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A Further Review of Foreign Investment Law and Implementation Regulations

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On March 15, 2019, the authors opined on Foreign Investment Law in our article *A New Era for Foreign Investment Legislation - A Commentary on China Foreign Investment Law*. Subsequently, Implementation Regulations for the Foreign Investment Law (hereinafter referred to as the "Implementation Regulations") were officially issued on December 26, 2019 and came into effect together with Foreign Investment Law on January 1, 2020. Combining Foreign Investment Law and Implementation Regulations, we interpret ten key issues that will interest or concern foreign investors the most.

1. Joint Ventures between Chinese Natural Persons and Foreign Investors

Article 2 of Foreign Investment Law provides, "for the purpose of this Law, foreign investment refers to any investment activities directly or indirectly carried out by foreign natural persons, enterprises or other organizations (hereinafter referred to as the "foreign investors"), which include the following circumstances: (1) a foreign investor establishes a foreign-funded enterprise within China, either alone or together with any other investors;…(3) a foreign investor invests in any new project within China, either alone or together with any other investors''. Implementation Regulations further clarify that the aforesaid "other investors" include "Chinese natural persons".

Before Foreign Investment Law, Chinese parties of joint ventures stipulated in *Sino-foreign Equity Joint Ventures Law* and *Sino-foreign Cooperative Joint Ventures Law* only include "Chinese companies, enterprises or other economic organizations". Nonetheless, Article 54 of *Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (Order of the Ministry of Commerce [2009] No. 6) stipulates that "Chinese natural person shareholders of domestic companies whose equity is acquired (by foreign investors) may, upon approval, continue to be the shareholders of the foreign investment enterprises incorporated after the acquisition". In practice, some provinces and cities, including Beijing, Shanghai, Sichuan, Chongqing and Anhui, removed restrictions on Chinese natural person investors in Sino-foreign joint ventures, and promulgated regulations to permit natural persons and foreign investors to jointly invest in China. However, these local policies mostly require case-by-case approvals, or are applied only to special geographical areas.

Foreign Investment Law and Implementation Regulations clarify the open issue "whether Chinese natural persons can be shareholders of foreign invested enterprises ("FIE")", and articulate that Chinese natural persons can establish FIEs together with foreign investors henceforward.

2. "Special Economic Areas"

Article 13 of Foreign Investment Law stipulates that, "the State may, as needed, establish special economic areas, or implement experimental policies regarding foreign investment in some areas, so as to promote foreign investment and expand opening-up". Accordingly, Implementation Regulations clearly state that "special economic areas" refer to "specific areas established with State approval to implement greater scope of opening-up policy measures". According to foreign investment practices, "special economic areas" generally include following types of areas:

A. Special Economic Zones (SEZs)

SEZs are established by the National People's Congress. On August 26, 1980, the fifteenth meeting of the Standing Committee of the Fifth National People's Congress approved the decision by the State Council to establish SEZs in Shenzhen, Zhuhai, Shantou, and Xiamen. The first meeting of the Seventh National People's Congress in 1988 decided to establish Hainan Special Economic Zone. In May 2010, the Central Xinjiang Work Conference officially approved the establishment of SEZs in Horgos and Kashgar in inland China. Under the authorization of the National People's Congress, SEZs can formulate laws and regulations according to specific conditions and actual needs, in accordance with the provisions of the Constitution and basic principles of laws and administrative regulations. SEZs can formulate more lenient or preferential regulations to attract foreign investment or multinational companies.

B. Economic and Technological Development Zones (ETDZs)

National economic and technological development zones are approved by the State Council, and are currently in a large number of more than 200. The ETDZs can be categorized into high-tech development zones, bonded logistics parks, and export processing zones. For example, there are currently 10 national ETDZs in Shanghai, including Waigaoqiao Free Trade Zone, Zhangjiang Hi-Tech Park, Lujiazui Financial and Trade Zone, and Jinqiao Export Processing Zone, etc. The focus of the ETDZs is on specific industries parks and high-tech research and development.

