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The New Foreign Investment Law of China: Implications for Variable Interest Entities

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NB: the work mentions and analyzes several legal documents: for those which are deeply analyzed, the source in Chinese and/or in English is provided; for those which are just mentioned, the reader can find the digital copy at https://www.pkulaw.com/ for the Chinese version and at http://www.lawinfochina.com/ for the English version.

前言

如今，中国是世界上仅次于美国的第二大经济体，经过几十年的经济、社会、政治发展，同时也为中国经济、社会、政治带来了巨大的增长。虽然在过去十年中，中国的国内生产总值一直保持正增长，但速度比前几年要慢；同样的，这些年外国投资者的资本流入增长也比较慢。为此，中国政府在 2013 年建立改革实验区域来解决问题，首先上海建立自由贸易区（PFTZ），随后，又有许多地区也进入改革阶段。2015 年，中国有关部门还公布了一项全新的外商投资法征求意见稿，该草案被认为是革命性的，因为它应该废除三部旧的《外商投资企业法》（《中外合资经营企业法》、《外商独资企业法》和《中外合作经营企业法》）。该法律草案根本没有得到执行，但随后的几条规定已包含在第二年（2016 年）的外商投资企业三项法律的修订中。因此，中国认为有必要进行一项革命性的改革，解决国内的问题，使外国投资者不仅将注意力转移，而且将资本转移到其他国家，这些国家可以取代中国成为亚洲大陆外国投资的主要接受国。此外，外国投资者也有许多对中国的不满之处，这些问题涉及不同的领域，如劳动力成本上升和不可预知的法律框架，而中国政府从未承诺彻底解决这些问题。这一变化的最终导火索是中美贸易战的爆发，因为这使得中国成为投资自有资本的不利国家。出于这些原因，中国制定了一部新的法律，解决了中国经济和政治体系所面临的各种问题：2018 年底，中国公布了新的外商投资法草案。

本文将重点分析中国于 2019 年 3 月 15 日在颁布的，并于 2020 年 1 月 1 日生效的新的知识产权法。这项新法律的颁布可以被视作是中国市场进一步对外开放的象征，为中国国内外企业建立一个公平竞争的环境。随着外商投资法的颁布，中国也依照从未出台的于 2015 年制定的投资法草案所述，废除了外商投资三法。这标志着中国外资监管法律体系迈出的重要一步。

本文首先简要介绍了这一新法律颁布的历史背景，然后对推动这一新法律颁布的因素进行了分析：如前所述，外国投资者对中国有许多不满之处，同时中国也间接受到其他经济日益增长的亚洲国家的威胁(特别是《东南亚国家联盟》， 简称《东盟》)，这些国家本来可以超越中国，接受外国资本的流入。其次，本文从比较的角度对外商投资进行实际分析，研究它与以往法律相比在不同领域发生的变化；这一新投资法涉及外商投资的各个方面，从招商、保护到管理，涉及法律责任的敏感区域。对比较的角度有助于凸显新外商投资法的特点，特别是在发生重大变化的情况下，例如当外商投资法在其内容中加入之前外商投资法中未涵盖的新概念。

最终，重点将转移到可变利益实体（VIE）结构上，根据外国投资法的新规定进行案例研究，以证明该新法律带来的自由化趋势。 VIE 是一家特殊的公司，其目的是规避中国有关外国投资进入敏感行业的规定，这些部门被指定为被禁止或限制的部门；事实上，中国当局一直避免公开有关 VIE 结构的文件，因为它们将被迫发布一份关于它们的明确声明，尽管它们开放了备案文件，但无条件的审批从来没有公布过。然后，重点将转移到上海明察哲钢案件上，该案件与上海明察哲刚和环生信息（这两家总部都位于上海市）成立合营企业有关，并接受了国家市场监管局的审查，是自成立以来首次发生的 VIE 相关案件。此案件非常重要，原因如下：

- 这是国家市场监管局第一次接受审查与可变利益实体有关的案件；
- VIE 从未收到中国当局的明确官方声明；
- 该案发生在今年的 4 月至 7 月之间，即外商投资法已生效时；
- 结果可以帮助最终了解中国当局对 VIE 的立场；

•它表明，自由化趋势不仅是虚拟的，而且是真实的。

实际上，新的外商投资法并没有接收 VIE 结构的依法正确性，但是本章中分析的案例研究可以帮助理解中国政府在实施外商投资法后所采用的方法。案例研究表明，中国当局为最终承认这一结构，并在可能的情况下不妨碍其运作。国家市场监管局首次发布了关于包括 VIE 在内的案件的声明，但没有任何条件：反应当然非常积极，因为这是过去 25 年来的第一次。此外，上海明察哲刚从未发布过任何宣布参与禁运或限制行业业务的文件：目前，如果不参与禁运或限制业务，可以假定 VIE 被接受，甚至即使公司结构或实际控制者对中国当局不透明。此外，重要的是要强调以下事实：国家市场监管局不允许成立 VIE，但承认其存在并允许其成立合法的合营企业。

本文将对上述议题进行分析，以评估新的外国直接投资是否对监管外国投资的法律框架带来了积极的变化，并且通过对 VIE 结构和相关案例研究的进一步分析，肯定或否定了其对这一特殊结构可能产生的积极影响。还必须强调的是，本文是在新冠肺炎大流行期间撰写的，该现象几乎阻碍了国际经济和贸易，因此外国投资流动也是如此，阅读分析的数据时应考虑到这个特殊因素，但这些数据不应被理解为错误或误导。

Introduction

Nowadays China is the second largest economy in the world following the United States, after several decades of economic, social and political development, which brought China to experience a significant growth. Nevertheless, in the last decade China's GDP has kept experiencing a positive growth, but at a slower pace than in the previous years; it was the same also for the capital inflows coming from foreign investors which experienced a slower growth in the last years[1]. For this reason, Chinese authorities tried to resolve the problem starting a reform era in 2013 with the establishment of the Pilot Free Trade Zone (PFTZ) of Shanghai, followed by many others in the years to come. In 2015 Chinese authorities published also a draft for public comment of a brand-new foreign investment law which was considered revolutionary since it should have repealed the old *Three Foreign-Invested Enterprise Laws* (Sino-Foreign Equity Joint Venture Law, Wholly Foreign-Owned Enterprise Law and Sino-Foreign Contractual Joint Venture Law, known as *Three FIE Laws*) implementing nation-wide new features experimented in the PFTZ of Shanghai. The draft law was not implemented at all, but several provisions were then included in the amendments of the Three FIE Laws of the following year, 2016[2].

Therefore, China felt the need to implement a revolutionary reform which could have resolved the problems within the country which made foreign investors shift not only their attention, but also their capitals to other countries which could substitute China as main recipient of foreign investment in the Asiatic continent. Moreover, China had been also the target of complaints by many foreign investors for several problems which touched different fields, such as the rising labor costs and the unpredictable legal framework, that Chinese authorities had never fully committed to resolve[3]. The ultimate trigger for the change was the trade war outburst with the US which made China a less

[1] Li, Xiaojun, *Regulating China's Inward FDI: Changes, Challenges, and the Future*, 2019.
[2] Bian, C., *National Security Review of Foreign Investment (The Rule of Law in China and Comparative Perspectives)*, 2020.
[3] Li, Xiaojun, *Regulating China's Inward FDI: Changes, Challenges, and the Future*, 2019.

favorable country to invest the own capitals into[4]. For these reasons China worked on a new law which could have finally resolved the different problems which had been overwhelming Chinese economic and political system: at the end of 2018 China published a draft of the new *Waishang Touzi Fa* 外商投资法, known internationally as *Foreign Investment Law* (FIL).

This thesis will focus on the analysis of the new FIL promulgated in China on March 15th, 2019 and entered into force on January 1st, 2020. This new law can be considered a symbol of China's ongoing process of liberalization of its market towards the outside, since its main objective is to establish a level-playing field for both domestic and foreign enterprises. Along with its promulgation, the Foreign Investment Law has also repealed the Three FIE Laws, as the never-published draft law of 2015 had provided, marking an important step in the Chinese legal framework in the regulation of foreign investments[5].

The thesis will first start with a brief historical introduction, which will contextualize the promulgation of this new law, and then an analysis of the factors which pushed it will be provided: as mentioned above, China had been the target for complaints moved by foreign investors, but was also indirectly threatened by the growing economical relevance of other Asiatic countries (especially of the Association of South-East Asian Nations, the ASEAN) which could have overstepped China as recipients of foreign investors' capital inflows[6].

The work will then focus on the practical analysis of the FIL from a comparative perspective, studying the changes in different fields from the previous laws; the fields touched by this new FIL regard every aspect of a foreign investment, starting from its promotion, continuing with its protection

[4] Fan, H., *Zhongmei Maoyizhan Beijing Xia de Guojia Jingji Zoushi* 中美贸易战背景下的国家经济走势, National Economy Trend under Background of Sino-US Trade Frictions, 2019.
[5] Schaub, M., Zhao, A., Dai, X., Zheng, W., *China Foreign Investment Law: How Will It Impact the Existing FIEs?*, 06/03/2019, King & Wood Mallesons, retrievable at https://www.chinalawinsight.com/2019/06/articles/foreign-investment/china-foreign-investment-law-how-will-it-impact-the-existing-fies/, last accessed September 29th, 2020. King & Wood Mallesons is a multinational law firm headquartered in Hong Kong and is based in Asia; it is the one of the largest law firms headquartered outside of the United States or European Union.
[6] ASEAN, *ASEAN Investment Report 2018: Foreign Direct Investment and the Digital Economy in ASEAN*, 2018.

and concluding with its management, touching also the sensitive field of legal liabilities[7]. The comparative perspective will help underline the new features implemented in the new FIL, especially whereas significative changes have occurred, for instance in case the FIL has introduced brand-new concepts that were missing in the old Three FIE Laws.

Eventually, the focus will shift to the Variable Interest Entity (VIE) structure, providing a case-study under the new regulation of the Foreign Investment Law, in order to demonstrate the trend of liberalization brought by this new law. The VIE is a particular company structured with the aim of circumventing Chinese regulations as regards the foreign investments into sensitive sectors, which are appointed as prohibited or restricted[8]; as a matter of fact, Chinese authorities had always avoided to open filings regarding VIE structure, for they would have forced to release a definitive statement on them, and whereas they opened filings, a clearance without conditions was never released[9].

The thesis will so analyze the topics mentioned above trying to assess whether the new FIL has brought positive changes in the legal framework regulating foreign investments, and through the further analysis of the VIE structure and the related case-study it will confirm or reject the positive impact that it could have to this particular structure. It is important to underline also that the thesis has been written and analyzes phenomena which took place during the pandemic of CoVid-19, which almost blocked international economy and commerce, and so also foreign investments flows: the data analyzed should be read taking into account this particular factor; however, such data have not to be read as wrong or misleading.

[7] Schaub, M., Zhao, A., Dai, X., Zheng, W., *China Foreign Investment Law: How Will It Impact the Existing FIEs?*, 06/03/2019, King & Wood Mallesons, retrievable at https://www.chinalawinsight.com/2019/06/articles/foreign-investment/china-foreign-investment-law-how-will-it-impact-the-existing-fies/, last accessed September 29th, 2020. King & Wood Mallesons is a multinational law firm headquartered in Hong Kong and is based in Asia; it is the one of the largest law firms headquartered outside of the United States or European Union.

[8] Santoni, G., *Foreign Capital in Chinese Telecommunication Companies: From the Variable Interest Entity Model to the Draft of the New Chinese Foreign Investment Law*, 2018.

[9] Aubin, D., *Investor risk lurks in legal structure of China IPOs -lawyers*, 06/23/2013, Reuters, retrievable at https://www.reuters.com/article/china-investments/investor-risk-lurks-in-legal-structure-of-china-ipos-lawyers-idUSL2N0EM1PD20130623, last accessed September 9th, 2020.

1. The Origins of the New Foreign Investment Law

At the first steps as a brand-new country, China was known as a close country, characterized by a protectionist economy, which had blocked any kind of foreign interference within the country. The trigger for change in the country was made along with the demise of Mao and the acquisition of power by Deng Xiaoping in 1978: during the III plenary session of XI Central Committee of CPC, Deng launched the new politics of the so-called "Reforms and Opening Up"[10]. In fact, in the period in which he was President of the PRC, Deng operated a series of changes which opened China to the outer world trying to make China a good option – if not the best – for foreign investments: in order to follow this trend, in 1979 the NPC Standing Committee promulgated the *People's Republic of China Sino-Foreign Equity Joint Venture* (known as *EJV Law*)[11], in 1986 it was the turn of the *People's Republic of China Law on Wholly Foreign-Owned Enterprises* (known as *WFOE Law*)[12], and in 1988 the work was concluded with the promulgation of the *People's Republic of China Sino-Foreign Co-operative Joint Venture Law* (known as *CJV Law*)[13]. These three laws, that are known as the *Three FIE Laws*, became the basis for whoever foreign entity wanted to approach such a big market that is the Chinese one; however, these laws, even if amended in the next years and complemented with different provisions, were still the expression of a period that nowadays is way far from the reality of the present: in 1979 Chinese GDP amount was CNY 406.26 billion, whilst in

[10] Xiao Y., Lei J., *"Zouchuqu" Zhanlüe Gaishu*, "走出去" 战略概述, Summary of the "Opening Up" Strategy, n° 2, 2011, retrievable at http://qwgzyj.gqb.gov.cn/yjytt/159/1743.shtml, last accessed October 3rd, 2020.

[11] *Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa* 中华人民共和国中外合资经营企业法, People's Republic of China Sino-Foreign Equity Joint Venture Law, 1979 (Amendment of 2016); full text in Chinese at: http://www.npc.gov.cn/zgrdw/npc/xinwen/2016-09/06/content_1997113.htm, and full text in English at: http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200301/20030100062855.shtml, last accessed August 28th, 2020.

[12] *Zhonghua Renmin Gongheguo Waizi Qiye Fa* 中华人民共和国外资企业发, People's Republic of China Wholly Foreign-Owned Enterprise Law, 1986 (Amendment of 2016); full text in Chinese retrievable at https://www.guanchangxiaoshuo.com/caishuifagui/1552720212302185.html, last accessed August 28th, 2020.

[13] *Zhonghua Renmin Gongheguo Zhongwai Hezuo Jingying Qiye Fa* 中华人民共和国中外合作经营企业法, People's Republic of China Sino-Foreign Co-operative Joint Venture Law, 1988 (Amendment of 2016); full text in Chinese at: http://www.npc.gov.cn/zgrdw/npc/xinwen/2016-09/06/content_1997112.htm, and full text in English at: http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200705/20070504715781.html, last accessed August 28th, 2020.

2019 the GDP reached the amount of CNY 99.08 trillion[14]; in order to reach such a result, Chinese Government started to find a solution to modernize the above-mentioned laws, in order to keep up the trend of high growth rate that has characterized the growth of Chinese economy so far. The new Foreign Investment Law (FIL) is an important step towards liberalization which has been expected by many parties from such a long time: the Three FIE Laws are to be considered as anachronistic since they were promulgated in a period that now is really far (more than 30 years), and, even though during the years different provisions, directives and interpretations regarding them have been published, the situation has become deeply different from the past[15]. The FIL has gone through many political discussions in the last decade, a period in which the triggers for the promulgation of a new foreign investment law have arisen in many fields and which stimulated concrete moves towards its promulgation[16].

In this chapter all of these factors will be deeply analyzed: first, the political background of China will be under the spotlight, analyzing all the changes the country has gone through after the entrance in the WTO and the different draft laws and provisions published or promulgated for the public comment. Then, the study will focus on the external factors which threatened the world economic position of China and so pushed Chinese Government to start working on the Law: the arising on the world scene of new countries with better competitive advantages than Chinese ones and the public comments of national and international institutions which blamed China to obstacle foreign enterprises to enter the domestic market. Eventually, the work will analyze the internal factors within the Chinese country, such as the augmentation of wages, which indirectly influenced the nature of the relationships between China and the foreign enterprises willing to invest into China. In

[14] People's Journal, *2019 Nian Woguo GDP Jin Baiwanyi Yuan, Zengzhang 6.1%*, 2019 年我国 GDP 近百万亿元，增长 6.1%, full text in Chinese retrievable at: http://www.gov.cn/xinwen/2020-01/18/content_5470531.htm, last accessed on August 28th, 2020.
[15] King & Wood Mallesons, *China Foreign Investment Law: How Will it Impact the Existing FIEs?*, 05/06/2019, available at https://www.kwm.com/en/cn/knowledge/insights/how-will-it-impact-the-existing-fies-20190605, last accessed September 13th, 2020.
[16] *Ibid.*

conclusion, this chapter will help to contextualize the promulgation of the Law, trying to offer an interpretative framework of its work, development and realization.

1.1 Political Discussions and Development of the Foreign Investment Law

The main trigger for the change and the promulgation of a new law regarding foreign investments can be found in 2001, year in which China finally gained the access in the WTO. Prior to the accession, the central government had fully recognised the opportunities and the potential advantages that could come from entering the international organisation, as a further integration with the global economy would have contributed to a sustained growth in international trade[17]. Indeed, the central government was required to undergo trade reforms and commitments to access into the WTO: the 15-year period of reforms included substantial tariff reductions and the dismantling of most nontariff barriers, which allowed China's integration with the global economy and generated benefits for most partner countries[18].

However, over the years, some of China's trade partners still have expressed concerns in certain specific areas (e.g., within the agricultural or financial sectors, or with regard to intellectual property), related in particular to delays in implementation, or to transparency of the legal framework and enforcement issues[19]. These are the reasons why a new foreign investment-related law was considered a necessary turning point for China to finally integrate and contribute to a global sustained economic growth.

1.1.1 Main Policies After the Entrance in the WTO

The entrance in the WTO requested China to change completely its institutional structure in order to establish projects aiming at attracting FDIs and maintaining them in the long-term: these

[17] Wang, L., *Report on Foreign Direct Investments in China*, 2004.
[18] Rumbaugh T., Blancher N., *China: International Trade and WTO Accession*, 2004.
[19] Hu, W., *China as a WTO developing member: is it a problem?,* CEPS – Policy Insights, No 2019/16, 2019.

projects were made immediately after the entrance to give the clear sign to the outside that China was now the perfect field for investments. As a matter of fact, as regarding the field of foreign direct investments, the Government managed to radically change its economic framework: first, trade-related investment measures (TRIMs) were removed, and then the service sector was opened to foreign investors[20].

Another important step to do was the establishment of a more transparent and predictable environment for foreign investments: the revision of the so called "Catalogue" in 2002 is an example of the willingness of China of creating a fairer domestic market which had written norms that every enterprise, both foreign and domestic, could have at their disposal. The Catalogue divided industries in encouraged, restricted and prohibited; a fourth unpublished subdivision embraced all of the left industries in which enterprises could invest without any particular restriction, but always abiding by the Three FIE Laws and the related provisions and regulations[21]. The revision of 2002 worked on the basis of the first version of the four Catalogues published in 1997: making a comparison between the two versions, in the revised Catalogue the major change consisted in the fact that the financial sector was classified as restricted, moving from the classification of prohibited. In the next years the Catalogue was revised many other times (2005, 2007, 2012), trying to adjust Chinese political and economic environment to the needs of foreign investors[22].

These kinds of measures which were claimed as moves towards the liberalization were often interluded by policies which moved to the opposite direction, trying to compensate the changes just issued. A clear example of such different trend in Chinese policies is the implementation of the Anti-

[20] OECD, *China: Progress and Reform Challenges*, 2003.
[21] Davies, K., *China Investment Policy: An Update*, 2013.
[22] Taken into account what has been said, even though the Catalogue was accepted as a sign of openness and liberalization for foreign investments, it was not a transparent tool, since it did not include every kind of industry and the relative treatments reserved to several specific sectors; moreover, the Catalogue itself contained the restricted and prohibited sections: these are still clear examples of the restrictions that China had to alleviate in order to enter WTO. Nevertheless, the continuous revisions of the Catalogue can be seen as the full commitment of the Government in the gradual process of liberalization of the domestic market towards the outside.

Monopoly Law, promulgated in 2007, in which the National People Congress (NPC) affirmed its concerns for the takeover of Chinese enterprises by foreign investors: it would have been implemented a system of examination in the cases of possible harness to the national security[23]; this could influence foreign investors discouraging them to enter Chinese market[24]. As regards the field of Mergers & Acquisitions (M&As), in 2003 the Government published the "Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors"[25], a set of temporary provisions which had to supervision the M&A procedures in the country, and, a few years later in 2006, China promulgated the "Regulations on Acquisition of Domestic Enterprises by Foreign Investors". This new set of Regulations can be considered as a possible obstacle for the foreign acquisitions, since a further supervision was implemented in the case of a major industry was involved in the operation, which could be blocked for reasons regarding the national security[26].

The measures undertaken after the entrance in the international organization are to be considered as very effective, since allowed China to become the main target for the foreign investments directed to developing countries; as a matter of fact, China accumulated FDI stock much more than any other developing country, reaching in 2010 the total amount of USD 579 billion[27].

1.1.2 Concrete Discussions for the Implementation of a New Law

At that time, a problem which arose suspicions among foreign investors was the case-by-case approval that every foreign company had to undergo in order to enter Chinese market: after the promulgation of new policies which followed the entrance in WTO, China was ready to implement

23 The vagueness and the lack of explanation as regards definitions were an obstacle for the possibility of entrance into the Chinese market for foreign investors, who were capable to distinguish whether their businesses were clearly in line with the principles stated in the law.

[24] Bian, C., *National Security Review of Foreign Investment (The Rule of Law in China and Comparative Perspectives)*, 2020.

[25] *Waiguo Touzizhe Binggou Jing Nei Zanxing Guiding* 外国投资者并购境内企业暂行规定, Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, 2003.

[26] OECD, *OECD Investment Policy Reviews: China 2008 – Encouraging Responsible Business Conduct*, 2008.

[27] Davies, K., *Inward FDI in China and its policy context, 2012*, 2012.

an important and revolutionary law. The election of Xi Jinping as new leader of China is to be considered as a jolting event in this phase of changings regarding policies, since he pushed the discussion towards a major liberalization in the country[28]. In the same year, Shanghai became a Pilot Free Trade Zone (PFTZ), the first within the jurisdiction of China; a PFTZ is a territory of experimental policies which could have been expanded in the future to the rest of China if successful: one of this revolutionary policies was the implementation of the "Negative List", a new Catalogue different from the national version[29]. The Shanghai trial showed good results, and as a consequence in 2015 the Government established three new PFTZs, which were the provinces of Guangdong and Fujian and the municipality of Tianjin: it is undoubtable that the Chinese technique to try new revolutionary policies in limited parts of the country with the aim to expand them in the whole national territory was successful. As a matter of fact, in 2017, the framework of the PFTZs was further expanded, establishing 7 new territories under special economic administration, increasing the total amount of 11 PFTZs in China: the new established territories were the provinces of Liaoning, Zhejiang, Hubei, Henan, Sichuan and Shanxi and the municipality of Chongqing[30].

Gaining the right momentum, in 2015 the Ministry of Commerce published a Draft Law regarding foreign investments, which was released for the public comment. At that time the situation in China was very confusing regarding the policies about foreign investments, since there were published several provisions and different regulations that had to be considered as single actions not linked one with each other; the Draft Law was finally the product which tried to collect them under a single document adding further improvements and provisions related to the matter[31].

[28] His policies were called "Supply-side Structural Reforms" (*gongjice jiegouxing gaige* 供给侧结构性改革), since he wanted to further liberalize the country starting from the basis, through the implementation of revolutionary reforms, which, in fact, aimed to change radically the structure of Chinese economic system.
[29] The Negative List (*Fumian Qingdan* 负面清单) in its first version consisted in a list of 190 between restricted and prohibited areas. The next year, in 2014, the list was improved, and the amount of restricted and prohibited areas decreased, reaching the total amount of 139 areas.
[30] Bian, C., *National Security Review of Foreign Investment (The Rule of Law in China and Comparative Perspectives)*, 2020.
[31] *Ibid.*

Among the many new provisions suggested in the Draft Law, there are a few of them that are worth to be analyzed because they predicted several features of the current FIL. One of them consisted in the repeal of the difference between a foreign invested enterprise and a domestic company, making both of them abiding without any difference to the Chinese Company Law. Moreover, in the Draft Law the policy of the Negative List was aimed to be extended at a national level, granting the national treatment to foreign investors and abolishing the practice of the case-by-case approval, substituting it with an examination which had to been undergone just by the foreign investors who were willing to invest into a sector which relied in the restricted ones of the Negative List. Eventually, the Draft Law claimed that every foreign investor had to provide a report about the information of the company at every business stage[32].

The Draft Law was welcomed as a major leap forward in the process of opening up and liberalization of Chinese market, since it finally gave order to the legislative framework which regulated foreign direct investments; nevertheless, it was still criticized to not be fair enough towards foreign investors for its existence itself – which had already differentiated domestic companies from foreign enterprises –, and because the language adopted in the draft was vague and lacked of clarity in different key points[33]. The Draft Law has never come into force and the concrete commitment to promulgate a new law on foreign investments was left behind for a few years, since the central Government did not feel the urgent necessity for a brand-new law at that time; nonetheless, Chinese Government did not stop its trend of opening up towards the outside and did not interrupt the development of new policies, which inherited several features and provisions suggested in the Draft

[32] *Ibid.*

[33] For example, the articles 13, 14 and 15 of the Draft Law created confusion about which enterprise could be defined foreign and which one domestic, since it was not given a clear explanation; whilst, in the article 18 the concept of "material control" over a company is not explained, making investors uncertain about the position of their business in China.

Law. Said that, it is not a mistake to affirm that the experience of the Draft Law has not been completely vain[34].

As a matter of fact, just after one year, at the end of 2016, the Government issued critical amendments on the Three FIE Laws; the amendments introduced several provisions that were clearly inspired – if not totally adopted – by the Draft Law. In fact, the new regulations provided the enactment of the Negative List on a national basis[35], and so the case-by-case approval was repealed; moreover, the filing system was now conducted by the MOFCO at a provincial-level and no more by the district branches of the Ministry, which were often not prepared and did not know perfectly the related provisions of the past laws and regulations: this shift of duties also restricted the time for the approval. The amendments were also a little step forward for the new law that would be promulgated less than five years later[36].

At the end of 2018, precisely in December, the Standing Committee of the NPC published a new *Draft Law of the Foreign Investment Law*, much shorter of the previous one[37]; the new Foreign Investment Law was finally promulgated on March 15th, 2019 by the NPC and came into effect on January 1st, 2020. In December 2019, the NPC published a further document, the "Implementation of the FIL", in which several aspects considered vague and not clear by the commentators were practically explained. The final version of the FIL promulgated by the NPC included 42 articles, completed by the 49 articles of the Implementation[38].

