



Original Article

The Adjustment of China's Foreign Investment Policy and Law - Lessons for Vietnam

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Abstract: In recent years, China's economy has made impressive leaps. The success of China is based on many factors, of which foreign investment is an important factor. Famous as the world's factory, China is a country with great potential to attract investment. In 2020, China was one of the five largest FDI recipients in the world. With reported inflows reaching an all-time high, China continued to be the second-largest FDI recipient after the United States [1]. FDI growth in China continued in 2020, with an increase of 6% to \$149 billion, reflecting the country's success in containing the pandemic and its rapid GDP recovery. The growth was driven by technology-related industries, e-commerce and research and development [2]. These results are due to the process of adjusting laws to be compatible with each stage of the country's development, which are experiences that Vietnam should learn from. In this article, I will clarify the changes in foreign investment policy and law that China has made over the years and propose lessons learned for Vietnam.

Keywords: China, Foreign Investment.

"The Foreign Investment Law is a comprehensive and fundamental set of legal standards for foreign investment activities in China under new circumstances" - said Wang Chen, vice chairman of the National People's Congress Standing Committee.

1. Introduction

China's new Foreign Investment Law¹ has created a more market-oriented investment

environment for foreign investors and enterprises, and has been acting as a guarantee for an increase of 4.5% of FDI to the country in 2020, according to Zang Tiewei, a spokesperson for the Legislative Affairs Commission of the National People's Congress Standing Committee. Data shows the scale of foreign investment and the global share reached a record high, making China the world's largest destination for foreign capital. The result comes against the challenge of the global epidemic and

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¹ Hereinafter referred to as FIL.

the law has shown the Chinese government's determination on opening-up policy. Actual foreign investment in the Chinese service sector expanded by 13.9% year on year with 77.677 billion yuan and took 77.7% of all FDI [3]. These impressive growth numbers have shown the effectiveness of China's adjustment of foreign investment law and policy.

2. The History of China's Foreign Investment Regulations

Before 1982, law became an important part of the movement to encourage international trade, foreign investment and international economic cooperation in China; however, the influence of a 30-year communist rule continued. General socialist political theories and collective economic principles remained strong. In 1982, a new state Constitution was adopted, and the following new laws were enacted: the Inheritance Law, Mineral Resource Law, Foreign Economic Contract Law, Election Law, Joint Venture Law, Bankruptcy Law, Trademark Law, and Patent Law. The new Constitution stresses the importance of law, and priority is given to drafting laws to facilitate international commerce. China wanted to attract foreign investment and technology and needed a legal system with familiar legal concepts to guarantee the protection of a foreign enterprise's investment in China or license of technology to a Chinese enterprise [4].

Ever since the high tide of foreign investors hit China in the late 1980s, China has frequently 'felt the stones' of globalisation, adjusting its balance through its regulatory infrastructure. The 2001 accession of the People's Republic of China to the WTO was a new challenge to the legal system and fueled the legislative procedure. Already during the period of preparation for accession-beginning in 1986, when negotiations started-it was evident that accession would be possible only if China crafted a functioning legal system in order to open itself up to the world. Inevitably, corporate law, intellectual property law, banking law, and

other areas of economic law had to be developed or modified. For example, in 1990 a copyright law was enacted, which was later revised in order to adapt it to the Bern Convention and TRIPS requirements. Also, Administrative Measures on Foreign Investment in the Commercial Sector of 2004 liberalised international trade [5]. These reforms kicked off a legendary era of high growth. Foreign-owned enterprises accounted for 28% of China's national industrial output prior to the WTO accession. By 2003, this figure had increased to 36%. From the get-go, China's primary objective behind attracting FDI was generating employment. China expected its WTO accession would add roughly 10 million jobs to the Chinese economy if growth expanded by 2.9% annually. Until the promulgation of the Labour Contract Law in 2008, there was bearish pressure on labour costs with firms saving 20–30% on their labour bill by omitting social insurance payments. A relatively unregulated labour market attracted FDI from the global manufacturing sector, accounting for more than 60% of incoming FDI during this period [6].

The Chinese government only recognised certain forms of commercial partnerships such as equity joint ventures, contractual joint ventures and wholly-owned foreign enterprises. By 2006, 49% of foreign investors entered China through joint ventures. By 2011, Special Economic Zones in coastal areas accounted for 22% of China's GDP, 45% of FDI and had generated 30 million jobs [6]. Attracting foreign investment by low production costs, abundant cheap labour, geographical location is the way that China used in the past, but nowadays, with rising labour cost, the emergence of competitive countries, it is obvious that China needs new adaptations in the new context.

3. Overview of China's New Foreign Investment Policies and Law

On January 1, 2020, the Foreign Investment Law of the People's Republic of China, which China's State Council enacted on March 15,

2019, took effect. On the same day, several related regulations and notices, which were issued at the end of 2019, also took effect. The new FIL and related regulations mark the beginning of a new era for foreign investment in China [7].

