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CHINA’S FOREIGN INVESTMENT LAW: MOVING TOWARD GREATER LIBERALIZATION?

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I. INTRODUCTION

After peaking at US$2.74 trillion (U.S. Dollars) in 2016, global foreign direct investment (FDI) declined significantly, and according to World Bank statistics, continued to fall throughout 2018, descending lower than during the 2008 financial crisis.\(^1\) Although the FDI flow in the first half of 2019 was 24% higher than the first half of 2018, such growth probably implied the last flicker before returning to depression.\(^2\) The United Nations Conference on Trade and Development (UNCTAD) 2019 report expresses the pessimistic prediction of the FDI trend.\(^3\) According to the report, the uncertainties caused by major economic slowdown and spreading geopolitical risks, trade tensions, and protectionism policies frustrate investors’ motivation and negatively impact the FDI trend.\(^4\)

\(^1\) Foreign direct investment, net inflows (BoP, current US$), WORLD BANK GROUP, https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD (last visited Feb. 5, 2022). Foreign direct investment (FDI) is a “category of cross-border investment in which an investor residing in one economy establishes a lasting interest and a significant degree of influence over a firm residing in another economy.” See OECD library, Foreign direct investment (FDI), https://doi.org/10.1787/9a523b18-en (last visited Apr. 25, 2022).

\(^2\) The report states that “the underlying FDI trend (removing the effects of one-off transactions and intra-firm financial flows, including repatriations driven by the 2017 US tax reforms) was up only 4%” and “remained below the average of the past ten years.” See U.N. CONF. ON TRADE & DEV., Investment Trends Monitor No. 32, 1 (Oct. 2019), https://investmentpolicy.unctad.org/publications/1209/global-investment-trends-monitor-no-32.

\(^3\) Id.

\(^4\) Id.
Though China is still leading in attracting global FDI, its FDI inflow has decreased since 2015.\(^5\) According to Organization for Economic Co-operation and Development (OECD) statistics, China attracted US$ 174.8 billion in 2016; more than 27% lower than the previous year.\(^6\) Although the amount rebounded in 2018 to US$ 155.8 billion, this is still more than 33% lower than 2015 number.\(^7\) In addition to the impact from the world economic turbulence, the competition in attracting FDI from other countries, especially the southeastern countries, has worsened China’s FDI trend.\(^8\)

On March 15, 2019, the Foreign Investment Law (FIL) was enacted by China’s National People’s Congress (NPC).\(^9\) It was put into force on January 1, 2020 and marked a new era of China being more open to foreign investment.\(^10\) However, the introduction of the FIL has been a tortuous process. The Ministry of Commerce issued the Foreign Investment Law of the People’s Republic of China (Draft for Comment) as early as 2015, however, the draft caused controversial debate.\(^11\) Three years later, on December 26, 2018, the Standing Committee of the NPC invited public comment on the draft. From the draft to the final enactment, the lawmaking process in NPC took less than three

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\(^6\) Id.

\(^7\) Id.


months, whereas many legislations usually take much longer.\textsuperscript{12} The quick enactment of FIL was the Chinese government’s urgent response to criticism that the Chinese market is too restrictive, which fermented especially during the Sino-American trade conflict.\textsuperscript{13}

The FIL replaces the original three laws concerning FDI enterprises, which had been enforced before 2020, and is expected to facilitate a more open and amicable legal environment for attracting FDI. China is focusing more on protecting investors’ rights through “the high-level policies of motivating liberalization and facilitation.”\textsuperscript{14} The FIL, which embodies the principle of “competitive neutrality,” prioritizes equal national treatment of foreign investors.\textsuperscript{15} For example, Chinese state-owned enterprises can no longer use their relationship with the government to gain undue advantage in market competition. The most obvious improvement is that the FIL emphasizes the “pre-

\textsuperscript{12} It is possible for a law to take several years or even longer to be promulgated. China’s Legislative Law stipulates that draft laws should be extensive consulted by the public through seminars, hearings and other means. After that, it will be submitted to the Legislative Affairs Office of the State Council for review and form a formal bill. The bill then will be deliberated by the Standing Committee of the National People’s Congress three times before it is submitted for final voting. For example, the Property Law was promulgated at the Fifth Session of the Tenth National People’s Congress in 2007. Its deliberation spanned nearly five years. See The Basic Procedure of Legislation in China, NPC (Feb. 19, 2013), http://www.npc.gov.cn/zgrdw/npc/sjb/2013-02/19/content_1755104.htm.

\textsuperscript{13} Gunjan Singh, China-US Trade War: An Overview, 5 MANAG. ECON. RES. J. 1, 3 (2019).


\textsuperscript{15} At the G30 International Banking Symposium in 2018, the Governor of the People’s Bank of China, Yi Gang, stated the principle of “competitive neutrality” for the first time: “To solve the structural problems in the Chinese economy, we will accelerate domestic reform and continue to open up to the outside world, especially the intellectual property protection. We will vigorously promote the opening up, including the service sector and financial industry.” See LU Tong, Fulfilling the Principle of Competitive Neutrality, 8 CHINA FIN. 81, 81–82 (2019).
establishment national treatment and Negative List” as the core part of the regulation regime of FDI.\textsuperscript{16} The FIL sets the stage of national treatment for FDI and entitles foreign investors to enjoy no less favorable treatment than that enjoyed by domestic investors throughout the whole process of FDI investment and operation.\textsuperscript{17} Reviewers in China estimated that the implementation of the FIL would be beneficial to China in attracting FDI in new fields, amplifying scale of economy, and improving market efficiency.\textsuperscript{18} Furthermore, the FIL seeks to ease complaints from overseas businesses and governments by strengthening equal treatment, establishing fair expropriation procedures, and prohibiting forced technology transfers.\textsuperscript{19}

Although China’s improvement in its business environment facilitation has been internationally recognized in recent years, the Chinese government still strives to make it better for investors.\textsuperscript{20} The government comprehensively plans to create a “legal-based, market-oriented and internationalized” business environment.\textsuperscript{21} The FIL,

\textsuperscript{16} The Negative List is Special Administrative Measures for Access of Foreign Investment. See Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 4.
\textsuperscript{17} Id.
\textsuperscript{19} WANG Shouwen The Foreign Investment Law will provide a better environment for foreign investment, (Mar. 9, 2019), http://www.xinhuanet.com/politics/201903/09/c_1210076976.htm.
which contains the principles of transparency, efficiency, and consistency, requires local governments to formulate facilitation policies and measures, such as simplified procedures, standardized administrative actions, and published investment guidelines.\textsuperscript{22} International investors expect to develop an investment climate toward the rule of law.\textsuperscript{23}

The FIL aims to open China’s FDI inflow.\textsuperscript{24} It is predicted that the FIL will help build a legitimate, liberalized, and facilitative business environment.\textsuperscript{25} It will also contribute to high-quality economic development.\textsuperscript{26} Despite the positive impacts, there is still concern whether the FIL will indeed benefit FDI inflow into China as FIL operates” as a kind of sweeping set of intentions rather than a specific, China to Attract Foreign Investment with Better Business Climate, \textsc{Website of the Central People’s Government of the PRC (Zhongguo Zhengfuwang)} (Oct. 16, 2019), http://english.www.gov.cn/premier/news/201910/16/content_WS5da73e27c6d0bca8e4e153e3.html.

\textsuperscript{22} See \textit{Foreign Investment Law of the People’s Republic of China, supra} note 9, at art. 3, 19–22.


\textsuperscript{26} \textit{Id.}
enforceable set of rules.” To respond to such concern and correct the FIL’s lack of clear and detailed stipulations, the State Council of China promulgated Implementing Regulation of Foreign Investment Law (FIL Implementing Regulation) in December of 2019. In general, the FIL acts as an overarching framework. More detailed interpretations of its rules are still needed. As such, this article will evaluate China’s FIL with respect to its achievements and possible insufficiencies through the perspective of international liberalization and facilitation.

II. CHINA’S FDI LEGAL REFORM: A GRADUAL PROCESS TOWARD OPENNESS

China’s openness to FDI began in 1979 after the Communist Party of China (CPC) announced its domestic reform at the end of 1978. China’s gradual, forty-year comprises three stages. The first stage, which began in 1979, is characterized by both preferential and restrictive FDI policies and saw the enactment China’s first FDI law.

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31 Id.

32 Id.
In the second stage, beginning in 2000 and driven by the World Trade Organization (WTO) access initiative, China amended its FDI laws to facilitate market access and national treatment.\textsuperscript{33} In 2013, the reform experimented with the Negative List in the Shanghai Free Trade Area with the expectation of substituting the long-standing approval mechanism of FDI and initiating further liberalization of FDI openness.\textsuperscript{34} In 2019, China entered its third stage of openness with its enactment of the FIL, which signified the unprecedented substantial reform of FDI regulation toward liberalization and facilitation.\textsuperscript{35}

A. 1979-1999: The Highly Regulated Openness to FDI

The Third Plenary Session of the Eleventh CPC Central Committee in December 1978 endeavored to end the chaotic situation caused by the ten-year Cultural Revolution and restart the modernization of economic development.\textsuperscript{36} As a result, the following decades saw the development of China’s initial FDI regulatory scheme known as the “Three Laws.” In 1979, China enacted the first FDI law, titled \textit{Law of the People’s Republic of China on Chinese-Foreign Equity Joint Ventures (EJV Law)},\textsuperscript{37} which permitted the creation of an equity-based joint venture. In 1986, China enacted the \textit{Law on Wholly Foreign-Owned Enterprises (WFOE Law)} to permit wholly foreign owned enterprises.\textsuperscript{38}
In 1988, the Law of the People’s Republic of China on Chinese-Foreign Contractual Joint Ventures (CJV Law) was enacted to permit contractual joint ventures established between domestic and overseas investors. These three laws established China’s FDI legal framework and regulated China’s FDI enterprises until 2019.

The promulgation sequence of the Three Laws indicates that China has gradually liberalized its domestic market it began to permit free agreements between domestic and foreign enterprises rather than tightly restricting FDI. However, the Chinese government is still prudent about continuous openness, which shows in the coexistence of rigidity and flexibility in its laws and regulations.

The Chinese government promulgated the EJV Law to take the lead in reform. Foreign capital began to enter the Chinese market through Sino-foreign Joint Ventures (SJV). Profit distribution, risk-sharing, and loose bearing of SJV are strictly based on the ratio between investments. Although this law does not stipulate a maximum proportion of foreign capital, it does require that the minimum not be less than 25%. This was probably the Chinese


41 Id.
43 See LI Chenggang, supra note 30.
45 Id.
46 EJV law, supra note 37, at art. 3.
legislators’ consideration at the dawn of the reform process. Legislators even considered that only sufficient FDI could achieve the goal of introducing capital and technology.\(^{47}\) The Chinese government’s enthusiasm for advanced technology was revealed in the EJV Law.\(^{48}\) Was it not an actual restriction under the guise of desire for FDI? As Deng Xiaoping said, foreign parties tended to prevent the spillover of core technologies.\(^{49}\) As a result, the Chinese party could not access key technologies by controlling a stake in SJV, nor could itself improve its research and development ability.\(^{50}\) Furthermore, the EJV Law strictly limited the joint venture’s sales to balance the influx of foreign currencies with domestic sales revenues.\(^{51}\) This restriction conflicted with the primary goal of FDI entering China’s vast sales market.\(^{52}\) If SJV products were uncompetitive abroad, blindly requiring export would inevitably affect FDI enthusiasm.\(^{53}\) Even worse, supporting services, like an approval mechanism, were lacking.\(^{54}\) By 1986, the number of new approved SJVs began to decline.\(^{55}\)

Under these circumstances, China formally incorporated the idea of “exchanging market for technology” into its subsequent wholly

\(^{47}\) On July 7, 1979, Deng Xiaoping talked about the issue of foreign economic cooperation at the 10th Conference of Chinese Diplomatic Envoys Stationed Aboard. Deng said: “Joint ventures are more appropriate now than compensation trade because the risks are assumed by both parties. We cannot get advanced things in compensation trade, while in joint ventures, the other party has to make economic calculations that it has to come up with advanced technologies for cost saving. Other party certainly has the right to reserve and possess specific technologies. In any case, it is used here and we will always learn a little.” See CPC PARTY LITERATURE RSCH. OFF., CHRONICLE OF DENG XIAOPING’S LIFE (1975-1997) 533 (2014).

\(^{48}\) See EJV law, supra note 37, at art. 5.

\(^{49}\) See CPC PARTY LITERATURE RSCH. OFF., supra note 47.

\(^{50}\) Id.

\(^{51}\) See Law of the People’s Republic of China on Sino-Foreign Equity Joint Ventures, supra note 37, at art. 9.


\(^{53}\) Id. at 142, 154.

\(^{54}\) Id. at 289.

\(^{55}\) GU MU, MEMOIRS OF GU MU 306 (2009).
foreign-owned enterprise (WFOE) Law.\textsuperscript{56} China permitted the establishment of WFOEs, which were also allowed, to operate independently without the surveillance of a Chinese partner.\textsuperscript{57} WFOEs could organize in forms other than limited liability companies (LLCs), and their assets were protected, not nationalized and expropriated.\textsuperscript{58} Compared with SJVs, WFOEs, operated independently by foreign investors, were more inclined to choose the most advanced technology to reduce their costs.\textsuperscript{59} China even had the opportunity to become a research and development base and establish mutually beneficial cooperation with WFOEs, which, is objectively more conducive to technology spillover.\textsuperscript{60}

Subsequent promulgation of the CJV Law further softened the adverse relationship between Chinese and foreign capitals from the
extremes of cooperation or separation. The Sino-foreign cooperative enterprise was born, which was established by contract rather than capital contribution ratio. Contracts among shareholders created the equity, interest distribution, resulting in wider options for FDI after entering the Chinese market. The new cooperative enterprise form indicated that the Chinese government had focused more on cooperation. Both Chinese and foreign parties benefitted from coequal relationships. The Chinese party generally provided land occupancy or exploration rights, while foreign partners usually provided capital, advanced technology, and equipment. Moreover, the enterprises were permitted to depend on China for production areas and potential markets. For example, during their global operations, the CJV Law lifted restrictions on the domestic sale of products manufactured by foreign companies.

The promulgation of the Three Laws was not only a product of China’s gradual opening, but also a pillar for its economic reform. Beijing officials exhibited complicated ambivalence in this process. They required foreign capital, advanced technology, and management experience, but were unwilling to allow FDI into the fragile domestic market. Therefore, legislation and related policies in China provided incentives to foreign investment while also imposing restrictions. Foreign investors enjoyed both super-national treatment and sub-national treatment during this period.

