

SECURING LIBERALIZATION: CHINA’S NEW FOREIGN INVESTMENT LAW

NICOLAS F. RUNNELS*

I.	INTRODUCTION	38
II.	THE HISTORY OF FOREIGN INVESTMENT IN CHINA.....	40
III.	THE NEW FOREIGN INVESTMENT LAW	44
IV.	THE NATIONAL SECURITY REVIEW & RETALIATION PROVISIONS	46
V.	CONCLUSION.....	49

I. INTRODUCTION

Since 1978, China has formally pursued a policy of “reform and opening-up” in an effort to attract foreign investment into its economy.¹ Over the past forty years, the resulting reforms have gradually liberalized the nation’s foreign investment regime. Most recently, in a landmark step, China adopted the new Foreign Investment Law (FIL)² and the Regulations on Implementation of the Foreign Investment Law (Implementing Regulations),³ both of

* This online annotation was written in the course of the author’s tenure as a Staff Editor on the *N.Y.U. Journal of International Law & Politics*.

1. See XIANFA art. 36, § 2 (2017) (China) (reaffirming China’s constitutional commitment to Deng Xiaoping’s theory of “reform and opening up”); Joshua Eisenman, *What We Really Know About China’s Reform and Opening Up*, WASH. POST (Nov. 15, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/11/15/what-we-really-know-about-chinas-reform-and-opening-up/> [https://perma.cc/HR5H-YQQ7] (“China is . . . commemorating four decades since it turned away from Mao Zedong Thought and toward Reform and Opening Up . . .”).

2. Zhonghua Renmin Gongheguo Waishang Touzi Fa (中华人民共和国外商投资法) [Foreign Investment Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2019, effective Jan. 1, 2020), translated in *Foreign Investment Law of the People’s Republic of China*, U.S.-CHINA BUS. COUNCIL, https://www.uschina.org/sites/default/files/foreign_investment_law_of_the_peoples_republic_of_china_-_unofficial_translation.pdf [https://perma.cc/MM5P-Q75G] [hereinafter FIL].

3. Zhonghua Renmin Gongheguo Waishang Touzi Fa Shishi Tiaoli (中华人民共和国外商投资法实施条例) [Regulations for the Implementation of the Foreign Investment Law of the People’s Republic of China] (promulgated by the

which came into effect January 1, 2020. With the goal of “actively promot[ing] foreign investment,”⁴ the new regime considerably expands foreign investment protections, lifts certain foreign ownership limitations, and relaxes regulatory requirements for foreign investors in China.⁵

Notably, China has remained committed to implementing the FIL as a means for further liberalization despite the COVID-19 pandemic.⁶ While numerous jurisdictions have tightened their foreign investment regimes in light of the crisis, China is proving to be a rare exception.⁷ Indeed, the Chinese government continued to relax limitations on inbound foreign investment and promote special measures for facilitating inflow well into 2020.⁸ Nevertheless, the

Standing Comm. Nat'l People's Cong., Dec. 31, 2019), *translated in Regulation on the Implementation of the Foreign Investment Law of the People's Republic of China*, SHANGHAI MUN. PEOPLE'S GOV., http://shanghai.gov.cn/nw48709/20200826/0001-48709_127901.html [<https://perma.cc/3R3T-MMJZ>] [hereinafter Implementing Regulations].

4. FIL, *supra* note 2, art. 1

5. See Mo Zhang, *Change of Regulatory Scheme: China's New Foreign Investment Law and Reshaped Legal Landscape*, 37 PAC. BASIN L.J. 179 (2020) (analyzing the FIL's alterations to the Chinese foreign investment regime).

