



金杜律师事务所  
KING & WOOD  
MALLESONS



香港信託人公會  
Hong Kong Trustees' Association

# PRC New Foreign Investment Law

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1

THE HISTORY OF  
FOREIGN INVESTMENT  
POLICIES

2

HIGHLIGHTS OF FIL

3

CHANGES AND  
CHALLENGES

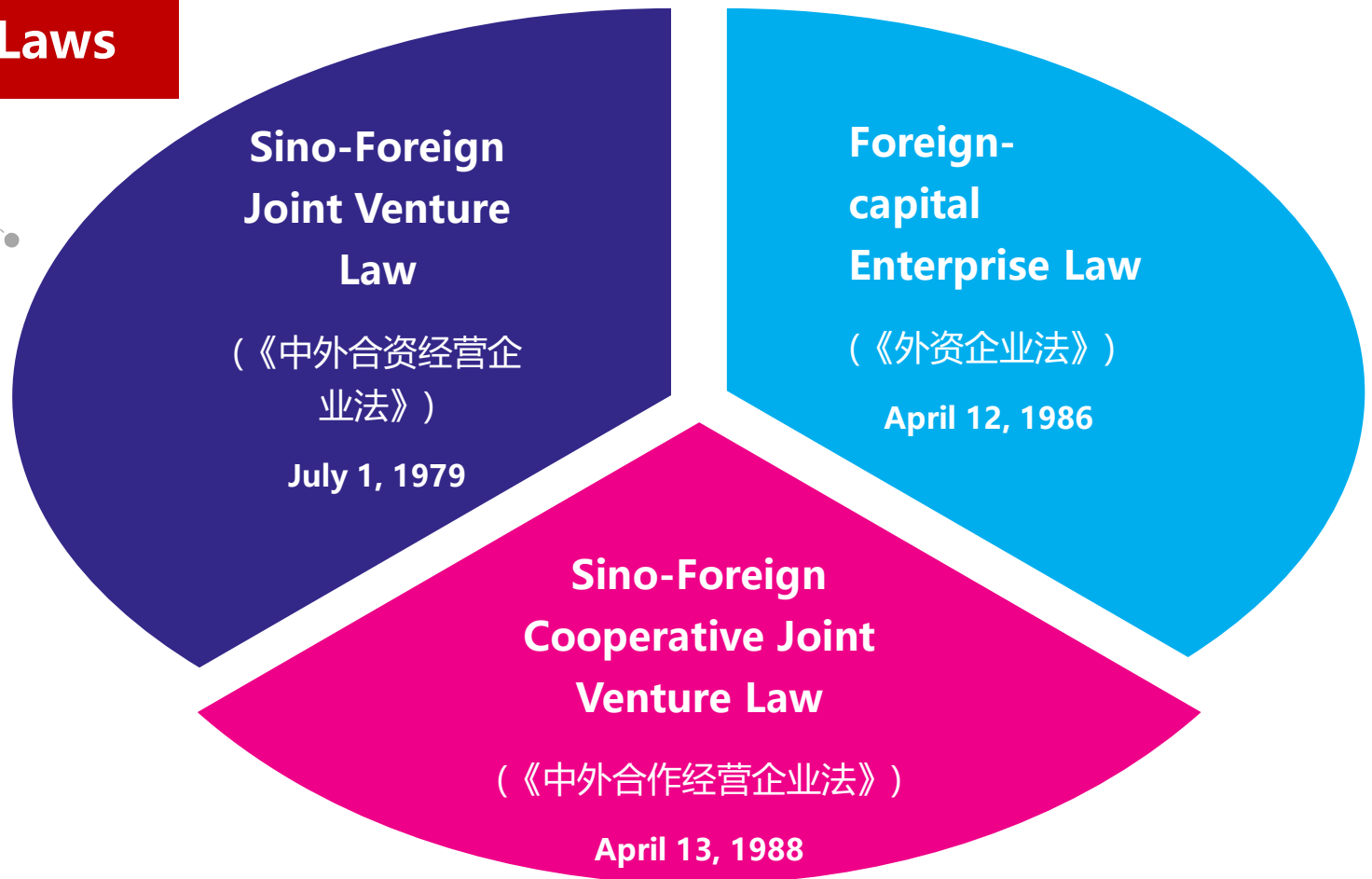
# Contents

# 1. THE HISTORY OF FOREIGN INVESTMENT POLICIES



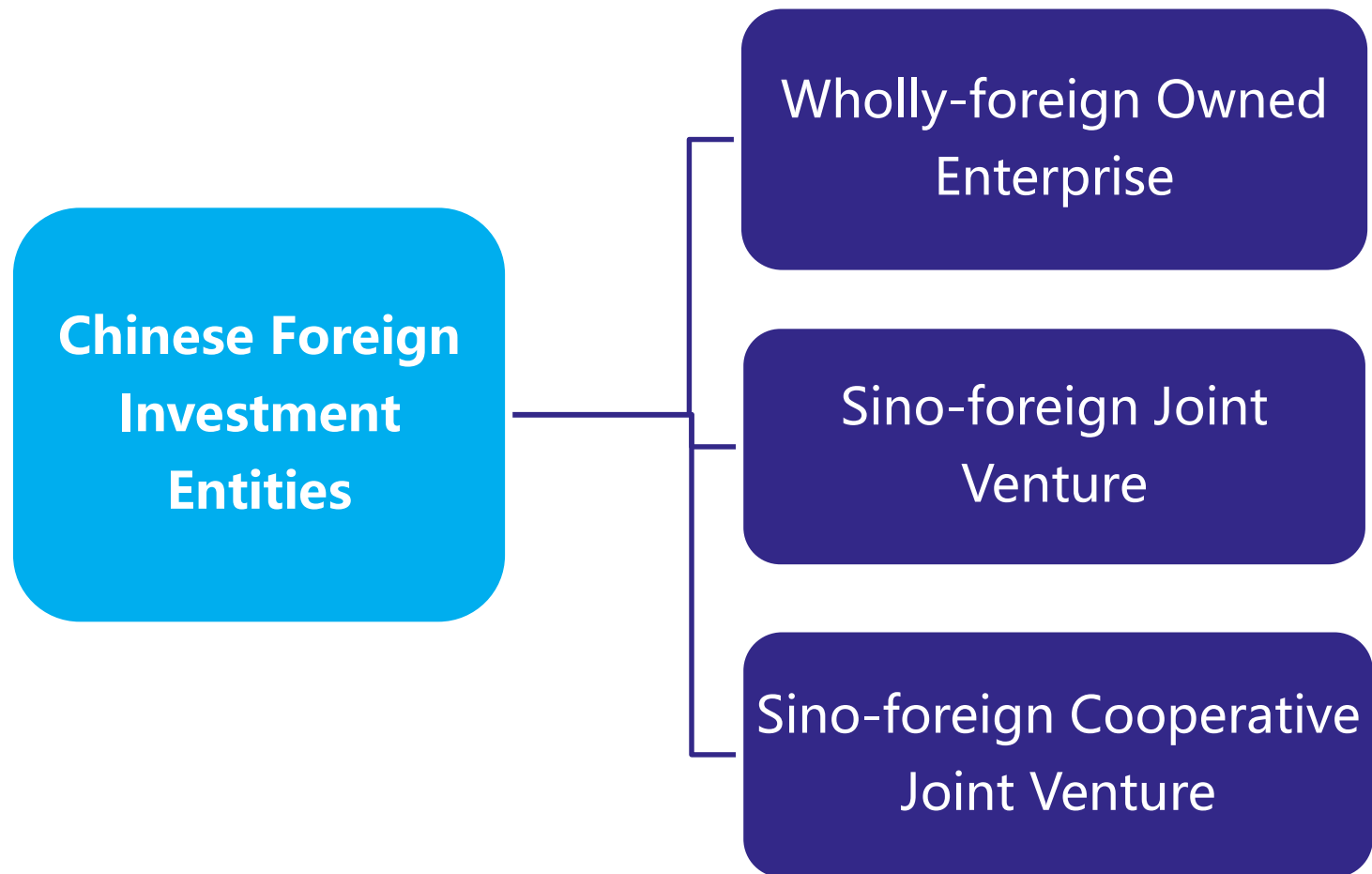
# (1) The Era of Approval

## ◆ Three FDI Laws



# Categories

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# The Good Old Days of FIEs.....

**For a long time, FIEs enjoyed Super-national Treatment compared with the domestic company. For example:**

## Tax Treatment

- According to Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises, the tax rate was 15%, while domestic entities were up to 33% at the same time
- Repealed in 2008

## Capital Contribution

- Before 2014, only FIEs could apply "capital subscription system", which means that when establishing FIEs, the investors could subscribe capital contribution and pay up in the future, while, at the same time, the shareholders of domestic enterprises should apply "capital pay-up system"