For example, China granted foreign companies preferential treatment in areas like taxation, profit repatriation, dispute settlement,

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61 See CJV law, supra note 39, art. 2.
62 Id.
63 Id. at art. 8.
64 See LI Chenggang, supra note 30.
65 Id.
66 Id.
67 See CJV law, supra note 39, art. 19.
68 Id.
69 YANG Songling, China’s Administrative Mode for Foreign Investment: From Positive List to Negative List, 33 SING L. REV. 93, 94–97 (2015).
70 Id.
71 Id.
72 Id.
and property rights. Three Laws granted tax breaks to foreign enterprises, allowing foreign-invested enterprises to enjoy tax exemptions in their first and second year, and a 50% tax reduction in their third, fourth, and the fifth years as long as they agreed to operate for more than ten years. Furthermore, Three Laws reduced the time between the application and government approval for FDI to enter the Chinese market and advanced the prohibition of nationalization or expropriation of foreign capital. During this period, foreign-funded enterprises enjoyed super-national treatment in China. After the series of FDI laws had been promulgated, China announced *Company Law* in 1993. Beijing was eager for FDI, which contributed to creating the domestic market economic rules in China.

However, China forced sub-national treatment on FDI in some respects, such as the above-mentioned forms of enterprise organization, sale destination, and the provision of advanced technology and equipment. Moreover, EJV and WFOE laws, which set local requirements about using domestically manufactured goods, stimulated the development of the local industrial chain. Fortunately, these restrictions were relaxed, starting with the CJV Law.

China’s most typical sub-national treatment took form in its administrative measures exerting that tightly controlled FDI

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73 See JIAO Zhiyong, supra note 44.
75 See Until 2004, the Amendments to the Constitution of the People’s Republic of China formally regulated that citizens’ lawful private property may not be infringed upon and compensation should be paid if the state expropriates or takes over private property for the public interest. See XIANFA, art. 13 (2018).
77 See YANG Songling, supra note 69.
78 See CJV Law, supra note 39, at art. 9; WFOE Law, supra note 38, at art. 15.
admission, such as restrictions on FDI sectors. For example, the Provisional Regulations on Direction Guide to Foreign Investment (“Provisional Regulations”) were issued in 1995 by the Ministry of Commerce. The Provisional Regulations divided foreign investment projects into four categories: encouragement, permission, restriction, and prohibition. However, prohibitive and restrictive rules outnumbered encouraging and permissive ones. The subsequent amended version emphasized opening more industries and departments, especially infrastructure industries that involved national security and economic arteries like transportation, telecommunication, and minerals. The Provisional Regulations enhanced the transparency and predictability of the Chinese investment environment, and the expanding industries promoted China’s determination to loosen restrictiveness. However, this system’s essence was examination and approval, and it acted as a positive list in that market access of FDI was forbidden if the list did not permit it. The subject, form, and industries of FDI were restricted rigorously. The Chinese government shackled the FDI in the list cage.

From 1979 to 1999, China opened its doors and attempted to liberalize FDI policies and attract FDI inflows. Chinese legislatures promulgated a series of laws and regulations to illustrate foreign
investors’ rights and obligations as the government opened more areas to FDI, such as Special Economic Zones (SEZs) initially established in Shenzhen.\textsuperscript{88} Figure 2.1, presented below, shows the growth of FDI inflows into China from 1979 to 1999, beginning in 1982 after the Constitution of the People’s Republic of China (1982) affirmed the full legal status of FDI.\textsuperscript{89} Following a stable growth phase from 1983 to 1991,\textsuperscript{90} inflows increased dramatically to US$27.51 billion in 1993, which was probably closely related to the amendment of the EJV Law in 1990.\textsuperscript{91}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure2.png}
\caption{FDI Inflow in China: 1979-1999 (Billion US$)\textsuperscript{92}}
\end{figure}


\textsuperscript{89} Foreign direct investment, net inflows (BoP, current US$), \textit{supra} note 1. \textit{See also} XIANFA, art. 18 (2018).

\textsuperscript{90} \textit{Id.}

\textsuperscript{91} \textit{Id.}

\textsuperscript{92} \textit{Id.}
Behind the remarkable results were a time-consuming system and costly approval for investment in the infrastructure industry, which was encouraged by the Chinese government. The sectors that the Chinese government encouraged investment in, such as infrastructure, had relatively high up-front costs and an extended repayment cycle. These were probably not preferable for FDI. Furthermore, at the end of the 1990s, foreign-funded enterprise products began to occupy China’s domestic market. Under the circumstances—the lack of core technology, rising production cost, and harsh competition in the international market—China promptly sought reforms. China planned to join the WTO to stimulate domestic economic development, begin a new round of liberalization, and facilitate reform by following WTO rules and commitments. China subsequently repealed some content that did not comply with WTO rules from the Three Laws. The next part of this article will focus on this content.

B. 2000-2019: The Gradual Reform toward Liberalization and Facilitation

When the WTO was founded in 1995, China applied for membership. The purpose of WTO agreements affecting investment is to cancel investment measures that restrict and distort trade

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93 See QIU Rungen, supra note 87.
94 Id.
96 By 1998, in the mobile phone and pager market, Motorola, Ericsson and NEC have occupied more than 90% of the Chinese market. The foreign capital share of the tire market is 60%. Beverages, washing, cosmetics, and machinery markets have similar situations. See Wang Jiating, How far will Market for technology evolve?, 17 CHINA ECON. & TRADE HERALD 20, 20–23 (1998).
97 Id.
99 Id.
freedom.\textsuperscript{101} China began to accept and absorb the concept of fair competition and the principle of non-discrimination.\textsuperscript{102} The supranational and sub-national treatment of the Chinese Three Laws was significantly challenged at that time.\textsuperscript{103} China needs to revise domestic laws to comply with WTO treaty obligations.\textsuperscript{104} Chinese legislatures amended approximately 2,300 laws, regulations, and legal documents before China’s admission.\textsuperscript{105} The CJV Law and WFOE Law were enacted on October 31, 2000, and the amendment to EJV Law was enacted on March 15, 2001.\textsuperscript{106} Numerous restrictions were lifted and revised to conform with WTO rules and requirements, particularly those concerning equal treatment to FDI.\textsuperscript{107}

The WTO’s \textit{Agreement on Trade-Related Investment Measures} (TRIM) and \textit{General Agreement on Trade in Services} (GATs) required China

\begin{thebibliography}{9}
\bibitem{101} Id.
\bibitem{103} The principle of non-discrimination is embodied through national treatment and most-favored-nation treatment. It requires the host country to treat FDI equally from pre-established to post-established period. For example, in the pre-established period, host states should fully open the domestic market as much as possible. The access mechanism of the approval system in China at that time does not meet the requirements. Furthermore, WTO emphasized the principle of transparency to implement non-discrimination treatment. The focus of transparency requires all member parties to announce trade-related laws and regulations promptly. During that period, a considerable number of foreign investment laws and regulations in China and governments at all levels had great power to formulate rules on the use of FDI. Foreign investors were usually confused when they are facing Chinese foreign investment legislation.
\bibitem{105} The data is from the statement of Mr. Shi Guangsheng, the then Minister of the Ministry of Foreign Trade and Economic Cooperation (MOFTEC). See China has cleaned up and revised 2,300 regulatory documents for its “WTO accession”, CHINA NEWS (Zhongguo Xinwenwang)(Oct. 16, 2001), http://www.chinanews.com/2001-10-16/26/130794.html.
\bibitem{106} EJV Law, supra note 37; WFOE Law, supra note 38; CJV Law, supra note 39.
\bibitem{107} Mary E. Gallagher, "Reform and Openness": Why China’s Economic Reforms Have Delayed Democracy, 54 WORLD POLIT. 338, 340–60 (2002).
\end{thebibliography}
to revise its FDI laws.\textsuperscript{108} The TRIM affect Chinese FDI laws most significantly.\textsuperscript{109} The core obligation of the TRIM is that member states abolish investment measures involving business requirements.\textsuperscript{110} The Illustrative List of the Annex enumerates the investment measures prohibited by the TRIM, namely, local content requirements and restrictions on import or export for trade balance requirements and foreign exchange requirements.\textsuperscript{111} The inconsistency between China’s Three Laws and the TRIM agreement manifests mainly in local content requirements and foreign exchange balance requirements.\textsuperscript{112} China removed local requirements in laws and policies, such as local content, import restrictions, domestic sales, trade export performance, technology transfer, and foreign exchange balancing.\textsuperscript{113} For instance, the three revised FDI laws eased the local purchase requirement by stipulating that those overseas goods, like raw materials and fuel, could also be purchased based on the principle of fairness and reasonableness.\textsuperscript{114} Additionally, the Chinese government previously compelled foreign-funded enterprises to use advanced technology and equipment.\textsuperscript{115} After 2002, the three revised FDI laws replaced the word “force” with “encouragement” and abolished the requirement that all or most products manufactured by foreign-funded enterprises should be exported.\textsuperscript{116} The State Council issued the supporting Administrative Regulations of the People’s Republic of China on Foreign Exchange.\textsuperscript{117} It lifted

\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} See EJV law, supra note 37 at art. 75; WFOE law, supra note 38, at art. 18; CJV law, supra note 39, at art. 20.
\textsuperscript{114} See EJV law, supra note 37, at art. 10; WFOE law, supra note 38, at art. 15; CJV law, supra note 39, at art. 19.
\textsuperscript{115} See QIN, Julia Ya, supra note 113.
\textsuperscript{116} See WFOE law, supra note 38, at art. 3; CJV law, supra note 39, at art. 4.
\textsuperscript{117} Zhonghua Renmin Gongheguo Waihui Guanli Tiaoli (中华人民共和国外汇管理条例) [Administrative Regulations of the People’s Republic of China on
restrictions on the use of foreign exchange for currency accounts. The CNY currency account was convertible in the new foreign exchange management system.

The GATS regulate the superior standard of market access, which creatively added a chapter of exemptions concerning national treatment during the market access period. The Party would list their specific commitment schedule. In other words, unjustifiable discrimination against non-listed corresponding subsectors were forbidden. The annexed exemption created by the GATS initiated a precedent for countries to formulate non-conforming measures and the Negative List. Developed countries inspired by the GATS have commonly applied the form of non-conforming measures in Bilateral Investment Treaties (BITs), Free Trade agreements (FTA), and International Investment Agreements (IIA). The structure of the GATS has affected China’s market access mechanism profoundly. The State Council abolished the 1995 Provisional Regulations in 2002 and published a new Catalogue of Industries for Guiding Foreign Investment (CIGFI). The Catalogue was revised in 2004, 2007, 2011, and 2015, gradually reducing restricted industries and increasing encouraged ones. For instance, previously prohibited infrastructure areas such as

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119 Id. CNY means Yuan. The yuan is the unit of account of the country’s economic and financial system.
121 Id.
122 Id.
123 Andrew Newcombe, General exceptions in international investment agreements, SUSTAINABLE DEV. WORLD INVESTMENT LAW 363–64 (2011).
124 See QIN, Julia Ya, supra note 113.
telecommunications and gas were listed as permissive industries.\textsuperscript{127} Restrictions on service industries like finance, transportation, retail, and insurance were lifted to fulfill WTO commitments.\textsuperscript{128} Furthermore, China’s investable areas have shifted, moved from coastal cities to inland areas since the government began to guide foreign capital inflow to the Midwest.\textsuperscript{129}

China acceded the WTO with its subsequent revision of a series of laws and regulations.\textsuperscript{130} The gradual opening-up strategy helped China become the world’s largest FDI recipient in 2002.\textsuperscript{131} The following Figure 2.2 illustrates the FDI inflows in China from 2000 to 2018, after WTO accession.\textsuperscript{132} After sustainable growth, China experienced a period of stability from 2010 to 2014.\textsuperscript{133} However,

\begin{itemize}
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} See Catalogue for the Guidance of Foreign Investment Industries, supra note 125, at art. 5, ¶ 5.
\item \textsuperscript{130} Simultaneously, China’s intellectual property law (IPL) began to make amendments in line with the TRIPs agreement. It was not until China joined the World Intellectual Property Organization in 1980 that China started to enact IPL such as Trademark Law, Patent Law, and Copyright Law. China has successfully introduced new versions of the Patent Law, Copyright Law, and Trademark Law since 2000. For example, the revised Trademark Law expands trademark exclusive righter to individuals and protect the color and three-dimensional symbol. The new Copyright Law has improved the protection level of domestic copyrights to make it consistent with foreign copyrights, which realized equal protection of copyright. See Zhonghua Renmin Gongheguo Shangbiaofa (2001Nian Xiuding) (中华人民共和国商标法) [Trademark Law of the People’s Republic of China (Revised in 2001)] (promulgated by Standing Committee of the NPC, Oct. 27, 2001, effective Dec. 1, 2001) at art. 8 (China); Zhonghua Renmin Gongheguo Zhuzuoquanfa (2001 Nian Xiuding) (中华人民共和国著作权法) [Copyright Law of the People’s Republic of China (2001 Revision)] (promulgated by Standing Committee of the NPC, Oct. 27, 2001, effective Oct. 27, 2001) at art. 2 (China); Zhonghua Renmin Gongheguo Zhuanlifa (2000Nian Xiuding) (中华人民共和国专利法) [Patent Law of the People’s Republic of China(Revised in 2000)] (promulgated by Standing Committee of the NPC, Aug. 25, 2000, effective Jul. 1, 2001)(China).
\item \textsuperscript{132} Foreign direct investment, net inflows (BoP, current US$), supra note 1.
\item \textsuperscript{133} Id.
\end{itemize}
the period between 2014 and 2017 showed a notably decreasing trend, and then the inflow increased again to US$203 billion in 2018.\textsuperscript{134}

![Figure 2.2 FDI Inflows in China: 2000-2018 (Billion US$)](image)

The figure presented above shows FDI fluctuation in China during the post-WTO era.\textsuperscript{136} The Chinese reforms that served solely to fulfill WTO commitments were ineffective for attracting continuous FDI for two main reasons.\textsuperscript{137}

First, the domestic reforms were not comprehensive enough. The revised legal rules for investment still had gaps compared with WTO rules.\textsuperscript{138} Parts expressly prohibited by the TRIMs were abolished, but China had not amended other relevant regulations.\textsuperscript{139} For example, China allowed FDI inflow into more domestic industries in line with the GATS, but it did not refer to the Exception

\begin{flushright}
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\end{flushright}
mechanism, a typical innovation of the GATS.\textsuperscript{140} The market access mechanism in China was essentially an approval system.\textsuperscript{141} Additionally, China’s intellectual property rights protection was far below the requirements of the WTO agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), especially in terms of trademark protection.\textsuperscript{142} Counterfeiting and piracy were rampant during that time.\textsuperscript{143} Furthermore, there were no transparent rules applicable to domestic investment in China.\textsuperscript{144} The Three Laws regulated different enterprise forms, which resulted in an unequal legal status between EJV, CJV, and WFOE.\textsuperscript{145} The Three Laws were further confused with other Chinese domestic laws, such as Company Law—laws concerning intellectual property—and Labor Law.\textsuperscript{146} In addition, Chinese local governments formulated local preferential policies.\textsuperscript{147} All these factors caused difficulties for foreign investors when investors decided the application of relevant laws or policies in China. Finally, China had not deleted the preferential measures in the Three Laws.\textsuperscript{148} Both inventive and restrictive measures hinder the free flow of foreign


\textsuperscript{141} Id.


