A Revisit to China's Foreign Investment Law: With Special Reference to Foreign Investment Protection

Yongmin Bian*

Three foreign investment laws of China were enacted when she was mainly a capital-importing state. The main purpose of these laws was to boost the Chinese economy with the capital, technology and management of foreign investors. Many preferential treatments, rather than national treatment, were given to foreign investment especially before the country joined the WTO. Following the reform of market economy, fair and equal treatment to foreign investors are replacing the preferential treatments. A new draft of Foreign Investment Law was released in the spring of 2015 to reform the governance of foreign investment by granting national treatment to foreign investors in both admission and operation. The restrictions to foreign investment will be subject to the categories of special administrative measures, which are composed of forbidden and restrictive categories. This is going to be China's biggest reform on the legal system of foreign investment since 1980s.

Keywords
China's Foreign Investment Law, Equity Joint-Ventures, Contractual Joint-Ventures, Wholly Foreign-Owned Enterprises

* Professor of International Law at the University of International Business and Economics Law School. A.B./LL.M. (CUPL), Ph.D. (UIBE). ORCID: http://orcid.org/0000-0002-7950-1160. This research is supported by the Collaborative Innovation Center for China's Multinational Enterprise (No. 201501YY001A). The author may be contacted at: bianyongmin@uibe.edu.cn / Address: 10 Huixin East Street, Chaoyang District, Beijing, 100029, P.R. China.
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1. Introduction

Both trade and investment policies have been playing significant roles in China's breathtaking economic development. Chinese trade law has become stable, especially after China became a member of the World Trade Organization ("WTO"), while investment law is still evolving with continuous domestic economic reforms, as well as negotiations for free trade agreements and bilateral investment treaties. Because the current foreign investment laws were adopted about 30 years ago and a fundamental reform is in the undertaking, it is time to review the current foreign investment laws and understand the proposed reforms as well as their probable implications.

The primary purpose of this research is to review and preview China's foreign investment law with special focus on the protection of foreign investment. In doing so, this paper is composed of six parts including a short Introduction and Conclusion. Part two will review the evolution of foreign investment laws of China, showing how the Chinese market opens gradually to foreign direct investment ("FDI"). Part three will analyze the treatments to foreign investment, from the current post-establishment national treatment to the proposed pre-establishment national treatment. Part four will discuss the administrative measures and policies that may affect foreign investment although they are not provided in the three foreign investment laws of China. Finally, Part five will investigate the settlement of disputes arising from foreign investment in China, presenting China's increasing openesss to settle disputes by international tribunals. One feature of Chinese investment laws is how to accommodate Chinese characteristics in the adoption of international practice.

2. The Evolution of Foreign Investment Laws of China (1970s-80s)

A. The Beginning

When China enacted her first foreign investment law in the end of 1970s, nobody could anticipate that China would have started to export its capital 30 years later. As a capital importing State in late 1970s and early 1980s, China decided that her foreign investment law should be different from those of western States, the capital

exporters.[1] The 1979 Law of People's Republic of China on Chinese-Foreign Equity Joint Ventures (hereinafter EJV Law) was not only the first foreign investment law, but also the first law of business organizations in the country. It was adopted over 10 years ago, when China enacted her first Company Law in 1993. This explains why foreign invested companies remain unincorporated and have been operating on a different track from Chinese domestic companies till today, although there are overlapping areas for both.

The EJV law is composed of only 15 articles. It was supplemented by implementation regulations in 1983, which was subsequently re-amended in 1990 and 2001. The EJV law requires the foreign invested entity to take the form of a limited liability company with the proportion of investment contributed by foreigner(s) generally no less than 25 percent of the registered capital of a joint venture.[2] Investors' right to profits and obligation to debts are all distributed in ratio to their respective contribution of capital.[3] All equity joint ventures ("EJVs") must be registered as Chinese entities, subject to Chinese jurisdiction.[4]

An EJV was regarded as an ideal form for China as a host State because it was anticipated to not only bring capital, but also provide Chinese access to technology as well as management experience. In the very beginning, it did not, however, work for all economic cooperation between the foreign and Chinese investors, *e.g.*, in joint exploration of petroleum or natural gas, and in relation to business with unknown value, etc. The EJV Law also disappointed those investors who preferred to receive their share of profits earlier than a payout computed strictly according to the ratio of their investment would permit, or have more flexible arrangements on how to manage the joint venture.[5] To meet such expectations, a new type of joint venture, the contractual joint venture ("CJV") was created by the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures in 1988 (hereinafter CJV Law). This law allows a CJV to choose to be a legal person or just an economic organization with limited liability, which may have flexible arrangement of management according to investors' choice.[6] The investment to

1 An Chen & Ana Gu, *Shall We Forget the Lens of "North-South Conflict" – A Close Look at the China-Canada BIT,* 2 Mod. Juris. 148 (2013).

2 EJV Law art. 4.

3 *Id*.

4 *Id*. art. 2.

5 Xuejiang Wang, *The Birth and Feature of the Law of Chinese-Foreign Contractual Joint Ventures* [《中外合作经营企业法》的诞生和特点], 8 Int'l Econ. Cooperation [国际经济合作] 42-3 (1988).

6 CJV Law art. 2. It provides that CJVs "conform the conditions of Chinese laws on qualifications of legal persons may acquire the status of Chinese legal person." In practice, some CJVs prefer not to claim the status of Chinese legal

CJVs, if not in the form of money, need not to be computed in monetary equivalence. The investors may share profits and debts according to their agreements and such sharing may not necessarily be based on the ratio of their investment.[7] Similar to the EJV Law, the first CJV Law only set up a general regulatory framework, which was supplemented by the Implementing Regulation in 1995 and amended in 2000 before China joined the WTO.[8]

The third form of foreign invested entity, the wholly foreign-owned enterprise ("WFOE") came into existence after the promulgation of the Wholly Foreign-Owned Enterprise Law of the People's Republic of China (hereinafter WFOE Law) in 1986. It was supplemented by the Implementing Regulation of the Law of PRC on Wholly Foreign-Owned Enterprises of 1990. A WFOE is preferred by most foreign investors to avoid conflicts with Chinese partners due to differences of cultures or commercial practices. However, Article 3 of the WFOE Law provides that WFOE is a prohibited form to invest in certain sectors,[9] such as manufacture of airplanes, civil satellites, yachts, transformer equipments, construction of railways, airports, or exploration of petroleum, gas, etc.[10] The Implementing Regulation on Wholly Foreign-Owned Enterprises was subsequently amended in 2001[11] and 2014.[12] The newest amendment of the WFOE Law has cancelled a restriction on investment in the form of industrial property rights or proprietary technology, which, according to the old rule, could not be more than 20 percent of the total registered capital computed in monetary

person. *See* Sibao Shen, *The Main Attributes of the Law of Chinese-Foreign Contractual Joint Ventures* [论中外合作经营企业法的主要特点], 7 J. Int'l Trade [国际贸易问题] 38 (1988).