## Recoup Investment

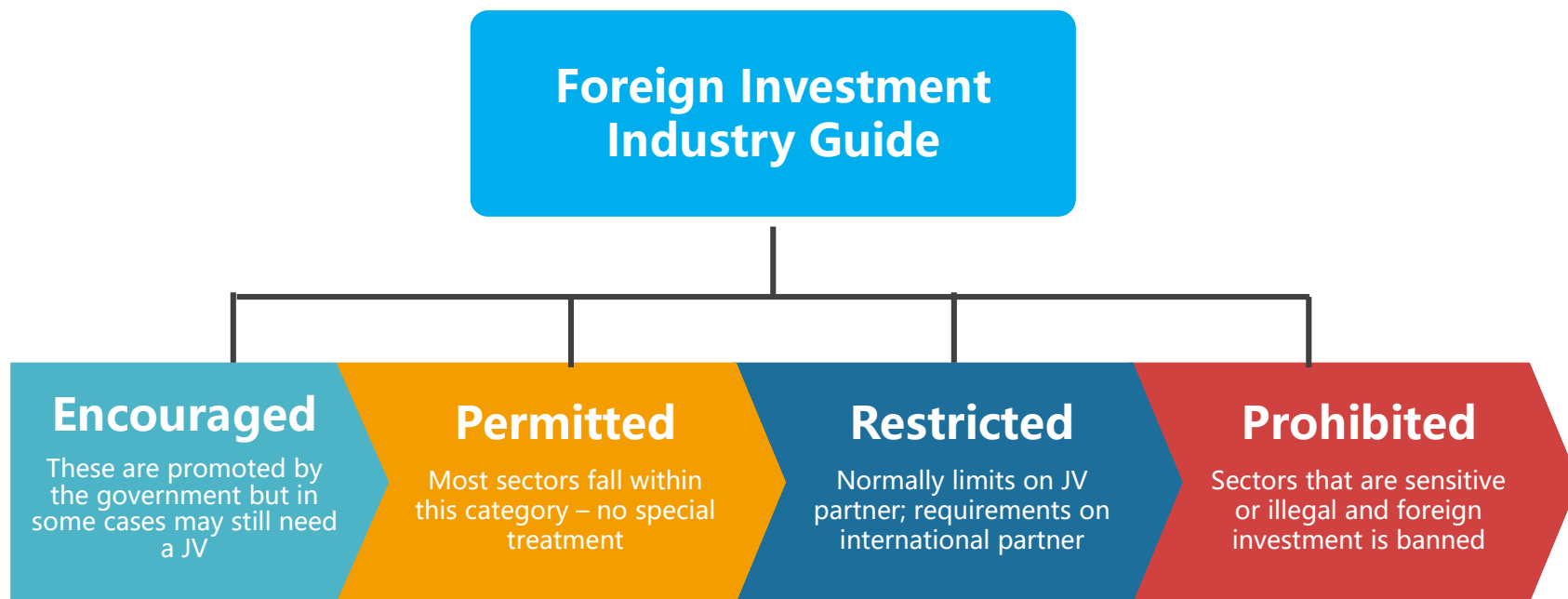
- According to Sino-Foreign Cooperative Joint Venture Law, foreign investors were able to recoup their investment within the period of co-operation

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Matters	Joint Venture Law	Company Law
Director	Chinese investors and foreign investors to the JV can <b>at least</b> appoint one director respectively	No limit
Quorum	Board of directors (Highest authority)  2/3 of all the directors	Shareholders' meeting (Highest authority)  No limit
Voting mechanism for important matters	<b>Unanimous consent of directors</b> attending the meeting	Passed by shareholders representing <b>two-thirds of votes shares</b>
Transfer of shares	<b>Unanimously agreed</b> by other shareholders	Passed by a <b>simple majority</b> of votes casted by shareholders, unless otherwise agreed by shareholders  Where more than half of the other shareholders do not consent to the proposed transfer, <b>the non-consenting shareholders shall acquire such equity interests</b> , failing which they shall be <b>deemed to have consented</b> to the proposed transfer