\textsuperscript{143} Id.


\textsuperscript{148} WANG Xia & CHEN Liuqin, Should China’s Foreign Investment Incentives Be Eliminated? –Based on the Perspective of FDI Competition Among Host Governments, 11 J. OF SHANGHAI UNIV. OF INT’L BUS. & ECON. 25 (2007).
capital. If foreign-funded enterprises enjoy preferential treatment, domestic enterprises will inherently experience discrimination.

Second, unlike unequal taking that characterized the traditional relationship between investors and host countries, the changing international investment environment promotes reciprocity. Previously, Investors would select developing countries with lower labor costs and richer natural resources as investment destinations, and host countries would usually have no right to express interest needs, but instead inclined to formulate policies favorable to investment. Now, with a substantial number of emerging economies and the advancement of science and technology, the demand for production materials has begun to change. While exporting advanced technology and management experience, foreign capital needs a huge host country market for profit. The new relationship between investors and host countries has converted into sharing.

China mainly used preferential policies and entry barriers to attract its needed FDI. Still, this management model of supernational and sub-national treatment was no longer suitable for attracting FDI at that stage. Nothing other than reforming the access mechanism and establishing a healthy domestic environment would contribute to bringing in and retaining FDI in China. Moreover, Sino-American Bilateral Investment Treaty (BIT) negotiation from

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149 See YANG Songling, supra note 69.
150 Id.
152 Id.
153 Id.
156 See WANG Xia & CHEN Liuqin, supra note 148.
157 See YANG Songling, supra note 69.
2008 to 2015 prompted China to experiment with a Negative List applied in the U.S. BIT model.159

China began to explore the management model of pre-establishment national treatment and a Negative List.160 The Shanghai Free Trade Zone (SFTZ) took the lead in implementing the Negative List system.161 The Negative List manifested the jurisprudential philosophy that “all is permissible unless prohibited.”162 Hence, foreign investment could flow into any industry within the free trade zone except the Negative List reservations.163 The Negative List mechanism marked China’s formal Acknowledgment of exception measures outside the service trade, a significant breakthrough in the establishment of FDI access.164 In 2017, the new version of China’s Catalogue of Industries for Guiding Foreign Investment finally introduced the


162 Yao & Tang, supra note 60, at 80.


164 With the Shanghai Free Trade Zone’s in-depth development, new free trade zones were announced in 2015, 2017, and 2018 in 10 districts (Tianjin, Fujian, Guangdong, Liaoning, Zhejiang, Hubei, Henan, Chongqing, Sichuan, Shanxi, Hainan). With decreasing articles from 120 to 48, the Negative List was magnified applied in the FTZs above. See Khoonming Ho & Lewis Lu, China: China introduces new free trade zones and improved practices, ITR (Oct. 15, 2019), https://www.internationaltaxreview.com/article/b1hlmhttpdhtb/china-china-introduces-new-free-trade-zones-and-improved-practices.
nationwide application of the Negative List.\textsuperscript{165} During the previous few years, some sectors—such as telecommunications, gas, heat, water supply, drainage, and others—referred to as “urban construction” were opened through modification for the first time.\textsuperscript{166} Service trade openness was further expanded, with areas such as financial industries, transportation, tourism, legal services, accounting and auditing, audiovisual products, and franchising.\textsuperscript{167} In brief, the catalog encouraged FDI inflow in a broader geographic distribution and more targeted economic sectors.\textsuperscript{168} The Three Laws were amended in 2016 to stipulate a file-recording system for FDI establishment to entrench the Negative List’s nationwide implementation.\textsuperscript{169} The approval system was replaced by the filing system to facilitate FDI inflow further.\textsuperscript{170}

\textsuperscript{165} China had accelerated the adjustments of industrial policies for FDI. The new version of Guiding the Foreign Investment Direction was issued in 2002, which further regulated industries’ guidance catalog. The new catalog reflects the continuous openness in investment access. For instance, the list of encouraged categories were increased from 186 to 262. In contrast, the number of restricted categories were reduced from 112 to 75. The catalog greatly loosened the industry access restrictions. See Waishang Touzi Chanye Zhidao Mulu (外商投资产业指导目录) [Catalogue for the Guidance of Foreign Investment Industries] (promulgated by National Development and Reform Commission; State Economic and Trade Commission; Ministry of Foreign Trade and Economic Cooperation; State Council, Mar. 11, 2002, effective Apr. 1, 2002)(China), http://www.chinaconsulatesf.org/chn/kj/zyxx/t38777.htm. The government continuously revised the catalog in 2004, 2007, 2011, 2015, and 2017 to expand openness and reduce restriction. After several years of practice in SFTZ, the catalog of the 2017 version finally introduced the nationwide application of Negative List.

\textsuperscript{166} See ZHANG Qianwen, supra note 160; Catalogue for the Guidance of Foreign Investment Industries, supra note 165.

\textsuperscript{167} Catalogue for the Guidance of Foreign Investment Industries, supra note 165.

\textsuperscript{168} JANE GOLLEY & SONG LIGANG, RISING CHINA: GLOBAL CHALLENGES AND OPPORTUNITIES, 1–8 (ANU Press 2011).


\textsuperscript{170} The approval system usually means that the government makes a substantive review of the application items and materials before the establishment of
Since the Reform and Opening-up Policy, Chinese leadership has expected to increase FDI inflows and upgrade domestic industries through positive FDI spillovers. Fortunately, China is a country with both great productivity and a large market, which lends a natural advantage in attracting FDI. Nevertheless, applying super- and sub-national treatment to guide and control foreign investment direction is outdated. In the post-WTO era, China began to prepare for a new round of reforms, and the Negative List experiment was the first step. Only the fundamental reform of the access mechanism and the establishment of a healthy domestic business environment would help bring in and retain foreign investment.

C. 2020: The New Opening-up Era Started by the FIL

Through the FIL, which took effect on January 1, 2020, China expected to open up further and promote a new comprehensive opening regime. FDI inflow was encouraged by States’
implementation of high-level investment liberalization and facilitation policies.\textsuperscript{177} Inflow requires the host country to promote FDI and develop a stable, transparent, predictable, and fair market environment.\textsuperscript{178} The FIL ended the fragmental situation of the Three Laws and applied collectively to all types of foreign enterprises.\textsuperscript{179}

The introduction of the FIL was a tortuous process.\textsuperscript{180} The draft version of the FIL contained 170 articles.\textsuperscript{181} Much scrutiny and revision, reduced the final version to only forty-one.\textsuperscript{182} Because of its general stipulations—which grant the executive government flexibility to make detailed implementation rules in the future—the final version is probably better to adapt to dynamic change and the international investment environment’s relevant rules.\textsuperscript{183} Before enforcing the FIL, China’s State Council enacted a more detailed document, Implementing Regulations of the Foreign Investment Law of the People’s Republic of China (Implementing Regulations), to implement the FIL.\textsuperscript{184}

\textsuperscript{177} See Foreign Investment Law of the People’s Republic of China, supra note 9, at art.3.
\textsuperscript{178} Id.
\textsuperscript{180} The Chinese Ministry of Commerce issued the Comments Sought on the Foreign Investment Law (Draft) as early as 2015, but it was suspended because of the large controversial debate. Three years later, from 2018 to 2019, the Standing Committee of the NPC again issued the new draft twice for public consultation.
\textsuperscript{182} See Foreign Investment Law of the People’s Republic of China, supra note 9.
\textsuperscript{184} See WANG, supra note 10.
The FIL stipulates promotion, protection, and management of foreign investment. At the FDI admission stage, the FIL emphasizes the “Pre-establishment National Treatment and Negative List” as a nationwide new management regime after several years of experimentation in FTZs.\(^{185}\) FDI projects will no longer experience case-by-case examination and approval.\(^{186}\) Under the Negative List management regime, FDI can enter the Chinese market like domestic investors if the relevant industry is not expressly prohibited or restricted by the Negative List.\(^{187}\) The entered industry only needs to be filed instead of approved by Chinese authorities.\(^{188}\) This management regime advances national treatment for FDI at the admission stage.\(^{189}\) The Negative List effectively restricts the undue interference of the government, significantly improving the stability and predictability of the investment environment and enhancing investor confidence.\(^{190}\) In 2020, China issued a new Negative List and further deleted the original industrial restrictions on foreign investment.\(^{191}\) In recent years, China has been deleting Negative List items annually and has gradually opened industries like services, manufacturing, and agriculture.\(^{192}\) The Chinese government


\(^{186}\) Id.

\(^{187}\) Id.

\(^{188}\) Id.


\(^{192}\) See YANG Songling, supra note 90.
undoubtedly aims to expand the scope of opened sectors further and deepen the openness of market access to promote FDI.\footnote{Id.}{\textsuperscript{193}}

After FDI entered the Chinese market, the FIL further made an effort to encourage and protect foreign investment and reform the mode of regulation.\footnote{See Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 2, 24, 25.}{\textsuperscript{194}} Through the principle of competitive neutrality, the FIL emphasizes equal treatment when FDI competes in the marketplace.\footnote{Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 15, 16. The concept of “competitive neutrality” first appeared in Australia in the 1990s to ensure equal competition between public and private companies; this principle was subsequently seen by the Organization for Economic Co-operation and Development (OECD) as an essential part of the corporate governance of State-Owned Enterprises (SOEs). Now it is further developed and promoted on a global scale to ensure that SOEs cannot take advantage of their relationship with the government and gain undue advantage in market competition. See Competitive Neutrality in Competition Policy, OECD, http://www.oecd.org/competition/competitive-neutrality.htm (last visited Mar. 30, 2022).}{\textsuperscript{195}} For instance, Chinese state-owned enterprises can no longer use their relationship with the government and gain undue advantage in market competition.\footnote{At the G30 International Banking Symposium in 2018. The Governor of the People’s Bank of China, Yi Gang, stated the principle of “competitive neutrality” for the first time: “To solve the structural problems in the Chinese economy, we will accelerate domestic reform and continue to opening up to the outside world, especially the intellectual property protection. We will vigorously promote the opening up, including the service sector and financial industry.” See Fulfilling the Principle of Competitive Neutrality, ADVISORY WEBSITE OF WTO/FTA (WTO/FTA ZIXUNWANG) (May 17, 2019), http://chinawto.mofcom.gov.cn/article/br/bs/201905/2019052860549.shtml.}{\textsuperscript{196}} The state’s policies are equally applicable to foreign-invested enterprises.\footnote{Id.}{\textsuperscript{197}} Products manufactured by foreign-invested enterprises can also be subject to Chinese government procurement.\footnote{Id.}{\textsuperscript{198}}
Additionally, the FIL addresses facilitation for foreign enterprises that operate in China. The FIL emphasizes transparency and efficiency by prioritizing timely compilation and publication of foreign investment guidelines for foreign investors, helping foreign investors participate in legislation. People’s governments at all levels and relevant departments are also required to streamline procedures for handling affairs and providing consulting services promptly. The FIL continues to provide preferential treatment under stipulations of laws or administrative regulations for foreign investment to support the adjustment of China’s industrial structure.

The FIL also strengthens foreign-invested enterprises’ property rights, especially concerning intellectual property rights (IPR). China is facing accusations of “unfair trade practices,” especially the “theft of intellectual property,” in the China–United States trade war. The FIL emphasizes intellectual property protection for foreign-invested enterprises. The Chinese government encourages technical cooperation between domestic and foreign-invested enterprises, but technology transfer must follow business rules. The FIL prohibit administrative mandatory technology transfer. Meanwhile, the government will mete out harsher punishments for IPR infringements. The FIL also

199 See Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 3.
200 Id. at art. 10.
201 Id. at arts. 11, 19.
202 Id. at art. 14.
203 Id. at art. 21, 22.
205 See Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 22.
206 Id.
207 Id.
208 Id.
emphasizes the protection of intellectual property owned by foreign investors, which is achieved by the domestic intellectual property legal system.\textsuperscript{209} In addition to IPR, the FIL stipulates that the state cannot expropriate foreign investors’ investment.\textsuperscript{210} Even if the expropriation is implemented for public interest, it should be within the framework of legal procedures, and fair and equitable compensation should follow in a timely manner.\textsuperscript{211}

Moreover, government control over foreign exchanges is decreasing and contributions, profits, and capital gains of foreign investors can be freely transferred in and out of China.\textsuperscript{212} For example, the FIL stipulates that the government at all levels shall not illegally decrease foreign investors’ legal rights and interests, increase their obligations, or set market access or exit conditions without authorization.\textsuperscript{213} Also, local authorities should strictly implement all legal contracts signed with foreign-invested enterprises, failing which, foreign investors should be compensated for their losses.\textsuperscript{214} Finally, the FIL improved the rights protection mechanism for foreign-invested enterprises.\textsuperscript{215} Foreign investors can seek the right to voice through organizing or voluntarily participating in the chambers or associations of commerce to better protect their legitimate rights.\textsuperscript{216} They can also voice their complaints about the government’s ambiguous, inefficient, and inconvenient actions.\textsuperscript{217}

Regarding management model, FIL Article IV had introduced the Negative List mechanism.\textsuperscript{218} The FIL also underlined the national security review system and the information reporting system as the last line of defense for national security after FDI enters the Chinese

\begin{itemize}
  \item \textsuperscript{209} Id.
  \item \textsuperscript{210} Id. at art. 20.
  \item \textsuperscript{211} Id.
  \item \textsuperscript{212} Id. at art. 21.
  \item \textsuperscript{213} Id. at art. 24, 25.
  \item \textsuperscript{214} Id. at art. 20.
  \item \textsuperscript{215} Id. at Ch. 3.
  \item \textsuperscript{216} Id. at art. 27.
  \item \textsuperscript{217} Id. at art. 26.
  \item \textsuperscript{218} See Special Administrative Measures for Access of Foreign Investment, supra note 191; See Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 4.
\end{itemize}
As a new FDI management mode, the information reporting system intends to accurately read the operation of FDI so that the Chinese government can improve policies and guidelines in a timely manner. The reporting system focuses on comprehensively foreign-invested enterprises’ information, such as investment region, investment industry, actual controllers, transactions and assets liability by aggregation and data analysis. Moreover, China is devising a national security mechanism. The establishment of this mechanism began in the Pilot FTZ several years ago. The General Office of the State Council published the Circular on Establishing the Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors (Circular) in 2011. However, the Circular did not have much reference for the establishment of the new system. The Circular lists whether the FDI violates national defense security, national economic development, social order, and critical technology as review standards. However, the review standards does not specify to what extent is considered a violation of national security standards.

