CHINA LAW UPDATE

FURTHER OPENING-UP TO FOREIGN INVESTMENT: THE NEW NEGATIVE LISTS

Lian Ruihua*

Table of Contents

* This note is prepared by Lian Ruihua, an English Language and Literature B.A. candidate at Tsinghua University Department of Foreign Languages and Literatures, with a dual degree in Law.

FURTHER OPENING-UP TO FOREIGN INVESTMENT: THE NEW NEGATIVE LISTS

Lian Ruihua

I. INTRODUCTION

On June 30th 2019, the National Development and Reform Commission and the Ministry of Commerce jointly released the Special Administrative Measures for Foreign Investment Market Access (2019 Version) (Negative List), the Special Administrative Measures for Foreign Investment Market Access in Pilot Free Trade Zones (2019 Version) (FTZ Negative List). The new Negative Lists indicate China's determination to further liberalize foreign investment by adopting the negative list approach and the pre-establishment national treatment. This note addresses the changes in the new Negative Lists. Part II reviews the development of the negative list approach in both international and domestic contexts. Part III assesses the transparency and predictability of the new Negative Lists from a comparative perspective. Part IV analyses the structural change brought by the new *Foreign Investment Law* (FIL). Part V discusses the potential dispute settlement mechanism under the current legal framework.

II. A BRIEF REVIEW OF THE NEGATIVE LIST

A. Negative List in International Context

The negative list approach under international investment agreements (IIAs) and Bilateral Investment Treaties (BITs) is generally referred to as the adoption of an exhaustive reservation inventory of all non-conforming measures contracting parties maintain.[1] Based on the United States' adoption of the negative list under the BITs since the 1980s, the North American Free Trade Agreement (NAFTA) concluded in 1994 enumerates the country-specific exceptions to, *inter alia*, the national treatment obligations in the corresponding Annex.[2] The NAFTA mode of negative list, featuring a

[1] U.N. Conference on Trade and Development, *Preserving Flexibility in IIAs: The Use of Reservations Scope and Definition*, 18, UNCTAD/ITE/IIT/2005/8 (Octo. 20, 2006).

[2] North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M.

high degree of predictability and transparency, applies in the full life cycle of investment, namely both the pre-establishment and the post-establishment phases. The impasse of Doha Rounds further accelerated the global wide acceptance of Regional Trade Agreements (RTAs), while the NAFTA-inspired negative list was adopted by the US as the basis of most RTA negotiations and some BIT negotiations. In the last decade, two major US-dominated RTAs, the Trans-Pacific Partnership (TPP), Transatlantic Trade and Investment Partnership (TTIP) have performed leading roles in the promotion of a new generation of international investment rules, which features higher standards in liberalization commitment, including the adoption of the negative list and the pre-establishment national treatment. Developed economies including EU and developing economies, such as states in Latin America and Southeast Asia, begin to accept the negative list approach in BITs, IIAs and domestic legislation regarding foreign investment under the impact of the globalized trend of adopting the negative list approach.

B. Negative List in Domestic Context

China's new Negative lists are developed through previous practice in BITs and FTAs as well as the domestic course of opening-up. China has been progressively stepping toward further liberalization on market access with caution since it concluded the first BIT with Sweden in 1982. The 2003 China-Germany BIT mentioned Non-Conforming Measures regarding the treatment of foreign investment for the first time. Though without a specific list, the measure bears similarities with the "ratchet" mechanism, committing to "not increase the non-conformity of these measures" and to "progressively remove the non-conforming measures".[3] The adoption of the negative list approach achieved substantial progress under the China-US BIT negotiation during which China committed to provide nondiscriminatory national treatment based on a negative list in 2013.[4]

[3] Agreement between the Federal Republic of Germany and the People's Republic of China on the Encouragement and Reciprocal Protection of Investments, China-Ger. [hereinafter *China-German BIT*], art. 2 and 3, Dec. 1, 2003, available at http://tfs.mofcom.gov.cn/article/Nocategory/201002/20100206787159.shtml

[4] *Shangwubu: Zhongmei Shuangbian Touzi Xieding Tanpan Qude Jinzhan Shi "Liangdian"* (商务部：中美双边投资协定谈判取得进展是"亮点") [*Ministry of Commerce: China-US BIT Negotiation Making Progress is a "highlight"*], (July 15, 2014), ZHONGGUO ZHENGFU WANG (中国政府网) [Chinese government website], http://www.gov.cn/xinwen/201407/10/content_2715166.htm.