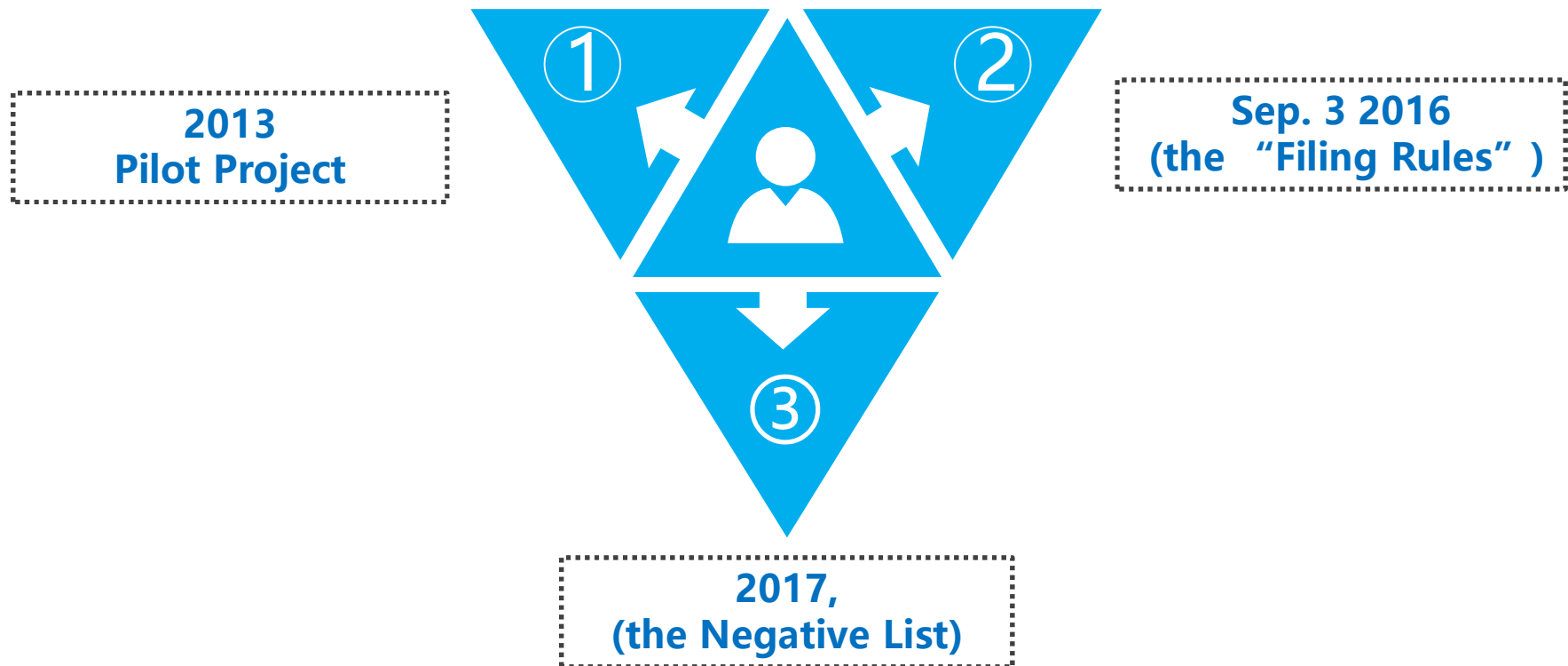
# Catalogue

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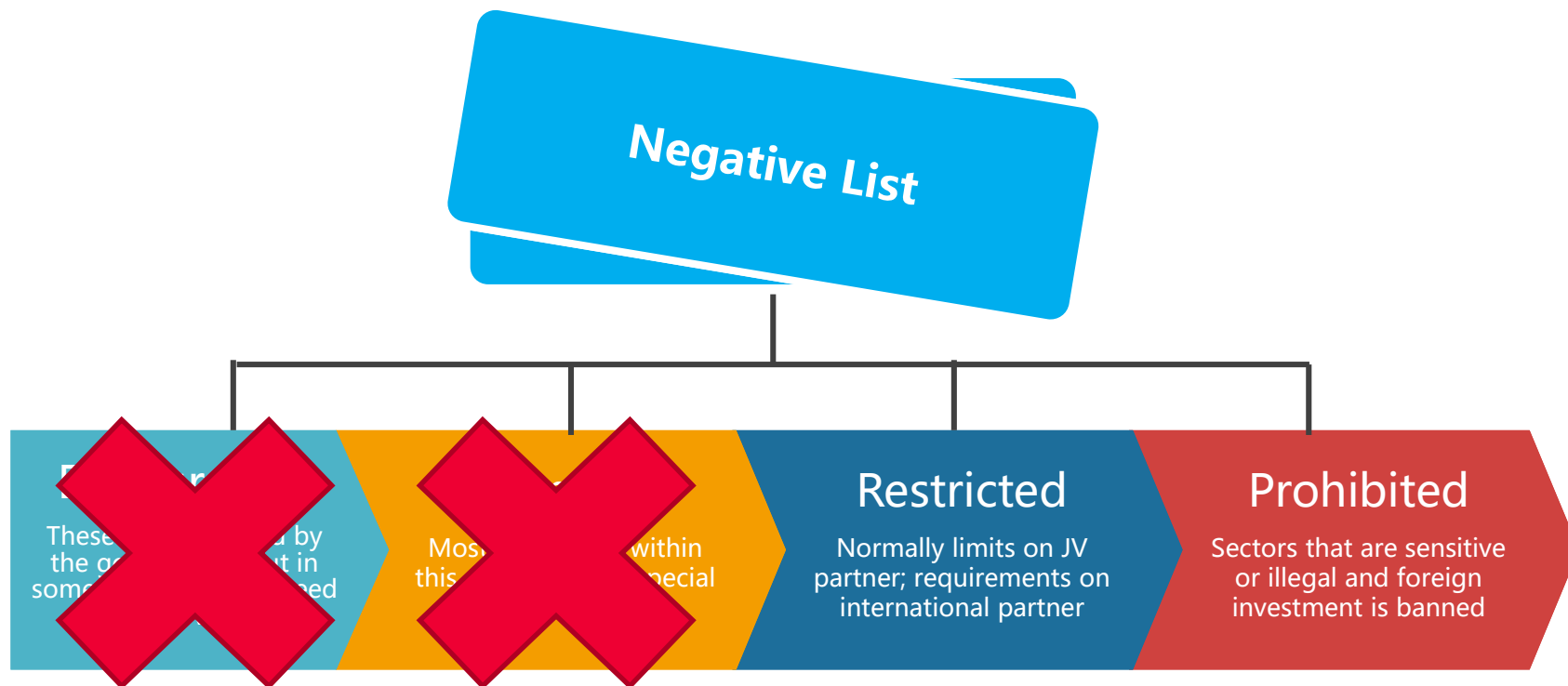