[34] Bian, C., *National Security Review of Foreign Investment (The Rule of Law in China and Comparative Perspectives)*, 2020.
[35] Even if the amendments took force in October 2016, the nationwide Negative List was implemented in June 2017.
[36] Bian, C., *National Security Review of Foreign Investment (The Rule of Law in China and Comparative Perspectives)*, 2020.
[37] The version of 2015 was formed by the total amount of 170 articles, whilst, the brand-new Draft Law was only constituted by 39 articles. Therefore, as F. Bermingham (2019) noted, such a massive decrease in the number of the articles could be explained as the low-degree of commitment involved by the Government for the implementation of a new effective regulation in the matter of foreign investments, since its publication had to be considered as a hasted result reached in order to try to avoid a trade war against the US.
[38] Wei, C., *Summary of China's New Foreign Investment Law*, 03/15/2019, National People's Congress Observer, retrievable at https://npcobserver.com/2019/03/15/summary-of-chinas-new-foreign-investment-law/, last accessed September 15th, 2020.

1.2 External Factors Pushing for the New FIL

The FIL is obviously not only the result of internal policies: it is undoubtable the importance of external factors, such as the pressure exerted from international organizations or even individual countries, whose political weight is not inconsistent at all. The need of a new regulatory regime for foreign investments has been requested for such a long time that Chinese Government could not keep deaf about it; however, since the policies implemented have not been always perfect and thorough, China has been claimed to promulgate them just in order to show to the international political framework its willingness to change, but not its actual change.

1.2.1 China in the International Political Framework: What Is the International Position about Chinese Regulatory Regime?

China has acquired recently its position in the global economic framework: after the implementation of the "Opening Up" policy at the end of the 1970s, the Government issued different policies in order to make China a perfect field for foreign investments and prepared the path for Chinese investors to outflow their capital to foreign countries; this process culminated with the above mentioned entrance into the WTO in 2001. The entrance was a further step towards the liberalization of Chinese market, since the Government implemented several changes in the economic structure of the country. Nevertheless, the country has been receiving continuously critiques from different foreign and international institutions[39].

1.2.1.1 Position of EU

China is the second-biggest trading partner of EU, just after the US, while the EU is the biggest trading partner of China: the importance of the relationship between the two powers is undeniable[40].

[39] Davies, K., *China Investment Policy: An Update*, 2013.
[40] Official website of the European Commission, *Country and Regions – China*, retrievable at https://ec.europa.eu/trade/policy/countries-and-regions/countries/china/, last accessed August 28th, 2020.

In the last two decades, the trade between China and EU has experienced a continuous and increasing growth, but it is hosted by trade and non-tariff barriers which have been cutting the possibility of a better development of the trade; China has also to bear such barriers when exporting to EU, but the barriers imposed by the Asian country are even heavier[41].

Even though the European Commission recognizes the relationship with China as crucial, it admits that the Asian country shows several issues which impede a fair environment for the development of the trade between them. The European Commission identified four main problems that China should face in order to improve the trade environment: lack of transparency, industrial policies which discriminate foreign investors and/or enterprises, strong and deep presence of the Government in the domestic market and poor enforcement in intellectual property rights[42].

Therefore, all of these unresolved issues created a situation of asymmetry in the field of foreign investment treatment, that persisted in the last two decades; the situation was already acknowledged by the former EU Trade Commissioner Peter Mandelson, who stated in 2007 during the EU-China Business Summit held in Beijing:

> *"[…] If I am honest I would have to say that there is a fair bit of frustration too. […] Frustration at the fact that European businesses lose an estimated 55 million euros a day in trade opportunities because of remaining barriers in the Chinese market. […] Frustration at Europe's exploding trade deficit with China. Frustration that Europe still sells more to the 7.5 million people who live in Switzerland than the 1.3 billion people who live in China […]"*[43].

[41] Dadush U., Domíniguez-Jiménez M., Gao T., *The State of China – European Union Economic Relations* (Working Paper), 2019.
[42] Official website of the European Commission, *Country and Regions – China*, retrievable at https://ec.europa.eu/trade/policy/countries-and-regions/countries/china/, last accessed August 28th, 2020.
[43] Mandelson, P., *Growing Trade, Shared Challenges*, EU-China Business Summit, Beijing, November 27th, 2007, retrievable at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_07_758, last accessed August 28th, 2020.

This trend of trepidation and fear for the appearance of a new actor on the global kept its pace also in the 2010s, as Chinese investments peaked in the first half of the decade. However, as analyzed in the previous paragraph, there was not a concrete change in the policies as regards the foreign investments in the domestic market at least until 2016, year in which there were issued amendments to the Three FIE Laws. The persistence of such a situation of asymmetry in the relations brought several European investors to be more skeptical towards Chinese Government and towards a possible investment in the country: even though China remained a key-field for European companies, as the *Business Confidence Survey 2014*[44] showed, European investors began to consider China less important than it was in the past. This has to be read together with the fact that in the same survey, European investors acknowledged as a main problem the partiality of the regulatory environment: even if they recognized written laws as adequate, they could not say the same for their enforcement; they also complained about the difficulty to enter into the Chinese market due to factious market barriers which undoubtedly favored domestic companies: in 2013 the European Commission counted 18 different trade protectionist measures adopted by Chinese Government against European imports[45].

As just stated, tariffs are not the only way through which China has threated European investors: non-tariff barriers have played a significant role in hindering the trade with EU, which include restrictions on government procurement, import quotas for agricultural products and trade remedies[46]. The barriers imposed from China are surely a threat for the European investments in the market, and, as showed in the above-mentioned survey, can make European investors unconfident in taking the risk of entering into a protectionist market. For this reason, in 2018 China reduced the

[44] European Chamber of Commerce in China, *European Business in China – Business Confidence Survey 2014*, 2014, retrievable at https://static.europeanchamber.com.cn/upload/documents/documents/EN_final_20140603[256].pdf, last accessed August 28th, 2020.
[45] Dadush U., Domíniguez-Jiménez M., Gao T., *The State of China – European Union Economic Relations* (Working Paper), 2019.
[46] *Ibid.*

tariffs on the imports of luxury goods and apparel products, helping several EU members, like Italy and France[47].

In 2019 the situation of disparity between EU and China did not disappeared at all, but, as stated in a paper published by the European Commission[48], the project called "Made in China 2025"[49] was identified also as a clear example of the partial attitude by the Chinese Government of preferring domestic companies, and so penalizing foreign enterprises in the sectors interested in "Made in China 2025"[50]. Consequently, the European Commission claimed China to ensure a level playing field and a better implementation of the rules; this paper was published slightly before the promulgation of the new FIL (March 12th) and the thoughts expressed have to be read as the reflection of the general state of affairs between the two countries in this period.

After the promulgation of the new FIL and its implementation, EU talked through the voice of the President of the European Commission, Ursula Von Der Leyen, who, during the EU-China Summit held in 2020, stated:

> *"Indeed, relationship between European Union and China is simultaneously one of the most strategically important and one of the most challenging that we have. […] Progress implies cooperation by both sides, implies reciprocity, and implies trust […]"*[51].

[47] *Ibid.*
[48] European Commission and HR/VP contribution to the European Council, *EU-China – A strategic outlook*, 2019, retrievable at https://ec.europa.eu/commission/sites/beta-political/files/communication-eu-china-a-strategic-outlook.pdf, last accessed August 28th, 2020.
[49] Made in China is a national strategic plan to further develop the manufacturing sector of the People's Republic of China, issued by Premier Li Keqiang and his cabinet in May 2015.
[50] European Commission and HR/VP contribution to the European Council, *EU-China – A strategic outlook*, 2019, retrievable at: https://ec.europa.eu/commission/sites/beta-political/files/communication-eu-china-a-strategic-outlook.pdf, last accessed August 28th, 2020.
[51] Official website of the European Commission, *Von der Leyen following EU-China Summit: We must make progress, one that implies reciprocity and trust*, 2020, retrievable at https://ec.europa.eu/commission/presscorner/detail/en/ac_20_1170, last accessed August 28th, 2020.

As Von Der Leyen said, even if the new FIL had short time to give its fruits, challenges for China remain and other discussions about the development of the establishment of a level-playing field and about the removal of the asymmetric trade relationship between the two countries are likely to happen.

1.2.1.2 Position of the US

For its status as global economic leader, the US have showed more than a simple concern towards the rapid growth of the Chinese economy. The US have been moving the same complaints of the EU about Chinese regulatory regime for foreign investments and about its protectionist attitude; besides, another fact to take into account is the trade war that was launched in 2018, whose impact has affected the global economic framework.

As seen in the previous paragraph, even though China had to radically liberalize its regulations in order to enter the WTO, foreign investors complained about the discriminatory policies that still persisted in the economical and administrative structure in China[52].

The two countries opened discussions for a Bilateral Investment Treaty in 2008, hardly requested by the former US and Chinese presidents George W. Bush and Hu Jintao: in the Treaty, the then-US president Bush clearly requested a fairer environment for US investments in China. Unfortunately, the negotiations were abandoned just after one year, in concomitance with the election of the new US president Barack Obama[53]; nonetheless, he tried to reopen the discussions focusing on the issue of intellectual property and trade secrets theft, but the issues treated were not deeply developed and so the relationship between the two countries began to be again mutually hostile after

[52] Lewis, J., *Section 301 Investigation: CHINA'S ACTS, POLICIES AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION*, 2020.
[53] U.S. Department of the Treasury, *US-China Comprehensive Economic Dialogue*, retrievable at https://www.treasury.gov/initiatives/Pages/china.aspx, last accessed August 28th, 2020.

the election of president Donald Trump, in 2016, who was and is still known for the deep hostility towards China and its protectionist economy[54].

During its mandate, Trump has always blamed China for not respecting a level-playing field with US enterprises in Chinese domestic market and for adopting unfair methods in the field of international trade commerce. For these reasons, in 2018 Trump launched against China a Trade War in order to force the Asian country to establish a fairer environment for FDIs in the domestic market[55].

Before the outburst of the Trade War, in 2017 James Lewis[56] stated clearly which was the position of the US towards China:

> *"The Obama-Xi agreement showed that China's behavior can still be changed through sustained engagement at senior levels, through realistic proposals for change, and with threats, implicit or otherwise, of trade penalties, but it is far more difficult to do this than in the past. […] China is much more responsive when US requests for change are accompanied by similar requests from Germany, Japan and the European Commission. No one can object to a country trying to increase its innovative capabilities or research productivity, but it is the methods that China uses that are a problem. In addition to investment in science and engineering, China aggressively pursues illicit technology transfer and intervenes to support Chinese firms against*

[54] *Ibid.*
[55] Further information on Sino-US Trade War can be found at: Leung Chong, T. T., Li, X., *Understanding the China–US trade war: causes, economic impact, and the worst-case scenario*, 2019, retrievable at https://doi.org/10.1080/20954816.2019.1595328; Li, C., He, C., Lin, C., *Economic Impacts of the Possible China–US Trade War*, 2018, retrievable at https://doi.org/10.1080/1540496X.2018.1446131; Liu, T. & Woo, W. T., *Understanding the U.S.-China Trade War*, 2018, retrievable at https://doi.org/10.1080/17538963.2018.1516256; Lukin, A., *The US–China Trade War and China's Strategic Future*, 2019, retrievable at https://doi.org/10.1080/00396338.2019.1568045; Yu, M. & Zhang, R., *Understanding the recent Sino-U.S. trade conflict*, 2019, retrievable at https://doi.org/10.1080/17538963.2019.1605678.
[56] James Andrew Lewis is a senior Vice-President and Director of the Technology Policy Program at the Center for Strategic and International Studies (CSIS) in Washington DC.

foreign competitors. Illicit acquisition of foreign technology has been promoted by the government policy since China opened its economy […]"[57].

The Trade War, which has not come to an end yet, has hurt worldwide economies, including Chinese economy: China is the one running a big trade surplus, and Beijing remains highly dependent on both U.S. aggregate demand for its exports – for which there is no substitute – and sophisticated U.S. technology, especially high-end microchips[58]. Moreover, Sino-US Trade War has influenced the behavior of current investors and also of would-be investors: the current impact of Sino-US economic and trade frictions on Chinese economy is mainly an impact onto investors' confidence, which will also lead to a wait-and-see attitude; in addition, economic and trade frictions will cause some companies with weak resistance to relocate. If the Sino-US Trade War could continue to go on, the impact on Chinese economy would impact foreign investors' trade behavior[59]. Moreover, the Trade War has favored third countries which have taken advantage of the difficult situation of Sino-US trade barriers through trade diversion into their respective economies, subtracting exports and imports from US and China[60].

1.2.1.3 Position of WTO and OECD

Together with the two world economic powers, also international institutions have shown concerns over China's slow openness to more liberalized market access rules, in particular, here it has been reported the positions of the WTO and the Organization for Economic Co-operation and Development (OECD). As just stated before, China became a member of WTO in 2001 after 15 years of negotiations in which the country went through several changes regarding policies and even laws

[57] Lewis, J., 2020.
[58] Magnus, G., *Will the Trade Conflict Confound China's Ambitions?*, 2019, retrievable at https://carnegietsinghua.org/2019/09/30/will-trade-conflict-confound-china-s-ambitions-pub-79954, last accessed August 28th, 2020.
[59] Fan, H., *Zhongmei Maoyizhan Beijing Xia de Guojia Jingji Zoushi* 中美贸易战背景下的国家经济走势, National Economy Trend under Background of Sino-US Trade Frictions, 2019.
[60] Nicita, A., *Trade and trade diversion effects of United States tariffs on China*, 2019.

to adapt to the international organization's requests and standards. As regards the OECD, the Asian country has never formally entered into the latter international organization, but has been maintaining a strong relationship with it since 1995.

Through its work on Trade in Value Added and global value chains, the OECD has recognized that China has much to gain from removing remaining restrictions on FDI, particularly in the services sector, in which a well-functioning transport, logistics, finance, communication and other business and professional services are all needed to ensure a well combined flow of goods and services along manufacturing value chains globally[61]. According to the OECD FDI Regulatory Restrictiveness Index, China has taken important steps to ease barriers on foreign investment in recent years, placing among the top FDI reformer countries. By revisioning the Catalogue for the Guidance of Foreign Investment Industries in 2015, investment conditions gradually eased in key services sectors such as distribution and rail transport. Other reforms in 2016 brought further improvements by facilitating investment screening requirements in some sectors, bringing China's FDI regime closer to international levels of openness and transparency[62]. Despite significant reforms over the last years, China still had room for further remove restrictions on foreign direct investment in order to fully use the opportunities it brings. For example, China still applied limits on foreign ownership in various services sectors listed in the Catalogue for the Guidance of Foreign Investment Industries. These included prohibitions on majority foreign ownership in domestic air and maritime transport companies, and a full prohibition on foreign investment in postal and domestic express services. Limitations on foreign ownership also applied in basic telecommunications services and in "value-added telecommunications services", which include several ICT services[63]. Although China had undertaken important reforms in 2016, most services sectors included in the Catalogue remained subject to screening, with FDI approval being conditioned

[61] The Organization for Economic Co-operation and Development (OECD), *China Policy Brief: fostering foreign direct investment in services sector,* 2017, retrievable at http://www.oecd.org/policy-briefs/china-investment-fostering-foreign-direct-investment-in-services-sectors.pdf, last accessed August 28th, 2020.
[62] *Ibid.*
[63] *Ibid.*

on proof of net economic benefits to the Chinese economy. In conclusion, it seems confident to state that also international organization are pressuring or are hoping for a greater liberalization from China[64].

1.2.2 The Growing Competitiveness of ASEAN Countries

The Association of Southeast Asian Nations (ASEAN) was established in 1967 by Indonesia, Malaysia, Philippines, Singapore and Thailand; nowadays the Member States amount to the total of ten: during the years the other countries to have adhered to the Association have been Brunei Darussalam, Viet Nam, Lao PDR, Myanmar and Cambodia. The aim of the association was and is mainly to jointly develop the economy in the area of South-East Asia: in 1992 the Association established the ASEAN Free Trade Area (AFTA), which were adhered consequently by all of the Member States which also entered into ASEAN in a second moment; the AFTA was basically aimed at trade integration, but eventually became also a pushing factor for FDI inflows from non-Member States[65]. For this reason, after the Asian economic crises (1998 -2005), ASEAN countries started to attract more FDIs both from non-Member States and Member States, mainly the latter ones, thanks also to investment liberalization policies adopted in the course of years.

In the last decade – especially from 2016 onwards – ASEAN member countries have experienced a huge growth of FDI inflows at a growth rate that gave more than a simple concern to China: flows to ASEAN rose from $123 billion in 2016 to an all-time high of $137 billion in 2017[66]. Moreover, the growth of FDIs into ASEAN countries has raised the share of global FDIs towards developing economies from 18% in 2016 to 20% in in 2017, and also it raised the share of global FDIs in East and South-East Asia from 31% in 2016 to 34% in 2017[67].

[64] *Ibid.*
[65] Plummer, M. G., & Cheong, D., *FDI effects of ASEAN integration*, 2009.
[66] ASEAN, *ASEAN Investment Report 2018: Foreign Direct Investment and the Digital Economy in ASEAN*, 2018.
[67] *Ibid.*

Data shows how the investments in 2017 were concentrated in just three Member States (Singapore, Indonesia and Viet Nam[68]), whose amount reached the 72% of the total FDIs towards ASEAN; nevertheless, ASEAN countries were all experiencing a growth of FDIs inflows into their industries: the concentration raised more than in previous years, counting an annual growth rate average of 79% per year in the three biggest recipients in the five-year period 2012-2016. The increase of FDIs was also sustained by the massive growth of M&As, which accounted by 124% ($16.7 billion in 2017): the phenomenon interested also intra-regional investments, along with foreign enterprises and ASEAN enterprises which founded a more developed net of investments in different ranges of industries in the macro-region[69]. As a matter of fact, investments were promising, since the ever-improving environment for investments, a strong economic growth, the emerging of the middle class and the advancing regional integration: many companies from the US and the EU (the 80%) were expected to corroborate their investment plans in ASEAN countries in the next five years. Another important datum to highlight is the improving commodity prices offered by countries such as Brunei Darussalam; the manufacturing sector and the services pushed also for attracting new FDI inflows in the ASEAN countries. A key industry that arose after 2015 was the digital economy: the emerging sector gave several opportunities to foreign enterprises to invest into a sector from whose network effects and scalability enterprises could take benefits[70].

The 2018 was the third year in a row which saw ASEAN FDI inflows experience a growth: FDIs raised from the $147 billion of the previous year to the $155 billion, along with the growth of the share of global FDIs amounted at 11.5% (in 2017 the share was 9.6%). The sector which experienced the major development and growth of FDIs was the manufacturing sector with the annual

[68] Singapore remains the biggest recipient of FDIs in this economic area, accounting for the 45% of total investments in ASEAN in 2017 ($62 billion).
[69] Foreign companies which decided to expand their businesses in ASEAN countries are for example the Japanese Seven-Eleven, the German Continental and even the Chinese Alibaba; as stated above, ASEAN companies too decided to invest into other ASEAN Member States, as an example it should be important to quote few of them: the Malaysian Axiata, the Singaporese RedDoorz and Keppel and the Thailandese Siam Cement.
[70] ASEAN, *ASEAN Investment Report 2018: Foreign Direct Investment and the Digital Economy in ASEAN,* 2018.

raise of $20 billion (from the $30 billion in 2017 to the $50 billion in 2018). Following the path of the previous year, the technical and the digital industries kept their pace of development thanks to start-ups and producers of relevant technologies (such as industrial robots or data analytics)[71].

It is important to underline that the trend of continuous growth was really encouraging: an important datum to put under the spot is the shift of many productions from China to ASEAN countries, since the Member States did not stop their path of renovation of policies regarding foreign investments, such as the implementation of tax incentives measures and the creation of co-investment opportunities[72].

In 2018 ASEAN countries became more than ever a key actor in political and economic global framework: the Trade War between China and US caused many foreign industries to shift their investments in the Asian South-East in order to avoid Chinese tariffs and to allocate investments in similar countries with similar features[73]. Another important problem to highlight is the rising cost of labor in China – that will be further analyzed in the next paragraph – which further pushed foreign enterprises to invest in ASEAN countries, where the cost was still low and maintained the characteristic of developing countries.

1.3 Internal Factors Pushing for the New FIL

China entered WTO as a developing country, but underwent different changes that are not typically required to a developing country, since its particular economic growth that characterized the country after the "Open Up" and "Go Global" policies: the inner change in China in the last year is undoubtable. The Asian country became the second biggest economy in the world just after US and now more than before many are asking whether China is still to be considered a developing country

[71] *Ibid.*
[72] *Ibid.*
[73] Zhou, J. & Wang, A., *To dodge trade war, Chinese exporters shift production to low-cost nations*, Reuters, 27/06/2019, retrievable at https://www.reuters.com/article/us-usa-trade-china-manufacturing/to-dodge-trade-war-chinese-exporters-shift-production-to-low-cost-nations-idUSKCN1TS01L, last accessed August 28th, 2020.

and whether it has become a developed one[74]. The definition of China of developing or developed country is not the topic of the work, but the relative issues and the changes that China underwent in the last decade could help explain the reason why China decided to promulgate the new Foreign Investment Law abruptly in 2019, just three years after the amendments to the Three FIE Laws, which, as stated before, mainly implemented the Negative List approach offering so a higher grade of liberalization to foreign companies.

The factors attracting foreign investments in a country are always under continuous study, but this work will take as a guide the research and the analysis of the economist John H. Dunning (1993)[75], in which he identified five main key factors that drive investments into a country:

- Market size. It is measured through indexes such as the GDP or the population; larger markets imply more possible opportunities for investors.
- Openness for international trade. It is measured through actual policies which liberalize the market and the trade regime, and so attracting investors.
- Top-level institutions for policy implementation. A country where a stable and transparent legal environment is present attracts more investors than another one with a chaotic set of regulations always subjected to change.
- The growth rate of GDP. A growing GDP indicates that a country's wealth is increasing and attracts foreign investors.
- Macroeconomic situation of the country. It is possible to affirm that this is a category more than a single factor which embraces a greater amount of other factors related to the costs of production, importing and exporting in a country[76].

[74] Global Times, *China's status as developing country undeniable*, Global Times, 12/11/2019, retrievable at https://www.globaltimes.cn/content/1173184.shtml#:~:text=China%20remains%20the%20largest%20developing,balance%20of%20development%2C%20among%20others., last accessed August 28th, 2020.
[75] John Harry Dunning was a British economist, head of Economics Department of University of Reading. He is widely known for his works in the field of international business, and for being the father of the "Eclectic Paradigm".
[76] Dunning J. H., *Multinational Enterprises and the Global Economy*, 1993.

Following the analysis of the factors proposed by Dunning, China's strong points were and still are its market size and its growth rate of GDP: China is identified as the biggest market in the world, with the population that amounts at 1.398 billion in 2019 which are all potential consumers, whilst, as regards the GDP, the growth rate is positive, reaching 6.1% in 2019[77].

On the contrary, China has always showed lacks as regards the grade of openness to the outside and institutions: as seen in §1.1 and §1.2, even if China launched policy programs aimed at the gradual opening to the outside and at the liberalization of its economy, foreign investors are still completely out of specific sectors; as regards Chinese legal environment, as explained before, after the entrance into WTO in 2001, China implemented many rules and provisions which were aimed at establishing a more stable and predictable environment for foreign investors, but, eventually, created a chaotic set of regulations which were hard to follow by investors. As regards Chinese macroeconomic situation, this work has already highlighted the issue of Sino-US Trade War, which caused increasing exporting and importing tariffs in China, damaging also investors' interests; however, China displayed other endemic problematics which hindered standard inflows of investments, such as the rising labor costs and land prices.

1.3.1 The Rising Labor Costs in China

One of the factors that made China the world recipient of FDIs in 2014 was the low labor cost. China has experienced in recent years the development of the economy and the emergence of a considerable middle class; moreover, Chinese Government is increasingly pushing the shift towards a consumption-based economy in order to establish a stable path for a common economic

[77] Data retrieved in the official website of the World Bank: https://databank.worldbank.org/home.aspx, last accessed August 28th, 2020.

development: as a matter of fact, in the 12th Five-Year Plan (2011–15) one of the goals expressly stated was the national economic growth[78].

The 12th Five-Year Plan managed to achieve what ensured few years before and so in 2015 China's GDP per capita eventually reached the amount of $8,067, near doubling the relative amount of GDP per capita in 2010, before the implementation of the five-year plan, which was $4,550[79]. Another datum to highlight is the increasing value of Chinese yuan: the value of the yuan increased during the years, and this made Chinese labor more expensive than in other countries[80].

In 2013, average monthly wages in China amounted to about US$ 600[81]. Even though such a situation could be read as a positive signal for Chinese workers, it actually had the effect of shifting the traditionally low-cost manufacturers to other countries whose wages were still low[82]. For this reason, the raise of wages can be considered as an important factor which could push foreign enterprises to allocate their plants in different countries, always researching the best conditions and the lowest costs to face; so, this could actually change the current flows of inwards FDIs favoring other countries over China.

[78] Wang P., Kinnucan H., Duffy P., *The effects of rising labour costs on global supply chains: the case of China's cotton yarn industry*, Applied Economics, 51:33, 3608-3623, https://doi.org/10.1080/00036846.2019.1584372.
[79] The World Bank, *GDP per Capita – China*, https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=CN&view=chart, last accessed August 28th, 2020.
[80] Ceglowski, J., Golub S. S., *Does China Still Have a Labor Cost Advantage*?, 2012.
[81] According to the International Labor Organization, Chinese wages at that time were about three times higher than wages in Indonesia or Viet Nam.
[82] There are different examples of big manufacturing brands that decided to relocate their plants from China into different countries in the Asian region: one of them is Microsoft which announced its shift of plants from China towards Viet Nam in 2014, laying off about 18,000 employees; another colossus of manufacturing which had already planned to move towards Viet Nam was the South-Korean Samsung. The explanation of such trend was given by Nguyen Van Toan, Vice President of Viet Nam Association of Foreign Investment Enterprise (VAFIE), who declared: "*[…] the investment climate in the country is getting better and Vietnam is becoming the preferred destination of foreign investors, especially as many international companies are gradually withdrawing from China because of macroeconomic instability and high labor costs […]*" (Ministry of Planning and Investment, Foreign Investment Agency (FIA) Vietnam, *Silicon Valley dream in Vietnam is coming true*, last access August 28th, 2020, retrievable at https://dautunuocngoai.gov.vn/detail/1207/Silicon-Valley-dream-in-Vietnam-is-coming-true, last accessed August 28th 2020, and Dignan L., *Microsoft moves Nokia manufacturing from China to Vietnam*, ZDNet, retrievable at https://www.zdnet.com/article/microsoft-moves-nokia-manufacturing-from-china-to-vietnam/, last accessed August 28th 2020).

1.3.2 The Legal Environment

As shown previously, the legal framework regulating foreign investments in China is characterized by different laws, provisions and implementing rules which created a strong sentiment of uncertainty among foreign investors[83]: the Three FIE Laws are the example of such complex environment. Moreover, Chinese legal framework is also criticized for the lack of transparency in the enactment of laws and procedures and the low-degree intellectual property rights protection, which made different countries and international organizations complain about such an issue in China. The amount of laws and provisions regulating this field is even complicated by the implementation of regulations promulgated at a local level, which impact just the area of the local government. Together with the lack of transparency, predictability and stability of the country's legal environment, the time-consuming processes derived from a cumbersome bureaucracy also may drive away potential foreigners. As the legal environment plays an important role to improve the investment environment in China, allowing more potential foreign investors to invest in the country, the central government have been pushed to simplify processes thus gaining the international trust and further promoting foreign investments in China[84].

