



Newsletter No. 223 (EN)

**The new Chinese Foreign Investment Law
2019**

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I. Introduction

On 15 March 2019, the „**Foreign Investment Law** of the People’s Republic of China” was adopted by the 2nd Session of the 13th National People’s Congress by a 2929 (!) to 8 vote. It will come into force on 1 January 2020 and replace several regulations of the currently very fragmented foreign investment regime, including the Law on Chinese-Foreign Equity Joint Ventures, the Law on Chinese-Foreign Contractual Joint Ventures and the Law on Wholly Foreign-Owned Enterprises (collectively referred to as the "Three Laws on Foreign Capital").

The new law consists of six chapters (general provisions, investment promotion, investment protection, investment management, legal liability, and supplemental provisions) with a total of 42 articles. It will establish the basic institutional framework for the use of foreign capital in China and become the basic law for foreign investment in China.

II. Strengthening foreign investment protection

The new law will strengthen the protection of foreign investment in China.

- According to Article 9, all national policies on supporting the development of enterprises shall **equally apply** to foreign-funded enterprises in accordance with the law.
- Article 19 states that the various levels of the government and their relevant departments shall, based on the principles of convenience, efficiency, and transparency, streamline work procedures, improve work efficiency,

and optimize government services, to further increase the level of service for foreign investment.

The relevant competent departments shall formulate and publish foreign investment guidelines to offer services and convenience to foreign investors and foreign-invested enterprises.

- According to Article 22, the State **protects the intellectual property** rights of foreign investors and foreign-invested enterprises, the lawful rights and interests of intellectual property rights holders and relevant rights holders and for acts infringing on intellectual property rights, it strictly pursues legal responsibility in accordance with law.

The State encourages technological cooperation to be conducted in the course of foreign investment and on the basis of the principle of voluntariness and business rules. The conditions for technological cooperation are to be determined through consultation by the various parties to the investment on the basis of equality and the principle of fairness. Administrative organs and their employees must **not force the transfer of technology** through administrative measures.

- Administrative organs and their employees shall, **in accordance with the law**, maintain the confidentiality of the trade secrets of foreign investors or foreign-invested enterprises that they learn in the course of performing their duties, and must not

disclose or unlawfully provide them to others, Article 23.

- According to Article 20, the State shall not expropriate the investment of foreign investors. Under special circumstances, the State may, for the public interest, expropriate or requisition the investment of foreign investors in accordance with the provisions of law. Expropriations and requisitions shall be conducted in accordance with legally prescribed procedure and promptly give fair and reasonable compensation.
- Article 25 states that the local people's governments at all levels and their relevant departments shall strictly keep their policy commitments made to foreign investors and foreign-funded enterprises. If any policy commitment or contract needs to be changed, the foreign investor or foreign-funded enterprise concerned shall be compensated for losses incurred thereby in accordance with the law.
- A foreign investor may, in accordance with the law, **freely transfer inward and outward its contributions, profits, capital gains**, income from asset disposal, royalties of intellectual property rights, lawfully obtained compensation or indemnity, income from liquidation and so on within the territory of China in CNY or a foreign currency (Article 21).
- Where a foreign-funded enterprise or its investor deems that any administrative act of an administrative department or its staff member infringes its legitimate rights and interests, in addition to seeking coordination and resolution through the complaint mechanism for foreign-funded

enterprises, it may apply for administrative review, or lodge an administrative litigation (Article 26).

III. Conclusion

The new Foreign Investment Law has improved the system for investment promotion and protection in China. It emphasizes the principle of granting national and foreign investors and companies the same (legal) treatment and equal participation in the Chinese market. The law also introduced the obligation of the government to consider comments and suggestions from foreign-funded in a proper manner when formulating laws, regulations and rules relating to foreign investment. Also, the government shall, according to the principle of efficiency and transparency, optimize procedures for handling matters and government services, raise the efficiency, and guarantee fair hearing. However, the biggest obstacle for foreign investors is the opacity of policies because of the **very vague wording** of the law. There are still many unclear parts that require further definition, explanation and regulation.

The Foreign Investment Law symbolizes the Chinese government's determination and will of optimizing the business environment for foreign businessmen, but it has to be observed how the different measures will be implemented in the future.

ANNEX

Promulgation Date: 2019-3-15

Title: Foreign Investment Law of the People's Republic of China

Promulgating Entities: The National People's Congress

Source of text: http://www.npc.gov.cn/npc/xinwen/2019-03/15/content_2083532.htm

Order of the President of the PRC

No. 26

The "Foreign Investment Law of the People's Republic of China" has been adopted by the 2nd Session of the 13th National People's Congress on March 15, 2019 and is hereby promulgated to take effect on January 1, 2020.