Meanwhile, in domestic legislation, China adopted the guidance list approach guided by the Catalogue for the Guidance of Foreign Investment Industries, which was a mixture of encouraged, restrictive, and negative list. Under the guidance approach, foreign investment was subject to administrative approvals before entry into the market.[5] In 2013, the negative list approach was adopted in Shanghai pilot free trade zones (FTZs) for the first time and was implemented nationwide in 2017. The newly-passed FIL in 2019 confirms the pre-establishment national treatment and the negative list approach.[6] It was under such a context that the 2019 version Negative Lists were released.

The 2019 Negative Lists are based on the categorization of industries in the National Industries Classification. Restrictions on market admission to offshore investors in several sectors have been further removed. Compared with the 2018 Negative Lists, the number of items specified in the National Negative List continues to be reduced, from 48 to 40, and the number of items specified in the FTZ Negative List has also been reduced from 45 to 37. No new item has been added. The major changes are sketched below.

In the mining sector, the restriction that the investment in exploration and development of oil and natural gas shall be carried out in the form of a Sino-Foreign Equity Joint Ventures (EJV), or Sino-Foreign Cooperative Joint Ventures (CJV) has been lifted, meaning that the Wholly Foreign-owned Enterprises (WFOEs) are granted with free access to the industry. The prohibitions on the prospecting for, and mining of, molybdenum, tin, antimony, and fluorite have also been lifted. The exploration and development of oil and natural gas in China, at the upstream of the mining sector, has long remained insufficient to supply the increasing demand and led to the dependency on foreign oil. This phenomenon resulted from the high cost caused by the lack of efficient competition. To break up the monopoly in upstream enterprises, these changes will further vitalize the upstream industry. Besides, restrictions on foreign control of municipal

[5] Waishang Touzi Chanye Zhidao Mulu (外商投资产业指导目录) [Catalogue for the Guidance of Foreign Investment Industries], (promulgated by Nat'l Dev. and Reform Comm'n and the Ministry of Commerce, Nov. 30, 2004, effective Jan. 1, 2005) (Chinalawinfo).

[6] Waishang Touzi Fa (外商投资法) [Foreign Investment Law of the People's Republic of China], (promulgated by Nat'l People's Congress, Mar. 15, 2019, effective Jan. 1, 2020) art. 4 (Chinalawinfo).

gas supply have been removed as well, thus encouraging more foreign investment into the utilization of natural gas in the downstream.

In the value-added telecommunication service (VATS) sector, the 50% limit on foreign shares in multi-party communication, store-and-forward and call center businesses has been lifted. The VATS sector in China has steadily expanded over the last few years, stimulated by the robust increase in the number of mobile phone users accessing online data. At present, private capital has developed into a major force in the VATS sector, accounting for over 90% of the total number of proprietors in the sector.[7] Therefore, the ripened domestic VATS market is expected to be able to utilize the advanced technology while performing well confronted the economic shock brought by the diversified foreign investment.

In the transportation sector, the 51% equity cap on foreign investment in domestic marine shipping agencies has been removed. Shipping agencies provide fundamental services for shipping companies and have long been dominated by state-owned enterprises. However, it is currently confronted with shrunk profit margins after the 2008 Financial Crisis. By removing the equity cap on foreign investment in domestic agencies, the shipping agencies are expected to improve in transparency and efficiency so as to facilitate the expansion of the overall shipping market.

Besides, in the culture and entertainment sector, the restriction that the controlling shares of movie theatres and performance managing agencies shall be held by the Chinese party, has been dropped as well. In the agriculture sector, the prohibition on investment in the exploitation of state-protected wild animal and plant resources native to China has been lifted. In the manufacturing sector, the prohibition on investment in *xuan* (rice) paper and ink sticks has been lifted as well.

In general, the new Negative List removes limits on foreign investment in several strategic and sensitive sectors which used to be dominated by state-owned enterprises, in order to foster competition and bring more dynamic to the domestic market. Meanwhile, sectors

[7] Guonei Zengzhi Dianxin Yeuwu Xuke Qingkuang Fenxi Baogao (国内增值电信业务许可情况分析报告) [Analyst Report on Admission of Domestic Telecommunication Business], CHINA ACADEMY OF INFORMATION AND COMMUNICATIONS TECHNOLOGY (Sept. 29, 2019), http://m.caict.ac.cn/yjcg/201909/P020190916369394722368.pdf.

considered being ripened enough to embrace the competition of foreign investment are further opened-up as well. Notably, the gap between the FTZ Negative List and the nationwide Negative List has also been narrowed. These changes further highlight China's determination to further liberalize foreign investment.

