

SYMPOSIUM ON INSTITUTIONALIZING INVESTMENT DISPUTE PREVENTION

INSTITUTIONALIZING INVESTOR-STATE DISPUTE PREVENTION IN CHINA

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China's 2019 Foreign Investment Law establishes a formal mechanism to handle complaints by foreign-invested enterprises (FIEs)—i.e., Chinese enterprises that are wholly or partly foreign-owned. Its “complaint agencies” are empowered to prevent disputes by facilitating settlements; they do not have adjudicatory authority. Beyond the immediate objective of dispute prevention, this essay argues that the FIE complaint mechanism was intended to strengthen central oversight and control over subnational governments. However, the mechanism may be hindering its intended objectives in practice. In particular, the flexibility and informality of its processes encourage *ad hoc* settlements between FIEs and errant subnational governments in ways that may undermine the exercise of central administrative powers.

Evolution of the Mechanism

China's complaint handling mechanism emerged from the dispute prevention practices of subnational governments in place since the late 1980s.¹ Provinces and cities receiving the greatest foreign investment at the time established local complaint agencies to address foreign investors' grievances.² There is little publicly available information about these agencies' operation. A 1998 research paper by China's Ministry of Commerce (MOFCOM) mentions such agencies in Fujian province accepted over 1,300 disputes in 1996 (including investor-state and investor-investor disputes), most of which were settled through negotiation and mediation.³ MOFCOM policymakers thus concluded that such a mechanism is effective in preventing the “internationalization of investment disputes.”⁴

In 2006, MOFCOM attempted to roll out a centralized, nationwide mechanism through ministerial rules (whose authority are much lower than laws and State Council regulations within the Chinese legislative hierarchy).⁵

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¹ Mo (莫), *Guangdong Waishang Touzi Qiye Xiehui Jiji Shouli Waishang Tousu* (广东外商投资企业协会积极受理外商投诉) [Guangdong Association of Enterprises with Foreign Investment Actively Accepts Complaints by Foreign Investors], 4 GUOJI JINGJI HEZUO (国际经济合作) [J. INT'L ECON. COOP.] 37 (1989).

² Li Ling (李玲) & Zhao Hong (赵宏), *Dui Waiqi Qiye Xingzheng Zhenyi Youguan Wenti De Sikao* (对外资企业行政争议有关问题的思考) [Reflection on Issues Concerning FIE Administrative Disputes], 12 GUOJI JINGJI HEZUO (国际经济合作) [J. INT'L ECON. COOP.] 20 (1998).

³ *Id.*

⁴ *Id.*

⁵ [Waihang Touzi Qiye Zanzing Gongzuo Banfa](#) (外商投资企业投诉工作暂行办法) [Interim Rules on Complaints of Foreign-Invested Enterprises] (promulgated by the Ministry of Commerce, Sept. 1, 2006, effective Oct. 1, 2006) (China) [hereinafter 2006 Interim Rules].

The 2006 Interim Rules on Complaints of FIEs require the national complaint center and competent subnational agencies to accept FIEs' complaints, without obliging subnational governments to establish such agencies.⁶

However, the centralized FIE complaint mechanism did not function as intended. This is partly attributable to the vertical weakness of the 2006 Interim Rules. Absent a mandatory requirement, some provincial governments refrained from establishing a local FIE complaint agency; the effect was even more pronounced at the city and county levels.⁷ MOFCOM's own research also shows the *national* FIE complaint center played little role in supervising or coordinating the handling of complaints nationwide.⁸ Moreover, the Interim Rules could not horizontally regulate other ministries at the same level as MOFCOM within the government hierarchy, leaving unaddressed the practices of other ministries that resulted in investment disputes over land, construction, tax, and policing.⁹

The 2019 Foreign Investment Law thus sought to establish an improved central mechanism to handle complaints filed by FIEs at the level of basic law (only second to the Constitution in the Chinese legislative hierarchy).¹⁰ With the general framework being laid out in basic law, the new ministerial rules—the 2020 Rules on Handling FIE Complaints detailed the complaint mechanism.¹¹

A Multi-tiered Structure

Today, China's FIE complaint system is multi-tiered and hierarchical, with an Inter-Ministerial Joint Meeting System (Joint Meeting) and a national FIE complaint center at the central level, and subnational complaint agencies at various levels. At the apex of the system sits the Joint Meeting.¹² It is coordinated by MOFCOM, and its members include thirty-six line ministries.¹³ MOFCOM is responsible for the Office of the Joint Meeting's daily activities.¹⁴ Below the Joint Meeting is the national FIE complaint center, housed within MOFCOM's Investment Promotion Agency.¹⁵ At the subnational level, local governments at the province, city, and county levels designate specific departments (usually the commerce department) to handle FIE complaints within their own regions.¹⁶

⁶ *Id.* Art. 5.

