's Not Enough' (*New York Times*, 4 March 2019) <www.nytimes.com/2019/03/04/business/china-foreign-investment.html?_ga=2.183131183.805398511.1566855958-1761277219.1566855957> accessed 22 July 2019.

4.3 *The Lack of Boldness*

Although the recent change of China's foreign investment legal regime has attracted considerable attention and raised expectations, its effects are underwhelming. The steps towards the development goals made by the reform were somewhat unsatisfactory due to the apparent conservative attitude in the FIL.

Compared to the draft FIL published in 2015, the word-count was reduced from more than 18,000 to around 3,000 and one-third of the clauses contain only one sentence. Although the problem is significantly improved by the detailed rules stipulated in the FIL Implementation Regulation, some important issues remain undetermined, such as the operation of the working mechanism handling the complaints.¹⁸⁹ Accordingly, the progress made by the recent change cannot be assessed in the abstract, as some commentators insist, the actual meaning of the clauses will only emerge in the practice.¹⁹⁰

Moreover, despite the emphasis on equal treatment, the FIL only addresses a minor aspect of the concern regarding the differential treatment encountered by foreign investments in China.¹⁹¹ Other rules that may treat foreign and domestic investments differently remain intact. For instance, article 30 of the FIL stipulates that laws and regulations can create exceptions to the equal examination of licensing applications by foreign investors, apparently grandfathering the discriminatory treatment of foreigners in licensing applications or even permitting future discriminatory measures. Meanwhile, the current wide discretion in evaluating applications also creates ample opportunity to impede foreign investments in sectors that are permitted by the negative lists;¹⁹² the FIL also fails to address this problem. Moreover, only the pre-establishment approval conducted by commerce departments is touched upon in the recent change; thus, foreign investors may still need to obtain other permits like receiving land rights. In some cases, the opinions of consulting agencies acting on behalf of domestic enterprises are solicited, creating possible conflicts of interest detrimental to foreign investors.¹⁹³ Additionally, some forms of preferential treatment granted to domestic investors are not covered by the change,

189 Art 29 of the FIL Implementation Regulation (n 6) only specifies that local governments should establish a complaint working mechanism based on the needs.

190 Koty (n 146).

191 Gerry Shih, 'Amid Skepticism, China Fast-Tracks Foreign Investment Law to Show Goodwill to Washington' (*Washington Post*, 15 March 2019) <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?noredirect=on> accessed 21 August 2019.

192 Out-law Guide, 'China's Foreign Investment Law' (2019) <www.pinsentmasons.com/out-law/guides/chinas-foreign-investment-law> accessed 18 October 2020.

193 US Department of State (n 71).

such as the incentives granted to State-owned enterprises (SOEs)¹⁹⁴ and the exemption of SOEs in certain industries from anti-monopoly review.¹⁹⁵ The rationale behind this differential treatment is the conviction that industries controlled by SOEs are the backbone of the national economy and security.¹⁹⁶ However, in any event, clarifying which industries are exempt and what the different treatments entail in practice would strike a better balance between different development goals.

It can be seen that the recent change has made discernible progress towards further encouraging foreign investment flows. Considering the scale of China's economy, its vast territory, and the huge number of people and investments covered by the recent change, the conservative and prudent attitude of the reform is understandable and it mirrors the instances of incremental investment liberalization in the West.¹⁹⁷ However, the slow and uncertain progress of further opening up China's market may nevertheless undermine its attractiveness to foreign investors, especially when other countries are opening up their markets at the same time.¹⁹⁸ Consequently, the lack of boldness can hinder the fulfilment of the development goals.

5 Conclusion

The recent change of China's foreign investment law facilitates the attainment of China's development goals, through the replacement of the previous approval and filing procedure conducted by commerce departments with a reporting and negative list regulatory system, through the emphasis of equal treatment and investment protection, and through the establishment of an investment promotion regime and a post-establishment supervision mechanism. In this way, the recent change can further open China's market and attract foreign investments especially those from target industries, while effectively supervising and steering investments towards China's development goals.

194 Thomas Kohlmann, 'What Can the Foreign Investment Law Bring?' (*Deutsche Welle*, 16 March 2019) <<https://p.dw.com/p/3FB6n>> accessed 21 August 2019.

195 See 2007 Anti-Monopoly Law of the PRC (adopted 30 August 2007, entered into force 1 August 2008) art 7.

196 *ibid.*

197 Leon E Trakman, 'China and Foreign Direct Investment: Does Distance Lend Enchantment to the View?' (2014) 2(1) *The Chinese Journal of Comparative Law* 1.

198 Shih (n 191).

The correct implementation of the reform is essential for the achievement of these goals. The recent change has strengthened the guarantee of its effective enforcement by improving the clarity and transparency of the rules, as well as by limiting the room for discretion and arbitrariness of pertinent authorities. Therefore, it is now relatively straightforward to interpret the rules and identify instances of violation by the authorities. This increased clarity can solve the problems of legal conflicts and possible bureaucratic resistance. With the help of various relief channels available to foreign investors, proper and full implementation of the new regime can be expected.

However, full implementation of the recent change may still be undermined by flaws in the newly designed regime. The lack of clear and unified rules on certain issues makes their implementation overly rely on the discretion of competent authorities, which will cause legal uncertainty and may have negative effects on the fulfilment of the goals. This problem can be solved by modification and refinement of pertinent rules.

Moreover, complete enforcement of the recent reform would require support from China's legal system; however, the latter suffers from some endemic problems that could inevitably affect the reform too. The problem can only be solved through the change and enhancement of both the legal system as a whole as well as the applicable implementation rules and avenues and procedures for review and appeal. In the absence of systemic development, it is likely that the efforts made by reforming China's foreign investment legal regime might prove ultimately unproductive and fail to contribute to the achievement of the development goals.

The last problem lies in the FIL and reflects the conservative and prudent attitude of the change, casting doubt on the implementation of the law. Consequently, the reform might have disappointed foreign investors and might be insufficient to entice them into choosing China as their investment destination. However, to take a cautious approach might be acceptable, as long as further plans of opening can be respected. A more complete achievement of China's development goals through shaping of its investment legal regime can be expected in the near future.

Biographical Note

Yawen Zheng received her PhD from the University of Edinburgh, United Kingdom. She began a postdoc at the Chinese University of Hong Kong in June 2021.

Acknowledgements

The author would like to thank Dr Filippo Fontanelli and Mr Navraj Singh Ghaleigh for their inspiration and feedbacks, as well as the reviewers for their very helpful comments, which have greatly improved this article. Comments are most welcome, and the author can be reached at yawen.zheng@ed.ac.uk.