

The new Foreign Investment Law

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The new law replaces the “three foreign capital laws”: the Law on Sino-Foreign Equity Joint Ventures, the Law on Sino-Foreign Contractual Joint Ventures and the Law on Foreign-Capital Enterprises. What is the feedback from the foreign business community? Many observers welcome the new law and put faith into President Xi Jinping that he will guarantee its implementation.

Certainly many business people are happy with the streamlining of the different laws and the build-in guarantees that many were asking for. Most positive feedback comes from the leaders of major foreign companies.

But others gave it a lukewarm welcome. Why? Let listen to the voice of the small and medium companies and from the businesspeople who are often off the radar.

First of all many expressed their concern that the new law will be rushed through to please Washington and the Chinese side will not sufficiently consult the foreign parties, such as the major chambers of commerce, e.g. The American Chamber (Amcham) and the European Chamber of Commerce in China (European Chamber).

Generally speaking, most of the Chinese laws are well written, see for example the laws to protect the environment. What has failed is either a lack of rigorous implementation or a different treatment for foreign entities compared with “real” domestic entities. That has been since long a complaint from the foreign business community, in many sectors. Like when inspections are carried out in foreign-owned restaurants but Chinese ones are mostly left unchecked. Or foreign companies must respect all regulations and labor contracts for their staff while many Chinese companies do not sign contracts nor pay the required social security fees.

As a result the business community has become suspicious about promises of equal treatment.

The IP issues have been a burden for foreign companies. In my own experience, projects and joint-ventures would not be approved unless there was a transfer of technology. Many companies accepted it, as it was the key to set up operations and transferring know-how to a developing country was deemed reasonable.

The problem was that often Chinese companies would manage to steal the know-how and open a competing factory, sometimes even next door. Foreign companies were left defenseless in many cases.

In other instances, government bodies would require, by law, to investigate the details of the manufacturing process before the venture or production could be approved. As an example, for chemical products the foreign party had to submit all key data. More than once, the Chinese entity appointed to investigate would leak the product secrets to domestic competitors. Those cases have been documented.

The new law guarantees those problems will be eliminated but the business community remains skeptical as they still fear the authorities will not duly enforce the rules.

For IP issues, the Chinese side will have to prove implementation will be handled fairly to instill confidence. As the saying goes “The proof is in the pudding.”

Since many years foreign chambers of commerce have published detailed reports to highlight the complaints and concerns of the foreign business community, such as the White Paper (Amcham) and the Position Paper (European Chamber). While at times import duties were a concern, real market access for their members was the key issue, as they felt domestic companies systematically received preferential treatment. I was personally involved in the drafting of part of the Position Paper for about ten years when I headed the Public Procurement Working Group in the European Chamber. It gave me an inside view on the problems foreign companies are facing.

Often market access is made impossible through invisible trade barriers. At times Chinese entities come up with unreasonable and unfounded reasons to bar foreign products, while claiming "The market is open for foreign companies." Let me give a typical example that I assume none of the readers have heard about. And that is exactly the core issue: it happens daily but nobody mentions it because it mostly affects smaller foreign companies.

Recently Chinese customs came out with a new regulation to be enforced: no any food and beverage products could be imported if they contained acesulfame potassium.

It is a calorie-free sugar substitute in the European Union known as E950.

It has been used in foods and beverages around the world for fifteen years and in numerous foods in the U.S.A. since 1988. More than ninety studies have demonstrated the safety of acesulfame potassium, also known as acesulfame K.

It is used in such products as candies, baked goods, frozen desserts, beverages, dessert mixes, tabletop sweeteners, some beers and many other food products and condiments. Unlike other sweeteners, it is stable when heated. This explains why it is found in many baked goods.

As a result suddenly many famous fruit juices were stopped by Chinese Customs.

Containers of Belgian beer were bulldozed as it was said to contain the substance; actually the substance is a direct result from the fruit added in the beer and was not added separately.

The move was seen by many as a way to block imports of foreign products that were a threat to domestic competitors, fruit juices among others.

That is one example of why foreign business people have been complaining about fair market access. For them, the Investment Law is just another act by politicians and is more important for the larger companies. Their attitude will only change when implementation of all laws and regulations in the market place will be fair.

Finally, we all hope a new wind of reform will blow to remove the clouds of "market pollution".