⁷ MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, [THE 2019 REPORT ON FOREIGN INVESTMENT IN CHINA](#) 66 (2020) (China) [hereinafter 2019 REPORT].

⁸ [Cujin Henan Waishang Tousu Quanyi Baohu Gongzuo De Jidian Sikao](#) (促进河南外商投诉权益保护工作的几点思考) [Reflection on Promoting FIE Complaint Handling in Henan Province], MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA (June 1, 2015).

⁹ *Id.*

¹⁰ Shangwubu (商务部) [Ministry of Commerce], *Hangshi Waiqi Baobu Zhidu Jichu: Shangwubu Zhaokai Zhuanti Xinwen Fabubui Jiedu Waishang Touzi Qiye Tousu Gongzuo Banfa* (夯实外资保护制度基础：商务部召开专题新闻发布会解读《外商投资企业投诉工作办法》) [Reinforcing Foreign Investment Protection Systems: MOFCOM News Conference on the 2020 Rules on Handling Complaints of FIEs], 19 ZHONGGUO WAIZI (中国外资) [FOREIGN INV. CHINA] 16 (2020).

¹¹ [Waishang Touzi Qiye Tousu Gongzuo Banfa](#) (外商投资企业投诉工作办法) [Rules on Handling Complaints of Foreign-Invested Enterprises] (promulgated by the Ministry of Commerce, Aug. 25, 2020, effective Oct. 1, 2020) (China) [hereinafter 2020 Rules].

¹² *Id.* Art. 5.

¹³ 2019 REPORT, *supra* note 7, at 170.

¹⁴ 2020 Rules, *supra* note 11, Art. 5.

¹⁵ *Id.* Art. 6.

¹⁶ *Id.* Art. 7.

Important Functions but Limited Powers

Under the 2019 Foreign Investment Law, complaint agencies have two primary functions: addressing FIEs' grievances and improving the domestic investment climate.¹⁷

First, complaint agencies are authorized to respond to FIEs' grievances about the "actions of administrative agencies violating FIEs' rights and interests."¹⁸ This includes only investor-state grievances.¹⁹ In practice, such grievances tend to arise from FIEs' interactions with subnational governments, which enjoy extensive enforcement and discretionary power over foreign investors from matters of land use to administrative approvals.²⁰ The 2019 Foreign Investment Law reflects the central government's policy of reining in subnational authorities, instructing them to comply with laws and regulations in formulating foreign investment regulatory documents, respect their commitments and contracts with foreign investors,²¹ and respect FIEs' normal production and business activities.²²

The FIE complaint mechanism is intended to serve as a first port of call. Filing a complaint does not preclude FIEs from seeking administrative or judicial review,²³ but once such mechanisms are invoked the complaint mechanism can no longer be accessed.²⁴ An FIE must first make a grievance with the appropriate subnational complaint agency, and, if unsatisfied, may pursue the complaint with the competent agency at the next level up in the hierarchy.²⁵ The highest-level national FIE complaint center oversees all lower agencies, and also handles first-instance complaints concerning the conduct of ministries under the State Council, provincial governments and their staff, as well as complaints with "significant national or international impact."²⁶ However, the 2020 Rules do not define this last criterion, leaving it potentially unclear where a particular complaint should be lodged. In any case, the 2020 Rules allow complaint agencies to terminate claims without a legal basis in Chinese law.²⁷

Complaint agencies are not empowered to adjudicate claims—they are charged only with facilitating a settlement. Once a complaint is submitted, the complaint agency can "invite the disputing parties to meetings to state their opinions, explore solutions, and seek expert opinions when necessary."²⁸ Both parties are obliged to cooperate and provide information when requested to do so.²⁹ The complaint agency can "push for a mutual understanding between the disputing parties, for example, by pushing for a settlement agreement, coordinate with the respondent administrative agency, or take any other appropriate action."³⁰ Once a settlement agreement is reached, it is binding on both parties. If the respondent administrative agency refuses to enforce an agreed

¹⁷ Waishang Touzi Fa (外商投资法) [Foreign Investment Law] (promulgated by the Nat'l People's Cong., Mar. 15, 2019, effective Jan. 1, 2020), Art. 26 (China) [hereinafter 2019 Foreign Investment Law].

¹⁸ [2020 Rules](#), *supra* note 11, Art. 2.

¹⁹ *Id.* Art. 14.

²⁰ Zhenyu Xiao, *The Evolution of the Settlement of Investor-State Disputes in China* 99 (June 24, 2022) (unpublished Ph.D. dissertation, University of New South Wales) (on file with author).

