

China Adopts Foreign Investment Law March 2019

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On March 15, 2019, China's national legislature, the National People's Congress passed the Foreign Investment Law (the "Law"), a landmark legislation that will provide stronger protection and a better business environment for foreign investors. The Law will take effective on January 1, 2020. Upon its effectiveness, the Law will replace China's current foreign investment regimes, i.e, the existing three laws on Chinese-foreign equity joint venture, the Chinese-foreign contractual joint venture and wholly foreign-owned enterprises, which were promulgated in the early years after the country started to implement the reform and opening policy.

The Law includes six chapters with a total of 42 articles, with unified provisions for the entry, promotion, protection, and regulating of foreign investment, the Law aims to improve the transparency of foreign investment policies and ensure that foreign-invested enterprises participate in market competition on a level playing field with predictable rules.

I. What is the Foreign Investment Law

The Law will be the new fundamental law in the foreign investment fields, and as above mentioned, will replace the existing foreign investment laws. The existing foreign invested enterprises which are incorporated in accordance with the existing foreign investment laws may remain their enterprise organization in five years after the Law coming into force and then shall revise their chart documentation to conform with the Chinese Company Law.

II. Definitions and Scope of Foreign Investment

According to the Law, foreign investment means foreign individuals, enterprises or other entities engaging in investment directly or indirectly within the territory of China¹. Specifically, foreign investment shall include the following circumstances: (i) foreign investor establishes foreign invested enterprise in China itself or jointly with the other investors; (ii) foreign investor obtains shares, equity interests, assets or the other similar interests in an enterprise in China; (iii) foreign investor invests in new project in China itself or jointly with other investors; and (iv) other investment means as specified by the laws, administration regulations or regulations enacted by the State Council².

III. Investment Promotion

¹ Article 2 of the Law.

² Article 2 of the Law

The Law sets up the principle of investment promotion from the following aspects:

1. **Pre-Establishment National Treatment plus Negative List.** After the Law's Effectiveness, the pre-establishment national treatment with a negative list (the "Negative List") is introduced nationwide in China. That is to say, the country will treat foreign investment no less favorably than domestic investment during the investment access stage, unless the Negative List provides otherwise. The Negative List was first introduced in 2014 in Shanghai Free Trade Zone to explore the further openness to foreign investments and was gradually introduced nationwide in 2016. The Negative List means only the investment areas and/or activities listed in the Negative List shall be reserved to Chinese nationals, and foreign investors are allowed to engage in investment activities in the areas outside of the Negative List equal footing with Chinese nationals. The current Negative List was jointly enacted by the National Development and Reform Commission and the Ministry of Commerce in 2018, there are 48 areas where foreign investment is restricted requiring pre-approval or forbidden or is banned. We noticed the recent news from the State Council that a new version Negative List is likely to be released in this 2019.
2. **Fairness and Equality.** The Law also underscores the fairness and equality from the following aspects: government policies supporting enterprise development shall apply equally to foreign invested enterprises³; foreign invested enterprises will be able to participate into the standard formulating and the compulsory standard of the country shall applied to foreign invested enterprise equally⁴; the foreign invested enterprises may participate in the governmental procurement on an equal footing⁵; foreign invested enterprise shall be allowed to raise funds by issuing securities or through other means like domestic enterprises.
3. **Service-oriented Government.** The Law states the government will develop a foreign investment service system to provide consultation and services for foreign investors and foreign invested enterprises with respect to laws and regulations, policy measures and investment project information.