The investment policies of the ETDZs emphasize integration with the industrial characteristics. Article 4 of *Opinions of the State Council on Promoting the Innovation and Enhancement of National Economic and Technological Development Zones and Creating New Heights for Reform and Opening Up* (Guo Fa [2019] No. 11) states that “We must optimize in directing foreign investment. The FIEs engaged in encouraged industries and playing important roles in improving the industrial chain in the ETDZs in the Midwestern and Northeastern areas can be supported according to regulations”. Local governments can also formulate investment promotion policies for the ETDZs in the local region in accordance with industry directions. *Tianjin Notice of Implementation Plan for Promoting Reform and Innovation Development in the Development Zones* states that, “Combining with industrial development directions, the Development Zones can, within the scope of policies and authority, formulate corresponding preferential policies for investment, and provide support to projects that makes great contributions to employment, economic development, and technological innovation in the aspects of loan discounts, listing financing, investment, research and development, equipment, talent, training and other subsidies. Besides, the investment, operation and institutional transaction costs of real economy enterprises shall be reduced”.

Bonded areas are more inclined to enhance trade facilitation and enjoy preferential policies in customs control. Article 34 of *Customs Law* stipulates that “Customs shall carry out supervision and administration in bonded zones and other special customs supervision zones established in China with the State Council’s approval in accordance with relevant regulations”. For example, with regard to foreign exchange, Article 5 of *Measures for Special Supervision Zone of Customs on Foreign Exchange Control* stipulates that transactions between institutions in the zone can be settled in RMB or foreign currencies.

C. Free Trade Zones (FTZs)

On August 22, 2013, the State Council announced the establishment of Shanghai Free Trade Zone. As of August 2, 2019, 18 FTZs have been established in Shanghai, Guangdong, Tianjin, Fujian, Liaoning, Zhejiang, Henan, Hubei, Chongqing, Sichuan, Shaanxi, Hainan, Shandong, Jiangsu, Hebei, Yunnan, Guangxi and Heilongjiang.

The FTZs emphasize investment liberalization, trade facilitation, financial internationalization, and law-based supervision. In terms of foreign investment, the negative list has been streamlined and restrictions on foreign investment access have been relaxed. *Special Administrative Measures (Negative List) for Admission of Foreign Investment in Free Trade Zones (2019)* issued by the National Development and Reform Commission and the Ministry of Commerce in 2019, include 37 special administration measures, 4 items fewer than the national negative list, and some prohibitive measures have been changed to restrictive measures. For example, the provision of “prohibition of investment in cultural and performing groups” is changed to “cultural and performing groups must be controlled by Chinese parties”. The FTZs can also promulgate local regulations, rules or regulatory documents to promote investment or trade facilitation in accordance with actual local situation. For example, *Regulations on China (Fujian) Free Trade Zone* have an exclusive chapter on Fujian-Taiwan exchanges and cooperation; *Regulations on China (Guangdong) Free Trade Zone* specially provide for Guangdong-Hong Kong-Macao cooperation and the “Belt and Road” construction; *Regulations on China (Liaoning) Free Trade Zone* pay more attention to structural adjustment of old industrial bases and regional opening up and cooperation with Northeast Asia.

D. Free Trade Ports (FTPs)

The FTP mainly refers to Hainan Free Trade Port. Hainan is China’s largest special economic zone. With a unique geographical location, the best ecological environment, and a relatively independent geographic unit, it has unique advantages of becoming a national experimental field for reform and opening up.

3. Encourage and Direct Foreign Investors to Invest in Specific Industries, Fields, and Regions

Foreign Investment Law and Implementation Regulations “encourage and guide foreign investors to invest in specific industries, fields, and regions”. What are these “specific industries, fields, and regions”?

