

The Durability of China's Lawmaking Process under Xi Jinping: A Tale of Two Foreign Investment Laws

XIAOJUN LI

On March 15, 2019, the National People's Congress passed a long-anticipated Foreign Investment Law (FIL) after a short deliberation period of only three months. This expedited legislative process seems unusual, considering that the original draft of the FIL proposed by the Ministry of Commerce in January 2015 was tabled indefinitely after a brief period of public consultation. How can we explain this stark difference? Comparing the legislative processes and contents of the two laws, this paper shows that, as with many previous laws, bureaucratic politics likely contributed to an impasse in the 2015 draft, whereas external shocks—in this case, the escalating trade war between China and the United States—helped accelerate the deliberation process and the passage of the new FIL. These two cases demonstrate the durability of lawmaking institutions and procedures under Xi Jinping despite the recentralization of power in the executive after changes to the constitution.

KEYWORDS: Lawmaking; bureaucratic politics; veto players; foreign direct investment; China.

* * *



On March 15, 2019, China's National People's Congress (NPC) passed a long-anticipated Foreign Investment Law (FIL) that replaced its original three laws governing foreign investment. China and the United States had been locked in a trade dispute in which foreign and particularly American investors were complaining about unfair practices impeding their entry into the market and the use of

XIAOJUN LI (李曉雋) is an Associate Professor at the Department of Political Science at the University of British Columbia. His research interests include international and comparative political economy, political behavior, and Chinese politics. He can be reached at <xiaojun.li@ubc.ca>.

forced technology transfers. The new FIL was thus hailed as Beijing's attempt to create a more level playing field for foreign direct investment (FDI) in the world's second largest economy.

The new FIL was approved after a short deliberation period of only three months. This expedited legislative process seems unusual, considering that nearly half of all laws passed in China exceed the stated five-year period of the legislative plan, and 12% of laws take more than 10 years to pass (Truex, 2018). The fate of the new FIL also stands in sharp contrast with that of the original draft released by the Ministry of Commerce (MOFCOM) in January 2015, which was shelved indefinitely after a brief period of public consultation.

Between the failure of the 2015 draft FIL and the passage of the new FIL, a watershed moment in Chinese politics occurred in March 2018 when the NPC passed a constitutional amendment at the 19th Party Congress, resulting in the removal of the presidential term limit (Fewsmith, 2018). Casual observers may connect the dots and conclude that FIL's getting fast-tracked in the NPC had something to do with a new consolidation of power at the apex of China's leadership. More broadly, it could also indicate major shifts in the lawmaking process.

In this paper, I argue that the contrasting fates of the two FILs are not the result of changes in the existing legislative framework, which continues to follow a "multi-stage, multi-arena" process that moves from agenda setting to policy implementation (Tanner, 1995). While it is possible that the constitutional amendment gave President Xi more agenda-setting power in the lawmaking process to push forward the revision of the FIL as a top priority in the legislative plan, it is important to note that agenda setting is only the first step, and many other factors are important determinants of the success of any legislation. In particular, the more veto players are involved in the interagency review and competition period, the more likely it is that the legislative process will be delayed and even stalled. Conversely, the legislative process can be accelerated by an urgency to respond to either domestic or international threats to the stability of the regime.

Using online comments submitted during the public consultation on the 2015 draft FIL and comparing the texts of the 2015 and 2019 versions of the FIL, I show that as with many previous laws, the gridlock in the passing of the 2015 draft was likely the result of bureaucratic competition among various central and local agencies. The deliberation process and passage of the new FIL in the NPC was in turn expedited by external shocks in the form of the escalating trade war between China and the United States. Nevertheless, the new FIL is lacking in certain elements that are likely to give rise to new problems with regard to implementing and enforcing the new law.

The rest of the paper is organized into five sections. Section 2 provides a brief overview of the lawmaking process in post-reform China. Section 3 discusses the background to and evolution of China's legal and regulatory framework regarding inward FDI. The next two sections trace the legislative processes leading to the failure of the FIL in 2015 and the passage of the new FIL in 2019. The last section concludes.

Lawmaking in Post-Reform China

Since the reform and opening up, lawmaking in China has developed into a “multi-stage, multi-arena” process with each law moving sequentially through five different stages: agenda-setting; interagency review; top leadership approval; NPC deliberation and passage; and the explication, implementation, or adjudication of the law as policy (Tanner, 1995). In the agenda-setting stage, the State Council and NPC consider bills drafted by NPC deputies, the State Council, State Council ministries, central party leaders, and other policy entrepreneurs (Truex, 2018). These bills are then placed in a five-year legislative plan and announced by the NPC Standing Committee in the first year of each congress.

There are three classes of priority in the legislative plan. The highest is Class I, which includes draft laws for which the conditions are comparatively mature and which are intended to be submitted for deliberation during the term (*tiaojian bijiao chengshou, renqi nei ni tiqing shenyi de falü cao'an* 條件比較成熟、任期內擬提請審議的法律草案). Class II includes draft laws for which work should be rushed and which will be submitted for deliberation when conditions become mature (*xuyao zhuajin gongzuo, tiaojian chengshou shi tiqing shenyi de falü cao'an* 需要抓緊工作、條件成熟時提請審議的法律草案). Class III includes legislative projects for which legislative conditions are not completely mature and continuing research and discussion are needed (*lifa tiaojian shang bu wanquan jubei, xuyao jixu yanjiu lunzheng de lifa xiangmu* 立法條件尚不完全具備、需要繼續研究論證的立法項目). While placement in Class I means that a draft law has the highest chance of being passed by the end of the congress, if and when this will happen is determined in the next two stages.

In the second stage of interagency review, relevant stakeholders in the proposed law supply opinions on the draft law and may attempt to manipulate specific amendments or provisions. These stakeholders include (but are not limited to) the Chinese Communist Party (CCP) Central Committee, Politburo, Politburo Standing Committee, major bureaucratic units, state-owned enterprises (SOEs), and

provincial-level authorities. In the third stage of leadership approval, high-level party leaders review the draft law and decide whether or not it can move on to the NPC deliberation stage, at which point it is almost guaranteed to pass (from which has arisen the term “rubberstamp parliament”). Finally, the passed law enters the explanation and implementation stage, which often requires the promulgation of separate implementing regulations by the State Council or relevant ministries at both central and local levels.

