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China's foreign investment complaint mechanism: A new beginning of foreign investment governance reform?

by

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Foreign investment complaint mechanisms (FICMs) have been established by some Chinese local governments since the 1980s, to serve as “bridges” between investors and relevant authorities. The FICM is similar to the ombudsperson or home doctor system in some countries. They liaise within the government, coordinate with the authorities and help organize meetings or meditations, but do not make binding decisions. To help harmonize and streamline the FICMs, China’s Ministry of Commerce adopted the [Interim Measures on Work of Complaints from Foreign-invested Enterprises](#) in 2006. Due to their lack of transparency, the operation and effectiveness of these FICMs remain unclear and could be unsatisfactory.

The Foreign Investment Law of 2019 established the first national FICM,¹ covering all situations where a foreign investor “views that the administrative act of an administrative authority or the staff has infringed upon its lawful rights or interests.”² In 2020, China adopted the [Implementation Rules of the Foreign Investment Law](#), providing detailed guidance for the FICM’s operation. Accordingly, the Ministry of Commerce shall establish an inter-ministerial joint conference to promote the FICM,³ and local governments should also establish FICMs.⁴ According to the [Working Rules of the FICM](#) of 2020, the FICM’s intervention could result in a settlement, coordination within relevant authorities, recommendations or any other appropriate measures.⁵ If a complaint cannot be processed within one year, the FICM authority shall report to the government and recommend the measures to be taken.⁶

The Foreign Investment Law and its Implementation Rules are landmark in China’s FDI governance. They establish the first national FICM and create the inter-ministerial working mechanism. But the new rules also leave some pertinent procedural issues to be clarified.⁷ Given this legislative vacuum, and as the FICM is not yet operating, the actual role and impact of the FICM remain largely unclear.

The FICM could play several different roles, with national and international impacts:

- The FICM is not a pre-arbitration requirement, nor does it prejudice investors' right to utilize administrative review or litigation or to take recourse to investor-state dispute-settlement (ISDS). It is also non-adversarial, and retaliatory measures shall not be taken against investors that utilize the FICM.⁸ Such features could make the FICM a welcome ISDS alternative for investors—and help realize its objective of “limiting the risk of international investment disputes.”⁹ Thus, investors will need to assess the pros and cons of available remedies and their interrelations to decide which remedy (or remedies) could best address their concerns. Clear reference to the FICM in Chinese investment agreements as a pre-arbitration requirement or as one of the local remedies could make the FICM more relevant in the context of ISDS.
- The FICM could be an investment facilitation measure as the Foreign Investment Law envisages.¹⁰ Aside from solving disputes, it also seeks to address other fundamental issues, advise the government and improve FDI governance. Issues frequently raised by investors through the FICM may be brought to the attention of upper-level authorities and will likely be solved effectively through the internal reporting system within the government, which could help build an investment-friendly business environment in China. Here, greater transparency should be helpful in gaining the confidence of investors.
- The FICM could help advance the reform of China's FDI regulatory framework. Unlike administrative litigation and review, the FICM is not primarily adjudicative, but relies on coordination with authorities, especially at the ministerial level. Such high-level coordination is only available on an issue-specific basis, such as the national security review of FDI. The FICM signals improved institutionalization of such coordination mechanism. In this regard, top-level participation in such a coordinating institution and systematic efforts from all relevant authorities are needed.

The FICM could be a helpful launch pad for improving China's FDI governance, if its role is clearly defined and strong. Detailed and effective working rules at the national and local levels should be put in place soonest.

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¹ Foreign Investment Law of the People's Republic of China, the Ministry of Commerce.

² FIL, Art. 26(2).

³ [Regulations for the Implementation of the Foreign Investment Law of the People's Republic of China, National Decree No. 723 of 26 December 2019](#), Art. 29(2).

⁴ Implementation Rules, Art. 29(1).

⁵ [Working Rules of FICM](#), August 25, 2020, Art. 18.

⁶ Working Rules, Art. 21.

⁷ Implementation Rules, Art. 29(3).

⁸ Implementation Rules, Art. 31(1).

⁹ [“2018 nationwide meeting of FICM organizations held in Beijing.” Ministry of Commerce, July 26, 2018.](#)

¹⁰ [Zheng Yun, “China's new foreign investment law: Deeper reform and more trust are needed,” *Columbia FDI Perspectives*, No. 264, Nov. 4, 2019, pp. 1-2.](#)

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