The scope of “specific industries and fields” can be reflected by *Industry Guidelines on Encouraged Foreign Investment (2019)*, which encourage foreign investment in modern agriculture, advanced manufacturing, high-tech, energy conservation and environmental protection, modern service industries and other fields nationwide, to promote industrial upgrading. Specifically, from the guidelines that more than 80% of revised and new entries focus on the manufacturing sector, manufacturing is currently a key sector for encouraged foreign investment, and the State supports more foreign investment in high-end manufacturing, intelligent manufacturing, and green manufacturing. The core industries the State encourages include electronic information industries such as 5G core components, etchers for integrated circuits, chip packaging equipment, cloud computing equipment, equipment engineering industries such as industrial robots, new energy vehicles, key components of smart cars, modern pharmaceutical industries such as key raw materials for cell therapy drugs and large-scale cell culture products, and new materials industries such as new aerospace materials, single crystal silicon, and large silicon wafers. In addition, the State continues to strengthen support for the development of productive service industries, which are mainly represented by engineering consulting, accounting, taxation, inspection and certification services in the field of business services, cold chain logistics, e-commerce, and railway dedicated lines in the field of commerce and trade, artificial intelligence, clean production, carbon capture, circular economy and other industries in the field of technical services.

"Encouraging foreign investors in specific regions" mainly refers to transferring foreign-invested industries to the central and western regions and the northeastern region to promote coordinated regional development. These 22 provinces (autonomous regions and municipalities) should adjust measures to local conditions and take advantage of their industries, particularly encouraging foreign investment in labor-intensive, advanced and applicable technology industries and supporting facilities, such as the development of agricultural product processing, textile and apparel, furniture manufacturing and other industries in Yunnan, Inner Mongolia, Hunan and other provinces with distinctive agricultural resources and labor advantages, the development of general integrated circuits, tablet computers, communication terminals and other industries in Anhui, Sichuan, Shaanxi and other provinces with electronic industry clusters, and the development of logistics and storage facilities, automobile filling stations and other industries in Henan, Hunan and other provinces with dense transportation and logistics networks.

4. FIEs Participating in Standards Formulation

Article 15 of Foreign Investment Law provides that "the State protects FIEs' equal rights to participate in standard formulation". Implementation Regulations also provide, "FIEs shall participate in the formulation and revision of national standards, industry standards, local standards and group standards on equal grounds with domestic enterprises. FIEs may formulate enterprise standards alone or jointly with other enterprises", "FIEs may submit standard proposals to the standardization administrative departments and other relevant administrative departments, and provide opinions and suggestions in the process of project approval, drafting, technical review, implementation feedback and evaluation, and undertake the work of standard drafting, technical review and translation according to regulations".

The participation of FIEs in the formulation of national standards and industry standards promotes FIEs' participation in China's economic activities. Chinese enterprises can benefit from learning the advanced industry experience of FIEs.

This is not the first time that laws grant FIEs rights to participate in the standard formulation. In March 2015, *Deepening Standardization Work Reform Plan* issued by the State Council clearly states "to further relax restrictions on FIEs' participation in the formulation of standards in China". In January 2017, *Notice of the State Council on Several Measures for Expansion of China's Opening Up and Active Use of Foreign Capital* requires promoting fair participation of domestic and FIEs in standardization work, and the National Standards Commission should lead to implement. The National Standards Committee, the National Development and Reform Commission and the Ministry of Commerce jointly issued *Guiding Opinions for the Participation in China's Standardization Work by FIEs* on November 13, 2017" (hereinafter referred to as the "Opinions") to create a fair and standardized environment for FIEs. The contents of the *Opinions* include the principles, scope, methods, channels, intellectual property protection and requirements of FIEs participating in China's standardization work. It confirms the FIEs' right to participate in China's standardization work, and Sino-foreign joint ventures, cooperative joint ventures, and FIEs legally established in China have same rights as domestic enterprises to participate in China's standardization work. In addition, it specifies the content, methods and requirements for FIEs of standard formulation and revision work, such as participating in drafting of national standards and translation of foreign versions of national standards, as well as putting forward opinions and suggestions in the process of project establishment, consultation, and implementation. The *Opinions* clearly provides that FIEs can participate in China's standardization technical organizations and international standardization activities. For example, they can join the Standardization Administration as members or observers, participate in relevant activities of the International Standardization Organization in accordance with regulations, conduct standardization exchanges and cooperation, and carry out standardization services.

