The impact of the new Chinese Foreign Investment Law 2019 on the administrative legal system governing foreign investments and implications for the investment relations with Lusophone Markets[1]

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Abstract

In March 2019, China revamped its domestic legal regime governing foreign investments with a new Foreign Investment Law that will enter into force in 2020 ('FIL-2019'). The paper examines how the new law impacts the administrative control of foreign investments in China. Given the past approach of China, using administrative legal measures in diverse legal instruments to regulate foreign investments, how the FIL 2019 abolishing/consolidating those instruments increases or decreases the scope of administrative control of foreign investment is an intriguing question facing foreign investors and administrative law scholars alike. In a similar vein, the potential implications of the new FIL 2019 upon specific foreign investment relations becomes equally significant. The FIL 2019 could not only trigger new reciprocity concerns viz-a-viz certain host states of Chinese outward investments, but also may demand the revision of some existing Chinese BITs with foreign states. The paper makes a brief reference regarding the general implications of the new law upon the investment relations with specific Lusophone host markets (for which, Macau SAR is the official facilitator of Economic Relations). Based on the findings, the paper concludes with a discussion on some future course.

Keywords: *foreign investments, administrative control, PRC administrative law, Foreign Investment Law 2019.*

JEL Classification: K22, K23

1. Introduction

Administrative legal regime of the People's Republic of China (PRC) is an intriguing field of research for any comparative legal study, due to its unique characteristics and distinct flavour. The nature of the PRC administrative legal system has even impelled questions regarding its very existence as an independent discipline of law. The absence or limited recognition of certain typical elements, which are generally found in administrative law, like for example, the right to seek judicial review of administrative action has prompted such challenges. Moreover, the general concerns regarding limitations of separation of powers or rule of law in the PRC have also added further impetus for such arguments. However, many of the related debates may not stand enough ground today due to the substantive growth and transformation of field of administrative law in the PRC during the last three decades.

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The object of the present paper is not to delve into the question of such transformation or maturity of administrative law as such, but to examine its manifestation in the specific context of economic governance in the field of foreign investments. Interestingly, the emergence and evolution of administrative law in the PRC could be traced in parallel with the initial opening of the Chinese economy to foreign trade and investment and its progressive liberalization subsequently. The basic premise of the paper rest on the potential argument that this economic governance dimension provides one of the best explanations for the motivations for administrative law reforms and developments in China. To test this basic premise, the present paper closely examines how the administrative regulatory system governing economic activities in China, particularly in the context of regulation of foreign investment, has transformed over the years. In this context the present paper specifically examines to what extent the latest Foreign Investment Law enacted in March 2019 (FIL 2019) and scheduled to enter into force in January 2020, can address typical concerns of administrative control of foreign investments in China. Finally, the paper also intends to briefly explore how the administrative law reforms in the FIL 2019 could impact the investment relations of the PRC with foreign markets with a specific reference its investment cooperation with Lusophone markets for which the Macau SAR is designated as a platform to promote economic relations.

To achieve the above objectives, the first part of the paper introduces the evolution of the administrative legal system in China and discusses the key issues faced by the foreign parties. The second part of the paper closely examines the key concerns of administrative regulation faced by foreign investors to highlight the perceived administrative barriers to foreign investments. The third part of the paper closely examines the newly introduced provisions of FIL 2019 and examines whether the new law has the potential to address some of the basic concerns of the foreign investors relating to the administrative legal measures. The concluding part of the paper briefly discusses how the new regulatory standards could impact the Chinas investment relations with Lusophone countries and the related investment promotion role of Macau SAR.