1.3.3 Other Factors Affecting Inflows of Foreign Investments in China

Among the other factors that affect foreign investment decision it is worth-mentioning in China's case other minor but still relevant elements, such as low industrial land price, but also the level of transparency and corruption in the country and, lately, the rising implementation of

[83] The presence of three different laws instead of just one is a clear example of the complex legal framework in China; besides, the Three FIE Laws were completed by other provisions and regulations which had the effect of making just more difficult the regulation about foreign investments: a clear example is the *Negative List*.

[84] HG.org Legal Resources, *China's Legal Environment for Foreign-Owned Enterprises*, retrievable at https://www.hg.org/legal-articles/china-s-legal-environment-for-foreign-owned-enterprises-6263, last accessed August 28th, 2020.

environmental regulations, which are all significant, historically and currently, in China's inwards foreign investments context.

The land price is another factor that has been driving FDIs in China as demonstrated in different studies [85]: land is considered a significant tool, especially for local governments, to attract foreign investments and, consequently, improve economic growth locally in China. Considering that, in terms of land leasing price for industrial use, higher is the land price, more discouraged will be the investors to enter the country[86]. In China, according to latest news, average industrial land price in 2016 has increased of 2,8% from the previous year[87]. This together with the higher competitiveness of other countries' land prices (see Vietnam and other south-east countries) has cooperated in redirecting FDIs in other countries.

Another factor that has been creating obstacles for FDIs to enter China has been the persistence of non-transparent actions by corrupt officials: the central government has historically fought rampant corruption, striving for eradicating it throughout its entire system. These efforts have culminated most recently in the launch of the Anti-Corruption Campaign in 2012 under president Xi Jinping, through which more than one million of individuals, most of them government officials, were prosecuted. This has potentially created both dangerous political and economic implications for Chinese policy makers, since indeed corruption hindered the country's economic growth and development, also, in some cases, by obstructing foreign investors to enter mainland China, who are now preferring to invest in the free trade zones, relatively less corrupt[88]. However, it has also been observed that the anti-corruption campaign has cooperated in affecting the country's economic

[85] He C., Huang Z., *Land use change and economic growth in urban China: A structural equation analysis*, 2014; Tao R., Su F., Liu M., *Land leasing and local public finance in China's regional development: Evidence from prefecture-level cities*, 2010.

[86] Huang Z., Du X., *Strategic interaction in local governments' industrial land supply: Evidence from China*, Urban Studies, 54 (6): 1328-1346, 2016, https://doi.org/10.1177/0042098016664691.

[87] Xinhua, *China land prices increase in 2016*, Xinhua, 13/02/2017, retrievable at http://www.xinhuanet.com/english/2017-02/13/c_136053301.htm, last accessed August 28th, 2020.

[88] Jennings, R., *Bad for Business? China's Corruption Isn't getting any better despite Government Crackdowns*, Forbes, 15/03/2018, retrievable at https://www.forbes.com/sites/ralphjennings/2018/03/15/corruption-in-china-gets-stuck-half-way-between-the-worlds-best-and-worst/#16ea209973d1, last accessed August 28th, 2020.

situation as it has eventually resulted in the outflow of capitals from wealthy Chinese, which ultimately concerns the central government about weaker growth are also making the Chinese currency less attractive [89].

Among the different practices that foreign investors undergo, foreign investment verification and approval process have been some of the most criticized areas for lacking transparency and accountability. While China's prosperous economy and its huge consumer market attracted over the years more and more foreign investors, the latter have encountered obstacles in sealing deals, in part because of government intervention [90]. For example, the process of establishing FIEs, M&A, shareholding investment must be approved by the MOFCOM, particularly reviewed by Department of Foreign Investment and Department of Treaty and Law. This process also triggered other compliance requirement involved with China's State Administration of Foreign Exchange (SAFE), China Securities Regulatory Commission (CSRC), National Development, and Reform Commission (NDRC), State-owned Assets Supervision and Administration Commission (SASAC)[91]. This time-consuming process would create rent-seeking behavior, such as a bribe.

The last consideration related to obstacles in foreign investments decisions must be done on the implementation of environmental regulations: governments across the world, concerned about further deterioration of the environment, are imposing more stringent regulations on pollution with the intention of guiding firms to develop greener technologies and produce more environmentally responsible goods. However, in some cases, firms may respond by relocating their production to places with less stringent environmental regulations, a phenomenon known as the pollution haven hypothesis. This not only could affect the efficiency of environmental policies but could also worsen

[89] Sender, H., *China's anti-corruption push may drive wealthy overseas*, Financial Times, 11/11/2014, retrievable at https://www.ft.com/content/cb9308f2- 6983-11e4-8f4f-00144feabdc0, last accessed August 28th, 2020.
[90] Chen, G., *China probe may curb foreign deals: sources*, Reuters, 31/10/2008, retrievable at https://www.reuters.com/article/us-china-foreigninvestment-approvals-idUSTRE49U3I120081031, last accessed August 28th, 2020.
[91] U.S. Chamber of Commerce, *China's Approval for Inbound Foreign Direct Investment: Impact on Market Access, National Treatment and Transparency*, 2012.

the overall scenario. For example, developing countries may manipulate their environmental policies to attract more foreign investments, which could lead to an increase in overall pollution levels.

Researches have shown that foreign multinationals from countries with good environmental protection are generally insensitive to the change in environmental regulation in China, since their investments possibly exploit other benefits of the country, instead of the lax environmental regulation. However, environmental regulation seemed to be an important factor determining investment in China by foreign multinationals from countries that joined international treaties on environmental protection later than China. The findings may help relieve the concern that toughening environmental regulations in developed countries would cause a shift of dirty manufacturing production to countries with laxer environmental regulations, which then may not tackle the environmental deterioration and would have significant distributional implications on employment and industry structures[92].

1.4 Concluding Remarks

In order to conclude the chapter and give an analytical explanation, after having conducted a research of the factors which pushed the implementation of a new law, it is impossible to affirm that the new Foreign Investment Law was promulgated just because a particular event, while, it is the result of different forces co-acting in China and outside, which indirectly forced National People's Congress to work on a new law about foreign investments. Taking into account what has just been said, it has to be underlined that the major force which pushed in that particular moment the implementation of the Law was the outburst of the Sino-US Trade War: the first tariffs were imposed in March and April 2018 and the first draft of the new Law was published in December for public comment, followed by other two drafts in January and March 2019, and finally by the promulgation of the new Foreign Investment Law on March 15th. Hence, there are two key points that deserve to

[92] Cai X., Lu Y., Wu M., Yu L., *Does environmental regulation drive away inbound foreign direct investment? Evidence from a quasi-natural experiment in China*, 2016.

be underlined: the first one is the quick response by Chinese Government to the fears arisen in the contest of Trade War, starting the discussions for a law regarding inwards FDIs, right just three years after the amendments of the Three FIE Laws; the second one is the time passed between the first draft and the promulgation of the Law, less than 3 months: a very short period of time considering the slower pace normally held by China for previous laws[93].

This fact can be read as an immediate reaction of China to the US complains, trying to mitigate the relations between the two countries and to conclude as soon as possible the trade war; however, China knew that a new regulation on foreign investments was needed: as showed previously in §1.1, China opened the discussions for a new law in 2015 with the publication of the Draft Law for Public Comment, which was used as a basis for the amendments on the Three FIE Laws in 2016. So China was aware that its regulatory framework needed a change because the situation in China too was changing and the Three FIE Laws became difficult to put into force: when the three laws were promulgated, the Asian country was the favorite destination for foreign investments and had no rivals; for this reason, China adopted a regulatory framework which discriminated foreign investors and favored domestic enterprises.

The changes were slow, and this convinced investors to look to other possibilities in the same area but not in China anymore: for this reason, ASEAN has been receiving FDIs inflows with more consistency than in China. The attractiveness of this new agent in the area could scare China for the possibility of driving investors into ASEAN itself, subtracting them to China that has been considered traditionally the first Asian country for FDI inflows. It is also true that China is still the first country in Asia for FDI inflows, but the growing amount of foreign investments directed to the Association could sound as an alert to China. The attractiveness of ASEAN countries touched China, too: as afore

[93] Taking as an example the process of formulation and promulgation of the Anti-Monopoly Law, its formulation was listed in the legislative plan of the 8th Session of the NPC Standing Committee in 1994, but it was promulgated only in 2007, after 13 years of discussions in which different drafts were outlined.

mentioned, many colossuses moved their production in South-East Asia, and one of those is Alibaba, one of the biggest Chinese companies.

During the time, the country adopted more and more measures in order to adapt its regulatory framework to the arising requests by other countries; besides, problems arose also from inside, threatening the *status quo* reached with many efforts in a few years: the rising labor cost is one of the main issues that discouraged investors to keep their flows going into the Asian country, but it is not the only one. Another issue which hindered foreign investments to reach China was the rising cost of real estate, making investors escape from the country which started to be seen as an expensive destination as a developing country; the regulatory framework itself was an obstacle for the investments: the regulatory system in China was seen as unpredictable, unfair, complicated and untransparent, the amount of provisions and measures to follow is huge and they are not collected in a single piece of work that can be consulted. Moreover, as afore said, the Three FIE Laws were an expression of a different China, which had just started the process of opening to the outside in the Eighties: the amendments of 2016 could have been a perfect tool in order to renovate the old measures used to deal with foreign investments. However, the trade war arisen with the US made clear that the amendments were not enough, and this worsened the already compromised situation; China needed a new set of rules – or even better, a unique law – which could really encounter the requests of foreign investors, gaining again their trust.

Eventually, the new Foreign Investment Law was promulgated and completed by its *Implementing Regulations* released in the December of the same year (2019). However, the Law was not welcomed as it was expected by Chinese authorities: as a matter of fact, the Law is seen as a response to the requests moved by Trump in order to avoid an escalation of the trade war[94], so its

[94] Bermingham F., Zheng W., *China is rushing through overseas investment reform at unprecedented spees "under pressure from US",* South China Morning Post, 29/01/2019, retrievable at https://www.scmp.com/economy/china-economy/article/2184138/china-rushing-through-overseas-investment-reform-unprecedented, last accessed August 28th, 2020.

value as move towards the liberalization of the system is not clearly accepted. Another factor to take into account is the continuous request for a change at an international level: as already shown in §1.2.1.1, Ursula Von Der Leyen kept claiming trust and reciprocity from China towards EU countries.

The Law encountered a major and objective difficulty since its enforcement (January 1st, 2020), that is the outburst of Covid-19 pandemic, which obviously blocked the standard flow of economy worldwide and did not let the new Law work at its best. Taken that into account, it is not a mistake to affirm that the Law can potentially be a tool for the liberalization, but it needs the commitment of Chinese Government to be the leap forward descripted by the national authorities.

2. Analysis of the New Foreign Investment Law: a Comparative Perspective

In the first chapter, it was analyzed the historic framework of regulatory policies which culminated with the promulgation of the Foreign Investment Law, and also the factors – external and internal – which pushed its promulgation. In the second chapter, the work will focus on the analysis of the Law, explaining its new provisions and trying to analyze whether it offers improvements; to do so, the work will consider in the analysis also the previous laws, in order to look the new FIL under a comparative perspective with the past, trying to offer a complete framework of the situation of the foreign investments and of the foreign investors in China from the promulgation of the Law onwards.

The Foreign Investment Law was divided into 6 main parts: General Provisions, Investment Promotion, Investment Protection, Investment Management, Legal Liability and Supplementary Provisions; as afore mentioned, the total amount of articles is 42. The FIL came into effect on January 1st, 2020. It has now received widespread attention around the world because demonstrates that the Chinese government is addressing the concerns of multinational companies, such as: forced technology transfer, level playing field for foreign-invested enterprises, intellectual property protection and the right to participate in public procurement projects for foreign investors.

The new features introduced in the FIL are not numerous, but revolutionary: they imply plenty of changes in the management of foreign-invested enterprises, the protection of intellectual property rights and the access to the market. In this paragraph, the analysis will proceed focusing on the main articles of the FIL trying to show what has really changed making a comparison with the previous laws and provisions and explaining what practically could happen thanks to the new features introduced.

The FIL itself is not complete and does not give practical regulations in many fields treated: as a matter of fact, the FIL was later completed with its Implementing Regulations, a set of clarification about different matters which were not widely explained in the Law. This second document is important as well, since it can be considered as a deep explanatory document of the FIL. For this reason, the analysis will take into consideration the *Implementing Regulations*[95] as well, in order to offer a deeper study of the Law and of the relative new provisions.

2.1 Repeal of the Three FIE Laws and General Provisions

Starting with the analysis, the first important provision to focus on is surely the last one, which concludes the Law, but allows the international critique understand the magnitude and the importance of this legislative maneuver: in the art. 42, the Law affirms the repeal of the Three FIE Laws and their thorough replacement with the FIL itself along with the other correlated laws regulating the management of enterprises in China:

> *"[…] The Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures, the Law of the People's Republic of China on Wholly Foreign-owned Enterprises, and the Law of the People's Republic on Sino-Foreign Contractual Joint Ventures shall be repealed simultaneously […]"*[96]

As stated above, the Three FIE Laws were promulgated in the early stage of China's reform and opening up, laying a solid foundation for attracting foreign investments. Despite outstanding

[95] *Zhonghua Renmin Gongheguo Waishang Touzi Fa Shishi Tiaoli* 中华人民共和国外商投资法实施条例, Implementing Regulations of the Foreign Investment Law of the People's Republic of China (hereinafter referred to as "Implementing Regulations"), 2019, retrievable at: http://www.npc.gov.cn/npc/c30834/202001/e72e9a2fdb6d45eeab2c8893d99a0ed6.shtml, last accessed August 28th, 2020.

[96] Foreign Investment Law, Art. 42.

contributions, the three methods of foreign investment have gradually lagged behind the dynamic market reality, making it difficult to cope with new challenges in the field of foreign investment[97].

Besides, another feature contained in the Three FIE Laws consisted in the definition of foreign investment as just those which were foreign direct investments in China; after the implementation of the FIL, it is clarified in the art. 2 that the definition of "foreign investment" (*waishang touzi* 外商投资) includes four types of direct or indirect new establishments in China, acquisition of shares and similar rights, investment in new projects, and other forms of investment. As a result, foreign investment forms such as M&As and investments in new projects, as well as indirect investment situations, are all included in the management scope of the FIL.

> *"[…] The term "foreign investment" as used in this Law refers to the activities related to the investments directly or indirectly issued within the Chinese territory by any foreign natural person, any foreign enterprise or any other foreign organization […], including the following circumstances:*
>
> *a. any foreign investor either alone or jointly with any other investor establishes a foreign-invested enterprise within the Chinese territory;*
>
> *b. any foreign investor obtains stocks, equity shares, property shares or other similar rights of an enterprise within the Chinese territory;*
>
> *c. any foreign investor either alone or jointly with any other investor invest in any brand-new project within the Chinese territory;*
>
> *d. any investment of other form prescribed by the law, administrative regulations or the State Council.*

[97] For example, the Three FIE Laws mainly focused on the field of foreign direct investment, without mentioning other forms of investment such as corporate M&As.

The term "foreign-invested enterprise" as used in this Law refers to any enterprise established within the Chinese territory and registered in accordance to the Chinese law whose investments are totally or partially issued by a foreign investor."[98]

The article is obviously really important, and it is not a case that is the second one, just after the first one in which the NPC underlines its commitment in the process of opening up of the country and the enforcement of the Law in line with the Constitution[99]. The Government for the first time clearly defines in a single document – even in a single article – what a foreign investment is, embracing every kind of investment, direct and indirect ones, under the range of application of a single law.

Moving the attention to the Chinese party, in line with the Sino-Foreign Joint Ventures Law, it had to be an enterprise or another economic organization, without including the possibility of considering Chinese natural persons as legitimate parties in a joint venture: in Sino-foreign joint ventures, the Chinese subject could not be a Chinese natural person . The situation where the Chinese party is a Chinese natural person only exists when an existing domestic enterprise is acquired by a foreign party's equity, and the original Chinese natural person – who was a shareholder – still retains the equity of the domestic enterprise[100]. The FIL itself does not clarify the precise entity of the Chinese party in joint ventures, but it is clearly defined in the Implementing Regulations, art. 3:

"The scope of "other investors" mentioned in the Art. 2 […] of the FIL includes natural persons in China."[101]

According to the art. 2 of the FIL, the definition of foreign investment includes the establishment of foreign-invested enterprises or new projects jointly by foreign investors and "other

[98] Foreign Investment Law, Art. 2.
[99] Foreign Investment Law, Art. 1.
[100] EJV Law, Art. 1.
[101] Implementing Regulations, Art. 3.

investors" in China: as it has just been shown above, in the Implementing Regulations, the definition of "other investors" clears any doubt, underlining the possibility of the establishment of a foreign-invested enterprise by a Chinese natural person (*ziranren* 自然人). This liberalization policy will help to mobilize the activity of the domestic market in China creating more possibilities for Chinese investors who would like to establish a joint venture with foreign investors without the necessary affiliation to any company, enterprise or any other economic entity[102].

2.2 Negative List, Security Review System and Information Reporting System

Other relevant changes introduced in the FIL regard the national treatment granted to foreign investors in the security review system. The FIL adopts the method of the *Negative List*[103] in order to classify the different industries into which foreign investors could drive their investments, confirming it after the amendments of the Three FIE Laws of 2016.

> *"The country implements the management systems of the Pre-Admission National Treatment and of the Negative List […].*
> *Excluding the investments into sectors which rely in the Negative List, the State shall offer the National Treatment. […]"*[104]

Besides, according to the article just quoted, outside the scope of the Negative List, foreign investors equally enjoy the same national treatment as domestic investors, without any kind of

[102] Yao, L. & Pan, Y., *Cong Waizi San Fa Dao "Waishang Touzi Fa", Waizi Xin Fa Shengxiao Hou de Bianhua Ji Guanzhudian* 从外资三法到《外商投资法》，外资新法生效后的变化及关注点, From the Three FIE Laws to the "Foreign Investment Law", Changes and Key Points after the Implementation of the New Law on Foreign Investments, 02/14/2020, AllBright Law Offices, retrievable at https://www.allbrightlaw.com/CN/10475/7d354811747f9b16.aspx, last accessed September 29th, 2020. AllBright Law Offices is a law firm based in Shanghai and of the largest law firms in Asia.
[103] *Waishang Touzi Zhunru Tebie Guanli Cuoshi* 外商投资准入特别管理措施, Special Administrative Measures of Access for Foreign Investments (simply known as "Negative List"); the last version was revised on 06/23/2020, retrievable at http://www.mofcom.gov.cn/article/ae/ai/202006/20200602977244.shtml, last accessed August 28th, 2020.
[104] Foreign Investment Law, Art. 4.

discrimination because of their status of non-Chinese investors[105]. The FIL does not specify which version of the Negative List should be adopted; therefore, the FIL will adopt the versions that will be continuously revised, avoiding the risk of publishing a separated document every time the Negative List would be modified: the process is clearly made simpler and less cumbersome[106]. As stated in the first chapter, the Negative List is a political tool through which China can still keep under control sensitive sectors, but it is also a clear barrier which still differentiates a domestic investor from a foreign one; the FIL contains other articles regarding the Negative List which emphasize its function and warn foreign investors of the existence of legal consequences in the case of breach of the limits posed by the list. The art. 28 so emphasizes the role of the Negative List:

> *"Foreign investors must not invest in the fields prohibited by the regulation of the Negative List.*
>
> *In the case of limited investments in fields under the regulation of the Negative List, foreign investors' investments should be in line with the conditions of the regulation of the Negative List.*
>
> *The management of domestic and foreign investments beyond the Negative List shall be implemented under the principle of equality."*[107]

As stated above, the FIL repeats and makes clearer to foreign investors the regulation of the Negative List, without leaving room for any interpretation; as regards the legal liabilities for the

[105] See *Note 102*.

[106] The Negative List has been nationally revised once a year so far, since the Government has shown its commitment in a progressive opening up to the outside. The Government every year has been publishing two versions of the Negative List, one for national implementation and another one for PFTZs; however, since the analysis is focusing on the FIL, the Negative List hereinafter considered would be the version for national implementation. After the national adoption of the Negative List method in 2017 instead of the Catalogue, the list has been revised three times (2018, 2019, 2020). The version of 2019 followed the promulgation of the FIL, but after its enforcement the Government adopted the newest version published in 2020, making the total amount of versions published up to four within four years. Every time the Negative List was revised, the range of sectors into which foreign investments were restricted or even prohibited became narrower, so shortening the Negative List: the 2017 version restricted or prohibited foreign investments into 63 different sectors, in 2018 the list was shortened to 48 industries, the revision of 2019 brought the total amount down to 40 and, eventually, the current version of July 2020 shortened again the list down to 33 items, almost halving the amount of the first national version of 2017.

[107] Foreign Investment Law, Art. 28.

foreign investors that violate the list, the art. 36 reports that in any case of violation, regarding both restricted and prohibited sectors, the foreign investors will bear legal liabilities[108]. However, the Law itself does not specify how an investigation of alleged cases of violation of the Negative List should be conducted. The breach of the Negative List and its consequences are also treated in the art. 34 of the Implementing Regulations[109], underlining once more the relevance of the Negative List, discouraging foreign investors to violate it[110].

As regards the national security review of foreign investments, it is first important to briefly outline historically the topic. The national security review system for foreign investments is not mentioned at all in the Three FIE Laws, and is strictly linked to the *Anti-Monopoly Law*[111]: as a matter of fact, it was first formally mentioned in a law in the Anti-Monopoly Law itself, promulgated in 2007, which reported the application of a review for M&As with domestic enterprises based on national security[112].

Previously, China incrementally established the foundation of a review system for the foreign investments: the Government started to pay attention on such a system after the entrance in the WTO, especially in the case of M&As[113]; as a consequence, in 2003 China promulgated the *Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (known as "Takeover Provisions of 2003") which set a case-by-case approval system, and in 2006 promulgated

[108] Foreign Investment Law, Art. 36.
[109] Implementing Regulations, Art. 34: *"[…] if it is discovered that a foreign investor is investing into a prohibited sector on the negative list, or if the investment activity of a foreign investor is in violation of the special administrative measures required for investing in a restricted sector on the negative list, the provisions provided in article 36 of the Foreign Investment Law shall be applied."*.
[110] Nevertheless, China has never publicly dealt with the issue regarding the presence of semi-hidden structures which avoid the Negative List and let foreign investors freely invest into those sectors normally restricted or prohibited; such structures, the Variable Interest Entities, are a serious obstacle for the credibility of the Negative List and even of the FIL. The topic will be better discussed later.
[111] *Zhonghua Renmin Gongheguo Fan Longduan Fa* 中华人民共和国反垄断法, Anti-Monopoly Law of the People's Republic of China, 2007; full text in Chinese at http://www.gov.cn/flfg/2007-08/30/content_732591.htm, and full text in English at http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml.
[112] Anti-Monopoly Law (2007), Art. 31: "*Where a foreign investor participates in the concentration of undertakings by merging and acquiring a domestic enterprise or by any other means, which involves national security, the matter shall be subject to review on national security […]*".
[113] Bian, C., 2020.

the *Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (the "Takeover Provisions of 2006") which granted the authority to the MOFCOM of terminating or divesting a transaction which hindered the national security. After the aforementioned appearance in the Anti-Monopoly Law, the next important step was made in 2009, with the amendment of the *Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors*[114], which set definitely a stable system which would have been implemented in 2011, along with the promulgation of the *Notice of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (the "Notice 2011")[115] and of the *Provisions of the Ministry of Commerce on the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (the "Provisions 2011")[116], which clarified the formal procedure through which the national security review should have been conducted[117].

The FIL is the first law regarding foreign investments that treats with the national review system, precisely in the art. 35, which is however the only one article related to it; therefore, the article does not describe how the national review should be conducted, but just mentions its application.

[114] *Guanyu Waiguo Touzizhe Binggou Jing Nei Qiye de Guiding* 关于外国投资者并购境内企业的规定 （2009 修订）, Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (Amendment of 2009), 2009, retrievable at http://www.mofcom.gov.cn/article/b/c/200907/20090706416939.shtml, last accessed August 28th, 2020.

[115] *Guowuyuan Bangongting Guanyu Jianli Waiguo Touzizhe Binggou Jing Nei Qiye Anquan Shencha Zhidu de Tongzhi* 国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知, Notice of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, 2011, retrievable at http://www.mofcom.gov.cn/article/b/f/201102/20110207403117.shtml, last accessed August 28th, 2020.

[116] *Shangwubu Shishi Waiguo Touzizhe Binggou Jing Nei Qiye Anquan Shencha Zhidu de Guiding* 商务部实施外国投资者并购境内企业安全审查制度的规定, Provisions of the Ministry of Commerce on the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, 2011, retrievable at http://www.mofcom.gov.cn/article/b/c/201108/20110807713530.shtml, last accessed August 28th, 2020.

[117] Further information on the matter can be found at Bian, C., *National Security Review of Foreign Investment (The Rule of Law in China and Comparative Perspectives)*, 2020; Li, Xingxing, *National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and U.S. Laws and Practices*, 2016.

"*The State shall establish a security review system for the foreign investments, conducting the review of the foreign investments that influence or could influence the national security.*

The decision issued by the security review should be considered as final in accordance to the law."[118]

As it can be read, the article mentions the application of the national review system based on the possible harm to national security that particular cases of foreign investments can bring to the country. It is worthy to note also the second paragraph of the article, in which the Law states the impossibility of seeking any remedy from the final decision of the security review, making it irreversible. The Implementing Regulations as well do not clarify and explain better the art. 35 of the FIL and the security review system at large, since the art. 40 of the Implementing Regulations only repeats what has been already stated in art. 35 of the FIL[119].

Besides, the security review system is now applicable to every kind of foreign investment: since the already-seen art. 2 has uniformed every kind of transaction related to foreign investors under the definition of foreign investment, the security review should now be conducted also for those enterprises which in in the past relied in the range of the Three FIE Laws. The Notice 2011 and the Provisions 2011 clearly stated that the review should have been conducted just in the cases of M&As, and not in the cases of enterprises relying under the range of the Three FIE Laws; moreover, the Notice 2011 and the Provisions 2011 still retained the case-by-case approval system for M&As, intimidating with its strict regulatory framework would-be investors.

As regards the review system of foreign investments permitted with the Three FIE Laws, thanks to their amendments promulgated in 2016, it was officially implemented an *ex-post* review

[118] Foreign Investment Law, Art. 35.
[119] Implementing Regulations, Art. 40.

system which made foreign investors to be subject to a filing requirement[120], leaving the application of the case-by-case approval system only for the foreign investments relying under the sectors described in the Negative List. It is not possible to affirm the same for M&As: even if the Notice 2011 and the Provisions 2011 have not been repealed yet, FIL extends the *ex-post* in permitted sectors also to M&As for the first time, showing once more to the outside that China is committed to open and liberalize its system.