As of October 2017, the number of members of the Standardization Administration from FIEs has reached 2652, accounting for 5.9% of the total number of members. A considerable number of FIEs have also participated in standardization committees of various industries. For example, the National TC 124 on Industrial Process Measurement, Control and Automation (TC124) includes 59 foreign-invested members including Emerson, Rockwell, Honeywell, General Electric, Echelon, Schneider, Siemens, Omron, Phoenix and ABB.

5. Reinvestment in China by Foreign-invested Enterprises

Article 47 of Implementation Regulations stipulates that "the relevant provisions of Foreign Investment Law and Implementation Regulations shall apply to investments in China by FIEs."

The nature and specific operational issues of domestic reinvestment by FIEs have also long perplexed foreign investors. The relevant regulations on domestic reinvestment by FIEs prior to the effective date of Foreign Investment Law and Implementation Regulations can be summarized as follows:

1) Where the industry in which FIEs reinvest falls into the category of "prohibited industries", the reinvestment is not allowed;

2) Where the industry in which FIEs reinvest falls into the category of "encouraged industries" or "permitted industries", the reinvested enterprises may directly conduct business registration as domestic enterprises do;

3) Where the industry in which FIEs reinvest falls into the category of "restricted industries", the reinvested enterprises may conduct business registration as FIEs after the authorities' approval;

4) Where a FIE invests in the central and western parts of China, and the equity ratio of the foreign investor in the invested company is not less than 25%, which is qualified to apply for the treatment of FIEs, the aforesaid enterprise shall, in accordance with the relevant procedures for the establishment of FIEs, apply to the provincial-level authority where the invested company is located for approval, and such enterprise is a FIE.

5) Where foreign-invested venture capital enterprises make reinvestment in China, regardless whether the industry they invest in falls into the category of "encouraged industries", "permitted industries" or "restricted industries", the re-invested enterprises shall be deemed as FIEs. The availability of preferential treatment of FIEs to the aforesaid enterprises depends on whether the total proportion of foreign investors' actual capital contribution is higher than 25% of the registered capital of the invested company.

It can be seen from the above summary that the nature of domestic reinvestment of FIEs is mainly determined in accordance with the principle of "substance over form". That is, foreign investors cannot evade foreign investment restrictions by "establishing FIEs first and then using the FIEs to reinvest in China", while enterprises that the FIEs reinvest face the same restrictions or prohibitions as the FIEs in terms of "restricted industries" and "prohibited industries".

The differentiation in identifying enterprises reinvested by FIEs as domestic enterprises or FIEs was relevant in the era when FIEs used to enjoy preferential policies and treatment (for instance, before 2008, the income tax rate for domestic enterprises was 33%, while FIEs could enjoy preferential tax rates of 15% or 24%). With the Foreign Investment Law, Implementation Regulations and supporting laws and regulations coming into effect, however, FIEs will receive the same "national treatment" as domestic enterprises, and the significance of distinguishing domestic enterprises and FIEs dwindled. Because of the particularity and complexity of domestic reinvestment by FIEs, in practice, specific analysis based on different industries, regions, and characteristics needs to be made so as to meet the regulatory requirements of government authorities.

