

# INTERNATIONAL INVESTMENTS

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D. 1. 1. 1 (Ulpianus *libro primo institutionum*)

**3. Ius naturale est, quod natura omnia animalia docuit:** nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: **videmus etenim cetera quoque animalia**, feras etiam istius iuris peritia censi.

**4. Ius gentium est, quo gentes humanae utuntur.** Quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, **hoc solis hominibus inter se commune sit.**

D. 1. 1. 6 (Ulpianus *libro primo institutionum*)

**pr. Ius civile est, quod neque in totum a naturali vel gentium recedit nec per omnia ei servit:** itaque cum aliquid addimus vel detrahimus iuri communi, **ius proprium, id est civile efficimus.**

**Sources of International Law:** An Introduction by Professor Christopher Greenwood  
([https://legal.un.org/avl/pdf/ls/greenwood\\_outline.pdf](https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf) )

**Where does international law come from and how is it made?**

These are more difficult questions than one might expect and require considerable care. In particular, **it is dangerous to try to transfer ideas from national legal systems to the very different context of international law.**

**There is no “Code of International Law”. International law has no Parliament and nothing that can really be described as legislation. While there is an International Court of Justice and a range of specialised international courts and tribunals, their jurisdiction is critically dependent upon the consent of States and they lack what can properly be described as a compulsory jurisdiction of the kind possessed by national courts.**

## Sources of International Law: An Introduction by Professor Christopher Greenwood ([https://legal.un.org/avl/pdf/ls/greenwood\\_outline.pdf](https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf) )

The result is that **international law is made largely on a decentralised basis by the actions of the 192 States** which make up the international community. **The Statute of the ICJ, Art. 38** identifies five sources:

- (a) Treaties between States;** [several **taxonomies** can be used such as bilateral/multilateral]
- (b) Customary international law derived from the practice of States;** [the rule n. 1 here]
- (c) General principles of law** recognized by civilised nations; and, **as subsidiary means** for the determination of rules of international law:
- (d) Judicial decisions** and the **writings of “the most highly qualified publicists”**.

**This list is no longer thought to be complete** but it provides a useful starting point.

## **XIX century**

- **International customs** about the protection of goods belonging to foreigners located in other State's territory
- **A few treaties**

## **XX century**

- Attempt to reach the agreement for a **multilateral treaty on investments on a global or** however on a **supra-regional scale: not succeeded so far...**
- **In particular after the WWII** there was a proliferation of Bilateral investment treaties **BITs**

**New trends: Investment related matters regulated in specific chapters of new FTAs**

It seems that **a number of BITs** which are **expiring** are **not being renovated**

**The efforts to reach multilateral treaties are rather focusing on regions and macro-regions**  
(although the results do not seem to be so brilliant so far...)

**China is a WTO member since 2001** - The main issues with China are rather with the so-called **Non-tariff barriers**

Nonetheless **China is currently party to more than 20 FTAs** (including the RCEP - Regional Comprehensive Economic Partnership among the 10 ASEAN Countries + China, Japan, the ROK, Australia and New Zealand - which should be at the moment giving ground to the largest free trade area in the world), it is having more than 10 under negotiation and several more under feasibility study ([http://fta.mofcom.gov.cn/english/fta\\_qianshu.shtml](http://fta.mofcom.gov.cn/english/fta_qianshu.shtml))

**China – EU FTA negotiations** were ongoing but it seems like they have been **in stand by since December 2020** (after the **Lisbon Treaty** – Article 3(1)(e) of the Treaty on the Functioning of the European Union (TFEU) - the **EU has exclusive powers for common commercial policies + more bargaining power with China**)

In the context of **China-promoted ‘new wave of globalization’** under the impetus of the **Belt and Road Initiative (BRI)**, it might be reasonably expected that the large number of transnational activities would necessitate a **higher standard of investment regulation** and China itself may play a relevant role in its promotion.