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219 See Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 34, 35.
220 See Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 34, 35.
221 See Foreign Investment Law of the People’s Republic of China, supra note 9, at arts. 34; see also, Implementing Regulations of the Foreign Investment Law of the People’s Republic of China, supra note 28, at art. 39.
222 See Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 35.
223 PENG Delei & FEI Xiuyan, China’s free trade zones: Regulatory innovation, legal assessment and economic implication, 50 CHINESE ECON. 238 (2017).
226 Id.
227 Id.
standard of review and procedures of review are vague in this Circular.\textsuperscript{228}

Furthermore, the Circular ambiguously states that the review body is a related government organ, but does not explain which government agency is “related”.\textsuperscript{229} The authority-responsibility relationship among the government sectors is unclear from this statement. The National Security regulations in China are quite generally expressed.\textsuperscript{230} Therefore, China needs to seek additional breakthroughs based on the Circular.

The introduction of the FIL, a legal achievement for adapting and integrating with new situations and requirements, manifests the confidence and determination of China for further openness and summarizes the reform experiences over the past forty years. China enacted the unified FIL to end the chaos of laws and regulations in the past.\textsuperscript{231} The FIL aims to liberalize investment by further reducing access restrictions, opening the domestic market, and restricting government interference. It facilitates investments by creating a consistent, transparent, and efficient investment environment to attract potential foreign investors to invest, conduct research, and develop in China.\textsuperscript{232} Promotion, protection, and a new management mode are the three key words of the FIL. Nevertheless, some scholars criticize it, stating that a certain number of accessible industries are still limited.\textsuperscript{233} On a practical level, the word of law and its Implementing Regulation are still vague, and details such as approach and extent are

\textsuperscript{228} Id.
\textsuperscript{229} See Foreign Investment Law of the People’s Republic of China, supra note 9, at art.3.
\textsuperscript{231} See YUAN Anyuan, supra note 146.
\textsuperscript{232} CUI Fan & CAI Kaiming, \textit{An Initial Discussion on China’s Foreign Investment Law} (外商投资法（草案）初步解读与评论), 26 \textit{J. SHANGHAI UNIV. OF INT’L BUS. & ECON.}, 3, 14–17 (2019).
\textsuperscript{233} See YANG Songling, supra note 90.
awaiting further clarification. Opening-up is still a basic state policy in China.

III. THE CONTROVERSY CONCERNING THE FOREIGN INVESTMENT LAW’S LIBERALIZATION REFORM

Liberty concerns individual freedom. Liberalization is a course in which a state reduces its limitations on individual activities. Adam Smith, the representative of classical liberalism, believed that the lubricant of self-interest miraculously rotates the gears of a laissez-faire economy. Neither planners nor government laws and decrees are needed to control prices or manage production, and the market can solve all its problems independently.

After Keynesianism had prevailed for nearly forty years, neoliberalism began to rise in the 20th century, influencing international trade and investment. In international investment law, investment liberalization reduces or eliminates government restrictions and preferences on foreign private investment behavior. Nevertheless, it is unrealistic to exclude state intervention in the international market completely because of the state’s economic


236 *Id.*


238 *Id.*

239 Neoliberalism attempts to restore the liberalization policy of classical liberalism in a new form under new circumstances. Many schools of neoliberalism, such as Chicago School, London School, and Freiburg School, have their unique theories, methods, and policies. Still, their basic ideas are all based on the assumption of rational economic people derived from classical economics. They believe in the omnipotent market mechanism and advocate reducing or eliminating state intervention in the economy.

sovereignty. Therefore, minimizing intervention from the host country is more feasible. Generally, investment liberalization is a process in which the domestic market is expanded by FDI access, and the host country treats the FDI investors in a non-discriminatory manner.

In addition to opening up to FDI by reducing market access barriers caused by governmental interference, facilitating investment by providing a fair and healthy domestic business environment can sustainably help FDI enterprises operate liberally and compete in the host country after their market entrance. Facilitation is the purpose of investment climate reform, which the World Bank defines as the regulatory reforms that “can promote private sector growth by eliminating bureaucratic obstacles, reducing cost and time constraints to doing business, and improving the efficiency of legal institutions.” The facilitation as one purpose of investment climate reform is usually based on law and the policy approach of the government. In recent years, investment facilitation has become a hot issue in discussions of international development policy-making. It derives from trade

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241 Id.
242 Id.
243 See FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT, MAXIMISING BENEFITS, MINIMISING COSTS, MAXIMISING BENEFITS, MINIMISING COSTS, supra note 154, at 27.
244 See Jesse Coleman et al., What Do We Mean by Investment Facilitation?, COLUM. CTR. SUSTAINABLE. INV. (Feb. 21, 2018), http://cesi.columbia.edu/2018/02/22/what-do-we-mean-by-investment-facilitation.
facilitation and emphasizes streamlining and simplifying international investment procedures.\textsuperscript{248}

Documents from relevant international organizations often use the terms “facilitation” and “liberalization” in parallel. For instance, Asia Pacific Economic Cooperation (APEC) issued an action agenda titled \textit{Trade and Investment Liberalization and Facilitation} (Osaka Action Agenda) in 1995.\textsuperscript{249} There are two reasons for concern about rising facilitation. First, since most developing countries began to relax FDI controls and expand market access, governmental non-interference alone has lost attraction, and host countries have begun to use more active measures to facilitate FDI inflow.\textsuperscript{250} Second, growing numbers of developing countries have been investing in developed countries.\textsuperscript{251} As the domestic industries of developed countries face threats, many developed countries have tightened their domestic markets and strengthened government controls.\textsuperscript{252} The limit of laissez-faire and the narrow sense of liberalization policy, has prompted the international community to favor the use of facilitation.\textsuperscript{253} When the liberalization process remains stagnant, it is necessary to establish a cordial and legal business climate as a foundation for the future authentic opening-up—investment facilitation enhances the realization of investment liberalization, and its ultimate goal is to achieve comprehensive liberalization.\textsuperscript{254}

\textsuperscript{248} FELIPE HEES \& PEDRO MENDONÇA CAVALCANTE, FOCUSING ON INVESTMENT FACILITATION – IS IT THAT DIFFICULT?, 1 (Colum. Ctr. Sustainable Inv. 2017), https://academiccommons.columbia.edu/doi/10.7916/D87372FJ.
\textsuperscript{253} See Investment Facilitation for Development, supra note 247.
The investment liberalization demonstrated in this article is contextually broad. It not only includes the government’s non-intervention measures, such as the expansion of market access and non-discrimination treatment to liberalize FDI and intervention measures, such as improving transparency and predictability, but also the efficiency of the investment environment in facilitating FDI.255

A. FDI Liberalization Initiative

The World Bank published a report in 1992 forming the foundation of FDI liberalization.256 The report guided countries to promote FDI through five principles: 1) “one-stop shop” admission for free of unnecessary obstacles; 2) fair and equitable treatment; 3) regulation of expropriation or other de facto deprivation; 4) compensation for unilateral alterations or terminations of contracts for non-commercial reasons; and 5) formation of dispute settlement mechanism.257

According to the UNCTAD’s World Investment Report, which was promulgated in 1998, investment liberalization is a dynamic process that mainly includes three aspects.258 The first aspect is reducing and eliminating arbitrary measures that cause market distortions, such as restrictions or incentives explicitly applied to foreign investors.259 Restrictions mainly refer to the limitations on the rights of ownership, operation, and authorization of FDI, while incentives usually include tax advantages and financial incentives.260 The second aspect is improving treatment standards for foreign

255 Id. at 157.
257 Id. at 17, 20, 24, 30.
259 Id. at 94–95.
investment, including national treatment, most favored nations (MFN) treatment, fair and equitable treatment, and transparency, so capital can flow unimpeded without unnecessary or unjust barriers. The final aspect is strengthening the prudential supervision mechanism for FDI operation—the fundamental guarantee of liberalization—through sophisticated competition policy, information disclosure rules, and anti-monopoly regulation.

In 1998, the OECD launched a draft of the *Multilateral Agreement on Investment* (MAI) to spur investment liberalization. It stipulated many liberalization requirements, including non-discriminatory treatment, fair and equitable treatment, nationalization, intellectual property protection, and labor market and environment upgrades. The MAI’s most significant contribution was establishing a mechanism for investment dispute settlement between investors and host countries. Although the draft mainly referenced freedom and openness, it still enumerated activities that violated the liberalization requirements as exceptions and safeguards.

The OECD uses the *FDI Regulatory Restrictiveness Index* (FDI Index) to evaluate the concerned countries’ FDI restrictions in their twenty-two economic sectors. The FDI Index evaluates restrictions

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262 *Id.*


266 *Id.*

267 *See* [FDI Regulatory Restrictiveness Index, OECD,](https://www.oecd-ilibrary.org/docserver/5km91p02zj7g-en.pdf?expires=1647016077&id=id&accname=guest&checksum=2576EDAA3CD8F8FCA867AC9F1A6EDF46) last visited Mar. 11, 2022.
on a scale from zero to one, with lower scores indicating greater restrictions and higher scores indicating more openness.\textsuperscript{268} The OECD evaluates four categories of restrictiveness: 1) foreign equity limitations; 2) discriminatory screening or approval mechanisms; 3) restrictions on the employment of foreigners as key personnel; and 4) operational restrictions, such as branching, land ownership, or capital exchange by foreign-owned enterprises.\textsuperscript{269} Even if the FDI Index can estimate a country’s ability to attract FDI, the OCED emphasizes that other factors, such as geography and market size, can also influence FDI inflow.\textsuperscript{270}

World Bank, UNCTAD, and the OECD recognize investment liberalization generally comprise two perspectives: First, opening domestic markets to FDI and limiting government activities involving economic distortion from the pre-establishment to the post-establishment period.\textsuperscript{271} Non-discriminatory treatment is the fundamental principle.\textsuperscript{272} Host government only choose supervision mechanism as last safeguards.\textsuperscript{273} Second, upgrading transparency, establishing a one-stop-shop, and fulfilling government commitments.\textsuperscript{274} The government acts on these appropriate interventions within the scope of investment facilitation.

But, based on the evaluation indicators of investment liberalization proposed by the various international organizations can

\textsuperscript{268} Id.
\textsuperscript{269} Id. at 9.
\textsuperscript{270} Id. at 6.
\textsuperscript{271} Id.
\textsuperscript{272} According to GATT, the principle of non-discrimination includes three levels of requirements in trade relations: most-favored-nation treatment, national treatment, and reciprocal treatment. It is applied in the international investment field over the years. See General Agreement on Tariffs and Trade, Oct. 30 , 1947, 61 Stat. A-11, 55 U.N.T.S. 194 Article I, III, XIII [hereinafter GATT].
\textsuperscript{273} See Bath, supra note 230.
the FIL grant FDI widespread national treatment and prevent unprovoked and arbitrary intervention in its establishment and operation?

B. Openness and National Treatment in China

1. Market Access Period: Pre-establishment National Treatment and Negative List System.

The market access mechanism presenting pre-establishment national treatment encountered fierce debate between developed and developing countries in the development process of international investment liberalization.275 Developed countries expect a freer market for greater openness, while developing countries are more concerned about whether the domestic market can withstand the impact of FDI inflow.276 During the WTO negotiation of multilateral trade agreements, the pre-establishment national treatment proposal stagnated, and was ultimately reflected only in the GATS through specific commitments.277 However, many countries followed suit after the United States incorporated the pre-establishment national treatment into its investment agreement negotiation model.278 The Sino-U.S. trade negotiation further accelerated China’s pace of its application.279 After the success in SFTZ, China finally adopted “pre-establishment national treatment and a Negative List,” which aims at achieving higher-quality liberalization, as an underlying national administrative regime for foreign investment.280

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276 See Foreign Direct Investment for Development, supra note 243.
277 See GATT, supra note 128, at, art. XVI, ¶ III.
279 See SHAN Wenhua & CHEN Hongrui, supra note 159 at 232–33.
restrictions, all industries are open for foreign investors.\textsuperscript{281} Thus, foreign investors are granted nearly the same investment opportunities as domestic investors in China.\textsuperscript{282} Nevertheless, no country has wholly opened all its sectors to FDI.\textsuperscript{283} Some countries, especially developing countries have more or less proposed reservations such as non-conforming measures declared in international treaties, or a Negative List established by domestic law.\textsuperscript{284} Therefore, foreign investors expect a clear, unambiguous, simplified, and transparent non-conforming measure or Negative List.

Since its establishment seven years ago, China has been continuously improving the Negative List by reducing its number of items and eliminating restrictions.\textsuperscript{285} For example, the Negative List of SFTZ initially contained 190 special administrative measures in 2013.\textsuperscript{286} Subsequently, it was reduced to thirty through six amendments.\textsuperscript{287} Outside the SFTZ, complementing the FIL

\textsuperscript{281} See id.
\textsuperscript{282} See id.
\textsuperscript{283} See Foreign Direct Investment for Development, supra note 154.
\textsuperscript{284} LIN Chun Hung, \textit{The Relationship between FDI and Economic Sovereignty on Developing Countries with Reference to the Multilateral}, 2 J. ECON. & MGMT, 93 (2006).
\textsuperscript{287} See The Special Administrative Measures (Negative List), China Gov’t, http://wap.sh.gov.cn/nw2/nw2314/nw2319/nw12344/u26aw39501.html (last visited Mar. 11, 2022); See also The Special Administrative Measures (Negative List) 2015, China Gov’t, http://www.gov.cn/zhengce/content/2015-04/20/content_9627.htm (last visited Mar. 11, 2022); The Special Administrative Measures (Negative List) 2017, China Gov’t, http://www.gov.cn/zhengce/content/2017-06/16/content_5202973.htm (last visited Mar. 11, 2022); The Special Administrative Measures (Negative List) 2018, China Gov’t, http://www.mofcom.gov.cn/article/b/f/201806/20180602760435.shtml (last visited Mar. 11, 2022); The Special Administrative Measures (Negative List) 2019, China Gov’t, http://www.gov.cn/gongbao/content/2019/content_5428464.htm (last visited Mar. 11, 2022); The Special Administrative Measures (Negative List) 2020,
implementation, China promulgated a nationwide Negative List (2019 Edition). The new edition’s clauses were further reduced from forty-eight in 2018 to forty in 2019, and in 2020, the new Negative List was promulgated again with only thirty-three items.

Additionally, the 2019 edition of the nationwide Negative List eliminated restrictions in seven sub-industries, specifically, mining, manufacturing, communication and transportation, storage and mail, water conservancy, environment and public facility management, and culture, sports, and entertainment. The 2020 edition further loosened the limit on the foreign shareholding ratio on commercial vehicle manufacturing. It also abolished the prohibition of FDI in smelting and processing radioactive minerals and nuclear fuel production. The financial sector removed the foreign equity limit on securities companies, security investment fund companies, futures companies, and life insurance companies. In the field of infrastructure, the requirement that construction and operation of water supply and drainage pipeline networks in cities with more than 500,000 people be controlled by Chinese parties was canceled. The transportation sector lifted restrictions on FDI in air traffic control. Undoubtedly, these changes in both the number of items and the industrial fields are significant, which indicates the Chinese government’s determination to open more to FDI.