3.1. Foreign Investment Law

The new FIL 2020 replaced three laws on foreign investment: Law on Chinese-Foreign Equity Joint Ventures (passed in 1979, amended three times); Law on Wholly Foreign-Owned Enterprises (passed in 1986, amended twice); Law on Sino-Foreign Contractual Joint Ventures (passed in 1998, amended four times).

The FIL 2020, as a single unified body of law has, provides for greater promotion and protection of foreign investment as well as enhanced regulatory transparency. The FIL indicates that China is maintaining its commitment to further open up its market and boost inbound foreign investment. Several key changes under the New Law (such as national treatment of foreign investment subject to the Negative Lists, protection of foreign *intellectual property (IP)* rights and trade secrets, and equal treatment of domestic and foreign companies in government procurement) address some of the "asks" from the United States under its trade negotiations with China, some of which have been further reflected in the phase one trade agreement recently concluded between the United States and China [8].

3.2. The Regulations on the Implementation of the Law on Foreign Investment

The State Council adopted the Regulation on the Implementation of the FIL (the "Implementing Regulation") on December 12, 2019, and it took effect on January 1, 2020. The Implementing Regulation provides additional details and clarity on several general provisions and principles set out in the FIL. The Implementing Regulation:

- Requires national treatment for foreign-invested enterprises² in many important areas, including government funding, land supply, tax reductions and exemptions, permitting, standards formulation, public procurement, and project approvals (Article 6);

- Requires government authorities to take measures and establish systems for transparency in rule-making and administration, and to provide consulting services and guidance for foreign investors, and handle complaints by FIEs or their investors (Article 9);

- Sets out the rights of FIEs to participate in rule-making, standards formulation and government procurement (Article 15);

- Provides further details regarding expropriation of foreign investors' investments, protection of intellectual property, the new "negative list" system for administration of the establishment of and changes to FIEs, information reporting, and the transitioning of existing FIEs (Article 21); [7].

3.3. Negative Lists and Encouraged Industries Catalogue

These two legal documents were jointly issued annually by the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM). They are regularly updated to suit the circumstance of the country. The Negative Lists restrict foreign investment in some sectors, while the Encouraged Industries Catalogue encourage foreign investment in others.

The newest Negative Lists for foreign investment were issued on Dec 27, 2021, including national negative list and pilot free trade zone negative list. The number of items that are off-limits for foreign investors was cut to 31 in the 2021 version of the national negative list from 33 in the 2020 version. The number of items on the pilot free trade zone negative list was reduced to 27 from 30 in the 2020 version. The two new negative lists took effect on Jan 1, 2022 [9].

² Hereinafter referred to as FIEs.

The most updated Encouraged Industries Catalogue was released on December 28, 2020 (there is no 2021 version). It was implemented on January 27, 2021, replacing its 2019 version. Compared with the 2019 edition, it includes more entries to encourage foreign investment, expands the scale of encouragement, encourages foreign investors to enter advanced manufacturing and modern service industries, and optimises the regional distribution. The 2020 edition has 1,235 entries, an increase of 127 or more than 10% over the 2019 edition. Among the 127 new entries, 65 are applicable nationwide and 62 in the central and western regions [10].

3.4. Regulations on FIEs Information Reporting and Administration

Article 34 of the FIL introduced a Foreign Investment Information Reporting System, which is an administrative system to provide information to the government. The government uses the information collected for making and improving foreign investment policy measures, enhancing precision services, and delivering effective investment promotion and protection. The system is not a precondition for businesses to process business registration procedures or other such matters, nor is it a new administrative approval targeting foreign investors or FIEs. Compared to the previous foreign investment requirements, this system introduces multiple changes, including the timing, format, information to be submitted, and reporting method for investors. To facilitate the implementation of the system, China released two regulatory documents in December 2019 to

provide further guidance on how the foreign investment information reporting administration works in the country: *Measures on Reporting of Foreign Investment Information (Ministry of Commerce, State Administration for Market Regulation Order No. [2019], Circular No.2)*; and *Announcement of the Ministry of Commerce on Matters Relating to Reporting of Foreign Investment Information (Ministry of Commerce Announcement [2019], Circular No.62)*. Both the Circulars came into effect – alongside the FIL – from January 1, 2020. Such submission of relevant information by FIEs after incorporation through an online system is not new in China – it has been implemented in some form since 2016. The new foreign investment information reporting mechanism, however, ensures that the reporting is done in a comprehensive and consolidated manner in which duplicate reporting with multiple government agencies can be avoided. Circular No.2 and Circular No.62 provide further clarifications on which types of entities must report information regarding foreign investment; what kind of investment information should be submitted and legal consequences of violating foreign investment information reporting obligations [11]. They divided foreign investors into six different reporting entities i) Foreign direct investors³, ii) Foreign enterprises⁴, iii) Foreign-invested enterprises for reinvestment purposes⁵; iv) Foreign investment enterprises⁶, v) Ordinary enterprises which are set up in mainland China by foreign investment enterprises via reinvestment⁷ and vi) Investors from Hong Kong, Macau and Taiwan, and overseas Chinese. There are four types of information

³ A foreign investor who directly invests in the establishment of a company or partnership enterprise, or purchases the equity interest in a non-foreign investment enterprise (including banking, securities, insurance and other financial industries) in mainland China.