	Sino-Foreign Equity Joint Venture Law Wholly Foreign-Owned Enterprise Law Sino-Foreign Cooperative Joint Venture Law	Notice 2011 and Provisions 2011 (M&As)	FIL
Content	Not mentioned in the original documents, but *ex-post* review after the amendments of 2016	*Ex-ante* review	*Ex-post* review for any kind of foreign investment

Table 1 National Security Review System before and after FIL

Nevertheless, the co-existence of the Notice 2011 and the Provisions 2011 together with the FIL surely creates a legal contradiction, since the same matter is treated in two different manners in three different legal documents. In order to ensure the effective implementation of the FIL, the Implementation Regulations clarify that in the case of the regulations on foreign investment formulated before January 1st, 2020 – and obviously not repealed – show discrepancies with any provision of the Foreign Investment Law and the Implementation Regulations, the latter shall prevail[121]. Therefore, following this provision, the *ex-ante* review system provided by the Notice 2011 and the Provisions 2011 for M&A transactions with foreign takeovers of domestic companies must be considered as repealed, since the FIL and the Implementing Regulations provide otherwise.

[120] *Waishang Touzi Qiye Sheli Ji Biangeng Beian Guanli Zanxing Banfa* 外商投资企业设立及变更备案管理暂行办法, Provisional Measures on Administration of Filing for Establishment and Change of Foreign-Invested Enterprises, 2016 (revised in 2017 and in 2018) (hereinafter referred to as "Provisional Measures 2016"), retrievable at http://www.mofcom.gov.cn/article/b/f/201610/20161001404974.shtml, last accessed August 28th, 2020.
[121] Implementing Regulations, Art. 49.

The information reporting system introduced with the amendment of the Three FIE Laws was maintained also in the FIL, which mentions it in the art. 34:

> *"The State shall establish a system for reporting foreign investments' information. Foreign investors and foreign-invested enterprises should report and submit investments information to the relevant department of the Ministry of Commerce […]. […] investment information that can be obtained through the interdepartmental shared information must not be required to be submitted again."*[122]

According to the Implementation Regulations, foreign investors or foreign-invested enterprises shall submit investment information to the competent commerce department through the enterprise registration system and the credit information disclosure system[123]; the content of the foreign investment information report, the scope, frequency and specific procedures shall be determined and announced by the competent commercial department of the State Council in conjunction with the market supervision and administration department of the State Council and other relevant departments in accordance with the principles of necessity, efficiency and convenience[124]; foreign investors' or foreign-invested enterprises' investment submitted information shall be true, accurate and complete[125].

On December 31st, 2019, the Ministry of Commerce and the State Administration for Market Regulation (SAMR) jointly issued the *Foreign Investment Information Reporting Measures* (hereinafter referred to as the "Information Reporting Measures")[126], which entered into force on

[122] Foreign Investment Law, Art. 34.
[123] Implementing Regulations, Art. 38.
[124] Implementing Regulations, Art. 39.
[125] *Ibid.*
[126] *Waishang Touzi Xinxi Baogao Banfa* 外商投资信息报告办法, Foreign Investment Information Reporting Measures (hereinafter referred to as "Information Reporting Measures"), 2019, retrievable at http://www.fdi.gov.cn/1800000121_23_75233_0_7.html, last accessed August 28th, 2020.

January 1st, 2020. According to the Information Reporting Measures, information reports are divided into:

- Initial report,
- Modification report,
- Deregistration report,
- Annual report.

The Initial report shall submit any kind of basic information about the enterprise, such as information of investors and their actual controllers and investment transaction information; if the enterprise would undergo changes specified in the initial report, it should comply a Modification report specifying what has changed. If the company would like to quit operations in China, it should comply the Deregistration report, in order to inform the local department. The Annual report shall submit and confirm the information of the enterprise which were stated in the Initial report or in the last Modification report provided to the commercial department[127]. Any kind of report should be provided to the local competent commercial department, which will be directly responsible for its management[128]. Making a comparison with the former Provisional Measures 2016, the new Information Reporting Measures added two new reporting documents that should be complied in the specified cases by foreign-invested enterprises, the Deregistration report and the Annual report.

In the case of violation of reporting obligations, the FIL poses a severe fine for the foreign investor much higher than the one provided by the Provisional Measures 2016:

> *"Whereas a foreign investor or a foreign-invested enterprise do not appropriately follow the submit procedure of the information reporting system violating this Law, the competent relevant department of commerce shall order corrections within a time*

[127] Information Reporting Measures, Artt. 10-11-12-13-14-15-16.
[128] Information Reporting Measures, Art. 3.

limit; if no corrections have been made, a fine of more than RMB 100,000 and less than RMB 500,000 yuan shall be imposed."[129]

The Information Reporting Measures underline the aforementioned FIL provision in the art. 25, in which it is added the precise time limit for making corrections within 20 working days[130]; as said above, the fine is higher than the previous one: as a matter of fact, the Provisional Measures 2016 provided a fine which could not overcome the total amount of RMB 30,000[131].

Since the FIL does not introduce any new review system, neither explains the procedure that should be followed, leaving the Law mutilated of an important aspect which could have granted to itself more actual relevance[132]; for this reason and for the still-current enforceability of the Notice 2011 and the Provisions 2011, until any new provision would be published, the current body should remain the Joint Conference, a two-tier review body formed by MOFCOM and the National Development and Reform Commission (NDRC) and the procedure would remain the same[133].

That been said, the FIL and its Implementing Regulations do not practically introduce any new relevant feature regarding the review system, but extend the already-existent system of *ex-post* review to M&A operations. The main problem of the system is the protectionist attitude of Chinese authorities, not necessarily linked to the FIL itself, but that in any case can spoil the attempt to liberalize the environment for foreign investments[134].

[129] Foreign Investment Law, Art. 37.
[130] Information Reporting Measures, Art. 25.
[131] Provisional Measures 2016, Art. 24.
[132] Bian, C., *National Security Review of Foreign Investment (The Rule of Law in China and Comparative Perspectives)*, 2020.
[133]
[134] A clear example of the protectionist attitude of the review system is the Yonghui case of 2019, a period in which the FIL was not enforceable yet, but was already promulgated. The case shows how invasive could be Chinese authorities when a foreign investor could interfere even in a sector which cannot be considered harmful to national interests and security. Yonghui is a Chinese group which is a chain of supermarkets and it is a foreign-invested enterprise, since it is owned by a Hong-Kongese group, the Dairy Farm LTD, which is likewise owned by a British group, the Mathijsen, for about the 80% of its shares. Yonghui is a shareholder of Zhongbai, another chain of Chinese supermarkets: in order to better understand the case, it is important to underline that Zhongbai is a State-owned enterprise, since it is owned by the Wuhan State Assets Corporation. The total amount of shares of Zhongbai owned by Yonghui was the 20%; in August, Yonghui advanced the proposal of buying other shares from Zhongbai, reaching the amount of 40% of the total shares.

2.3 Intellectual Property Rights Protection

The new FIL also treats the sensitive topic of the protection of intellectual property (IP) rights, aiming at strengthening them along with the trade secrets; another important topic related to IP rights is the forced technology transfer, also touched by the FIL. The IP rights theft has always been a problem for foreign investors involved in operations in China. In terms of strengthening the protection of IP rights, the Chinese government focuses on improving the intellectual property rights and guaranteeing the enforcement and the protection of such rights. Relevant regulations and measures have not only promoted domestic development, but overseas intellectual property rights holders have also received effective protection[135].

The day after the promulgation of the FIL, during the press conference for the Session II of the 13th NPC, the Chinese Prime Minister Li Keqiang stressed the importance of the many matters touched by the new FIL, and among them the IP rights protection, underlining the fact that the matter anyway has to follow a path of an ongoing improvement[136]. As a matter of fact, three days after the promulgation of the FIL, on March 18th, 2019, he signed the State Council Decree No. 709 and

Since the FIL had not entered into force yet, Yonghui had to file its request of shares acquisitions to the Joint Conference, the entity accountable for the review. Nevertheless, in October the Joint Conference unpredictably opened a file for the review of the acquisition based on concerns about the national security. Supermarkets cannot be considered sensitive sectors because the sector is not mentioned in the Negative List and it was seeking the control of the domestic enterprise *de facto*, but the case went on and in December Yonghui voluntarily dropped its offer. This case shows that Chinese authorities had applied the review system based on national security concerns in order to protect a State-owned enterprise by the partial acquisition of a foreign-invested enterprise. Notably, the Yonghui-Zhongbai case is the first and only known case of application of the national security review system. Further information can be found at Ruan, R., *Fan Zhuan Yan He! Yonghui Chaoshi Quxiao Yaoyue Shougou Zhongbai Jituan – Zhichi Wuhan Guozi Jixu Dang Shi Kongren* 反转言和！永辉超市取消要约收购中百集团 支持武汉国资继续当实控人, Unexpected Reconciliation! Yonghui Supermarkets Withdrew Proposition to Acquire Zhongbai Group – Supporting Wuhan Governmental Investments to Keep Being the Actual Controller, 12/16/2019, retrievable at http://company.stcn.com/2019/1216/15548487.shtml, last accessed August 28th, 2020, and at Trivium China, *Foreign investment comes under scrutiny — China Tip Sheet August 23, 2019*, 08/23/2019, retrievable at https://triviumchina.com/2019/08/23/foreign-investment-comes-under-scrutiny-china-tip-sheet-august-23-2019/, last accessed August 28th, 2020.

[135] Xu, P., Yao, L., Feng, C., Yao, P., Zhu, J., *Implementing Regulation for Foreign Investment Law heralding a New Era of Foreign Investment Regime in China*, 01/08/2020, King & Wood Mallesons (for further information see *Note 5*), retrievable at https://www.chinalawinsight.com/2020/01/articles/foreign-investment/implementing-regulation-for-foreign-investment-law-heralding-a-new-era-of-foreign-investment-regime-in-china/, last accessed September 29th, 2020.

[136] Li Keqiang, *Press Conference for the Second Session of the 13th National People's Congress*, 2019, retrievable at http://milano.china-consulate.org/chn/zgyw/t1646016.htm, last accessed August 28th, 2020.

announced the State Council Decision on Amending Certain Administrative Regulations[137]. The State Council decided to amend the Regulations on the Administration of Technology Import and Export[138] among others, including the deletion of the following regulations:

- during the validity period of the technology import contract, the result of improving technology belongs to the improving party;
- technology import contracts must not contain specific restrictive clauses, such as clauses that require the transferee to accept conditions that are not essential for technology import[139].

The Three FIE Laws – or even other related laws in China – had never treated the protection of foreign investors' IP rights so carefully, as we can see in the table below:

	Sino-Foreign Equity Joint Venture Law	Wholly Foreign-Owned Enterprise Law	Sino-Foreign Cooperative Joint Venture Law
Content	Art. 5: *"[…] In case of deception with the intentional supply of outdated technology and equipment which causes losses, the party shall compensate for the losses […] ([…] ruguo youyi luohou de jishu he shebei jinxing qipian, zaocheng sunshi de, ying peichang sunshi 如果有意以落后的技术和设备进行欺骗，造成损失的，应赔偿损失 […])"*	Art. 4: *"Foreign investors' investments in China, profits obtained, and other legal rights and interests shall be protected by Chinese law […] (Waiguo touzizhe zai Zhongguo jing nei de touzi, huode de lirun he qita hefa quanyi, shou zhongguo falü baohu 外国投资者在中国境内的投资、获得的利润和其他合法权益，受中国法律保护 […])"*	There is no provision related to foreign investors' IP rights protection.

Table 2 The IP Rights Protection in the Three FIE Laws

[137] *Guowuyuan Guanyu Xiugai Bufen Xingzheng Fagui de Jueding* 国务院关于修改部分行政法规的决定, State Council Decision on Amending Certain Administrative Regulations, 2019.
[138] *Zhonghua Renmin Gongheguo Jishu Jinchukou Guanli Tiaoli* 中华人民共和国技术进出口管理条例, Regulations on the Administration of Technology Import and Export, 2001 (revised in 2011 and 2019); full text of 2019 Amendment retrievable at http://www.gov.cn/gongbao/content/2019/content_5468926.htm, last accessed August 28th, 2020.
[139] *Ibid.*

As it is possible to see in §Table 2, Sino-Foreign CJV Law did not mention anything in the matter at all, whilst, Sino-Foreign EJV Law recognized a compensation just in the case of losses come from the intentional supply of outdated technology; the WFOE Law was the only one among them which mentions that the IP rights of foreign investors should have been protected. So, the improvement and the assurance of IP rights protection in the FIL could be considered a great step forward made by China. The lack of provisions regarding the IP rights protection in the Three FIE Laws could be justified by the presence and the validity of other laws related to the matter, which were meant to be followed also by foreign investors: the *Trademark Law*[140], the *Copyright Law*[141], and the *Patent Law*[142] and the *Anti-Unfair Competition Law*[143]; these laws have not been repealed and are still an important pillar for Chinese Government in the field of IP rights protection for foreign investors.

The chapter regarding the investment protection – under this definition the FIL includes also the protection of foreign investors' IP rights – starts with art. 20, which touches one of the main matters for which China has been hardly criticized so far, that is the forced technology transfer:

> *"The State shall not expropriate foreign investors' investments.*
> *Under extraordinary circumstances, in order to safeguard the national public interest, the State may expropriate or requisition foreign-investors' investments in accordance to the regulations of the law. Expropriation and requisition should follow legitimate*

[140] *Zhonghua Renmin Gongheguo Shangbiao Fa* 中华人民共和国商标法, Trademark Law of People's Republic of China, 1982 (amended in 2019), retrievable at https://www.pkulaw.com/chl/937235cafaf2a66fbdfb.html, last accessed August 28th, 2020.
[141] *Zhonghua Renmin Gongheguo Zhuzuoquan Fa* 中华人民共和国著作权法, Copyright Law of People's Republic of China, 1990 (amended in 2010).
[142] *Zhonghua Renmin Gongheguo Zhuanli Fa* 中华人名韩国专利法, Patent Law of People's Republic of China, 1984 (amended in 2008).
[143] *Zhonghua Renmin Gongheguo Fan Bu Zhengdang Jingzheng Fa* 中华人民共和国反不正当竞争法, Anti-Unfair Competition Law, 1993 (amended in 2019), retrievable at http://gkml.samr.gov.cn/nsjg/fgs/201906/t20190625_302771.html, last accessed August 28th, 2020.

procedures and should promptly render a correspondent and rational compensation."[144]

Even if the first paragraph assures foreign investors that their investments cannot be expropriated by the State, the second recognizes that in the special cases of possible harm to national security, the State has the authority of proceeding with the expropriation of the investments; however, an adequate compensation is granted in any case. The forced technology transfer is also treated in the second paragraph of art. 22, in which the FIL emphasizes the illegality of forced technology transfer:

"[…] The administrative organs and the relative workers must not take advantage of any administrative mean in order to force the any technology transfer."[145]

It is undoubtable that Chinese Government wants to reassure foreign investors that one of the most criticized practices complained in the past is now not only recognized, but also legally forbidden by the Law regulating foreign investments in the country[146].

Keeping the attention on the art. 22, its first paragraph states the commitment of the State for the protection of foreign investors' IP rights:

"The State shall protect the intellectual property rights of foreign investors and foreign-invested enterprises, safeguarding intellectual property rights holders and their relative legitimate rights and interests; in the case of intellectual property rights infringement, the State shall rigorously ascertain where the legal responsibility would lie in accordance to the law […]"[147]

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[144] Foreign Investment Law, Art. 20.
[145] Foreign Investment Law, Art. 22.
[146] McKenzie, P. D., Milner, G. A., Yin, X., Lu, Q., Zhou, T., *China's Foreign Investment Law: Are You Ready for It?*, 01/03/2020, Morrison & Foerster, retrievable at https://www.mofo.com/resources/insights/200102-chinas-investment-foreign-law.html, last accessed September 29th, 2020. Morrison & Foerster is a group of legal advisors operating in the international framework which has received several awards and honors by different recognized institutions, such as the Financial Times or the Chambers Europe.
[147] *Ibid.*

The article stipulates that the state protects the intellectual property rights of foreign investors and foreign-invested enterprises, and in the case of IP rights infringements, legal liabilities shall be strictly investigated. The Implementing Regulations emphasize that the State will increase penalties for intellectual property infringements and continue to strengthen the enforcement of intellectual property rights[148].

The definition of punitive damages for those who have infringed foreign investors' IP rights was not clearly stated in the former Three FIE Laws, and so this feature can be considered as brand-new of the new FIL and of its Implementing Regulations. However, China introduced a punitive damages system when it amended the Trademark Law in 2013, which stipulated that for malicious infringement of the exclusive right to use a trademark, if the circumstances were serious, punitive damages from one to three times could be inflicted[149]; moreover, when the Trademark Law was revised in November 2019, the Government maintained the trend of improving the protection of IP rights in line with the just-promulgated FIL increasing the amount of punitive damages to more than one time and less than five times[150].

As regards the trade secret, it was not mentioned at all in the Three FIE Laws; the FIL considers this matter in its body in artt. 23 and 39; the first one states the commitment of the administrative organs to not leak any kind of information regarding the trade secret:

> *"The administrative organs and the relative workers should keep confidential any trade secret of foreign investors and foreign-invested enterprises about which they have been informed while performing their duties, and must not leak or illegally provide any related information to others."*[151]

[148] Implementing Regulations, Art. 23.
[149] Trademark Law (Amendment of 2013), Art. 63.
[150] Trademark Law (Amendment of 2019), Art. 63.
[151] Foreign Investment Law, Art. 23.

The latter completes what has been stated in art. 23 underlining a legitimate punishment for the workers which do not respect the aforementioned provision:

> *"If a worker of an administrative organ […] engages in malpractices in the promotion, protection and management of foreign investment, or leaks or illegally provides others with trade secrets that he or she knows in the course of performing his duties, he or she shall be punished according to law […]"*[152]

The Implementing Regulations stipulate that state administrative agencies should take the following specific measures in order to protect the trade secrets of foreign investors and foreign-invested enterprises:

- strictly limiting the scope of materials and information related to business secrets required by administrative agencies;
- forbidding the unrelated personnel to enter into contact with materials and information involving trade secrets;
- keeping confidential trade secrets to prevent leakage when sharing information with other administrative agencies[153].

The above-mentioned provisions on the obligations of State administrative agencies to protect foreign investors and foreign-invested enterprises' trade secrets are the same of the art. 9 of Anti-Unfair Competition Law[154].

In order to give a final comment on the treatment reserved by the FIL to IP rights protection, the symbolic step forward made by China in the matter is undeniable, since in the past the protection of foreign investors' IP rights has never been officially treated in the Three FIE Laws and neither in

[152] Foreign Investment Law, Art. 39.
[153] Implementing Regulations, Art. 25.
[154] Anti-Unfair Competition Law (Revision of 2019), Art. 9.

the respective amendments, even if the FIL does not introduce any new practical feature regarding the protection of IP rights. However, China has started a process of revision regarding the main laws on IP rights protection: as it was mentioned above, right after the promulgation of the FIL, the Regulations on the Administration of Technology Import and Export 2001 were revised, the Trademark Law was also amended in the same year, while the revisions of the Copyright Law and of the Patent Law have been included in the *NPC Standing Committee 2020 Legislative Working Plan*[155]. Taken this into account, the FIL provisions on the matter have to be considered as a part of the current legislative trend of IP rights protection improvement[156].

2.4 Application of the Company Law on Existing Foreign-Invested Enterprises

As mentioned above, the FIL replaced the original Three FIE Laws from January 1st, 2020; since then, foreign-invested companies should be considered as domestic ones. For this reason, foreign-invested enterprises enjoy the same possibilities of developing projects within China without any restriction[157]: the Implementing Regulations further underline the possibility for foreign investors to participate to public procurements without any kind of discrimination[158].

The equal treatment granted to both foreign and domestic companies is also highlighted by art. 31 of the FIL, states that every company should abide by the regulations of the Company Law or of the Partnership Law:

[155] *NPC Standing Committee 2020 Legislative Working Plan*, retrievable at http://www.npc.gov.cn/npc/c30834/202006/b46fd4cbdbbb4b8faa9487da9e76e5f6.shtml, last accessed August 28th, 2020.
[156] Zhou, Q., *How to Read China's New Law on Foreign Investment*, 10/31/2019, China Briefing – From Dezan Shira & Associates, retrievable at https://www.china-briefing.com/news/read-chinas-new-law-foreign-investment/, last accessed September 29th, 2020. China Briefing is a website run by Dezan Shira & Associates, a foreign direct investments consultancy which employs more than 300 professionals, including lawyers, accountants, auditors, and business specialists from across the world, working in 25 offices located in Asia, Europe and North America.
[157] As analyzed above, the only restriction is the application of the Negative List to foreign-invested enterprises, which still marks the difference between a domestic and a foreign company.
[158] Implementing Regulations, Art. 15.

"Organizational form, structure and activities standards of foreign-invested enterprises shall apply the provisions of the "Company Law of the People's Republic of China", the "Partnership Enterprise Law of the People's Republic of China" and other relative regulations."[159]

The text of the provision clarifies also that foreign-invested enterprises shall abide by any related provision and notice that in the past were meant only for domestic companies, making the gap between foreign and domestic enterprises even smaller. Since the repeal of the Three FIE Laws and the application of the *Company Law* [160]or the *Partnership Enterprise Law*[161] should involve changes in the corporate structures of foreign-invested enterprises, the FIL states as follow:

"[…] Foreign-invested enterprises in accordance with the Sino-Foreign Equity Joint Ventures Law of the People's Republic of China, the Wholly Foreign-Owned Enterprises Law of the People's Republic of China, or the Sino-Foreign Contractual Joint Ventures Law of the People's Republic of China established before the implementation of this Law may keep unchanged their original forms of business organizations within five years after the implementation of this Law […]"[162]

As regards existing foreign-invested companies, the implementation of the FIL does not involve an abrupt change for them, but gives the possibility to maintain and adjust the existing corporate structure within five years from the effective date of the Foreign Investment Law (i.e.

[159] Foreign Investment Law, Art. 31.
[160] *Zhonghua Renmin Gongheguo Gongsi Fa* 中华人民共和国公司法, Company Law of the People's Republic of China (Company Law), 1993 (amended in 1999, 2004, 2013 and 2018); full text in Chinese retrievable at http://gkml.samr.gov.cn/nsjg/xyjgs/201907/t20190719_304991.html, and in English at https://www.pkulaw.com/en_law/aec0c211a78989e9bdfb.html, last accessed August 28th, 2020.
[161] *Zhonghua Renmin Gongheguo Hehuo Qiye Fa* 中华人民共和国合伙企业法, Partnership Enterprise Law of the People's Republic of China, 1997 (amended in 2006); full text retrievable in Chinese at https://www.pkulaw.com/chl/a1486b29a8cf663fbdfb.html, and in English at http://www.fdi.gov.cn/1800000121_39_4109_0_7.html, last accessed August 28th, 2020.
[162] Foreign Investment Law, Art. 42.

January 1st, 2020); after the end of the five-year transition period, all foreign-invested enterprises shall apply the Company Law or the Partnership Law.

Since 2006, wholly foreign-owned enterprises have been abiding by the Company Law in terms of organizational form and corporate structure[163]; therefore, the FIL has a very limited impact on them as regards the organizational structure. It is not possible to affirm the same for the foreign-invested companies that were under the regulations of the other two former laws about foreign investments: the FIL has a more significant impact on existing Sino-foreign Equity Joint Ventures (EJVs) and Contractual Joint Ventures (CJVs)[164]. The main reason is that there is a fundamental difference between the company's organizational form and enterprise structure stipulated in the two joint venture laws and the Company Law; the main changes regard also shareholders ratio requirements, share transfer system, dividend distribution and profit remittance[165].

The main change in Sino-foreign EJVs and in CJVs in the organizational structure regards the role of shareholders: the first thing to notice is the shift of the role of highest authority in the company to the Shareholders' Meeting, instead of the Board of Directors, previously provided by both the joint venture laws. Then, another different feature regards voting rules for relevant decisions: in the past, EJVs and CJVs needed the unanimity of choice by the members of their respective Board of Directors; since the highest authority is now the Shareholders' Meeting, the implementation of the Company Law shifts the power of decision to the shareholders of companies, which should not reach the unanimity of the votes, but at least two-thirds of their total amount. Other changes in the corporate structure regard the term for Directors or the quorum, but it is worth noting that the application of the

[163] *Guanyu Waishang Touzi de Gongsi Shenpi Dengji Guanli Falü Shiyong Ruogan Wenti de Zhixing Yijian* 关于外商投资的公司审批登记管理法律适用若干问题的执行意见, Implementational Opinions on Several Issues Concerning the Application of Laws on the Approval and Registration of Foreign-Invested Companies, 2006.
[164] Schaub, M., Zhao, A., Dai, X., Zheng, W., *China Foreign Investment Law: How Will It Impact the Existing FIEs?*, 06/03/2019, King & Wood Mallesons (for further information see *Note 5*), retrievable at https://www.chinalawinsight.com/2019/06/articles/foreign-investment/china-foreign-investment-law-how-will-it-impact-the-existing-fies/, last accessed September 29th, 2020.
[165] *Ibid.*

Company Law provides more power for the shareholders instead of the Directors of a company, giving more freedom of choice to every member of a company, without considering the representation of the Directors. If the companies choose to abide by the Partnership Enterprise Law, any relevant provision (such as the representative of the partnership or the quorum) should be specified in the agreement.

	Sino-Foreign Equity Joint Venture Law	Sino-Foreign Contractual Joint Venture Law	Company Law (New Foreign-Invested Enterprises)
Highest authority	Board of Directors	Board of Directors	Shareholders or Shareholders' Meeting
Powers and duties of highest authority	All major issues such as change of articles of association, increase and decrease of registered capital, merger or spin-off and dissolution	All major issues such as change of articles of association, increase and decrease of registered capital, merger or spin-off, assets mortgage and dissolution	More detailed than those under the JV Laws
Voting rules for major issues	Unanimous consent of all Directors present at a Board meeting	Unanimous consent of all Directors present at the meeting	Favorable votes of shareholders holding two-thirds or more of the voting rights
Number of Directors	No less than 3 Directors	No less than 3 Directors	3-13 Directors for a Board or one executive director
Quorum	Two-thirds or more of all Directors	Two-thirds or more of all Directors	Free to be agreed by shareholders

Term of director	4 years	No more than 3 years	No more than 3 years
Legal representative	Chairman of the Board	Chairman of the Board	Chairman of the Board, Executive Director or General Manager

Table 3 Corporate Governance Before and After FIL[166]

One of the main features about companies to underline is the shareholder ratio requirement: in the EJV Law, it is required the minimum participation in the equity by the foreign party with the 25%[167]; in the case of the foreign party should have not reached the minimum contribution of 25%, it should not be accountable for a preferential tax treatment. After 2008, along with the publication of the *Notice on Issues relating to Strengthening Administration of Approval, Registration, Foreign Exchange and Tax Collection for Foreign Investment Enterprises*[168], the tax treatment for foreign-invested enterprises had been uniformed to the one destinated to domestic companies, the requirement of the minimum contribution of 25% became an effective threshold for the participation of the foreign party[169]. Thanks to the application of the Company Law, of the Partnership Law and especially of the principle of equal treatment now destinated to foreign investors, the threshold has been repealed, giving the possibility to the foreign party to participate as much as it desires to.

