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A New Era for Foreign Investment Legislation ——A Commentary on China Foreign Investment Law

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On March 15, 2019, the Second Session of 13th National People's Congress passed the People's Republic of China Foreign Investment Law (hereinafter "**FIL**"), which will come into effect on January 1, 2020. Ever since the issuance of the draft of Foreign Investment Law (Literally, Law of Investment from Foreign Countries) in 2015, this biggest update in China's foreign investment legislation has been drawing attention from all walks of life globally. Now that the FIL (Literally, Law of Investment by Foreign Investors) has finally been passed, the authors would like to share observation on the FIL, based on our experience of law practicing in the foreign investment area.

I. Evolvment of China's Foreign Investment Legislation

Lawyers who started practicing law in recent years may have enjoyed the convenience of filling out online forms to complete filings for

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establishment or changes of a foreign invested enterprise (“FIE”). They may not be aware that previously, in almost three decades every single step in the establishment, change or deregistration of FIEs required approvals by relevant department in charge. One of the authors remembers vividly that over ten years ago, he had to run to the local commerce bureau multiple times and discuss repeatedly with the clerk on details in applications documents, just for an approval to establish a wholly foreign-owned enterprise (“WFOE”). At this moment of passing the FIL, the authors would like to give readers a glimpse of the history of China’s foreign investment regulatory regime building up from scratch.

1. Era of Approval

1.1. The Foreign Investment “Trilogy”

At the very beginning of China’s Opening-up, the *Sino-Foreign Joint Venture Law* was passed on July 1, 1979. Subsequently, China passed the *Wholly Foreign-Owned Enterprise Law* and the *Sino-Foreign Cooperative Joint Venture Law* in 1986 and 1988 respectively. These three statutes were collectively deemed as the Foreign Investment Law Trilogy (the “**Law Trilogy**”), marking the beginning of China’s foreign investment regulatory regime. The Law Trilogy established the three major foreign investment channels, i.e. WFOE, Sino-foreign joint venture and Sino-foreign cooperative joint venture. With the change in China’s foreign investment environment and policies, the Law Trilogy was subsequently amended several times and will ultimately be repealed upon the FIL’s taking effect.

1.2. Catalogue of Foreign Investment Industry Guide

On June 20, 1995, the former State Planning Commission, Economy and Trade Commission and Ministry of Trade and Economic Cooperation jointly issued the *Guidance on Foreign Investment Industries Tentative Rules*, and published the first edition of the *Catalogue of Foreign Investment Industry Guide* (the “**Catalogue**”). The *Guidance on Foreign Investment Industries Tentative Rules* provided that an approval of foreign investment must be premised on the fulfilment of industrial requirements set by the Catalogue. Since 1995, China¹ updated the Catalogue seven times, with the latest edition published in 2017. The Catalogue divides foreign investment into four categories²: permitted, encouraged, restricted and prohibited. The Catalogue specifies the encouraged, restricted and prohibited industries for foreign investment, while unspecified industries are all permitted. Falling into different categories of foreign investment industries not only determines whether the authorities will approve the investment and relevant approval procedures, but also relates to whether foreign investors may receive preferential tax treatment and other incentives.

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2. Era of “Filing”

2.1. Draft Foreign Investment Law

The Draft of Foreign Investment Law (Literally, Law of Investment from Foreign Countries, draft for public comments) issued in 2015 triggered heated discussion among foreign investors, and concerns among VIE investors. The Draft intended to “rule out” the regulatory regime established by the Law Trilogy, by introducing a ground-breaking proposal to grant national treatment to foreign investors other than those listed in a so-called “foreign investment special control catalogue”. Another highlight of the Draft is that it defines “foreign control” based on the notion of “nationality + actual control”. If the “actual control” criteria were ultimately adopted, VIE investments would be substantially impacted. That is, VIE investors, who were previously barely regulated under China law, would be categorized as “foreign investors” subject either to the Catalogue or to “foreign investment special control catalogue”. Therefore, after the issuance of the Draft, it received substantial attention from foreign investors. Although the Draft did not become a law, a lot of principles and key points raised in the Draft provided guidance on subsequent foreign investment legislation.

2.2. The “Filing” Reform

The *Foreign Invested Enterprise Establishment and Change Filing Administration Tentative Rules* (“**Tentative Rules**”) took effect on October 8, 2016. The Tentative Rules abolished the approval regime that has been implemented for four decades, and provided that other than FIEs in industries subject to “special state market-entry control mechanisms”, the establishment and change of FIEs may be completed by filing with commerce authorities, as opposed to obtaining approvals. Accordingly, the 2017 Catalogue amended restricted and prohibited items and combined them into a list of “foreign investment market entry special control measures (foreign investment market entry negative list)”. The Law Trilogy and their implementation rules were amended accordingly. Since then, the foreign investment regulatory regime evolved to the “filing + negative list” mode, which significantly simplifies the establishment and change procedures of FIEs.