2. The developments and characteristics of Chinese administrative legal system

The right of redressal against the acts of transgression of law or dereliction of duty by an administrative functionary and the right to seek compensation for any consequent loss, have gained constitutional recognition in the PRC as early as 1954. However, it is important to note that in this early period, the right to redressal could not seek any judicial intervention and the aggrieved party could only make a written or verbal complaint to an organ of the state[3]. Moreover, the constitutional provisions

[3] See relevant provisions read as follows: “Citizens of the People's Republic of China have the right to bring complaints against any person working in organs of state for transgression of law or neglect of duty by making a written or verbal statement to any organ of state at any level. People suffering

recognizing the right explicitly referred to the acts of transgression or dereliction of the functionaries and not the administrative organ as a distinct entity. The limited manifestation of the right in 1954 was further expanded in the revised Constitution of the PRC in 1982 with some striking improvements. Firstly, the right to seek redressal and seek compensation was recognized not only against the acts of violation of law or dereliction of duty of administrative functionaries but also the acts of administrative organs.

Secondly, a 'right to criticize and make suggestion' regarding a state organ or its functionary was recognized for the first time. However, the conspicuous absence of judicial intervention continued as the aggrieved party only had the right to complain to the relevant state organs. But the law mandated the state organs to deal with complaints in a responsible manner and prohibited any suppression or retaliation against such complaints[4]. Even though, the right to challenge administrative action gained constitutional recognition in the early years, the sceptics have underplayed those developments. For example, despite the expanded provisions in the 1982 constitution, opinion was expressed "The written constitution was not the place to start if one wanted to know what the government of China was really like. One might say that the written constitution had little to do with the actual constitution, that is, the real structure of government"[5].

The purpose of the present paper is not to ponder on such critic, but to assess how the constitutional recognition of the right was a significant beginning in acknowledging that administrative excesses in a socialist state could happen and should be actionable. But the purpose of this paper should be even more specifically defined. The exposition of the evolution of the administrative system in China is mainly to understand its implications over foreign economic actors and not to systematically trace the transformation of the Chinese administrative legal system as such. To this extent, distinct features of the development of the administrative legal regime, pertinent to foreign actors must be noted through the process of its evolution. From this perspective, it is relevant to note that the constitutional recognition of the right to challenge an administrative action in the 1954 and 1981 versions of the Constitution was limited to the citizens of the PRC[6].

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loss by reason of infringement by persons working in organs of state of their rights as citizens have the right to compensation." See Article 97, Constitution of the People's Republic of China (1954) [Expired] available online at http://en.pkulaw.cn/display.aspx?cgid=52993&lib=law (accessed on 26 April 2019).

[4] On a similar footing, the revised constitutional law also prohibits any abuse of the rights for ulterior purposes. The relevant provision enumerates "…Citizens have the right to make to relevant state organs complaints or charges against, or exposures of, any state organ or functionary for violation of the law or dereliction of duty; but fabrication or distortion of facts for purposes of libel or false incrimination is prohibited…". See Article 41, Constitution of the People's Republic of China [Revised] available online at https://china.usc.edu/constitution-peoples-republic-china-1982 (accessed on 25 April 2019).

[5] See William C. Jones, *The Constitution of the People's Republic of China*, 63 "Washington University Law Quarterly" (1985) 707 at 711.

[6] See above n.1 and 2.

The 1980s was a significant beginning for the development of substantive administrative law system in China. What was only a constitutional recognition until then started to find place in ordinary legislation. For example, the General Principles of the Civil Law 1987, enacted the first set of enabling provisions for the pursuit of actions of civil liability against state organ or its personnel causing damage while discharging their duties[7]. The Civil Law was acclaimed as a critical development. It established its role as the basic law providing a second layer below the constitution to regulate civil relations. At the same time, it also served as a higher law to the next layer consisting of enactments of specific laws and regulations governing economic relations[8]. Moreover, this enactment was not only seen as a significant development of civil law but also a symbol of wider paradigm shift epitomizing Chinese law and democracy entering a new level of maturity[9]. However, the civil liability recognized under the 1987 Law was pertaining to infringements of lawful rights or interests of citizens and legal persons, with no explicit reference to foreign persons or economic actors.