[166] *Ibid.*, the table is partially inspired by the one provided by the authors. The Wholly Foreign-Owned Enterprise Law is not included in the table since – as mentioned in the text – the enterprises under this law started to abide by the Company Law in 2006 and, as a matter of fact, they are not touched by the new FIL as regards the corporate governance; as regards the Partnership Enterprise Law, it is not shown in the table since it is based on the provisions reached by all the partners in the partnership agreements, making the provisions more flexible than the ones contained in the Company Law.

[167] EJV Law, Art. 4.

[168] *Guanyu Jiaqiang Waishang Touzi Qiye Shanpi, Dengji, Waihui Ji Shuishou Guanli Youguan Wenti de Tongzhi* 关于加强外商投资企业审批、登记、外汇及税收管理有关问题的通知, Notice on Issues Relating to Strengthening Administration of Approval, Registration, Foreign Exchange and Tax Collection for Foreign Investment Enterprises, 2008.

[169] Schaub, M., Zhao, A., Dai, X., Zheng, W., *China Foreign Investment Law: How Will It Impact the Existing FIEs?*, 06/03/2019, King & Wood Mallesons (for further information see *Note 5*), retrievable at https://www.chinalawinsight.com/2019/06/articles/foreign-investment/china-foreign-investment-law-how-will-it-impact-the-existing-fies/, last accessed September 29th, 2020.

	Sino-Foreign Equity Joint Venture Law	Wholly Foreign-Owned Enterprise Law	Sino-Foreign Contractual Joint Venture Law	Company Law and Partnership Enterprise Law (New Foreign-Invested Enterprises)
Content	Art. 4: "[…] *The proportion of investment contributed by a foreign partner as its share of the registered capital of an equity joint venture shall in general be no less than 25 per cent […] ([…] zai heying qiye de zhuce ziben zhong, waiguo heyingzhe de touzi bili yiban bu di yu baifen zhi ershiwu 在合营企业的注册资本中，外国合营者的投资比例一般不低于百分之二十五 […])*"	Art. 2: "*The term "foreign-funded enterprises" as used in this law refers to enterprises established in China in accordance with relevant Chinese laws with all capital invested by foreign investors […] (Ben fa suo cheng de waizi qiye shi zhi yizhao Zhongguo you guan falü zai Zhongguo jing nei sheli de quanbu ziben you waiguo touzizhe touzi de qiye 本法所称的外资企业是指依照中国有关法律在中国境内设立的全部资本由外国投资者投资的企业 […])*"	There is no provision at all regarding the minimum shareholding requirement[170]	No restrictions on the minimum shareholding ratio requirements

Table 4 Minimum Shareholding Requirements Before and After FIL

As regards the share transfer, even in this matter the Company Law and the Partnership Enterprise Law provide different regulations than those provided by the two joint venture laws. Under the regulations of EJVs and CJVs, transfers of shares – both internal and external – needed to encounter the unanimity of agreement by every shareholder of the company, making the process

[170] *Ibid.*; as already underlined in the text, the authors notices the fact that after the implementation of the Notice on Issues Relating to Strengthening Administration of Approval, Registration, Foreign Exchange and Tax Collection for Foreign Investment Enterprises (2008), the minimum shareholding requirement of 25% for the foreign party became a barrier for tax reasons, especially for CJVs, whose law did not include any provision regarding the matter.

difficult and long. The matter was already under the spotlight of Chinese authorities as it is noticeable from the Regulations of Supreme People's Court on Several Issues Concerning the Trial of Dispute Cases Related to Foreign Investment Enterprises (I)[171], through which Chinese authorities had already tried to make EJVs' and CJVs' share transfer system more similar to the one adopted in the Company Law[172].

In the two joint venture laws, whether it was a transfer within the company or outside the same, the shareholder who was willing to sell its part or the total of his shares to another one had to encounter the unanimous consent of other shareholders, making also the transfer cumbersome and likely to reach the veto of even just one of the shareholders; on the contrary, the Company Law provides a different system of share transfer for internal transfers and for external ones. As regards an internal transfer, the shareholder who decides to sell his/her shares do not need the consent of the others, making the transaction more simple and fast; in the case of external transfers, the shareholder has to reach more than a half of consents among the other shareholders[173].

Even in this case, it is possible to notice the freedom acquired by shareholders that are not anymore linked each other and to the company under the strict regulations provided by the joint venture laws[174]. If shareholders choose to abide by the Partnership Law, the regulations are the same of those provided by the Company Law in the case of an internal transfer, so allowing the partner to sell its shares to another one without the possibility of encountering the possible veto of the other

[171] *Zuigao Renmin Fayuan Guanyu Shenli Waishang Touzi Qiye* 最高人民法院关于审理外商投资企业纠纷案件若干问题的规定（一）, Regulations of Supreme People's Court (SPC) on Several Issues Concerning the Trial of Dispute Cases Related to Foreign Investment Enterprises (I), 2010.
[172] Schaub, M., Zhao, A., Dai, X., Zheng, W., *China Foreign Investment Law: How Will It Impact the Existing FIEs?*, 06/03/2019, King & Wood Mallesons (for further information see *Note 5*), retrievable at https://www.chinalawinsight.com/2019/06/articles/foreign-investment/china-foreign-investment-law-how-will-it-impact-the-existing-fies/, last accessed September 29th, 2020. The authors underline the fact that the aforementioned Regulations of SPC made the EJV Law and the CJV Law more similar to the Company Law in the matter of share transfer, but had not provided the uniformity with the Company Law yet.
[173] Company Law, Chapter 3.
[174] Schaub, M., Zhao, A., Dai, X., Zheng, W., *China Foreign Investment Law: How Will It Impact the Existing FIEs?*, 06/03/2019, King & Wood Mallesons (for further information see *Note 5*), retrievable at https://www.chinalawinsight.com/2019/06/articles/foreign-investment/china-foreign-investment-law-how-will-it-impact-the-existing-fies/, last accessed September 29th, 2020.

partners; in the case of an external transfer, differently from the Company Law, the other partners cannot interfere with the transaction, but can just enjoy the right to the priority of purchase of the shares. The Partnership Law grants also the possibility of adopting different provisions when specified in the partnership agreement[175].

Another important feature to analyze is the dividend mechanism, which is connected to the profit remittance. EJVs and CJVs enjoyed different treatments in the matter under their own regulations: EJVs provided a dividend mechanism that was proportional to the registered capital of the shareholders, without any room for different agreements; on the contrary, CJVs provided to adopt the dividend mechanism specified in the joint venture contract, resulting less restrictive than EJVs. The Company Law provides a mechanism that relies in the middle of the two adopted by the joint venture laws: similarly to what Sino-foreign EJV Law stated, the distribution of dividends considers the proportion of the registered capital, but, more similarly to what provided by Sino-foreign CJV Law, gives room for adopting different mechanisms of distribution. In this way, as regards CJVs, the impact under this aspect would be minimal differently to what EJVs should undergo[176]. The Partnership Law, also as regards the dividend mechanism, provides the system specified in the contract[177].

The profit remittance in the Three FIE Laws was regulated by the Income Tax Law[178] has been eased in the years as the Notice on Widening the Scope of Application Regarding the Provisional Deferral Treatment for Withholding Tax on Distributed Profits used for Direct Re-investment by

[175] Partnership Law, Chapter 2.
[176] Schaub, M., Zhao, A., Dai, X., Zheng, W., *China Foreign Investment Law: How Will It Impact the Existing FIEs?*, 06/03/2019, King & Wood Mallesons (for further information see *Note 5*), retrievable at https://www.chinalawinsight.com/2019/06/articles/foreign-investment/china-foreign-investment-law-how-will-it-impact-the-existing-fies/, last accessed September 29th, 2020. The authors highlight that CJVs would be less affected to abiding by the Company Law since their dividend mechanism is very flexible; however, they also consider the fact that CJVs are unfortunately much less than EJVs and such matter could become a problem for the majority of foreign investors.
[177] Partnership Law, Art. 33.
[178] *Zhonghua Renmin Gongheguo Geren Suode Shuifa* 中华人民共和国个人所得税法, Individual Tax Law of the People's Republic of China, 1980 (amended in 1993, 1999, 2005, 2007 (1), 2007 (2), 2011 and 2018).

Foreign Investors[179], but profits had to undergo a difficulty process of approval by the State Administration of Foreign Exchange (SAFE)[180]. The new FIL does not change the validity of the Income Tax Law for foreign investors, but assures the that the profit remittance would be free and also granted in foreign currency:

> *"Foreign investors' capital contribution, profits, capital gains, assets disposal income, intellectual property license fees, legally obtained compensation or reimbursement, liquidation proceeds and other similar items may be freely remitted in Renminbi or in a foreign currency in accordance to the law."*[181]

In art. 23 of the Implementing Regulations, the art. 21 of the FIL is repeated and also emphasized by the fact that there should not be restrictions of any kind imposed by any entity on different matters regarding the inbound and outbound remittance, such as the frequency or the amount of the transactions[182].

As it has been explained above, a very clear point is that during the five-year transition period starting from January 1st, 2020, the highest authority of joint ventures, the voting rules of major issues, the quorum that constitutes an effective meeting, and the equity key issues, such as the transfer mechanism and dividend rules, will be changed and implemented in accordance with the Company Law and with the Partnership Law[183].

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[179] *Guanyu Kuoda Jingwai Touzizhe Yi Fenpei Lirun Zhijie Touzi Zan Bu Zhengshou Yuti Suode Shui Zhengce Shiyong Fanwei de Tongzhi* 关于扩大境外投资者以分配利润直接投资暂不征收预提所得税政策适用范围的通知, Notice on Widening the Scope of Application Regarding the Provisional Deferral Treatment for Withholding Tax on Distributed Profits used for Direct Re-investment by Foreign Investors, 2018.

[180] For further information, the link provides SAFE's website in English: https://www.safe.gov.cn/en/index.html, last accessed August 28th, 2020.

[181] Foreign Investment Law, Art. 21.

[182] Implementing Regulations, Art. 23.

[183] Schaub, M., Zhao, A., Dai, X., Zheng, W., *China Foreign Investment Law: How Will It Impact the Existing FIEs?*, 06/03/2019, King & Wood Mallesons (for further information see Note 5), retrievable at https://www.chinalawinsight.com/2019/06/articles/foreign-investment/china-foreign-investment-law-how-will-it-impact-the-existing-fies/, last accessed September 29th, 2020. The real problem now regards how the new regulations will be put in act within the former joint ventures: the changes brought by the implementation of the FIL has a great impact on the interests of shareholders, since it touches many key issues of their role and of their dependence on the other party.

2.5 Concluding Remarks

The previous chapter remarked the role of the Trade War as main trigger for the promulgation of the new Foreign Investment Law in China: as a matter of fact, many fields touched by the Law have been those about which the US complained to China. The lack of transparency in the procedures, the deeply different treatment reserved to foreign-invested companies and the disrespect of the intellectual property rights are just a few issues that China tried to resolve with the promulgation of the FIL and the application or revision of the other relative documents that were analyzed in the current chapter.

In order to give a final comment to the Foreign Investment Law, it is important first to underline the role and the moment in which it has been promulgated. As analyzed in the first chapter, Sino-US Trade War was not the only factor which pushed the change in the Chinese legal framework regarding foreign investments; China had to cope with other challenges which had already taken place even before the outburst of the Trade War: the slowing growth of foreign investments inflows is a clear proof of difficult situation in which China has been relying since 2016. The factors analyzed brought foreign investors to lose confidence into China as the main destination for their investments; for this reason, China needed an important move in order to reassure foreign investors[184].

As regards the actual changes introduced in the new Law, besides the repeal of the Three FIE Laws, major steps forwards have been made in the fields of access to domestic markets, review system, intellectual property rights protection and management of foreign-invested enterprises. The repeal of the case-by-case approval system for M&A in sectors not considered sensitive is an important move for the ongoing liberalization of the country and for foreign investors willing to take over a company

[184] *Shangwubu Zhaokai Lixing Xinwen Fabuhui (2018 Nian 12 Yue 27 Ri)* 商务部召开例行新闻发布会（2018 年 12 月 27 日）, Regular Press Conference of the Ministry of Commerce (December 27th, 2018), retrievable in Chinese at http://www.mofcom.gov.cn/xwfbh/20181227.shtml, and in English at http://english.mofcom.gov.cn/article/newsrelease/press/201812/20181202821476.shtml, last accessed August 28th, 2020.

within Chinese territory. The liberalization process is also noticeable in the continuous revision of the Negative List, which the MOFCOM has ceaselessly shortened, in order to further open different sectors to foreign investors. The IP rights protection was also a sensitive matter in China: one of the reasons of tension between the US and China which provoked the outburst of the Trade War was the technology transfer that US accused China to have allegedly instigated[185]. The new implementation of the Company Law or the Partnership Law to foreign-invested companies will also grant more decisional power to shareholders and more freedom in terms of agreements between them.

The consequences of the implementation of the FIL cannot be seen in the short-term, since this work has been writing not even one year after the implementation of the Law; moreover, another fact that has to be taken into account is the outburst of Covid-19 (as already mentioned above), which has almost blocked worldwide operations for the first part of 2020. Nevertheless, Chinese authorities wanted to underline the establishment of a task force to apply the FIL even in the special situation that the world and especially China were living, and decided to announce the positive results of its enforcement:

> *"[…] In the first half of this year, Paid-in foreign investment reached RMB472.18 billion, down 1.3% year-on-year, 9.5 percentage points smaller than that in the first quarter. In the second quarter, paid-in foreign investment grew by 8.4% year-on-year, representing a steady rise in foreign investors' expectation and confidence. A recent MOFCOM survey found that 99.1% of FIEs would continue to invest and operate in China […]"*[186]

[185] See §1.2.1.2 and *Note 55* for further information.
[186] Gao, F., *Shangwubu Zhaokai Wangshang Lixing Xinwen Fabuhui (2020 Nian 7 Yue 30 Ri)* 商务部召开网上例行新闻发布会（2020 年 7 月 30 日）, Online Regular Press Conference of the Ministry of Commerce (July 30th, 2020); full Chinese text retrievable at http://www.mofcom.gov.cn/xwfbh/20200730.shtml, and in English at http://english.mofcom.gov.cn/article/newsrelease/press/202008/20200802989377.shtml, last accessed August 28th, 2020.

As the representative of MOFCOM Gao Feng stated, the FIL boosted foreign investments and worked as a legal tool for gaining the confidence of foreign investors, even in a difficult period for the global economy[187].

However, the FIL can show the same issues for which Chinese Government has always been accused, such as the lack of transparency or the poor and unpredictable enforcement of its laws[188]. The first cracks in the Law were already noticeable right after its enforcement, along with the publication of its Implementing Rules, which did not clarify several provisions of the Law, leaving the respective fields of application without a limpid procedure to enforce[189].

The next chapter will analyze the Variable Interest Entities in China and their treatment after the implementation of the FIL, which carefully did not provide any provision regarding them, leaving room for the analysis of a specific case-study.

[187] *Ibid.*
[188] OECD, *OECD Reviews of Regulatory Reform: China*, 2009.
[189] Lowe, A., *China misses its chance to clear up doubts about the Foreign Investment Law*, South China Morning Post, 2020, retrievable at https://www.scmp.com/comment/opinion/article/3045898/china-misses-its-chance-clear-doubts-about-foreign-investment-law, last accessed August 28th, 2020.

3. The Variable Interest Entity under the new Foreign Investment Law: the Shanghai Mingcha Zhegang Case

This final chapter aims at analyzing whether the new Foreign Investment Law has outlined and/or introduced a new approach for Variable Interest Entities (VIEs). Then, the focus will be put on the case-study related to the establishment of a joint venture between Shanghai Mingcha Zhegang and Huansheng Xinxi, two Chinese firms based in Shanghai, which underwent the review filed by the State Administration for Market Regulation (SAMR), first time of VIE-related case since its establishment[190]. This case-study is very important for several reasons:

- it is the first time SAMR has accepted to review a file regarding a Variable Interest Entity;
- VIEs had never received a definitive and official statement by Chinese authorities;
- the case has occurred this year, between April and July, i.e. when the FIL had been already put into force;
- the outcome can help to finally understand what the position of Chinese authorities towards VIEs is;
- it demonstrates that the regime of liberalization brought by the FIL is not only theoretical, but also real.

The chapter will first introduce the VIE structure and then analyze which position Chinese authorities had been taking on VIEs before the implementation of the new FIL, studying the various cases happened in the past, and then trying to explain the respective resolutions, in order to show the changes occurred in the current case-study. The chapter will then continue focusing on the FIL and

[190] SAMR was established in 2018, as the official review body of the Anti-Monopoly Law, consolidating in one body the functions that were before held by the General Administration of Quality Supervision, Inspection and Quarantine (GAQSIQ), the China Food and Drug Administration (CFDA) and the State Administration of Industry and Commerce (SAIC).

the relative drafts in order to outline which moves were suggested and put into act by Chinese legislative body: this section will introduce the case-study, whose aim is the confirmation of the positive trend of liberalization seen in the provisions of the new Law through the recognition of VIE structure in China after 20 years since the first known case.

3.1 Development of VIEs in China and Reaction of Chinese Authorities

The Variable Interest Entity (which is known in Chinese as "*VIE Moshi VIE 模式*, VIE Model"[191]) is a concept that comes from an interpretation of the American Financial Accounting Standards Board (FASB), the FIN 46[192], published in 2003, which considered a VIE an entity which is controlled by means that are not the controlling interest exerted through the majority of voting rights[193]. The concept of VIE was highlighted from FASB just after the Enron case[194], which put under the spotlight the serious need of a stricter system of accounting standards.

The structure of a VIE is complicated to analyze since its convoluted mechanism from a fiscal point of view: the thesis will not focus on this particular point of view, but it will analyze it in the light of the different reactions and policies adopted by Chinese authorities. A VIE is an onshore company which is owned by onshore citizens which operates under the indirect control of an offshore

[191] The definition in Chinese can be retrieved at Yang, C., *Xinlang Moshi (VIE Moshi) – Falü Pingxi (2012)* 新浪模式（VIE 模式）— 法律评析（2012）, The *Sina Model* (VIE Model) – Legal Comment (2012), LawBridge, 2012, retrievable at http://www.lawbridge.org/legal-analysis-of-sina-mode-vie-mode/, last accessed October 3rd, 2020; LawBridge (in Chinese *Falü Qiao* 法律桥) is a website which collects legal comments of more than 70 lawyers from Shanghai. Chinese authorities too have adopted the acronym as the official definition as can be seen in the *Shangwubu Gonggao 2012 Nian Di 49* 商务部公告 2012 年第 49, MOFCOM Announcement 2012/49, retrievable at http://www.mofcom.gov.cn/article/b/fwzl/201208/20120808284418.shtml, last accessed September 29th, 2020: the MOFCOM Announcement regards the Wal-Mart – Yihaodian Case (for further information see §3.1.3), in which the VIE structure is literally translated in "*VIE Jiegou* VIE 结构". A full-Chinese translation of the term exists too, but, as just seen, Chinese authorities rather prefer the English acronym followed by the Chinese term which stands for "structure" or "model": the Chinese term is *Kebian Liyi Shiti* 可变利益实体, Variable Interest Entity; the source of this translation can be found at Tang, Z., *Kebian Liyi Shiti Yuanyin, Fengxian Fenxi Ji Duice* 可变利益实体原因、风险分析及对策, Analysis and Countermoves to the Origins and Risks of the VIE, 2012.

[192] FIN 46, 2003 (revised again in 2003 and known as FIN 46R), retrievable at https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1175801627792&acceptedDisclaimer=true, last accessed 09/01/2020. The FIN46 was amended again by FASB Statement 167, in 2009.

[193] *Ibid.*

[194] Enron Corporation was a major American multinational company which in 2001 set up several minor Special Purpose Entities (SPEs) in order to shift away its debt away from its books, either through guarantees of the debt or SPEs' assets.

one; the latter controls the onshore company (the VIE) through a series of pledges and agreements which do not include the control via the normal procedure of shareholding[195]. The establishment of a VIE is motivated by a main factor: foreign investors can freely invest into those sectors whose capital inflows are restricted or even prohibited[196].

The VIE structure is quite convoluted: foreign investors invest into an offshore company (called "Special Purpose Vehicle" or simply "SPV") which is the owner of 100% of shares of an onshore company; in order to invest into those sectors which are restricted or prohibited, onshore shareholders establish a company (the VIE) which is linked to the existing onshore company through economic contracts, and so able to pass the profits of activities which rely in prohibited or restricted sectors through service fees. Moreover, onshore shareholders exert the actual control of the FIE through control agreements; the profits of the VIE are then remitted to the offshore parent company under the form of dividends[197]. The main systems of control adopted by offshore companies to maintain the *de facto* control of the onshore company are 5: loan agreements, equity pledge agreements, call option agreements, technical service agreements and power of attorney[198]. The operating principle of a VIE is better explained in §Table 5[199], in which it is underlined the relation between the foreign company and the VIE through a convoluted series of agreements:

[195] Santoni, G., *Foreign Capital in Chinese Telecommunication Companies: From the Variable Interest Entity Model to the Draft of the New Chinese Foreign Investment Law*, 2018.
[196] In other words, establishing a VIE is a way to circumvent the Negative List regulation.
[197] Ellis, M., Milner, G. A., Hu, M., *The VIE Structure: Past, Present and Future – Part I*, 06/05/2020, Hong Kong Lawyer, retrievable at http://www.hk-lawyer.org/content/vie-structure-past-present-and-future-%E2%80%93-part-i, last accessed September 29th, 2020. Hong Kong Lawyer is an online journal which is controlled by "The Law Society of Hong Kong", a company located in Hong Kong to which nowadays more than 10,000 lawyers are affiliated.
[198] Santoni, G., *Foreign Capital in Chinese Telecommunication Companies: From the Variable Interest Entity Model to the Draft of the New Chinese Foreign Investment Law*, 2018.
[199] Ellis, M., Milner, G. A., Hu, M., *The VIE Structure: Past, Present and Future – Part I*, 06/05/2020, Hong Kong Lawyer (for further information see *Note 198*), retrievable at http://www.hk-lawyer.org/content/vie-structure-past-present-and-future-%E2%80%93-part-i, last accessed September 29th, 2020. §Table 5 describes how a VIE operates in China: in addition to the fact the table identifies onshore shareholders as Chinese nationals (PRC stands for People's Republic of China), the onshore company is identified as a WFOE (wholly foreign-owned enterprise), which, after the implementation of the new FIL, should be identified as a foreign-invested enterprise.

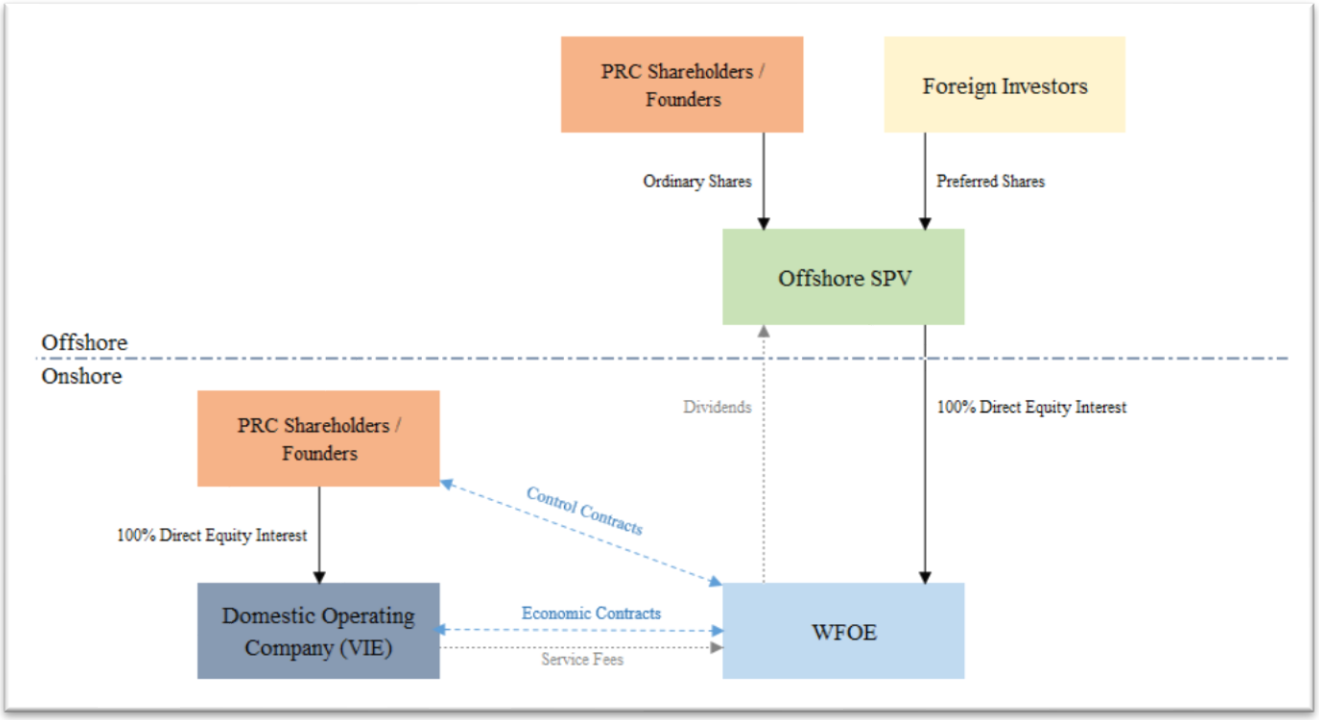

Table 5 Operating Principle of a VIE

As regards the point of view of Chinese nationals, VIEs have been adopted in order to raise funds through the inflow of foreign capitals, which were the easiest way to be financed: the State-owned banking system and the undersized bond market have been unable to help domestic companies in this way, almost pushing them to search for capitals abroad[200]. In order to acquire capitals abroad, Chinese companies used to be listed abroad, and gaining so the liquidity they needed through the method of Initial Public Offerings (briefly known as "IPOs"; in Chinese they are known as *Shouci Gongkai Mugu* 首次公开募股[201]): this allowed foreign investors to acquire shares of the onshore company[202]. In conclusion, VIEs are companies with a particular structure which circumvent restrictions on foreign investments, trying to acquire capitals in sectors which are considered sensitive by the authorities of the country in which the VIE has been established.

[200] Liu, M., *The New Chinese Foreign Investment Law and Its Implication on Foreign Investors*, 2018.
[201] The official translation can be found in the article *Alibaba Wancheng Shi Shang Zui Da Shouci Gongkai Mugu* 阿里巴巴完成史上最大首次公开募股, 09/24/2014, People's Journal, retrievable at http://finance.people.com.cn/n/2014/0924/c1004-25720739.html, last accessed October 2nd, 2020.
[202] Santoni, G., *Foreign Capital in Chinese Telecommunication Companies: From the Variable Interest Entity Model to the Draft of the New Chinese Foreign Investment Law*, 2018.