3. Other Notable Laws

In addition to the laws mentioned above, a full spectrum of foreign investment related laws and regulations also play an important role in China’s foreign investment regulatory regime, such as the *Foreign Investor Strategic Investment in Listed Companies Administrative Measures* (2005), the

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Foreign Investor Acquisition of Domestic Company Rules (2006), the *Notice on Establishment of Security Review Mechanism for Foreign Investor's Acquisition of Domestic Companies* (2011), the *Foreign-Invested Projects Approval and Filing Measures* (2014), and China's pilot measures experimented in its free trade zones, as well as other foreign investment laws and regulations on FIEs' foreign exchange, taxation, finance, foreign debt and business operations.

As it can be seen from the above, China's foreign investment regulatory regime has been evolving and improving since its inception. In recent years, major simplification and reforms have occurred to the previous regulatory regime, which formed the rudiments and laid a solid foundation of the FIL. The FIL is the natural result of the evolvement of China's foreign investment regulatory regime.

II. Key Points of the FIL

As a fundamental and comprehensive law on foreign investment, the FIL repeals (mainly the Law Trilogy), amends or supplements the existing foreign investment laws and regulations. Below is the authors' preliminary review of the FIL, making a comparison of its key points with the corresponding provisions under the existing laws and regulations.

1. General

1.1 Definition and Circumstances of Foreign Investment

Current Laws and Regulations	The FIL
(1) The Wholly Foreign-owned Enterprise Law Article 1 In order to expand foreign economic cooperation and technological exchange and to promote the development of the national economy, the People's Republic of China permits foreign enterprises and other economic organizations or individuals (hereinafter referred to as foreign investors) to establish wholly foreign-owned enterprises within the territory of China, and protects legitimate rights and interests of such enterprises.	Article 2 Any foreign investment within the territory of the People's Republic of China ("China") is governed by this Law. Foreign investment referred to in this law means any investment activity directly or indirectly carried out by foreign natural persons, enterprises or other organizations (hereinafter referred to as foreign investors), including the following circumstances: (1) a foreign investor establishes a foreign-invested enterprise within China, either alone or together with other

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Article 2 Wholly foreign-owned enterprises referred to in this Law are enterprises established within the territory of China in accordance with relevant laws, with their capital provided totally by a foreign investor, excluding branches established in China by foreign enterprises or other economic organizations. (2) The Sino-foreign Equity Joint Venture Law Article 1 In order to expand international economic cooperation and technological exchange, the People's Republic of China permits foreign companies, enterprises and other economic entities or individuals (hereinafter referred to as foreign joint venturers) to establish equity joint ventures together with Chinese companies, enterprises or other economic entities (hereinafter referred to as Chinese joint venturers) within the territory of the People's Republic of China after the approval by the Chinese government in accordance with the principles of equality and reciprocity. (3) The Sino-foreign Cooperative Joint Venture Law Article 1 This Law is formulated in order to expand foreign economic cooperation and technological exchange and to encourage foreign enterprises and other economic entities or individuals (hereinafter referred to as foreign cooperators) to establish Sino-foreign	investors; (2) a foreign investor acquires shares, equities, proprietary shares or any other similar rights and interests of an enterprise within China; (3) a foreign investor invests in any new project within the territory of China, either alone or together with any other investor; (4) other foreign investments prescribed by laws and regulations or State Council. Foreign-invested enterprises referred to in this Law shall mean enterprises invested wholly or partially by foreign investors in China under Chinese laws.
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cooperative joint venture enterprises (hereinafter referred to as cooperative enterprises) together with enterprises or other economic entities of the People's Republic of China (hereinafter referred to as Chinese cooperators) within the territory of the People's Republic of China in accordance with the principles of equality and reciprocity.	
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The FIL defines foreign investment, foreign investors and FIEs, and sets forth the specific types of foreign investment. The FIL abandons the decade-long distinction between WFOE, Sino-foreign joint venture and Sino-foreign cooperative joint venture, and defines them collectively as FIEs. In the future, the words "wholly foreign-owned enterprise", "Sino-foreign joint venture" and "Sino-foreign cooperative joint venture" will no longer appear in the column of "enterprise type" in the business license of FIEs. At the same time, the corporate governance of certain FIEs, which differs from those prescribed by the Company Law, will need to be adjusted according to the requirements of the Company Law.

It is worth mentioning that the enumeration of foreign investment in the FIL includes a catch-all clause of "other forms of foreign investments in accordance with laws, regulations or provisions of the State Council". This denotes that although the FIL does not explicitly list other forms of foreign investment such as the VIE investment, in the future, such "alternative" foreign investment may still be seized in the scope of "foreign investment". The application of such catch-all clause and the specific impact needs to be analyzed in conjunction with the then effective negative list of foreign investment.