6. Shangwu Bu Guanyu Yingdui Yiqing Jinyibu Gaige Kaifang Zuo Hao Wen Waizi Gongzuo De Tongzhi (商务部关于应对疫情进一步改革开放做好稳外资工作的通知) [Notice of the Ministry of Commerce on Further Reform and Opening Up in Response to the Epidemic] (promulgated by the Ministry of Com. [MOFCOM], Apr. 1, 2020), <http://www.mofcom.gov.cn/article/b/f/202004/20200402951657.shtml> [<https://perma.cc/8AM7-BVXZ>] (establishing the guiding principles of “fully supporting foreign-invested enterprises to restore normal production and operation,” “promoting opening-up to a higher level,” and “continuing to optimize the environment for foreign investment.”)

7. See Neil Cunningham et al., *Global Foreign Investment Control Regimes: Changes in Light of COVID-19*, ASHURST (May 21, 2020), <https://www.ashurst.com/en/news-and-insights/legal-updates/global-foreign-investment-control-regimes---changes-in-light-of-covid-19/> [<https://perma.cc/K9U8-ZKAW>] (finding that Australia, Canada, France, Germany, India, Italy, Japan, Poland, Spain, and the United States, as well as the European Union, have issued restrictive reforms to their inbound investment regimes in light of COVID-19).

8. Notice on Actively Strengthening Services to Foreign Enterprises and Attracting Investment During the COVID-19 Epidemic (promulgated by MOFCOM, Feb. 7, 2020) (urging local governments to provide special assistance to foreign enterprises) (China); Notice on Stabilizing Foreign Trade and Foreign Investment and Promoting Consumption to Fight the COVID-19 Epidemic (promulgated by MOFCOM, Feb. 18, 2020) (China) (encouraging additional measures to support foreign investment enterprises such as expedited licensing approvals); see also Zoey Zhang, *China's Support Policies for Businesses Under COVID-19: A Comprehensive List*, CHINA BRIEFING (July 3, 2020), <https://www.china->

FIL's codification of a significantly expanded national security review as well as a formal legal basis for retaliation against other jurisdictions' discriminatory measures may limit China's capital inflows in the future.⁹ Ultimately, whether China's latest reforms will increase foreign investment may hinge upon the government's interpretation and implementation of these provisions.

This annotation will examine China's new foreign investment regime, the ambiguities that remain in the novel framework, and the potential impacts on foreign investors in light of the COVID-19 pandemic. Part II provides a brief history of foreign investment in China leading to the FIL's adoption. Part III discusses the FIL's scope and the regulatory developments it introduces. Part IV analyzes the FIL's national security review and retaliation provisions by contextualizing them with global trends. Part V concludes.

II. THE HISTORY OF FOREIGN INVESTMENT IN CHINA

Prior to 1978, China had a centrally planned socialist economy largely closed to foreign investors.¹⁰ Following the death of Mao Zedong, the nation formally adopted Deng Xiaoping Theory, which aimed to encourage capital inflows through economic "reform and opening-up."¹¹ China's gradual liberalization of its inbound foreign

briefing.com/news/china-covid-19-policy-tracker-benefiting-business-enterprises-comprehensive-updated-list/ [https://perma.cc/WT46-Z458] (listing the local and national policies China has announced to support businesses during the COVID pandemic).

9. *Compare* ORG. ECON. COOP. & DEV., CURRENT TRENDS IN INVESTMENT POLICIES RELATED TO NATIONAL SECURITY AND PUBLIC ORDER 7 (Nov. 2018), <http://www.oecd.org/daf/inv/investment-policy/Current-trends-in-OECD-NatSec-policies.pdf> [https://perma.cc/5Z2C-7JUC] (stating that national security mechanisms may reduce the attractiveness and openness of a country for inbound foreign investment), *with* JAMES K. JACKSON, CONG. RES. SERV., FOREIGN INVESTMENT AND NATIONAL SECURITY: ECONOMIC CONSIDERATIONS 22 (Apr. 4, 2013), <https://fas.org/sgp/crs/natsec/RL34561.pdf> [https://perma.cc/2DUJ-MMKM] (arguing that there is no exact way to measure the economic costs of "national policies that attempt to direct or restrict foreign investment for national security concerns.").