⁴ Foreign enterprises (including territories) that engage in production and operational activities in mainland China & Foreign enterprises (including territories) that set up a

residential representative office which engages in production and operational activities in Mainland China.

⁵ Investment companies, venture capital enterprises and partnership enterprises with investment as their core business which are set up by foreign investors for reinvestment in mainland China.

⁶ including enterprises set up in mainland China by foreign-invested enterprises for reinvestment purposes.

⁷ Excepting foreign-invested enterprises for reinvestment purposes.

reports: Initial Reports, Change Reports, Annual Reports and Dissolution Reports. Different investors only need to submit certain types of reports so that the management process can be simplified (Article 9, 11-14, 33 Circular No.2, Article 1, 4 Circular No.62). For instance, foreign investors who directly invest in the establishment of a company or partnership enterprise, or purchases the equity interest in a non-foreign investment enterprise (including banking, securities, insurance and other financial industries) in mainland China shall submit initial reports only. (Article 9 of Circular No. 2, Article 1 Circular No. 62), while foreign enterprises that engage in production and operational activities in mainland China submit initial reports, change reports and annual reports (Article 1 Circular No. 62).

Longer times for the correction of the violation of the information reporting obligations were also provided. *The timeframe for foreign investment enterprises to submit annual reports is from January 1 to June 30 of each year* (Article 14, Circular No. 2). If a foreign investor or foreign investment enterprise fails to report the investment information as required, there is an added procedure that the reporting entity shall be notified by the relevant commerce departments to make supplementary reports or corrections within 20 working days (Article 19, Circular No. 2). Additionally, the administrative penalty of warning has been removed from the final version. These "lenient" administrative penalty procedures may have taken into account the fact that the foreign investment information reporting system is not a strict pre-approval or filing procedure and it may also be designed to provide a buffer for foreign investors and foreign investment enterprises to adapt to this new system. Furthermore, *according to the Announcement of the Ministry of Commerce, the State Administration for Market Regulation and the State Administration of Foreign Exchange on Carrying out the Annual Report on Foreign Investment Information in 2019*, from July 1, 2020, if there is any failure, error or omission in the annual report, the foreign

investment enterprise shall apply to the relevant commerce department for a supplementary report or correction through the foreign investment information report management system [12].

The information on this system will be shared with MOFCOM and other government agencies to avoid duplicative reporting. This system provides the necessary information for policy making and prevents foreign investors from hiding the identity of the actual ultimate investors to evade requirements or limitations in some industries. In former time, foreign investors accessed Chinese industries in the Negative List by signing agreements with domestic enterprises with licenses for operation in the restricted industries to control and operate the actual business. Such investors may no longer hide the identities of the actual controlling investors.

3.5. Supreme People's Court Interpretation of FIL

On December 26, 2019, the Supreme People's Court of the People's Republic of China issued the Interpretation on Certain Issues Regarding the Application of the FIL, which also took effect on January 1, 2020. The Interpretation provides guidance on questions relating to the effectiveness and enforceability of foreign investment-related agreements, such as shareholder agreements, share transfer agreements, and project contracts that may arise under the new negative list system for administration of foreign investment. With respect to agreements for investments in sectors that are not restricted under the negative list, Chinese courts should not uphold a claim that an agreement is void or invalid because the parties have not completed relevant registration and approval procedures. However, with respect to agreements for investments in sectors that are prohibited by the negative list and agreements that violate the restrictions set out in the negative list, Chinese courts should support a claim that the agreement is invalid [7].

3.6. Notice by the Ministry of Commerce of Issuing the Plan for Development by Utilising Foreign Investment during the “14th Five-Year Plan” (2021-2025) Period

This document which contains general policies was issued on October 12, 2021 by Ministry of Commerce. The new guidelines for the next five years focus on deep open-up market, encouraging foreign investment in modern technologies and measures to cope with the new global circumstance, which can be seen as follow:

- Promote higher-level opening-up: Shorten negative list for foreign investment access: Reduce special management measures for foreign investment access...

- Improve industrial structure of foreign investment: Support investment in advanced manufacturing, strategic emerging industries and modern services; Develop green economy and digital economy; encourage investment in digital transformation, energy conservation and environmental protection, ecology and environment, green services and other industries, and in new infrastructure construction; More foreign investment in modern agriculture; Support investment in consumer-oriented service industries, including medical and health care, elderly and child care, tourism and household services, to increase the supply of quality services; encourage participation in national science and technology programs.

- Promote reinvestments in China: Support investment in key links of artificial intelligence, advanced materials, integrated circuits, biomedicine and other high-end and high-tech industries.

- Improve service mechanisms: Strengthen mechanism against major public emergencies, facilitate cross-border movement of personnel and supplies.