Xi Jinping, President of the People's Republic of China

March 15, 2019

Chapter I: General Provisions

Article 1: This Law is formulated on the basis of the Constitution to further expand the scope of opening-up, to actively promote foreign investment, to protect the lawful rights and interests of foreign investment, to standardize the regulation of foreign investment, to make new grounds in opening up on all fronts, and to promote the healthy development of the socialist market economy.

Article 2: This Law applies to foreign investment within the mainland territory of the People's Republic of China (hereinafter referred to as mainland China).

"Foreign investment" as used in this Law refers to the investment activities in mainland China conducted directly or indirectly by natural persons, enterprises, or other organizations of foreign countries (hereinafter referred to as foreign investors), including the following circumstances:

- (1) Where foreign investors individually or jointly with other investors establish foreign-invested enterprises in mainland China;
- (2) Where foreign investors acquire stock shares, stock equity, property shares, or other similar rights and interests in mainland Chinese enterprises;
- (3) Where foreign investors individually or jointly with other investors invest in new projects in mainland China;
- (4) Other methods of investment as prescribed by laws, administrative regulations, or the State Council.

"Foreign-invested enterprises" as used in this Law refers to enterprises that, in accordance with Chinese law, are established in mainland China after being registered and that are wholly or partially invested by foreign investors.

Article 3: The State adheres to the basic state policy of opening up and encourages foreign investors to invest in mainland China in accordance with law.

The State implements the policy of liberalizing and facilitating investment at a high level, establishes and improves mechanisms for promoting foreign investment, and builds a market environment of stability, transparency, predictability, and fair competition.

Article 4: The State implements the management scheme of pre-establishment national treatment plus negative list with respect to foreign investment.

As used in the previous paragraph, "pre-establishment national treatment" refers to affording foreign investors and their investments treatment, during the investment access stage, no less favorable than that afforded to Chinese domestic investors and their investments; and "negative list" refers to the special administrative measures on access that are implemented in certain fields for foreign investment as prescribed by the State. The State affords national treatment to foreign investment outside the negative list.

The negative list is to be published by or published as authorized by the State Council.

Where the international treaties or agreements that the People's Republic of China concludes or joins have more favorable provisions for the treatment of access by foreign investors, the relevant provisions may be followed.

Article 5: The State protects the investment, proceeds, and other lawful rights and interests of foreign investors in mainland China according to law.

Article 6: Foreign investors and foreign-invested enterprises that engage in investment activities in mainland China shall abide by Chinese laws and regulations and must not endanger China's national security or harm the public interests.

Article 7: The competent departments for commerce and investment under the State Council are to carry out work on promoting, protecting, and managing foreign investment according to their division of duties; the other relevant departments under the State Council are responsible for the relevant work on promoting, protecting, and managing foreign investment within the scope of their respective duties.

The relevant departments of the local people's governments at or above the county level are to carry out the promotion, protection, and management of foreign investment in accordance with laws and regulations and the division of duties determined by the people's government at the same level.

Article 8: The employees of foreign-invested enterprises are to establish labor union organizations in accordance with law to carry out labor union activities and to protect the employees' lawful rights and interests. Foreign-invested enterprises are to provide the necessary conditions for the activities of their respective labor unions.

Chapter II: Investment Promotion

Article 9: The State's various policies supporting the development of enterprises equally apply to foreign-invested enterprises in accordance with law.

Article 10: In the formulation of laws, regulations, or rules relating to foreign investment, appropriate means shall be taken to solicit the opinions and suggestions of foreign-invested enterprises.

Normative documents, written judgments, and such other documents that are related to foreign investment shall be promptly published in accordance with law.

Article 11: The State establishes and improves the foreign investment service system and provides counseling and service for foreign investors and foreign-invested enterprises about laws and regulations, policy measures, project information, and such other areas.

Article 12: The State establishes multilateral or bilateral cooperation mechanisms on investment promotion with other countries and regions or international organizations and strengthens international communication and cooperation in the field of investment.

Article 13: As needed, the State is to establish special economic zones or implement experimental policy measures on foreign investment in certain areas to promote foreign investment and expand the scope of opening-up.

Article 14: Based on the needs of national economic and social development, the State encourages and guides foreign investors to invest in certain industries, fields, or regions. Foreign investors or foreign-invested enterprises may enjoy preferential treatment in accordance with the provisions of laws, administrative regulations, or the State Council.

Article 15: The State ensures that foreign-invested enterprises equally participate in efforts to formulate standards and strengthens information disclosure and public oversight during the formulation of standards.