Conventional wisdom suggests that authoritarian governments are more efficient at passing laws than democratic countries in which legislative gridlock often arises due to the excessive number of “veto players” in the system—individual or collective actors whose agreement is required to change the status quo (Tsebelis, 1995, 2002). This popular conception has since been challenged by scholars of authoritarian politics. Collectively, they have demonstrated that authoritarian leaders also face constraints in the policymaking process from key stakeholders within the ruling coalition or the “selectorate” (Boix & Svobik, 2013; Bueno de Mesquita, 2005; Magaloni, 2008; Malesky, Abrami, & Zheng, 2011; Shih, 2008; Shirk, 1993; Svobik, 2009, 2012). This general conclusion has certainly been borne out by empirical data in the Chinese legislature—slightly more than half of all laws passed in China occur within the stated five-year period of the legislative plan, with many draft laws taking years, sometimes even decades, before reaching the voting stage in the NPC (Truex, 2018).

How can we explain variations in the length and outcome of the draft laws? Scholars of Chinese politics have applied the “fragmented authoritarianism” model (Lieberthal, 1992; Lieberthal & Oksenberg, 1988) to study the lawmaking process in China, which is susceptible to legislative gridlocks similar to those observed in democracies due to bureaucratic competition and bargaining (Truex, 2018). The influence of bureaucratic politics is especially pronounced during two of the five stages in the legislative process. At the interagency review stage, any number of policy stakeholders within the government may seek to obstruct, logroll, or drag out the legislation process if the proposed law moves policy away from their preferred outcomes (Lü, Liu, & Li, 2018; Tanner, 1995, 1999; Truex, 2018). In other words, they become *de facto* “veto players” (Tsebelis, 1995, 2002). Increasingly, stakeholders outside of the government are also drawn into bureaucratic bargaining through private and public consultations in which all related parties are invited to provide comments on initial drafts of proposed laws (S. Balla, 2014; S. J. Balla, 2017; Dickson, 2016; Horsley, 2009). Not surprisingly, the presence of more policy stakeholders increases the number of potential veto players and consequently the likelihood that the interagency review process may break down.

The same can be said after a draft law enters the NPC deliberation stage, which “normally involves a three-review” procedure in the NPC Standing Committee (NPCSC), as stipulated by the Legislation Law (*lifa fa* 立法法) passed in 2000 (Li & Otto, 2002). However, the Legislation Law did not specify a timeline for the three reviews and allows additional time for deliberation and public consultation on draft laws “where there are significantly different opinions on any issue in a bill, or any issue in a bill involves any major adjustment of interests.” Once again, more veto players at this stage will likely increase the time spent for each review, and sometimes even the number of reviews. In recent years, it has not been uncommon for more contentious laws that involve multiple bureaucratic agencies to be reviewed more than three times. For example, the draft Property Law (*wuquan fa* 物權法) and the draft Labor Contract Law (*laodong hetong fa* 勞動合同法) were reviewed eight and five times within a period of five years. The drafts of the Social Insurance Law (*shehui baoxian fa* 社會保險法), National Compensation Law (*guojia peichang fa* 國家賠償法), Tort Law (*qinquan zeren fa* 侵權責任法), and Budget Law (*yusuan fa* 預算法) were each reviewed four times in three years.

While bureaucratic competition and bargaining can delay the time before a draft law can be voted on at the NPC, the legislative process can be accelerated out of the urgency to respond to either domestic or international threats to regime stability. One such example is the Food Safety Law (*shipin anquan fa* 食品安全法). After a series of food safety incidents in the early 2000s, the Legislative Affairs Office of the State Council and relevant departments proposed the Food Safety Law in 2007 to replace the Food Hygiene Law (*shipin weisheng fa* 食品衛生法) of 1995. The first two reviews of the draft law occurred at the 31st session of the 10th NPC Standing Committee in December 2007 and the 4th session of the 11th NPCSC in August 2008, a month after the Sanlu scandal broke out in Gansu Province. The ensuing revelation, investigation, and widespread public anger over the melamine-tainted baby formula that sickened an estimated 300,000 victims in China provided a major impetus that increased the pace of food safety legislation. After receiving significant revisions in response to the scandal, the draft law was submitted to the NPCSC for the third and final review in October 2008 (only two months after its second review) and swiftly adopted a few months later at the 7th session of the 11th NPCSC on February 28, 2009. In the remainder of this paper, I will demonstrate the durability of the legislative process as described above using the case of these two FILs which seem to have followed very different paths. Beforehand, however, I will provide more context by briefly reviewing China's legal and regulatory framework regarding inward FDI and how this framework evolved in the reform era.

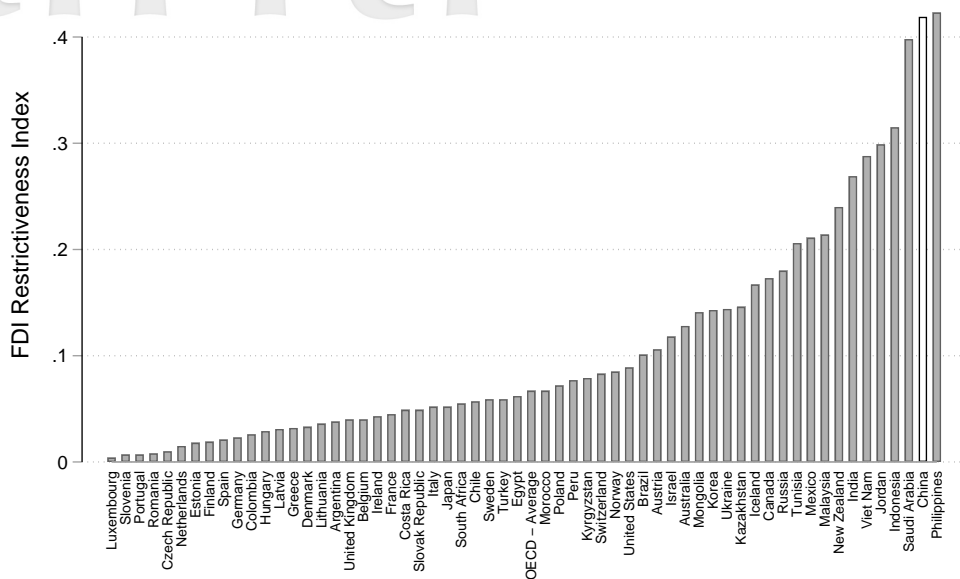
China's Legal and Regulatory Framework on Inward FDI

Foreign investment was officially added to the Constitution of the People's Republic of China (PRC) at the 23rd session of the 5th NPC in April 1982, establishing the legal status of foreign-invested enterprises (FIEs) in China. Specifically, Article 18 of the PRC Constitution stipulates that “foreign enterprises and other economic organizations or individuals are allowed to invest in China in accordance with the laws and regulations of the People's Republic of China and carry out various forms of economic cooperation with Chinese enterprises or other economic organizations.” Furthermore, “the legal rights and interests of foreign companies and other foreign economic organizations within China are protected by the laws of the People's Republic of China” (National People's Congress of the PRC, 2004).