## (2) The Era of Filing



# Negative List

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# Negative List

## ■ Some Prohibited or Restricted Sectors

### Information Transmission, Software and Information Technology Services

#### Restricted

- Value-add telecommunications and basic telecommunications businesses

#### Prohibited

- Internet news service, Internet publishing services, Internet audio-visual program service and cyber culture operation (except for music) and Internet information dissemination service

### Finance Industry

#### Restricted

- Security company and securities investment fund management company –51% (ratio restriction canceled in 2021)
- Futures company and life insurance company – 51%

### Scientific Research and Technical Services

#### Prohibited

- Mapping
- Human stem cells, genetic diagnosis and treatment technology
- Research institutions of humanistic and social sciences

### Education

#### Restricted

- Pre-school education, normal high schools and higher education institutions

#### Prohibited

- Compulsory education institutions and religious education institutions

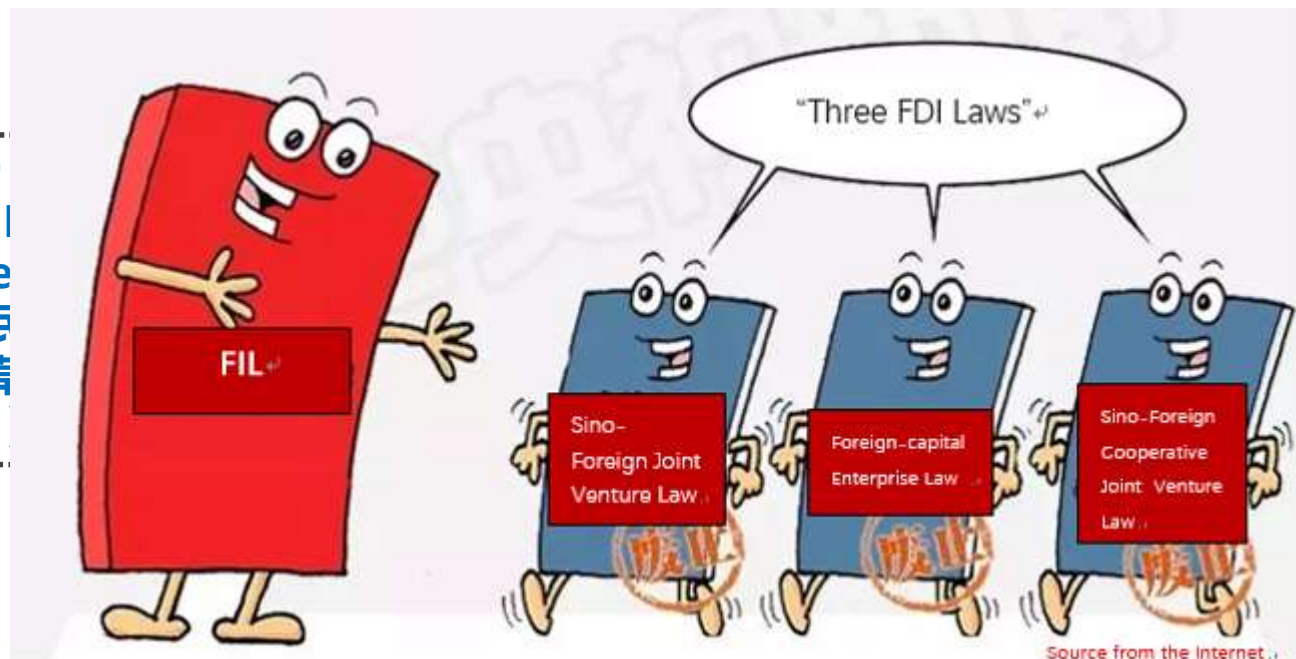
### Culture, Sports, and Entertainment

#### Prohibited

- News organizations
- Editing, publication and production of books, newspapers, periodicals, audio-visual products and electronic publications