2. Investment Facilitation

2.1 Fair Competition

Current Laws and Regulations	The FIL
On January 12, 2017, the State Council promulgated <i>the Notice on Several Measures for Expansion of Opening-up Policies and Active Use of Foreign Capital (Guo Fa [2017] No.5)</i> , mentioning that the creation of	Article 15 The State safeguards foreign-invested enterprises to equally participate in formulation of standards, and that the information disclosure and social supervision of formulation of standards shall

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fair competition environment shall be furthered, including: (10) Promoting fair participation of domestic and foreign-owned enterprises in China's standardization work; further deepening the reform of standardization work and improving the transparency and openness of standard revision; promoting information disclosure throughout the entire process of standard revision, and strengthening information sharing and social supervision in the process of standard revision. (Led by the National Standards Committee) (11) Deepening the reform of government procurement, adhering to the principles of openness, transparency and fair competition; treating products produced by foreign-invested enterprises in China equally according to laws and regulations; encouraging domestic and foreign-invested enterprises to equally participate in government procurement bidding. (Led by the Ministry of Finance) (13) Encouraging foreign-invested enterprises to expand financing channels. Foreign-invested enterprises can be listed on the main board, SME board and GEM board, and be listed on the New Third board in accordance with the law and regulations, and issue enterprise bonds, corporate bonds, convertible bonds and use debt financing instruments for non-financial enterprises	be reinforced. Compulsory standards formulated by the State shall equally apply to foreign-invested enterprises. Article 16 The State safeguards foreign-invested enterprises to participate in government procurement activities through fair competition in accordance with the law. Products produced and services provided by foreign-invested enterprises in China are treated equally in government procurement in accordance with the law. Article 17 Foreign-invested enterprises may raise funds through public issuance of securities such as stocks and corporate bonds and in other forms in accordance with the law.
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to get financing. (The National Development and Reform Commission, the Ministry of Commerce, the People's Bank of China, the CSRC, etc. are responsible according to the division of responsibilities)	
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Unlike previous normative documents, the FIL, in the form of law, clearly stipulates the promotion of FIEs' equal participation in formulating standards, fair participation in government procurement, and expanding financing channels of FIEs. This will undoubtedly promote the development of foreign investment by offering a better protection of the legitimate rights and interests of foreign investors and FIEs.

3. Investment Protection

3.1 Nationalization/Taking

Current Laws and Regulations	The FIL
(1) The Wholly Foreign-owned Enterprise Law Article 5 The State does not nationalize or expropriate wholly foreign-owned enterprises; under special circumstances and as social public interests require, wholly foreign-owned enterprises may be expropriated in accordance with legal procedures with appropriate compensation paid.	Article 20 The State does not expropriate foreign investment; under special circumstances, the State may expropriate foreign investment for social public interests and according to the law, and fair and reasonable compensation shall be made in a timely manner.
(2) The Sino-foreign Equity Joint Venture Law Article 2 The State does not nationalize or expropriate equity joint ventures; under special circumstances and as social public interests require, equity joint ventures may be expropriated in accordance with legal procedures with appropriate compensation paid.	

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The FIL emphasizes the established principle of “no expropriation” on foreign investment. At the same time, the FIL emphasizes that in the circumstances that foreign investment is subject to expropriation due to special conditions, such expropriation must meet the principles of "public interest needs" and "compliance with legal procedures". As to compensation standard, the FIL stipulates that foreign investment subject to expropriation should be indemnified with "fair and reasonable" compensation. This new clause enhances the protection of foreign investment, compared with the "corresponding compensation" stipulated by the existing law.

3.2 Protection of Trade Secrets

Current Laws and Regulations	The FIL
/	Article 23 Administrative organs and their personnel shall keep confidential the trade secrets of foreign-invested enterprises which they learn about in the course of performing their duties, and shall not divulge or illegally provide such trade secrets to others.

Obviously, pursuant to the principle of “rule of law in administration”, administrative organs and their personnel should keep confidential the trade secrets obtained in the course of performing their duties. Also, many similar provisions are included in the existing law on various administrative areas. Nevertheless, it is the first time that the protection of trade secrets of foreign investors and FIEs is articulated in a regulation at a level of law. The FIL shows that the Chinese government attaches great importance to the protection of trade secrets of foreign investors and FIEs. In tandem with the protection of intellectual property rights mentioned in Section 3.4 below, this provision will create a refined environment for the protection of intellectual achievements of foreign investment in China.