In 1986 and 1988, two additional laws were passed: the Foreign-Invested Enterprise Law and the Foreign Cooperative Joint Venture Enterprise Law. Along with the Foreign Equity Joint Venture Enterprise Law, these three laws colloquially known as “*sanzi qiye fa* (三資企業法)” and their corresponding implementation provisions issued by the State Council form the foundation of China's regulatory framework for foreign investment. In addition to the three central laws, there are over 1,000 rules and regulatory documents related to foreign investment in China issued by various government ministries. Among them is the Foreign Investment Industrial Guidance Catalogue (the Catalogue) first issued in 1995 jointly by the State Planning Commission, the State Economic and Trade Commission, and the Ministry of Foreign Trade and Economic Cooperation. The Catalogue includes three categories of sectors (encouraged, restricted, and prohibited), with the unpublished fourth category (permitted) deemed to include all sectors not covered by the other three. As such, the Catalogue identifies industries in which foreign investors are allowed to invest and sets limits in many cases on how investments can be structured in the case of joint ventures.

Throughout the reform period, Chinese regulators have continuously refined laws and regulations to relax controls on foreign investment, though the scope and pace of liberalization have been uneven across sectors and issues (Pearson, 1991). A major round of revisions occurred during China's entry into the World Trade Organization (WTO), when all three central laws were substantially amended between 2000 and 2001, including the removal of restrictions stipulating that wholly foreign-owned FIEs are only allowed if they adopt advanced technology or export the majority of their products. Furthermore, many service sectors were moved from the prohibited category to the restricted category in the 2002 revised Catalogue in accordance with

FDI Restrictiveness in 2012



Source: Data from the OECD FDI Regulatory Restrictiveness Index (OECD, 2020).

Fig. 1. Comparing China's FDI Regulatory Restrictiveness Index with other countries' in 2012. A smaller number denotes fewer restrictions on foreign investment.

China's WTO commitment to open up these sectors within five years of China's accession in December 2001.

Over the four decades of reform and opening up, FDI poured into China at an average annual growth rate of 13.1%, a number unrivaled by any country in the developing world. Nevertheless, many industries in China were still partially or completely closed to foreign investors, including sectors reserved for domestic companies due to their political, strategic, economic, or cultural importance. In the 2012 version of the OECD's FDI Regulatory Restrictiveness Index, China was ranked the second most restrictive country against FDI out of 62 countries, behind the Philippines (see Figure 1).¹

Further complicating the problem is the fact that China's existing legal and regulatory framework for FDI has become highly decentralized and fragmented across

¹The OECD FDI Regulatory Restrictiveness Index is based on four main indicators of restrictions against foreign investment: foreign equity restrictions, discriminatory screening or approval mechanisms, restrictions on key foreign personnel, and other operational restrictions (such as limits on purchasing land or repatriating profits and capital).

a large number of government and bureaucratic agencies at the central and local levels. Under this complex regulatory system, foreign investors are often required to go through an extensive review and approval process by multiple government agencies as well as relevant industry regulators if the investment is headed for industries the Catalogue deems restricted. Separate approval processes also exist when it comes to land use and other administrative areas. To make matters worse, the regulatory agencies often have overlapping authorities that can change overnight, making it hard for investors to know exactly what to do. Not surprisingly, “inconsistent regulatory interpretation and unclear laws” have been consistently rated as some of the top business challenges for foreign investors operating in China according to the annual Business Climate Survey conducted by the American Chamber of Commerce in China (AmCham) between 2008 and 2012 (AmCham, 2013).

Recognizing these problems and hoping to maintain China’s attractiveness as a top destination for foreign investment, the CCP after the 18th Party Congress in November 2012 launched one of the largest and most ambitious economic reform programs since 1978. Among other things, it called for the broadening of foreign investment access to China. Revising the existing foreign investment laws was put into the NPC legislative agenda (2012–2017) as a Class II Law as a part of these reforms.

The Draft Foreign Investment Law in 2015

After some internal discussions, the draft FIL moved to the interagency review stage on January 19, 2015 when the MOFCOM released a discussion draft Foreign Investment Law (Draft Law) of the People’s Republic of China (*zhonghua renmin gongheguo waiguo touzi fa [cao’an zhengqiu yijian gao]* 中華人民共和國外國投資法 [草案徵求意見稿]) for public comments (MOFCOM, 2015a). The draft FIL at the time represented China’s most ambitious endeavor to overhaul the FDI regulatory framework that had been in place for decades. The draft was comprehensive in its scope, covering the definitions of foreign investor and foreign investment as well as market entry administration, national security review, information reporting, investment promotion, investment protection, coordination and dispute resolution, supervision, and inspection in a total of 11 chapters and 170 articles. If enacted, the FIL would have unified the three central FDI laws and their implementing rules as well as applicable provisions scattered throughout numerous other laws, regulations, and departmental rules. Furthermore, the FIL would have adopted a reporting mechanism to replace the Ministry’s approval system, thereby reducing investor uncertainty about transactions currently subject to discretionary approval at both central and local levels.

The stated goal of the new FIL was to facilitate and protect investment with a view to creating a stable, transparent, and predictable investment environment. To this end, one highlight of the draft law was the granting of “national treatment”—that is, foreign investors would no longer be subject to a different regulatory regime from domestic Chinese investors except in the restricted and prohibited sectors specified in the Catalogue (akin to the idea of a “negative list”). Another new feature of the proposed FIL was “limited licensing plus comprehensive reporting” for foreign investors that differed from the existing practice that required FIEs to obtain prior approval via licenses from a range of governmental authorities.