- Performing arts groups
- Film production companies, distribution companies and cinema companies as well as film introduction business etc.

### (3) One Unified Law

Jan. 19  
Draft of  
Investme  
(《中华人民  
国投资法 (草  
见稿)



2019  
tment  
PRC  
L)

force  
y 1,

Dec. 12 2019 (Approved)  
Dec. 26 2019 (Promulgated)  
the “Implementing Regulation”

## 2. HIGHLIGHTS OF FIL



# Overview

## ■ FIL

### ➤ 6 chapters, 42 articles

- General Provisions
- Investment Promotion
- Investment Protection
- Investment Administration
- Legal Liabilities
- Miscellaneous



# Overview

## ■ Implementing Regulation

KWM has actively participated in the legislative process and was invited by Ministry of Justice to provide comments and suggestions on the Implementing Regulation

### 中华人民共和国司法部

#### 司法部办公厅关于征求《中华人民共和国外商投资法实施条例（征求意见稿）》意见的函

金杜律师事务所：

《中华人民共和国外商投资法》将于 2020 年 1 月 1 日起施行。为确保这部重要法律的有效实施，根据党中央、国务院决策部署，司法部会同商务部、发展改革委在认真研究论证的基础上，起草形成了《中华人民共和国外商投资法实施条例（征求意见稿）》。现将征求意见稿及其说明送上，请研究提出意见，并于 2019 年 10 月 30 日前将意见反馈我部。

感谢对立法工作的支持！

# Overview

## ■ Implementing Regulation

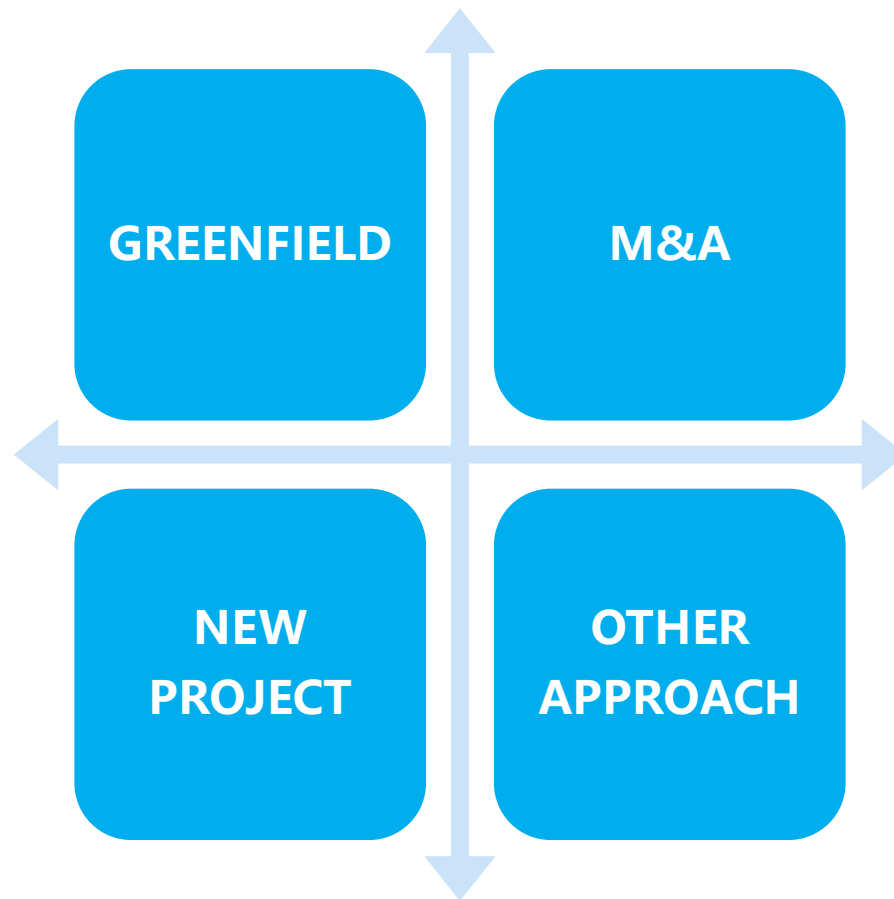
### ➤ 6 chapters, 49 articles

- General Provisions
- Investment Promotion
- Investment Protection
- Investment Administration
- Legal Liabilities
- Miscellaneous