Although, some of the key legislative developments from the 50s to 80s slowly started to incorporate rules addressing remedies against administrative action, it is relevant to note that they were not exclusive administrative law instruments. They were constitutional or civil law legislation recognizing some specific administrative remedies. It was only in 1989, the PRC introduced a major full-fledged administrative legislation. The Administrative Procedure Law passed in 1989, is a hallmark for the introduction of various key features and characteristics in the administrative legal system of China. For example, the 1989 law paved the way for the introduction of judicial intervention of administrative action in China. This law, for the first time recognized the right to bring a suit against an administrative organ or its personnel before a people's court[10]. Apart from the citizens and legal persons referred in the previous legislation, the law recognized 'other organizations' as a distinct category with the right to bring an administrative suit. The law also conferred on the people's courts as independent judicial power to decide administrative cases without any interference from administrative organs or public organizations or individuals. Despite its recognition of the right to bring a suit against several specific infringing administrative acts, the law excluded a set of such acts from the scope of judicial scrutiny[11]. Although certain acts that are typically

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[7] Article 121 of the General Principles of Civil Law, 1987, available online at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/ 49688/108015/F2085571488/CHN49688%20Eng.pdf (accessed on 29 April 2019).

[8] Tong Rou, *The General Principles of Civil Law of the PRC: Its Birth, Characteristics, and Role*, "Law and Contemporary Problems*"*, 52(2) (1989) 151.

[9] Ibid.

[10] See Article 2 of the Administrative Procedure Law 1989 available online at https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn15 6en.pdf (accessed on 2 May 2019).

[11] See Jyh-Pin Fa and Shao-chuan Leng, *Judicial Review of Administration in the People's Republic of China, "*Case Western Reserve Journal of International Law" 23 (1991) 447 and Anke Frankenberger, *Review of Regulations in the People's Republic of China, "*Law and Politics in Africa, Asia and Latin America", 28(1) (1995) 77.

excluded, like the acts of the state involving national defence and foreign affairs were part of the list, it contained certain broad exclusions that were subjected to criticism[12].

The 1989 law introduced an exclusive chapter addressing the issue of claim and determination of compensation for infringement of rights. Under the new law, the infringing act causing a damage had to be 'a specific administrative act' of an administrative organ or its personnel. Although the aggrieved parties, who make independent claim for damages could seek judicial intervention, they must first exhaust the avenue of approaching a relevant administrative organ for redressal. If the outcome of the disposition by the relevant administrative organ was not acceptable, could a suit for damages be filed before a people's court. Ironically, the new law recognized the possibility of conciliation being applied to handle the suit for damages, although it provided a general rule that conciliation should not be used in handling an administrative case[13].

Another striking feature of the Administrative Procedure Law of 1989 was its explicit recognition of the application of its provisions to foreign interests. The administrative procedure involving foreign interests was also prescribed in a separate chapter of the law. The law indeed extended its application to foreign nationals as well as stateless persons and foreign organizations involved in administrative suits[14] in China, unless it was not permitted by any other law. More importantly, the law enshrined the principle of equality by providing the foreign interests with the same litigation rights and obligations of Chinese citizens and organizations. However, this equality right was qualified by the principle of reciprocity requiring a similar treatment for Chinese citizens and organizations by the courts of the state from where the foreign interest in question emanated.

The new law recognized the precedence of the provisions of international treaties applicable to the PRC in the event of any difference between such treaty provisions and the 1989 law. This is particularly relevant to the foreign parties, who have established economic relations with China by virtue of specific bilateral or multilateral treaties governing trade or investments. When they perceive distinct procedural treatment in administrative litigation different from the relevant treaty guarantees, they could demand the application of the provisions of the treaty over the law. Moreover, such recognition in the 1989 law underscores the significance of incorporating necessary procedural guarantees while negotiating relevant economic pacts with the PRC. In determining the administrative challenges faced by foreign

[12] For example, the exclusion of "administrative rules and regulations, regulations, or decisions and orders with general binding force formulated and announced by administrative organs" was very broad and vague and could trigger undesirable challenges to the jurisdiction of the courts. See Article 12 (2) of the Administrative Procedure Law 1989.

[13] Compare Article 67 in Chapter IX of the Administrative Procedure Law 1989 (dealing with the issue of liability for compensation for infringement of Rights) *viz a viz* Article 50 in Chapter VII of the same law (addressing the subject of trial and judgment of an administrative case).