III. THE NEW NEGATIVE LISTS FROM A COMPARATIVE PERSPECTIVE

To gain more insight into the current Negative Lists, this part will compare China's domestically-adopted Negative Lists with the NAFTA-inspired Negative list, which is generally adopted by the United States in its FTAs and BITs from the perspective of transparency and predictability. The *Agreement between the United States of America, the United Mexican States, and Canada* (USMCA) concluded in March 2018, which is developed on the basis of NAFTA and has followed the practice of the negative list approach, will be taken as the example for comparison. The NAFTA-inspired Negative List lays down the exceptions to obligations such as national treatment by identifying all sectors that are closed in the annex of the treaties or agreements, taking the form of Non-Conforming Measures. The rule is laid down in Section 1 of Article 14 "Non-Conforming Measures" of the USMCA as "Article 14.4 (National Treatment), Article 14.5 (Most-Favored-Nation Treatment), Article 14.10 (Performance Requirements), and Article 14.11 (Senior Management and Boards of Directors) do not apply to (a) any existing non-conforming measure that is maintained by a Party at: (i) the central level of government, as set out by that Party in its Schedule to Annex I . . .".[8]

The NAFTA-inspired Negative List distinguishes as being highly transparent by providing detailed descriptions of the restrictions on different sectors to avoid ambiguity. Annex I of the USMCA identifies the sectors and sub-sectors for which the Non-Conforming Measures are made, the level of government (central, regional or local) maintaining the measures, and provides a general non-binding description of the measures by identifying the specific laws, regula-

[8] Agreement between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S. [hereinafter *USMCA*], art. 14.5, Nov. 30, 2018, available at https://ustr.gov/tradeagreements/free-trade- agreements/united-states-mexico-canada-agreement/united-states-mexico.

tions, or other measures applied to the corresponding sector.[9] For example, regarding the restrictions on mining sector, Annex I of USMCA specifies the related laws by the description that "Under the *Mineral Lands Leasing Act of 1920*, aliens and foreign corporations may not acquire rights-of-way for oil or gas pipelines . . .".[10] This approach is highly transparent to investors by providing detailed information such as from which government agencies the investors must obtain authority to conduct certain activities. From a comparative perspective, China's new Negative Lists, though shortened, still lacks transparency. The Negative Lists simply enumerate the restrictions on different sectors without the support of related laws or regulations. Current laws and regulations regarding the administrative approval, national security review in different sectors are not unified, which might lead to confusion for investors. Besides, some descriptions of the restrictions in the Negative Lists are still ambiguous. For example, the restrictions on telecommunication sector are laid down as "The policies for pilot programs within the original area (28.8 square kilometers) of the China (Shanghai) Pilot Free Trade Zone shall extend to all pilot free trade zones". However, there is no available information about the current policies for pilot programs within the FTZ.[11] Such ambiguous expressions under the nested structure decrease the transparency of the Negative Lists and disincentivize the government to improve the transparency of the administrative procedures for the establishment of foreign investment.

In terms of predictability, Annex II of the USMCA further enumerates the specific sectors, subsectors, or activities for which state parties may maintain existing, or adopt new or more restrictive measures that do not conform with obligations imposed by, *inter alia*, national treatment, most-favored-nation treatment.[12] This annex enables states to protect sensitive sectors with unforeseeable prospect in a flexible and predictable way. China's Negative Lists are annual-

[9] *Id.* Annex I-Explanatory Note.

[10] *Id.* Annex I-United States-5.

[11] Ziyou Maoyi Shiyan Qu Waishang Touzi Zhunru Tebie Guanli Cuoshi (自由贸易试验区外商投资准入特别管理措施(负面清单)(2019年版)) [Special Administrative Measures (Negative List) for the Access of Foreign Investment in Pilot Free Trade Zones (2019)] (promulgated by Nat'l Dev. and Reform Comm'n and the Ministry of Commerce, June 30, 2018, effective July 30, 2019) VII. 17 (Chinalawinfo).

[12] *USMCA*, *supra* note 8, Annex II-Explanatory Note-1.

ly updated in order to serve the need for reform. Therefore, there are frequent changes in restrictions on those strategic and sensitive sectors such as financial services and manufacturing industry in the course of progressive opening-up. However, the high frequency of revision might be detrimental to the reasonable anticipation of investors in arranging future investments. It also denies the possibility for the government to impose future restrictions on sensitive industries or "infant industries" in a predictable way.