²¹ 2019 Foreign Investment Law, *supra* note 17, Art. 25.

²² *Id.* Art. 24.

²³ [2020 Rules](#), *supra* note 11, Art. 8.

²⁴ *Id.* Art. 14.

²⁵ *Id.* Art. 22.

²⁶ *Id.* Art. 6.

²⁷ *Id.* Art. 19.

²⁸ *Id.* Art. 17.

²⁹ *Id.*

³⁰ *Id.* Art. 18.

settlement, it shall be held accountable.³¹ Reflecting this, Mark McLaughlin characterizes China's complaint mechanism as a form of "state-centric investment mediation."³²

Ultimately, the powers of complaint agencies are limited. They cannot compel the respondent administrative agency or other agencies of government to adopt their recommendations. In practice, MOFCOM and local commerce departments, the key complaint agencies, are relatively weak in the Chinese political ecosystem.³³ Consequently, it would not be unusual for a strong respondent to refuse to respond to their recommendations.

The second function of FIE complaint agencies is to improve the domestic investment climate through policy recommendations. The 2020 Rules reflect the Chinese government's efforts toward curbing the abusive aspects of subnational regulatory documents and embracing a more bottom-up approach to policymaking.³⁴ However, it remains unclear how receptive complaint agencies will be to FIEs' concerns and whether the Chinese government will translate recommendations into new or revised policies in practice.³⁵

Specifically, the 2020 Rules provide that complaint agencies address "outstanding issues in the domestic investment climate," particularly concerning foreign investment policies and measures.³⁶ Complaint agencies can provide the respondent administrative agency with recommendations to improve policies.³⁷ More serious situations can be reported to the national complaint center and further to the Office of the Joint Meeting. These may include situations where the regulatory documents in question are inconsistent with laws or manifestly improper, or when subnational complaint agencies identify common problems concerning investment governance at the subnational level.³⁸

The Joint Meeting does not handle specific complaints, but exercises an overarching coordination, supervisory, and guidance function in national complaint handling. It is established to enhance central oversight and control over subnational governments in investment governance. It deals with regulatory documents inconsistent with laws, and common governance problems such as the lack of predictability and consistency in policy implementation at the subnational level.³⁹ To date, there is little public information on whether or how the Joint Meeting exercises its functions in practice.

The national FIE complaint center has a third important function: to raise awareness of China's legal obligations concerning foreign investment across different levels of governments, with the aim of preventing investment disputes.⁴⁰ The national complaint center is responsible for "disseminating foreign investment laws and policies, carrying out special FIE complaint handling training for government officials, promoting good practices of complaints handling, and urging subnational governments to properly handle complaints."⁴¹

³¹ *Id.*

³² Mark McLaughlin, *Conceptualising State-Centric Mediation: An Analysis of China's Foreign Investment Complaints Mechanism*, 19 ASIAN J. INT'L L. 1 (2024).

³³ Orange Wang, *China's Ministry of Commerce: What is Mofcom and What Is It Responsible for?*, S. CHINA MORNING POST (Sept. 5, 2021).

³⁴ On the definition of regulatory documents: see Jamie Horsley, *China's Central Government Seeks to Rein in Regulatory Documents*, BROOKINGS (June 28, 2019).

³⁵ See Hannah C. L. Ha, *China's New Foreign Investment Complaint Mechanism – A Sign of Commitment to Protect and Attract Foreign Investment?*, MAYER BROWN (Apr. 6, 2020).

³⁶ See *2020 Rules*, *supra* note 11, Arts. 2, 9; Ministry of Commerce, *supra* note 10, at 15.

³⁷ *2020 Rules*, *supra* note 11, Arts. 6, 18.

³⁸ *Id.* Art. 26.

³⁹ *2019 REPORT*, *supra* note 7, at 170.

⁴⁰ Ministry of Commerce, *supra* note 10, at 17.

⁴¹ *Id.*

Taken together, the FIE complaint mechanism reflects Chinese policymakers' concerns about both investor-state disputes *and* central control over subnational governments. It creates a bottom-up triggering mechanism, in which (foreign) private actors can initiate procedures that expose a wide range of government conduct and regulatory documents to scrutiny. Yet its effectiveness remains stymied by its lack of authority in key areas, particularly horizontally vis-à-vis other powerful agencies.

Questionable Operation in Practice

By the end of 2018, all thirty-two provincial level governments in Mainland China had set up FIE complaint agencies. However, little is known about their operation in practice. The most comprehensive data come from the 2019 Report on Foreign Investment in China (2019 Report), relating to the period immediately before the changes introduced by the 2019 Foreign Investment Law. The 2019 Report reveals complaint agencies nationwide accepted 144 cases in 2018, primarily concerning “inconsistent implementation of policies related to land use rights, compensation for demolition, concessions contracts, and administrative approvals.”⁴² Considering the scale of foreign investment in China (for instance, Henan province⁴³ alone handled 197 FIE complaints between 2010 and 2014),⁴⁴ 144 is a small number for the country as a whole.