Compulsory standards formulated by the State are to be applied equally to foreign-invested enterprises.

Article 16: The State ensures that foreign-invested enterprises participate in government procurement activities through fair competition in accordance with law. In accordance with law, government procurement is to give equal treatment to products manufactured by, or services provided by, foreign-invested enterprises in mainland China.

Article 17: Foreign-invested enterprises may raise capital by publicly issuing stocks, corporate bonds, and other securities in accordance with law as well as through other means.

Article 18: Local people's government at or above the county level may, in accordance with the provisions of laws, administrative regulations, or local regulations, with their legally prescribed authorities formulate policy measures on the promotion and facilitation of foreign investment.

Article 19: The various levels of people's governments and their relevant departments shall, based on the principles of convenience, efficiency, and transparency, streamline work procedures, improve work efficiency, and optimize government services, to further increase the level of service for foreign investment.

The relevant competent departments shall formulate and publish foreign investment guidelines to offer services and convenience to foreign investors and foreign-invested enterprises.

Chapter III: Investment Protection

Article 20: The State will not expropriate the investment of foreign investors.

Under special circumstances, the State may, for the public interest, expropriate or requisition the investment of foreign investors in accordance with the provisions of law. Expropriations and requisitions shall be conducted in accordance with legally prescribed procedure and promptly give fair and reasonable compensation.

Article 21: Foreign investors' capital contributions, profits, capital gains, income from asset disposal, intellectual property right royalties, compensation or indemnification obtained in accordance with law, liquidation income, and so forth, that are made or obtained in mainland China, may be freely transferred into or out of mainland China in RMB or foreign exchange in accordance with law.

Article 22: The State protects the intellectual property rights of foreign investors and foreign-invested enterprises; protects the lawful rights and interests of intellectual property rights holders and relevant rights holders; and for acts infringing on intellectual property rights, strictly pursue legal responsibility in accordance with law.

The State encourages technological cooperation to be conducted in the course of foreign investment and on the basis of the principle of voluntariness and business rules. The conditions for technological cooperation are to be determined through consultation by the various parties to the investment on the basis of equality and the principle of fairness. Administrative organs and their employees must not force the transfer of technological through administrative measures.

Article 23: Administrative organs and their employees shall, in accordance with law, maintain the confidentiality of the trade secrets of foreign investors or foreign-invested enterprises that they learn in the course of performing their duties, and must not disclose or unlawfully provide them to others.

Article 24: Normative documents formulated by the various levels of people's governments and their relevant departments that involve foreign investment shall conform to the provisions of laws and regulations; without any basis in laws or administrative regulations, they must not derogate from the lawful rights and interests of foreign-invested enterprises or increase their obligations, must not set market access or exit conditions, and must not interfere with the normal business activities of foreign-invested enterprises.

Article 25: The various levels of local people's governments and their relevant department shall fulfill the policy commitments made to foreign investors or foreign-invested enterprises and the various types of contracts concluded in accordance with law.

Where it is necessary that they change policy commitments or contractual agreements for the national or public interest, they shall proceed in accordance with legally prescribed authorities and procedures and compensate the foreign investors or foreign-invested enterprises for any loss sustained as a result in accordance with law.

Article 26: The State establishes working mechanisms for complaints by foreign-invested enterprises, promptly handles the issues raised by foreign-invested enterprises or their investors, and coordinates and improves the relevant policy measures.

Where foreign-invested enterprises and their investors consider the administrative acts of administrative organs and their employees to have infringed upon their lawful rights and interests, they may petition for a resolution through the working mechanisms for complaints by foreign-invested enterprises.

Where foreign-invested enterprises and their investors consider the administrative acts of administrative organs and their employees to have infringed upon their lawful rights and interests, in addition to petitioning for a resolution through the working mechanisms for complaints by foreign-invested enterprises in accordance with the provisions of the previous paragraph, they may also petition for administrative reconsideration or initiate administrative litigation in accordance with law.

Article 27: Foreign-invested enterprises may establish and voluntarily join chambers of commerce or associations in accordance with law. Chambers of commerce and associations carry out relevant activities in accordance with the provisions of laws, regulations, and charters, and safeguard the lawful rights and interests of their members.

Chapter IV: Investment Management

Article 28: For fields in which the negative list for foreign investment access provides that investment is prohibited, foreign investors must not make investment.

For fields in which the negative list for foreign investment access provides that investment is restricted, foreign investors shall meet the requirements provided by the negative list in making investment.

Fields outside the negative list for foreign investment access are to be managed according to the principle of consistency between domestic and foreign investment.

Article 29: Where the approval or recording of investment projects need to be processed for foreign investment, follow the relevant State provisions.