It is worth noting that in the past, except investment-oriented FIEs and FIEs established in certain free trade zones are allowed to reinvest in China with their registered capital, FIEs in general may not use their registered capital to make domestic equity investments. On October 25, 2019, the State Administration of Foreign Exchange issued *Notice on Further Promoting the Facilitation of Cross-border Trade and Investment*, allowing non-investment-oriented FIEs to make domestic equity investments with their capital, subject to the current special administrative measures for foreign investment access (negative list) and on the premise that the domestic investments are true and legal.

6. Expropriation of Foreign Investments

Article 20 of Foreign Investment Law stipulates that "the State does not expropriate the investment of foreign investors. Under special circumstances, the State may, for the need of the public interest, expropriate or requisition the investment of foreign investors according to the law. In case of expropriation or requisition, statutory procedures shall be followed, and fair and reasonable compensation shall be made in a timely manner." Implementation Regulations further clarify that where the investment of foreign investors is expropriated for public interest reasons, compensation shall be made based on "the market value of the expropriated investment"; "where foreign investors disagree with the expropriation decision, they may apply for administrative review or file an administrative lawsuit pursuant to the law." The biggest highlight of Implementation Regulations is that the standard of compensation is changed from a more subjective standard of "fairness and reasonableness" to a relatively objective compensation standard of "market value"; besides, it was clarified that foreign investors can apply for administrative review on the expropriation decision. The above provisions are favorable for investment protection for foreign investors.

Main circumstances of lawful expropriation or requisition are summarized as follows:

Expropriation	
Specific circumstances of expropriation stipulated by law	Object of expropriation
1) For national defense and diplomatic needs; 2) For the needs of infrastructure (such as energy, transportation, and water facilities) construction organized and implemented by the government; 3) For the needs of public utilities, such as technology, education, culture, hygiene, sports, environmental and resources protection, disaster prevention and mitigation, preservation of cultural relics, social welfare, and municipal utilities, organized and implemented by the government; 4) For the needs of affordable housing project construction organized and implemented by the government; 5) For the needs of reconstruction of old towns, such as sections where dangerous buildings are concentrated, and sections with poor infrastructure, organized and implemented by the government pursuant to the relevant provisions of urban and rural planning laws; 6) For the needs of other public interest stipulated by laws and administrative regulations.	Buildings on State-owned land
For the needs of public interest, such as ecological protection, and infrastructure construction.	Woodland and woods
For the needs of demarcation or expansion of military restricted zones and military administrative zones	Woodland, water and mudflat
For the needs of mineral exploration and project construction	Grassland

Requisition	
Specific circumstances of requisition	Object of requisition

stipulated by law.	
For the emergency needs, such as rescue and disaster relief.	Immovable property or movable property of organizations and individuals
For the need of investigating crimes.	Vehicles, communication tools, premises and buildings of organs, groups, enterprises and public institution and individuals
For the needs of performing tasks of martial law.	Buildings, premises, facilities, vehicles, engineering machinery, etc. of State organs, enterprises and public institutions, social groups and citizens
For counterespionage needs.	Vehicles, communication tools, premises and buildings of organs, groups, enterprises and public institutions and individuals
For the needs of infection prevention and control.	Buildings, vehicles, and relevant facilities and equipment
For national defense needs.	Civilian transportation resources, such as civilian vehicles, transportation facilities, transportation resources, etc.
For anti-terrorism needs.	Property of organizations and individuals

7. Outward Remittance of Foreign Investors' Funds

Article 21 of Foreign Investment Law stipulates that "foreign investors may, according to the law, freely remit into or out of China, in RMB or any other foreign currencies, their capital contributions, profits, capital gains, income from asset disposal, intellectual property royalties, lawfully acquired compensation, indemnity or liquidation income within the territory of China." Implementation Regulations add that "no organization or individual shall restrict the currency type and amount as well as the frequency of inward and outward remittance against the law."