7 CJV Law art. 21.

8 Report by Guangsheng Shi (Minister of the Ministry of Foreign Trade and Economic Cooperation) to the Eighteenth Session of the Standing Committee of the Ninth National People's Congress on the Amendment of the Law on Chinese-Foreign Equity Joint Ventures (draft), the Amendment of the Law on Chinese-Foreign Contractual Joint Ventures (draft) and the Amendment of the Wholly Foreign-Owned Enterprise Law of China (draft) [关于《中华人民共和国合资经营企业法修正案（草案）》,《中华人民共和国合作经营企业法修正案（草案）》和《中华人民共和国外资企业法修正案（草案）》的说明], Gazette the Standing Committee of National People's Congress [全国人民代表大会常务委员会公报], No. 6, 2000, at 646-9.

9 WFOE Law art. 3. It provides: "…Lines of business in which the establishment of enterprises with sole foreign investment is prohibited or restricted shall be stipulated by the State Council." The detailed list, known as the Catalogue for the Guidance of Foreign Investment Industries, is made by the State Council.

10 Ministry of Commerce of China, Catalogue for the Guidance of Foreign Investment Industries (Amended in 2011), the last part (Catalogue of prohibited foreign investment industries), *available at* http://english.mofcom.gov.cn/article/policyrelease/aaa/201203/20120308027837.shtml; http://www.docin.com/p-407493299.html (all last visited on Nov. 6, 2015).

11 Implementation Regulations of the Law on Wholly Foreign-Owned Enterprises, as amended in 2001, *available at* http://www.fdi.gov.cn/1800000121_23_67947_0_7.html (last visited on Oct. 16, 2015).

12 Implementation Regulations of the Law on Wholly Foreign-Owned Enterprises, as amended in 2014, *available at* http://www.tpan.cn/html/10941.htm (last visited on Oct. 16, 2015).

value. The old requirement that the foreign investors have to engage a Chinese accountant to carry out the verification of capital and produce a report[13] has also been omitted.

Therefore, it is evident that the Chinese laws on foreign investment keep changing by consistently responding to domestic economic development. They may bear the problem of 'uncerntainty,' but always serve the purpose of the rising economy. Whether Chinese experience may work for other developing countries, could be subject to debate. The examples of North Korea and Vietnam could be offered in this regard. It seems that, at least, both North Korea's initiative in encouraging foreign economic cooperation in 1980s[14] and Vietnam's foreign investment law of 1987[15] showed influence from China.

B. Expanded Investment Vehicles

1. Merger and Acquisition

While transforming from center-planed economy to market economy, many Chinese medium and small state-own-entities ("SOEs") have encountered significant difficulties in surviving market competition. In response to such situation, the government launched a reform on SOEs by permitting mergers and acquisitions, even privatizing small SOEs. The Company Law of 1993 provides a wide legal vehicle for complicated mergers and acquisitions not limited to medium and small SOEs. Foreigners were not allowed to buy existing enterprises until the Interim Provisions on Foreign Investment to Reorganize State-Owed-Enterprise and Interim Provisions on Acquisition of Domestic Enterprises by Foreign Investors were issued in 1998 and 1999, respectively. As the rules set by these two interim provisions were very complicated, however, there were not many cases of merger or acquisition of SOEs by foreigners until one of them was clarified by the Notification of Some Issues on the Transfer of State Shares and Corporate Shares of List Companies to Foreign Investors in 2002; the 1999 interim provision was revised in 2003, 2006 and 2009. One notable result of this normative evolution is that instead of establishing start-up foreign invested enterprises, foreigners can now buy into existing supply chains and distribution networks operating in China.

13 *Supra* note 11, art. 32.

14 Eric Yong-Joong Lee, *Development of North Korea's Legal Regime Governing Foreign Business Cooperation: A Revisit Under the New Socialist Constitution of 1998*, 21 Nw. J. Int'l. L. & Bus. 203-4 (2000).

15 W. Duong, *Partnership with Monarch in the Search of Oil: Unveiling and Re-examining the Patterns of "Third World" Economic Development in the Petroleum Sector,* 25 U. Pa. J. Int'l Econ. L. 1192, n. 78 (2004).

The 2006 Provisions on Acquisition of Domestic Enterprises by Foreign Investors[16] increases transparency and certainty in the regulatory regime of mergers and acquisitions of SOEs by foreign investors and helped make transactions more efficient. It filled in many gaps of rules left by its predecessors. According to the Provisions, after any combination of merger or acquisition, if foreign investment has reached or exceeded 25 percent of the registered capital, the new entity should apply to be an EJV or CJV for a tax break; otherwise, a foreign investment of less than 25 percent of the capital could not be registered as foreign invested entity with tax break.[17] Uncertainty remains in Article 12, nonetheless, which requires that the merger or acquisition be approved by the Ministry of Commerce, not its local branches, if the foreign investors get actual control over the entity, and the transaction: (1) is related to the key sectors of economy; (2) affects or may affect national economic security; and (3) may result in domestic famous trademark-holders or China's time-honored firm keepers losing their control over the trademarks or firms. It is debatable as to what the key sectors of economy and economic security as referred to in Article 12 are. The State Council of China shed some lights on these issues in 2011 in its Notification on Establishing Scheme on Security Review in Acquisition of Domestic Enterprises by Foreign Investors.[18] The scope of security review covers military industry, key agricultural products, key energy and resources, key infrastructure, key transportation service, crucial technology, and major equipment manufacture, etc.[19] In 2009, a new provision on anti-monopoly was promugated to supplement the 2006 Interim Provisions, responding to the China Law of Anti-Monopoly[20] which entered into force in 2008 and the Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings.[21] Based on the Anti-Monopoly Law of China, the

16 Ministry of Commerce, China Securities Regulation Commission, the State Administration of Exchange Control, the State Administration for Industry and Commerce, the State Administration of State-owned Assets and the State Administration of Taxation, Provisions on Acquisition of Domestic Enterprises by Foreign Investors (Aug. 8, 2006), *available at* http://www.mofcom.gov.cn/article/b/c/200608/20060802839585.shtml (last visited on Oct. 6, 2015).

17 Provisions on Acquisition of Domestic Enterprises by Foreign Investors, art. 9.

18 State Council of China, Notification on Establishing Scheme on Security Review in Acquisition of Domestic Enterprises by Foreign Investors [国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知], Guobanfa [国办发], No. 6 [2011], Feb. 3, 2011, *available at* http://www.gov.cn/zwgk/2011-02/12/content_1802467.htm (last visited on Oct. 6, 2015).

19 Notification on Establishing Scheme on Security Review in Acquisition of Domestic Enterprises by Foreign Investors, art. 1.

20 Anti-Monopoly Law of China (adopted on Aug. 30, 2007), *available at* http://www.lawinfochina.com/display.aspx?lib=law&id=6351&CGid= (last visited on Nov. 8, 2015).