IV. Investment Protection

³ Article 9 of the Law

⁴ Article 15 of the Law

⁵ Article 16 of the Law

Expropriation, capital remittance, intellectual property rights protection, forced technology transfer have long time been the major concerns of foreign investors and foreign invested enterprises, as these issues are close to the interests of foreign investors and foreign invested enterprises. Now, the Law addresses to such issues and highlights the protection of foreign investors' legitimate interest in China, including,

1. **Governmental Expropriation and Compensation.** The Law provides that, in general, foreign investors' investments are not subject to governmental expropriation. Only under special circumstances and for the public interest, the government may expropriate or requisition their investments, but must promptly provide fair and reasonable compensation.
2. **Capital Remittance.** The Law states that capital contributions, profits, and returns on investment of foreign Investors may be freely transferred outside China in RMB or in foreign currency. The existing laws also specify that the foreign investors' legitimate income in China is allowed to be freely remitted outside China, however, in practice, foreign investors may encounter delay. It remains to be observed the implementation of the Law after its effectiveness. It is notable that three days after the Law was passed, the State Administration for Foreign Exchange released a circular to relax and ease the rules regarding cross-border financing activities by multinational companies.
3. **Intellectual Property Rights Protection and Banned Forced Technology Transfer.** China has been subject to criticism on intellectual property rights protection and forced technology transfer in relation to foreign investment. Now, the Law addresses to such criticism and provides that the State will protect the intellectual property rights of foreign investors and foreign invested enterprises in accordance with law and encourage technology cooperation based on voluntariness and commercial norms. The governmental agencies and officials shall not force technology transfer by administrative means. Similarly, three days after the Law was passed, the State Council enacted and implemented the Decision of the State Council to Amend and Repeal Certain Administrative Regulations (the "Decision"). The remarkable part of the Decision is the revision to the Chinese Technology Importation and Exportation Administrative Regulation (the "Technology Regulation") and removes Item 3 of Article 24, Article 27 and Article 29 of the Technology Regulation. The above articles of the Technology Regulation imposed heavy liabilities for warranty against defect on technology transferor, specified the technology improvement should belong to Chinese parties, and restricted the terms on the usage of transferee's technology. The removal of such stipulations shows China's determination and initiative on implementing the spirit of the Law and we

believe this will enhance the confidence of foreign investors and foreign invested enterprises on the enhancing investment environment in China. In addition, the Law also states the governmental agencies and officials shall keep trade secret of foreign investors and foreign invested enterprises and shall not divulge to and share with others illegally.

4. Government Performance

The Law provides that local governments shall not issue administrative documentation to restrict or impair the legitimate interests of foreign invested enterprises or increase the foreign invested enterprises burden⁶ and local governments shall perform the contracts with foreign investors or foreign invested enterprises and keep the commitment to foreign investors or foreign invested enterprise as well⁷. Also, the Law states foreign invested enterprises may protect their legitimate interests via administrative complaint, administrative review and administrative litigation against government agencies and governmental officials⁸.

V. Regulating Investment

The Law states (i) foreign investors are prohibited from investing in prohibited industries on the Negative List, and shall comply with the specified requirements when investing in restricted industries⁹; (ii) if for the industries that foreign investors shall apply for licenses, the governmental agencies shall treat such application same as one by domestic investors¹⁰; (iii) foreign invested enterprises shall conform with the Chinese Company Law and Chinese Partnership Law in terms of their organizational forms, institutional frameworks and activities etc. in China¹¹; (iv) foreign investors who merge with or acquire Chinese enterprises or otherwise participate in concentration of undertakings must submit to anti-monopoly review¹²; (v) foreign investors or foreign invested enterprise shall file information reports to the governmental agencies in charge¹³; (vi) if foreign investment affects or may affect national security, the State may launch state security review against such investment¹⁴.

Epilogue

⁶ Article 24 of the Law

⁷ Article 25 of the Law

⁸ Article 26 of the Law

⁹ Article 28 of the Law

¹⁰ Article 30 of the Law

¹¹ Article 31 of the Law

¹² Article 33 of the Law

¹³ Article 34 of the Law

¹⁴ Article 35 of the Law

In a nutshell, the Law releases the signal of greater transparency, and will boost Chinese markets appeal to foreign investment. As the Premier Li Keqiang mentioned, China's opening-up measures will not come on a one-time basis, instead, it is introduced quarter after quarter and year after year. In hindsight, when we review the course of China's opening-up we will recognized how much tremendous change it has brought to the country. However, as some comments noted the Law is lack of details and vague and it remains to be seen how the implementation regulations and rules will fill in the gap and we will keep a close eye on the progress of the release of implementation regulations.