For instance, **"Belt and Road" Cooperation and Partnership Model Agreement**





## China is a member to the **ICSID Convention**

The following Contracting States have notified the Centre, pursuant to Article 25(4) of the Convention, of the class or classes of disputes they would or would not consider submitting to the jurisdiction of the Centre:

<u>Contracting State</u> <sup>5</sup>	<u>Classes of Disputes</u>
China	<p><u>Text of Notification:</u></p> <p>“[P]ursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes disputes over compensation resulting from expropriation and nationalization.”</p> <p><u>Date of Notification:</u></p> <p>January 7, 1993</p>

(In the largest part of disputes brought to the ICSID it is rather discussed whether there was an expropriation or not...)

## **Digression on the regime of the ownership in China:**

- the **ownership** in China can be: **public or private**
- the **public ownership** can be **State ownership** (ownership of the whole people) or **collective ownership** (ownership of a given community)

**Constitution** (art. 12) **public ownership is sacred and inviolable** + **Civil Code** (art. 206) **public property plays a predominant role** - other kind of discussions after the 2006 Real Rights Law

**Land ownership is public – resources ownership is public**

Since the 80s, the international investments in China were mainly regulated through the:

- Law on wholly foreign owned enterprises
- Law on Sino-foreign contractual joint ventures
- Law on Sino-foreign equity joint ventures

And the...

# FOREIGN INVESTMENT CATALOGUE

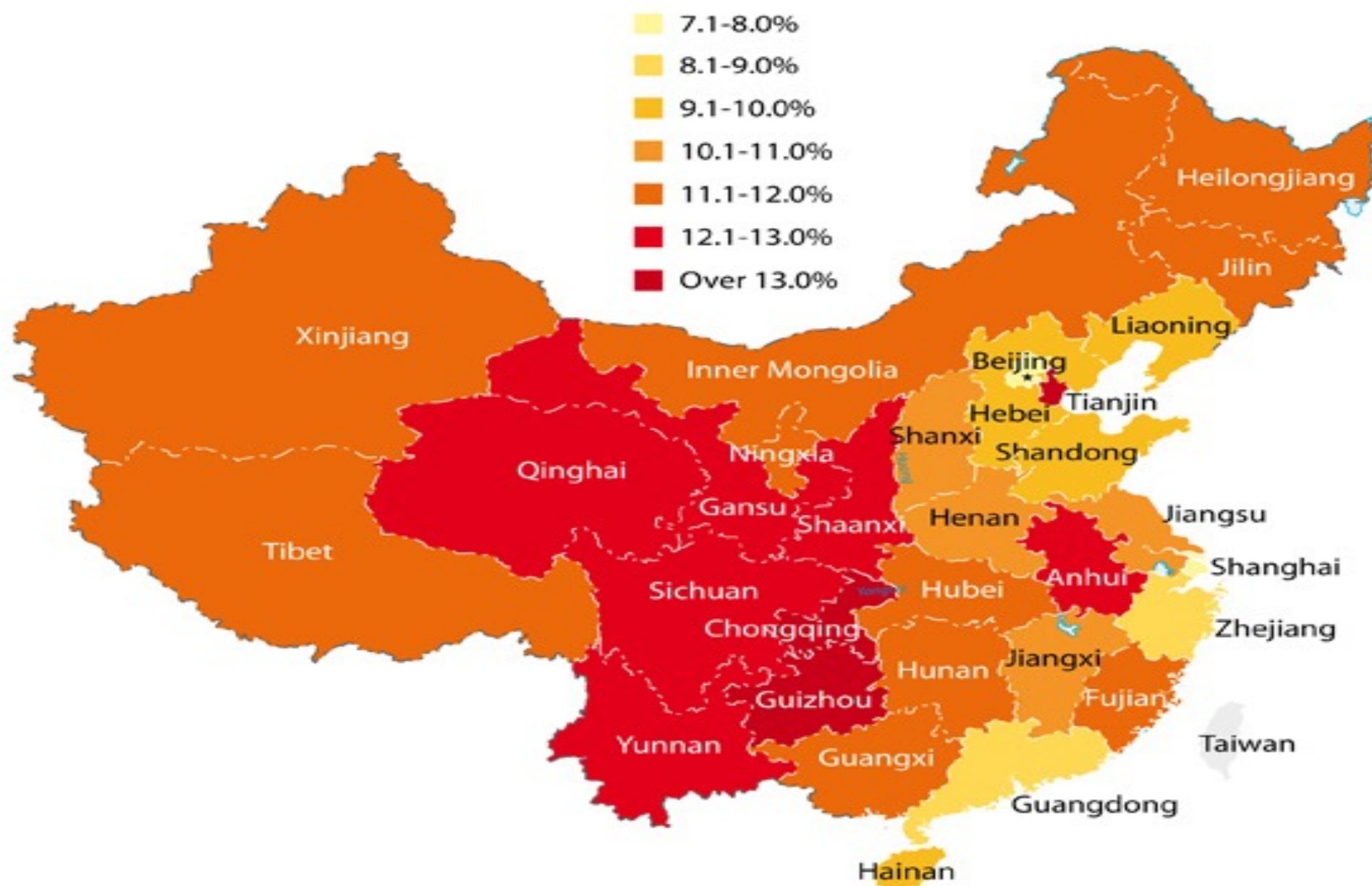
At the beginning of the opening and reform policies there were **direct negotiations between governments and their Countries major companies**