[14] Albeit subjected to the requirement that a lawyer from the Chinese Bar had to be appointed when the foreign parties decide to appoint a lawyer as agent *ad litem* in administrative suits. See Article 73 of the Administrative Procedure Law 1989.

investors in China, as well as in assessing any relevant bilateral investment treaties (BITs), the implications of the principles of reciprocity and precedence of treaty provisions discussed above should be given due consideration.

After the right to compensation for administrative infringement and the related procedures were addressed in an exclusive chapter under the 1989 law, China decided to enact a separate legislation to comprehensively regulate the issue of compensation. The State Compensation Law 1994 added criminal compensation for the state infringement of relevant rights in exercise of its various powers and functions related to criminal law enforcement[15]. Regarding the forms of compensation, the law generally recognized that the state compensation will be of pecuniary in nature. Nevertheless, the law interestingly qualified this rule by stating that where a property could be returned, or re-conversion was possible such a return or re-conversion of the property should be made. This is particularly significant for foreign investors in cases of wrongful taking of their property by the state. The explicit recognition by the 1994 law that its provisions are applicable to foreigners, foreign enterprises and organizations claiming state compensation in China confirms such significance[16]. The innovations of the 1994 law are generally acknowledged. But the critics have pointed to several limitations regarding its scope of application and the effectiveness of its procedures raising scepticism about its utility[17].

Although the Administrative Procedure Law of 1989 introduced the right to seek judicial intervention in administrative cases, it still retained the possibility of seeking a review or reconsideration by an administrative authority. This was recognized in two distinct contexts namely when a voluntary choice was made or when it was mandated by law. First, an aggrieved party could voluntarily seek reconsideration of an administrative act, by applying to a higher-level administrative organ or an appropriate administrative organ prescribed by the law. If the outcome of the process was not satisfactory, then the party could approach the court. Second, in cases where a law mandates the exhaustion of the application to an administrative organ for reconsideration, the aggrieved party should first seek such a reconsideration before approaching the court on the ground that reconsideration decision was not acceptable[18].

With this retaining of the possibility of an administrative review, the PRC decided to elaborate its scope and ensure its effectiveness by introduction of a new Administrative Review Law in 1999. This could be perceived as a measure to encourage the utility of administrative review as an alternative to the seeking of a judicial intervention. At the same time, it is equally arguable that the introduction of the new law was also a necessity, given the fact that administrative review could become inevitable in certain cases, especially when judicial intervention could not

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[15] See Articles 15-24, Chapter III of the State Compensation Law 1994 available online at http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/state-compensation-law-of-the-peoples-republic-of-china-1994.html (accessed on 12 May 2019).

[16] See Article 33, ibid.

[17] See Keith Hand, *Watching the Watchdog: China's State Compensation Law as a Remedy for Procuratorial Misconduct* "Pacific Rim Law & Policy Journal" 9(1) (2000) 95.

[18] See Article 37, Administrative Procedure Law 1989.

be successfully sought. For example, the Administrative Procedural Law of 1989 prescribed certain requirements that must be satisfied in order to bring an administrative suit before the court. This included requirements like need to identify a specific defendant or defendants as well as a specific claim. Moreover, the requirements demanded that the suit must fall within the category of cases acceptable by the courts and should be within the specific jurisdiction of a court[19]. Therefore, in circumstances where such conditions could not be satisfied, seeking an administrative review could be the only avenue for an aggrieved party and the new Administrative Review Law 1999 was expected to serve well in such cases.

Under the 1999 Law, the administrative review organs were required to correct every wrong in administrative actions challenged. The party seeking an administrative review under this law could still resort to an administrative lawsuit in court under the 1989 law, if the outcome i.e. the administrative review decision was not acceptable unless such a decision was deemed final by the law[20]. In addition, the 1999 law also foresaw the possibility of engaging arbitration in certain cases[21]. The 1999 law recognized a range of administrative acts that could be challenged in an administrative review. Challengeable acts that are pertinent to foreign investors[22] includes administrative sanction, compulsory administrative measures, administrative decision affecting certificates such as a licenses and permits, administrative decision relating to ownership or right to use of natural resources, administrative acts infringing managerial decision-making power, administrative acts infringing agricultural contract, inaction or failure to issue qualified certificates like permits and licenses, failure to perform statutory duty and other specific administrative acts infringing upon lawful rights and interests[23].