3.1.1 First Cases in the Nineties: the CCF Model

The first examples of Chinese VIEs can be tracked back to the mid-Nineties, when China had not even entered the WTO[203]: the first case related to the VIE structure was the China Unicom case[204]. The Unicom case was treated hostilely by Chinese authorities, who, at first, accepted the existence of the particular model that was operating in the Nineties. It is not possible to consider this kind of structure as a Variable Interest Entity, since the concept had not even been outlined by FASB[205]; moreover, the structure adopted by Unicom jointly with other foreign companies was quite different from what is nowadays know as VIE. The old model, whose name was *China-China-Foreign Model* (known briefly as "CCF Model", translation of its Chinese name *Zhong-Zhong-Wai Moshi* 中中外模式[206]), shared just a characteristic with the VIE structure, that is its application to circumvent a sector prohibited at that time[207]. China Unicom adopted this method since it wanted to gain a competitive advantage against the more powerful China Telecom, but it needed funds, without which any operation could have been possible.

As a matter of fact, foreign telecommunication companies used to enter Chinese market through joint ventures established not directly with China Unicom, but with a subsidiary: the joint venture then would have signed contractual agreements with China Unicom, which, under the name of the joint venture, would have constructed a new network (a pager or mobile network) and purchased equipment, that should be owned by Unicom. The system worked for several years, until

[203] For further information see §1.1. As mentioned above, the entrance into WTO was a major leap forward the liberalization of the domestic market, and helped China to continuously adjust its regulatory framework in order to encounter the standards requested by the Organization.
[204] Ziegler, S. F., *China's Variable Interest Entity Problem: How Americans Have Illegally Invested Billions in China and How to Fix It*, 2016.
[205] As said afore, the concept of VIE was outlined only in 2003, after the Enron case.
[206] The term in Chinese is mentioned in Yang, Z., *Caiqu "Zhong-Zhong-Wai" Moshi Jiakuai Beijing Gongye Jiegou Tiaozheng* 采取 "中中外" 模式加快北京工业结构调整, Adopting the "CCF" Model to Accelerate the Adjustment of Peking's Industrial Structure, 1996.
[207] At that time the Negative List was not promulgated yet (as seen in §1.1.2, the first time the Negative List became a legal tool to classify investments was in 2013, just in the PFTZ of Shanghai, and then was extended nationwide with the amendments of the Three FIE Laws in 2016), instead, the Catalogue was still the main act which regulated any foreign investment in any field.

the State Council outlined the system adopted by these companies criticizing the irregularity in the accounting system, in 1998[208]. In fact, at first the CCF Model was defined "irregular" and the authorities asked for a revision of these foreign investments: as it can be noticed, the definition of "irregular" activities did not imply directly their status of "illegal", but, right after in the same year the Model was definitively defined "illegal", signing its demise.

The CCF Model is important not only because it is the first kind of indirect investment structure whose aim was to circumvent the regulations imposed from the Catalogue, but it showed at that time the neglecting attitude to regulate it held by high-ranking officials: even if they knew such a process was obviously illegal, they did not clearly dispose of it when they could, instead, they endorsed it[209]; the CCF Model received also the endorsement of the former premier Li Peng and of the former minister of Information Industry Wu Jichuan[210].

3.1.2 Improvement of the CCF Model: the Sina Model

Even if the CCF Model was declared illegal, Chinese companies found a new method to circumvent national restrictions, managing to acquire foreign capitals in those particular sectors. The pioneers of this new era of circumvention of foreign investment restrictions were Sina and Netease,

[208] Since the ownership of the network established by the joint venture and the relative equipment purchased did not belong to joint ventures themselves, the State Council noticed that joint ventures should not have accounted for the depreciation of such assets.
[209] Lubman, S., *Looking for Law in China*, 2006.
[210] *Ibid.*; it is not an isolated case of high-ranking officials endorsing foreign investments in a prohibited or restricted field, as the experience of Rupert Murdoch can show. Rupert Murdoch was a journalist of BBC, who, in the Nineties, tried to acquire the sympathies of Chinese high-ranking officials, releasing several public statements which endorsed Chinese political choices, such as blocking Chris Patten (former Hong Kong Governor) to publish a book on Sino-Western relations under his publishing company, breaking the latter's contract. In order to reward Murdoch for his gestures, Chinese authorities allowed him to invest into China Netcom Corporation (operating in the telecom sector; merged completely to China Unicom in 2008). However, his ambitions started to encounter several issues in 2005, when customs officials confiscated materials in a subsidiary of Star TV, the channel owned by Murdoch, and when the State Administration of Radio, Film and Television blocked the takeover of Qinghai Tv by a subsidiary of News Tv, main company owned by Murdoch. See more at Lubman, S., *Looking for Law in China*, 2006; Sydney Morning Herald, *Murdoch out of step in new China*, 08/30/2005, retrievable at https://www.smh.com.au/business/murdoch-out-of-step-in-new-china-20050830-gdlywe.html, last accessed September 8th, 2020.

and in a second moment Sohu adopted the same structure[211]. The first difference with the CCF Model regarded the sector touched by this new so-called *Sina Model*[212] (known in Chinese as "*Xinlang Moshi* 新浪模式"[213]), which was anything but what would have been recognized as a Variable Interest Entity structure.

The CCF Model was adopted by telecom companies with the aim of purchasing and building new asset-heavy telecom services, whilst, at least in a first moment, the Sina Model was adopted by companies which operated in the digital sector; such companies were Internet Content Providers (briefly known as "ICPs") because provided value-added services (i.e. webmail, videogames etc.) on an already existent network, and for this reason they did not need to build or purchase new networks, eliminating so the issue of accountability of irregular assets due to which the CCF Model had been declared illegal[214]. Moreover, the Sina Model adopted not only economic contracts but also control contracts with the parent company, enabling so the offshore company to be listed abroad[215], consolidating so the financial statement of the VIE, which was actually controlled by the offshore company[216].

[211] Ellis, M., Milner, G. A., Hu, M., *The VIE Structure: Past, Present and Future – Part I*, 06/05/2020, Hong Kong Lawyer (for further information see *Note 197*), retrievable at http://www.hk-lawyer.org/content/vie-structure-past-present-and-future-%E2%80%93-part-i, last accessed September 29th, 2020.

[212] Yu, S., Jiang, F., Li, R., Xu, E., Liu, D. report in *Is VIE an Obstacle to China Merger Filing?*, 07/27/2020, retrievable at http://www.zhonglun.com/Content/2020/07-27/1638551106.html, last accessed September 29th, 2020; Zhong Lun is a Chinese law firm founded in 1993 whose achievements have been recognized with several awards by many international institutions and law journals. The Sina Model is also known as *Netease Model*, as Ellis, M., Milner, G. A., Hu, M., *The VIE Structure: Past, Present and Future – Part I*, 06/05/2020, Hong Kong Lawyer (for further information see *Note 197*), retrievable at http://www.hk-lawyer.org/content/vie-structure-past-present-and-future-%E2%80%93-part-i, last accessed September 29th, 2020; however, whichever definition commentators have given to such new structure, it was what would be later known as a Variable Interest Entity structure.

[213] The definition of the structure in Chinese can be retrieved at Yang, C., *Xinlang Moshi (VIE Moshi) – Falü Pingxi (2012)* 新浪模式（VIE 模式）— 法律评析（2012）, The *Sina Model* (VIE Model) – Legal Comment (2012), LawBridge (for further information see *Note* 191), 2012, retrievable at http://www.lawbridge.org/legal-analysis-of-sina-mode-vie-mode/, last accessed October 3rd, 2020.

[214] Yu, S., Jiang, F., Li, R., Xu, E., Liu, D., *Is VIE an Obstacle to China Merger Filing?*, 07/27/2020, Zhong Lun (for further information see *Note 212*), retrievable at http://www.zhonglun.com/Content/2020/07-27/1638551106.html, last accessed September 29th, 2020.

[215] Often in the US stock exchanges, such as NASDAQ and NYSE.

[216] Yu, S., Jiang, F., Li, R., Xu, E., Liu, D., *Is VIE an Obstacle to China Merger Filing?*, 07/27/2020, Zhong Lun (for further information see *Note 212*), retrievable at http://www.zhonglun.com/Content/2020/07-27/1638551106.html, last accessed September 29th, 2020.

As said above, the digital sector was the first to adopt this new model, but many others followed the example: the new model was not really faced by a strong commitment from Chinese authorities[217], and for this reason, in 2012, over the 50% of companies listed in the US market were VIEs[218]. Taken into account what has been just said, other several factors pushed the adoption and the growth of the VIE model; as said before, from Chinese perspective, the main task of VIEs is to attract foreign capitals into those sectors whose foreign inflows are prohibited or restricted: for this reason, the fact of being listed on US stock exchanges could be read also as a marketing strategy, since the company listed acquires more prestige[219].

3.1.3 Further Development of VIE Structure and Recent Policies

The first signs of the willingness of regulate the VIE structure were visible in the Anti-Monopoly Law, promulgated in 2007: the fourth section of the Anti-Monopoly Law is dedicated to the topic of concentration of undertakings and one of the situation which can be considered a consideration of undertakings is the following:

> "*[…] control over other undertakings or the ability capable of exerting a decisive influence on the same gained by an undertaking through signing contracts or other means.*"[220]

The provision clearly defines the concentration of undertakings a mean adopted to establish a VIE, but it does not define as illegal the method; according to another provision,

[217] The regulatory uncertainty which characterized VIEs in China has always been an issue for foreign investors, and the fact has encountered the attention of commentators; among them, one reported that "*by leaving the issue in a legal gray area, China can attract foreign investment to bolster key sectors of the economy, while keeping the right to clamp down when it desires*" (Aubin, D., *Investor risk lurks in legal structure of China IPOs -lawyers*, 06/23/2013, Reuters, retrievable at https://www.reuters.com/article/china-investments/investor-risk-lurks-in-legal-structure-of-china-ipos-lawyers-idUSL2N0EM1PD20130623, last accessed September 9th, 2020).
[218] Santoni, G., *Foreign Capital in Chinese Telecommunication Companies: From the Variable Interest Entity Model to the Draft of the New Chinese Foreign Investment Law*, 2018.
[219] Shi, S. Y., *Dragon's House of Cards: Perils of Investing in Variable Interest Entities Domiciled in the People's Republic of China and Listed in the United States*, 2014.
[220] Anti-Monopoly Law, Art. 20.

the concentration of undertakings should be punished when it overcomes a control limit set by the Anti-Monopoly Law itself[221]. Moreover, the Anti-Monopoly Law applies the review of the concentration of undertakings also to foreign investors[222].

The Anti-Monopoly Law was later accompanied by the Notice 2011[223], regarding the operations of M&As in which it was involved a foreign investor: as a matter of fact, the Notice 2011 emphasized the concept of "actual control" (*shiji kongzhi* 实际控制) of companies in key sectors, which should be held by the Chinese investor[224]. The following Provisions 2011[225] underlined the same concept, clarifying also that foreign investors should not avoid the national security review for M&A operations through illicit means, such as control contracts or overseas transactions[226]. These measures were adopted to stop the diffusion of VIE structure among Chinese and foreign investors, but the main problem was their enforceability[227]; however, both Chinese and foreign investors knew that the operations they were conducting were not plain and, due to the climate of uncertainty which wrapped the matter, many issues arisen within companies were handled very carefully and fearfully of the reaction of Chinese authorities[228].

The trend of closeness towards the VIE structure was maintained also the year after, when MOFCOM accepted a review for the Wal-Mart – Niu Hai Case: Wal-Mart, a US

[221] Anti-Monopoly Law, Art. 22.
[222] Anti-Monopoly Law, Art. 31.
[223] See *Note 115*.
[224] *Ibid.*
[225] See *Note 116*.
[226]See *Note 116*, Art. 9.
[227] Shi, S. Y., *Dragon's House of Cards: Perils of Investing in Variable Interest Entities Domiciled in the People's Republic of China and Listed in the United States*, 2014.
[228] In 2010, Gigamedia Limited experienced a phenomenon of blackmail by one of its executive officers in China: when China head executive Wang Ji knew about the possibility of his dismissal from the VIE and the WFOE, he seized several documents, impeding so Gigamedia to work in a document-based environment that is the Chinese market; this action impeded also Gigamedia to maintain the control over the two companies based in China, making unable the process of sharing their profits to Gigamedia itself; the issue was resolved reaching an agreement with Wang Ji, who gave back the key documents. This demonstrates how fearful were foreign investors of openly performing any kind of action regarding the VIE structure, even legitimately suing an employee. See more at Ziegler, S. F., *China's Variable Interest Entity Problem: How Americans Have Illegally Invested Billions in China and How to Fix It*, 2016.

multinational company specialized in the retail sector, decided to acquire the 33.6% of the total shares of the Chinese company Niu Hai, which should have enabled Wal-Mart to hold a controlling stake in the online direct sale business of Yihaodian, the largest online retailer in the Chinese market[229]. The concerns of Chinese authorities are justified by the fact that Wal-Mart, a foreign enterprise, could have acquired so the right to invest into a sector that is formally prohibited to foreign investors, the telecommunication sector, since Yihaodian offered also value-added telecom services[230]. Afterwards, MOFCOM had taken a long period for the review, it released a public decision in which it declared that the transaction was accepted, but Wal-Mart should have abide by several provisions and restrictions in order to not breach Chinese regulations regarding the foreign investments in prohibited and restricted fields:

- Wal-Mart activities should have been confined to the sale segment of Yihaodian;
- Without any approval for acquiring value-added telecom services, Niu Hai should have not allowed any other parties to engage in such activities;
- Wal-Mart should have not been able to operate in the internet sector of Yihaodian through VIEs[231].

It is interesting to notice that MOFCOM clearly identified the possibility of Wal-Mart to operate in a prohibited sector through the illicit structure of the Variable Interest Entity: it

[229] Ning, S., Yin, H., Wu, H., *MOFCOM Approved Wal-Mart's Acquisition of Controlling Stake in Yihaodian but Said NO to VIE Structure*, 08/20/2012, King & Wood Mallesons (for further information see *Note 5*), retrievable at https://www.chinalawinsight.com/2012/08/articles/compliance/mofcom-approved-walmarts-acquisition-of-controlling-stake-in-yihaodian-but-said-no-to-vie-structure/, last accessed September 29th, 2020; for further information see also and *Shangwubu Gonggao 2012 Nian Di 49* 商务部公告 2012 年第 49, MOFCOM Announcement 2012/49, retrievable at http://www.mofcom.gov.cn/article/b/fwzl/201208/20120808284418.shtml, last accessed September 29th, 2020.

[230] As it has been analyzed afore, it is not the first time that foreign investors tried to invest in the telecommunication sector, since the first cases of illicit foreign investment were directed in this sector in the China Unicom case, due to the proliferation of the CCF Model; for further information return to §3.1.1.

[231] *Shangwubu Gonggao 2012 Nian Di 49* 商务部公告 2012 年第 49, MOFCOM Announcement 2012/49, retrievable at http://www.mofcom.gov.cn/article/b/fwzl/201208/20120808284418.shtml, last accessed September 29th, 2020.

was the first time that Chinese authorities explicitly referred to VIEs[232]. Therefore, the trend of closeness towards VIEs that appeared along with the promulgations of the Notice 2011 and the Provisions 2011: it was clear that the Anti-Monopoly Bureau had taken a hostile position against VIEs[233].

For this reason, the VIE structure should be considered not safe at all since it is not regulated or protected by any Chinese regulation: the case of Alibaba can better explain the situation. Alibaba was listed on NASDAQ stock exchange and in 2014 was protagonist of the biggest initial public offering in US history[234]. As Alibaba adopted the VIE structure to avoid Chinese regulations aimed at limiting foreign investments, the company bore the same risks of any other Chinese enterprise which adopted the VIE structure: as a matter of fact, in a form requested by US authorities, Alibaba acknowledged the difficulties and the risk to adopt such a structure. The main risk is the uncertainty and the instability which are intrinsic in the structure and that are borne also by foreign investors: Jack Ma – the founder of the company – abandoned the VIE approach in order to defend its interests against the major foreign investor of Alibaba, Yahoo[235]. When Alibaba created the Alipay payment system, Jack Ma unilaterally decided to move the major stakes of Alipay VIE in a China-domiciliated company in order to exclude Yahoo investors from the distribution of Alipay profits; due to the ambiguity and intrinsic irregularity of the VIE structure, Yahoo investors did not properly react to Jack Ma's decision[236].

[232] Ning, S., Yin, H., Wu, H., *MOFCOM Approved Wal-Mart's Acquisition of Controlling Stake in Yihaodian but Said NO to VIE Structure*, 08/20/2012, King & Wood Mallesons (for further information see *Note 5*), retrievable at https://www.chinalawinsight.com/2012/08/articles/compliance/mofcom-approved-walmarts-acquisition-of-controlling-stake-in-yihaodian-but-said-no-to-vie-structure/, last accessed September 29th, 2020; the measures which had been taken until that moment did not mention the existence of VIEs, but just described the structure without giving the proper name, leaving the VIE in a "grey zone" within Chinese regulations.
[233] *Ibid.*
[234] Johnson, K., *Variable Interest Entities: Alibaba's Regulatory Work-Around to China's Foreign Investment Restrictions*, 2015.
[235] *Ibid.*
[236] *Ibid.*

To conclude the analysis of the development of the VIE structure in China, it is important to underline several aspects:

- Even if VIEs are a tool for foreign investors to circumvent Chinese restrictions, their undefined status in Chinese Law creates instability and uncertainty for them;
- Chinese authorities do not want to release definitive statements regarding the VIE structure in order to control any case, and act when it is necessary for the interest of Chinese companies[237].

3.2 The Shanghai Mingcha Zhegang Case: Has the New FIL Changed the Approach towards VIEs?

In order to better understand the case-study, firstly the analysis will focus on the different approaches proposed by the various drafts of the FIL and of the Implementing Regulations; it is important to underline the fact that the definitive text of the Foreign Investment Law does not include any provision clearly aimed at regulating Variable Interest Entities, and, for this reason, this sector will try to analyze the words adopted in the documents. When a clear framework of the legal situation will have been provided, the attention will be put on the case-study regarding the establishment of a joint venture between the Shanghai Mingcha Zhegang and the Huansheng, two Chinese companies both from Shanghai, which has been put under investigation because the former is a VIE. It is

[237] As regards this last point, it is important to quote at least the example of the two different positions of the Supreme People's Court related to VIE cases: in 2012 the judicial body considered a VIE agreement invalid (Chinachem – Minsheng Bank Case) due to the application of art. 52 of the Contract Law (which declares the invalidity of the contracts aimed at circumventing Chinese Law), whilst, in 2015 considered valid a VIE agreement (Yaxing – Anbo Case). For this reason, it is possible to acknowledge that Chinese authorities (at least the Supreme People's Court) did not follow precedents; it is also true that at that time there was no rule regulating precisely VIE agreements, as it is today, but, as it will be explained in the next paragraph, even though the new FIL does not mention directly VIE structure, it could indirectly regulates it. For further information of the two cases mentioned above see Santoni, G., *Foreign Capital in Chinese Telecommunication Companies: From the Variable Interest Entity Model to the Draft of the New Chinese Foreign Investment Law*, 2018.

important to analyze this case-study since it can show the current position that Chinese authorities are keeping towards VIEs after the enforcement of the FIL.

3.2.1 Background of the Case-Study

During the years, the VIE structure has received much attention from Chinese authorities, but it has never formally recognized. The first time that Chinese authorities tried to acknowledge the existence of the VIE structure and the relative treatment can be retrieved in 2015, when the NPC published the *Draft FIL for Public Comment*[238], in which the concept of "control" of a company is outlined as follows:

> *"For the purpose of the Law, a party shall have the "control" over an enterprise under any of the following circumstances:*
>
> 1. *When the party holds, directly or indirectly, 50% or more of shares, equity, shares in property, voting rights or other similar rights and interests in the enterprise;*
> 2. *Where the party holds, directly or indirectly, less than 50% of shares, equity, shares in property, voting rights or other similar rights and interest, but any of the following conditions are satisfied:*
>   a. *The party is entitled to, directly or indirectly, appoint at least half of the members of the seats in the board of directors or a similar decision-making body of the enterprise;*
>   b. *The party is capable to ensure that its nominated persons can occupy at least half of the members of the seats in the board of*

[238] Jones Day, *Foreign Investment Law Of the People's Republic of China (Draft for Comments) (Unofficial English Translation)*, Jones Day, 2015, retrievable at https://www.uschina.org/sites/default/files/2015%20Draft%20Foreign%20Investment%20Law%20of%20the%20People%27s%20Republic%20of%20China_JonesDay_0.pdf, last accessed September 29th, 2020.

directors or a similar decision-making body of the enterprise; and

c. *The voting rights to which the party is entitled to are sufficient to exert a significant impact on the resolutions of the shareholders' meeting, the general meeting of shareholders, board of directors or other decision-making body of the enterprise.*

3. *Where the party is capable to exert a decisive impact on the enterprise's management, finance, human resources or technologies by contracts, trust or other ways."*[239]

The concept of control (*kongzhi* 控制) was important in the Draft FIL 2015 because it identified a foreign investor from a domestic one, deciding consequently whether the enterprise could freely invest into those sectors prohibited or restricted. The text of art. 18 is really plain and precise, outlining the main feature of a VIE structure without mentioning it: as a matter of fact, it underlined the actual control of a company and not only the control depending on the distribution of the shares. The Draft FIL 2015 is characterized so by the thorough closing towards VIEs, but – as it was analyzed in the first chapter – it was never promulgated, and just a few provisions were adopted in the consequent amendments of 2016 of the Three FIE Laws: any provision regarding the VIE structure was left apart and it was not neither mentioned in the amendments.

The new FIL and the Implementing Regulations have not mentioned any provision regarding the treatment of VIEs: even if it was expected a clarification about the matter especially in the Implementing Regulations[240], some commentators considered the choice of being silent on the

[239] Draft FIL 2015, Art. 18.
[240] Zhou, Q., *How to Read China's New Law on Foreign Investment*, 10/31/2019, China Briefing – From Dezan Shira & Associates (for further information see *Note 156*), retrievable at https://www.china-briefing.com/news/read-chinas-new-law-foreign-investment/, last accessed September 29th, 2020.

argument as a smart one[241]. However, it is possible to identify a provision which could interest the management of VIE cases within the territory of China. In art. 2 of the FIL – which it has been already mentioned above – the law explains which kind of investments should go under the definition of "foreign investments":

> *"[…] The term "foreign investment" as used in this Law refers to the activities related to the investments directly or indirectly carried out within the Chinese territory by any foreign natural person, any foreign enterprise or any other foreign organization […]"*[242]

The provision clearly states that any kind of investment, direct or indirect, should be defined as "foreign investments": a VIE is anything but an indirect form of investment, and so this provision could legitimate the practice of VIEs.

3.2.2 Main Events of the Case-Study and Observations

On April 20th, 2020, SAMR published a notification in which announced the opening of a review regarding the establishment of a joint venture between the Shanghai Mingcha Zhegang and the Huansheng Xinxi; as said above, the two companies from Shanghai were blocked because SAMR acknowledged an uncommon concentration of undertakings, which had to be deeply inspected. Moreover, the issue that has raised the attention is the fact that one of the two companies, precisely the Shanghai Mingcha Zhegang, is a Variable Interest Entity, considering also the fact that in the past Chinese authorities tried to avoid entering any investigation regarding such entities. The following

[241] Xu, P., Yao, L., Feng, C., Yao, P., Zhu, J., *Implementing Regulation for Foreign Investment Law heralding a New Era of Foreign Investment Regime in China*, 01/08/2020, King & Wood Mallesons (for further information see *Note 5*), retrievable at https://www.chinalawinsight.com/2020/01/articles/foreign-investment/implementing-regulation-for-foreign-investment-law-heralding-a-new-era-of-foreign-investment-regime-in-china/, last accessed September 29th, 2020; quoting the article, it states: "[…] *FIL and the FIL Implementing Regulation made a conscious choice by remaining silent on the topic. Considering the large number of enterprises currently taking advantage of the VIE structure, the potential repercussion if the status quo is broken could be more than significant. The FIL Implementing Regulation's silence is widely expected. In fact, it is exceedingly hard to find a perfect resolution acceptable to all stakeholders. Maintaining the status quo is apparently the most pragmatic approach for the time being […]*".

[242] Foreign Investment Law, Art. 2.

table (§Table 6[243]) is the original notice released by SAMR on April 20th, in which the case is introduced and deeply analyzed:

案件名称	上海明察哲刚管理咨询有限公司与环胜信息技术（上海）有限公司新设合营企业案	
交易概况（限200字内）	上海明察哲刚管理咨询有限公司（“**明察哲刚**”）和环胜信息技术（上海）有限公司（“**环胜信息**”）拟设立合营企业，从事餐饮行业信息科技、网络科技领域的技术开发、数据处理、人工智能应用软件开发、人工智能硬件开发等业务，探索产研合作的新模式，为餐饮行业提供更多技术解决方案。明察哲刚与环胜信息将分别持有合营企业60%和40%的股权，并共同控制合营企业。	
参与集中的经营者简介	1、明察哲刚	明察哲刚所在集团主要从事的业务包括：为企业提供消费者全触点测量与优化、智能分析与决策、业务及数据中台的营销智能闭环解决方案，以及智慧餐饮等场景下的新一代人机协同解决方案，为政府部门或公共事业提供人工智能解决方案。明察哲刚的最终控制人是LEADING SMART HOLDINGS LIMITED（汇智控股有限公司），一家开曼注册的公司，其通过关联实体基于一系列协议安排控制明察哲刚。
	2、环胜信息	环胜信息所在集团拥有肯德基、必胜客、塔可贝尔、东方既白、小肥羊和COFFii & JOY连锁餐厅品牌，其主要在中国从事西式快餐、中式快餐、火锅餐饮、休闲餐饮等业务。环胜信息的最终控制人是百胜中国控股公司。

[243] State Administration for Market Regulation, *Shanghai Mingcha Zhegang Guanli Zixun Youxian Gongsi Yu Huansheng Xinxi Jishu (Shanghai) Youxian Gongsi Xin She Heying Qiye An* 上海明察哲刚管理咨询有限公司与环胜信息技术（上海）有限公司新设合营企业案, Case on the New Establishment of a Joint Venture between Shanghai Mingcha Zhegang Management Consulting LTD and Huansheng Xinxi (Shanghai) LTD, 04/20/2020, retrievable at http://www.samr.gov.cn/fldj/ajgs/jzjyajgs/202004/t20200420_314431.html, last accessed September 29th, 2020.

简易案件理由（可以单选，也可以多选）	□1. 在同一相关市场，所有参与集中的经营者所占市场份额之和小于 15%。
	☑2. 存在上下游关系的参与集中的经营者，在上下游市场所占的市场份额均小于 25%。
	□3. 不在同一相关市场、也不存在上下游关系的参与集中的经营者，在与交易有关的每个市场所占的份额均小于 25%。
	□4. 参与集中的经营者在中国境外设立合营企业，合营企业不在中国境内从事经济活动。
	□5. 参与集中的经营者收购境外企业股权或资产的，该境外企业不在中国境内从事经济活动。
	□6. 由两个以上的经营者共同控制的合营企业，通过集中被其中一个或一个以上经营者控制。
备注	1. 中国餐饮行业信息技术应用产品及服务市场 • 明察哲刚：[0-5%] 2. 中国餐饮服务市场 • 环胜信息：[0-5%]

Table 6 Original Notice Released by SAMR about Shanghai Mingcha Zhegang Case

The notice offers an overview of the two companies, explaining in which sectors they operate, and which aim the joint venture has. The "Shanghai Mingcha Zhegang Case" is opened with the analysis with the Huansheng Xinxi, the notice underlines the participation of Huansheng Xinxi in many companies related to the catering industry, including both western and eastern cuisine, such as KFC, Pizza Hut, Taco Bell, East Dawning, Little Sheep and COFFii & JOY; the analysis of Huansheng Xinxi terminates informing the audience that the ultimate owner of the company is the Yum! group[244].