21 State Council of China, Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings, Decree No. 529 (Aug. 3, 2008), *available at* http://fldj.mofcom.gov.cn/article/c/200903/

Ministry of Commerce issued a ban on Coca Cola's acquisition of Huiyuan Juice Company.[22] This transaction, according to the Ministry of Commerce, may result in the dominant status of Coca Cola in the Chinese market for carbonated soft drinks, enabling Coca Cola to further restrain competition and squeeze the space for Chinese medium and small juice companies.[23]

Mergers and acquisitions provide an alternative and promising way of investing in China. However, lack of transparency in the discretion of enforcement agencies in national security[24] and anti-monopoly reviews[25] remind the investors to be cautious before they plan to invest in sectors with large SOEs presence, since it may create a large, or even very large private competitor.

2. VIEs

The Variable Interest Entity ("VIE") is an organizational structure which operates through a series of contractual agreements. A foreign company can control the activities of a Chinese domestic entity with the VIE.[26] A typical VIE is composed of an offshore parent company usually registered according to the laws of the Cayman Islands or other similar nations for tax purposes and listed on a capital market such as the NASDAQ, an onshore WFOE domiciled in China and a Chinese company holding the license and operating the business.[27] The VIE structure was first adopted by the Chinese internet companies to bypass the Chinese regulations that prohibit foreign investment in such sector. The VIE enables Chinese companies to access the capital market for fundraising which would otherwise be impossible, while providing foreign investors with an alternative to invest in China's high-growth investment projects. Although the main purpose of VIEs is to circumvent the laws prohibiting or restricting foreign investment in certain sectors, the Chinese government did not declare it illegal. Therefore, for the past ten years, the VIEs were

20090306071501.shtml (last visited on Oct. 6, 2015).

22 Ministry of Commerce, Final Decision on Anti-Monopoly Review of the Acquization of Huiyuan Company of China by Coca Cola (Mar. 18, 2009), *available at* http://www.mofcom.gov.cn/aarticle/ae/ai/200903/20090306108388.html (last visited on Oct. 6, 2015).

23 *Id*.

24 C. Hartge, *China's National Security Review: Motivations and Implications for Investors*, 49 Stan. J. Int'l L. 263 (2013).

25 S. Farmer, *The Evolution of Chinese Merger Notification Guideline: A Work in Progress Integrating Global Consensus and Domestic Imperatives*, 18 Tul. J. Int'l & Comp. L. 45 (2009).

26 D. Schindelheim, *Variable Interest Entity Structures in the PRC: Is Uncertainty for Foreign Investors Part of China's Economic Development Plan*?, 21 Cardozo J. Int'l & Comp. L. 203 (2012).

27 *Id*. at 198.

believed to exist in a legally 'grey' area.[28]

Despite the legal status was uncertain, the VIEs developed fast, in sectors ranging from internet to media, energy, agriculture, education and IT, etc. By 2012, over 90 Chinese companies adopted VIEs to explore foreign capital markets,[29] posing a legal risk to oversea investors as well as the onshore WFOEs. The Chinese government's actions towards the VIE structure may indicate that the uncertainty surrounding the VIEs is a calculated policy to encourage or discourage foreign investment to benefit Chinese economy, while offering protection against domination by the foreign capitalists.[30] The legality of VIEs needs to be clarified for the benefits of both the foreign investors and the Chinese domestic industries which plan to adopt VIEs to circumvent Chinese regulatory restrictions on FDI.

3. Treatment to Foreign Investment

A. Post-Establishment National Treatment

Since China's first drafting of the foreign investment law, the concept of national treatment has not been applied to foreign investment because the basic laws and regulations relating to FDIs were mostly about preferential or restrictive measures.[31] Special treatment to FDI can be superior to national treatment in terms of tax breaks and other incentives,[32] or inferior to national treatment in terms of market access and some special restrains on the operation of FDI.

1. Entering the Chinese Market

The national treatment status does not fully apply to the Chinese investment market. While many States rule out foreign investment in certain important sectors for security, cultural or political reasons, the Chinese approach to restrain market

28 S. Shi, *Dragon's House of Cards: Perils of Investing in Variable Interest Entities Domiciled in the People's Republic of China and Listed in the United States*, 37 Fordham Int'l L. J. 1280 (2014).

29 *See Alibaba's VIE Structure*, Daily Mail, Sept. 9, 2014, *available at* http://www.dailymail.co.uk/wires/reuters/article-2748861/Alibabas-VIE-structure.html (last visited on Oct. 6, 2015).

30 *Supra* note 26, at 229.

31 Wenhua Shan, *Norah Gallagher and Sheng Zhang, National Treatment for Foreign Investment in China: A Changing Landscape,* 27 ICSID Rev. 128 (2012).

32 Zhaodong Jiang, *China's Tax Preference to Foreign Investment: Policy, Culture and Modern Concepts*, 18 Nw. J. Int'l L. & Bus. 563-4 (1998).

access is a positive list titled, Catalogue for the Guidance of Foreign Investment Industries ("CGFII").[33] In 1995, China released her first CGFII which listed four categories of industries for foreign investment, namely forbidden, restrained, permitted, and encouraged.[34] The CGFII was revised in 1997,[35] 2002,[36] 2004,[37] 2007[38] and 2011.[39] From 1997, the CGFII has been composed of three instead of four categories of industries, by elimination of the 'permitted' one. Generally, these CGFIIs move to a more open market for FDI and respond to adjustments in China's economic policy. This approach to regulate market access for FDI, however, has several drawbacks. Although the investment market was expanding more widely, the access to some sectors could be narrowed down by a revised CGFII. *E.g.*, the investment in developing ordinary house was encouraged in the 2004 CGFII, but it was restrained according to the 2007 and 2011 CGFIIs. The manufacture of cars was on the 'encouraged' category in 2007, but was moved to the 'restrained' list in 2011. The 'uncertainty' created by adjustments may be hard to deal with for a big investor who has planed consecutive investment for a long period. In addition, the wordings of the CGFII is not always very clear. In the event of ambiguity, the government is the sole authoritative interpreter.[40] This also caused problems for the prospective

33 Article 4 of the Implementation Regulations of WFOE Law (2001), Article 3 of the Implementation Regulations of EJV Law (2011) and Article 2 of the Implementation Regulations of the CJV Law (1995), all provide that foreign investment shall follow the Catalogue for the Guidance of Foreign Investment Industries or the provisions for guiding foreign investment industries.

34 Provisional Guidance on Directions of Foreign Investment, released by former State Planning Commission and former State Commission of Economy and Trade (June 1995), *available at* http://www.people.com.cn/zixun/flfgk/item/dwjjf/falv/2/2-1-23.html (last visited on Oct. 6, 2015).

35 Catalogue for the Guidance of Foreign Investment Industries, released by former State Planning Commission and former State Commission of Economy and Trade (Dec. 1997), *available at* http://www.people.com.cn/zixun/flfgk/item/dwjjf/falv/2/2-1-29.html (last visited on Oct. 6, 2015).

36 Ministry of Commerce of China, Catalogue for the Guidance of Foreign Investment Industries, released by former State Commission of Development and Planning and former State Commission of Economy and Trade (Mar. 2002), *available at* http://www.mofcom.gov.cn/article/zt_swfg/subjectby/200612/20061204133375.shtml (last visited on Oct. 6, 2015).