When challenging an administrative act, the aggrieved party could also challenge specific legal provisions that formed the basis of the administrative act in question except in certain circumstances[24]. Apart from guaranteeing the right of an aggrieved party to seek an administrative review, the 1999 law interestingly recognizes the possibility of any other person interested in the specific administrative act challenged to partake in the administrative review process as a third party[25]. The recognition of third-party intervention is quite pertinent for foreign investors as it

[19] See Article 41, ibid.

[20] See Article 5, Administrative Review Law 1999 available online at http://www.fdi.gov.cn/1800000121_39_2729_0_7.html (accessed on 2 May 2019).

[21] If an aggrieved party refuses to accept a mediation or other disposition on a civil dispute made by an administrative organ, the 1999 law recognizes the possibility of seeking arbitration as an alternative to the lawsuit in a court of law. See Article 8, ibid.

[22] The application of the 1999 law is explicitly extended to foreign parties engaging in the process of administrative review in China. See Article 41, ibid. However, it is pertinent to note that the recognition of relevant rights of the foreign parties under the 1999 law is not subjected to the reciprocity requirement as enumerated in the 1989 and 1994 laws discussed earlier.

[23] See Article 6, ibid.

[24] For instance, such a review cannot be sought for certain rules of departments and commissions under the State Council and rules of local people's governments that can only be reviewed in accordance with related laws and administrative regulations. See Article 7, ibid.

[25] See Article 10, ibid.

will enable them to make a preventive intervention in administrative review cases, which they perceive could impact their investment interest in the future.

Apart from some of the prominent legislative developments noted above, the introduction of a range of other legislation, regulations and amendments have also contributed to the growth of the administrative legal system in China[26]. For the purpose of the present paper, it is not necessary to closely examine all those individual legal instruments. Reference could be made to specific provisions of those instruments wherever relevant and necessary. The following section examines the challenges of the administrative control mechanism perceived by foreign investors in China.

3. Administrative control of foreign investment in China

Despite the growing maturity of the administrative legal system in China, concerns of administrative control or regulation of foreign investments continued due to the perceived limitations in various administrative legal measures introduced by China. Moreover, such concerns often exacerbated because of the general notion of limitations of separations of powers doctrine and rule of law in China. This section explores some specific issues of administrative control or regulation faced by foreign investments and related concerns expressed by foreign investors.

The advent of basic features of administrative legal system in the 80s and 90s, quelled the fundamental concerns of foreign investors regarding the absence of checks and balance on administrative acts in China. This could be attributed as one of the reasons for the conspicuous increase in the inflow of FDI in China since the opening of its economy. However, the concerns continued to exist on a range of specific administrative acts and controls that have implications for foreign investments. Identifying and addressing such concerns is of paramount importance for China to sustain its attractiveness as a host market for foreign investors. The concerns and challenges as perceived by foreign investors merit a closer consideration in order to understand the potential investment barriers they create and identify the relevant administrative law reforms needed.

After the initial bout of legislation providing administrative and judicial review of administrative acts and granting related remedies, China had to undertake a range of reforms to its administrative regulations. Some of these reforms were made as part of the undertaking of the PRC by virtue of its accession deal to enter the WTO. Even after those reforms, foreign economic actors in China continued to call for further reforms in the administrative rules and mechanism. A range of such

[26] Notable legal instruments in this regard includes the Administrative Penalty Law 1996, available online at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/64047/108049/F989790908/ CHN 64047%20Eng.pdf (accessed on 5 May 2019); Regulations on Administrative Reconsideration 1990 available online at http://www.asianlii.org/cn/legis/cen/laws/roar461/(accessed on 6 May 2019); Rules for Tax Administrative Reconsideration available online at http://www.fdi.gov.cn/ 1800000121_39_3435_0_7.html (accessed on 8 May 2019).

concerns emanated from the specific perspective of foreign investors in China[27] and a close assessment of such concerns is important to test whether the reforms introduced by the recent FIL 2019 are effective in addressing those concerns and breaking related investment barriers.