- **1° Edition: 1995**
- Following Editions: 1997, 2002, 2004, 2007, 2012
- Last Edition: 2015

**A special Catalogue for investments in central-western regions** had been issued since 2008

**Now substituted by the «Negative List»** (last edition in force since Nov. 1° 2024) **+ the Catalogue for Encouraged Industries for Foreign Investors** (last edition 2022) **with a special part on the central and western regions**

# China's Provincial GDP Growth Rates in 2012

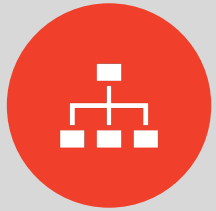


# Catalogue's Structure

- Encouraged Investments
  - Tax benefits, approval and authorization processes related benefits etc.
- Restricted Investments
  - Higher requirements and stricter approval and authorization procedures – sometimes necessary to enter a EJV or CJV with a Chinese partner (who sometimes may be required to have the control of the company)
- Forbidden Investments
- Allowed Investments
  - Everything that is not mentioned in the Catalogue

# Important Features of the new FIL

adopted at the 2nd Session of the 13<sup>th</sup> National People's Congress of the People's Republic of China on March 15, 2019, came into force on January 1, 2020.



**STRUCTURE**



**PRE-  
ESTABLISHMENT  
NATIONAL  
TREATMENT (NT)**



**NEGATIVE LIST**



**CANCELS CASE-  
BY-CASE  
APPROVAL  
SYSTEM**



**IPRS  
(prohibit  
forceful the  
transfer)**



**COMPLAINTS  
MECHANISM**

# STRUCTURE

Total of 42 articles in six Chapters:

General  
Provisions

Investment  
Promotion

Investment  
Protection



Investment  
Administration

Legal Liability

Supplemental  
Provisions



## General provisions

Article 1 **For the purposes** of further expanding the country's opening up, vigorously boosting foreign investment, protecting the lawful rights and interests of foreign investors, regulating the administration of foreign investment, propelling the formation of a new pattern of extensively opening up, and promoting the sound development of the socialist market economy, this Law is enacted in accordance with the Constitution.

Article 2 (...) For the purposes of this Law, **“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”)**...

## General provisions

Article 3 (...) The **state implements high-level investment liberalization and facilitation policies**, establishes and improves the **foreign investment promotion mechanisms**, and builds a **stable, transparent, and foreseeable investment environment** with a level playing field.

Article 4 The state applies the **administrative system of pre-establishment national treatment plus negative list to foreign investment**.