37 Catalogue for the Guidance of Foreign Investment Industries, released by National Development and Reform Commission and the Ministry of Commerce (Nov. 2004), *available at* http://www.china.com.cn/chinese/PI-c/726125.htm (last visited on Oct. 6, 2015).

38 Ministry of Commerce of China, Catalogue for the Guidance of Foreign Investment Industries, released by National Development and Reform Commission and the Ministry of Commerce (Oct. 2007), *available at* http://www.mofcom.gov.cn/aarticle/b/f/200711/20071105248462.html (last visited on Oct. 6, 2015).

39 *Supra* note 10.

40 According to the Decision on Tighten the Interpretation of Laws [关于法律解释工作的决议], made by the Standing Committee of National People's Congress in 1981, administrative regulations shall be interpreted by the State Council or competent authorities. The Notification of the Authority and Procedure to Interpret Administrative Regulations [关于行政法规解释权限和程序问题的通知], issued by the State Council of China in 1993, provides that the competent administrative organ which is responsible for executing administrative regulations shall have the authority to interpret

investors.

2. National Treatment in Post-establishment operation

After the foreign investment is approved, China provides partial national treatment under different conditions.[41] Various Chinese bilateral investment treaties ("BITs") use six approaches to provide national treatment in the operation stage.[42] In the China's BITs with eight European States,[43] national treatment is subject to old rules like "any existing non-conforming measures maintained" in the territory of the contracting party and "the continuance of any such non-conforming measures."[44] Actually, a unique approach can be found in the China-Seychelles BIT, which provides a full post-establishment national treatment.[45]

In addition to the non-national treatment as provided clearly by the BITs, foreign invested entities in China use to complain that several unfavorable treatments exist in practice, such as: (1) the *de facto* preferential treatment to state-owned-entities to maintain their dominant position in the Chinese economy; (2) local protectionism to favor local SOEs specially;[46] and (3) policies supporting national champions.[47] The SOEs may have a greater access to generally cheap rates of financing, direct and indirect subsidies, preferential treatment in public procurement processes, the ability to impart influence over some regulatory and standardization processes.[48] The Communist Party of China Central Committee's Decision on Major Issues concerning Comprehensively Deepening Reforms adopted in November 2013

the regulations. In case that other administrative organs disagree with the interpretation of the authorized organ, the State Council shall make the final interpretation. For details, *see* Zhusheng Huang, *A Study on the Subjects of Interpretation of Administrative Laws* [行政法解释的主体制度初探] <available only in Chinese>, 41 J. Guangxi Normal U. [广西师范大学学报] 6-10 (2005).

41 Bin Sheng & Ran Ji, *Comparative Study on National Treatment in Investment Treaties and the Approach of List As Well As Their Implications for China* [国际投资协议中国民待遇原则与清单管理模式的比较研究及对中国的启示], 36 Guo Ji Shang Wu Yan Jiu [国际商务研究] 13 (2015).

42 *Supra* note 31, at 132-6.

43 These are Spain, Portugal, The Netherlands, Belgium, Luxembourg, Germany, Czech Republic, and Finland.

44 The Protocol to the Agreement on the Encouragement and Reciprocal Protection of Investments, China-F.R.G. art. 3, 2003.

45 *Supra* note 31, at 136.

46 European Chamber, *European Business in China: Position Paper 2014-2015*, at 16, *available at* http://www.europeanchamber.com.cn/en/publications-position-paper (last visted on Oct. 6, 2015).

47 US Chamber of Commerce, *China's Approval Process for Inbound Foreign Direct Investments: Impact on Market Access, National Treatment and Transparency 2012* (Nov. 11, 2012), at 50, *available at* https://www.uschamber.com/china's-approval-process-inbound-foreign-direct-investment-impact-market-access-national-treatment (last visited on Oct. 6, 2015).

48 *Id*. at 39. *See also U.S. Chamber of Commerce White Paper on American Business in China 2013*, at 3 & 9.

detailed the roadmap for China's further Development.[49] Article 9 of this Decision requires to "annul all sorts of regulations and methods that impede the national unified market and fair competition."[50]

B. Moving towards 'Pre-Establishment' of National Treatment

When the China-US BIT negotiation was initiated in 2008, Chinese representatives thought that pre-establishment of national treatment was not acceptable.[51] A breakthrough was, however, achieved after the summit in 2013.[52] China finally agreed to proceed with negotiations for adopting a pre-establishment of national treatment.[53] To reach to this target, China has to abandon the approach of positive list and to assure long time certainty on market access. To navigate the administration over foreign investment to meet the requirements of future Sino-US BIT, China strives to change her way to regulate foreign investment and prepares for pre-establishment of national treatment plus a negative list.[54]

1. To Improve market access for foreign investors

The current strategy of China is to reduce the scope of industries, forbidden or restrained, for foreign investment and change the way of regulation. It is implemented to transfer a positive list restricting market access subject to adjustment every few years to a negative list, which is expected to be certain for a longer period of time. The CGFII was revised again in 2015 with significant improvement on market access for foreign investors. The 2015 CGFII enlarges substantially the scope of industries where foreign investment are encouraged.[55] In the meantime, it cuts the numbers of restrained industries from 79 to 38. Restraints in the 2011 CGRII to pharmaceutical

49 *The Communist Party of China Central Committee's Decision on Major Issues concerning Comprehensively Deepening Reforms* (Nov. 2013), art. 9, *available at* http://news.xinhuanet.com/politics/2013-11/15/c_118164235.htm (last visited on Oct. 6, 2015).

50 *Id*. art. 9.

51 Congyan Cai, *China-US BIT Negotiation and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 J. Int'l Econ. L. 467 (2009).

52 PRC Ministry of Commerce, There are already 77 States adopt Pre-establishment National Treatment and the Modality of Negative List (July 12, 2013), *available at* http://finance.people.com.cn/n/2013/0712/c1004-22173506.html (last visited on Oct. 10, 2015).

53 *Id*.

54 On July 12, 2013, the spokesman of the Ministry of Commerce, Danyang Shen said that China had agreed to negotiate the US BIT with the USA based on "pre-established national treatment and a negative list." [中方同意以准入前的国民待遇和负面清单为基础与美方进行投资协定实质谈判], *available at* http://news.xinhua08.com/a/20130712/1210936.shtml (last visited on Oct. 6, 2015).

55 *See* The category of "Encouraged Foreign Investment" of the 2015 CGRII, at 1-19.

industry, the manufacure of general and specialized equipment, chemical fibre, chemical raw materials and products, petroleum processing, coking are lifted in the 2015 CGRII.[56] The requirements of EJV or CJV as the form of investment are also reduced to allow foreign investors to have more freedom to choose the form of their business.[57] 32 sectors, nevertheless, still require that the Chinese shares be higher than the foreign ones to ensure the Chinese control over the EJVs.[58]

The enlarged market access by the 2015 CGFII was expected to help the current Xi Jinping government to adapt the future regulatory ways based on a negative list. Any sectors not on the negative list have to be open for foreign investment. This negative approach is completely different from the positive list approach. Because the list is defined by a treaty rather than China's domestic law, it will be hard to adjust unilaterally after the closure of negotiation. As innovations of industries may emerge faster than amendments to the treaties, new sectors may be created after a negative list is set. In *China-Publications and Audiovisual Products*, the Appellate Body of the WTO challenged several Chinese regulations that were made more than a decade ago to restrict the trading right and distributing channels of andiovisual products.[59] During the past two decades, the forms of publications, audiovisual products, and their distribution channels have changed dramatically.[60] Therefore, accommodating the future development of new sectors proves to be a big challenge for law-makers today.