The apprehension of foreign investors in China includes broad and specific concerns, which may demand reforms at different levels or degrees. For example, some concerns may require a comprehensive and systemic improvement of the administrative system or the underlying process, while other may call for reforms of specific administrative rules. One of the fundamental concerns of foreign investors pertains to the lack of full transparency in the administrative and judicial appeal process, which have emerged despite the specific legislative improvements introduced in the 80s and 90s. Similarly, concerns of lack of effectiveness of those process have also been expressed. Although the issue of lack of transparency could be addressed relatively well, the perception of lack of effectiveness of the appeal or review mechanism will prove harder to address as this may require more fundamental reforms of the elements constituting the broader judicial or legal systems.

Lack of clear criteria for administrative approval of foreign investments is also a typical concern. Although efforts could be made to address this concern, the question of approval typically involve exercise of discretionary powers and the freedom to evaluate investment proposals based on broader economic or development policies, which may not be easily defined using express criteria. However, the related demands seeking a clear timeline for approval of investments and the need to provide reasoned administrative decisions are more straightforward expectations that could be met with determined efforts.

Concerns have also been expressed about the differences in approval process for domestic and foreign investments, raising the issue of national treatment. The differences resulting in a more onerous treatment for foreign investment were perceived as a result of a higher number of categories of such investments requiring administrative approval, requirement of additional departmental approvals, more arduous approval processes, incongruent treatment to foreign investment even when such a treatment was not contemplated by the relevant regulations, etc. The potential causes for such differential treatment are attributed to China's industrial policies favouring domestic industries, the lack of transparency in FDI approval process as well as the absence of means to challenge administrative acts that could potentially violate relevant regulations or China's WTO obligations[28].

Among the above, the third cause raises a fundamental question as to the effectiveness and utility of various legislative measures offering judicial and

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[27] See for example US Chamber of Commerce, *China's Approval Process for Inbound Foreign Direct Investment: Impact on Market Access, National Treatment and Transparency*, Washington D.C.: US Chamber of Commerce (2012) PP.1-53.

[28] The differential treatment has given rise to questions about China's compliance with national treatment obligations particularly arising out of the WTO General Agreement on Trade in Services. See US Chamber of Commerce (2012) *op cit.,* 34.

administrative review mechanism discussed earlier. Although the availability of those mechanisms is generally acknowledged, the critics point out to several reasons, which discourage foreign investors from utilizing those avenues. These includes broadly defined grounds for denying investment applications, challenges in producing enough evidence to prove infringing administrative acts, lack of judicial or administrative independence and general reluctance to challenge administrative acts[29]. Some of these alleged reasons could be effectively countered with opposite arguments, but the focus should be more on seeking a closer objective introspection on potential weakness in the areas of administrative governance pointed out by the critic. Such an engagement will be more productive in strengthening the administrative system governing foreign investments in China. The next section of the paper will closely examine how far the newly introduced FIL 2019 is an effort in this direction.

4. The scope and limitations of Foreign Investment Law 2019

The pertinent objectives of FIL 2019 include active promotion of foreign investment, protection of the lawful rights and interests of foreign investment, standardization of the regulation of foreign investment, and promotion of a healthy development of the socialist market economy. Among these, the objective to protect lawful rights and interests of foreign investment has a direct nexus to the administrative legal system and various related issues raised earlier in this paper. Similarly, the object of standardization of the regulation of foreign investment will be relevant for the purpose of improving national treatment to foreign investments in the context of administrative governance identified earlier.

The FIL 2019 provides the definition of foreign investment[30], which is comprehensive in covering various direct and indirect forms of foreign investment and the relevant foreign investors will be entitled to seek administrative remedies guaranteed under the PRC laws. Some of the goals aspired by the new law in implementing its policy of opening-up and liberalizing includes building a stable, transparent and predictable market environment with fair competition. Achieving this will require further improvements in administrative legal measures.