Nonetheless, the Negative List still has exceptions to openness, which indicates that the discrimination against FDI during the pre-establishment period still exists.\textsuperscript{296} Moreover, openness cannot be evaluated merely by considering the reduction in the number of exceptive sectors; the importance of the sectors in which FDI is prohibited or limited is another consideration. The Chinese government must focus on the quantity, structure, and composition of the Negative List.\textsuperscript{297}

China’s Negative List risks being seen as arbitrary because it is attributed to domestic law rather than bilateral investment agreements negotiated with other countries,\textsuperscript{298} which may negatively affect the list’s stability and acceptability. However, the list also challenges and tests Chinese legislators’ professionalism and predictability. For example, in the \textit{BIT between the United States and Rwanda}, the Non-Conforming Measures are stipulated by three annexes. Annex II, specifies the right of each party to adopt or maintain measures in the future.\textsuperscript{299} Both parties listed the obligations they may violate, such as National Treatment, Performance Requirements, and Senior Management and Boards of Directors, along with specific industries, subsectors, or activities that may be affected.\textsuperscript{300}

The United States has reserved rights in clarified sectors like communication, social services, minority affairs, and transportation, while Rwanda enumerated aviation, fisheries, and telecommunications.\textsuperscript{301} Similarly, in the \textit{China-Canada Foreign Investment Promotion and Protection Agreement}, Canada declared explicit reservations for future measures in some listed sectors, such as communications, fisheries, and government finance.\textsuperscript{302} These reservation measures seem

\textsuperscript{296} See \textit{id.}


\textsuperscript{298} See Special Administrative Measures, \textit{supra} note 288.


\textsuperscript{300} \textit{Id.} at art. 14.


detrimental to investment liberalization, but the Agreement clearly stated the affected obligations and industries, which is the consequence of negotiation between the two parties. Under the circumstances, increasing new non-conforming measures will violate the treaty, so both parties must maintain the relative stability and transparency of the measures to the greatest extent possible.303

This enumeration of non-conforming measures can increase the flexibility of agreements in compliance with the obligations and increase both parties’ predictability. In comparison, if the government were to amend the Negative List unilaterally the vague modification would presumably affect foreign investors’ confidence.304 Both non-conforming measures and the Negative List have been created to protect the relatively vulnerable industries of a country. No country can guarantee that its industries will not decay in the context of economic globalization. Hence, no country can pledge that the items in the Negative List will remain unchanged or that the number of items will continue to be reduced. For example, as the Chinese economic situation changes, there is a possibility that China will include new or additional industry-specific restrictions in its Negative List, which it has directly promulgated in domestic law to manifest the right of reservation.305 Since the first Negative List was issued for SFTZ in 2013, China has successively introduced the new Negative List in 2014, 2015, 2017, 2018, 2019, and 2020. However, the FIL still lacks a description about the limit on future addition or modification. The Implementing Regulation explicitly states that the Chinese government retains the right to modify the Negative List based on social and economic development, but it does not specify the names of industries that will be reserved in the future and the obligations that may be violated.306 The modification procedure of the Negative List is also unilaterally decided by China’s State Council.307 There is no guarantee

303 See Treaty Concerning the Encouragement and Reciprocal Protection of Investment, supra note 299; Treaty for the Promotion and Reciprocal Protection of Investments, supra note 302.
304 The Negative List is in Chinese domestic legal system. See TUAN, supra note 297.
305 Id.
306 Id.
307 Id.
that China will not increase restrictions, even though the number of items has decreased over the past few years. The current Negative List model is afraid to fall short of the expectations of foreign investors.\(^{308}\) Under the background of unilateral enactment, improving the Negative List’s transparency and predictability is critical for the Chinese government.

Furthermore, the types of open industries gradually affect FDI motivation.\(^ {309}\) After sustaining openness for years, the pace of restriction has slowed.\(^ {310}\) As the easily achievable goals have already been met, subsequent reforms may be hindered.\(^ {311}\) Since 2014, China has continuously reduced FDI restrictions by deleting the Negative List items, especially in the manufacturing sector.\(^ {312}\) A good example is the variation of the OECD FDI Regulatory Restrictiveness Index from 2013 to 2019, which shows that such index in China declined from 0.432 in 2013 to 0.244 in 2019.\(^ {313}\) Manufacturing indicators also fell dramatically from 0.24 to 0.083.\(^ {314}\) However, some primary and service sectors crucial to economic productivity gains still have much room

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\(^{309}\) *Id.*


\(^{311}\) *Id.*


\(^{313}\) *Id.* The FDI Regulatory Restrictiveness Index (FDI Index) measures statutory restrictions on foreign direct investment across 22 economic sectors. It gauges the restrictiveness of a country’s FDI rules by looking at the four main types of restrictions on FDI: 1) Foreign equity limitations; 2) Discriminatory screening or approval mechanisms; 3) Restrictions on the employment of foreigners as key personnel and 4) Other operational restrictions, e.g. restrictions on branching and on capital repatriation or on land ownership by foreign-owned enterprises. Restrictions are evaluated on a 0 (open) to 1 (closed) scale. The overall restrictiveness index is the average of sectoral scores.

\(^{314}\) *Id.*
for openness. The easing of restrictions in some industries is not apparent. For example, the dip in the primary industry is slight, from 0.484 to 0.344. The index of business services dropped from 0.338 to 0.225, but the value has not changed since 2017. Media and communications have almost remained steady at 1 and 0.75, respectively, which is still highly restrictive.

In some industries, China has strengthened restrictions. For instance, the legal industry index rose from 0.65 to 0.75 in 2017 and remained high until 2019.

In addition, the Negative List issued by China clearly reflects the uneven opening-up in industries. For instance, the Negative List of the SFTZ has gradually reduced restrictions on the manufacturing industry. However, the opening-up of the primary and service industries was indefinite and inconsistent. Table 3.1 shows the

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315 Id.
316 Id.
317 Id.
318 Id.
319 Id.
revised highlights of the special administrative measures in the SFTZ from 2014 to 2020 by summarizing the variation in quantity among diverse industries. Except for manufacturing, the extent of reduction in restriction is not particularly obvious. Specifically, the number of items in the infrastructure industry, industry involved in the extraction and production of raw materials, and service industries declined sporadically in specific years, while the number of items in the manufacturing industry dropped almost every year except for 2018. Restrictions on financial services and cultural industries increased rather than decreased in 2015. Nonetheless, the Chinese government has fulfilled its commitment to remove limitations involving foreign shareholding proportion in securities, futures, and life insurance companies. Now, it seems that access restrictions on the financial services sector have been completely lifted.

Table 3.1 Variation in the Number of Negative Lists of the Free Trade Zone across Industries 2014-2020

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321 Id.; The primary industry includes agriculture, forestry, fishing, mining, quarrying, and the extraction of minerals.
322 Id.
323 Id.
324 Id.
325 Id.
Because countries have proactively promoted foreign participation in manufacturing sectors, it is estimated that manufacturing is less attractive to investment than other sectors with a low threshold. The effect of the Negative List, then, may deviate from the targeted sector-scope.

The remaining restrictions in China are essentially concentrated on the service industry, which has played a significant role in global wealth accumulation. According to the World Bank database, the world value of total services was approximately three times more than manufactured goods between 2010 and 2018.

<table>
<thead>
<tr>
<th>Year</th>
<th>Sectors</th>
<th>Number of articles</th>
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<tbody>
<tr>
<td>2020</td>
<td>Financial Services</td>
<td>Decrease 3</td>
</tr>
<tr>
<td></td>
<td>Manufacturing</td>
<td>Decrease 1</td>
</tr>
<tr>
<td></td>
<td>Production and Supply of Electric Power, Heating Power, Gas and Water</td>
<td>Decrease 1</td>
</tr>
<tr>
<td>2019</td>
<td>Agriculture, Forestry, Animal Husbandry and Fishery</td>
<td>Decrease 1</td>
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<tr>
<td></td>
<td>Mining</td>
<td>Decrease 1</td>
</tr>
<tr>
<td></td>
<td>Transportation</td>
<td>Decrease 1</td>
</tr>
<tr>
<td></td>
<td>Manufacturing</td>
<td>Decrease 2</td>
</tr>
<tr>
<td></td>
<td>Culture, Sports and Entertainment</td>
<td>Decrease 1</td>
</tr>
<tr>
<td>2018</td>
<td>Agriculture, Forestry, Animal Husbandry and Fishery</td>
<td>Decrease 1</td>
</tr>
<tr>
<td></td>
<td>Mining</td>
<td>Decrease 2</td>
</tr>
<tr>
<td></td>
<td>Culture, Sports and Entertainment</td>
<td>Decrease 2</td>
</tr>
<tr>
<td>2017</td>
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</tr>
<tr>
<td></td>
<td>Transportation</td>
<td>Decrease 1</td>
</tr>
<tr>
<td></td>
<td>Business Services</td>
<td>Decrease 3</td>
</tr>
<tr>
<td>2015</td>
<td>Manufacturing</td>
<td>Decrease 33</td>
</tr>
<tr>
<td></td>
<td>Financial Services</td>
<td>Increase 10</td>
</tr>
<tr>
<td></td>
<td>Culture, Sports and Entertainment</td>
<td>Increase 16</td>
</tr>
<tr>
<td>2014</td>
<td>Services</td>
<td>Decrease 14</td>
</tr>
<tr>
<td></td>
<td>Manufacturing</td>
<td>Decrease 14</td>
</tr>
</tbody>
</table>

327 See The Special Administrative Measures (Negative List), supra note 288.
328 Manufacturing, value added, WORLD BANK, https://data.worldbank.org/indicator/NV.IND.MANF.CD (last visited May 4,
gap between manufacturing and total services in China grew from approximately US $0.765 Trillion in 2010 to US $ 4.174 Trillion in 2018. The value produced by total services was also nearly 40% higher than that of manufacturing in 2019.

Because of this increase in services, barriers to service sector investment are more likely to have larger detrimental effects on FDI in comparison to other sectors in China, like manufacturing. To maximize its absorption of positive spillovers, China should satisfy the appetite of profit seeking FDI besides considering the domestic industry’s competitiveness. Reducing impediments to services or other non-manufacturing industries has become ever more significant for improving national competitiveness in attracting FDI.

Adopting pre-establishment national treatment and market access management in the form of a Negative List can achieve liberalization at a higher level. The restrictions on FDI are limited to the listed industries, while the remaining industries are free and open to FDI. They can enjoy the same treatment as Chinese domestic investments. However, since there is no international treaty restraint, a Negative List made unilaterally with domestic law is modifiable. The Chinese government should consider adding restrictive clauses to prevent arbitrary amendments that would increase limitations.


330 Id.


333 See ZHANG Qianwen, supra note 160 at 441, 451.

334 See ZHANG Anran, supra note 308.
Furthermore, industries that have already been opened should align with international industrial development needs. The standard of the industry market access system, especially in the service industry, requires further deliberation.

2. Post-establishment National Treatment

Free entry into the domestic market is a starting point. It is also necessary to create an equal and free business environment, undistorted by the host government. Considering the operating cost, whether a country specifically implements post-establishment national treatment is another significant indicator for assessing FDI attractiveness.

a. Expropriation

Expropriation, the action of a state taking private property for public benefit, has always been considered a vital factor influencing foreign investors’ decisions.\(^{335}\) It is considered controversial because of the conflict between the investors’ private property interests and public interest cited by the host state.\(^{336}\) The definition of its scope and compensation standard are significant issues for the host country when formulating the laws and policies of expropriation.\(^{337}\) The provisions of the Chinese Constitution stipulate the state’s protection of foreign investors’ rights and interests.\(^{338}\)


\(^{336}\) See VIÑUALES, JORGE E., SOVEREIGNTY IN FOREIGN INVESTMENT LAW, OXFORD UNIVERSITY PRESS 319 – 24 (Oxford Univ. Press 2014).


\(^{338}\) See XIANFA, art. 18, ¶ 2 (2018).
Article 22 of the FIL specifically states that China shall not expropriate any foreign investment, but neither the FIL nor the FIL Implementing Regulations define “expropriation.” For instance, the Article 22 does not specify whether “expropriation” includes “indirect expropriation.” The UNCTAD analyzes the current trend to standardize and clarify indirect expropriation clauses in investment treaties instead of leaving all disputes to the arbitral tribunal. The majority of international investment treaties define indirect expropriation. The 2012 United States Model BIT stipulates that indirect expropriation refers to an action or a series of actions taken by the contracting party, which lead to an effect equivalent to direct expropriation. It often affects economic value or interferes with investment-backed expectations without the passing of title or physical acquisition.

Some of China’s recent international agreements have included indirect expropriation regulations. The 2012 China-Canada BIT, 2015 China-Korea FTA, 2019 China-Congo BIT, and 2020 China-Turkey BIT defined indirect expropriation as “measures having an effect equivalent to expropriation or nationalization.” China has


343 Id.


345 See Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of
repeatedly been involved in international investment arbitrations related to indirect expropriation disputes, for example, *China Ping An v. the Kingdom of Belgium* and *Señor Tza Yap Shum v. The Republic of Peru.*

Unfortunately, the FIL and other domestic laws in China have not yet established a legal framework for indirect expropriation. It is absent in treaties or agreements signed by China.

Compared with the vague concept of expropriation, the improvement in China’s compensation standards is more evident. The FIL Implementing Regulations amended the original compensation standard stipulated in the FIL. The stipulation of non-discriminatory treatment was added during the expropriation process. The compensation criterion was also modified based on the FIL Implementing Regulations. The “fair and reasonable” quantum was substituted by the “market value conformed to the expropriated investment.” Unlike the “fair and reasonable” principle, which is full of highly subjective elements, the “market value” rules are more effective in protecting investor interests because they are more

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348 *Id.*

349 *Id.*

350 *Id.*
straightforward and predictable. It is widely acknowledged that developing countries often adopt the “appropriate compensation” principle, while developed countries tend to apply the “adequate, prompt and effective” rules. China’s adoption of “market value” seems to be approaching the compensation criteria of developed countries.

There are similar, more detailed provisions in many investment treaties and agreements China signed several years ago. For example, in the 2015 China-Korea FTA, the stipulation of “fair” is added to “market value.” Compensation is based on the time of the expropriation’s announcement or occurrence because public awareness causes value fluctuation. The agreement emphasizes that the fair market value shall not reflect any changes in market value that have occurred. Nevertheless, the FIL Implementing Regulations currently lack similar provisions. There is room for further development of detailed domestic laws and regulatory rules following the international treaty’s provisions and agreement.