- Enhance overall services for foreign investment: Registration, visa services (Optimise registration, information reporting procedures for foreign-invested firms; Streamline approval, filling process for foreign-funded projects; Ease work permit, residence

permit, visa application for expats), Promote decoupling business licenses and operation permits, and notification- commitment system for business administration streamlining; Pursue “single window” for international investment; Increase cross-provincial interconnectivity in administrative services, e.g. electronic certificates.)

- Specialized services: Encourage legal, accounting, tax and other specialised services [13].

4. New Changes in Chinese New Foreign Investment Policy and Law

The new law has notable new changes:

4.1. New Definitions of “Foreign Investment” and “Foreign-Invested Enterprise”

The FIL for the first time gives a clear and explicit definition on the term of “foreign investment” which is provided in Article 2:

“The Law shall be applicable to the foreign investment within the territory of the People's Republic of China (“the territory of China”). For the purpose of the Law, foreign investment refers to the investment activity directly or indirectly conducted by a foreign natural person, enterprise or other organisation (the “foreign investors”), including the following circumstances:

- i) A foreign investor establishes a foreign-funded enterprise within the territory of China, independently or jointly with any other investor;

- ii) A foreign investor acquires shares, equities, property shares or any other similar rights and interests of an enterprise within the territory of China;

- iii) A foreign investor makes investment to initiate a new project within the territory of China, independently or jointly with any other investor; and

- iv) A foreign investor makes investment in any other way stipulated by laws, administrative regulations or provisions of the State Council.

For the purpose of the Law, a foreign-funded enterprise refers to an enterprise that is incorporated under the Chinese laws within the territory of China and is wholly or partly invested by a foreign investor⁸.

From the definition, it seems that a company in China is called a foreign invested enterprise simply for the reason that there is a foreign investor holding its equity interest. The definition has no mention of where the money underpinning the foreign investment shall come from, so a reasonable interpretation of the definition may be that it is the nationality of the shareholder in a company that dictates whether it is a foreign-invested company or a domestic one without reference to where the capital comes from [14]. According to the FIL, the legal forms and organisational structures of foreign-invested enterprises shall be merged with those of domestic enterprises, which will end the different forms of organisation and framework of domestic and foreign-invested enterprises for the last 40 years [15]. Under the new Law, the organisation form of foreign-invested enterprises shall be regulated by the Company Law and Partnership Enterprise Law. Therefore, a new foreign-invested enterprise will be registered either as a limited liability company, a joint-stock limited company, or a partnership enterprise, without the current types such as wholly foreign-owned, Sino-foreign joint ventures or Sino-foreign cooperation [16]. On the same day on which the new FIL came into force, the Shanghai Market Supervision Administration issued the very first Business License for a Foreign-Invested Enterprise which is established with a Chinese natural person as one of the investors. The license shows that the type of enterprise is "*Limited Liability Company (foreign investment, non-sole proprietorship)*", which means that the concept of "*Sino-foreign*

Joint Venture" and "*Sino-foreign Cooperation*" has officially retired [17].

4.2. Clarify New Contents in Equal Treatment

Those domestic and foreign investors should be treated equally is a principle which was recognised. In the new law, to further promote foreign investment, more specific contents were clarified: the FIL (Article 9) and Implementing Regulations (Article 6) stipulate that foreign investors shall be treated equally with domestic companies regarding access to government funds, land supply, tax exemptions, licensing, project applications and so on. FIEs may comment on new legislation and administrative rules concerning foreign investment (FIL, Article 10), and only published documents may form the basis for the exercise of administrative authority (Implementing Regulations, Article 7). Under the FIL, foreign investors may enjoy preferential policies in certain sectors and regions as designated by the Chinese authorities (Article 14). FIEs may participate in government procurement through fair competition (FIL, Article 16), and must not be discriminated against in such procurement processes with respect to their products manufactured, and services provided, in China (Implementing Regulations, Article 15). Further, the FIL specifically allows FIEs to raise funds through public offerings of equity and debt securities (Article 17). Clearly, such new provisions aim to encourage more foreign investment into China [8].

4.3. Investment Protection:

The FIL clarifies that foreign investors' capital contributions, profit, capital gains, income from asset disposals, royalties from IP rights, lawfully obtained compensation or indemnity amounts, and proceeds from liquidation, may be freely remitted in or out of

⁸ *Regulations on the Implementation of the Law on Foreign Investment* - Article 3: "Other investors referred to in (1)

and (3) of paragraph 2 of Article 2 of the Foreign Investment Law include natural persons in China."

China in RMB or foreign currency (Article 21); the Implementing Regulations disallow any restrictions on the currency, amount, and frequency of such remittances (Article 22). Further, the Implementing Regulations provide for a swift collaborative protection mechanism to facilitate the settlement of IP disputes, and for the protection of the IP rights of foreign investors and FIEs (Article 23). More specifically, both the FIL (Articles 22 and 23) and the Implementing Regulations (Articles 24 and 25) prohibit government officials from forcing foreign investors or FIEs to transfer their technology, and require authorities to take effective measures to protect the trade secrets of foreign investors that they have learned while performing their duties. Finally, local governments must comply with policy commitments made to, and investment agreements entered into with, foreign investors, and shall reasonably compensate those foreign investors if it is necessary to adjust those commitments or agreements due to national or social public interest reasons (FIL, Article 25) [8]. In streamlined administrative procedures for FDI, China introduced new mechanisms to strengthen the procedure for handling complaints from foreign-invested enterprises by broadening the scope of possible grievances [2].