Although the Sino-US BIT is just an agreement, it may result in profound multilateral effects through the 'most favored' national treatment clause. Many States that signed bilateral investment treaties with China may benefit from the enlarged market access and protection of investment following prominent

56 *See* The category of Encouraged Foreign Investment in Manufacture of the 2015 CGRII, at 1-16.

57 *E.g.,* the process of rare species logs, ocean manganese nodules mining, barite prospecting and mining, the production of famous brand *Baijiu and huangjiu* (liquor) are opened further to the foreign investors. *See* the Category of Encouraged Foreign Investment in Agriculture, Mining and Manufacture of the 2015 CGFII, at 1.

58 Examples under this category include the design, manufacture and repair of civil aircrafts, the design and manufacture of civil satellites, the building and operating of nuclear power plants, main railway lines, hydropower projects and theaters, printing of publications, futures companies, surveying and mapping companies, etc. *See* the Encouraged and Restrained Categories of the 2015 CFGII.

59 Appellate Body Report, *China-Measures Affecting Trading Rights and Distribution Services for Publications and Audiovisual Products*, WT/DS 363, (Dec. 21, 2009), *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (last visited on Oct. 15, 2015).

60 Audiovisual products, such as video cassettes and DVDs once were tangible products. Now they can merely be considered as electronic products. The change of physical form of the audiovisual products has great impacts on the way of production, importation and distribution of audiovisual products. It even blurs the difference of audiovisual products and service.

international practice.[61]

2. Substantial reform of the way to regulate foreign investment: The 2015 Draft FIL

A substantial reform of the way to regulate foreign investment has been going on by making a new Foreign Investment Law to replace the current three foreign investment laws which have been in force for more than 30 years. On January 19, 2015, China released her draft of Foreign Investment Law (hereinafter draft FIL) to solicit public comments.[62] This draft FIL fundamentally changed the ways to regulate foreign investment. Some of the major points as encapsulated in the draft FIL are highlighted below.

Not all foreign investment needs to be approved

The draft FIL provides that foreign investors need not to have all their investments be approved in every single case. China commits to provide national treatment to foreign investment,[63] except for prohibitions and restrictions in the Special Control Catalogue, which will be made by the State Council based on China's treaty obligations and domestic investment laws.[64] This is heralded as the approach of "national treatment plus a negative list,"[65] which is believed to be international practice.[66]

Reporting will be chosen as a substitutional approach to regulate foreign investment. Entities who have invested overseas have to report their investment and operation to the Chinese government regularly.[67] The annual report should include information of operation, such as employment, taxes paid, research and development, import and export, etc, as well as accounting information, such as assets, debts, owners' equity, income, costs and profits, etc.[68] Such information shall be accessible to the

61 *E.g.*, Article 3.3 of the Agreement between China and Korea on Promotion and Protection of Investment (2007) provides that each party shall "…accord to investors of the other Contracting Party and to their investments and activities …treatment no less favourable than that accorded in like circumstances to… any third State…, including the admission of investment." The present reform on foreign investment in China target to open market for foreign investment generally, not only to American investment.

62 PRC Ministry of Commerce, Foreign Investment Law (Draft) and its Interpretations (Jan. 19, 2015), *avaiblable at* http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml (last visited on Oct. 6, 2015).

63 Draft Foreign Investment Law of China art. 6.

64 *Id*. art. 23.

65 *Supra* note 62, at 1.

66 *Id*. at 2.

67 Draft Foreign Investment Law of China, arts. 78-81.

68 *Id.* art. 29.

public.[69] The foreign invested entities and investors are required to report more information than their domestic counterparts, who are required to report when registering at the Administration of Industry and Commerce, Administration of Taxation, etc.[70] This extra burden on foreign investment and the investors may not be fully consistent with the principle of national treatment. The draft FIL also provides for the exposure of information of the foreign invested entities and investors to the public and their business rivals,[71] even though not all of them are listed companies.

More transparency

The Chinese government undertakes to regulate foreign investment following the principle of fairness and transparency.[72] Article 115 of the draft FIL, however, seems to limit the obligation of transparency to "timely publication of laws, regulations and judicial decisions relating to investment"[73] and the opportunity for foreign investors to participate in the law-making process by making comments.[74] These requirements may fall short of the legitimate expectations of the investors. In addition, many administrative measures and decisions may be closely relevant to foreign investment and should also be released in a timely manner. Since the wording of laws and regulations may be interpreted in different ways, there remains the possibility that not only the judicial, but also administrative decisions based on these laws and regulations may highlight the meanings of the laws and their official interpretations in different ways. This may be a very serious concern for prospective investors as the publication of administrative decisions is crucial for understanding and judging their investment plans, especially in cases where judicial remedy is not available.[75]

New criterion inidentifing foreign investment and its implications to VIEs

The draft FIL defines the new concept of 'actual controller' as a criterion to distinguish 'foreign investment' from 'Chinese one.'[76] An actual controller is an entity or individual

69 *Id.* art. 83.

70 The Regulation on Registration of Corporations of China [中华人民共和国公司登记管理条例] (2005), arts. 9, 20 & 21, *available at* http://www.gov.cn/banshi/2005-12/22/content_134834_3.htm (last visited on Oct. 6, 2015).

71 The US-China Business Council, *Comments on the Draft Foreign Investment Law of China*, Feb. 17, 2015, at 9, *available at* https://www.uschina.org/sites/default/files/USCBC%20Foreign%20Investment%20Law%20Comments%20%28Chinese%29.pdf (last visited on Oct. 6, 2015).

72 *Supra* note 63, art. 8.

73 *Id.* art. 115.

74 *Id*.

75 *E.g.,* the administrative decision on the security review of foreign investment is final and cannot be submitted for judicial review.