10. *See generally* MCKINSEY GLOBAL INST., CHINA AND THE WORLD: INSIDE THE DYNAMICS OF A CHANGING RELATIONSHIP 25 (2019), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/china/china%20and%20the%20world%20inside%20the%20dynamics%20of%20a%20changing%20relationship/mgi-china-and-the-world-full-report-feb-2020-en.pdf> [https://perma.cc/GY62-RYZG] (providing a history of China's opening-up to foreign investors since 1978).

11. Marius Stucki, China's New Foreign Investment Law—With a Special Note

investment regime over the past four decades has had relative success: Since the first foreign investment firm entered China in 1979,¹² the nation's annual capital inflows have surged from \$920 million in 1983 to \$138.3 billion in 2019.¹³ Today, the Chinese economy is among the top global recipients of foreign investment with over 960,000 related enterprises operating within its jurisdiction.¹⁴

Prior to the FIL's adoption, foreign investors in China were required to operate through statutorily defined foreign invested enterprises (FIEs).¹⁵ Unlike domestic entities, FIEs were required to organize as either equity joint ventures (EJV), cooperative joint ventures (CJV), or wholly foreign-owned enterprises (WFOE).¹⁶ In turn, each form of FIE was governed by separate sets of law: EJVs by the Sino-Foreign Equity Joint Ventures Law,¹⁷ CJVs by the Sino-Foreign Cooperative Joint Ventures Law,¹⁸ and WFOEs by the Wholly Foreign-Owned Enterprises Law.¹⁹ This tripart regime

on Swiss-Chinese Investment 2 (Jan. 6, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3503897 [<https://perma.cc/46R7-YR8R>].

12. Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 4 (2006).

13. *Foreign Investment Thriving in China*, MOFCOM (Sept. 19, 2019) (China), <http://us2.mofcom.gov.cn/article/chinanews/201910/20191002904211.shtml> [<https://perma.cc/7329-VMWP>].

14. *2019 Investment Climate Statements: China*, U.S. DEPT STATE (2019), <https://www.state.gov/reports/2019-investment-climate-statements/china/> [<https://perma.cc/9AQB-KL37>]; MCKINSEY GLOBAL INST., *supra* note 10, at 109.

15. Meichen Lu, *The New Chinese Foreign Investment Law and Its Implication on Foreign Investors*, 38 NW. J. INT'L L. & BUS. 285, 287–88 (2018).

16. James Chen, *Foreign Invested Enterprise (FIE)*, INVESTOPEDIA (Nov. 9, 2020), <https://www.investopedia.com/terms/f/fie.asp> [<https://perma.cc/5E7R-K8EW>].

17. Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa (中华人民共和国中外合资经营企业法) [Sino-Foreign Equity Joint Ventures Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong. July 1, 1979, amended Mar. 15, 2001), <http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200301/20030100062855.shtml> [<https://perma.cc/Z3AQ-TEYU>] [hereinafter EJV Law].

18. Zhonghua Renmin Gongheguo Zhongwai Hezuo Jingying Qiye Fa (中华人民共和国中外合作经营企业法), [Sino-Foreign Cooperative Joint Ventures Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 13, 1988), <http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200301/20030100065891.shtml> [<https://perma.cc/EH2J-UTGW>] [hereinafter CJV Law].

19. Zhonghua Renmin Gongheguo Waizi Qiye Fa (中华人民共和国外资企业法) [Wholly Foreign-Owned Enterprise Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1968, amended

imposed stringent foreign ownership limits on FIEs, required universal government approval for their establishment, and effectively limited the scope of their operations in the mainland.²⁰

In addition, FIEs in China have been subject to the government's firm market access control measures. Prior to 2016, these measures were implemented through the Ministry of Commerce's Catalogue for the Industrial Guidance of Foreign Investments (MOFCOM Catalogue), which maintained a list of domestic industries in which foreign investment may be strictly limited or outright prohibited.²¹ The MOFCOM Catalogue framework subjected every FIE investment to extensive government review and approval processes, including anti-trust and national security reviews, regardless of the applicable industry.²² If approved, their business activities were strictly limited to the scope of their business licenses. In 2016, the MOFCOM Catalogue was replaced by the Special Administrative Measures for the Access to Foreign Investment (Negative List), which removed the universal review and approval processes.²³ Under the Negative List framework, foreign investors are afforded the same market access as domestic entities, unless the particular industry is restricted or prohibited for reasons of national security or public welfare. Though the Negative List has

Oct. 31, 2000), <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200301/20030100062858.html> [https://perma.cc/Y8WU-GG3G].