[244] *Ibid.*

A similar analysis is provided for the Shanghai Mingcha Zhegang, whose main business includes: providing enterprises with consumer full-touch measurement and optimization, smart analysis and decision-making, business and data center marketing intelligent closed-loop solutions, and a new generation of artificial intelligence machineries for smart solutions reserved to Government departments or to public utilities. It is also underlined that the last controller (literally "*zuizhong kongzhi* 最终控制) is the Leading Smart Holdings Limited, "*a Cayman-registered company that controls Mingcha Zhegang through related entities based on a series of agreement*" ("*yi jia Kaiman zhuce de gongsi, qi tongguo guanlian shiti jiyu yi xilie xieyi anpai kongzhi Mingcha Zhegang* 一家开曼注册的公司，其通过关联实体基于一系列协议安排控制明察哲刚"). As analyzed in the precedent section, the Shanghai Mingcha Zhegang is a Variable Interest Entity which operates in China under the actual control of the Leading Smart Holdings Limited[245]. The following table (§Table

[245] *Ibid.*

7[246]) shows the different companies through which Shanghai Mingcha Zhegang is ultimately controlled by Leading Smart Holdings Limited:

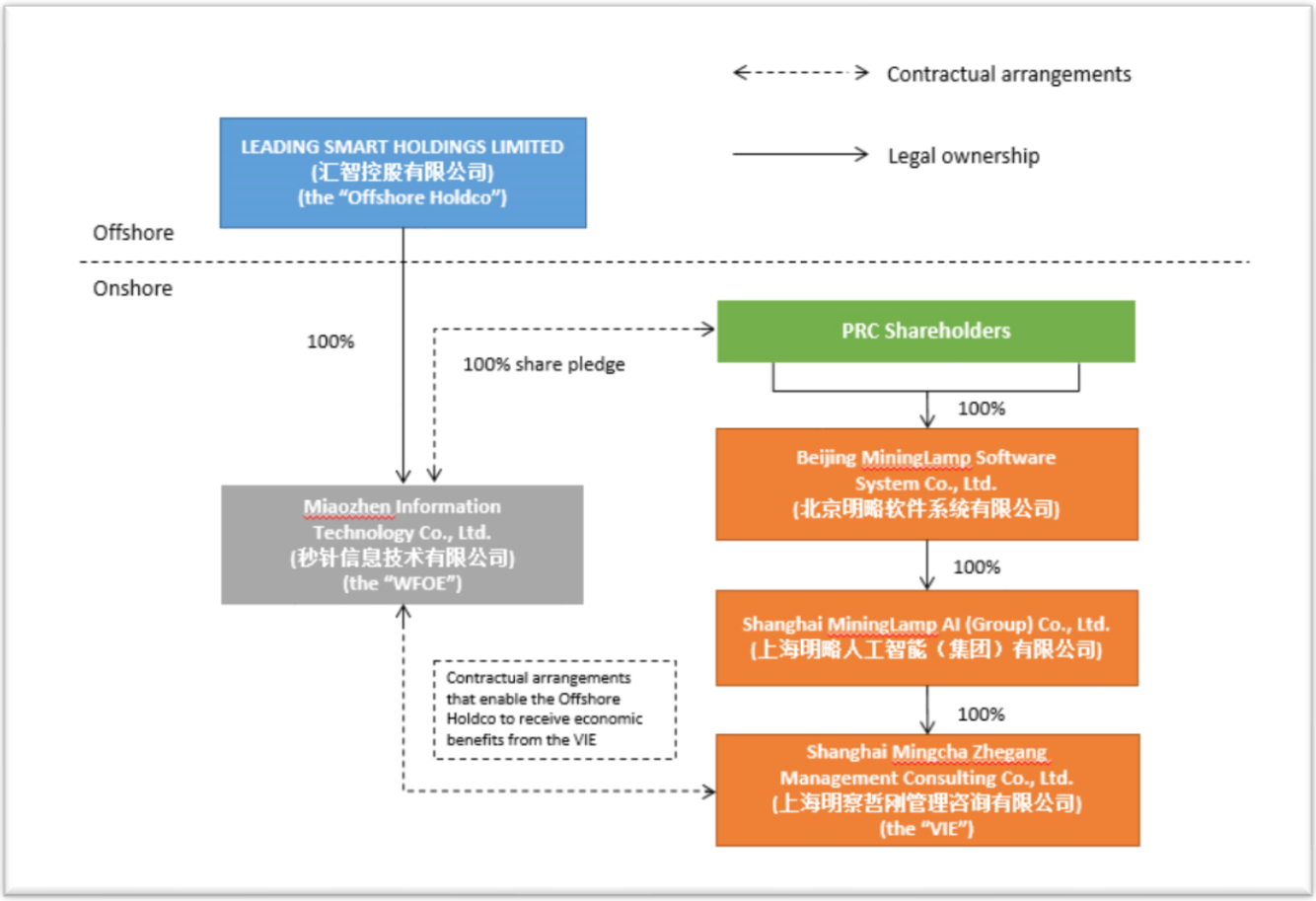

Table 7 Panel of the Control Bounds of Shanghai Mingcha Zhegang

As showed in the figure, Shanghai Mingcha Zhegang is controlled by the Leading Smart Holdings Limited through a series of agreements, which partially hide the actual controller of the Chinese company. The Leading Smart Holdings Limited (called in §Table 7 "Offshore Holdco") is the only company that operates offshore (as specified also in the notice of SAMR, the company's registered office is located in Cayman Islands), but it is the one which exerts the actual control of Shanghai Mingcha Zhegang; the company is the official controller of Miaozhen Information Technology Co., an onshore Chinese company that is defined as the wholly foreign-owned enterprise

[246] Ellis, M., Gerrits, R. P., Hu, M., *Chinese Anti-Monopoly Regulator Accepts First Merger Control Filing Involving Variable Interest Entity ("VIE") Structures*, 04/27/2020, Morrison & Foerster (for further information see *Note 146*), retrievable at: https://www.mofo.com/resources/insights/200426-chinese-anti-monopoly-regulator.html, last accessed September 23rd, 2020.

(the "WFOE"), even though after the implementation of the FIL the concept of wholly foreign-owned enterprise has vanished in favor of the one of foreign-invested enterprise. Through a control exerted with a total share pledge by Chinese shareholders, the Miaozhen Information Technology Co. is linked to Beijing Mining Lamp Software System Co., which directly and totally controls the Shanghai Mining Lamp AI (Group) Co., that is the official controller of Shanghai Mingcha Zhegang. As described in the image, the Shanghai Mingcha Zhegang allows the offshore company to receive economic benefits through further contractual arrangements with the Miaozhen Information Technology Co.[247].

The notice explains also in which sector the joint venture will operate: Shanghai Mingcha Zhegang and Huansheng Xinxi intend to establish a joint venture in order to engage in technology development in the fields of information technology and network technology in the catering industry, such as data processing, artificial intelligence application software development and artificial intelligence hardware development, exploring new models of cooperation between production and research. Mingcha Zhegang and Huansheng Xinxi will hold 60% and 40% of the equity in the joint venture and jointly control the joint venture[248].

It is important to underline that in the notice published by the SAMR there is no evidence of the fact that the status of VIE of the Shanghai Mingcha Zhegang could arise problems, since, as it has been analyzed above, there is neither a specific regulation for VIEs in China and VIEs have received unfavorable attention by Chinese authorities. Moreover, the notice does not provide any information regarding any suspicious investment in prohibited or restricted sectors by Mingcha Zhegang, limiting

[247] *Ibid.*

[248] State Administration for Market Regulation, *Shanghai Mingcha Zhegang Guanli Zixun Youxian Gongsi Yu Huansheng Xinxi Jishu (Shanghai) Youxian Gongsi Xin She Heying Qiye An* 上海明察哲刚管理咨询有限公司与环胜信息技术（上海）有限公司新设合营企业案, Case on the New Establishment of a Joint Venture between Shanghai Mingcha Zhegang Management Consulting LTD and Huansheng Xinxi (Shanghai) LTD, 04/20/2020, retrievable at http://www.samr.gov.cn/fldj/ajgs/jzjyajgs/202004/t20200420_314431.html, last accessed September 29th, 2020.

the range of the analysis to the objective of the willing-to-establish joint venture with Huansheng Xinxi[249].

Before this case, SAMR had never accepted any filing request regarding VIEs, since it was market practice not to open a filing based on the Anti-Monopoly Law with respect to transactions involving VIE arrangements: there was no clear lawful basis for SAMR not accept such filings. SAMR has been refusing to accept these filings so far as its final decision on the case could have been viewed as thoroughly approving or rejecting the VIE structure[250]. The formal acceptance of a merger review file including a Variable Interest Entity by Chinese authorities (in this case the SAMR) was already considered at the time (April) a major step further the liberalization process of accepting VIEs in Chinese domestic market, finally allowing them to come out of the grey zone in which they have been relegated so far[251].

On July 16th, after 88 days of review[252], SAMR published the weekly list in which it usually shows the results of the recent review filings which are unconditionally approved ("*wu tiaojian pizhun jingyingzhe jizhong anjian* 无条件批准经营者集中案件"): in the list, among several results, it was

[249] Liu, C., Bi, Y., Corporate & Commercial Group, King & Wood Mallesons, *"VIE Kunju" Yinglai Zhuanji! Fan Longduan Ju Shouci Pizhun She VIE Jiagou de Fan Longduan Shenbao* "VIE 困局" 迎来转机！反垄断局首次批准涉 VIE 架构的反垄断申报, A Chance to Solve the "VIE Dilemma"! The Anti-Monopoly Bureau Has Approved an Anti-Monopoly Application Concerning the VIE Structure for the First Time, 07/23/2020, King & Wood Mallesons (for further information see *Note 5*), retrievable at https://www.chinalawinsight.com/2020/07/articles/corporate-ma/vie%E5%9B%B0%E5%B1%80%E8%BF%8E%E6%9D%A5%E8%BD%AC%E6%9C%BA%EF%BC%81%E5%8F%8D%E5%9E%84%E6%96%AD%E5%B1%80%E9%A6%96%E6%AC%A1%E6%89%B9%E5%87%86%E6%B6%89vie%E6%9E%B6%E6%9E%84%E7%9A%84/, last accessed October 7th, 2020.

[250] Ellis, M., Gerrits, R. P., Hu, M., *Chinese Anti-Monopoly Regulator Accepts First Merger Control Filing Involving Variable Interest Entity ("VIE") Structures*, 04/27/2020, Morrison & Foerster (for further information see *Note 146*), retrievable at: https://www.mofo.com/resources/insights/200426-chinese-anti-monopoly-regulator.html, last accessed September 23rd, 2020.

[251] *Ibid.*

[252] Liu, C., Bi, Y., Corporate & Commercial Group, King & Wood Mallesons, *"VIE Kunju" Yinglai Zhuanji! Fan Longduan Ju Shouci Pizhun She VIE Jiagou de Fan Longduan Shenbao* "VIE 困局" 迎来转机！反垄断局首次批准涉 VIE 架构的反垄断申报, A Chance to Solve the "VIE Dilemma"! The Anti-Monopoly Bureau Has Approved an Anti-Monopoly Application Concerning the VIE Structure for the First Time, 07/23/2020, King & Wood Mallesons (for further information see *Note 5*), retrievable at https://www.chinalawinsight.com/2020/07/articles/corporate-ma/vie%E5%9B%B0%E5%B1%80%E8%BF%8E%E6%9D%A5%E8%BD%AC%E6%9C%BA%EF%BC%81%E5%8F%8D%E5%9E%84%E6%96%AD%E5%B1%80%E9%A6%96%E6%AC%A1%E6%89%B9%E5%87%86%E6%B6%89vie%E6%9E%B6%E6%9E%84%E7%9A%84/, last accessed October 7th, 2020; the amount of days required for the review can reach the maximum of 30 days, and the author underlines the fact that in first quarter of 2020, SAMR spent the average amount of 12-13 days to resolve the reviews.

also figured the definitive closing of the Shanghai Mingcha Zhegang Case[253]. As reported by several commentators[254], such a result must be received as positive signal, since a case of merging review including a VIE has never been accepted without imposing any particular condition[255]. The official information disclosed about the resolution of the Shanghai Mingcha Zhegang Case are very scarce and they leave room for discussions regarding the adoption of the VIE structure and its regulation under the new FIL.

The first thing to notice is that the Governmental body under which the review has gone through is the SAMR, the review body of Anti-Monopoly Law[256]: as mentioned above, the reason of the opening of the filing for a merger review was the concentration of undertakings, a topic that is treated in the Anti-Monopoly Law, and for this reason it is possible to assume that the body review for cases involving VIEs should informally be the SAMR[257].

Moreover, the reason of filing did not regard the establishment of a VIE, but the establishment of a joint venture between a VIE and a Chinese enterprise: the case-study is demonstrating that Chinese authorities (in this specific case the SAMR) are recognizing that VIEs exist in the reality of

[253] State Administration for Market Regulation, *2020 Nian 7 Yue 13 Ri – 7 Yue 19 Ri Wu Tiaojian Pizhun Jingyingzhe Jizhong Anjian Liebiao* 2020 年 7 月 13 日−7 月 19 日无条件批准经营者集中案件列表, List of the Cases on Concentrations of Undertakings Unconditionally Approved from July 13th, 2020 to July 19th, retrievable at http://www.samr.gov.cn/fldj/ajgs/wtjjzajgs/202007/t20200722_320099.html, last accessed September 30th, 2020.

[254] Liu, C., Bi, Y., Corporate & Commercial Group, King & Wood Mallesons, *"VIE Kunju" Yinglai Zhuanji! Fan Longduan Ju Shouci Pizhun She VIE Jiagou de Fan Longduan Shenbao* "VIE 困局" 迎来转机！反垄断局首次批准涉 VIE 架构的反垄断申报, A Chance to Solve the "VIE Dilemma"! The Anti-Monopoly Bureau Has Approved an Anti-Monopoly Application Concerning the VIE Structure for the First Time, 07/23/2020, King & Wood Mallesons (for further information see *Note* 5), retrievable at https://www.chinalawinsight.com/2020/07/articles/corporate-ma/vie%E5%9B%B0%E5%B1%80%E8%BF%8E%E6%9D%A5%E8%BD%AC%E6%9C%BA%EF%BC%81%E5%8F%8D%E5%9E%84%E6%96%AD%E5%B1%80%E9%A6%96%E6%AC%A1%E6%89%B9%E5%87%86%E6%B6%89vie%E6%9E%B6%E6%9E%84%E7%9A%84/, last accessed October 7th, 2020; Yu, S., Jiang, F., Li, R., Xu, E., Liu, D., *Is VIE an Obstacle to China Merger Filing?*, 07/27/2020, Zhong Lun (for further information see *Note* 212), retrievable at http://www.zhonglun.com/Content/2020/07-27/1638551106.html, last accessed September 29th, 2020.

[255] As analyzed above in §3.1, in the past Chinese authorities had shown a turbulent relationship with the VIE structure: the China Unicom case (CCF Model, in §3.1.1) was not only declared "irregular" at first, but then was also banned, and for this reason Chinese enterprises adopted a new structure, the Netease Model (in §3.1.2), which cleared the path for the development of the VIE structure in China; as shown in the Wal-Mart – Yihaodian Case (in §3.1.3), the existence of the VIE structure was recognized, but its adoption was also forbidden when entering in the field of foreign investments into prohibited or restricted sectors.

[256] Yu, S., Jiang, F., Li, R., Xu, E., Liu, D., *Is VIE an Obstacle to China Merger Filing?*, 07/27/2020, Zhong Lun (for further information see *Note* 212), retrievable at http://www.zhonglun.com/Content/2020/07-27/1638551106.html, last accessed September 29th, 2020.

[257] *Ibid.*

the domestic market[258], and that whenever such entities do not engage in businesses which are prohibited or restricted for foreign investors can be considered as lawful, even if their actual control is not based on the possession of shares. It is important not to consider this case as an official clearance to foreign investors for the establishments of VIEs: VIEs have been recognized, not permitted[259].

SAMR has not specified whether the VIE (Shanghai Mingcha Zhegang) would operate in prohibited or restricted sectors, allowing the commentators think that the operations of the enterprise rely on permitted ones: as a matter of fact, the main reason for which VIEs have been received the negative attention from Chinese authorities – that is their adoption purposely aimed at circumventing the regulation of the Negative List – should not subsist[260].

This case-study allows commentators to notice that SAMR, differently by MOFCOM, is likely to proactively operate cases in which VIE structure is involved, differently from the former MOFCOM which had adopted a passive approach[261]: SAMR has cleared the case from the point of view of antitrust authority and took into examination factors such as market data and competition analysis, which were considered regular, allowing the establishment of the joint venture between Shanghai Mingcha Zhegang and Huansheng Xinxi[262]. The approach taken by SAMR is a step forward the gradual liberalization of the VIE structure in China and set a possible guideline for the future cases involving VIEs[263].

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[258] *Ibid.*

[259] Liu, C., Bi, Y., Liu, J., Corporate & Commercial Group, King & Wood Mallesons, *"VIE Kunju" Yinglai Zhuanji! Fan Longduan Ju Shouci Pizhun She VIE Jiagou de Fan Longduan Shenbao* "VIE 困局"迎来转机！反垄断局首次批准涉 VIE 架构的反垄断申报, A Chance to Solve the "VIE Dilemma"! The Anti-Monopoly Bureau Has Approved an Anti-Monopoly Application Concerning the VIE Structure for the First Time, 07/23/2020, King & Wood Mallesons (for further information see *Note 5*), retrievable at https://www.chinalawinsight.com/2020/07/articles/corporate-ma/vie%E5%9B%B0%E5%B1%80%E8%BF%8E%E6%9D%A5%E8%BD%AC%E6%9C%BA%EF%BC%81%E5%8F%8D%E5%9E%84%E6%96%AD%E5%B1%80%E9%A6%96%E6%AC%A1%E6%89%B9%E5%87%86%E6%B6%89vie%E6%9E%B6%E6%9E%84%E7%9A%84/, last accessed October 7th, 2020.

[260] *Ibid.*

[261] Yu, S., Jiang, F., Li, R., Xu, E., Liu, D., *Is VIE an Obstacle to China Merger Filing?*, 07/27/2020, Zhong Lun (for further information see *Note* 212), retrievable at http://www.zhonglun.com/Content/2020/07-27/1638551106.html, last accessed September 29th, 2020.

[262] *Ibid.*

[263] *Ibid.*

Another factor that is important to underline is the prevailing willingness of providing a clear framework of the VIE structure to the authorities in order to reduce the antitrust risk exposure[264]: as noticed earlier in the chapter, in the past VIEs traditionally preferred to stay outside the range of Chinese authorities' radar in order to avoid reviews which could have been an impediment for their standard affairs in China; instead, the case-study marks a different turn in the traditional procedure. The Shanghai Mingcha Zhegang notified its presence without avoiding the competition review system, making an important step further the standardization of the VIE structure[265].

3.3 Concluding Remarks

The Variable Interest Entity has characterized the Chinese framework of foreign investments in the last 25 years: the existence of a method to be adopted in order to avoid the national restrictions on several specific fields has never been seriously faced by Chinese authorities, which allowed firstly China Unicom to establish joint ventures with foreign telecommunication operators and to work with them through a hidden structure that had been accepted for several years until it was banned; secondly, Chinese authorities had never tried to block directly the new model outlined by Netease, Sohu and Sina, that would have been later recognized as a Variable Interest Entity structure, which spread among all of those sectors which could not receive a strong financial aid by the Chinese national financial market. Another fact to take into consideration is the unpredictability of Chinese legal framework and of Chinese authorities when involved in operations regarding foreign investments in prohibited and restricted sectors: China Unicom operations was even endorsed by high-level authorities.

[264] *Ibid.*

[265] *Ibid.*; in the amendment draft of the Anti-Monopoly Law of 2020 the fine provided for failure to notify (mistakes or lacks in the notice for the Anti-Monopoly Bureau) that has been proposed is increased: from a fine of the amount of RMB 500,000 provided in the current regime, the draft has proposed a fine whose amount is equal to the 10% of one undertaking's group-level turnover which can strongly affect the revenues of a company, discouraging so foreign investors to risk to hide any information in the notice provided to the Anti-Monopoly Bureau.

The risks concerning the operations within a VIE structure do not only regard the exposure to the risks concerning the national reviews, but also the possibility by Chinese investors to act in favor of their own interests, damaging foreign investors' ones: the example examined above of Alibaba shows how its founder Jack Ma disposed of foreign investors when recognized that the new project of Alipay could be a big opportunity of profit.

As regards the new FIL, commentators expected that Chinese authorities would have provided clear and limpid provisions regarding the regularization or the ban of VIEs; unexpectedly, the Law, differently from the draft published earlier, did not provide any provisions that directly mentioned the VIE structure. Giving a look backwards, the first draft proposed in 2015 took a strong position against the VIE structure, nullifying their numerous contractual agreements which defined the actual controller of a company; as a matter of fact, the above-analyzed concept of "actual control" should have been the scale of judgement adopted by Chinese authorities to issue reviews on VIEs: recognizing the actual controller of an allegedly-Chinese company could have helped Chinese authorities to apply the rules of the Catalogue and – when published – of the Negative List. The concept of actual control had been already outlined in the Notice 2011 and in the Provisions 2011 regarding the review process of M&As, but obviously it was extended just to the cases of M&As, allowing greenfield investments (i.e. establishment of joint ventures) not to be included by such a review mechanism.

As just said, the new FIL and the respective Implementing Regulations do not include any provision regarding VIE structure or VIEs at general. The only article which at least mentions their main feature is the art. 2 of the FIL, in which every foreign investment is considered so even if it direct or indirect: the inclusion of foreign indirect investments is clearly a sign of opening towards VIEs, whose existence should be accepted by Chinese authorities. However, their existence is justified just in case their business is not illegal, i.e. their adoption does not aim at circumventing the regulations of the Negative List, as the FIL underlines in art. 2.

The regularization of VIEs has always been a serious problem for Chinese regulators: on one hand it relies on a mechanism whose aim is to circumvent Chinese regulations, but on the other hand many companies adopt such a structure in order to gain financial support from foreign investors. As shown above, Chinese enterprises operating in restricted or prohibited sectors found difficulties in financing themselves because the banking system and the financial market were not so developed to assist them in their operations; besides, their business in such particular sectors restrained them to find financial aid abroad, leaving Chinese investors to a dead-end spot. The contribution of the VIE structure in China which allowed these sectors to survive and to be competitive is undeniable: many firms rely on this particular structure, and among them it is not strange to observe the presence of Baidu, Alibaba and Tencent, three of the most important digital enterprises in China. VIEs in China have been creating job posts, increasing tax revenues, bringing innovation and supporting global expansion. The reliance on this structure by many Chinese enterprises – even several ones among the most important national companies – has created an uncomfortable situation for Chinese legislative authority: accepting them could mean the endorsement of the Government to an illegal practice, whilst, banning them could bring financial chaos and disruption not only in Chinese economy but also in the global one[266].

As a matter of fact, the new FIL did not regularize the VIE structure, but the case-study analyzed in this chapter could help to understand the approach Chinese authorities would adopt after the implementation of the Law which has been introduced as main leap forward the liberalization of the system regarding foreign investments in China. The case-study demonstrates how strong is the push by Chinese authorities to finally recognize the structure and, when possible, not to impede its operations. SAMR for the first time released a statement on a case including a VIE without any

[266] Greguras, F., *China Variable Interest Entity Structure 2020*, 02/24/2020, Inventus Law, retrievable at https://www.inventuslaw.com/china-variable-interest-entity-structure-2020/, last accessed September 30th, 2020. Inventus Law is an American law firm which represents high growth startup companies, founders, angel investors, incubators, accelerators, venture capital and private equity investors based in Silicon Valley, New York, Washington State, Dallas, New Mexico, India, Europe, Southeast Asia, East Asia, Middle East, Latin America and Africa.

condition: the reaction is anything but positive, since it is the first time in the last 25 years. Moreover, the Shanghai Mingcha Zhegang did not release any document in which it declared its involvement in businesses within prohibited or restricted sectors: at the present, it is possible to assume that VIEs are accepted in case they are not involved in prohibited or restricted businesses, even though the structure of the company or the actual controller are not limpid and transparent to Chinese authorities. Besides, it is crucial to underline the fact that SAMR did not permit so the establishment of a VIE but recognized its existence and allowed to it the establishment of an allegedly lawful joint venture.

Eventually, the case-study is the only one known case which has been publicly released: the thoughts and the opinions expressed in this chapter are to be taken carefully since its unicity; maybe in the months and the years to come many other cases will be published and will have a different outcome, but at this moment the opinion of Chinese authorities is the one which can be redeemed by the Shanghai Mingcha Zhegang Case.

Conclusions

It would be quite difficult to assess the impact of the new FIL on the trend of foreign inflows in China, since the short time that has passed from its implementation; for this reason, the thesis aimed at showing the trend of liberalization within China which was brought by the new Law. The trend of liberalization was already noticeable in the previous years: in 2015, China released a draft law about foreign investments and the year after the Three FIE Laws were amended. China needed a further push to start a revolutionary reform and, luckily, it arrived: the US launched the Trade War against China and the Government felt the necessity to reassure the foreign investors who were starting to leaving the Asiatic country searching for different options to invest their capitals into. The rushed process – as mentioned above, just 3 months of work – gave birth to what is known today as Foreign Investment Law.

The FIL introduced several provisions which encountered the requests and the complaints moved from international organizations and from foreign investors represented by their countries' governments. The innovative features were introduced already in Section I of the FIL, in which the Government took the relevant decision to uniform the treatment reserved to domestic enterprises also to foreign ones, leaving as the only difference the presence of the Negative List that should be always followed by foreign investors willing to enter Chinese market. The protection of foreign investors' IP rights was finally treated: in Section III, identified as "Investment Protection", the FIL clearly reassures foreign investors that their IP rights would be respected and, in case of infringements, the Law provides punishments even for the Chinese administrative staff. Moreover, the FIL is directly linked to the Company Law and the Partnership Enterprise Law, consenting foreign enterprises to abide by one of the two and making their management swifter and less cumbersome. The trend of innovation and liberalization brought by the Law is also noticeable in the treatment reserved to VIEs.

The treatment reserved to VIEs has always been a sensitive matter for Chinese authorities since they are under the proverbial sword of Damocles: on one hand, if the VIE structure were deemed to be valid, the issue of financing those enterprises which rely in the prohibited and restricted sectors would be resolved, but at the same time the Negative List would have no reason to subsist, and any Chinese sector could be subject of the control exerted by foreign investors; on the other hand, if the VIE structure were deemed to be invalid, the Negative List would still be effective, but the impact on Chinese economy and on domestic enterprises would be dramatic. For this reason Chinese authorities have always avoided to release definitive statements and/or regulations regarding VIEs.