76 Draft Foreign Investment Law of China, arts. 18-19.

who controls a foreign invested entity or investor:[77] To be an acutual controller, s/he should: (1) own more than 50 percent of shares of the controlled entity; or (2) have the right to nominate more than half of the members of the board or executive organ; or is able to ensure that his/her nominees may occupy at least 50 percent of the seats of board or executive organ; or may affect the decision making of the board or executive organ substantially with his/her voting power; or (3) is able to affect substantially the decisions on operation, human resources, finance or technology.[78]

If the actual controller of a foreign invested entity is a Chinese, this entity may be treated as Chinese one relating to market access,[79] and *vice versa*, a Chinese entity may be treated as foreign if the actual controller is a foreigner. These provisions cause concern about the fate of existing VIEs. Bypassing Chinese regulations restricting or forbidding foreign investment in certain industries, the VIE structures enable the offshore foreign parent company to exercise control over its onshore WFOE, which controls, by legal agreements rather than traditional equity, over the activities of a Chinese entity holding the business license and operating in China.[80] The draft FIL clearly provides that the VIE can be foreign investment if it is actually controlled by foreigner.[81] The existing foreign invested entities controlled by the VIEs must report to the government in order to get approval. If the actual controller of the VIE is Chinese, the foreign invested entity controlled by the VIE may continue its operation in China;[82] otherwise, it may be required to apply license although it has been in the market. If exisiting VIEs controlled by Chinese is legalized with license, that Chinese companies can raise funds overseas continuously. However, curbing shareholder control in favor of the management would violate basic principles of company law and policy of China. It is not clear whether the foreign governments who regulate the capital markets in their respective countries would accept this approach.

Although there remain several issues that need to be addressed carefully, this draft FIL is definitely the biggest and sweeping reform on China's foreign investment law so far and will restructure the scheme of foreign investment once finalized.

77 *Id.* art. 19.

78 *Id.* art. 18.

79 *Id.* art. 45.

80 *Supra* note 26, at 202.

81 Draft Foreign Investment Law of China, art.15 (6).

82 *Id.* official commentary, § 3.3.

4. Other Administrative Measures and Policies regarding Foreign Investment

The current Chinese economic scheme is mainly managed and reformed by the government. Although the Chinese government claims that China is already under free enterprise system, some different opinions still prevail.[83] In spite of diverse and crticial perspectives to the Chinese economy, the Chinese government maintains a lot of administrative measures relating to foreign investment. Some measures or their execution have caused concern from foreign investors. Some of these are discussed below.

A. Licensing and Approving

Except for special requirements for foreign investment, the foreign investors have to follow the laws and regulations on licensing and approving in spite of their nationalities. Although these licensing and approving requirements do not target foreign investment in particular, there might be issues of transparency relating to the publication, interpretation and implementation of those laws and regulations.

Transparency was introduced into the Chinese administrative system when China acceded to the WTO in 2001. China's commitment of transparency in the Protocol on the Accession of the People's Republic of China only covers "laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange."[84] Investment was not under this purview. Although the Government has endeavored to improve transparency, some regulations and their implementation details relating to investment remain unavailable or ambiguous, and leave big space for discretion. A typical example may be the State Council's Catalogue of Projects Subject to Government Approval.[85]

[83] G. Thompson, Economic Dynamism in The Asia-Pacific: The Growth of Integration and Competitiveness 75 (1998). The author argues that China maintains "a whole plethora of restrictions on import and the free movement of capita." China's labor market is not free either. *See also* Marina Y. Zhang, China 2.0: The Transforming of An Emerging Supperpower and The New Opportunities 177 (2010). The author would argue that China lacks "fair economic rules embedded in sound legal system, surrounded by institutional accountability."

[84] The Protocol on Accession of The People's Republic of China (Nov. 23, 2001), WT/L/432, pt. I, art. 2 (C).1, *available at* https://docsonline.wto.org/dol2fe/Pages/SS/DirectDoc.aspx?filename=t%3A%2Fwt%2Fl%2F432.doc& (last visited on Nov. 10, 2015).

[85] State Council, Catolugue of Investment Subject to Governmental Approval [政府核准的投资项目录], Guofa [国发] No. 53 (2014) (Oct. 31, 2014), *available at* http://www.gov.cn/zhengce/content/2014-11/18/content_9219.htm (last visited on Nov. 6, 2015).

Responding to the Plan for the Institutional Restructuring of the State Council and Transformation of Functions, which specifies that many requirements concerning investment, production, operations, licensing, and accreditation shall be canceled or delegated to the lower-level governments, the State Council revised the Catalogue of Projects Subject to Government Approval in October 2014, eliminating many requirements of approval, or delegating the right to approval to the provincial governments.[86] This Catalogue lists the projects that need to be approved by the central and local governments respectively; it does not, however, contain the criteria and procedure of the approval provided by the Measures of Investment Projects Subject to Government Approval (2014).[87] Article 23 specifies the five criteria on which the approval of government agencies shall be 'based.' The Projects shall: (1) conform with the laws and regulations as well as the policy of macroscopic adjustment and control of state; (2) conform with development plan, industry policy, technology policy and standard of market access; (3) explore and utilize resources reasonably; (4) have no impacts to national, economic and biological security; and (5) have no substantial negative impacts to public interest, especially the public interest of the site of project.[88]

The provision integrates the national plan and various policies which are generally expressed in abstract words into this regulation. Policies like the "policy of macroscopic adjustment and control," 'development plan' and 'industry policy' can only be interpreted by the agencies that authored them. Judicial organs may interpret and enforce law and regulations. However, it is extremely difficult for judicial organs to check the governmental decisions based on such 'policies' as domestic industries and national champions, and the indigenous innovation, which would have already caused concerns.[89] *E.g.*, the 12th Five-year National Plan of Pharmaceutical Industry (2011-2015) aims to, *inter alia*, concentrate on the pharmaceutical industry, developing more than five enterprises with a sales revenue exceeding RMB 50 billion [USD 8 billion] or more than 100 enterprises with sales revenues exceeding RMB 10 billion [USD 1.6 billion], the top 100 of which will generate over 50 percent of

86 *Id. E.g.*, Article 10 provides for the foreign investment in industries that Chinese share shall be more than foreign share, if the investment is at or more than USD 1 billion, it shall be submitted to the Ministry of Commerce for approval; if the investment is less than USD 1 billion, it may be submitted to the Provincial Governments for approval.

87 National Development and Reform Commission, Measures of Investment Projects Subject to Government Approval, May 14, 2014, *available at* http://www.sdpc.gov.cn/zcfb/zcfbl/201405/t20140526_612895.html (last visited on Oct. 6, 2015).

88 *Id*. art. 23.

89 Siyuan An & Brian Peck, *China's Indigenous Innovation Policy in the Context of Its WTO Obligations and Commitments,* 42 Geo. J. Int'l L. 407-7 (2011). The authors argued that China's indigenous innovation policy may be inconsistent with several of its obligations under the WTO agreements.

the industry's total revenue by 2015.[90] Foreign invested pharmaceutical companies in China do not seem to be potential candidates to be fostered by the national plan although they are Chinese entities under the Chinese law. The Director of the Association of Pharmaceutical Industries of China interpreted that the National Plan favored the development of medicine innovated by the Chinese.[91]

The 12th Five-year Development Plan also specifies that the administrative charges and government-funded items that are illegal and improper shall be repealed or delegated. So far, seven rounds of elimination and delegations have been conducted and 463 items have been repealed at the national level since 2013.[92] It involves about a third of all items that once needed the central government's approval. The items for approval would be reduced further in the years ahead. Departments at all level are now required to publish a list of existing items that need administrative approval. In May 2015, the State Council decided to repeal all national non-administrative approval items and adjusted 84 of them into internal administrative approval items.[93]

Similar administrative reforms are being carried out at the provincial and local levels, but the extent to which administrative simplification is implemented varies greatly. Zhejiang Province, *e.g.*, has eliminated 181 administrative approved items and 464 non-administrative approved items since 2013.[94] In case of reducing all those, only 11 percent of the 1,617 existing administrative items should get approval.[95] If comparing the procedure and results of application of licenses and approvals between foreign and Chinese domestic entities, it would reflect the existence of some unfavorable practices or treatment to foreign entities.[96] For some Chinese authorities, it may be quite legitimate to treat foreign and Chinese applicants differently even

90 Ministry of Industry and Information Technology of China, *The 12th Five-year Plan of Pharmaceutical Industry*, § 3.3.5 (2012), *available at* http://www.china.com.cn/policy/txt/2012-01/20/content_24456158_3.htm (last visited on Oct. 6, 2015).