Foreign investors inevitably need to deal with governments at all levels during the investment process. The FIL clearly stipulates that local people's governments at all levels and their relevant departments shall fulfil the policy commitments made to foreign investors and foreign-invested enterprises in accordance with the law and various types of contracts concluded in accordance with the law. Article 27 of the Implementation Regulations further clarifies that "policy commitments" include local people's governments at all levels and their relevant departments, within their legal authority, regarding the support policies and benefits that foreign investors and foreign-invested enterprises can enjoy in written commitments on preferential treatment and convenience. Article 28 stipulates that relevant government departments shall not breach the contract on the

grounds of adjustment of administrative divisions, change of government, adjustment of institutions or functions, and replacement of relevant persons in charge, etc.; if the national interest or the public interest needs to change policy commitments or contractual agreements, they should be carried out in accordance with statutory authority and procedures, and if changes are detrimental to foreign investors, they need to receive compensation. This will undoubtedly provide a clearer legal basis for the implementation of agreements signed with the government in the process of foreign investment. It is worth noting that Article 41 of the Implementation Regulations has increased the relevant legal responsibilities of relevant government departments and their staff in the field of foreign investment, including in particular the failure to fulfil the policy commitments made to foreign investors and foreign-invested enterprises in accordance with the law as well as various contracts concluded in accordance with the law, policy commitments are made beyond statutory authority, or the content of policy commitments does not comply with laws and regulations. This means that the government will be more cautious when making foreign investment commitments in the future. On December 10, 2019, the Supreme People's Court issued the "Provisions on Several Issues Concerning the Trial of Administrative Agreement Cases". This judicial interpretation uses cases to urge the administrative agency to fulfil the policy commitments made to the society and related parties in accordance with the law, and to improve the enforceability of various contracts signed by the administrative agency and the investment subject in judicial practice. However, neither the Implementation Regulations nor the judicial interpretations provide a clear definition of what the government means "in accordance with the law" or commitments made within "statutory powers." The legality of government commitments or government agreements still needs to be paid attention to in practice. This also reminds investors that they should strengthen legality checks when negotiating with the

government to ensure the enforceability of government commitments or government agreements [18].

4.3. FDI liberalisation

China expanded by 10% the list of industries in which foreign investment is encouraged [2] and amended its national negative list and its negative list for free trade zones, lifting several restrictions on FDI in industries such as financial services, manufacturing, agriculture, radioactive mineral smelting and the pharmaceutical industry. Furthermore, China released the Special Administrative Measures for the Access of Foreign Investment in the Hainan Free Trade Port, enumerating industries and sectors that are restricted or prohibited for foreign investment in Hainan. The list is shorter than the national negative list and the negative list for free trade zones. In March 2021, China abolished the restrictions on foreign shareholding in joint-venture life insurance companies [2].

4.4. Foreign Exchange of Foreign Investors

Article 21 of the FIL says: “A foreign investor may, in accordance with the law, freely transfer inward and outward its contributions, profits, capital gains, income from asset disposal, royalties of intellectual property rights, lawfully obtained compensation or indemnity, income from liquidation and so on within the territory of China in CNY or a foreign currency.”

Regulations on the Implementation of the Law on Foreign Investment - Article 22: “Foreign investors' capital contributions, profits, capital gains, income from asset disposal, intellectual property right royalties, compensation or indemnification obtained in accordance with law, liquidation income, and so forth, which are made or obtained in mainland China, may be freely transferred into or out of mainland China in RMB or foreign exchange in accordance with law; and the currency, amounts, and frequency of import or export, must not be restricted by any unit or individual”. The salary and other lawful income of foreign national

staff of foreign-invested enterprises and the staff of Hongkong, Macau, Taiwan may be freely remitted.

Moving money in and out of China has been a focal concern of foreign investors and foreigners having an interest in China. This Law seems to reassure foreign investors that their money has the way back home after it is invested in China. While this is a promising hope, the actual way leading to the fulfilment of the hope is still muddy, even against the backdrop that China has made efforts to pave the way for capital account convertibility. The fear of free flow of capital account of foreign exchanges is always out there for China government, which could deplete the blood of China's economy if not well put under control [17].

4.5. Government's control

The FIL refers (Article 35) to the requirement for national security review of certain foreign investments in sensitive industries and sectors, a mechanism that has been in place since 2006 although not frequently invoked [13]. China's new Regulation on the Unreliable Entity List establishes a framework of restrictions or penalties on foreign entities deemed to endanger China's national sovereignty, security or development interests. Furthermore, the country strengthened its national security review of foreign investment by mandating pre-closing filings and authorising the Government to review foreign investments in various sectors, including military, agriculture, energy, transportation and information technology [2].

