

Annex A

Summary of China's Foreign Investment Law

Approved by 2,929 China's National People's Congress lawmakers on 15th March 2019, the FIL:

- replaces 3 previous laws, namely the Wholly Foreign-Owned Enterprises Law (also known as the Foreign-Capital Enterprises Law), the Sino-Foreign Equity Joint Ventures Law, and the Sino-Foreign Contractual Joint Ventures Law;
- is considered as the main legislative accomplishment of this year's "two sessions", as well as a landmark law in China's opening up;
- attempts to address outstanding concerns from foreign investors, namely unfair treatment regarding market access and government procurement, forced technology transfer to Chinese partners and the theft of commercial secrets from foreign businesses in China;
- is designed to level domestic playing field for overseas investors including Singapore businesses;
- will come into effect on 1st January 2020.

Chapter-by-Chapter Summary

Chapter I

Definitions and Guiding principles vis-à-vis foreign investment.

Article 2 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.

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 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 favourably than domestic investment during the "investment access stage"** [投资准入阶段] (defined in the second draft 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 favourable treatment of foreign investment at the access stage, China is not obligated to—but simply “may”—follow such provisions.

Chapter II

A list of policy measures for promoting foreign investment.

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

Chapter III

Lists a few protective measures for foreign investment.

Article 20 provides that 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 (Article 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

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 (Article 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 (Article 30).

Article 34 requires foreign investors or FIEs to file information reports; violations are punishable with a fine of up to 500,000 RMB (Article 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).

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 “labour protection and social insurance.”

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

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) (Article 38).

Chapter VI

Reciprocal measures against jurisdictions

The Law authorizes China to take reciprocal measures against jurisdictions that discriminate against Chinese investment (Article 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 (Article 41).

Finally, as mentioned above, upon taking effect, the FIL 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.

Transition Period

The new law provides for a **five-year transitional period** during which the existing joint ventures and WFOEs must adapt their organizational form to the FIL and accordingly the Chinese Company Law. Joint ventures will be a particular focus, as the company's highest governance body will change from the Board of Directors to the Shareholders' Meeting.