20. See, e.g., EJV Law, *supra* note 17, art. 4 (requiring EJVs to submit their articles of association to the government for examination and approval for establishment); CVJ Law, *supra* note 18, art. 5 (requiring CJVs to secure approval from the government for establishment); see also Keith Bradsher, *China Eases Limits on Foreign Stakes in Financial Firms*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/business/china-foreign-investment-limits.html> [https://perma.cc/CW38-FPGQ] (noting that foreign investors' ownership stakes in EJVs were limited to twenty-five percent for large, publicly traded securities firms, forty-nine percent for other related businesses, fifty percent for insurance companies, and twenty-five percent for banks).

21. *Catalogue for the Guidance of Foreign Investment Industries*, MOFCOM (Dec. 1, 2004) (China), <http://english.mofcom.gov.cn/aarticle/policyrelease/gazette/200505/20050500093692.html> [https://perma.cc/P8ZZ-JEQV].

22. See generally Peter J. Wang & Yizhe Zhang, *China's New National Security Review Will Examine Foreign Investment in Chinese Companies*, JONES DAY (Feb. 2011), <https://www.jonesday.com/en/insights/2011/02/chinas-new-national-security-review-will-examine-foreign-investment-in-chinese-companies> [https://perma.cc/A2XL-2XDE] (describing required national security and anti-monopoly review procedures for foreign investors).

23. Lu, *supra* note 15, at 287.

been significantly shortened in recent years, it previously restricted foreign investment in sectors such as securities, infrastructure, legal services, energy and manufacturing, and outright prohibited foreign investment in sectors such as transportation, media and biomedicine.²⁴

Despite these reforms, foreign investors have widely criticized China's foreign investment regime. Particular concerns have arisen over unfair transfer of technology, barriers to market access, non-transparent administrative procedures, difficulty in enforcing laws or contractual agreements, preferential access for Chinese firms to subsidies and licenses, and preferential treatment of Chinese firms and state-owned enterprises, particularly in government procurement.²⁵ To alleviate these concerns and further encourage the inflow of foreign investment, China initiated largescale reforms to its regulatory regime in 2015 to establish equivalent, "stable, transparent and predictable" regulations and laws for domestic and foreign investment.²⁶ To this end, MOFCOM issued a preliminary draft of the FIL in 2015 and solicited public comments.²⁷ After publishing a

24. See *China's 2020 Negative List Shortened Again*, STATE COUNCIL CHINA (July 20, 2020), http://english.www.gov.cn/news/videos/202007/20/content_WS5f14f200c6d00bd0989c63be.html [https://perma.cc/F2FF-RFM8] (finding that, when compared to the 2019 Negative List, the 2020 Negative List reduced the number of restrictive and prohibitive measures by seventeen percent and removed ownership caps on securities, fund management, futures, commercial vehicle manufacturing and life insurance).

25. See, e.g., EUR. CHAMBER COM. CHINA, EUROPEAN BUSINESS IN CHINA: 2020/2021 22 (Sept. 24, 2019), http://www.europeanchamber.com.cn/en/publications-archive/864/_European_Business_in_China_Position_Paper_2020_2021 [https://perma.cc/EE6A-9U42] ("[S]erious issues remain[] in China's economy, including state-owned enterprise (SOE) domination, unfair transfer of technology, and a burdensome regulatory environment, among others."); *2020 Investment Climate Statements: China*, U.S. DEP'T STATE (2020), <https://www.state.gov/reports/2020-investment-climate-statements/china/> [https://perma.cc/L6KH-2N48] (noting that remaining obstacles to foreign investment in China include ownership caps, unfair transfer of technology, preferential treatment of domestic and state owned enterprises, and other continued restrictions).

26. Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform ¶ 24 (promulgated by Cent. Comm. Communist Party China, Jan. 16, 2014), http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602_7.htm [https://perma.cc/K2B]-2CMU].

27. *Public Solicitation of Opinions on the Draft of the Foreign Investment Law*, MOFCOM (Jan. 19, 2015) (China), <http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml> [https://perma.cc/524P-TGUB].

second draft, the final text of the FIL was adopted by the National People's Congress on March 15, 2019, and its Implementing Regulations were adopted on December 31, 2019.²⁸

III. THE NEW FOREIGN INVESTMENT LAW

The FIL has the express objectives of (i) expanding China's opening up, (ii) encouraging foreign investment, (iii) protecting the legal rights and interests of foreign investors, (iv) regulating the administration of foreign investment, (v) forming of a new pattern of opening up, and (vi) promoting the sound development of the socialist market economy.²⁹ To achieve these ends, the FIL and its Implementing Regulations replace the stringent limitations of the tripart regime and instead subjects FIEs to the same statutory requirements as domestic enterprises (subject to the FIL's provisions and the Negative List's continued restrictions).³⁰

The FIL applies to all foreign investment, broadly defined as the "investment activities of foreign natural persons, enterprises or other organizations . . . directly or indirectly in China."³¹ Article 2 specifically provides that this definition encompasses foreign investors who (i) form foreign-invested enterprises in China, whether jointly or alone, (ii) obtain stocks, shares, property shares or other similar forms of equity, rights, or interests in China, (iii) invest in new projects in China, whether jointly or alone; or (iv) invest in other way prescribed by law.³²

The FIL affords foreign investors significantly expanded protections when compared to the prior regime.³³ Significantly, Article 4 extends national treatment to all foreign investors, including those already in the country, in all sectors (provided that market access is neither restricted nor prohibited by the Negative List.)³⁴

28. Both the FIL and its Implementing Regulations came into effect on January 1, 2020. FIL, *supra* note 2; Implementing Regulations, *supra* note 3.

29. FIL, *supra* note 2, art. 1.

30. *Id.* arts. 4, 28, 31, 42.

31. *Id.* art. 2. The EJV Law further requires that foreign investors contribute at least twenty-five percent of an EJV's registered capital. EJV Law, *supra* note 17, art. 4.

32. FIL, *supra* note 2, art. 2.

33. See Lucy Lu et al, *China's Foreign Investment Law: Are You Ready for It?*, MORGAN FOERSTER (Jan. 3, 2020), <https://www.mofo.com/resources/insights/200102-chinas-investment-foreign-law.html> [https://perma.cc/UD86-SCFH] (finding the FIL provides expanded protections and greater flexibility for foreign investors in China).

34. FIL, *supra* note 2, art. 4.

Similarly, Article 16 mandates equal treatment of foreign investment in government procurement.³⁵ Expropriation of foreign investment is prohibited under Article 20, with an exemption for extraordinary circumstances authorized by law or necessary for the public interest.³⁶ The FIL prohibits the forced transfer of technology or disclosure of business secrets,³⁷ including by administrative agencies.³⁸ Local governments are required under Article 25 to honor and enforce foreign investors contracts,³⁹ and Article 26 establishes a complaint and settlement mechanism for foreign investors to challenging the administrative acts of government agencies.⁴⁰

In addition, the FIL establishes certain restrictions on foreign investment. For instance, Article 4 formally codifies the Negative List as national law and provides that it will continue to restrict market access.⁴¹ Thus, foreign investors will continue to be denied market access if their industry is listed as prohibited,⁴² and failure to comply will result in criminal liability.⁴³ Article 34 mandates that all foreign investors and foreign investment enterprises submit “investment information” to a newly established “foreign investment information reporting system,”⁴⁴ or else incur criminal liability.⁴⁵ Significantly, Article 40 provides that China may take “corresponding measures” against “any country or region adopt[ing] discriminatory prohibitions, restrictions, or other similar measures on investment in the People’s

35. *Id.* art. 16.