In the practice of foreign exchange control, authorities and banking financial institutions tend to encourage funds inflow but to be cautious on funds outflow. Particularly, at times when RMB is expected to depreciate and the State faces high pressure of funds outflow, the authorities usually mandate a foreign exchange quota for banks. Banks are only allowed to exchange and remit foreign exchange within the quota, while any foreign exchange above the quota must be approved by the authorities. In addition, authorities will from time to time issue "over the counter guidelines" to direct banks to reduce the speed of processing remittance by foreign investors of investment gains or income from asset disposal, especially the remittance of dividends, profits, and gain from equity transfer.

As a relief to foreign investors, Implementation Regulations explicitly prohibit any restrictions on the inbound and outbound remittance of funds from the investment of foreign investors, and fully protect the free use of funds by foreign investors.

Nowadays, current accounts such as profits, capital gains, and intellectual property royalties have already been freely convertible in China, while obstacles exist in the free exchange and outbound remittance of capital accounts funds such as capital contributions, income from asset disposal, lawfully acquired compensation, and indemnity or liquidation income. The relevant provisions of Foreign Investment Law and Implementation Regulations will facilitate the free exchange and outbound remittance of foreign exchange under capital accounts. Nonetheless the actual implementation effect remains to be seen when the supporting legal documents will be issued in the future.

8. VIE (Variable Interest Entities)

The draft of Implementation Regulations once stipulated that "upon examination by the competent department of the State Council and approval by the State Council, investment in China made by wholly-owned enterprise established outside China by Chinese natural persons, legal persons (excluding FIEs) or any other organizations may be exempted from relevant restrictions of special administrative measures for market access stipulated in the negative list for foreign investment market access." However, in the official version of Implementation Regulations, all contents relating to VIE were deleted.

The VIE model and the exploration of its regulatory framework have been in existence in China for nearly two decades, and its evolvement is roughly summarized as follows:

Year	Event
2000	Sina was listed in the U.S.: the first domestic company was listed overseas using the VIE structure
2005	*Notice on Issues Relating to Foreign Exchange Administration for Financing and Round-trip Investments by Domestic Residents through Overseas Special Purpose Vehicles*: Hui Fa [2005] No. 75 was promulgated, in which "round-trip investment" and "contractual control" were first mentioned
2010	Shanghai International Arbitration Center (SHIAC) made two arbitral awards with regard to the validity of VIE structure. VIE agreements were held invalid for the concealment of illegal purpose in legitimate form.
2014	*Notice on Issues Relating to Foreign Exchange Administration for Overseas Investment and Financing and Round-trip Investments by Domestic Residents through Special Purpose Vehicles*: Hui Fa [2014] No. 37 was promulgated, which only used the wording "control" instead of "contractual control".
2015	*Foreign Investment Law (draft for comments)*: identified the VIE structure as a form of control, and adopted penetration mechanism for recognition of control, which may prevent foreign investors from circumventing Chinese foreign investment laws through VIE structure
2016	Changsha Yaxing Real Estate Development Co., Ltd. v. Beijing Anbo Chuangying Education Technology Co., Ltd.: the Supreme Court heard VIE case for first time, but evaded the question whether VIE structure is valid

2019	*Implementation Regulations for the Foreign Investment Law (draft for comments)*: domestic investors' wholly outbound investment can be exempted from foreign investment regulations after approval by the State Council.
2020	Implementation Regulations: no regulations on VIE structure.

From the above, we can see that, as of the time Implementation Regulations took effect, the legality of the VIE structure has neither been approved nor denied. The VIE model has always been in a grey area under China's legal framework.

It is not surprising that regulators chose to leave regulations for the VIE model in blank. In 20 years, the VIE model has long been the top choice for foreign investment to invest in restricted industries in China, as well as the overseas listing of many domestic Internet and high-tech companies. Leaving the regulations blank again reflects the authorities' regulatory prudence, and it is a pragmatic choice in the context of economic driving, deepening reform, and expanding foreign investment.