Under the existing FDI legal and regulatory framework discussed earlier, foreign investors often are required to go through extensive review and approval processes stipulated by multiple government agencies. To say the process is cumbersome is an understatement. In order to obtain the necessary government approval, it is estimated that foreign investors normally need to go through a total of seven steps (United States Chamber of Commerce [USCC], 2012). More specifically, the government agencies involved in the FDI regulatory process include the central and local-level MOFCOM (for anti-monopoly review), the Administration of Industry and Commerce (for name approval and registration), the Land and Resources Department (for approval of land-use rights), central and local environmental protection bureaus (for environmental impact assessment), the provincial planning department (for zoning opinion on planned location), the State-Owned Assets Supervision and Administration Commission (for use of state assets or state-owned land-use rights), the Development and Reform Commission (for project approval), industrial regulators (for business activities licenses such as food and drug production, pesticide manufacturing, mining, etc.), commerce departments (for approval of related contracts, articles of association, and FIE formation). Because the proposed FIL would overhaul the entire FDI legal and regulatory regime, all of the above agencies and departments were important stakeholders that needed to be consulted in the interagency review process. As a consequence, each of them became a potential veto player. According to one MOFCOM official involved in the interagency review process of the FIL (personal communication, December 2019), there were wide-ranging disagreements among these agencies and departments, all of which wanted to ensure that their own interests were preserved in the new FIL, “making it next to impossible to reach any kind of consensus.”

While it is not possible to gain access to these internal, behind-the-scenes discussions for a systematic examination of the bureaucratic competition and bargaining, other forms of consultation may help shed some light on the legislative deliberation

process at the interagency bargaining stage. In addition to online consultation, the MOFCOM encouraged feedback from all stakeholders through email, phone, and letter. There were also more direct channels of communication (Hui & Chan, 2016). The US-China Business Council (USCBC), for example, drafted a lengthy document on its view of the draft FIL and made sure that the document was relayed to the MOFCOM and other relevant ministries through its own channel and network (USCBC, 2015). But the best window of opportunity into these internal debates and discussions may be in the form of comments that were collected from the online portal mentioned earlier and, rather unusually, archived by the MOFCOM.

Over the course of the month when the online consultation portal was open, a total of 62 comments were submitted to the Ministry (see Appendix for more details). The number of submissions may appear small—nearly 30,000 online comments were garnered by public consultation on a plan to reform the health system that was announced by the central government through the National Development and Reform Commission in October 2008 (S. J. Balla & Liao, 2013). This is understandable, however, considering that the FIL was much more technical and that ordinary citizens had neither the expertise nor the stakes to offer feedback on the draft.

What is more interesting is that the comments came from a wide range of government and social groups. The largest number of comments (29%) were from various government bureaucracies at the local level that included provincial governments, provincial and city bureaus of commerce, finance, foreign trade and economic cooperation, industry, and taxation. The second largest group of comments was from firms (24%), including SOEs, domestic private firms, and FIEs. About 15% of the commenters either did not provide their affiliations or used pseudonyms. The rest were submitted by law firms (9%), industrial and trade associations (8%), followed by equal shares (4%) from accounting firms, tax firms, and university scholars.

Those who had submitted an online comment were also asked to pick one of six predefined categories: the revision of specific articles (*juti tiaowen xiugai lei yijian* 具體條文修改類意見), approval (*zancheng lei yijian* 贊成類意見), critical (*piping lei yijian* 批評類意見), feedback (*fanying qingkuang lei yijian* 反映情況類意見), general principle (*yuanze xing yijian* 原則性意見), and others (*qita yijian* 其他意見). More than half (56%) of the online comments involved highly detailed suggestions on how to revise various articles in the draft law. Nearly 15% of the comments provided feedback to the MOFCOM based on their own experiences working with the existing FDI regulatory framework, remarking how the new FIL may or may not make things better. The approval, critical, and general comments each accounted for 8% of the total, and the last 5% were “other comments.”

What can these comments tell us about the interagency bargaining process? One of the major goals of the proposed new FIL was to simplify and streamline the process for foreign investors through a “limited licensing plus comprehensive reporting” system. The adoption of such a system would effectively have removed the pre-approval requirements for licenses from a wide range of governmental authorities. Unfortunately, this also meant the removal of many relevant government agencies from the process which would mostly likely have resulted in the loss of revenues, positions, influence, and rent-seeking opportunities. Obviously, such a change did not sit well with the affected government agencies, a sentiment epitomized by the following “critical comment” submitted anonymously:

I am not in favor of the formulation of a unified foreign investment law. China is in a period of rapid transition. Many situations are changing rapidly. It is difficult for a unified foreign investment law to adapt to [China's] actual development, which will lead to legal instability and lack of flexibility in the law. It is better to leave various domestic departments to manage foreign investments, which is also consistent with the spirit of the pre-entry national treatment principle advocated by the state.

不贊成制定統一的外資法，中國處於急劇的轉型期，很多情況瞬息萬變，制定統一的外資法難以適應現實發展，會造成法律的不穩定和缺乏靈活性。由國內各部門法來管理外資是比較好的途徑，這也是和國家倡導的准入前國民待遇原則精神相一致的。

Some government agencies took issue with more specific items in the proposed FIL in a turf war against other agencies. The Jiangsu Provincial Department of Finance, for example, submitted the following “specific comment,” claiming their jurisdiction over the supervision and inspection of the FIE against the audit department's:

We propose that “audit” in Article 126 of Chapter IX “Supervision and Inspection” be changed to “finance”. The “audit” here should be understood as the national audit department. According to China's “Audit Law,” the state audit department does not have the supervision and management functions for foreign investors and foreign investment enterprises. According to the provisions of China's “Accounting Law” and “Certified Public Accountant Law,” enterprise accounting information and the certified public accountant industry are managed by the state financial departments, which are responsible for supervising and inspecting the accounting information for enterprises, including FIEs, as well as the quality of the auditing provided by the auditing and accounting firms that provide service to FIEs. Therefore, the word “audit” should be changed to “financial.”