91 Yao Li, *12th Five-year Plan of the Pharmaceutical Industry Is Going to be Released and Pharmaceutical Industry Will boom,* China's Pharmaceutical, Aug. 22, 2011, *available at* http://news.pharmnet.com.cn/news/2011/08/22/340384.html (last visited on Nov. 7, 2015).

92 Wei Zhang, *Local Reform on Administrative Approval Hit a Bottleneck* [地方行政审批改革遭遇瓶颈], Legal Daily [法制日报], Aug. 29, 2014.

93 State Council Decision on Revocation of Approval for Non-Administrative Licensing Items [国务院关于取消非行政许可审批事项的决定], Guofa [国发] No. 27, (2015), *available at* http://www.gov.cn/zhengce/content/2015-05/14/content_9749.htm (last visited on Oct. 6, 2015).

94 Hu Dan & Zhang Li, *To be the 'Most Efficient' Government* [全力打造"办事最快"政府], Zhe Jiang Daily [浙江日报] (Aug. 10, 2013), *available at* http://zjnews.zjol.com.cn/system/2013/08/10/019525636.shtml (last visited on Oct. 6, 2015).

95 *Id*.

96 *Supra* note 47, at 37-40.

on the very same applications. In the Zhejiang province, *e.g.*, several departments would spend different amounts of time to finish their work for Chinese and foreign applicants.[97] This difference is minor, however.

There is no unified or single publication of all laws, regulations and administrative measures, decrees, etc. relating to foreign investment. Therefore, it could be quite a sweeping work to collect all the necessary information and track the constant changes and revisions.

B. Anti-Monopoly Investigations

China's anti-monopoly investigation has been welcomed by her domestic consumers as well as the business leaders. Between 2008 and 2012, China's National Development and Reform Commission ("NDRC") has decided just more than 20 cases of anti-monopoly investigations under the Anti-Monopoly Law.[98] Many giant SOEs had dominated Chinese market before the Anti-Monopoly Law was made in 2007. Nevertheless, anti-monopoly investigations against some SOEs apparently went too slowly and were sometimes pending for years.[99] Anti-monopoly investigations were significantly increased in 2013 and 2014 imposing fines on many multinational and Chinese companies. Multinational companies were especially concerned about these investigations.[100] Regardless of whether this is true, according to the survey of the US-China Business Council, foreign companies appear to have well-founded concerns about how investigations are conducted and decided. Their concerns include: (1) fair treatment and non-discrimination; (2) lack of due process and regulatory transparency; (3) lengthy time periods for merger reviews; (4) role of non-competitive factors in competition enforcement; (5) determination of remedies and fines; and (6) broad definition of monopoly agreements.[101]

97 *E.g.,* the Zhejiang Industry and Commerce Bureau commits to finish registration within 2 days for the Chinese entities and 3 days for the foreign entities although the law provides the same period of 15 days for both of them, *available at* http://www.zjzwfw.gov.cn/col/col1510/index.html (last visited on Oct. 6, 2015).

98 Sue Hao & John Lenhart, *China's 'Golden Year' of Antimonopoly Investigation,* China Bus. Rev., Dec. 12, 2013, *available at* http://www.chinabusinessreview.com/chinas-golden-year-of-antimonopoly-investigations (last visited on Nov. 11, 2015).

99 *E.g.*, the investigations against China's two giant telecommunication companies - China Telecom and China Unicom - were filed in 2011, but no decisions were made till 2014. *See* Zhenhua Sun, *Why There Were No Decisions on Cases of Anti-Monopoly Against China Telecom and China Unicom* Unicom, Legal Daily [法制日报], Feb. 25, 2014, *available at* http://www.legalweekly.cn/index.php/Index/article/id/4613 (last visited on Oct. 6, 2015).

100 N. Jenny, *The Politics of China's Anti-Monopoly Investigation*, Int'l Pol'y Dig. (Sept. 17, 2014), *available at* http://www.internationalpolicydigest.org/2014/09/17/politics-china-s-anti-monopoly-investigations (last visited on Oct. 6, 2015).

101 The US-China Business Council, Report on Competition Policy and Enforcement in China (Sept. 1, 2014), *available at*

It is true that the foreign entities punished in anti-monopoly cases chose to pay fines rather than to take the option of judicial review. They may not believe in justice, considering that nobody was punished so far in sectors with more monopoly cases, such as telecommunication, petroleum, gas, and banking, etc. [102]

5. Dispute Settlement in Foreign Investment

A. Disputes between Chinese and Foreign Investors

When China adopted her first EJV Law in 1979, the country had not signed any bilateral investment treaty with any other country. Accordingly, the dispute resolution from FDI was fully decided by the domestic law. During that time, for all investment contracts of either EJVs or CJVs, the applicable law must be the Chinese law. Parties might choose to settle disputes by either Chinese judiciary or any arbitration tribunals.[103]

Most disputes between foreign and Chinese investors of EJVs and CJVs were submitted to China International Economic and Trade Arbitration Commission ("CIETAC") for settlement especially in 1980s and 1990s. This made CIETAC a new rising star of international commercial arbitration, ranking second in the world with regard to the number of cases decided in 1990.[104] Then, most Chinese businessmen were very reluctant to submit a dispute to a foreign forum due to the cost, lack of qualified professional legal service at home, and lack of awareness of foreign judicial or semi-judicial systems. However, they now have access to these facilities more widely following the globalization. Disputes may also be submitted to international commercial arbitration or to foreign courts. Danone France, *e.g.*, took Wahaha, a Chinese beverage company to Stockholm Chamber of Commerce to arbitrate their joint-venture disputes.[105] Other popular seats of arbitration often chosen by Chinese businessmen and their foreign counterparts are Singapore and Hong Kong. No

https://www.uschina.org/sites/default/files/AML%202014%20Report%20FINAL_0.pdf (last visited on Oct. 6, 2015).

102 Jingzhou Tao, *Anti-Monopoly Policy Is not Industry Policy*, 9 Rep. China Econ. 21 (2014).

103 EJV Law art. 15; CJV Law art. 25.

104 Xiaoyan Zhou, Law and Practice and Settlement of Disputes Arising from Economic and Trade Transactions Involving Foreign Interests [解决涉外经济纠纷的法律与实务] 82 (1999).