“**Pre-establishment national treatment**” means 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;

and “**negative list**” as mentioned in the preceding paragraph means a **special administrative measure for access of foreign investment in specific fields as imposed by the state**. The state accords **national treatment to foreign investment outside of the negative list**.

The negative list shall be issued by or with the approval of the State Council.

## **Digression: from the catalogue to the negative list...**

On June 30, 2019, the **National Development and Reform Commission (NDRC)** and the **Ministry of Commerce (MOF)** jointly issued two “**negative lists**” (one to be implemented on a national scale and one for the **FTZs**) and one “**catalogue for the encouraged industries...**” (divided between a ‘general catalogue’ and a catalogue for encouraged investments in the central-western regions), all three of which took effect on July 30, 2019.

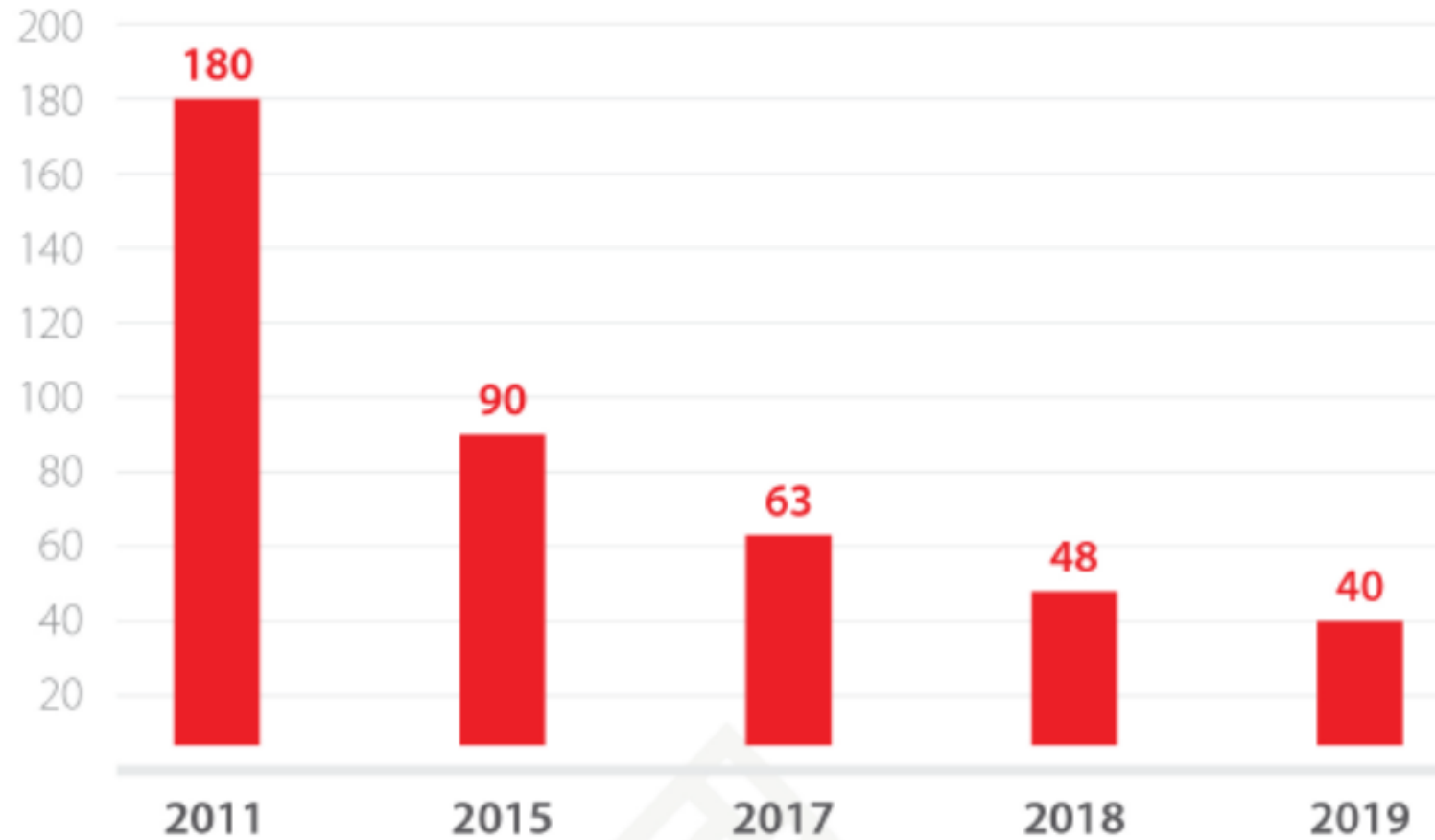
**A new Catalogue has been then issues in 2022 and a new negative list in 2024 – in force since November 1<sup>st</sup>**