The absence of VIE regulations in Implementation Regulations is not the end-of-story for VIE. On the one hand, under the VIE model, it makes no sense that companies controlled by Chinese investors are unable to operate unrestricted industries and businesses in China simply because they use offshore structures for financing. On the other hand, the purpose of the VIE model is for many high-tech companies with "disguised foreign investment" to survive in the process of overseas financing, overseas listing, and domestic compliance operation. However, because the special VIE structure essentially circumvents regulations, this issue will not be disregarded in the long term.

With the continuous opening up for foreign investment, the restricted and prohibited foreign investment industries are gradually decreasing. Moreover, the domestic capital market is increasingly improved, including the accelerating promotion of the STAR Market and relevant supporting policies, more Internet and high-tech companies will consider domestic stock market as their top choice for listing, which also affect the choice and establishment of the VIE structure from an economic perspective. Under the influence of multiple factors, we believe that the necessity and legality of the VIE model will be completely settled in the near future.

9. Information Disclosure and Report of FIEs

Foreign Investment Law establishes a reporting mechanism for FIEs, and foreign investors or FIEs shall, via company registration systems and enterprise credit information publication system, report investment information to competent authorities. The scope and contents of such information reporting is limited to those absolutely necessary, and FIEs shall not be required to report information that can be obtained by authorities through inter-department sharing. As a supplementary regulation to Foreign Investment Law, *Foreign Investment Information Reporting Measures* also came into effect on January 1, 2020.

It is worth noting that although *Foreign Investment Information Reporting Measures* provide that foreign investment information is still to be reported to authorities in charge of commerce, with regard to foreign investors and FIEs, the information reporting systems they use are the company registration system and enterprise credit information publication system maintained by State Administration for Market Regulation. In other words, FIEs do not have to directly report to authorities in charge of commerce, but instead they report through the systems maintained by the company registration authorities. This indeed reduces the burden of information reporting on FIEs, which exemplifies Foreign Investment Law's objective of procedure simplification and investment promotion.

In relation to information reporting, one of the hot topics among foreign media and NGOs is that "China is about to roll out its corporate social credit system (CSCS)", which will use the information reported by companies to rate them; some even state that the CSCS is specifically "targeting" FIEs. For clarification, contrary to the foreign institutions' misinterpretation that the CSCS is brand new, China has began to design and implement the CSCS since 2012. Since State Council's publication of *Plan for Establishing a Social Credit System (2014 – 2020)*, China issued a large number of laws, regulations and policies at State level in relation to the establishment of the CSCS, and different government departments and government at various local levels also followed by issuing their own ancillary policies. It is true that information reported by companies will be an important source of the data used for rating in the CSCS, but such requirements are not targeting FIEs only, or rather, the CSCS treats domestic and foreign invested enterprise alike. According to our observation, since FIEs normally stress more on corporate compliance, the implementation of the CSCS would actually reflect well on FIEs with higher ratings, thus benefiting FIEs in China. For more information on the CSCS, please read our previous article *A Future Based on Creditworthiness - China's Corporate Social Credit System and Corporate Compliance*.

10. Investors from Hong Kong, Macao, Taiwan and other Overseas Chinese Investors

Article 48 of Implementation Regulations provides, "Investments in Mainland China by investors from Hong Kong Special Administrative Region, Macau Special Administrative Region shall be handled in accordance with Foreign Investment Law and these Regulations; provided that where applicable laws, administrative regulations or the State Council stipulate otherwise, such provisions shall prevail.

Taiwanese Compatriot Investment Protection Law of the People's Republic of China (hereinafter referred to as the "*TCIPL*") and its implementation regulations shall apply to investments in Mainland China by investors from Taiwan; matters not stipulated in the *TCIPL* and its implementation regulations shall be handled in accordance with Foreign Investment Law and these Regulations. Investments in China by Chinese citizens who settle abroad shall be handled in accordance with Foreign Investment Law and these Regulations; where laws, administrative regulations or the State Council stipulate otherwise, such provisions shall prevail."