The 2019 Report also provides some limited information on complaints addressed by complaint agencies. For example, MOFCOM convened a meeting to handle several foreign-invested automotive enterprises' complaints about the declining market share of their fossil fuel powered vehicles due to increasing government investment in electric vehicles.⁴⁵ At the subnational level, responding to Pittsburgh Plate Glass Industries' complaint that its import of hazardous goods had been hampered, Tianjin city established a specialized working group involving the Customs and Tax Departments, among others, to develop a new regulatory model for such imports.⁴⁶

There is little statistical information available on cases handled by complaint agencies since 2019. Foreign law firms describe the mechanism as a significant improvement, while also acknowledging uncertainties about its actual implementation.⁴⁷ My prior empirical research sheds some light on the operation of the mechanism. Interviews with Chinese lawyers working in the field of investor-state arbitration show that they (and their clients) do not consider the FIE complaint handling mechanism useful. Instead, they prefer to negotiate directly with local governments. The mechanism may be used even less than it was in the 1990s, when foreign investors had few alternative options.⁴⁸

Further, the mixed institutional setup of the complaint mechanism raises questions about its effectiveness. FIEs' complaints are limited to those with a legal basis, but the complaint agencies do not evaluate the legal merits of the complaint. Moreover, without adjudicatory power, it is unclear how complaint agencies can coordinate with the respondent to cancel or change its original administrative action or to take a new administrative action. It is

⁴² [2019 REPORT](#), *supra* note 7, at 171.

⁴³ In 2014, Henan province ranked the eighth in the amount of foreign investment attracted by all Mainland China provinces. *See* Zhongguo Chengshi Waizi Xiyinli Yanjiu Baogao (中国城市外资吸引力研究报告) [THE 2014 REPORT OF CHINESE CITIES' FOREIGN INVESTMENT ATTRACTIVENESS] (Niu Fengrui (牛凤瑞) & Lü Weihua (吕卫华) eds., 2014).

⁴⁴ *Reflection on Promoting*, *supra* note 8.

⁴⁵ [2019 REPORT](#), *supra* note 7, at 171.

⁴⁶ *Id.*

⁴⁷ [Ha](#), *supra* note 35.

⁴⁸ Interview 4 by Author, Beijing, China (Dec. 15, 2023) (records on file with author); Interview 18 by Author, Beijing, China (Dec. 22, 2023) (records on file with author).

uncertain how such agencies can push for a settlement between the FIE and the local government without undermining the exercise of administrative powers.

These issues may be less problematic for complaints involving administrative compensation, complaints involving an exercise of discretionary power by a government agency, or complaints concerning a government agency's failure to respond to FIEs when their applications meet the requirements as prescribed by law. For complaints about misconduct of local governments, however, legal authority and administrative powers may be compromised in practice.

Consider, for example, the common scenario where a local government has exceeded its legal authority in committing to providing tax reduction to an FIE in the hope of attracting foreign investment to its region. After the FIE has made a large investment, the local government violates the commitment. Consider another scenario where a local government illegally imposes additional fees on FIEs and forces them to go through more onerous approval procedures than local enterprises. In either scenario, the process of reaching a settlement mediated by the FIE complaint mechanism involves informality and compromise between the disputing parties in ways that can ignore wider public interests. For example, in the former scenario, an *ad hoc* settlement facilitated by the FIE complaint mechanism might result in the local government agreeing to provide the tax reduction despite this being illegal or beyond its competence under Chinese law. In the latter scenario, any successful settlement would likely involve a monetary award to the FIE (as, in contrast to the Chinese systems of administrative review and judicial review, the FIE complaint mechanism does not have the power to order administrative remedies). This outcome would resolve the dispute, but do little to hold wayward local officials accountable. In both scenarios, the potential for bargaining and informality assists in the immediate resolution of a particular dispute, but this flexibility comes at the expense of the wider objective of regulating misconduct of local governments.

Conclusion

In sum, the 2019 Foreign Investment Law establishes the FIE complaint handling mechanism as an alternative to administrative review and judicial review. Chinese policymakers hope the flexibility of the complaint mechanism will encourage greater use of it and prevent investment disputes. Its effectiveness ultimately depends on the powers of complaint agencies and how actively they exercise their functions. The agencies' limited powers, especially the lack of adjudicatory power, and the uncertainties about the operation of the complaint mechanism raise questions about whether it can effectively prevent disputes or foster central oversight and control.