3.3 Remittance of Foreign Exchange

Current Laws and Regulations	The FIL
(1) The Wholly Foreign-owned Enterprise Law Article 19 Foreign investors may remit abroad legitimate profits earned from foreign-owned enterprises, other	Article 21 Foreign investors may, according to law, freely remit into or out of China in RMB or any other foreign currencies, their capital contributions, profits, capital gains, asset disposal income, intellectual property

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legitimate income and funds obtained after liquidation. Wages and other legitimate income of foreign employees of foreign-owned enterprises may be remitted abroad after payment of individual income tax in accordance with the law. (2) The Sino-foreign Equity Joint Venture Law Article 11 Net profits received by foreign joint venturers after fulfilling obligations prescribed by laws, agreements and contracts, funds received upon the termination or suspension of equity joint ventures' operations and other funds may be remitted abroad in accordance with foreign exchange control regulations and in the currency specified in equity joint venture contracts. Foreign joint venturers shall be encouraged to deposit in the Bank of China foreign exchange that it is entitled to be remitted abroad. (3) The Sino-foreign Cooperative Joint Venture Law Article 22 Profits received by foreign cooperators after fulfilling obligations prescribed by laws and cooperative joint venture contracts, other legitimate income and funds received upon the termination of cooperative joint ventures may be remitted abroad. Wages and other legitimate income of	royalties, lawfully acquired compensation or indemnity, liquidation income, etc.
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foreign employees of cooperative joint ventures may be remitted abroad after payment of individual income tax in accordance with the law.	
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The FIL specifically provides the types of assets that foreign investors can transfer abroad and expands the scope to include “capital contributions”, “capital gains”, “indemnities or compensations obtained according to the law”, and specifically enumerating “intellectual property royalties”. In particular, it emphasizes the “free remittance” of foreign exchange. With the gradual relaxation of foreign exchange control on foreign investment, the lawful and free remittance of the above foreign exchange has gradually become an integral part of foreign investment, which has already been supported by applicable administrative laws and regulations on foreign exchange. The FIL’s further clarification on this regard helps promote foreign investment, by boosting the confidence of foreign investors.

3.4 Protection of Intellectual Property Rights

Current Laws and Regulations	The FIL
(1) <i>The Contract Law</i> stipulates that technical contracts that “illegally monopolize technology or hinder technological development” are invalid (Article 239); that technology transfer contracts “shall not limit technological competition and technological development” (Article 343), and that “patent licensing contracts shall only be valid during the duration of such patent rights. Holders of patent rights shall not enter into patent licensing contracts with other parties on such patents after the expiration of patent rights or the invalidation of patent rights.” (Article 344)	Article 22 The State protects intellectual property of foreign investors and foreign-invested enterprises as well as the legitimate rights and interests of holders of intellectual property rights and relevant right holders; strictly pursues legal liability against infringement on intellectual property rights. In the process of foreign investment, terms and conditions of technology cooperation shall be determined by the investment parties upon equal negotiation, and administrative agencies and personnel may not force the transfer of any technology by administrative means.
(2) Article 10 of <i>the Interpretation of the Supreme People’s Court on Issues related</i>	

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to <i>Applicable Laws for Trial of Dispute Cases involving Technical Contracts</i> specifies six circumstances where contracts are invalid because they “illegally monopolize technology or hinder technological development”. (3) <i>The Regulations on the Administration of Import and Export of Technology</i> stipulates that the technology transferor shall compensate the assignee for tort liability (Article 24); that during the validity period of the technology import contract, the result of improving the technology belongs to the party that makes the improvements (Article 27); that the assignor shall not restrict the assignee from improving the technology provided by the assignor, or to restrict the assignee from using the improved technology (Article 29). (4) <i>The Regulations for the Implementation of the Sino-foreign Joint Venture Law</i> stipulates that technology transfer agreements entered into by joint ventures shall be submitted for approval to the examination and approval authority; and technology importers (generally equity joint ventures) shall be entitled to continue using the technologies after the expiration of the technology transfer agreements (Article 43). (5) Article 30 of <i>the Foreign Trade Law</i> stipulates that when holders of intellectual property rights “take actions such as preventing licensees from	
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querying the validity of intellectual property rights contained in licensing contracts, implementing compulsory blanket licensing, or stipulating exclusive grant-back conditions in licensing agreements”, foreign trade authority of the State Council may take necessary measures to eliminate the hazard.	
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Intellectual property protection has been a focus of foreign investors. The US government’s 301 Report on China released in 2018 condemned that Chinese laws and policies contain discriminatory provisions on technology transfer and intellectual property rights (the *Contract Law*, the *Regulations on the Administration of Import and Export of Technology*, the *Sino-foreign Joint Venture Law* and its *Implementation Regulations*, the *Foreign Trade Law*, etc.), which require or force foreign companies to transfer technology by means of joint ventures, share ratio restrictions, administrative approval procedures, etc.; and that China imposes substantial restrictions and interventions on U.S. companies’ investments and activities, including restrictions on technology licensing terms, which forces U.S. companies to license technology in terms impartially unfair to favor Chinese licensees.