建議將第九章“監督檢查”第一百二十六條中的“審計”改為“財政”。這裡的“審計”應當理解為國家審計部門，根據我國《審計法》，國家審計部門不具有對外國投資者、外國投資企業的監督管理職能。根據我國《審計法》、《註冊會計師法》的規定，國家財政部門是企業會計信息、註冊會計師行業的主管部門，應當對包括外國投資企業在內的企業會計信息、以及為外國投資企業提供審計服務的我國會計師事務所的審計質量進行監督檢查。所以，應當將“審計”改為“財政”。

Turf wars were also waged vertically between central and local governments. One example was the Bureau of Commerce of Xiangyang, a municipal-level government agency in Hubei Province. In a “specific comment” submitted to the online

portal, the Bureau effectively asked that it be given authority that belonged to the provincial-level government in the management of foreign investment:

In accordance with the principle of decentralization and investment facilitation, as well as the current situation of local foreign investment management, we propose to change “the foreign investment department of the people’s government of the province, autonomous region or municipality directly under the central government where the investment is located” in “Article 145 [Violation of Permit Regulations]” and “Article 147 [The Administrative Legal Responsibility for Violation of the Information Reporting Obligation]” to “the foreign investment department of the municipal people’s government with the permission to establish the investment location.” This facilitates not only the management of FIEs, but also the contact and communication between FIEs and relevant authorities.

按照簡政放權，投資便利化的原則，根據目前地方上外國投資管理的實際狀況，建議將“第一百四十五條【違反准入許可規定】”以及“第一百四十七條【違反信息報告義務的行政法律責任】”中“投資所在地省、自治區、直轄市人民政府外國投資主管部門”修改為“投資所在地具有許可權設區的市級人民政府外國投資主管部門”。這樣不僅方便對外國投資企業的管理，也方便外國投資企業與主管部門的聯繫和溝通。

In addition to exposing competing bureaucratic interests, the draft FIL also encountered some pushback from outside the government. For lawyers, industry associations, and firms, one of the most contentious issues in the proposed FIL was the regulation of “Variable Interest Entities” (VIE) which the draft had officially defined as a form of foreign investment in Article 14(6). A VIE is a structure that allows foreign investors to gain de facto control over a domestic operating company that holds the necessary license(s) to operate in a restricted or prohibited sector such as telecommunications. Over time, VIEs have also become an effective means for Chinese tech firms such as Alibaba and Tencent to be listed on capital markets outside China.

It is believed that the expanded definition of foreign investment was (i) to curb VIEs as well as similar arrangements like shadow shareholding, leasing, contractual, or financing arrangements that enable foreign investors to circumvent restrictions on investment in China, and (ii) to subject existing VIEs to the same regulatory framework as other FIEs. Nevertheless, the lack of detail in the draft raised concerns as to how the new FIL would affect the existing VIEs, especially ones initiated by domestic firms. The following “specific comment” submitted by the China Venture Capital and Private Equity Association summarizes these concerns:

The VIE architecture is a specific product of a specific historical period. It has become an important channel for Chinese corporate financing in the absence of a mature capital market in China, thus promoting the development of China’s strategic industries. It is recommended that the government grandfather firms with existing VIE frameworks, especially those controlled by foreign investors.

VIE 架構是特定歷史時期的特定產物，其在中國資本市場不健全情況下，為中國企業融資找到了重要通道，從而促進了中國戰略新興產業發展。建議對已有 VIE 架構的處理，特別是對外國投資者控制的現有 VIE 架構，採取“老人老辦法，新人新辦法”的處理辦法。

While these online comments represent a very small portion of the debates surrounding the proposed FIL, they nevertheless reveal competing interests both horizontally across various bureaucratic ministries and vertically between different levels of government. Given the expansive scope of the FIL and the number of stakeholders (i.e., veto players) involved, it is unsurprising that the interagency review stage reached a standstill and the draft FIL failed to move on to the next stage of the legislative process. Indeed, although not publicly acknowledged, the legislative gridlock was attributed by some observers to sharp disagreements among “relevant authorities and ministries” (Kuhn, 2019).

The 2019 Foreign Investment Law

Even though the ambitious 2015 draft FIL was tabled, the Chinese government rolled out a series of more specific regulatory changes in the following years that were aimed at simplifying administrative procedures and improving the business environment for foreign investors. Major revisions to the laws and regulations governing inward FDI were implemented in June 2016, including the promulgation of the revised Foreign Investment Industrial Guidance Catalogue and the long-anticipated National Negative List. In July 2017, Premier Li Keqiang hosted a State Council Executive Meeting which led to the “Notice on Several Measures for Promoting Foreign Investment Growth” (State Council, 2017). The notice urged the government to build a convenient legal and international environment for foreign businesses by introducing new measures to enhance market access for FIEs in the services, manufacturing, mining, and infrastructure sectors.

During the Boao Forum for Asia on April 11, 2018, less than a month after the constitutional amendment that removed the presidential term limit, President Xi Jinping announced that China's doors would open “wider and wider” to foreign investment and promised to remove foreign equity stake caps for banks, securities firms, and insurance by the end of 2018 (Leng, Zhen, Zheng, & Wu, 2018). Xi further assured foreign investors that China would prioritize protecting intellectual property rights and tweak its domestic regulations to comply with international economic and trade rules (Leng et al., 2018). Xi's speech reaffirmed the central government's determination to further liberalize the FDI regulatory framework in an attempt to maintain China's position as a top destination for foreign investors. On September 7, 2018, the NPCSC released its legislative plan for the next five years (2018–2023). This time, the revision of the FIL was upgraded to Class I together

with 68 other draft laws (including the constitutional amendment) that were designated as priority laws to be passed during the term. The elevation of the FIL from Class II to Class I may suggest that President Xi had greater agenda-setting power after the constitutional amendment, but it could also have resulted from changes in his preferences regarding FDI.

This time, the draft law went straight to the fourth stage of NPC deliberation. This may seem unusual, but a closer look at the draft FIL will reveal that this version was substantially watered down. In contrast to the massive 2015 draft, the new one included only six chapters and 42 articles, a third of which contained only one sentence. The chapters on national security review, information reporting, coordination and complaint handling, and supervision and inspection in the 2015 draft had largely been dropped. The article on VIE, previously one of the most contentious issues, was simply gone. It appears that the removal of these hotly debated issues made it possible for legislators to quickly move the draft forward to the NPC. In other words, many of the veto players who had derailed the 2015 FIL had little reason to object this time.