In addition, many analysts are unsure whether the legislation will benefit foreign investors looking to do business in China. This is partly because the new FIL is too general in nature and leaves many details to be addressed in other regulations. The lack of details could cause loopholes to emerge that may bring new difficulties for foreign business operating in China. For example, the FIL forbids forced technology transfer by “administrative means,” but does not define what “administrative means”

are. Moreover, in practice, the government may apply non-administrative measures to acquire technology from FIEs. In addition to concerns over the FIL's vague wording, some observers believe that new provisions may in fact empower the government to intervene in investments in the event of a dispute with a foreign country. For example, according to the FIL, foreign investments could be expropriated under "special circumstances" and "for the public interest" and are subject to broad national security reviews. This may give the government a statutory basis to retaliate against a foreign company in the event of an international dispute [19].

Besides, outflows from developing Asia fell by 19% as outflows from China declined for the third consecutive year. Chinese M&A purchases abroad decreased to the lowest level of the past ten years. The decrease was attributed to continued restrictions on outward investment, geopolitical tensions and a challenging global trade and investment policy environment [1].

4.6. Foreign Investment Information Reporting System

The FIL - Article 34: "The State establishes a system for foreign investment information reporting. Foreign investors or foreign-invested enterprises shall submit investment information to the competent commerce departments through the enterprise registration system⁹ and the

enterprise credit information publicity system¹⁰". *Regulations on the Implementation of the Law on Foreign Investment* - Article 38: "Foreign investors or foreign-invested enterprises shall submit investment information to the competent departments for commerce through the enterprise registration system and the enterprise credit information publicity system". *The Measures for Foreign Investment Information Reporting* (35 articles in total, date of effect: Jan 1, 2020) comprises of six chapters, namely (1) General Principles; (2) Reporting Entities, Contents and Methods; (3) Information Sharing, Publication and Correction; (4) Supervision and Administration; (5) Legal Liabilities and (6) Supplementary Provisions. In addition to FIL, Regulations and Measures, the Ministry of Commerce, the State Administration for Market Regulation and other relevant departments have issued a series of supporting documents, which jointly form the new foreign investment information reporting system. It further details and clarifies the rules regarding the system of foreign investment information reporting in *FIL* and *the Regulations* and regulates the information reporting into four aspects: reporting, sharing, supervision and penalties. In addition, there are a number of other related documents¹¹ that have just been issued [19].

According to the Measures, there are four types of information reports: Initial Reports, Change Reports, Annual

⁹ Enterprise registration system (<http://wsdj.samr.gov.cn/saicmcdjweb/>) authoritatively provides the agency's online pre-approval of enterprise names, name change approval, name extension approval, name cancellation, name adjustment shareholders. Enterprises are obliged to register and, after registration, these enterprises are also required to report changes in business activities and occasional closures in their activities.

¹⁰ In 2014, China established the National Enterprise Credit Information Publicity System as an important measure to protect enterprises' creditors. The website domain of the China National Enterprise Credit Information Publicity System is: <http://www.gsxt.gov.cn/index.html>. You can search for any Chinese company's record in this system with the company's registered name in the Chinese language or Unified Social Credit Code [21].

¹¹ (1) "Announcement on Matters Relating to Foreign Investment Information Reporting" (Announcement No. 62 of the Ministry of Commerce), (2) "Notice on the Proper Handling of the Work of the Reform of "combining multiple reports into one integrated report" for Annual Reports" by the State Administration for Market Regulation, the Ministry of Commerce and the State Administration of Foreign Exchange (date of effect: Dec 16, 2019); (3) "Announcement on the Submission of Annual Reports for 2019 Foreign Investment Information Reporting" by the Ministry of Commerce, the State Administration for Market Regulation and the State Administration of Foreign Exchange (date of effect: Jan 1, 2020); (4) "Notice on Implementing the Foreign Investment Law and the Proper Handling of the Work of the Registration of Foreign-invested Enterprises" by State Administration for Market (date of effect: Jan 1, 2020).

Reports and Dissolution Reports. Article 2 of the Measures provides that “if foreign investors carry out investment activities in mainland China directly or indirectly, foreign investors or foreign investment enterprises shall submit investment information to the relevant commerce departments in accordance with these measures”, according to the Measures and the Announcement No.62 on Matters Relating to Foreign Investment Information Reporting of the Ministry of Commerce.

In particular, companies do not need to submit additional information such as cancellation and domestic investment (including multi-level investment) that can be obtained through departmental information sharing. The Ministry of Commerce also issued an announcement on foreign investment information reporting matters on the same day, clarifying relevant operational details and report content. Information reports that overlap with the current registration information submitted by foreign-invested enterprises to the market supervision and management department will be collected through data sharing, without the need for foreign investors or foreign-invested enterprises to fill in repeatedly, and the annual report will adopt the "multiple reporting in one" format. In this way, on the basis of the existing annual report information submitted to the market supervision department, the annual report items of the competent commercial department and the foreign exchange management department are added. These detailed operation rules will help solve the problem of duplication of information and effectively reduce the burden on foreign investors and foreign-invested enterprises [18].