The FIL emphasizes the protection of intellectual property rights of foreign investors and FIEs, imposing legal liability for intellectual property infringement, and encouragement of technical cooperation based on voluntariness and business rules, and clarifies that “the administrative organs and officials shall not use the administrative means to coerce technology transfer”. These provisions are expected to be embodied in the amendments of relevant laws. Except for the share ratio restrictions listed in the negative list, the shareholding ratio of other foreign investors in FIEs may no longer be restricted. These new provisions will help China refute accusations of compulsory technology transfer by other countries and alleviate or even eliminate disputes.

3.5 Incentives and Government Commitments

Current Laws and Regulations	The FIL
/	Article 13 The State may, as needed, establish special economic zones, or implement experimental policies and measures for foreign investment in some regions to promote foreign investment and expand

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	opening-up. Article 14 According to the needs of national economic and social development, the State may encourage and guide foreign investors to invest in specific industries, fields and regions. Foreign investors and foreign-invested enterprises may enjoy preferential treatments according to laws, administrative regulations or provisions of the State Council. Article 18 Local people's governments at or above the county level may, according to laws regulations and local rules, develop foreign investment promotion and facilitation policies and measures within the limit of its statutory authority. Article 25 Local people's governments and their internal departments shall honor policy commitments made to foreign investors and foreign-invested enterprises and contracts concluded according to the law. If any policy commitment or contract needs to be amended due to national interests or social public interests, statutory authority and procedures shall be followed, and the foreign investor or foreign-funded enterprise concerned shall be compensated for losses incurred thereby according to law. Article 26 The State establishes a complaint mechanism for foreign-invested enterprises to timely handle issues reported by foreign-invested enterprises or foreign investors, and coordinate and improve
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	relevant policies and measures. If a foreign-invested enterprise or any of its investors deems that the administrative actions of an administrative organ or personnel infringes upon its legitimate rights and interests, it may apply for coordination and resolution through the complaint mechanism for foreign-invested enterprises. If a foreign-invested enterprise or foreign investor deems that the administrative action of an administrative organ or its personnel infringes upon its legitimate rights and interests, apart from applying for coordination and resolution through the complaint mechanism for foreign-invested enterprises as prescribed in the preceding paragraph, it may also apply for administrative review or institute an administrative litigation.
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The FIL mentioned multiple times that the state and local governments can adopt preferential measures within their statutory authority to formulate foreign investment incentive policies. Moreover, in order to protect the legitimate rights and interests of foreign investors, the FIL requires local governments to strictly implement the “policy commitments made according to the law” and “all contracts concluded according to the law” in order to protect the legitimate rights and interests of foreign investors. If it is necessary to amend the commitment or contract for reasons of national and social interests, foreign investors should be compensated according to the law. The FIL also stipulates the establishment of a special FIE complaint mechanism, and clarifies the administrative litigation rights of FIEs, so that foreign investors and FIEs have ways to complain and litigate.

4. Investment Administration

The FIL stipulates the following three major investment administration mechanisms in the form of law. The implementation of these mechanisms will depend on the synchronized formulation and implementation of relevant supporting regulations.

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4.1 Market-entry: Pre-establishment national treatment + negative list

Current Laws and Regulations	The FIL
(1) On November 12, 2013, the Central Committee of the Communist Party of China promulgated <i>the Decision on Comprehensively Deepening the Reform of Some Major Issues</i> and proposed to “explore the management mode of pre-establishment national treatment and negative list for foreign investment”. (2) On June 4, 2014, the State Council issued <i>the Several Opinions on Promoting Fair Competition in the Market to Maintain Normal Market Order (Guo Fa [2014] No. 20)</i>, proposing to reform the market access system, including formulating a negative list of market access. The State Council clearly specifies by means of a list the industries, fields, and businesses where investments are prohibited or restricted, outside of which all types of market entities may equally enter (Led by the National Development and Reform Commission and the Ministry of Commerce); exploring the implementation of the management mode of pre-establishment national treatment and negative list for foreign investment. (Led by the National Development and Reform Commission and the Ministry of Commerce) (3) On October 8, 2016, the Ministry of Commerce promulgated <i>the Provisional Measures on Administration of Filing for Establishment and Change of Foreign-invested Enterprises</i>.	Article 4 The State establishes a pre-establishment national treatment and negative list regulatory regime for foreign investment. Pre-establishment national treatment referred to in the preceding paragraph means granting to foreign investors and their investments the treatment no less favorable than that granted to domestic investors and their investments in the phase of market access evaluation; the negative list referred to means special administrative measures for access of foreign investment in specific industries as stipulated by the State. The State grants national treatment to foreign investments that are not in the negative list. The negative list shall be issued or approved by the State Council. If better preferential treatment for foreign investor market access is provided under international treaties or agreements that the People's Republic of China concludes or accedes, such provisions may apply. Article 28 Foreign investors shall not invest in any industries prohibited by the negative list for foreign investment market access. Foreign investors shall meet investment requirements specified in the negative list for any industries restricted by the negative list for foreign investment market access.