The new draft FIL was deliberated first at the 7th Session of the 13th NPCSC in December 2018 and later at the 8th Session of the 13th NPCSC in January 2019. Between December 26, 2018 and February 24, 2019, the draft FIL was open for public consultation through the NPC online portal and garnered 1,139 comments from 391 people.² Soon after the public consultation, the draft FIL moved to the final round of review at the second Session of the 13th NPC, which passed the law on March 15, 2019 with 2,929 in favor, eight against, and eight abstentions. Taking only three months, the entire process was faster than most of the laws that have passed thus far in the 2018–2023 legislative plan.

While the rush to pass the FIL may seem striking, it was mentioned earlier that it is not unusual for the legislative process to gain momentum in response to an external shock, which in this case was the escalating U.S.–China trade war. Furthermore, if one compares the text of the new FIL with the 2015 version, it becomes more apparent that the law was swiftly passed as a peace offering to the United States ahead of the bilateral trade talks in May 2018 in which China was hoping to strike a deal with the U.S.³ Indeed, the new FIL addressed several big-ticket items raised by the

²Unlike the MOFCOM and the NDRC, the NPC has not disclosed the comments since the closing date of the public consultation.

³This assessment is supported by a number of scholars and officials involved in the drafting of the new FIL (personal communication, December 2019).

United States such as market entry, forced technology transfers, and intellectual property protection.

In the 2015 draft FIL, for example, there was no mention of forced technology transfers through administrative measures, and only a one-sentence reference to the “protection of intellectual property of foreign investors and foreign-invested enterprises in accordance with the law” in Article 116. Both issues are specifically addressed in Article 22 of the new FIL:

The state protects the intellectual property rights of foreign investors and foreign-invested enterprises; protects the lawful rights and interests of intellectual property rights holders and relevant rights holders; and for acts infringing on intellectual property rights, strictly pursues legal responsibility in accordance with law. The State encourages technological cooperation to be conducted in the course of foreign investment and on the basis of the principle of voluntariness and business rules. The conditions for technological cooperation are to be determined through consultation by the various parties to the investment on the basis of equality and the principle of fairness. Administrative organs and their employees must not force the transfer of technology through administrative measures.

Similarly, the new FIL has been expanded substantially on the subject of market entry compared to the 2015 version, which did not use the term “negative list.” Specifically, Article 4 of the new FIL makes it clear that the country “implements the management scheme of pre-establishment national treatment plus negative list with respect to foreign investment.” Furthermore, it stipulates:

The state affords national treatment to foreign investment outside the negative list. The negative list is to be published by or published as authorized by the State Council. Where the international treaties or agreements that the People's Republic of China concludes or joins have more favorable provisions for the treatment of access by foreign investors, the relevant provisions may be followed.

These positive changes notwithstanding, the new FIL is considered by many to be more “about slogans” than about substance (Birmingham, Zhou, & Zheng, 2019). It is well known that in China, problems often arise when it comes to implementing and enforcing rules and regulations at the local level due to the lack of capacity or accountability of local agents in charge of enforcement, as their interests may not align with those of the central leaders (Eaton & Kostka, 2014; Lieberthal & Oksenberg, 1988; Manion, 1991; O'Brien & Li, 1999). The slimmed-down version of the FIL has renewed concerns about the law's enforcement and implementation, issues which have been continually raised by foreign investors in China. In the 2018 Business Climate Survey released by the American Chamber of Commerce in China (AmCham, 2018), for example, 60% of the surveyed managers referred to “inconsistent regulation and enforcement” as their top concern when doing business in China. According to the

managers, uneven enforcement has become a subtler version of protectionism with foreign companies bearing more than their share of the government's heavy hand. Nearly half (46%) believed they were treated unfairly compared to local companies, with some claiming to have undergone tax audits or reviews of work permits more frequently than their domestic counterparts. Similarly, firms in the Canada China Business Survey in 2017 identified "inconsistent interpretation of regulations and laws and lack of transparency" as the top major obstacles to doing business in China (Canada China Business Council [CCBC], 2017). For multinational corporations in China, "operating by the book often seems to involve a book still being written" (AmCham, 2018).

Unfortunately, the lack of details and clarity in the implementation of the new FIL have not helped much to improve confidence in this regard. Article 25 of the FIL states vaguely that "the various levels of local people's governments and their relevant departments shall fulfill the policy commitments made to foreign investors or foreign-invested enterprises and the various types of contracts concluded in accordance with law," and "where it is necessary that they change policy commitments or contractual agreements for the national or public interest, they shall proceed in accordance with legally prescribed authorities and procedures and compensate the foreign investors or foreign-invested enterprises for any loss sustained as a result in accordance with law." Exactly how this will be done, however, is up in the air and will likely be intensely debated during the next stage of explication and implementation.

Immediate responses to the new FIL have been understandably lukewarm. Speaking for its members, the Chairman of AmCham expressed disappointment that "a lot of the implementing detail has been chopped out. . . . how are they going to be implemented in practice, that is what we cannot tell" (Birmingham et al., 2019). Even the much-publicized restrictions on forced technology transfers were considered to be more form than substance. According to a Chinese law professor, "the identification of 'forced' is very ambiguous, and there are many ways for Chinese government to do forced technology transfer even after the law is passed" (Birmingham et al., 2019).

Conclusion

Since a constitutional amendment removed the presidential term limit in March 2018, there has been much speculation on how this will affect China's domestic governance and foreign policies. By analyzing the divergent fates of the two FILs

before and after the constitutional amendment, this paper suggests that at least in the area of lawmaking, it is largely business as usual. President Xi Jinping may now enjoy greater agenda-setting power, but the institutional structure of the “multi-stage, multi-arena” legislative process which involves de facto veto players and adapts to external shocks seems to have endured. While the competing interests of various bureaucratic agencies at the interagency review stage derailed the 2015 FIL, the escalating U.S.–China trade war helped fast-track the deliberation process for the 2019 FIL in the NPC.

In addition to enriching our understanding of the lawmaking process in China under Xi Jinping, this paper also contributes more broadly to the literature on historical institutionalism (Pierson & Skocpol, 2002) which emphasizes how path dependence and institutional inertia shape political, social, and economic behavior and change. The constitutional amendment in many ways can be regarded as a “critical juncture” (Collier & Collier, 1991) in contemporary China, one that may set in motion a trajectory of institutional development and consolidation that will be difficult to reverse. The findings described in this article suggest that some institutions may be more durable than others when resisting changes.