The foreign investment information reporting system is an important part of China's latest foreign investment legal system, and on the one hand, greatly simplifies procedures and lessens the time constraints for foreign investment to enter China, but on the other hand, it raises the standards for foreign investors and foreign investment enterprises for information disclosure with regard to their investment, production and operational activities in China,

particularly in terms of punctuality, authenticity, accuracy and completeness; the failing of which will lead to severe risks both in terms of administrative penalties and corporate credit worthiness [20].

4.7. Legal Liabilities

If foreign investors invest in prohibited industries or fail to comply with investment access restrictions, they will be required to divest and/or rectify their non-compliance, and may face other sanctions under the FIL and other PRC laws. The FIL also imposes more stringent requirements on government authorities, mandating fair, transparent, effective treatment and facilitation for foreign investors; government authorities and personnel may face legal liability for breaching certain provisions of the FIL and Implementing Regulations. On the other hand, the FIL allows for certain counter-measures to be imposed in response to prohibitive or restrictive rules against China from other countries [8]. Penalties for Violating Information Reporting Obligations: According to the Measures, the reporting entity shall report investment information in a timely, authentic, accurate and complete manner, without any false or misleading information or omission of important information. At the same time, the reporting entity also has an obligation to supplement and correct the report where necessary. Meanwhile, the relevant commerce department may carry out supervision and inspection measures based on the complaints and suggestions of the relevant departments or authorities [20].

5. Experiences for Vietnam's Law-Making Process

In comparison with China, Vietnam had an earlier consolidation of regulations on domestic and foreign investment. The Foreign Investment Law and its implementing legal documents were invalid after the 2005 Enterprise Law and Investment Law were issued. On January 1,

2021, the new Investment Law 2020 officially took effect. Vietnamese law has a great similarity in regulatory structure compared to Chinese law with investment-prohibiting industries, investment-restricting industries and investment-promoting industries. The way to understand foreign investment is also open-minded.

The success of attracting investment in China depends on many factors. However, China also has some regulations that Vietnam can learn to develop its policy.

Firstly, in terms of policy, it is necessary to clearly define orientations as a guideline for attracting foreign investment. On August, 2019, the Central Committee was issued Resolution No. 50-NQ/TW on providing orientations for completing institutions and policies, and improving the quality and efficiency of foreign investment cooperation by 2030. The overall goal is completing institutions and policies on foreign investment cooperation with high competitiveness and international integration; meeting the requirements of innovating the growth model, restructuring the economy, protecting the environment, solving social problems well, and improving the productivity, quality, efficiency and competitiveness of the economy. Directing points of view are building and perfecting institutions and policies, actively attracting and selectively cooperating with foreign investors, and multilateralisation, diversification of partners and investment forms. Specific goals focus on capital, the proportion of enterprises aiming for high technology, localisation rate, proportion of trained workers. This 10-year orientation is a extremely long-term plan, and the content is quite general.

China issues the plan for foreign investment for a shorter time “Five-Year Plan” (2021-2025) with very detailed content. It doesn’t mean that a five-year plan is better than a ten-year plan, but a generic 10-year plan is obviously difficult to implement. China’s “Five-Year Plan” (2021-2025) for foreign investment focus on deep open-up market and measures to cope with the new global circumstance with specific issues that need to be done, such as: Shorten negative

list for foreign investment access; Develop green economy and digital economy; encourage investment in digital transformation, energy conservation and environmental protection; Support investment in medical and health care, elderly and child care, tourism and household services, in key links of artificial intelligence, advanced materials, integrated circuits, biomedicine; Strengthen mechanism against major public emergencies, facilitate cross-border movement of personnel and supplies; Enhance overall services for foreign investment like registration, visa services... These goals are apparent and easy to define responsibilities for state agencies. It takes effortless to imagine how China’s picture of attracting foreign investment will be in the next five years. This also helps foreign investors know which areas to invest in China are easier to be approved and facilitated. Building clear directions for foreign investment is essential so that Vietnam can make the best use of the benefits that foreign investors bring.

Secondly, the new policies and laws of China for foreign investment reveal the involvement of the entire Chinese political system (legislative, executive and judicial): National People’s Congress, the State Council, the National Development and Reform Commission, Ministry of Commerce, State Administration for Market Regulation, Supreme People’s Court (see part 3). That Deng Xiaoping’s way of ‘preparing nest for phoenix to lay eggs’ brought great progress to China in the 1980s has been continued to be inherited and maintained. Attracting foreign investment creates a great growth engine and more jobs for China’s billion-people economy, therefore, this is certainly an area that China needs to pay special attention to promote. In Vietnam, apart from the foreign investment law, this responsibility basically belongs to the Government, which is in charge of so many areas. This inevitably affects the attention to foreign investment, which can be seen from the number of legal documents regulating this sector. Foreign investment is not simply a content of state management, but it contains many contents of state management. In foreign

