



Global Services Coalition Comments on the Draft Foreign Investment Law of the People's Republic of China

23 February, 2019

The Global Services Coalition (GSC) represents the services sector in Coalition members' respective economies, particularly in matters of international trade and investment. A large number of our members have businesses operating in China, and many of these businesses would be interested in further investing in China. The GSC therefore has a strong interest in the on-going efforts by China towards economic reforms that would allow the private sector to play a more decisive role in the Chinese economy. The GSC therefore welcomes the initiative by the National People's Congress proposing significant steps to reform China's foreign investment regime. We share the view that such a step would contribute to attracting more foreign investment in the Chinese economy, with a potential for both more jobs and wealth-creation.

The GSC welcomes the opportunity to offer comments on the draft Foreign Investment Law (the draft law). Given the short consultation period involved, we have focussed only on some priorities. As the final version of the law is implemented and regulations related to it are developed, we hope that further consultations will be pursued.

We welcome the fact that the draft law sets up a streamlined process for the approval of a significant proportion of foreign investment, and that it incorporates important principles such as pre-establishment national treatment and a negative list (the "Special Management Measures for Foreign Investment"). We recognise the efforts made by the Chinese government in the previous Special Management Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones (FTZs) in 2015 and in 2017, progressively expanding the list of sectors where foreign enterprises were allowed to invest in FTZs. We note that the new draft law, as we understand it, expands investment opportunities to the whole territory of Mainland China, beyond the earlier pilot FTZs. This is a significant step forward in making China a more attractive destination for foreign direct investment. We would of course recommend expanding even further the list of services sectors that will be granted access.

The draft law is a positive step, with welcome positive elements, such as national treatment, elimination of joint venture requirements for some sectors, and prohibition of technology

transfer. Nonetheless, it is unclear at this stage how effective some of these provisions would be in light of the broad exceptions based on national security or the public interest. This is partly because the draft does not set out a clear enforcement mechanism and many of its terms are vague: in such areas the GSC would be grateful for more detailed information before offering a view on how the draft law is likely to operate in practice and how effective it will be in attracting fresh foreign investment. It may be, of course, that the draft law is intended to be in broad terms, and will be followed by more detailed implementing regulations. In that case the GSC would value consultations on the draft implementing regulations when they are available.

The draft law is certain to be viewed by potential investors in the wider context of compliance requirements that affect their operations in China. The draft law will be helpful in responding to the ongoing need for guidance to potential foreign investors to be as clear as possible, to help them find practical information on how to establish themselves. In these contexts, the GSC would suggest the fullest transparency in licensing procedures and implementation of laws, regulations and rules: all these features would help foreign businesses to ensure that their operations and procedures are compliant with the requirements of Chinese law.

The draft law establishes a complaint mechanism for foreign businesses to seek redress when they encounter problems. This is welcome; and for foreign investors it is a major step forward. The GSC would, however, appreciate more guidance regarding how to use that mechanism to effectively protect investors' rights, either in the draft law or in implementing regulations. We suggest that this should set out the full features of the mechanism, such as the specific details of how to make a complaint, the authority to which it should be made, the timeline and procedure for treatment of a complaint, and whether there is an appeal mechanism. The language proposed in Article 25 of the draft law could be extended further to bring out these features more fully. Similarly, it would be helpful to clarify which ministry or agency will be responsible for providing information and services to foreign investors (Article 11), and to better define the role of the Foreign Investment Service System and how that role will be performed (Article 19). The GSC would strongly recommend the setting up of a "one-stop shop" to offer help to potential foreign investors.

The draft law states that the negative list applicable to foreign investment will be published by or published as authorised by the State Council (Article 4). However, the GSC notes that some FTZs have reduced, or are in the process of reducing, the negative lists used within their respective zones. Foreign investors would value a clear understanding of the operative law to be complied with, if there are differences between local and central negative lists. If there are areas of doubt, these risk having a negative effect on predictability and certainty, which are critical for foreign investment. This question is also relevant to Article 18 of the draft law, which permits various levels of local government, within their legally prescribed authorities, to formulate foreign investment promotion policies. It would be desirable for foreign investors to be clear as to how the complaint and compensation mechanism will operate in a case where there are differences between national government and local government measures governing foreign investment.

The GSC welcomes Article 10 of the draft law, providing for the opinions and suggestions of foreign-invested enterprises to be heard in the formulation of laws, regulations, or rules related to foreign investment. We suggest however that this should be extended to allow the views of

business representative bodies, such as Chambers of Commerce and trade associations, to contribute to this process.

The GSC welcomes the provision in Article 16 of the draft law safeguarding foreign-invested enterprises' fair participation in government procurement activities, including “equal treatment to products manufactured by foreign-invested enterprises in mainland China”. However, this formulation, with its reference to “manufactured products” appears not to allow equal treatment for services supplied by foreign invested enterprises from services sectors. Services are now the dominant destination globally for foreign direct investment, accounting for 75 percent of the global stock of FDI, up from 50 percent in 1990 and 25 percent on 1970. The GSC therefore requests that Article 16 be extended to cover services as fully as manufactured goods.

The GSC notes that the draft law prioritises separate provisions for investment in or administration of financial services, including banking, securities, insurance (Article 38), but without explaining why these sectors are dealt with differently and what will be the regulatory regime for them. Given the potential for inward investment by financial services providers, this risks being a disincentive; and we suggest that this area of policy should be more fully explained.

Article 37 of the draft law provides for undefined retaliatory measures in the case of discriminatory action against Chinese investment abroad. This is an area of concern, as is the implication that retaliation under Article 37 could be applied to pre-existing foreign investment in China. The inclusion of such a provision is likely to have a potentially serious negative effect on investors, and seems at odds with the spirit of the draft law, and its welcome aim of making China more attractive to foreign investment. The GSC therefore feels bound to recommend the deletion of this provision from the draft law.

The GSC welcomes the fact that the draft law states in many occasions that foreign investors enjoy national treatment when investing in China. Article 31 however includes a requirement for all foreign investments to comply with an information reporting requirement that, as far as we understand, does not apply to domestic investments. The GSC suggests that this should be reconsidered, in the interests of applying national treatment.

The GSC thanks the National People’s Congress for providing this opportunity to comment on the draft Foreign Investment Law. We should be grateful if you would take these comments into consideration and remain at your disposal for any further information or dialogue on these issues.

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