351 Id.
352 See Hull Doctrine: “adequate” requires that the compensation quantum shall accord with expropriated investment and its interests. “Prompt” means that the compensation should be commenced as soon as possible in a lump-sum payment, or else installment interest will be charged. “Effective” regulates that the compensation shall be sustained profitable or converted freely based on the market exchange rate of expropriation day. See Levy, Tali, NAFTA’s Provision for Compensation in the Event of Expropriation: A Reassessment of the Prompt, Adequate and Effective Standard, 31 STAN. J. INT’L’L. L. 423, 432-443(1995).
356 Id.
357 Id.
Moreover, both the FIL and the FIL Implementing Regulations require timely and convertible compensation. The current compensation standard in China is approaching “adequate, prompt and effective.”\(^{358}\) It is likely related to China’s investment status gradually changing from a capital-importing country to a capital-exporting country.\(^{359}\) Expropriation stems from powers vital to the effective operation of a country.\(^{360}\) The compensation provision should not be read as an instrument of curbing or weakening a state’s power, but as a regulation measure to balance property interests and public welfare.\(^{361}\) To achieve better balance, Chinese legislators and justices should increase regulatory flexibility and enact commonly accepted judicial interpretations.\(^{362}\)

**b. Intellectual Property Protection and Transfer of Technology**

China’s intellectual property protection is a grievance of foreign investors. Unlike the FIL, the FIL Implementing Regulations have added an “equal” requirement to foreign intellectual property protection and specifically stipulate that standards involving patents of foreign enterprises shall be based on relevant domestic governing regulations.\(^{363}\) It seems to be an improvement on the equal protection of patent rights. However, the definition of “relevant” is ambiguous. The FIL Implementing Regulations do not specify whether the Regulations is grounded on the existing provisions of the *Chinese Patent Law* or based on regulations enacted in the future.\(^{364}\) The existing law does not seem to embody the national treatment. According to the *Chinese Patent Law*, through which any foreign enterprise or organization without a business office in China applies for a patent,

\(^{358}\) See SHEN Wei, *supra* note 354.

\(^{359}\) Id.


\(^{363}\) Id.

\(^{364}\) Id.
the application shall be treated based on the agreement signed between China and the organization’s country or an international treaty to which both countries are parties. Otherwise, the application shall be managed according to the principle of reciprocity. The principle of reciprocity essentially mandates differential treatment rather than equal treatment, as international agreements and treaties can propose special preferences or reservations. Hence, at least in patent protection, national treatment has not yet been generally achieved. China’s domestic intellectual property laws must be further improved along with the FIL.

Compulsory technology transfer is another controversy that foreign investment law needs to face. Foreign investors usually encounter performance requirements first in host countries. The requirements function like a threshold; foreign investors need to meet specified goals when operating in the host country. Strict performance requirements can directly reflect the level of foreign supervision over the host country. Both the MAI draft and the UNCTAD enumerate performance requirements. The requirements mainly involve exports, equity, technology transfer, manufacturing, employment, and sales. Both before and after China acceded the


366 Id. at art. 17.


369 Id. at 2.


371 See Multilateral Agreement on Investment, supra note 263; World Investment Report 1998-Trends and Determinants, supra note 261.

372 Summarizing the enumeration listed by MAI and UNCTAD, Performance Requirements mainly involves Local Content Requirements(LCRs),
WTO, numerous performance requirements, like local content, import restrictions, domestic sales, trade export performance, and foreign exchange balancing were gradually deleted. However, although international investment rules and domestic laws have restricted performance requirements, they have subtly emerged recently because host governments must achieve various policy objectives for developing local industry, employment, and technology. A typical imperceptible requirement is compulsory technology transfer. Along with the MAI and the UNCTAD, the 2012 United States BIT Model stipulates that the host country must not impose or enforce any transfer of technology, production process, or other proprietary knowledge on foreign enterprises during their period of establishment, acquisition, expansion, management, implementation, operation, or disposal.

As countries fiercely compete in the global market they are increasingly strengthening IPR protection to attract FDI. At the same time, foreign enterprises worry that China is infringing their intellectual property. Foreign investors have long complained that, although China lacks legal provisions for compulsory technology transfer, it enforces direct and indirect technology transfer through obscure government policies, which are mainly classified as restrictive or encouraging. For example, the Chinese government usually

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373 See Qin, supra note 113.
374 See Blonigen, supra note 331.
378 SHAN Xiaoguang, Discussion on Forced Technology Transfer, 6 ORIENTAL LAW 1, 1-5 (2020).
formulates restrictions on the FDI access period. Some foreign investment must be in the form of a joint venture, and the establishment of this type of enterprise requires technology transfer as a precondition for approval. Furthermore, the government is adept at applying incentives to induce foreign technology transfer to China, especially preferential tax policies and technology development policies. The contradiction concerning technology transfer finally emerged in 2018. The United States claimed that China had stolen its intellectual property, citing China’s compulsory technology transfer


380 WeiHuan Zhou et al., Technology Transfer under China’s Foreign Investment Regime: Does the WTO Provide a Solution?, 543 J. World Trade 455, 458–60 (2020).

381 See Guanyu Guli Jishu Yinjin He Chuangxin, Cu Jin Zhuanbian Waimao Zengzhang Fangshi Ruogan Yijian [Opinions of the Ministry of Commerce, the National Development and Reform Commission, the Ministry of Science and Technology, the Ministry of Finance, the General Administration of Customs, the State Administration of Taxation, State Intellectual Property Office and the State Administration of Foreign Exchange on Encouraging Technology Importing and Innovation and Promoting Changes in Pattern of Trade Growth] [promulgated by State Administration of Taxation; State Intellectual Property Office; State Administration of Foreign Exchange; Ministry of Finance; Ministry of Commerce; Ministry of Science and Technology; General Administration of Customs; National Development and Reform Commission, (Jul. 14, 2006) (LexisNexis) (China), The Chinese version is available at http://file.mofcom.gov.cn/article/gkml/200804/20080492911937.shtml; The English translation version is available at http://www.lawinfochina.com/display.aspx?lib=law&id=9827&CGid=

See also Guowuyuan Guanyu Jiakuai Keji Fuwuye Fazhan Ruogan Yijian [Several Opinions of the State Council on Accelerating the Development of the Science and Technology Service Industry] [promulgated by the State Council,Oct.9,2014](LexisNexis)(China). The Chinese version is available at http://www.gov.cn/zhengce/content/2014-10/28/content_9173.htm. The English Version is available at http://www.lawinfochina.com/display.aspx?id=26856&lib=law&SearchKeyword=%b9%fa%ce%f1%d4%ba%9d%8%d3%da%bc%d3%bf%ec%bf%e6%bc%be%7%ce%ce%f1%d2%b5%b7%e2%5%b9%5%e4%e8%f4%b8%e9%d2%e2%bc%fb

requirement during the China–United States trade war. In June 2018, the European Union also submitted a dispute consultation on technology transfer measures to the WTO. It argued that China had unfairly and unreasonably applied its domestic laws and regulations and violated provisions of the national treatment; patent owner rights; duration; protection of information and data of TRIPs; and the requirement of publication Art. XXII:3 of the General Agreement on Tariffs and Trade (GATT) 1994. On January 18, 2019, Japan and the United States requested to join the revised consultations.

The FIL responds to the concerns and queries of foreign enterprises. Article 22 explicitly prohibits forced technology transfer, which is the first time that China has proposed the concept of forced technology transfer in legislation. Article 22 emphasizes that the state should protect the IPR of foreign investors and prohibits administrative authorities and their staff members from forcing technology transfer by administrative means. The FIL Implementing Regulations further clarify the administrative body’s scope and the contents of administrative measures, such as administrative licensing, inspection, punishment, and enforcement. Both the FIL and the FIL Implementing Regulations underline the purpose, which is to ensure

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386 See Foreign Investment Law of the People’s Republic of China 2019, supra note 9, at art. 22.
387 Id.
that Chinese administrative agencies and their staff shall not use administrative means to force technology transfer. Other domestic legislation in China, such as the 2019 Administrative Licensing Law and the 2019 Administrative Regulations of Technology Import and Export, have begun to adjust accordingly. The revised Article 31 of the Administrative Licensing Law restricts the power of the Chinese government and its staff to force applicants subject to administrative permission to transfer technology before or during the administrative licensing process. The latest version of the Administrative Regulations of Technology Import and Export has deleted the original provisions requiring foreign companies to bear tort liability, attribution of technical improvement, and restrictive clauses in technology import contracts. This amendment directly reduces the administrative restrictions on the specific content of technology transfer contracts, which follows the autonomy of will in civil law. However, some provisions in the Chinese Civil Code are similar to the restrictive regulations. For instance, the 2019 Administrative Regulations on

389 See Zhonghua Renmin Gongheguo Xingzheng Xukefa [Administrative Licensing Law of the People’s Republic of China] (promulgated by Standing Committee of NPC, Apr.23,2019)(LexisNexis)(China). The Chinese version is available at http://www.npc.gov.cn/npc/c30834/201905/64f52a065d3142ae92d95fa860e2f0e0.shtml, The English translation version is available at http://www.lawinfochina.com/display.aspx?id=30314&lib=law&SearchKeyword=&SearchCKKeyword=%d0%d0%d5%fe%d0%ed%bf%c9%b7%a8; Zhonghua Renmin Gongheguo Jishu Jinchukou Tiaoli [Administrative Regulations of the People’s Republic of China on Technology Import and Export] (promulgated by the State Council, (Mar. 2, 2019) (LexisNexis) (China). The Chinese version is available at http://www.gov.cn/gongbao/content/2019/content_5468926.htm, The English version is available at http://www.lawinfochina.com/display.aspx?id=30550&lib=law&SearchKeyword=&SearchCKKeyword=%bc%bc%ca%f5%bd%8%b3%f6%bf%da%9%de%e0%edad
390 Id. at art. 31.
391 Id. at arts. 24, 27, 29.
392 Id.
Technology Import lifted the restriction requiring the receiving party to pay an exploitation fee for a technology when the patent right has expired or been invalidated. However, the Civil Code still regulates that a patent licensing contract is valid only within the terms of the patent right, and that if the patent right expires or is declared invalid, the patentee cannot enter a patent license contract with others.

Although the joint revision of the International Investment Law and relevant domestic laws has responded to some international accusations—a significant advancement—the response is incomplete. The FIL and relevant Chinese domestic laws and regulations merely prohibit technology transfer in the circumstance of administrative coercion. Although the FIL Implementing Regulations address disguised compulsory transfer, a detailed interpretation is lacking. Legal practitioners may also be confused by the incomplete improvement of domestic legislation, such as the contradictory regulations between the Administrative Regulations of Technology Import and Export and the Civil Code. The Chinese legislature should examine other relevant domestic laws involved in the FIL for consistency among and between them and investigate upper-level legislation. The FIL should also make clear that forced technology transfer cannot expand indiscriminately and promulgate corresponding rules or enumerations. The Chinese domestic


394 See Administrative Regulations of the People’s Republic of China on Technology Import and Export, supra note 389.
395 See Civil Code of the People’s Republic of China, Id. at art. 865.
396 The United States submitted a dispute consultation to WTO(DS542) in 2018 and accused that China’s technology transfer measures violated the TRIPS Agreement. One reason is that article 24, 27, and 29 of the People’s Republic of China’s Administrative Regulations on Technology Import and Export 2002 granted foreign technology holders lower treatment than Chinese. As mentioned above, the new version of the regulations deletes these three clauses related to disputes. Available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds542_e.htm.
397 See Administrative Regulations of the People’s Republic of China on Technology Import and Export, supra note 389.
398 See Implementing Regulations of the Foreign Investment Law of the People’s Republic of China article, supra note 28, at arts. 24, 43.
legislation can probably refer to the *Economic and Trade Agreement* signed by China and the United States in 2020. The Agreement stipulates that technology transfer and licensing should be conducted freely and openly based on the market. To prevent the distortion of market competition, neither party may guide or support domestic natural persons or enterprises to invest overseas with the hidden purpose of acquiring technology. The Agreement explicitly lists the situations that may constitute compulsory technology transfers: acquisition, informally requiring foreign enterprises to exchange technology for administrative authorization, utilizing the technology transfer as a precondition when foreign enterprises receive or perpetuate treatment. Therefore, the provisions of the China-U.S. Agreement on technology transfer are richer and more comprehensive than those of the FIL. However, because of the bilateral nature of the agreement, without the MFN treatment clause, this kind of agreement does not refer to other countries that have signed with China. Foreign-invested enterprises from countries other than the United States still rely on their own country’s agreement with China and China’s existing foreign investment laws and regulations. In order to allay the concerns of foreign enterprises further, legislators in China need to improve domestic laws and regulations further and provide judicial interpretation on technology transfer protection.

c. Government Procurement

China’s “unspoken rules” regarding complicated government procurement have long been questioned and criticized by foreign investors. As a potential consideration, the Chinese government prefers local companies when signing procurement contracts to

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400 *Id.* at art. 2.1.
401 *Id.* at art.2.3.
402 *Id.*
403 *Id.*
404 *Id.*
stimulate the local economy and employment rates.\textsuperscript{405} Such discriminatory procurement practices generate a barrier for FDI enterprises to compete with local companies in the Chinese market.\textsuperscript{406} The FIL and the FIL Implementing Regulations specifically address the government procurement issue. They stipulate that the state shall guarantee fairness in procurement competition between domestic-funded and foreign-funded enterprises when providing bid evaluation criteria, publishing information, reviewing qualifications, or determining the supplier’s condition.\textsuperscript{407} They also enumerate the subtle acts of differential and discriminatory treatment for tighter screening, such as disguised restrictions on ownership forms, organizational forms, or equity structure.\textsuperscript{408}

These regulations seem to be flawless, but they contain a vital prerequisite that the enterprises’ production sites should be limited to China.\textsuperscript{409} Neither the FIL nor the FIL Implementing Regulations mention the treatment standard for products and services provided overseas.\textsuperscript{410} The Chinese government essentially implements different procurement regulations for domestic and imported products based on the criteria of “whether or not they go through customs.”\textsuperscript{411} In other words, products manufactured in China enjoy national treatment according to the new provisions of the FIL, but those produced


\textsuperscript{406} Id.

\textsuperscript{407} See Foreign Investment Law of the People’s Republic of China, supra note 9 at art.15; Implementing Regulations of the Foreign Investment Law of the People’s Republic of China, supra note 28 at art.15.

\textsuperscript{408} See Implementing Regulations of the Foreign Investment Law of the People’s Republic of China, supra note 28, at art. 15, ¶2.

\textsuperscript{409} See id. at art. 16.

\textsuperscript{410} See Implementing Regulations of the Foreign Investment Law of the People’s Republic of China, supra note 28; Foreign Investment Law of the People’s Republic of China, supra note 9.