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(4) On June 10, 2018, the State Council promulgated <i>the Notice on Several Measures for Active and Effective Use of Foreign Capital to Promote High-quality Economic Development</i>, clearly stating that “all regions and departments shall not specifically restrict access of foreign investment in the fields that are not in the negative list”. (5) On October 29, 2018, the General Office of the State Council issued <i>the Notice on Focusing on Enterprise Concerns and Further Promoting the Implementation of Policies for Optimizing Business Environment</i>, requiring the National Development and Reform Commission and the Ministry of Commerce to “completely clean up and cancel restrictions on access of foreign investment in the fields that are not in the negative list of foreign investment access and realizing consistency of domestic and foreign investment access” by the end of March 2019. (6) On June 28, 2018, the National Development and Reform Commission and the Ministry of Commerce issued <i>the Special Management Measures for Foreign Investment Access (Negative List) (2018 Edition)</i>. (7) On December 21, 2018, the National Development and Reform Commission and the Ministry of Commerce issued <i>the Negative List for Market Access (2018 Edition)</i>.	Industries that are not covered in the negative list for foreign investment market access can be accessed uniformly by domestic and foreign investment.
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The FIL, in the form of law, sets forth a negative list administration mechanism for foreign investment access, and clarifies that the administration on industries other than those contained in the negative list of foreign investment access will be conducted in the principle of equal treatment to domestic and foreign investment. The current version of the negative list of foreign investment access, the *Special Management Measures for Foreign Investment Access (Negative List) (2018 Edition)*, has 48 provisions, with 15 provisions reduced from the 2017 negative list. It is expected that items on the negative list will be further reduced along with further market opening-up in the future.

For the content not covered by the *Special Management Measures for Foreign Investment Access (Negative List)*, the principle of equal treatment to domestic and foreign investment will apply, which also reflects the “national treatment” of foreign investment emphasized by the FIL.

4.2 National Security Review

Current Laws and Regulations	The FIL
(1) On February 3, 2011, the General Office of the State Council issued the <i>Notice on Establishing a Security Review System for Foreign Investors Acquiring Domestic Enterprises</i> (Guo Ban Fa [2011] No. 6), which only applies to foreign investors acquiring domestic enterprises, and does not apply to green-field investment. On August 25, 2011, the Ministry of Commerce formulated the Interim Provisions on Relevant Matters Concerning the Implementation of Security Review System for Foreign Investors Acquiring Domestic Enterprises. (2) On April 8, 2015, the General Office of the State Council issued the <i>Notice on Printing and Distributing the Trial Measures for the National Security Review of Foreign Investment in the Free</i>	Article 35 The State establishes a <u>security review mechanism for foreign investment</u> to review foreign investment affecting or likely to affect national security. A decision on security review made according to the law shall be final.

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Trade Zone (Guo Ban Fa [2015] No. 24), which applies not only to foreign investment by mergers and acquisitions but also to green-field investment and ways of investment such as VIEs.	
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The FIL once again clarifies the national security review mechanism for foreign investment in the form of law, sets forth the principles of establishing a foreign investment security review mechanism, and clearly provides that security review shall be conducted on foreign investment that affects or is likely to affect national security, covering both foreign mergers and acquisition and green filed investment. However, the FIL does not specify the details of the national security review mechanism, such as the scope of the review, review body, factors to consider, the initiation, the requirements for the application documents, the procedures, the time limit for review, and the legal consequences of the violations of security review reporting obligations. All these details are expected to be stipulated by the specific provisions of future national security review regulations.

It is worth noting that the FIL stipulates that a security review decision made under the foreign investment security review mechanism is the “final decision”, which means that no administrative review or administrative litigation for appeal is permitted.