Article 30: Where foreign investors invest in industries or fields for which a license needs to be obtained according to law, they shall perform the relevant formalities for the license in accordance with law.

The relevant competent departments shall review foreign investors' license applications using the conditions and procedures consistent with those applied to domestic investment, except where laws or administrative regulations provide otherwise.

Article 31: The provisions of the "P.R.C. Company Law" and the "P.R.C. Partnership Enterprises Law" apply to the organizational forms, institutional frameworks, and standards of conduct of foreign-invested companies.

Article 32: Foreign-invested enterprises, in carrying out business activities, shall follow the provisions of laws and administrative regulations relating to labor protection and social insurance; handle taxation, accounting, foreign exchange, and such other matters in accordance with the relevant laws, administrative regulations, and State provisions; and submit to the oversight and inspections carried out by the relevant competent departments in accordance with law.

Article 33: Where foreign investors merge with or acquire domestic Chinese enterprises or participate in the concentration of business operators by other means, they shall submit to review of concentration of business operators in accordance with the provisions of the "P.R.C. Anti-Monopoly Law."

Article 34: The State establishes a foreign investment information reporting system. Foreign investors or foreign-invested enterprises shall submit investment information to the competent departments for commerce through the enterprise registration system and the enterprise credit information disclosure system.

The content and scope of foreign-investment information reports are to be determined according to the principle of true necessity; investment information that can be obtained through interdepartmental information sharing must not be required to be resubmitted.

Article 35: The State establishes a security review system for foreign investment and conducts security review of foreign investment that affects or may affect national security.

Security review decisions made in accordance with law are final decisions.

Chapter V: Legal Responsibility

Article 36: Where foreign investors invest in areas in which the negative list for foreign investment access provides that investment is prohibited, the relevant competent departments are to order them to cease investment activities within a specified period and to restore the state before making the investment by disposing of stock shares and assets or through other necessary measures; where there is illegal proceeds, confiscate the illegal proceeds.

Where the investment activities of foreign investors violate the special restrictive administrative measures for access as prescribed by the negative list for foreign investment access, the relevant competent departments are to order them to make corrections within a specified period and to take necessary measures to satisfy the requirements of special administrative measures for access; where they fail to make corrections within the specified period, handle in accordance with the provisions of the previous paragraph.

Where the investment activities of foreign investors violate the provisions of the negative list for foreign investment access, in addition to being handled in accordance with the provisions of the previous two paragraphs, they shall also bear the corresponding legal responsibilities.

Article 37: Where foreign-investors or foreign-invested enterprises violate the provisions of this Law by failing to submit investment information in accordance with the requirements of the foreign-investment information reporting system, the competent departments for commerce shall order corrections within a specified period; those that have not made corrections within that period are to be given a fine between 100,000 RMB and 500,000 RMB.

Article 38: The violations of laws or regulations by foreign investors or foreign-invested enterprises are to be investigated and handled by the relevant departments in accordance with law and recorded in the credit information system in accordance with the relevant State provisions.

Article 39: Where the employees of administrative organs, in their efforts to promote, protect, and manage foreign investment, abuse their authority, neglect their duties, or misuse their power for personal benefit, or disclose or unlawfully provide others with the trade secrets they learn in the course of performing their duties, they are to be given sanctions in accordance with law; where a crime is constituted, pursue criminal responsibility in accordance with law.

Chapter VI: Supplementary Provisions

Article 40: Where any country or region takes discriminatory prohibitive, restrictive, or other similar measures against the People's Republic of China with respect to investment, the People's Republic of China may take corresponding measures against such country or region based on the actual circumstances.

Article 41: Where the State has separate provisions for the management of foreign investors' investments in mainland China in such financial industries as banking, securities, or insurance, or of their making investments in such financial markets as securities market or foreign exchange market, follow those provisions.

Article 42: This Law shall take effect on January 1, 2020. The "P.R.C. Chinese-Foreign Equity Joint Ventures Law," the "P.R.C. Wholly Foreign-Owned Enterprises Law," and the "P.R.C. Chinese-Foreign Contractual Joint Ventures Law" are simultaneously abolished.

Foreign-invested enterprises that are established in accordance with the "P.R.C. Chinese-Foreign Equity Joint Ventures Law," the "P.R.C. Wholly Foreign-Owned Enterprises Law," or the "P.R.C. Chinese-Foreign Contractual Joint Ventures Law" before this Law takes effect may retain their original corporate organizational forms, and so forth, for five years after the implementation of this Law. The specific implementing measures are to be formulated by the State Council.

*We hope that the information provided in this newsletter was helpful for you.
If you have any further questions, please do not hesitate to contact us.*

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