It is pertinent to note that the FIL 2019 had introduced specific measures to address some of the national treatment concerns raised earlier. The FIL 2019 introduces a dual approach in this regard. Firstly, by default aims it provides national treatment to foreign investments, specifically during the investment access stage. Secondly it introduces a "negative list" approach, whereby the state could prescribe special administrative measures for foreign investors to have access in certain fields of investment. However, this is subjected to the international obligations of the PRC and the provisions of various BITs concluded by the PRC with foreign states will take precedence. This explicit recognition is a positive implication for the Lusophone

[29] *Ibid*.

[30] See Article 2 (1-4), Foreign Investment Law of the People's Republic of China 2019 available online at https://npcobserver.com/ lawlist/foreign-investment-law/ (accessed on 8 May 2019).

countries that have concluded BITs with PRC and this advantage should be a motivation for the remaining Lusophone states to strive to conclude BITs with the PRC.

Apart from the protection of foreign investments and their proceeds, the FIL 2019 also reiterates its commitment to protect lawful rights and interests of foreign investors according to the law, and the corresponding aspirations of the administrative laws governing foreign parties also gets reinforced by this commitment. The FIL 2019 has some striking features that confers explicit duties on various administrative organs both at national and provincial levels to promote, protect and manage foreign investments in different contexts[31]. Conferring of such a positive set of duties towards foreign investments will arguably motivate the relevant administrative organs to pay more attention to the concerns relating to administrative control of foreign investments identified earlier.

Addressing the issue of investment promotion, the FIL 2019 introduces another prominent measure that could quell concerns relating to administrative system governing foreign investment in China. The FIL mandates soliciting of opinions and suggestions of foreign invested enterprises in the process of formulating domestic norms relating to foreign investment[32]. Some of the other notable investment promotion measures introduced by the new law includes application of enterprise development policies equally to foreign-invested enterprises, establishment of a 'foreign investment service system' to provide counselling and services about relevant laws, policy measures, etc., promotion of multilateral and bilateral investment cooperation mechanism with other countries, participation of foreign invested enterprises in formulation of standards and in government procurement activities, granting of freedom to local governments to formulate foreign investment promotion policy measures in accordance with laws and administrative regulations, etc[33] Many of these investment promotion provisions could have potential positive implications encouraging improvements in relevant administrative control measures governing foreign investments.

Regarding investment protection, the FIL 2019 in providing relevant guarantees against expropriation of foreign investments, enumerates protection of various other rights related to those investments like protection of intellectual property rights. Interestingly, in encouraging technological cooperation through foreign investment the new law emphasizes on voluntariness and specifically prohibits administrative organs and their employees from forcing technology transfer through administrative measures[34]. Moreover, the law mandates administrative organs and their employees to maintain confidentiality of the trade secrets related to foreign investments learnt in the course of performing their duties[35]. The rules governing foreign investments formulated by administrative bodies are

[31] See Article 7 of FIL 2019, *ibid.*
[32] See Article 10, *ibid.*
[33] See Articles 9-19, Chapter II, *ibid.*
[34] See Article 22, *ibid.*
[35] See Article 23, *ibid.*

required to be in conformity with laws and regulations and should not derogate from the lawful rights and interests of foreign-invested enterprises without a legal basis[36].

Another striking feature pertinent to administrative law is the establishment of working mechanisms to receive and promptly resolve complaints from foreign-invested enterprises, especially when they perceive administrative acts as an infringement of their lawful rights and interests[37]. Although, the new mechanism is designed to be an exclusive channel for foreign investors, it does not preclude them from seeking redressal through the administrative review process or administrative suits discussed earlier in this paper.

Regarding investment management, the FIL 2019 provides a positive improvement that mandates the competent administrative authorities to review license applications of foreign investors using similar conditions and procedures applied to domestic investment, unless otherwise provided by laws or administrative regulations[38]. However, some of the provisions like the establishment of a foreign investment information reporting system mandating foreign investors to submit foreign-investment information reports and the establishment of a security review system for foreign investments could cause anxiety to foreign investors[39].