investment, there are problems with stability, there are problems that need flexible and adaptive adjustment. Vietnam can consider China's experience in segmenting foreign investment issues and assigning different agencies to be flexible in promulgating regulations. For instance, in accordance with trial practices, Chinese *Supreme People's Court issued the Interpretation on Several Issues concerning the Application of the Foreign Investment Law* in hearing cases of investment contract disputes. Accordingly, the term "investment contracts" was clarified as "the relevant agreements arising from direct or indirect investment by foreign investors such as foreign natural persons, enterprises, and other organisations in China, including contracts for forming a foreign-funded enterprise, contracts on the transfer of shares, equity transfer contracts, contracts on the transfer of property shares or other similar rights and interests, contracts for new construction projects, and other agreements. This Interpretation shall apply to contract disputes arising from the relevant rights and interests obtained by foreign investors in the forms of gift, property division, combination and division of enterprises, among others" (Article 1). This document provides guidance for five different cases of foreign investment that when a complaint occurs, the authorised courts shall (not) sustain such claim¹². Synthesising problems in the practice of settling foreign investment disputes to issue specific guidelines is something that Vietnam has not been able to do. These summaries and guidelines will be of great help to foreign investors because they are always concerned about whether and how they will be protected in case of legal disputes.

Thirdly, about the flexibility in issuing documents and the speed of market opening. Vietnam has the List of sectors and trades

banned from business investment and the List of sectors and trades subject to conditional business investment (Category A & B – Appendix I Decree 31/2021/NĐ-CP of the Government), which are similar in properties to the Negative Lists of China. China has the Encouraged Catalogue for foreign investment, and Vietnam also has the List of sectors entitled to investment incentives (Appendix II Decree 31/2021/NĐ-CP). In China, the National Development and Reform Commission and the Ministry of Commerce issue these documents separately and update them almost every year by cutting down the Negative Lists and adding to the Encouraged Catalogue. Therefore, the change in the openness of Chinese market was carried out quite quickly. In Vietnam, these lists are issued by the Government, due to factors related to the decree promulgation process, they are not flexibly updated. For instance, the 2021 List of sectors entitled to investment incentives (Decree 31/2021/NĐ-CP) replaced the 2015's list (Decree 118/2015/NĐ-CP), which had a minor modification in 2020 (Decree 37/2020/NĐ-CP) - a list updated after a half of a decade shows the inflexibility and lack of timeliness in policy making. During this time, Vietnam joined EVFTA, TPP, CPTPP but regulations have not been updated. As a result, many regulations are still not compatible with international agreements after many years of joining, even with commitments in WTO. Legal services, accounting services, architectural services... are examples¹³. Regulations of a decree may have a long life, but the lists need to be adjusted to suit country's conditions in each period, global circumstance as well as international commitments in which Vietnam participates; for that reason, Vietnam could consider issuing these lists independently of the decree for easier adjustment.

¹² Full text: <https://www.court.gov.cn/zixun-xiangqing-212921.html> (Chinese), http://english.court.gov.cn/2021-10/19/content_37548524.htm (English)

¹³ A Summary of Comparing Vietnamese Law with WTO, EVFTA and TPP commitments on opening services for

foreign investment can be found in WTO Center: <https://trungtamwto.vn/file/17979/6.%20161129%20Ra%20soat%20Mo%20cua%20Dich%20vu%20-%20Tom%20tat.pdf>

Fourthly, about Foreign Investment Information Reporting System.

Investment report is an important job of foreign agencies and organisations investing in Vietnam. Foreign investors must make quarterly and annual reports on the organisation's business situation (the 2020 Investment Law – Article 72). Investors shall do reports in writing and online at <https://fdi.gov.vn/pages/trangchu.aspx> (National Information System On Investment). The investors who do not make reports will be fined. There are two types of reports: Quarterly Reports and Annual Reports.

Meanwhile, China creates four types of information reports (Initial Reports, Change Reports, Annual Reports, Dissolution Reports) and divides foreign investors into different groups, each group submits certain types of reports which are based on types of legal facts.

It can be seen that Vietnam and China have the different approaches in building the system of reports. Two types of reports of Vietnam focus on the time factor (Quarter & Year), which will form an administrative procedure which is too often with 5 reports per year. China has more types of reports than Vietnam (4 reports), but it does not put pressure of reporting frequency on investors. The report classification of China is more specialised and generally based on legal facts, periodic reports only need to be made annually. This is a significant simplification of administrative procedures that Vietnam can research to follow.

6. Conclusion

It can be seen that China has made major changes in its legal policy on foreign investment with a series of new legal documents. The governing trend of Chinese law is unity, equality, promotion, and control. The measures to achieve these goals have been clarified by state agencies. The issue of unity and equality has been well developed by Vietnamese investment law, even compared to China, Vietnam has done it earlier with a higher degree

of consistency. However, in order to promote and control foreign investment effectively, Vietnam needs to add new legal regulations as well as consider adjusting the existing obstacles in administrative procedures to become an attractive and safe destination for investors in the world.

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