Nevertheless, thanks to the implementation of the new FIL, it is time for their liberalization. Even if the FIL does not directly mention VIE structure, it is also true that for the same reason VIEs are not deemed to be illegal; besides, defining as "foreign investments" all those investments issued by foreign investors directly or indirectly, the Law implies the legitimacy of VIEs thanks to the acknowledgement of indirect investments as lawful. However, as just said, since there was no provision regarding VIEs, the legitimacy of such structure could have been object of mere speculation without any evidence of the actual treatment reserved to them after the implementation of the FIL. The Shanghai Mingcha Zhegang has been the perfect example to prove not only the commitment of Chinese authorities in the liberalization of foreign investments in China without imposing conditions to a VIE, but proved also the actual efficiency of the FIL. As explained above, commentators were afraid that the new Law was just a rushed response to the Trade War, but this case-study demonstrated the contrary.

Following the previous examples of VIEs in China briefly analyzed before the case-study, the Shanghai Mingcha Zhegang is a turning point in the history of foreign investments in China, especially as regards VIEs: the previous cases regarding the VIE structure had never received a clearance without any condition, while Shanghai Mingcha Zhegang has achieved for the first time this objective. Nevertheless, it is important to acknowledge that the case analyzed by the review body,

the SAMR, did not directly regard the Shanghai Mingcha Zhegang, but the establishment of a joint venture between the latter and the Huansheng Xinxi: SAMR actually did not recognize the establishment of a VIE. For this reason, the case-study does not dare to state that China finally publicly allowed the proliferation of VIEs, but it is undeniable the right step towards such a direction, which has been indicated by the implementation of the new FIL; probably, without the FIL this case-study could have had the same outcome of the previous ones and it would have not received the same attention from the international critique. It is important to underline the fact that SAMR recognized a VIE and allowed it to work jointly with a Chinese company, but fundamentally did not authorize the establishment of a brand-new one. Moreover, such openness to VIEs can be justified by the fact that Shanghai Mingcha Zhegang was not involved in businesses that are prohibited or restricted, and so not giving to SAMR a reason to impede its operations in China.

This final observations regarding the FIL and the case-study are to be taken considering the fact that the data of this thesis have been gathered in the first nine months of 2020, and for this reason could be contradicted by new events not occurred yet at the moment of writing. Nevertheless, at the moment of the writing, it is possible to affirm that the FIL has not only been innovative, but has also brought a wind of liberalization that China needed to keep constant foreign investors' capital inflows into its domestic market. Moreover, such trend of liberalization has brought Chinese authorities to recognize the existence of the VIE structure as method adopted by foreign investors to invest into China: this can be considered a milestone in Chinese economical and legal history. Probably Chinese authorities will adopt a case-by-case approach to review cases regarding VIEs, but, until other cases will arise, VIEs are to be considered accepted by Chinese authorities, provided that they do not openly operate in prohibited or restricted sectors.

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Annex 1[267]

中华人民共和国外商投资法

（2019 年 3 月 15 日第十三届全国人民代表大会第二次会议通过）

目　　录

第一章　总　　则

第一条　为了进一步扩大对外开放，积极促进外商投资，保护外商投资合法权益，规范外商投资管理，推动形成全面开放新格局，促进社会主义市场经济健康发展，根据宪法，制定本法。

第二条　在中华人民共和国境内（以下简称中国境内）的外商投资，适用本法。

本法所称外商投资，是指外国的自然人、企业或者其他组织（以下称外国投资者）直接或者间接在中国境内进行的投资活动，包括下列情形：

[267] Full text retrieved at http://gkml.samr.gov.cn/nsjg/fgs/201908/t20190829_306349.html, last accessed on September 22nd, 2020.

（一）外国投资者单独或者与其他投资者共同在中国境内设立外商投资企业；

（二）外国投资者取得中国境内企业的股份、股权、财产份额或者其他类似权益；

（三）外国投资者单独或者与其他投资者共同在中国境内投资新建项目；

（四）法律、行政法规或者国务院规定的其他方式的投资。

本法所称外商投资企业，是指全部或者部分由外国投资者投资，依照中国法律在中国境内经登记注册设立的企业。

第三条　国家坚持对外开放的基本国策，鼓励外国投资者依法在中国境内投资。

国家实行高水平投资自由化便利化政策，建立和完善外商投资促进机制，营造稳定、透明、可预期和公平竞争的市场环境。

第四条　国家对外商投资实行准入前国民待遇加负面清单管理制度。

前款所称准入前国民待遇，是指在投资准入阶段给予外国投资者及其投资不低于本国投资者及其投资的待遇；所称负面清单，是指国家规定在特定领域对外商投资实施的准入特别管理措施。国家对负面清单之外的外商投资，给予国民待遇。

负面清单由国务院发布或者批准发布。

中华人民共和国缔结或者参加的国际条约、协定对外国投资者准入待遇有更优惠规定的，可以按照相关规定执行。

第五条　国家依法保护外国投资者在中国境内的投资、收益和其他合法权益。

第六条　在中国境内进行投资活动的外国投资者、外商投资企业，应当遵守中国法律法规，不得危害中国国家安全、损害社会公共利益。

第七条　国务院商务主管部门、投资主管部门按照职责分工，开展外商投资促进、保护和管理工作；国务院其他有关部门在各自职责范围内，负责外商投资促进、保护和管理的相关工作。

县级以上地方人民政府有关部门依照法律法规和本级人民政府确定的职责分工，开展外商投资促进、保护和管理工作。

第八条　外商投资企业职工依法建立工会组织，开展工会活动，维护职工的合法权益。外商投资企业应当为本企业工会提供必要的活动条件。

第二章　投资促进

第九条　外商投资企业依法平等适用国家支持企业发展的各项政策。

第十条　制定与外商投资有关的法律、法规、规章，应当采取适当方式征求外商投资企业的意见和建议。

与外商投资有关的规范性文件、裁判文书等，应当依法及时公布。

第十一条　国家建立健全外商投资服务体系，为外国投资者和外商投资企业提供法律法规、政策措施、投资项目信息等方面的咨询和服务。

第十二条　国家与其他国家和地区、国际组织建立多边、双边投资促进合作机制，加强投资领域的国际交流与合作。

第十三条　国家根据需要，设立特殊经济区域，或者在部分地区实行外商投资试验性政策措施，促进外商投资，扩大对外开放。

第十四条　国家根据国民经济和社会发展需要，鼓励和引导外国投资者在特定行业、领域、地区投资。外国投资者、外商投资企业可以依照法律、行政法规或者国务院的规定享受优惠待遇。

第十五条　国家保障外商投资企业依法平等参与标准制定工作，强化标准制定的信息公开和社会监督。

国家制定的强制性标准平等适用于外商投资企业。

第十六条　国家保障外商投资企业依法通过公平竞争参与政府采购活动。政府采购依法对外商投资企业在中国境内生产的产品、提供的服务平等对待。

第十七条　外商投资企业可以依法通过公开发行股票、公司债券等证券和其他方式进行融资。

第十八条　县级以上地方人民政府可以根据法律、行政法规、地方性法规的规定，在法定权限内制定外商投资促进和便利化政策措施。

第十九条　各级人民政府及其有关部门应当按照便利、高效、透明的原则，简化办事程序，提高办事效率，优化政务服务，进一步提高外商投资服务水平。

有关主管部门应当编制和公布外商投资指引，为外国投资者和外商投资企业提供服务和便利。

第三章　投资保护

第二十条　国家对外国投资者的投资不实行征收。

在特殊情况下，国家为了公共利益的需要，可以依照法律规定对外国投资者的投资实行征收或者征用。征收、征用应当依照法定程序进行，并及时给予公平、合理的补偿。

第二十一条　外国投资者在中国境内的出资、利润、资本收益、资产处置所得、知识产权许可使用费、依法获得的补偿或者赔偿、清算所得等，可以依法以人民币或者外汇自由汇入、汇出。

第二十二条　国家保护外国投资者和外商投资企业的知识产权，保护知识产权权利人和相关权利人的合法权益；对知识产权侵权行为，严格依法追究法律责任。

国家鼓励在外商投资过程中基于自愿原则和商业规则开展技术合作。技术合作的条件由投资各方遵循公平原则平等协商确定。行政机关及其工作人员不得利用行政手段强制转让技术。

第二十三条　行政机关及其工作人员对于履行职责过程中知悉的外国投资者、外商投资企业的商业秘密，应当依法予以保密，不得泄露或者非法向他人提供。

第二十四条　各级人民政府及其有关部门制定涉及外商投资的规范性文件，应当符合法律法规的规定；没有法律、行政法规依据的，不得减损外商投资企业的合法权益或者增加其义务，不得设置市场准入和退出条件，不得干预外商投资企业的正常生产经营活动。

第二十五条　地方各级人民政府及其有关部门应当履行向外国投资者、外商投资企业依法作出的政策承诺以及依法订立的各类合同。

因国家利益、社会公共利益需要改变政策承诺、合同约定的，应当依照法定权限和程序进行，并依法对外国投资者、外商投资企业因此受到的损失予以补偿。

第二十六条　国家建立外商投资企业投诉工作机制，及时处理外商投资企业或者其投资者反映的问题，协调完善相关政策措施。

外商投资企业或者其投资者认为行政机关及其工作人员的行政行为侵犯其合法权益的，可以通过外商投资企业投诉工作机制申请协调解决。

外商投资企业或者其投资者认为行政机关及其工作人员的行政行为侵犯其合法权益的，除依照前款规定通过外商投资企业投诉工作机制申请协调解决外，还可以依法申请行政复议、提起行政诉讼。

第二十七条　外商投资企业可以依法成立和自愿参加商会、协会。商会、协会依照法律法规和章程的规定开展相关活动，维护会员的合法权益。

第四章　投资管理

第二十八条　外商投资准入负面清单规定禁止投资的领域，外国投资者不得投资。

外商投资准入负面清单规定限制投资的领域，外国投资者进行投资应当符合负面清单规定的条件。

外商投资准入负面清单以外的领域，按照内外资一致的原则实施管理。

第二十九条　外商投资需要办理投资项目核准、备案的，按照国家有关规定执行。

第三十条　外国投资者在依法需要取得许可的行业、领域进行投资的，应当依法办理相关许可手续。

有关主管部门应当按照与内资一致的条件和程序，审核外国投资者的许可申请，法律、行政法规另有规定的除外。

第三十一条　外商投资企业的组织形式、组织机构及其活动准则，适用《中华人民共和国公司法》、《中华人民共和国合伙企业法》等法律的规定。

第三十二条　外商投资企业开展生产经营活动，应当遵守法律、行政法规有关劳动保护、社会保险的规定，依照法律、行政法规和国家有关规定办理税收、会计、外汇等事宜，并接受相关主管部门依法实施的监督检查。

第三十三条　外国投资者并购中国境内企业或者以其他方式参与经营者集中的，应当依照《中华人民共和国反垄断法》的规定接受经营者集中审查。

第三十四条　国家建立外商投资信息报告制度。外国投资者或者外商投资企业应当通过企业登记系统以及企业信用信息公示系统向商务主管部门报送投资信息。

外商投资信息报告的内容和范围按照确有必要的原则确定；通过部门信息共享能够获得的投资信息，不得再行要求报送。

第三十五条　国家建立外商投资安全审查制度，对影响或者可能影响国家安全的外商投资进行安全审查。

依法作出的安全审查决定为最终决定。

第五章　法律责任

第三十六条　外国投资者投资外商投资准入负面清单规定禁止投资的领域的，由有关主管部门责令停止投资活动，限期处分股份、资产或者采取其他必要措施，恢复到实施投资前的状态；有违法所得的，没收违法所得。

外国投资者的投资活动违反外商投资准入负面清单规定的限制性准入特别管理措施的，由有关主管部门责令限期改正，采取必要措施满足准入特别管理措施的要求；逾期不改正的，依照前款规定处理。

外国投资者的投资活动违反外商投资准入负面清单规定的，除依照前两款规定处理外，还应当依法承担相应的法律责任。

第三十七条　外国投资者、外商投资企业违反本法规定，未按照外商投资信息报告制度的要求报送投资信息的，由商务主管部门责令限期改正；逾期不改正的，处十万元以上五十万元以下的罚款。

第三十八条　对外国投资者、外商投资企业违反法律、法规的行为，由有关部门依法查处，并按照国家有关规定纳入信用信息系统。

第三十九条　行政机关工作人员在外商投资促进、保护和管理工作中滥用职权、玩忽职守、徇私舞弊的，或者泄露、非法向他人提供履行职责过程中知悉的商业秘密的，依法给予处分；构成犯罪的，依法追究刑事责任。

第六章　附　　则

第四十条　任何国家或者地区在投资方面对中华人民共和国采取歧视性的禁止、限制或者其他类似措施的，中华人民共和国可以根据实际情况对该国家或者该地区采取相应的措施。

第四十一条　对外国投资者在中国境内投资银行业、证券业、保险业等金融行业，或者在证券市场、外汇市场等金融市场进行投资的管理，国家另有规定的，依照其规定。

第四十二条　本法自2020年1月1日起施行。《中华人民共和国中外合资经营企业法》、《中华人民共和国外资企业法》、《中华人民共和国中外合作经营企业法》同时废止。

本法施行前依照《中华人民共和国中外合资经营企业法》、《中华人民共和国外资企业法》、《中华人民共和国中外合作经营企业法》设立的外商投资企业，在本法施行后五年内可以继续保留原企业组织形式等。具体实施办法由国务院规定。

Annex 2[268]

Foreign Investment Law of the People's Republic of China

(Adopted at the Second Session of the XIII National People's Congress on March 15th, 2019)

Contents

Section I General Provisions

Art. 1 In order to further open the country to the outside, actively promote foreign investments, protect the legitimate interests of foreign investments, regulate the administration of foreign investments, push the formation of a new pattern of an all-round opening up, and promote the healthy development of the socialist market economy, this Law is enacted in accordance with the Constitution.

Art. 2 This Law shall apply to foreign investments issued within the territory of People's Republic of China (hereinafter referred to as "within the Chinese territory").

[268] Translation provided by the author.

The term “foreign investment” as used in this Law refers to the activities related to the investments directly or indirectly carried out within the Chinese territory by any foreign natural person, any foreign enterprise or any other foreign organization (hereinafter referred to as “foreign investors”), including the following circumstances:

a. any foreign investor either alone or jointly with any other investor establishes a foreign-invested enterprise within the Chinese territory;

b. any foreign investor obtains stocks, equity shares, property shares or other similar rights of an enterprise within the Chinese territory;

c. any foreign investor either alone or jointly with any other investor invests in any brand-new project within the Chinese territory;

d. any investment of other form prescribed by the law, administrative regulations or the State Council.

The term “foreign-invested enterprise” as used in this Law refers to any enterprise established within the Chinese territory and registered in accordance to the Chinese law whose investments are totally or partially issued by a foreign investor.

Art. 3 The country adheres to the national policy of opening-up to the outside, encourages foreign investors to invest within the Chinese territory in accordance with the law.

The country implements high-level policies for the liberalization and the facilitation of the investments, establishes and refines the mechanisms for the promotion of foreign investments, building a stable, transparent, foreseeable and fair environment for a competitive market.

Art. 4 The country implements the management systems of the Pre-Admission National Treatment and of the Negative List.

The term “Pre-Admission National Treatment” as used in the last paragraph refers to the treatment offered to foreign investors and their investments during the pre-admission phase of the investments which shall not be less favorable to the treatment offered to domestic investors and their investments; the term “Negative List” refers to a special pre-admission administrative measure regulated by the country regarding the access of foreign investments in particular fields. Excluding the investments which rely in the Negative List, the State shall offer the National Treatment.

The Negative List shall be issued or approved by the State Council.

In the case the People’s Republic of China concludes or participates to international treatments and agreements which provide more favorable regulations for the access of foreign investments, it can be possible to abide by the relative regulations.

Art. 5 The country shall protect foreign investors’ investments, profits and other legal rights and interests within the Chinese territory in accordance to the law.

Art. 6 The foreign investors who conduct investment-related activities within the Chinese territory and foreign-invested enterprises should respect the regulations provided by the law, should not endanger Chinese national safety nor damage the public interest of the society.

Art. 7 The departments of commerce and investments of the State Council in accordance with the division of the responsibilities shall conduct a work in terms of promotion, protection and management of foreign investments; the other relevant departments of the State Council – each under the scope of its own duties – shall be responsible of the

work regarding the promotion, the protection and the management of foreign investments.

The related departments of the local People's Government at a county-level or above shall conduct a work in terms of promotion, protection and management of foreign investments in accordance to the regulations provided by the law and to the division of responsibilities defined by the People's Government at this level.

Art. 8 The employees of foreign-invested enterprises shall establish trade union organization in accordance to the law, conduct trade union-related activities, protecting employees' legal rights and interests. Foreign-invested enterprises should provide conditions for the necessary activities of their own trade unions.

Section II Investment Promotion

Art. 9 Foreign-invested enterprises shall equally have access to every national policy for the support of enterprises development.

Art. 10 The plan and laws, rules and regulations regarding foreign investments should adopt the adapt measures in order to seek for foreign-invested enterprises' suggestions and recommendations.

Regulatory documents and judicial documents, among others, regarding foreign investments should be published timely in accordance to the law.

Art. 11 The country shall establish a healthy system of services for foreign investments, providing to investors and foreign-invested enterprises consultancy and services regarding regulations of the law, policies-related measures and information about investment projects among others.

Art. 12 The country shall establish jointly with other countries, regions and international organizations multilateral and bilateral mechanisms of investments promoting cooperation, improving the international exchange and cooperation in the field of investments.

Art. 13 If necessary, the country shall establish Special Economic Zones or shall implement trial measures for foreign investments, promote foreign investments and further improve the opening-up to the outside in selected regions.

Art. 14 According to the need of national economy and social development, the country shall encourage and lead foreign investors to invest in specific industries, fields and regions. Foreign investors and foreign-invested enterprises may enjoy favorable treatments in accordance to the law, administrative regulations or provisions of the State Council.

Art. 15 The State shall ensure foreign-invested enterprises to equally participate to the standards-setting work, strengthening information disclosure and public supervision of the same.

The standards formulated by the State shall equally apply to foreign-invested enterprises.

Art. 16 The State shall ensure foreign-invested enterprises to equally participate to purchasing activities through a fair competition in accordance to the law. Government procurements shall provide an equal treatment to the products produced within the Chinese territory and the services provided by foreign-invested enterprises within the Chinese territory.

Art. 17 Foreign-invested enterprises may conduct financing activities through public emission of stocks, corporate bonds or similar securities and in other manners in accordance to the law.

Art. 18 Local People's Government at a county-level or above may issue measures promoting and facilitating foreign investments in accordance to the law, administrative regulations and local regulations, within their statutory competence.

Art. 19 The People's Government at any level and the competent departments should simplify procedures, improve the efficiency, optimize administrative services and further improve the level of foreign investments services in accordance to the principles of convenience, high-efficiency and transparency.

The relevant competent departments should establish and publish foreign investments guidelines, providing services and facilitations to foreign investors and foreign-invested enterprises.

Section III Investment Protection

Art. 20 The State shall not expropriate foreign investors' investments.

Under extraordinary circumstances, in order to safeguard the national public interest, the State may expropriate or requisition foreign-investors' investments in accordance to the regulations of the law. Expropriation and requisition should follow legitimate procedures and should promptly render a correspondent and rational compensation.

Art. 21 Foreign investors' capital contribution, profits, capital gains, assets disposal income, intellectual property license fees, legally obtained compensation or reimbursement, liquidation proceeds and other similar items may be freely remitted in Renminbi or in a foreign currency in accordance to the law.

Art. 22 The State shall protect the intellectual property rights of foreign investors and foreign-invested enterprises, safeguarding intellectual property rights holders and their relative legitimate rights and interests; in the case of intellectual property rights infringement,

the State shall rigorously ascertain where the legal responsibility would lie in accordance to the law.

The State shall encourage the development of technical cooperation based on the principle of voluntariness and under commercial rules during the process of foreign investments. The conditions for technical cooperation shall be determined during the negotiations for the investments by any party involved abiding by the principle of fairness. The administrative organs and the relative workers must not take advantage of any administrative mean in order to force the any technology transfer.

Art. 23 The administrative organs and the relative workers should keep confidential any trade secret of foreign investors and foreign-invested enterprises about which they have been informed while performing their duties, and must not leak or illegally provide any related information to others.

Art. 24 The People's Government at every level and the relative departments shall issue inherent and pertinent documents in the matter of foreign investments and should **conform to** the regulations of the law; unless authorized by any law and administrative regulations, it is prohibited to derogate any legitimate right and interest of foreign-invested enterprises or increase their obligations, establish conditions for market access and exit, interfere with the regular activities of production of any foreign-invested enterprise.

Art. 25 The local People's Government at every level and the relative departments should fulfil their policy commitments made to foreign investors and foreign-invested enterprises and perform any kind of contract entered in accordance with the law.

If policy commitments or contractual agreements need to be changed for the State and public interests, they should be conducted in accordance with the statutory authority and

procedures, and foreign investors and foreign-invested enterprises shall be compensated for the losses they suffered accordingly.

Art. 26 The State shall establish mechanisms of complaint for foreign-invested enterprises and promptly manage the problems reported by foreign-invested enterprises or the relative foreign investors, jointly refining the relative policy measure.

In the case foreign-invest enterprises or the relative foreign investors believe that the performance of administrative organs and the relative workers has violated their legitimate rights and interests, they may appeal for a joint solution through the mechanisms of complaint for foreign-invested enterprises.

In the case foreign-invest enterprises or the relative foreign investors believe that the performance of administrative organs and the relative workers has violated their legitimate rights and interests, in addition to the regulation regarding a joint solution through the mechanisms of complaint for foreign-invested enterprises mentioned in the last paragraph, they may also apply for administrative reconsideration, filing an administrative lawsuit in accordance to the law.

Art. 27 Foreign-invested enterprises may establish and voluntarily participate to chambers of commerce and association in accordance to the law. Chambers of Commerce and associations shall develop relative activities under the regulations of the law and the statutes, safeguarding members' legitimate rights and interests.

Section IV Investment Management

Art. 28 Foreign investors must not invest in the fields prohibited by the regulation of the Negative List.

In the case of limited investments in fields under the regulation of the Negative List, foreign investors' investments should be in line with the conditions of the regulation of the Negative List.

The management of domestic and foreign investments beyond the Negative List shall be implemented under the principle of equality.

Art. 29 If foreign investment is required to go through the investment project approval or record procedure, it shall be implemented in accordance with relevant provisions.

Art. 30 In the case foreign investors would invest in industries and fields which require a permission in accordance to the law, they should follow the relative legitimate procedures for the permission.

The relevant relative departments should review foreign investors' application for permission in accordance to the equal condition and procedure for domestic investments, unless otherwise provided by the law or other administrative regulations.

Art. 31 Organizational form, structure and activities standards of foreign-invested enterprises shall apply the provisions of the "Company Law of the People's Republic of China", the "Law of the Partnership Enterprise of the People's Republic of China" and other relative regulations.

Art. 32 Foreign-invested enterprises that engage in production and business activities should abide by the provisions of laws and administrative regulations concerning labor protection and social insurance, and handle matters such as taxation, accounting, foreign exchange, etc. in accordance with laws, administrative regulations and relevant State provisions, and accept the supervision and inspection carried out by the relevant departments in accordance with the law.

Art. 33 In the case a foreign investor would acquire an enterprise within the Chinese territory or participates in the concentration of business operators in other ways, the foreign investor should undertake the examination in accordance to the regulation of the "Anti-Monopoly Law of the People's Republic of China".

Art. 34 The State shall establish a system for reporting foreign investments' information. Foreign investors and foreign-invested enterprises should report and submit investments information to the relevant department of the Ministry of Commerce through the system of registration of enterprises and the open system of information regarding enterprises' credit.

Content and scope of the information report of foreign investments shall be determined by the principle of necessity; investment information that can be obtained through the interdepartmental shared information sharing must not be required to be submitted again.

Art. 35 The State shall establish a security review system for the foreign investments, conducting the review of the foreign investments that influence or could influence the national security.

The decision issued by the security review should be considered as final in accordance to the law.

Section V Legal Liabilities

Art. 36 If a foreign investor invests into the sectors which are classified by the Negative List as prohibited for the admission of foreign investments, the relevant competent department shall order to stop the investment activities, dispose of the shares, assets or take other necessary measures within a specified time limit, and return to the status

before the investment was made; if there is the presence of any illegal income, it shall be confiscated.

Whereas the investment activities of a foreign investor violates the special management measures for the admission of foreign-investment regarding restricted areas in the Negative List, the relevant competent department shall order the correction within a specified time limit and take necessary measures to meet the conditions set forth by the special management measures for the admission of foreign-investment; if no corrections have been made within the time limit, the provisions of the previous article shall be applied.

Whereas the investment activities of a foreign investor violate the special management measures for the admission of foreign investments in the Negative List, in addition to the provisions of the preceding two paragraphs, it should also bear corresponding legal liabilities under the law.

Art. 37 Whereas a foreign investor or a foreign-invested enterprise do not appropriately follow the submit procedure of the information reporting system violating this Law, the competent relevant department of commerce shall order corrections within a time limit; if no corrections have been made, a fine of more than RMB 100,000 and less than RMB 500,000 yuan shall be imposed.

If a foreign investor or a foreign-invested enterprise violates the provisions of this Law and fails to submit investment information in accordance with the requirements of the foreign investment information reporting system, the competent commerce department shall order it to make corrections within a specified time limit; if no corrections have been made within the time limit, a fine of more than 100,000 yuan and less than 500,000 yuan shall be imposed.

Art. 38 Any violation of laws or regulations by foreign investors or foreign-invested enterprises shall be investigated and dealt with by relevant departments in accordance with the law and recorded into the credit information open system in accordance with relevant provisions.

Art. 39 If a staff of an administrative organ abuses his power, neglects his duties or engages in malpractices in the promotion, protection and management of foreign investment, or leaks or illegally provides others with trade secrets that he or she knows in the course of performing his duties, he or she shall be punished according to law; if he commits a crime, he shall be held criminally liable.

Section VI Supplementary Provisions

Art. 40 If any country or region adopts discriminatory prohibitions, restrictions or other similar measures on the People's Republic of China, the People's Republic of China may take corresponding measures against the country or the region according to actual conditions.

Art. 41 If the State provides other provisions for foreign investment in the banking, securities, insurance and other financial industries, or in the securities market, foreign exchange market and other financial markets within the territory of China, such provisions shall be applicable.

Art. 42 This Law shall come into force on January 1, 2020. The Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures, the Law of the People's Republic of China on Wholly Foreign-owned Enterprises, and the Law of the People's Republic on Sino-Foreign Contractual Joint Ventures shall be repealed simultaneously.

Foreign-invested enterprises that have been established before the implementation of this Law in accordance with the Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures, the Law of the People's Republic of China on Wholly Foreign-owned Enterprises, and the Law of the People's Republic of China on Sino-Foreign Contractual Joint Ventures may continue retaining their original forms of business organizations within five years after the implementation of this Law. The detailed implementation measures of this Law shall be prescribed by the State Council.