36. *Id.* art. 20; Implementing Regulations, *supra* note 3, art. 21.

37. FIL, *supra* note 2, arts. 22, 23; Implementing Regulations, *supra* note 3, arts. 24, 25.

38. FIL, *supra* note 2, art. 39; Implementing Regulations, *supra* note 3, art. 39.

39. FIL, *supra* note 2, art. 25. *See also* Zuigao Renmin Fayuan Guanyu Shiyong «Zhonghua Renmin Gongheguo Waishang Touzi Fa» Ruogan Wenti De Jieshi (最高人民法院关于适用《中华人民共和国外商投资法》若干问题的解释) [Interpretation on Several Questions Concerning Application of the Foreign Investment Law of the People’s Republic of China] Sup. People’s Ct. Gaz., Dec. 26, 2019, <http://www.court.gov.cn/fabu-xiangqing-212921.html> [<https://perma.cc/4HCZ-BVBH>] (holding that courts should not nullify a contract regarding a sector not on the Negative List because of lack of a license or registration).

40. FIL, *supra* note 2, art. 26; Implementing Regulations, *supra* note 3, art. 29, 30, 31.

41. FIL, *supra* note 2, art. 4.

42. *Id.* art. 28.

43. *Id.* art. 36.

44. *Id.* art. 34.

45. *Id.* art. 37.

Republic of China.”⁴⁶ Finally, Article 35 establishes a formal legal basis for governmental review of foreign investment that “affects or may affect national security,” and endows the reviewing body with the power to issue final decisions.⁴⁷

IV. THE NATIONAL SECURITY REVIEW & RETALIATION PROVISIONS

The FIL framework enhances the protection of foreign investors by expanding national treatment, formally abolishing the MOFCOM Catalogue’s universal review and approval process, and establishing a range of legally binding policy commitments on the Chinese government. However, it also establishes an expanded national security review and a formal basis for retaliation against discriminatory measures, which may erect new barriers to foreign investment in China, particularly in light of the COVID-19 pandemic.

Prior to the FIL’s adoption, China’s national security review was exclusively governed by executive orders issued by the State Council and MOFCOM.⁴⁸ Under this regime, the scope of permissible security review was limited to mergers and acquisitions in specifically listed sectors,⁴⁹ though no actual review processes was ever conducted.⁵⁰ The FIL significantly augments this approach, expanding the scope of permissible security review to encompass all

46. *Id.* art. 40.

47. *Id.* art. 35; Implementing Regulations, *supra* note 3, art. 40.

48. *Circular of the General Office of the State Council on the Establishment of Security Review System Regarding Merger and Acquisition of Domestic Enterprises by Foreign Investors*, MOFCOM (Mar. 4, 2011), <http://english.mofcom.gov.cn/article/policyrelease/aaa/201103/20110307430493.shtml> [https://perma.cc/57GW-A6PB] (China); *Rules on the Implementation of the National Security Review Mechanisms*, MOFCOM (Aug. 25, 2011), <http://www.mofcom.gov.cn/aarticle/b/c/201108/20110807713530.html> [https://perma.cc/3RDP-N4RZ] (China).

49. *Circular of the General Office of the State Council on the Establishment of Security Review System Regarding Merger and Acquisition of Domestic Enterprises by Foreign Investors*, *supra* note 48. *But see Administrative Measures for the Record-Filing of Foreign Investment in Pilot Free Trade Zones (for Trial Implementation)*, MOFCOM (Apr. 8, 2015), <http://english.mofcom.gov.cn/article/policyrelease/buwei/201506/20150601018263.shtml> [https://perma.cc/99XH-BMGP] (China) (expanding China’s national security review to encompass foreign investment generally from Shanghai, Tianjin, Guangdong, and Fujian).