IV. STRUCTURAL CHANGE UNDER THE FOREIGN INVESTMENT LAW

On March 15, 2019, the 13th National People's Congress passed the *Foreign Investment Law*. The new FIL will replace the three laws on WFOE, EJV, and CJV. It marks a milestone in the course of opening-up and aims to provide protection to foreign investors on an equal basis.

A. Broader Definition of Foreign Investment

The definition of "foreign investment" is closely connected with the scope of protection the host state provides for foreign investors and determines whether certain activity could fall under the regulation of the negative list. The 2019 FIL unifies the definition of "foreign investment" which used to scatter in the three laws on WFOE, EJV, and CJV. According to Article 2 of the FIL, "foreign investment" means "the investing activities within China directly or indirectly conducted by foreign natural persons, enterprises, and other organizations (hereinafter referred to as 'foreign investors')".[13] There are four circumstances, including "(1) A foreign investor forms a foreign-funded enterprise within China alone or jointly with any other investor; (2) A foreign investor acquires any shares, equities, portion of property, or other similar interest in an enterprise within China; (3) A foreign investor invests in any new construction project within China alone or jointly with any other investor; (4) Investment in any other manner as specified by a law or administrative regulation or the State Council".[14]

The change of the definition of foreign investment could be further interpreted in the context of international practice. There are

[13] *Supra* note 6, art. 2.
[14] *Supra* note 6, art. 2.

mainly two types of definition, the asset-based definition and the enterprise-based definition. The asset-based definition is typically followed by an illustrative list of the main categories of investment to be protected. Most of China's BITs adopted such a definition.[15] For example, the China-German BIT defines investment as "every kind of asset" which includes, *inter alia*, direct investment, and other investments such as shares, debentures, stock, and intellectual property rights.[16] The definition is designed to safeguard the interests of the investor in a broader context. However, the non-exhaustive nature of the definition, and the undefined term "investment" under Article 25(1) of the ICSID Convention have led to the expansion of the interpretations of investment that have been accepted by tribunals, which substantially disadvantages states. Therefore, some BITs begin to limit the scope of the definition. The first way is to adopt a close-end enterprise-based definition, which requires the establishment of an enterprise in the host state, while including as wide range of investment as possible in the exhaustive list. This type of definition is useful where the BIT covers pre-establishment treatment, such as NAFTA, under which the act of establishment has to go through an entity rather than the mere transfer of assets. Therefore, the host state is able to apply domestic laws and regulations which are often addressed to enterprises. The second way is to specify that only when an investment is in accordance with the laws of the host country will it be covered by the treaty. Most of China's BITs adopt such measure to limit the scope of the definition. As a result, obtaining of required administrative approvals in the pre-entry phase in accordance with the national laws is one of the premises for foreign investors to obtain protection under the BIT.

In contrast to the wide scope of the definition adopted in BITs, in national law, China used to limit the scope of foreign investment to the narrow enterprise-based investment under the framework of the three laws on WFOE, JV, and CJV. The 2019 FIL steps forward to remove the limitations and comes closer to the broad asset-based definition that has already been widely adopted in BITs. It extends to the project-based investment and the modes of investment via acqui-

[15] U.N. Conference on Trade and Development, *Scope and Definition (A Sequel), UNCTAD Series on Issues in International Investment Agreements II*, 33, UNCTAD/DIAE/IA/2010/2 (Mar. 1, 2011).

[16] *China-German BIT, supra* note 3, art. 1.

sition, *i.e.*, the acquisition of shares, equity, property shares or other similar rights. Besides, though the FIL seems to adopt a close-end definition, the Miscellaneous Provision in Article 2 allows "investment in any other manner as specified by a law or administrative regulation or the State Council" to fall under the definition, making the future expansion of the scope of foreign investment possible.[17]

Moreover, the investing activities indirectly conducted by investors are also recognized as foreign investment by FIL. The scope of the indirect investment is not clarified in the FIL. Previous BITs, such as the China-German BIT, defines "invested indirectly" as "invested by an investor of one Contracting Party through a company which is fully or partially owned by the investor and having its seat in the territory of the other Contracting Party."[18] The China-New Zealand FTA defines "invest indirectly" as "investments of legal persons of a third country which are owned or controlled by investors of one Party and which have been made in the territory of the other Party."[19] This indicates the possibility of future interpretation of indirect investment to include the investment from the enterprise fully or partially owned by the foreign investor under the FIL.