## From the catalogue to the negative list...

Implementation Date of China's Old and New Negative List and Encouraged Catalogue					
Implementation date	Old list	Number of items	Implementation date	2019 New list	Number of items
July 28, 2018 to July 29, 2019	2018 FI National Negative List	48	July 30, 2019	2019 FI National Negative List	40
July 30, 2018 to July 29, 2019	2018 FI FTZ Negative List	45		2019 FI FTZ Negative List	37
July 28, 2017 to July 29, 2019	2017 Catalogue of Industries for Foreign Investment (the "Encouraged" Category)	348		2019 Encouraged Catalogue (Encouraged Catalogue in the Central and Western Region included)	415
March 20, 2017 to July 29, 2019	2017 Encouraged Catalogue in the Central and Western Region	639			693

## From the catalogue to the negative list...

Number of Items Prohibited or Restricted in China's 2019 National Negative List, 2011 to 2019



## From the catalogue to the negative list...



Art. 4 ult.co.

Where **any international treaty or agreement concluded or acceded to by the People's Republic of China provides for any more favorable treatment** in respect of access of foreign investors, the **relevant provisions of the treaty or agreement may apply.**

Article 6 **Foreign** investors and foreign-funded enterprises conducting investing activities within China shall **abide by the laws and regulations of China**, and **neither compromise China's national security nor cause damage to the public interest.**

Article 8 Employees of a foreign-funded enterprise shall establish a trade union and conduct trade union activities according to the law to protect the lawful rights and interests of employees.

Article 14 As needed for national economic and social development, the **state encourages and directs foreign investors to invest in particular industries, fields, and regions.** Foreign investors and foreign-funded enterprises **may enjoy preferences** according to laws, administrative regulations, or the provisions issued by the State Council.

Article 16 **The state guarantees that foreign-funded enterprises participate in government procurement activities through fair competition according to the law.** Products manufactured and services provided by foreign-funded enterprises within China shall be equally treated in government procurement according to the law.

Article 20 **The state expropriates no foreign investment.** Under certain **special circumstances**, the state may expropriate or requisition the investment of foreign investors in the **public interest according to the provisions of laws.** Expropriation and requisition shall be conducted under **statutory procedures, and fair and reasonable compensation shall be made in a timely manner**



Article 21 A foreign investor may, according to the law, **freely remit into or out of China, in Renminbi or foreign exchange**, its contributions made, profits, capital gains, proceeds from disposition of assets, and royalties of intellectual property rights derived from, indemnity or compensation lawfully acquired, and income from liquidation, among others, within China.

**Article 22 The state protects the intellectual property rights of foreign investors and foreign-funded enterprises, and protects the lawful rights and interests of owners of intellectual property rights and relevant right holders; and for infringements of intellectual property rights, strictly holds the infringers legally liable according to the law.**

**The state encourages technology cooperation on the basis of free will and business rules in the process of foreign investment. Technology cooperation conditions shall be determined under the principle of fairness by all investing parties through equal consultation. No administrative agency or its employee may force the transfer of any technology by administrative means.**

**Article 23 Administrative agencies and their employees shall keep confidential, according to the law, the trade secrets of foreign investors and foreign-funded enterprises to which they have access in performing their duties, and neither divulge nor illegally provide others with such secrets.**

**Article 25 The local people's governments at all levels and their relevant departments shall fulfill their policy commitments legally made to foreign investors** and foreign-funded enterprises and various contracts legally concluded.