4.3 Reporting

Current Laws and Regulations	The FIL
(1) On August 7, 2014, the State Council promulgated the <i>Provisional Regulations on Public Disclosure of Enterprise Information</i> , which establishes a public disclosure system for enterprise information, and stipulates that enterprise information shall be disclosed to the public through the enterprise credit information publicity system.	Article 34 The State establishes a reporting system for foreign investment . Foreign investors or foreign-invested enterprises shall submit investment information to the commercial administration authorities through the enterprise registration system and the enterprise credit information publicity system . The contents and scope of reporting by foreign investment shall be determined under the principle of absolute necessity ; investment information that can be obtained
(2) On May 5, 2015, the Central Committee of the Communist Party of China and	

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the State Council issued <i>the Several Opinions on Building a New Open Economy System</i> (Zhong Fa [2015] No. 13), proposing to strengthen on-going and post-event supervision of foreign investment and establish information reporting system and information publicity platform for foreign investment, give full play to the platform role of the enterprise credit information publicity system, and form a full-time supervision system for foreign investment where all governmental departments share information and supervise collaboratively and the public participate in supervision.	by interdepartmental information sharing shall be exempted from reporting.
(3) On June 20, 2017, the Ministry of Commerce issued <i>the Notice on Relevant Work of Further Strengthening the Construction of Information Reporting System and Information Publicity Platform for Foreign Investment</i> (Guo Zi Han [2017] No. 318), emphasizing the full implementation of the reporting system of filing for the establishment and change of foreign-invested enterprises, continuously improving the joint reporting system for annual investment and business information of foreign-invested enterprises.	

Current foreign investment reporting in China mainly involves information on the establishment and changes of FIEs submitted by FIEs or foreign investors to competent commercial authorities, as well as annual investment and business operation information

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submitted by FIEs. The FIL provides the principles of foreign investment information reporting mechanisms in the form of law, emphasizing that the content and scope of the information reporting should be determined according to the principle of "absolute necessity and strict control". This will help reduce the reporting burden of FIEs while ensuring the necessary supervision of foreign investment. Of course, the foreign investment information reporting mechanism still needs to be formalized and refined according to the specific implementation rules in the future.

This chapter summarizes the key points of the FIL and its differences with current foreign investment laws and regulations. Moreover, it is worth mentioning that after the abolishment of the Law Trilogy, FIEs may face substantial changes resulting from the application of basic laws such as the Company law. It is advisable for FIEs to identify the difference and make adjustments accordingly in a timely manner. Below we take the example of the corporate governance of joint ventures and cooperative joint ventures under the Law Trilogy to illustrate the major differences in applying the Company Law.

Matters	Joint Venture Law	Cooperative Joint Venture Law	Company Law
Highest authority	Board of directors	Board of directors or joint management committee	Shareholders Meeting
Board composition of minimum numbers	At least 3 directors	At least 3 directors or members of the joint management committee	1 executive director
Quorum	2/3 of all the directors	2/3 of all the directors or the joint management committee	No limit
Director's term	4 years	Up to 3 years	Up to 3 years
Voting mechanism for important matters	Unanimous consent of directors attending the meeting	Unanimous consent of directors attending the meeting or the joint management committee	Passed by shareholders representing two-thirds of votes shares
Distribution of profits	In proportion to capital contributions	In accordance with cooperative joint	In proportion to actual capital

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		venture contracts	contributions, unless otherwise agreed by all the shareholders
Transfer of shares	Unanimously agreed by other shareholders	Unanimously agreed by other cooperatives	Passed by a simple majority of votes casted by shareholders, unless otherwise agreed by shareholders

III. Outlook and Suggestions

After the FIL takes effect, it will replace the Law Trilogy to become the fundamental law of foreign investment. In the future, other than foreign investment industries that require special regulation, the establishment, change, operations and deregistration of FIEs will be governed the same laws that apply to domestic companies, such as the *Company Law*, the *Contract Law* and the *General Part of Civil Law*. As a result, such laws will be enforced more ubiquitously and fairly. The “pre-establishment national treatment + negative list” regulatory regime will significantly reduce the administrative burdens of FIEs in their whole life cycle from establishment through deregistration, and will also expand the industries in which foreign investors can invest or invest with conditions. The FIL’s provisions on free remittance of foreign exchange, and protection of intellectual property rights and trade secrets set the tone for addressing practical concerns of foreign investors’ investment in China. Generally, the FIL is of epoch-making importance to improving foreign investment in China, and will create a new era for China’s foreign investment.

While acknowledging the importance of the FIL, the authors believe that some parts of the FIL require improvement either in subsequent amendment of the FIL or in separate regulation. We just name a few examples for discussion purposes below:

1. The Definition of “Foreign Investment” and “Foreign Investor”

Article 2 of the FIL provides that, foreign investment means any investment activity directly or indirectly carried out by foreign natural persons, enterprises or other organizations (hereinafter referred to as foreign investors), including the following circumstances...

Probably due to the objections to the definition of foreign investors in the Draft of Foreign Investment Law, such definition is not adopted by the FIL. Instead, foreign investors are defined as simply foreign natural persons, enterprises or other organizations. Concise as the definition is, it is tangled up with uncertainty. For example, it is unclear whether “foreign” means “foreign nationality”, “established

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according to foreign laws”, “located in foreign countries” or other explanations. By this definition, does a foreign company controlled by a Chinese company constitutes a foreign investor?