50. Xingxing Li, *National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and U.S. Laws and Practices*, 13 BERKELEY. BUS. L.J. 225, 265–66 (2016).

“foreign investment that affects or may affect national security.”⁵¹ While this development is largely regarded in China as a necessary safeguard, critics contend that it may pose new barriers to investment and create significant uncertainty for investors in determining which transactions may be subjected to review.⁵² This uncertainty may be further exacerbated, particularly in sensitive sectors, because the FIL leaves national security undefined and precludes foreign investors from appealing the reviewing body’s decisions.⁵³

However, China’s expansion of its national security review mechanism is not unique. The United States significantly expanded the scope of its security review to include non-controlling, minority investments in U.S. businesses (i) developing or producing critical technologies, (ii) owning or operating critical infrastructure assets, or (iii) possessing or collecting sensitive personal data of U.S. citizens,⁵⁴ whereas prior rules generally limited security review to controlling investments constituting ownership stakes greater than ten percent.⁵⁵ Other nations such as Australia, Canada, France, Germany, India, Italy, Japan, Poland, and Spain, as well as the European Union, have similarly expanded or enhanced their national security review regimes in response to the COVID-19 pandemic.⁵⁶

This trend may prove problematic for foreign investors from these jurisdictions given that the FIL permits China to take retaliatory measures against nations or regions with discriminatory measures against foreign Chinese investments.⁵⁷ Since recent reforms have

51. FIL, *supra* note 2, art. 35.

52. See, e.g., Pär Nyren, *The Missed Opportunity in China’s Foreign Investment Law*, DIPLOMAT (Apr. 5, 2019), <https://thediplomat.com/2019/04/the-missed-opportunity-in-chinas-foreign-investment-law/> [https://perma.cc/U764-DWH2] (noting the divide between Chinese and Western perspectives).

53. Compare FIL, *supra* note 2, art. 35 (“The security review decision made in accordance with the law shall be final.”), with *Ralls Corp. v. Comm. on Foreign Inv.* in the U.S., 758 F.3d 296, 319–21 (D.C. Cir. 2014) (holding that a Chinese-owned firm’s inability to challenge the review decision of the Committee on Foreign Investment in the United States deprived it of due process).

54. 31 C.F.R. §§ 800, 801 (2020). See also 31 C.F.R. § 802 (2020) (expanding U.S. security review to encompass foreign acquisitions of U.S. real estate); 85 Fed. Reg. 57,124 (Sept. 15, 2020) (to be codified at 31 C.F.R. § 800) (expanding the scope of “critical technologies” subject to U.S. security review).

55. Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Pub. L. No. 115-232, § 1703, 132 Stat. 2177 (2018) (defining “covered transactions” as those which could result in foreign control of U.S. businesses, non-controlling investments in limited types of U.S. businesses, and certain real estate transactions).

56. Cunningham et al., *supra* note 7.

57. FIL, *supra* note 2, art. 40.

relaxed China's regulatory regime and limited the legal tools available to the government for constraining inbound investment, the FIL's national security review will likely become an increasingly important means for such retaliation.⁵⁸

While COVID-19's shock to the global economy may increase both the supply and demand sides of the market for global investments,⁵⁹ expanded governmental review processes could present an effective barrier. Yet China may continue to prove to be a rare exception. At present, China seems to remain committed to promoting capital inflows even as other jurisdictions increase restrictions. The updated Negative List, issued on June 23, 2020, evinces such commitment, significantly reducing the scope of limitations and prohibitions on foreign investment in numerous sectors.⁶⁰ Additionally, the government has stressed that it remains