These changes may further interact with the new Negative Lists since more activities, including indirect investment might fall under the restriction or prohibition listed in the new Negative Lists.

B. The Pre-establishment National Treatment

The new Negative Lists come into force under the framework of the pre-establishment national treatment and negative list approach of the newly passed FIL, which marks a structural change in domestic regulations on foreign investment.

On the substance level, it is provided in the FIL that "the treatment accorded to foreign investors and their investments no less favorable to that accorded to domestic investors and their investments at the stage of investment access".[20] For investment falling outside of the negative list, "investment administration shall be conducted under the principle of equal treatment to domestic and foreign in-

[17] *Supra* note 6, art. 2.
[18] *China-German BIT*, *supra* note 3, art. 1(b).
[19] China-New Zealand Free Trade Agreement, China-N.Z., art. 135, April 7, 2008, available at http://images.mofcom.gov.cn/gjs/accessory/200804/1208158780064.pdf.
[20] *Supra* note 6, art. 28.

vestment."[21] On the procedure level, the pre-establishment national treatment investment falling outside of the Negative Lists no longer needs to go through the lengthy administrative approval before establishment. A simplified procedure in market entry which only requires filing is implemented as well.

National Treatment (NT) clause, as the core clause in BITs and FTAs, generally include three elements when applied to specific cases. First, the treatment accorded to the foreign investor is at least as favorable as the treatment accorded to foreign investors, namely, there is no differentiation of treatment. Second, the foreign investor shall not be discriminated in a "like situation" or "like circumstances". Third, if the treatment is less favorable, it has to be justified. China has adopted the NT clause in BITs and FTAs in the post-entry phase for long. However, it is the first time to explicitly include the national treatment in domestic law. The FIL adopts the general and abstract expression to require the administration to be conducted under the principle of equal treatment. Therefore, the national treatment requires reforms in the administrative authorities to further improve the transparency of the standard of the treatment that is no less favorable to foreign investors than domestic investors.

Meanwhile, it is noteworthy that China has limited the NT clause in BITs or FTAs to the post-entry phase. For example, Article 3 of the Canada-China FIPA reads "Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws, regulations and rules."[22] Besides, the national treatment clause applies only to "the expansion, management, conduct, operation and sale or other disposition of investments".[23] In comparison, the USMCA provides national treatment for foreign investors concerning "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments". This means China has not granted protection for the establishment of foreign investment in BITs. However, the ongoing negotiations between

[21] *Supra* note 6, art. 28.

[22] Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China [hereinafter *Canada-China FIPA*], art. 3, Sept. 9, 2012, available at http://tfs.mofcom.gov.cn/article/Nocategory/201111/720111107819474.shtml.

[23] *Id.* art. 6.

China and the EU are expected to include the pre-establishment national treatment.

V. DISPUTE SETTLEMENT

Under the current framework of the negative list approach, dispute between the investor and the state concerning a denial of admission might arise. This section discusses the potential contours, both international and domestic, for investors to resolve the dispute in the pre-entry phase.

A. Investor-State Dispute Settlement

The dispute settlement clauses in BITs and FTAs generally offer several possibilities for investors, including resorting to the domestic courts of the host state, bringing an investment arbitration to an *ad hoc* tribunal established under the UNCITRAL arbitration rules, or to International Center for Settlement of Investment Disputes (ICSID) if the government fails to fulfill its obligation under the BIT or FTA.

China initially adopted the *ad hoc* arbitration in Investor-State Dispute Settlement (ISDS) clauses in its earlier BITs.[24] China started to accept ICSID arbitration as one of the choices of ISDS in BITs from the 1990s. Most of the BITs China concluded in the last decade have adopted ICSID arbitration as the primary way of dispute settlement choice with other ways as exceptions.