In addition, as for the definition of “foreign investment”, the FIL includes both “direct” and “indirect” investment by foreign investor. Does this mean that indirect foreign investment shall be determined according to the ultimate actual controller? If so, how should we determine “control”? No answers can be found to these problems in the FIL.

The authors suggest that the above issues be clarified when other relevant laws and regulations related to foreign investment are formulated, so as to ensure the certainty and guidance function of the FIL.

2. Local Governments’ Power to Formulate Foreign Investment Policies

Article 18 of the FIL provides that “local people’s governments at or above the county level may, according to laws and regulations and local legislations, formulate foreign investment promotion and facilitation policies and measures within their statutory authority”. The term “foreign investment promotion and facilitation policies and measures” in this article is very vague; the term “policy and measures” may include not only local legislations or local government regulations, but also “red-letterhead documents” of local governments. In addition to the controversy about the legal effect of these “red-letterhead documents”, there is also great uncertainty about the scope of “promotion and facilitation policies and measures” which these “red-letterhead documents” can touch upon. Although the FIL restricts the local governments’ power authority to “according to laws, administrative regulations and local rules”, the nature of “red-letterhead documents” may still give rise to local governments’ inappropriate de facto “law-making” power. If these policies are related to the requirements for foreign investment access, then undoubtedly they should be regulated by State laws and regulations only, while local governments shall have no such power authority. If these policies related to preferential policies for foreign investment, local governments may introduce various preferential policies on land, tax and even social welfare of employees in order to attract foreign investment. If so, such local policies will not only affect fair competition in the market, but also cause labor, environment, land, taxation and other issues.

Therefore, the authors suggest that Article 18 be deleted when the FIL is revised. If not deleted, the content and scope of “foreign investment promotion policies and measures” that can be formulated by local governments should be expressly set forth by law.

3. Five-year Transition Period

Article 42 of the FIL provides that FIEs established pursuant to the Law Trilogy may retain the current

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organizational forms within five years of the FIL's taking effect. The purpose of this article is clearly to provide a transition period to existing FIEs after the FIL takes effect. Retaining "the current organizational forms within five years", however, does not make much sense. First, the current organizational forms of FIEs are WFOEs, joint ventures and cooperative joint ventures, which will remain the same before or after the FIL takes effect. Then what does "retaining the current organizational forms within five years" exactly mean? Second, if "organizational form" refers to the "WFOE", "joint venture" or "cooperative joint venture" names, then why does it matter whether they are retained or not? If it refers to "corporate governance" of FIEs, why does FIL not articulate? Last, the FIL is silent on what FIEs that retain current organizational forms should do after the five-year period.

The authors suggest that separate laws and regulations clarify and refine this provision, so that there is a concrete and detailed guidance to FIEs on this provision.

The FIL, a fundamental and framework legislation on foreign investment, aims to unify the regulatory regimes for both domestic and foreign investment and to uniformly apply basic laws such as the Civil Law, the Company Law and the Contract Law to domestic companies and FIEs. The FIL reserves room for requisite legislation of laws and regulations on foreign investment issues that require special regulation. The authors believe that the combination of uniform application of basic laws and other special regulations on foreign investment will give China's foreign investment a more open-tolerant and fairer environment, and that China can better use foreign investment to develop, transform and upgrade its economy.

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¹ The Catalogue was initially issued by the former State Planning Commission, Economy and Trade Commission and Ministry of Trade and Economic Cooperation, and subsequently updated and issued by the National Development and Reform Commission and Ministry of Commerce.

² Due to restrictions imposed by the Catalogue, foreign investors (or Chinese investors of the so-called “round trip” investment) who wish to invest in restricted or prohibited industries (in particular the telecommunication sector) gradually adopted an investment vehicle that is different from the channels provided under the Law Trilogy – variable interest entity (VIE). The essence of VIE is for foreign investors to establish an ordinary WFOE, which is used to control domestic companies operating in the restricted or prohibited industries (in terms of foreign investors) through contractual means. Thus, the profits of the domestic company can be transferred to the WFOE and foreign investors may consolidate the domestic company’s financial statements for the purpose of offshore fundraising or listing. Although strictly speaking, VIE is a way of foreign investment and to certain extent circumvents China’s foreign investment regulation, the Chinese government has not yet regulated VIE: it has neither outlawed VIE, nor has it ratified VIE. As a result, VIE as a foreign investment vehicle has been existing till today. For various reasons, the FIL does not specifically rule on VIE, and in the foreseeable future this foreign investment vehicle will continue to exist.