

Summary of China's New Foreign Investment Law

On Friday, March 15, 2019, the National People's Congress adopted the *Foreign Investment Law* (<https://npcobserver.com/lawlist/foreign-investment-law/>) [外商投资法] by a 2929–8 vote, with 8 abstentions and 3 delegates not voting. Upon taking effect on January 1, 2020, the Law will replace China's currently fragmented foreign investment regime: three separate foreign investment laws enacted in the early years of China's economic reform. Our English translation of the new Law is available [here](https://www.chinalawtranslate.com/en/%E4%B8%AD%E5%8D%8E%E4%BA%BA%E6%B0%91%E5%85%B1%E5%92%8C%E5%9B%BD%E5%A4%96%E5%95%86%E6%8A%95%E8%B5%84%E6%B3%95/) (<https://www.chinalawtranslate.com/en/%E4%B8%AD%E5%8D%8E%E4%BA%BA%E6%B0%91%E5%85%B1%E5%92%8C%E5%9B%BD%E5%A4%96%E5%95%86%E6%8A%95%E8%B5%84%E6%B3%95/>).

The Law includes six chapters with a total of 42 articles. It is a highly abridged version of the 170-article draft the Ministry of Commerce released in 2015. The length was greatly reduced presumably so that the Law could be **fast-tracked** (https://twitter.com/NPC_Observer/status/1106356761626324992?s=20) to facilitate China's trade negotiations with the United States. One beneficiary of the Law's utter lack of details is the State Council, which now has the authority to promulgate implementing rules to fill in the gap. It will likely finish this task by the Law's effective date, which is more than eight months away.

Chapter-by-Chapter Summary

Chapter I lays down a few definitions and guiding principles vis-à-vis foreign investment. It defines “foreign investors” [外国投资者] as any “natural person, enterprise, or other organization of a foreign country” and “foreign-invested enterprises” (FIEs) [外商投资企业] as any enterprise established under Chinese law that is wholly or partially invested by foreign investors (art. 2). The Law further defines “foreign investment” [外商投资] as any foreign investor's direct or indirect investment in mainland China, including:

- establishing FIEs either individually or jointly with other investors;
- acquiring shares, equity, property shares, other similar rights and interests in Chinese domestic enterprises;
- investing in new projects either individually or jointly with other investors;
- making investments through other means provided by laws, administrative regulations, or the State Council.

Article 3 reaffirms China's “basis State policy of opening up,” “encourages” foreign investment in mainland China, and vows to “build a market environment of stability, transparency, predictability, and fair competition.”

Article 4 establishes “pre-establishment national treatment plus negative list” [准入前国民待遇加负面清单] as the basic statutory scheme. In other words, China will treat foreign investment no less favorably than domestic investment during the “investment access stage” [投资准入阶段] (defined in the **second**

draft (<https://npcobserver.com/2019/02/14/unofficial-second-draft-of-foreign-investment-law-a-summary-of-main-changes/>) as the “establishment, acquisition, expansion, and such other stages of an enterprise”)—unless the negative list provides otherwise. This article also specifies that, where a treaty to which China is a party provides for more favorable treatment of foreign investment at the access stage, China is not obligated to—but simply “may”—follow such provisions.

The Law on its face does not apply to Hong Kong, Macau, or Taiwanese investments (“H/M/T investments”). The NPC Constitution and Law Committee confirmed this reading in **a report to the NPC (http://www.npc.gov.cn/npc/xinwen/2019-03/15/content_2083503.htm)** and explained:

H/M/T investments are not characterized as foreign investments [but as] special domestic investments [特殊国内投资]. . . . The State has always applied special policies and management to H/M/T investments, and has provided in the State Council’s administrative regulations, departmental rules, and other relevant normative documents that H/M/T investments [are regulated] with reference to [参照或者比照适用] rules on foreign investment It is appropriate and feasible to not make specific provisions for the application of law to H/M/T investments in the *Foreign Investment Law* and to continue [following those State Council rules]. Doing so will not change or affect the institutional arrangements or actual practices that have worked effectively over the years, and will not hinder or restrict H/M/T investments in any way.