58. See Ken Dai & Jet Dang, *Simple Guide to Deal with the National Security Review Procedure in China*, DENTONS (Feb. 14, 2020), <https://www.dentons.com/en/insights/articles/2020/february/14/simple-guide-to-deal-with-the-national-security-review-procedure-in-china> [<https://perma.cc/4E2Z-MDCP>] (noting that the FIL's national security review will remain one of the few ex ante regulatory mechanisms permitting China to restrict foreign investment); Nada Lau et al., *National Security Review Regime Under the New Foreign Investment Law*, HERBERT SMITH FREEHILLS KEWEI (Feb. 6, 2020), <https://sites-herbertsmithfreehills.vulturevx.com/95/21761/february-2020/national-security-review-regime-under-the-new-foreign-investment-law.asp?sid=32394f09-e37c-4af5-929c-53b86c3fb9df> [<https://perma.cc/U2FE-H9QS>] (“With continuous efforts to open the foreign investment regime and the reductions to the negative lists, [the national security review] is becoming an increasingly important measure for . . . reviewing foreign investment transactions.”); Scott Yu et al., *National Security Review in China*, ZHONG LUN (Sept. 26, 2019), <http://www.zhonglun.com/Content/2019/09-26/1645514465.html> [<https://perma.cc/75YR-E48S>] (“With other jurisdictions . . . strengthening their own national security review regime, China's [own regime] could also be leveraged as a counteraction in response to prohibited or restrictive investment measures against China's investment offshore.”).

59. See Nicholas Klein et al., *National Security Risks Lead to Expanded Global Foreign Direct Investment Reviews*, DLA PIPER (May 11, 2020), <https://www.dlapiper.com/en/czech/insights/publications/2020/05/covid19-national-security-risks-lead-to-expanded-global-foreign-direct-investment-reviews/> [<https://perma.cc/B4RS-XLGA>] (“As the global economy absorbs the shock of the COVID-19 pandemic, foreign investment opportunities are expected to increase to unprecedented levels . . .”). *Contra* U.N. CONFERENCE ON TRADE & DEV., INVESTMENT TRENDS MONITOR: IMPACT OF THE COVID-19 PANDEMIC ON GLOBAL FDI AND GVCs (Mar. 26, 2020), https://unctad.org/system/files/official-document/diaciainf2020d3_en.pdf [<https://perma.cc/3L2D-L68S>] (projecting that foreign direct investment flows could decrease by thirty to forty percent during 2020–21 due to the COVID-19 pandemic).

60. *China's 2020 Negative List Shortened Again*, *supra* note 24. See also Qian Zhou,

committed to fully supporting foreign-invested enterprises, promoting opening-up to a higher level, and continuing to optimize the environment for foreign investment in light of the COVID-19 pandemic, and has encouraged governmental agencies to provide special measures to foreign investors to stabilize and expedite capital inflows during the pandemic.⁶¹

V. CONCLUSION

China's adoption of the FIL signals its continued commitment to opening its economy to inbound foreign investment. Taken alongside the updated Negative List and recent governmental guidance, China's commitment in this endeavor seems uncompromised by the COVID-19 outbreak. However, other nations' recent restrictions on foreign investment evince how the pandemic has put national liberalization policies to the test. In light of current market volatility and continuing uncertainty, China may well follow global trends, employing the FIL to further limit, rather than liberalize, foreign investment.

China's 2020 New Negative Lists Signal Further Opening-Up, CHINA BRIEFING (July 1, 2020), <https://www.china-briefing.com/news/chinas-2020-new-negative-lists-signals-further-opening-up/> [https://perma.cc/5SD7-BRDC] (“For four years in a row, the [Negative Lists] have continued to reduce the number of measures limiting access for foreign investment.”).

61. Press Release, MOFCOM, The Ministry of Commerce Holds Online Press Conference on Responding to the Epidemic and Stabilizing Foreign Investment, (Apr. 4, 2020), <http://english.mofcom.gov.cn/article/newsrelease/press/202004/20200402953246.shtml> [https://perma.cc/JQD4-NMAB] (China) (discussing MOFCOM's Notice on Further Opening Up and Stabilizing Foreign Investment in Response to COVID-19, issued on April 1, 2020).