\textsuperscript{411} See Implementing Regulations of the Foreign Investment Law of the People’s Republic of China, supra note 28, at art. 15; Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 16.
overseas may not be so lucky. They can only be treated under the old rules.

The Chinese government has granted foreign-invested enterprises equal rights to participate in government procurement, which has progressed significantly compared with the past practice. However, foreign investors’ genuine intention is to provide products and services for profit rather than superficial equal participation.

Therefore, under the background of the vigorous reform of the FIL and relevant domestic laws, it is debatable whether the Chinese government can sincerely implement these seemingly advanced amendments, especially when most of them are superficial. Ambiguous statutes need further interpretation and seemingly elaborate laws await a law-abiding government. China’s legislature still needs to enact breakthrough, in-depth reforms like amending relevant domestic laws and regulations as soon as possible to coordinate with the FIL. Additionally, the judiciary needs to act by issuing corresponding judicial interpretation for practice, focusing on the situations that essentially create expropriation, compulsory technology transfer, and unequal procurement.

IV. THE ENHANCEMENT OF LIBERALIZATION: FACILITATION

A. The Implementation of FDI Facilitation

Investment liberalization, in the narrowest sense, opens up the domestic market and prohibits the host government’s distortion of market access. The FIL aims to offer national treatment to FDI from the market access period to the operation period. Nevertheless, in addition to liberalization policies, facilitation measures are needed to

412 See Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 15; Implementing Regulations of the Foreign Investment Law of the People’s Republic of China, supra note 28, at art. 15.
413 Madanmohan Ghosh et al., Impact of FDI restrictions on inward FDI in OECD countries, 12 GLOBAL ECON. J. 1,4-5 (2012).
facilitate entry and market performance in host countries by requiring the host government to act proactively on “facilitating” investment to reduce unnecessary investment costs created by government inefficiency and policy opacity.  

Facilitation is an indispensable driver for achieving ultimate liberalization.

The discussion of “investment facilitation” in the international community can be traced back to the 1940s and 1950s, but its terminology has been vague. The United States-Mexico Trade and Investment Facilitation Talks (TIFTs) stated that investment facilitation means promoting predictability and certainty in the markets of both parties of the negotiation.

With the development of the world economy, investment facilitation is now a hot issue in the international investment field. The international community has gradually formed a common understanding of “investment facilitation.” Asia Pacific Economic Cooperation (APEC) approved the Investment Facilitation Action Plan (IFAP) in 2008, which marked the debut of “investment facilitation” as a separate concept in international documents. According to the IFAP, investment facilitation refers to government measures to attract, foreign investment and maximize its benefits and efficiency. Its core principles are transparency, predictability, and simplicity. Aside from direct government action, the IFAP also emphasizes the significance

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415 Id.
417 See Sohei Nakayama & Giovannella Della Croce, *Suggestion on Economic Cooperation With Developing Countries: Redeemable Shares as a Principal Step toward the Facilitation of Private Investment*, 30 IL POLITICO 65 (1965).
419 See ASIA-PACIFIC ECONOMIC COOPERATION, INVESTMENT FACILITATION ACTION PLAN (2008/MRT/R/004).
420 Id.
of high-quality infrastructure, high-standard business service, full protection of property rights, and a sustainable labor market.\footnote{Id.}

Since then, several international organizations have expressly stipulated “Investment Facilitation.” The OECD promulgated The Policy Framework for Investment (PFI) in 2015 and considered Investment Promotion and Facilitation a core principle in its Horizontal Policies and Practices chart.\footnote{See ORGANIZATION FOR ECONOMIC CO-OPERATION, POLICY FRAMEWORK FOR INVESTMENT 39-44 (2015) available at https://www.oecd.org/investment/pfi.htm.} The core mandate of investment facilitation—which the OECD differentiates from promotion—includes providing investors with transparent, predictable, and readily acquired investment-related policies, rather than incoherent and inaccurate information and streamlining rules and procedures of FDI establishment or expansion.\footnote{Id. at 23.} Although facilitation and promotion are both beneficial for attracting responsible FDI and promoting local development, they are two parallel concepts. Investment promotion involves making catalysts of a country or a region that highlights profitable opportunities, such as tax preference or financial support in order to attract potential investors.\footnote{Id. at 39-41.} In comparison, investment facilitation involves assisting investors with establishing or expanding their existing investments.\footnote{Id.} It includes, for example, establishing a clear and practical public administration and policy framework like “a one-stop-shop with single-point authority,” or providing after-care services like incorporating investors’ feedback into policymaking.\footnote{See id. at 40.} In brief, the OECD proposed that investment facilitation mainly depends on the quality, consistency, transparency, effectiveness, and predictability of the investment policy framework.

Additionally, the UNCTAD proposed the Global Action Menu for Investment Facilitation (Action Menu) in the 2016 world investment
As an overall investment policy framework for attracting investment, it notes that investment facilitation covers the life cycle of foreign investment from the pre-establishment phase to the operating stage. Eliminating obstacles and promoting coordination and cooperation are the objectives of the Action Menu. Accordingly, the Action Menu launched ten action lines to help countries achieve the goal. Most of them involved accessibility, transparency, predictability, and consistency in investment policies, regulations, and administrative procedures. In the process of implementation, accountability and practicality are worth addressing. The Action Menu further emphasizes the differences between investment facilitation and investment promotion, and the reason is the same as the one provided by the OECD.

The WTO finally started discussing investment facilitation in 2017. Forty-two members, including China, signed the Joint Ministerial Statement on Investment Facilitation for developing a multilateral framework on investment facilitation. The statements that aim to improve cross-border investment mainly cover the following aspects: improving investment measures for transparency and predictability; streamlining and simplifying administrative procedures and

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428 Id. at 119.
430 Id.
431 Id.
432 Id.
433 Karl P. Sauvant, International Investment Facilitation: By Whom and for What?, Presentation to the ICTSD/IDB Round table on Trade Facilitation 2.0 in Regional Trade Agreements: Enabling Trade in the Digital Age (June 1, 2018).
requirements; advancing information sharing; enhancing international cooperation; and intensifying relations with relevant stakeholders. 435

Moreover, in February 2018, Brazil submitted an extensive draft proposal on investment facilitation to the WTO General Council for further structured discussion. 436 The proposal provides some examples for better implementation, such as creating a “single electronic window” to simplify the approval procedure or establishing a liaison point for international coordination. 437

In line with various international organizations’ views, facilitation is an ambiguous term. It encompasses administrative actions and regulatory mechanisms to assist investors during their entry, operation, and exit periods, which include improving transparency and predictability of investment measures, streamlining procedures, and enhancing coordination and cooperation between contracting parties. 438 However, the theoretical understanding of facilitation is superficial and inconsistent. For example, the OECD and UNCTAD distinguish between facilitation and promotion based on whether FDI enters the host country. 439 They state that facilitation merely appears in the operation phase of existing foreign investment, while the World Bank considers it a part of promotion that mostly relies on efficient policies and efforts, including non-discriminatory treatment, reduced performance requirements, and streamlined investment procedures. 440 APEC similarly implies that facilitation should be applied throughout the life cycle of foreign investment, from

435 Id.
438 See id. at 8.
439 See ORGANIZATION FOR ECONOMIC CO-OPERATION, supra note 422 at 39.
440 See id. at 39-42.
“pre-establishment” to “post-establishment.”

Although international organizations have various understandings of facilitation, they reached a partial consensus that facilitation mainly involves the enforcement of existing rules rather than their modification and primarily aims to establish a transparent, predictable, stable, and streamlined policy framework with administrative procedures — the core criteria of investment facilitation include transparency, predictability, stability, and efficiency.

B. FDI Facilitation Achievements in China

According to the World Bank’s 2020 Doing Business Report, China has been among the top ten economies with the most improvement in the global business environment for two years. Its global ease of doing business ranking rose from forty-six in 2019 to thirty-one in 2020, with a score of 77.9 out of 100. China has vigorously promoted facilitation services, primarily focusing on rule transparency, procedure simplification, and efficiency improvement, and has achieved positive results in optimizing the business environment. China’s FIL requires people’s governments at all levels to formulate facilitation measures following the principles of convenience, efficiency, and transparency. The FIL Implementing Regulations stipulate specific facilitation implementation rules.

1. Enhancing Transparency

As the core principle of investment facilitation, transparency can enhance the predictability and stability of the on-going investment circumstances. Transparency was introduced as early as 1947 in the

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441 See Investment Facilitation Action Plan, supra note 419.
444 Id. at 4.
445 See Foreign Investment Law of the People’s Republic of China, supra note 9, at art.18, 19.
GATT as an addendum rather than an independent clause. The GATT stipulates that countries should clearly notify trade partners of their laws, regulations, judicial decisions, general application policies, and corresponding measures that may affect that trade partners’ goods trade. After the birth of the WTO, transparency became the organization’s basic policy, ingrained in the WTO framework. When compared with the GATT, the WTO legal framework has increasingly expanded its approaches, including “notification” and “trade policy reviews.”

The development of trade transparency provides a blueprint for the improvement of investment transparency. APEC states that transparency should include the publication of laws, regulations, and administrative proceedings that affect investors’ interests. The UNCTAD further expanded that notion to the context of investor-state dispute settlement (ISDS), like amicus curiae submissions. The UNCITRAL subsequently issued Rules on Transparency in Treaty-Based Investor-State Arbitration, which mainly stipulates two aspects in the rules: the publication of information and documents and the disclosure of arbitral proceedings that include a public hearing and third-party submission (Non-disputing Contracting Party). Currently, international organizations’ interpretations of investment transparency

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446 See General Agreement on Tariffs and Trade, supra note 272, at art. X.
447 Id.
452 Id. at 9.
mainly focus on publishing laws and regulations and disclosing arbitration procedures. The core connotation of transparency has developed into the publication of substantive regulations and procedural processes.453

China made substantial improvements in transparency. In terms of substantive law, the FIL and FIL Implementing Regulations embody transparency in four aspects. First, Chinese governments at all levels are required to disclose government affairs.454 Second, the objects that need to be published include laws, regulations, rules, normative documents, and judgment documents relating to foreign investment, especially application conditions and foreign enterprise procedures.455 Third, the disclosure process has strict time limits.456 The government publishes regulated documents promptly while reserving preparation and adaptation time for foreign enterprises to acknowledge and implement normative regulations.457 The fourth aspect is establishing a standard participation mechanism for foreign investors to promote information exchange and sharing; it entitles them to join a commerce or association chamber or adopt their comments and suggestions when formulating laws and rules.458

In terms of procedural law, international organizations indicated that the meaning of transparency should include dispute settlement mechanisms.459 The FIL has apparently not responded to

454 See Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 15; Implementing Regulations of the Foreign Investment Law of the People’s Republic of China, supra note 28, at arts. 6, 7, 13, 29.
455 Id. at art. 6.
456 Id. at art. 7 (“Normative documents related to foreign investment shall be published in a timely manner in accordance with the law . . . ”).
458 See Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 15.
459 See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, supra note 450.
the issue. However, China has improved transparency in international investment arbitration by promulgating *International Investment Arbitration Rules (For Trial Implementation)* (Rules) as early as 2017. The Rules incorporate the UNCTAD and the UNCITRAL’s regulations on procedural transparency and assimilate international investment tribunals’ mature experience. The reform of Rules focuses on the publication of arbitration procedures. One aspect is information disclosure related to starting information, awards, decisions, instructions, and other documents. The other aspect is public court hearings. China began to experiment with *amicus curiae*, allowing non-disputing parties to make written submissions to the arbitral tribunal.

The FIL and FIL Implementing Regulations have improved service levels in terms of government transparency with the publication of domestic laws, regulations, rules, and various documents, although it still necessary to strengthen the connection with relevant procedural department laws, at least to provide clear direction and guidelines.

2. Pursuing Predictability and Stability

Even in an environment of transparent legislation and justice, foreign investors may be discouraged by the unpredictability or instability of a country’s foreign investment laws, reference regulations, and enforcement—only a host country’s consistency with rules and corresponding coherent consequences engenders predictability and stability. The debate over inconsistency often triggers investor-state disputes when host countries’ various government departments and layers interpret and apply investment regulations haphazardly. For example, the Tribunal in *CMS v. Argentina* emphasized the host

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461 See Id. at arts. 32, 55.

462 See id. at art. 44.

country’s stable legal framework and considered that the Argentine emergency legislation entirely and permanently transformed the privatized gas sector regulations, thus violating fair and equitable treatment. The Tribunal in Metalclad v. Mexico found that Mexico failed to ensure the predictability of the legal framework in governing the activities of Metalclad’s business operations. In MTD v. Chile, the Tribunal deemed that Chile had violated fair and equitable treatment because the same government’s two arms acted inconsistently vis-à-vis the same investors. Similarly, the Tribunal in Lauder v. Czech Republic stressed consistency when the domestic government applies domestic legislation. These opinions from arbitral tribunals indicate that consistency is associated with two central elements. The first is a coherent and synergic legal framework. Systematic and explicit criteria are the basis of administrative decisions. Seen horizontally, the host country must balance the relationship between its various domestic departmental laws and regulations or consolidate them. Longitudinally, shifting rules and policies are difficult for investors to follow. The host country’s legislative branch should avoid capricious legal changes.

The second element is the analogous and consistent application of domestic investment rules in administrative decisions by


468 Id.

governments at all levels in nations or sub-nations to avoid the discriminatory use of laws and regulations.