105 Danone v. Wahaha, SCC Arbitration V (061/2007). The award is confidential. *See* the arbitration report, *available at* http://www.ft.com/cms/s/0/01faf554-cd25-11de-a748-00144feabdc0.html#axzz3OB6rEld6 (last visited on Oct. 8, 2015).

matter where the forum is, Chinese law has been applied to the EJV or CJV disputes between Chinese and foreign investors.

B. Dispute between Foreign Investors and China

In the beginning, China did not accept investor-state dispute settlement by foreign judicial institutions. Naturally, no provisions on investor-state disputes can be found in the early versions of China's BITs with Sweden in 1982 and Germany in 1983. Soon after, however, China accepted the cases relating to expropriation to be submitted before the international tribunal. Such a way of dispute settlement was integrated into the BIT with Norway in the protocol of 1984, which provided that the dispute over the amount of compensation paid for expropriation can be "reviewed by…an international arbitral tribunal," … "If within 6 months of the commencement of consultation agreement has not been reached."[106] When China submitted its ratification to the Convention on the Settlement of Investment Dispute between States and National of Other States ("ICSID") in 1993, she notified the ICSID secretary in an explicit manner that: "The Chinese government would only consider submitting to the jurisdiction of ICSID disputes over compensation resulting from expropriation or nationalization."[107] According to Article 24(5) of the ICSID, the secretary-general shall forthwith transmit such notification to all Contracting Parties.

This position gradually changed after China joined the capital-exporting group to explore the international markets, especially in Africa and Latin America. An open position to investor-state arbitration with developing countries may lead China to secure her investments abroad. Meanwhile, it probably would not raise the possibility for China to appear for an arbitral proceeding. Therefore, a comprehensive dispute settlement mechanism was introduced in Chinese BITs. Article 9.3 of the Agreement between Botswana and China on the Promotion and Protection of Investment provides:

> Any dispute, if unable to be settled within six months after resort to negotiations… shall be submitted at the request of either party to: (a) International center for Settlement of Investment Disputes (ICSID)…; or (b) an ad hoc arbitral tribunal…[108]

[106] The Protocol of the People's Republic of China and Norway Agreement on Mutual Protection of Investment (1984), art. 2 (c), *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/765 (last visited on Oct. 6, 2015).

[107] ICSID, *Designations and Declarations of China*, Jan. 7, 1993, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/MembershipStateDetails.aspx?state=ST30 (last visited on Oct. 6, 2015).

[108] Agreement on the Promotion and Protection of Investment between Botswana and China, art. 9.3, June 12, 2000, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/500 (last visited on Oct. 6, 2015).

Similar provisions were also included in China's other BITs with western countries.[109] The scope of disputes that may be submitted to international arbitration has thus expanded from 'expropriation' to 'any disputes.'[110] Chinese investors could take advantage of these BITs to initiate both ICSID cases[111] and *ad hoc* arbitrations.[112] In the other side, foreign investors have the chance to take China to international tribunal for investment disputes, as well. In May 2011, *e.g.*, a Malaysian construction and development company initiated proceeding against China for revoking a 70-year land lease of its Chinese subsidiary in Hainan province.[113] Another example may be found when a South Korean property developer requested the ICSID intervention against China in November 2014.[114] It is pertinent to mention here that China does not generally accept international arbitration over any investor-state disputes without conditions. She normally requires a dispute be referred to her domestic administrative review before it is submitted to international arbitration. Article 6 of the Protocol to Sino-Germany BIT provides:

> With respect to investment in the People's Republic of China an investor of the Federal Republic of Germany may submit a dispute for arbitration under the following conditions only: (a) the investor has referred the issue to an administrative review procedure according to Chinese law.[115]

[109] *See*, *e.g.*, Agreement on the Encouragement and Reciprocal Protection of Investment, China-F.R.G., art. 9, 2005; Agreement on the Encouragement and Reciprocal Protection of Investment, China-Netherlands, art. 10, 2004; and Agreement on the Encouragement and Reciprocal Protection of Investment, China-Finland, art. 9, 2006.

[110] Both Article 9 of the Agreement between China and Finland on the Encouragement and Reciprocal Protection of Investment (2006) and Article 9 of the Agreement between China and Germany on the Encouragement and Reciprocal Protection of Investment (2005) provide that 'any dispute' may be submitted to ICSID or ad hoc arbitration if the dispute cannot be settled amicably or by consultation. Article 10 of the Agreement on the Encouragement and Reciprocal Protection of Investment between China and the Netherlands (2004) provides that 'disputes' may be submitted to ICSID or ad hoc arbitration. No restrictive words in this provision to specify the scope or nature of 'disputes' may be submitted to ICSID or *ad hoc* arbitration.

[111] *E.g.*, a Hong Kong resident, Tza Yap Shum initiated a case against Peru in 2011 (Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6); and Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium, ICSID Case No. ARB/12/29. For details, *see* Wei Shen, *Conceptuality or Textuality? Understanding the Notion of Expropriation in the Context of Tza Yap Shum v.The Republic of Peru*, 7 J. East Asia & Int'l L. 379-407 (2014)

[112] The Permanent Court of Arbitration is administering a case arising out of the cancellation of licenses held by PRC investors in the Tumurtei iron ore mine in 2012. Noticeable examples are China Heilongjiang International Economic & Technical Cooperative Corp. v. Mongolia and Sanum Investments Limited v. Lao People's Democratic Republic, UNCITRAL *ad hoc* tribunal, PCA Case No. 2013-13.

[113] Ekran Berhad v. People's Republic of China, ICSID Case No. ARB/11/15.

[114] Ansung Housing Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25.

[115] The Protocol to the Agreement on the Encouragement and Reciprocal Protection of Investment, China-F.R.G, art. 6, 2003, *available at* http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/905 (last visited on Oct. 6, 2015).

The administrative review procedure should not be regarded as a deliberate postponement for settling dispute as the procedure shall last only for three months. If the dispute still exists for three months after the issue was brought to review, any party may submit it for arbitration.[116] The government insists on this procedure in order to correct any mistakes on its side or to reach to an administrative reconciliation before rendering the dispute to a third person.

6. Conclusion

China's foreign investment laws provide vehicles for foreign investment and opportunity for foreign investors to benefit from China's fast economic development especially since 1980s. The early versions of the foreign investment laws favored export-oriented foreign entities or entities that shared technology with Chinese partners. Foreign entities once were encouraged or required to procure resources from local markets first. These unfavorable provisions for foreign investors have been eliminated following China's accession to the WTO.

When China's economy ceases the growth of over 10 percent per annum, a fair and transparent market becomes even more important to draw foreign investment. China is reforming her foreign investment law towards more market access and less government controls. China is currently moving toward the global standard in governing foreign investment. It will be the right direction since China is not only a capital importing, but also a capital exporting country. China should hit the balance of national interests between inbound and outbound investment. With the assurance of national treatment, fairness, and transparency, the foreign investors would be able to claim compensation for any sort of damage they have faced in international tribunals.

[116] *Id*. art. 6 (b).