The new FIL entered into force on January 1, 2020. The three central laws that had governed inward FDI in China for the past four decades were abolished at the same time. Now that the FIL has entered the explication and implementation stage, the same set of stakeholders within the bureaucracy may seek to shift policy outcomes by delaying or altering the implementation regulations in what Tanner (1995) refers to as the “second campaign” of the lawmaking process. Some are still optimistic that with consolidated power, President Xi Jinping’s deep commitment to promoting globalization will be the strong force ensuring the new law ushers in needed improvements that address foreign investors’ long-standing concerns about implementation and enforcement (Kuhn, 2019). Nevertheless, this remains to be seen.

Table A. 1.
Online Comments on the 2015 Draft FIL Submitted to the MOFCOM

Number	Type of comments	Actor	Date
1	General	Law	2015-01-19
2	Others	Government	2015-01-20
3	Specific	Firm	2015-01-20
4	Specific	Government	2015-01-20
5	Specific	Government	2015-01-21
6	Specific	Firm	2015-01-21
7	Specific	Other	2015-01-22
8	Specific	Firm	2015-01-22
9	Specific	University	2015-01-22
10	Specific	Government	2015-01-22
11	Specific	Law	2015-01-22
12	Specific	Tax	2015-01-23
13	Specific	Tax	2015-01-23
14	Specific	Government	2015-01-23
15	Specific	University	2015-01-23
16	Specific	Other	2015-01-23
17	Critical	Other	2015-01-23
18	General	Law	2015-01-26
19	Feedback	Other	2015-01-26
20	Specific	Government	2015-01-27
21	Specific	Other	2015-01-28
22	Specific	Government	2015-01-28
23	Feedback	Other	2015-01-29
24	Specific	Accounting	2015-01-29
25	Feedback	Other	2015-01-29
26	Others	Firm	2015-01-30
27	Specific	Accounting	2015-02-02
28	Specific	Government	2015-02-02
29	General	Government	2015-02-02
30	Support	Association	2015-02-02
31	Support	Association	2015-02-02
32	Specific	Firm	2015-02-03
33	Specific	Law	2015-02-03
34	Feedback	Firm	2015-02-03
35	Support	Association	2015-02-05
36	Specific	Government	2015-02-05

Table A. 1. (Continued)

Number	Type of comments	Actor	Date
37	Specific	Government	2015-02-05
38	Feedback	Government	2015-02-09
39	Support	Government	2015-02-10
40	Specific	Firm	2015-02-12
41	Specific	Government	2015-02-13
42	Feedback	Other	2015-02-14
43	Critical	Firm	2015-02-14
44	General	Firm	2015-02-14
45	Critical	Firm	2015-02-14
46	Others	Other	2015-02-15
47	Support	Firm	2015-02-15
48	Critical	Firm	2015-02-15
49	Specific	Firm	2015-02-15
50	General	Firm	2015-02-15
51	Specific	Government	2015-02-15
52	Critical	Law	2015-02-15
53	Specific	Tax	2015-02-15
54	Feedback	Firm	2015-02-16
55	Specific	Accounting	2015-02-16
56	Feedback	Association	2015-02-17
57	Specific	University	2015-02-17
58	Feedback	Association	2015-02-17
59	Specific	Government	2015-02-17
60	Specific	Government	2015-02-17
61	Specific	Government	2015-02-17
62	Specific	Law	2015-02-17

Note: Data collected from the Ministry of Commerce (MOF-COM, 2015b).

References

- American Chamber of Commerce in China (AmCham). (2013). *2013 China business climate survey report*. Retrieved from <https://media.npr.org/documents/2013/may/AmChamSurvey.pdf>.
- American Chamber of Commerce in China (AmCham). (2018). *2018 China business climate survey report*. Retrieved from <https://www.amchamchina.org/policy-advocacy/business-climate-survey/2018-business-climate-survey>.
- Balla, S. (2014). Health system reform and political participation on the Chinese internet. *China Information*, 28(2), 214–236.

- Balla, S. J. (2017). Is consultation the “new normal?": Online policymaking and governance reform in China. *Journal of Chinese Political Science*, 22(3), 375–392.
- Balla, S. J., & Liao, Z. (2013). Online consultation and citizen feedback in Chinese policy-making. *Journal of Current Chinese Affairs*, 42(3), 101–120.
- Birmingham, F., Zhou, C., & Zheng, S. (2019, March 7). China’s rushed foreign investment law gains lukewarm response from local and international businesses. *South China Morning Post*. Retrieved from <https://www.scmp.com/economy/china-economy/article/2189049/chinas-rushed-foreign-investment-law-gains-lukewarm-response>.
- Boix, C., & Svolik, M. W. (2013). The foundations of limited authoritarian government: Institutions, commitment, and power-sharing in dictatorships. *Journal of Politics*, 75, 300–316.
- Bueno de Mesquita, B. (2005). *The logic of political survival*. Cambridge, MA: MIT Press.
- Canada China Business Council (CCBC). (2017). *Canada China business survey*. Retrieved from https://www.ccbc.com/wp-content/uploads/2017/04/CCBC-Report-FINAL_SM.pdf.
- Collier, R. B., & Collier, D. (1991). *Shaping the political arena: Critical junctures, the labor movement, and regime dynamics in Latin America*. Princeton, NJ: Princeton University Press.
- Dickson, B. (2016). *The dictator’s dilemma: The Chinese Communist Party’s strategy for survival*. New York, NY: Oxford University Press.
- Eaton, S., & Kostka, G. (2014). Authoritarian environmentalism undermined? Local leaders’ time horizons and environmental policy implementation in China. *China Quarterly*, 218, 359–380.
- Fewsmith, J. (2018). The 19th Party Congress: Ringing in Xi Jinping’s new age. *China Leadership Monitor*, 55, 1–22.
- Horsley, J. P. (2009). *Public participation in the people’s republic: Developing a more participatory governance model in China* (Working paper). Retrieved from https://law.yale.edu/sites/default/files/documents/pdf/Intellectual_Life/CL-PP-PP_in_the_PRC_FINAL_91609.pdf.
- Hui, E. S. I., & Chan, C. K. C. (2016). The influence of overseas business associations on law-making in China: A case study. *China Quarterly*, 225, 145–168.
- Kuhn, R. L. (2019, March 13). China’s foreign investment law will be credible. Xi Jinping will see to it. *South China Morning Post*. Retrieved from <https://www.scmp.com/comment/insight-opinion/united-states/article/3001378/chinas-foreign-investment-law-will-be>.
- Leng, S., Zhen, L., Zheng, S., & Wu, W. (2018, April 10). Chinese President Xi Jinping stands up for globalisation and free trade at Asia’s Davos. *South China Morning Post*. Retrieved from <http://www.scmp.com/news/china/economy/article/2141099/chinese-president-xi-jinping-stands-globalisation-free-trade>.