Foreign Investment Law does not provide for its application to investors from Hong Kong, Macao and Taiwan, while Implementing Regulations make supplementary provisions in this regard.

Mainland China Investments by investors from Hong Kong and Macao, shall be referred to Foreign Investment law and Implementation Regulations, but if laws, administrative regulations or the State Council stipulate otherwise, such provisions shall prevail. The aforesaid other provisions mainly refer to a series of agreements under *Closer Economic Partnership Arrangement between Mainland China and Hong Kong*, and *Closer Economic Partnership Arrangement between Mainland China and Macao*.

For Taiwanese investors' investments in Mainland China, Implementation Regulations stipulate that the *TCIPL* and its implementation regulations apply; matters not stipulated in the aforesaid regulations, shall refer to Foreign Investment Law and Implementation Regulations. The *TCIPL* and its implementation regulations came into effect in 1994 and 1999 respectively. Although the *TCIPL* has been revised several times, it still lags behind the reality. Therefore, Foreign Investment Law and Implementation Regulations are necessary supplements to the *TCIPL* and its implementation regulations, which will help make full use of Taiwanese investment and protect interests of Taiwanese investors. For example, as far as matters not stipulated in the *TCIPL* and its implementation regulations, the *TCIPL* only generally provides that the State generally does not nationalize and expropriate investments from Taiwanese investors, other than the need of the public interest and requirement of legal procedures in exceptional circumstances with compensation. The implementation regulations of the *TCIPL* provide compensation standards, but fail to clearly define the method of gauging the compensation by the standards. Therefore, relevant provisions of Foreign Investment Law and Implementation Regulations shall be applied to the uncertainty in the matter of investment expropriation of Taiwanese investors, and compensation shall be made in accordance with the "market value of the expropriated investment".

For the investment of overseas Chinese within Mainland China, the draft of Implementation Regulations used the word of "Overseas Chinese". According to Article 1 of *Regulations on the Status of Overseas Chinese and Overseas Chinese Families* (Guo Qiao Fa [2009] No. 5) issued by the Overseas Chinese Affairs Office of the State Council, there are two major ways to identify overseas Chinese. First, Chinese citizens who have obtained the right of long-term or permanent residence in the country of residence and have been staying in the country for two consecutive years, with a cumulative residence of not less than 18 months within two years (i.e., "domicile"). Second, where Chinese citizens have not obtained the right of long-term or permanent residence in the country of residence, but have obtained the lawful residence status in the country of residence for more than five consecutive years (including five years) with a cumulative residence of not less than 30 months within five years. The aforesaid Chinese citizens are considered as overseas Chinese, other than those studying abroad (including public-funded and self-financed) or working abroad due to official business (including foreign labor). Implementation Regulations changed the word of "Overseas Chinese" to "Chinese citizens residing abroad". Whether the definition of "residence" is the same as the definition provided in *Regulations on the Status of Overseas Chinese and Overseas Chinese Families*, it remains to be clarified in subsequent supporting regulations. It is worth noting that although "Chinese citizens residing abroad" are still Chinese citizens, it is clearly different from the concept of "Chinese natural persons" under Foreign Investment Law. The investment of "Chinese citizens residing abroad" within Mainland China is deemed as foreign investment, which shall be implemented pursuant to Foreign Investment Law and Implementation Regulations. In contrast, investment of “Chinese natural persons” is entirely domestic investment, to which relevant foreign investment laws shall not apply.

Conclusion

Foreign Investment Law and Implementation Regulations are a comprehensive review and reform of the Foreign Investment Law “Trilogy”, other foreign investment regulations and practices over the past decades. Foreign Investment Law and Implementation Regulations have solved many imminent problems in foreign investment regulation, and in the meantime raised new issues and challenges. As the legislative process advances, it is believed that more foreign investment supporting regulations will be adopted. We will closely watch the legislative and judicial developments in this field, and continue to provide consistent professional interpretation and support for foreign investors and other professionals.

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