Finally, certain powers recognized under the FIL 2019 could trigger further concerns[40]. For example, specific powers conferred upon administrative like the powers to order the ceasing of foreign investment activities in prohibited areas, power to confiscate the illegal proceeds, power to impose fines when foreign investors fail to submit investment information reports, etc., are some of the potential areas that could trigger additional concerns for foreign investors. Similarly, an explicit recognition of the power of the state to introduce corresponding measures against investments from a specific foreign country that imposes prohibitive or restrictive investment measures relating to Chinese investments, could cause unease among foreign investors. At the same time, the recognition of the possibility to impose legal sanctions and even criminal responsibility upon administrative officials, who abuse their administrative authority or neglect their duties or misuse the power for personal benefit or unlawfully disclose trade secrets could be seen as a strong deterrent against administrative excesses[41].

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[36] Such rules should also not increase obligations, set market access or exit conditions and interfere with normal business activities affecting foreign investments. See Article 24, *ibid*.

[37] See Article 26, *ibid.*

[38] See Article 30, *ibid.*

[39] See Articles 34 and 35, *ibid.*

[40] See Articles 36, 37 and 40, *ibid.*

[41] See Article 39, *ibid.*

5. Concluding remarks

The exposition of the evolution of the Chinese administrative legal system in general from its humble beginnings demonstrate how economic interest was instrumental in introduction of the fundamental features of the review of administrative action in the PRC. The generally perceived scope and limitations of the administrative system as well as the specific concerns pertaining to foreign investment in China equally demonstrate the need for continued improvement of the system. With the advent of the new FIL 2019, certain concerns faced by foreign investors are expected to be addressed. The earlier analysis in this paper that reveal several issues relating to evolution of the general administrative legal regime, specific administrative concerns of foreign investors and the potential of the FIL 2019 to address such concerns need not be repeated or summarized here. Instead, the paper could be concluded with raising a caveat relating to the implications of the administrative legal system and the reforms introduced by the new FIL in China for its foreign investment relations.

Firstly, the findings of the paper examining the evolution of the Chinese administrative legal system reveals that the guarantees in administrative or judicial review mechanism is subject to the principle of reciprocity. Foreign countries interested in tapping the investment markets in China should be aware of the potential risks their investors may face in China because of any perception of lack of reciprocity in their domestic administrative governance standards. In order to avert such situation, agreeing certain general administrative governance standards through a BIT could an effective solution. Moreover, the BIT could also be used as a vehicle to comprehend specific concerns, a home country may have about the potential administrative challenges their investors may face in China.

The range of perceived challenges relating to administrative control of foreign investment demonstrate that the reforms required to address the challenges may not be easy to attain at a wider level. However, specific home countries targeting the investment markets in China could seek to attain tailor made solutions through bilateral investment pacts with the PRC. Finally, the introduction of relevant provisions in the FIL 2019 providing the necessary ground for China to retaliate any unfair treatment meted out to Chinese outward investments should be a major impetus for seeking bilateral investment cooperation with China. These implications are particularly relevant to Lusophone countries with which China has sought to improve closer economic relations using Macau SAR as platform.

A cursory review of the situation of the investment relations between China and Lusophone countries reveal that only Cape Verde, Mozambique and Portugal have established formal BITs with the PRC. Other Lusophone countries namely Angola, Brazil, East Timor, Guinea Bissau and San Tome and Principe have no BITs with the PRC. Given the implications of the administrative legal system in PRC, as well as the measures introduced by the new FIL 2019, it is essential for such countries to explore the avenues to seek formal bilateral legal agreements with China. In the similar vein, the circumstances enumerated also mandates Macau SAR

as a facilitator of economic relations between China and Lusophone countries to identify its potential role in achieving the stronger investment cooperation recommended between China and Lusophone countries. Further study of this need and the role of Macau SAR is recommended.

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