Chapter II sets out a list of policy measures for promoting foreign investment. Under this Chapter, China will treat foreign and domestic investments equally with respect to the application of business development policies (art. 9), formulation of standards and application of compulsory standards (art. 15), and government procurement (art. 16). In addition, the government will consult FIEs when formulating rules on foreign investment (art. 10); will promptly make public legal documents or judicial rulings related to foreign investment (*id.*); will provide counseling and services on a range of topics to foreign investors and FIEs (art. 11); and will publish foreign investment guidelines for their convenience (art. 19). FIEs are also allowed to raise capital by issuing securities or through other means (art. 17).

Chapter III lists a few protective measures for foreign investment. Article 20 provides that, in general, foreign investors’ investments are not subject to governmental expropriation. But under “special circumstances” and “for the public interest,” the government may expropriate or requisition their investments, but must “promptly” provide “fair and reasonable compensation.” Article 22 prohibits forced technology transfer by administrative measures. Article 23 bars government employees from “disclosing or unlawfully providing to others” trade secrets they learn at work—on pain of internal sanctions (*see* art. 39). Article 24 essentially bars local governments from interfering with national foreign investment laws and policies. Article 25 requires local governments to fulfill their policy commitments to and contracts with foreign investors and FIEs. Were national or public interest to require changing the commitments or contractual terms, they must compensate foreign investors and FIEs for any loss sustained as a result. Finally, article 26 allows FIEs and their investors to file complaints against administrative agencies and their employees through an “FIE complaint working mechanism” [外商投资企业投诉工作机制]. This article makes clear that this working mechanism does not replace other remedies available under existing law.

Chapter IV includes (mostly vague) provisions regulating foreign investment. Foreign investors are barred from investing in prohibited industries on the negative list and must comply with the specified requirements when investing in restricted industries on that list (art. 28). When a license is required to enter a certain industry, they must apply for one, and the government must treat the application the same as one by a domestic enterprise, except where laws or regulations provide otherwise (art. 30). Article 34 requires foreign investors or FIEs to file information reports; violations are punishable with a

fine of up to 500,000 RMB (*see* art. 37). Article 35 mandates national security review of foreign investment that “affects or may affect national security” and provides that national security review decisions are final (presumably not subject to administrative reconsideration or judicial review).

This Chapter also explicitly subjects FIEs to certain legal regimes applicable to their domestic counterparts. Article 31 provides that laws including the *Company Law* [公司法] and the *Partnership Enterprise Law* [合伙企业法] will govern the FIEs’ “organizational forms, institutional frameworks, and standards of conduct.” Article 32 requires FIEs to comply with the applicable rules on “labor protection and social insurance.” And under article 33, foreign investors that “merge with or acquire mainland Chinese enterprises” or otherwise participate in concentration of undertakings must submit to anti-monopoly review under the *Anti-Monopoly Law* [反垄断法].

Chapter V governs legal responsibilities. Under article 35, if a foreign investor invests in a prohibited industry, it will be ordered to cease investment activities, restore the status quo ante by, for instance, disposing of its shares or assets, and forfeit any illegal proceeds. And if a foreign investor investing in a restricted industry violates the conditions specified by the negative list, it will be ordered to make corrections to satisfy the conditions within a certain period. If it fails to comply, it will then be deemed to have invested in a prohibited industry, subject to the applicable penalties. The foreign investor may also be subject to liabilities under other applicable laws. Lastly, any violation of laws or regulations by a foreign investor or an FIE will be recorded in the enterprise credit information system (possibly governed by the *Provisional Regulations on the Disclosure of Enterprise Information* [企业信息公示暂行条例] and other rules) (art. 38).

Finally, under **Chapter VI**, the Law authorizes China to take reciprocal measures against jurisdictions that discriminate against Chinese investment (art. 40). It also makes clear that where other laws or regulations have contrary provisions for the management of foreign investors’ investments in financial industries or of their making investments in financial markets, those provisions prevail (art. 41). Finally, as mentioned above, upon taking effect the *Foreign Investment Law* will repeal China’s three current foreign investment laws: the *Wholly Foreign-Owned Enterprises Law* [外资企业法], the *Chinese-Foreign Equity Joint Ventures Law* [中外合资经营企业法], and the *Chinese-Foreign Contractual Joint Ventures Law* [中外合作经营企业法]. FIEs will then have five years to comply with China’s general corporation and partnership laws.

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