Where any policy commitment or provision of a contract **needs to be changed in the national or public interest**, such change shall be made **according to the statutory powers and procedures**, and foreign investors and foreign-funded enterprises shall be **compensated according to the law for their losses so incurred**.

**Article 26 The state establishes a working mechanism for complaints** of foreign-funded enterprises to address concerns of foreign-funded enterprises and their investors in a timely manner and coordinate and improve the relevant policies and measures.

Where a **foreign-funded enterprise or its investor deems that an administrative action taken by an administrative agency or its employee infringes upon its lawful rights and interests**, it may, **through the working mechanism for complaints of foreign-funded enterprises, apply for coordination to resolve the issue**.

Where a foreign-funded enterprise or its investor deems that an administrative action taken by an administrative agency or its employee infringes upon its lawful rights and interests, **it may also apply for administrative reconsideration or institute an administrative lawsuit according to the law**, in addition to applying for coordination to resolve the issue through the working mechanism for complaints of foreign funded enterprises.

Article **31** The business forms, structures, and rules of activities of foreign-funded enterprises shall be governed by the Company Law of the People's Republic of China, the Partnership Law of the People's Republic of China, and other laws.

Article 32 In conducting production and distribution activities, foreign funded enterprises shall comply with the provisions of laws and administrative regulations pertaining to labor protection and social insurance, conduct taxation, accounting, foreign exchange, and other affairs according to laws, administrative regulations, and the relevant provisions issued by the state, and accept the supervisory inspection legally conducted by the appropriate departments.

Article 34 The state establishes a foreign investment information reporting system. A foreign investor or foreign-funded enterprise shall submit investment information to the commerce department through the enterprise registration system and the enterprise credit information publicity system.

The contents and scope of reporting of foreign investment information shall be determined **under the principle of necessity**; and investment information accessible by interdepartmental information sharing shall not be required to be submitted again.

**Article 35 The state establishes a foreign investment security review system to conduct a security review of foreign investment that impacts or may impact the national security.**

A decision legally made upon a security review shall be final.

**Article 40 Where any country or region adopts any prohibitive, restrictive or other similar discriminatory measures against the People's Republic of China in terms of investment, the People's Republic of China may adopt corresponding measures against the aforesaid country or region according to the actual circumstances.**

**Article 41 Where the state has issued any other provisions on foreign investors' investment in the banking, securities, insurance, and other financial industries or the securities, foreign exchange, and other financial markets within China, such provisions shall prevail.**

Article 42 This Law shall come into force on **January 1, 2020**, upon which the Law of the People's Republic of China on Chinese-foreign Equity Joint Ventures, the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises, and the Law of the People's Republic of China on Chinese-foreign Cooperative Joint Ventures **shall be repealed**.

**Foreign-funded enterprises formed under** the Law of the People's Republic of China on Chinese-foreign Equity Joint Ventures, the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises, and the Law of the People's Republic of China on Chinese-foreign Cooperative Joint Ventures before this Law comes into force may maintain their original business forms, among others, **for five years after this Law comes into force**. The specific implementing measures shall be developed by the State Council.

This article 42 has to be coordinated with the above mentioned art. 31 providing that the **foreign-funded enterprises shall be governed by the Company Law** of the People's Republic of China, the **Partnership Law** of the People's Republic of China, and other laws

- **Difference between Company and Partnership**
- **Building blocks of an enterprise structure:**
  - the ascription of legal effects: ‘legal personality’
  - the limited liability: *peculium* or other mechanism
  - the contractual element: *societas – cum panis* (the paradox of the 一人有限责任公司)