As mentioned above, China has not granted pre-establishment right to investors in BITs or FTAs. Therefore, investors who were denied admission could not invoke admission rights and settle the dispute through arbitration. However, one possible way of resolving the dispute through arbitration is to invoke the Fair and Equitable Treatment (FET) clause. Different from the national treatment clause and most-favored-nation clause, FET sets out a non-contingent international standard. China used to provide FET clause in highly general and abstract terms in BITs and FTAs. However, recent BITs and FTAs also tend to specify the FET in a more concrete way. The China-Korea FTA adopts the Minimum Standard of Treatment clause

[24] *See* Agreement Between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments, China-Sing., art. 14.2, Nov. 21, 1985, Ministry of Commerce, Department of Treaty and Law, available at http://tfs.mofcom.gov.cn/aarticle/h/at/201002/20100206778532.html.

which provides FET according to customary international law.[25] The Canada-China FIPA also specifies FET as "the international law minimum standard of treatment of aliens as evidenced by general State practice accepted as law".[26]

Under the customary international law standard of FET, it can be very difficult to argue that the pre-establishment national treatment based on the Negative Lists provided in the 2019 FIL might lead to an FET breach when an investor denied market access deems the government fails to abide by its own law.

However, under a much higher standard of FET protection, the government may be found to breach the legitimate expectation it has generated from investors regarding admission rights. It has been accepted by tribunals that domestic law breach might lead to a breach of an investor's legitimate expectations. In *Tecmed v Mexico*, the tribunal considered that "the foreign investor expects the host State to act in a consistent manner", and "to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments".[27] Similarly, the *MTD v Chile* tribunal also held that, although investors could not expect states to change their laws in order to create more favorable conditions, they could expect that the extant law is applied properly.[28] From this perspective, if the government refuses to grant admission to an investor while breaching the restrictions from the Negative Lists and the due procedure provided in FIL, it is possible to submit the dispute through arbitration, even in the pre-entry phase.

B. Domestic Administrative Reconsideration and Litigation

Due to the abovementioned reason, the dispute concerning the right to enjoy the pre-establishment national treatment is more likely to be resolved under domestic laws and regulations.

The 2019 FIL provides three potential remedies for foreign investors, including applying for an administrative review, instituting an

[25] Free Trade Agreement between the Government of the People's republic of China and the Government of The Republic of Korea, China-S. Kor., art. 12.5, June 1, 2015, Ministry of Commerce, available at http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf.

[26] *Canada-China FIPA*, *supra* note 22, art. 4.2.

[27] Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶154 (May 29, 2003).

[28] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶25 (May 15, 2004).

administrative lawsuit, and going through the work mechanism for complaints. Article 26 of FIL establishes "a working mechanism for complaints to address concerns of foreign-funded enterprises and investors in a timely manner and coordinate and improve the relevant policies and measures".[29] It also allows foreign-funded enterprise or its investor to apply for administrative reconsideration or institute an administrative lawsuit according to the law. However, it is not clear enough whether the denial of market access in the pre-establishment phase falls under the scope of administrative regulations and whether it can bring a litigation against the government under such circumstances.

It would be more inspiring to discuss the potential development in domestic legislation regarding this issue if we compare the *Request for Public Comments on the Foreign Investment Bill* (the *Bill*), published in December 2018. Article 25 of the Bill only provides the work mechanism for complaints and limits the subject to "foreign-funded enterprise".[30] This indicates two changes for the way of resolving the denial of admission for foreign investors. The first is that the expansion of the scope of the subject from "foreign-funded enterprise" to "foreign-funded enterprise or its investor" makes it possible to include the investors in the pre-establishment phase, since the enterprises have not been established. Therefore, if the foreign investor is denied admission into the market and considered the government failing its obligation under the Negative Lists and the FIL, it might be qualified to institute a litigation or apply for an administrative review. The second is that by adding administrative review and litigation into the clause of investment protection, a more concrete and systemic mechanism is expected to be established to resolve related disputes. Foreign investors would be able to go through more transparent procedure in the future when the current clause in FIL is further unified with the *Administrative Litigation Law* and *Administrative Reconsideration Law*.

[29] *Supra* note 6, art. 26.
[30] *Waishang Touzi Fa (Cao'an) Zhengqiu Yijian* (外商投资法（草案）征求意见) [Request for Public Comments on the Foreign Investment Bill], (promulgated by Standing Comm. of the Nat'l People's Congress, Dec. 26, 2018) art. 25 (Chinalawinfo).

VI. CONCLUSION

The New Negative Lists are developed on the basis of China's previous practice in BITs under the global trend towards a higher standard of market liberalization. The pre-establishment national treatment and the negative list adopted by the FIL reveals China's determination to further open up to foreign investment by removing more procedural barriers of administrative approval and granting equal treatment at the pre-entry phase to foreign investors. In the future reformation, the lack of transparency and predictability, as well as the incomplete dispute settlement mechanism are expected to be addressed.