- Li, Y., & Otto, J. (2002). Central and local law-making: Studying China's experience. In I. Hooghe & E. B. Vermeer (Eds.), *China's legal reforms and their political limits* (pp. 1–30). London, UK: Taylor and Francis.
- Lieberthal, K. G. (1992). Introduction: The “fragmented authoritarianism” model and its limitations. In K. G. Lieberthal & D. M. Lampton (Eds.), *Bureaucracy, politics, and decision making in post-Mao China* (pp. 1–30). Berkeley: University of California Press.
- Lieberthal, K. G., & Oksenberg, M. (1988). *Policy making in China: Leaders, structures, and processes*. Princeton, NJ: Princeton University Press.
- Lü, X., Liu, M., & Li, F. (2018). Policy coalition building in an authoritarian legislature: Evidence from China's national assemblies (1983–2007). *Comparative Political Studies*, 53(9), 1380–1416. doi: 10.1177/0010414018797950.
- Magaloni, B. (2008). Credible power-sharing and the longevity of authoritarian rule. *Comparative Political Studies*, 41, 715–741.
- Malesky, E., Abrami, R., & Zheng, Y. (2011). Institutions and inequality in single-party regimes: A comparative analysis of Vietnam and China. *Comparative Politics*, 43, 409–427.
- Manion, M. (1991). Policy implementation in the People's Republic of China: Authoritative decisions versus individual interests. *Journal of Asian Studies*, 50(2), 253–279.
- Ministry of Commerce of China (MOFCOM). (2015a). *Shangwubu jiu “Zhonghua Renmin Gongheguo waiguo touzifa (caoran zhengqiu yijian gao)” gongkai zhengqiu yijian* [商務部就《中華人民共和國外國投資法（草案徵求意見稿）》公開徵求意見, The Ministry of Commerce publicly solicits opinions on the “Foreign Investment Law of the People's Republic of China”]. Retrieved from <http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml>.
- Ministry of Commerce of China (MOFCOM). (2015b). *Shangwubu jiu “Zhonghua Renmin Gongheguo waiguo touzifa caoran zhengqiu yijian gao” gongkai zhengqiu yijian: chakan taren de yijian han jianyi* [商務部就《中華人民共和國外國投資法（草案徵求意見稿）》公開徵求意見：查看他人的意見和建議, The Ministry of Commerce publicly solicits opinions on the “Foreign Investment Law of the People's Republic of China”: See other opinions and suggestions]. Retrieved from http://interview.mofcom.gov.cn/mofcom_interview/front/advice/list?mofcom_no=464.
- National People's Congress of the People's Republic of China. (2004). *The Constitution of the People's Republic of China*. Retrieved from http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/node_2825.htm.
- O'Brien, K. J., & Li, L. (1999). Selective policy implementation in Rural China. *Comparative Politics*, 31(2), 167–186.
- OECD. (2020). OECD FDI regulatory restrictiveness index. *OECD International Direct Investment Statistics* (database). Retrieved from <https://doi.org/10.1787/g2g55501-en>.

- Pearson, M. (1991). The erosion of controls over foreign capital in China, 1979–1988: Having their cake and eating it too? *Modern China*, 17(1), 112–150.
- Pierson, P., & Skocpol, T. (2002). Historical institutionalism in contemporary political science. In I. Katznelson & H. V. Milner (Eds.), *Political science: State of the discipline* (pp. 693–721). New York, NY: W.W. Norton.
- Shih, V. C. (2008). *Factions and finance in China*. Cambridge, UK: Cambridge University Press.
- Shirk, S. L. (1993). *The political logic of economic reform in China*. Berkeley: University of California Press.
- State Council. (2017). *Guowuyuan guanyu cujin waizi zengzhang ruogan cuoshi de tongzhi* [國務院關於促進外資增長若干措施的通知, Notice of the State Council on several measures to promote foreign investment growth] (State Council Circular No. 39). Retrieved from http://www.gov.cn/zhengce/content/2017-08/16/content_5218057.htm.
- Svolik, M. W. (2009). Power sharing and leadership dynamics in authoritarian regimes. *American Journal of Political Science*, 53, 477–494.
- Svolik, M. W. (2012). *The politics of authoritarian rule*. Cambridge, MA: Cambridge University Press.
- Tanner, M. S. (1995). How a bill becomes a law in China: Stages and processes in lawmaking. *China Quarterly*, 141, 39–64.
- Tanner, M. S. (1999). *The politics of lawmaking in post-Mao China: Institutions, processes, and democratic prospects*. Oxford, UK: Oxford University Press.
- Truex, R. (2018). Authoritarian gridlock? Understanding delay in the Chinese legislative system. *Comparative Political Studies*, 53(9), 1455–1492. doi: 10.1177/0010414018758766.
- Tsebelis, G. (1995). Decision making in political systems: Veto players in presidentialism, parliamentarism, multicameralism and multipartyism. *British Journal of Political Science*, 25, 289–325.
- Tsebelis, G. (2002). *Veto players: How political institutions work*. Princeton, NJ: Princeton University Press.
- United States Chamber of Commerce (USCC). (2012). *China's approval process for inbound foreign direct investment: Impact on market access, national treatment and transparency*. Retrieved from <https://www.uschamber.com/china%E2%80%99s-approval-process-inbound-foreign-direct-investment-impact-market-access-national-treatment>.
- US-China Business Council (USCBC). (2015, February 17). *US-China Business Council comments on the draft foreign investment law of the People's Republic of China*. Retrieved from https://www.uschina.org/sites/default/files/en-comments_on_moj_fil_draft_implementing_regulations.pdf.