The FIL adopts predictability and stability as fundamental principles for guidance.\textsuperscript{470} It prompted the corresponding formulation and application of domestic investment regulations reformation. Like a centralized guideline, the FIL provides foreign investors with a catalog of the application of Chinese domestic law. The FIL clarifies which branch of domestic law regulates foreign-invested enterprises under which circumstances.\textsuperscript{471} For example, the institutional framework, organization form, and standard of conduct of foreign enterprises are subject to \textit{Chinese Company Law}. \textit{Chinese Anti-Monopoly Law} regulates foreign investors who acquire a company within China’s territory through mergers and acquisitions or participate in the concentration of undertakings by other means.\textsuperscript{472} Moreover, the Chinese legislature has clarified regulations that are likely to confuse foreign investors, namely, the puzzling relationship between the CIGFI and the Negative List.\textsuperscript{473} As the Negative List is promulgated nationwide, China has officially differentiated the Negative List from the CIGFI: the Negative List is regarded as a filter that excludes prohibited and restricted industries, while the CIGFI encourages foreign investment into specific domestic industries.\textsuperscript{474} Indeed, the

\begin{itemize}
\item[470] See Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 3.
\item[471] See Foreign Investment Law of the People’s Republic of China, supra note 9, at arts. 24, 31, 32, 33.
\item[473] The CIGFI has assumed dual functions of encouraging and restricting foreign investment initially. Before introducing the Negative List in SFTZ 2015, encouraged, restricted, and prohibited industries were included in the CIGFI. The 2017 edition remained the same tripartition, but the wording of the Negative List appeared for the first time. The Negative List was introduced at the end of the CIGFI that replaced the original restricted and prohibited parts. During the same period, FTZs were applied separate Negative List mechanism. It follows that foreign investors were facing two completely different governmental guidelines in FTZ and out-FTZ.
\item[474] See Catalogue for the Guidance of Foreign Investment Industries, supra note 165.
\end{itemize}
government changed the name of the regulation from CIGFI to the *Catalog of Industries for Encouraged Foreign Investment* for greater distinction.\(^ {475} \)

However, the FIL requires consistent application of investment regulations and rules across relevant institutions.\(^ {476} \) First, governments at all levels must act according to legal authorities and procedures.\(^ {477} \) Furthermore, China has implemented the complaint and social supervision mechanism to prevent bureaucratic discretion\(^ {478} \) Second, the FIL emphasizes the enforcement of government commitments and contracts.\(^ {479} \) It mainly embodies two aspects. The first is Written Commitment. The FIL Implementing Regulations expressly stipulate that the government should make a written commitment to foreign enterprises, especially regarding supporting policies, preferential treatment, and convenience.\(^ {480} \) The second is Fair Compensation. Unless it is for national interests or public welfare, the contract cannot be breached or scrapped; the losses suffered by the enterprises must be compensated by the responsible department promptly, impartially, and reasonably.\(^ {481} \)

China’s reform regarding consistency in legal formulation and application has contributed to the predictability and stability of investment. However, the investment legal framework is still lacking. The international consistency standards require host countries to avoid

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\(^ {477} \) See Foreign Investment Law of the People’s Republic of China, *supra* note 9, at arts. 24, 25.

\(^ {478} \) See *Id.* at arts. 15, 26.

\(^ {479} \) See *Id.* at art. 25.


\(^ {481} \) See *Id.* at art. 28.
frequent legislative changes while new investment rules are in the process of being framed in China. It may result in less certainty in the Chinese legal framework. Nevertheless, stability and predictability do not mean an unchangeable legal framework.\footnote{482} Even consistent domestic regulatory frameworks are never completely free of inconsistencies.\footnote{483} The domestic regulatory section should consider new factors such as economic or financial crises and social pressure.

As China is in the stage of economic reform, it will inevitably continue to amend its investment laws. The FIL and the FIL Implementing Regulations explicitly entitle the people’s governments at the county level or above to autonomously set preferential regulations for local economic development.\footnote{484} Regular evolution of law is necessary for the policy space of legal consistency. Accordingly, the host government should seek a balance between flexibility and consistency, but, under no circumstances should it handle procedural or enforcement violations imprudently.\footnote{485} China can consider utilizing transparency reform to help investors keep up with its own legal changes by increasing foreign investors’ participation and preparation time when formulating rules.

\footnote{482} See Emilio Agustín Maffezini \emph{v. The Kingdom of Spain}, ICSID Case No. ARB/97/7, Award, ¶64 (Nov. 13, 2000), (“emphasiz[ing] that Bilateral Investment Treaties are not insurance policies against bad business judgments”) Available at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/19/maffezini-v-spain, at para.64; See also Marvin Roy Feldman Karpa \emph{v. The United Mexican States}, ICSID Case No. ARB(AF)/99/1, Award, (Dec. 16, 2002) (noting “that not every business problem experienced by a foreign investor is an indirect or creeping expropriation under Article 1110, or a denial of due process or fair and equitable treatment under Article 1110(1)(c).”), available at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/33/feldman-v-mexico, at para.112.


\footnote{484} See Foreign Investment Law of the People’s Republic of China, \textit{supra} note 9, at art. 18; Implementing Regulations of the Foreign Investment Law of the People’s Republic of China, \textit{supra} note 28, at art. 19.

The legal framework’s coherence does not necessarily imply legal uniformity. Consistency should also include synergic application. Although the FIL limits administrative power of governments at all levels, the corresponding measures and the assessment of the limitation remain to be further explained by Chinese judiciary authorities.\textsuperscript{486} Moreover, although the FIL has made significant improvement in fulfilling government commitments, there are still ambiguities to be clarified. For example, does the expropriation referred to in the FIL include indirect expropriation? Will failure to fulfill government commitments constitute indirect expropriation? It is difficult for private contract rights to contend with state power, especially when the state power is acting in the interest of national interests or public welfare.\textsuperscript{487} The FIL fails to demonstrate core concepts such as national interest and indirect expropriation sufficiently. Moreover, the seemingly fair and reasonable compensation standard mentioned as the last step is also rife with uncertainty and subjectivity, making it difficult to practice.

3. Implementing Efficiency

Another crucial task for investment facilitation is improving efficiency by reducing the cost of conducting business.\textsuperscript{488} The UNCTAD and APEC request adopting simple, timely, and low-cost administrative procedures, like clarifying and streamlining the submission of required forms. They are related to the required submission documents, such as certificates, during applications.\textsuperscript{489} The cooperation and coordination of governments in all regions and at all levels is required to streamline and expedite administrative procedures for admission, registration, and licensing.\textsuperscript{490} Setting up “one-stop-shop” approval authority and making policy information available

\textsuperscript{486} See Foreign Investment Law of the People’s Republic of China, supra note 9, at art. 19.
\textsuperscript{487} See Implementing Regulations of the Foreign Investment Law of the People’s Republic of China, supra note 28, at art. 28.
\textsuperscript{488} Sauvant & Khalil, supra note 416.
\textsuperscript{490} Id.
would be beneficial.\textsuperscript{491} Therefore, it depends on the technical assistance of the host country. For example, electronic portals can help investors obtain precise and up-to-date information and advance notice on matters like regulatory changes in applicable standards and requirements; a centralized online application window can simplify investment application procedures.\textsuperscript{492} Accordingly, assistance is aimed at strengthening links between various authorities and building institutional centralization.

The FIL established a “single window” to simplify the FDI access mechanism.\textsuperscript{493} The countrywide Negative List ended the earlier case-by-case approval. Without a bureaucratic procedure of approval by the competent authority, the Negative List enables foreign investors to enter the domestic market expeditiously.

The FIL specifies simplifying the licensing and reporting system, primarily the industrial and commercial registration, after FDI enters the Chinese market. The Chinese government has started a “one-stop-shop” service platform from the central to the local levels.\textsuperscript{494} The representative breakthrough was the publication of The Decision on Revising the Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises (Decision).\textsuperscript{495} Decision aims to build a new management model of

\textsuperscript{491} Id.
\textsuperscript{492} See MEHTA & MANGLA, supra note 489.
\textsuperscript{493} See Foreign Investment Law of the People’s Republic of China, supra note 9, at art.19.
“internet plus government service” for “one single form and one-stop services.” Information sharing and operational cooperation among governments of all levels and regions are required to reduce the processing time and operating costs of foreign-invested enterprises.

In recent years, China has improved the setup and administrative processing of tax authorities and antitrust enforcement agencies immensely. In terms of tax, China is combining and reducing taxes and simplifying the tax compliance process. It was embodied in the Action Plan for Further Optimizing the Tax Business Environment in the National Tax System (2018-2022). The plan promotes a “one-stop” tax service to improve tax processing efficiency, encompassing three objectives. First, the plan aims to reduce tax-processing time. China actively promotes the development of an electronic taxation bureau to realize the handling of all tax-related service matters online. Second, the plan establishes a government service center to administrate tax matters initially dispersed in different departments; such as real estate transaction tax and vehicle purchase tax. Third, the plan optimizes after-tax procedures by providing taxpayers with an authorized online channel for self-service inquiries for credit.

Since 2018, China has established a unified enforcing authority, standards, and rules regarding anti-monopoly law enforcement in terms of antitrust. The State Administration for Market Supervision

See id. at arts. 3, 6.
Id.

See Committed to fair competition, service reform and development “China Anti-monopoly Law Enforcement Annual Report (2019) released, STATE ADMINISTRATION FOR MARKET REGULATION,
was established to integrate the original responsibilities that were distributed among the National Development and Reform Commission, the State Administration of Industry and Commerce, and the State Council. The State Administration subsequently issued three sets of provisions to unify anti-monopoly enforcement procedures and standards.

China also chose Beijing and Shanghai to an experiment to improve its efficiency further in the future. For example, these two regions reduced the time required for a new electricity connection from more than 130 days to nearly thirty days through online application and payment. Moreover, they streamlined the


501 Id.


503 See WORLD BANK, supra note 497 at 12.

504 Id.
registration processes for new buildings by reducing application time and simplifying documentation requirements.\textsuperscript{505}

The FIL has also established an information reporting system for monitoring foreign investment circumstances in a timely manner.\textsuperscript{506} Although China has simplified the approval and licensing process, foreign investors must face the new process. Will this impose a new burden on them? They probably do not need to be anxious about that. The FIL imposes two limitations on information reporting systems. First, overseas enterprises only need to submit materials to authorities, and they do not need to wait for results like permits or approvals.\textsuperscript{507} Second, the government will eliminate repeated submission because of departmental information sharing, which will increase efficiency significantly.\textsuperscript{508}

After China opened its doors, foreign investors began to value its domestic business environment. Unseen, bureaucratic, administrative requirements are a burden “behind the liberalization.” China is seeking a new form of administrative and regulatory coordination to standardize regulatory and administrative systems and processes.\textsuperscript{509}

The FIL emphasizes the facilitation broadly promoted in past years, showing a trend toward enhancing regulatory transparency, consistency, and efficiency to minimize the transaction costs of procedural matters. It emphasizes the publication of domestic laws, regulations, rules, and various documents along with consistency in legal formulation and application. The Chinese government further improved the policy information portal and established a “one-stop”

\textsuperscript{505} Id.
\textsuperscript{506} See Foreign investment law, \textit{supra} note 9, at art. 34; Implementing Regulations of the Foreign Investment Law, \textit{supra} note 28 at art. 39.
\textsuperscript{507} Id.
\textsuperscript{508} Id.
\textsuperscript{509} See Foreign investment law, \textit{supra} note 9, art. 18.
service mechanism to simplify administrative procedures, especially regulatory processes.

Nonetheless, there are still insufficiencies in facilitation. The lack of specific procedural guidelines plagues law enforcement officials—for example, the ambiguous concepts of government commitment and expropriation and their unclear relationship. Moreover, the FIL entitled Chinese governments at or above the county level the right to formulate relevant policies and regulations on facilitation within their respective statutory authorities. However, “authority” is not explained any further.\(^5\) Without a unified rule-making body, this multi-level legislation may generate multi-stop service, which is inconsistent with the “one-stop” requirements proposed by the UNCTAD. Hence, the FIL needs clearer and more detailed judicial interpretation.

Finally, China cannot implement transparency, consistency, and efficiency separately because only with these principles combined can facilitation be optimized. For instance, simplified administrative measures expedite processing time, but they are underpinned by timely and accurate publication and a consistent investment legal framework. Without them, foreign investors cannot easily acknowledge and act on changeable investment-related information, such as responsible institutions, formalities, and fees. Furthermore, a consistent investment legal framework will contribute to predictability and stability. However, it should not aim to eliminate discretion. The state has the right of regulation because of its sovereignty.\(^6\) Both timely publication and coordinated regulations are required to minimize the burden of foreign investors.

V. CONCLUSION

Investment liberalization aims to create a mutually beneficial situation under the contemporary background of international labor

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\(^5\) Id.

\(^6\) Yulia Levashova, The Right of States to Regulate in Their Public Interest and the Right of Investors to Receive Fair and Equitable Treatment, 4-15 (2019).
division.\textsuperscript{512} Foreign investors optimize global resources for productivity and benefits while host countries develop their economies through FDI spillovers like advanced technology transfers or innovation management practices and operating processes.\textsuperscript{513} For the past few years, with a declining populace and a slow-developing economy, China has focused on creating a more liberal investment environment to remain competitive in terms of FDI attraction. China’s FIL advances its historic mission of reform and opening-up. The new law ends the chaos of the Three Laws, granting complete national treatment for FDI and simplifying investing and business activities in China. China has ceased resisting FDI and has begun to grant additional procedural and substantive rights to investors. Instead of the growing investment protectionism of many developed countries, China is shifting its FDI policy to protect investors’ interests and rights. This shift corresponds with China’s conversion of investment status from primary recipient to primary FDI provider.\textsuperscript{514}

Investment liberalization is an important international initiative to promote global investment, and its presence can indicate the FDI’s appeal. Liberalization works to open up the domestic market and standardize national treatment while facilitation is mainly concerned with institutional and procedural issues in investment administration. If liberalization is a measure of whether a country has opened its doors sufficiently, then facilitation concerns ensuring the open doors remain open. The FIL has made significant progress in liberalization and facilitation. Nevertheless, multiple arguments and analyses have revealed that China’s attitude concerning facilitation has been more amenable when compared with “opening the door.” In contrast to China’s liberalization policies, the laws and regulations

\textsuperscript{512} See Beata Smarzynksa Javorcik, Does foreign direct investment increase the productivity of domestic firms? In search of spillovers through backward linkages, 94 AM. ECON. REV. 605, 607-619 (2004).
\textsuperscript{513} Id. at 2.
concerning facilitation are more comprehensive and practical. The main reason is that positive action is easier than negative inaction for the Chinese government. It is much easier for the Chinese government to guarantee and implement areas it has promised to open up than to re-expand new ones. If China fully opens its doors and realizes national treatment, enormous FDI inflow will hit domestic enterprises, especially state-owned enterprises that control vital industries. Complete investment liberalization is also a considerable test for China’s labor market, financial market, and soft powers like IPRs. China is not sufficiently prepared yet.

With the number of open areas continuously increasing, issues of national security and supervision are trailing during the post-establishment period. Although the FIL mentions the national security review system to prevent risks caused by large FDI inflows, its corresponding application conditions, such as “special circumstances” and “for the public interest,” lack specific explanation. As the state exercises economic sovereignty when applying national security law, the law’s provisions take on a stronger administrative role/character. China must elaborate vague provisions based on the FIL principles to transition from uncertain and unjust administrative enforcement to explicit and impartial judicial settlement.

China still has a long way to go in reforming the current FIL and its Implementing Regulation to make them less superficial, changeable, and unforeseeable, and instead more precise, stable, and predictable. The FIL has not solved the shackled dilemma that the Three Laws encountered for a long time fundamentally. The Chinese government has indeed made great progress in pushing forward investment liberalization and facilitation by enacting the FIL. In recent


517 Id.

years, China has been the leader among the main FDI inflow and outflow countries domestic business environment improvement. China’s facilitation improvement will undoubtedly enhance its ultimate investment liberalization. However, the essential reform issue is how China can liberalize and facilitate FDI inflow and operation by reducing unjust governmental intervention through strict legislation and enforcement, and develop a transparent, fair, consistent, and efficient administrative mechanism.