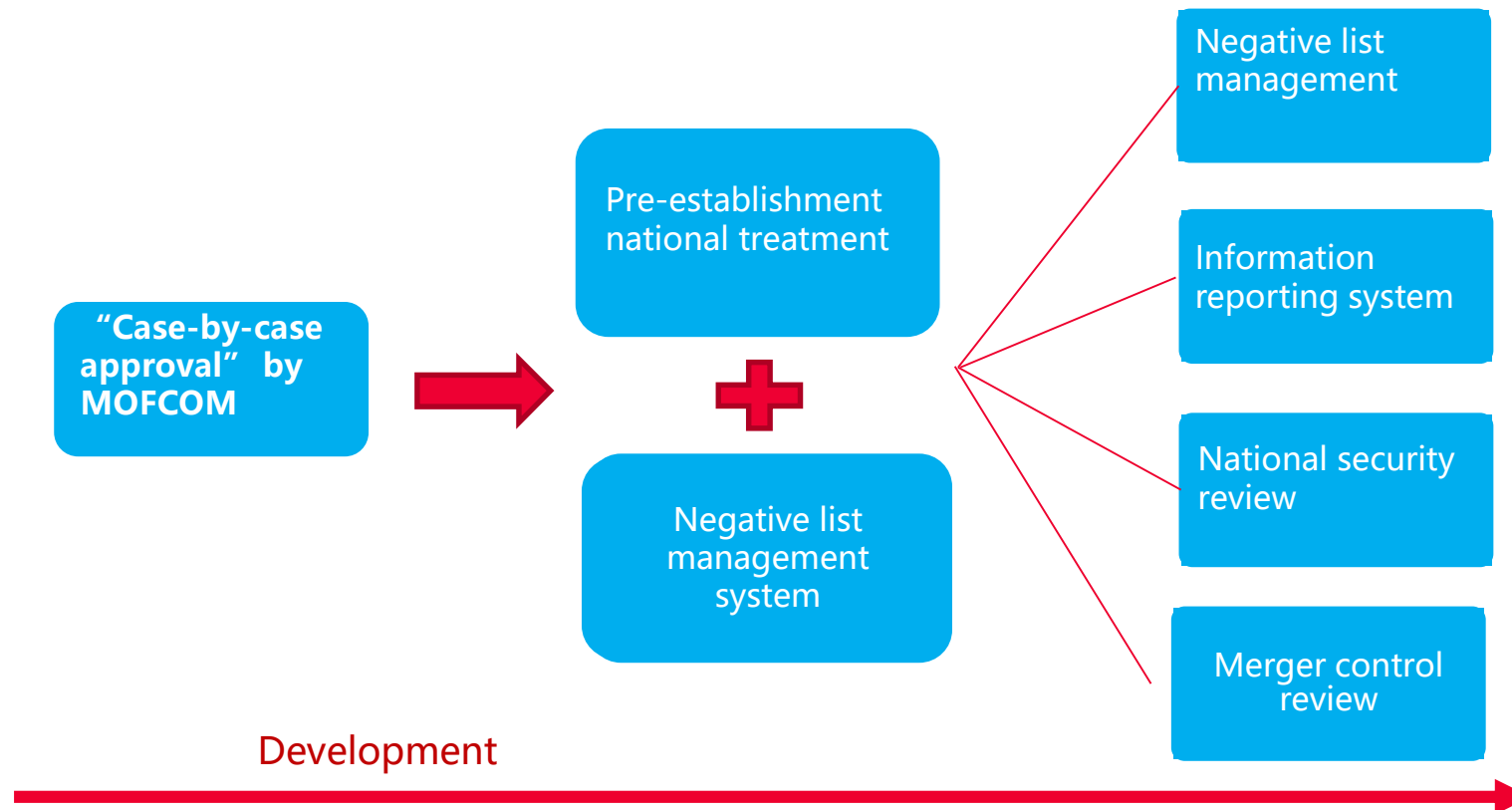




# (1) Scope of Foreign Investment



## (2) Investment Administration



# ◆ National Treatment Plus Negative List For Foreign Investment

## ■ FIL Article 4

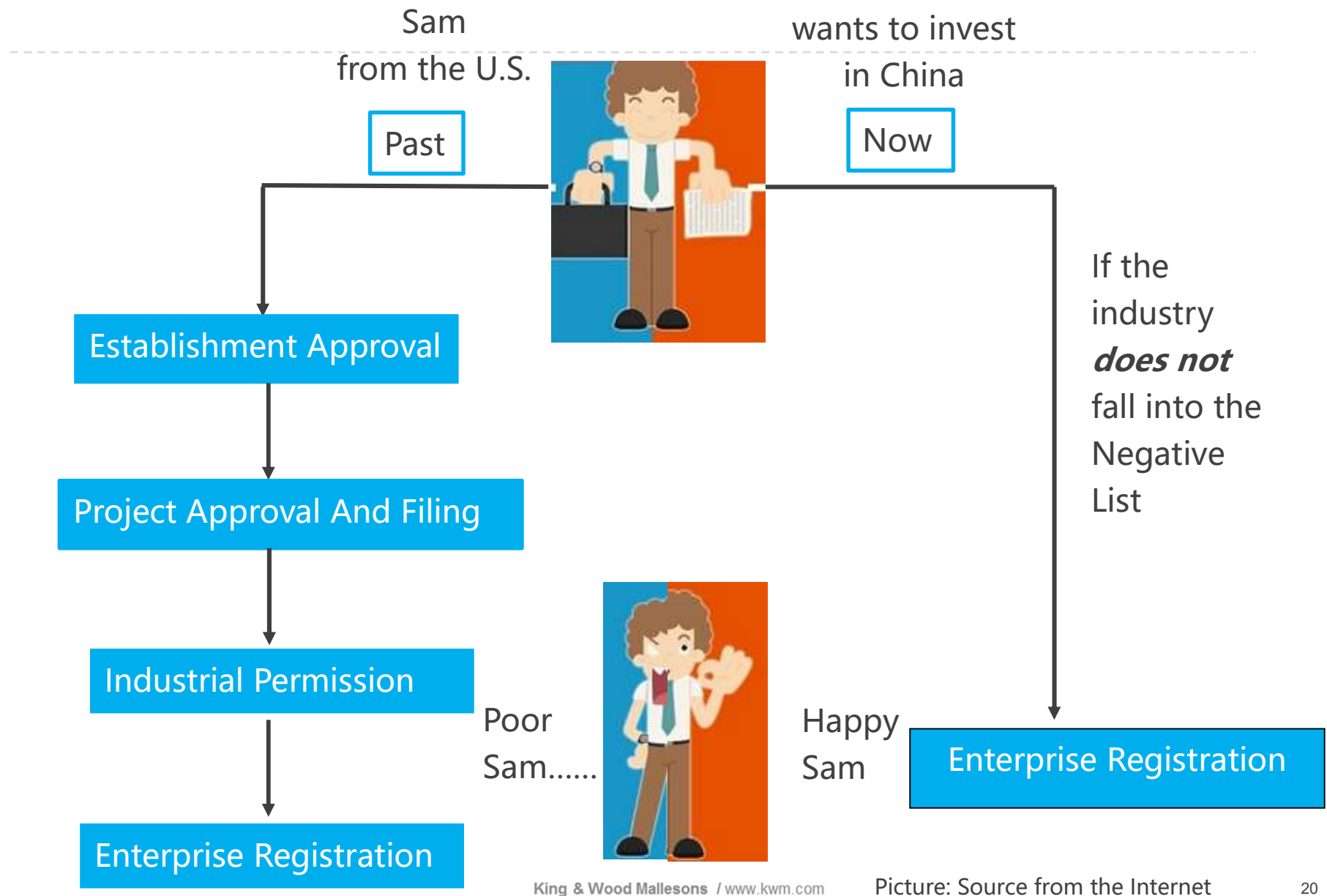
### **National Treatment**

Refer to granting to foreign investors and their investments, in the stage of investment access, the treatment no less favorable than that granted to domestic investors and their investments

### **Negative List**

Refer to special administrative measures for access of foreign investment in specific fields as stipulated by the State

## ◆ Negative List System



### (3) Investment Promotion and Protection

In connection with foreign investors' concerns about non-national (less favorable) treatment, FIL clearly protects the legitimate rights and interests of foreign investors and FIEs in China, including:



Equal policy support for FIEs in accordance with applicable law



Protect FIEs' right to equally participate in the standards formulation procedure



Protects FIEs' right to participate in government procurement activities through fair competition



May conduct financing via public offering, issuance of corporate bonds or other securities, and other approaches in accordance with applicable law



May freely remit into or out of China their contributions, profits, capital gains, income from asset proposal, IP royalties, compensation, liquidation income, etc



The people's governments at all levels and their departments concerned shall not impair FIEs' legitimate rights and interests or increase their obligations



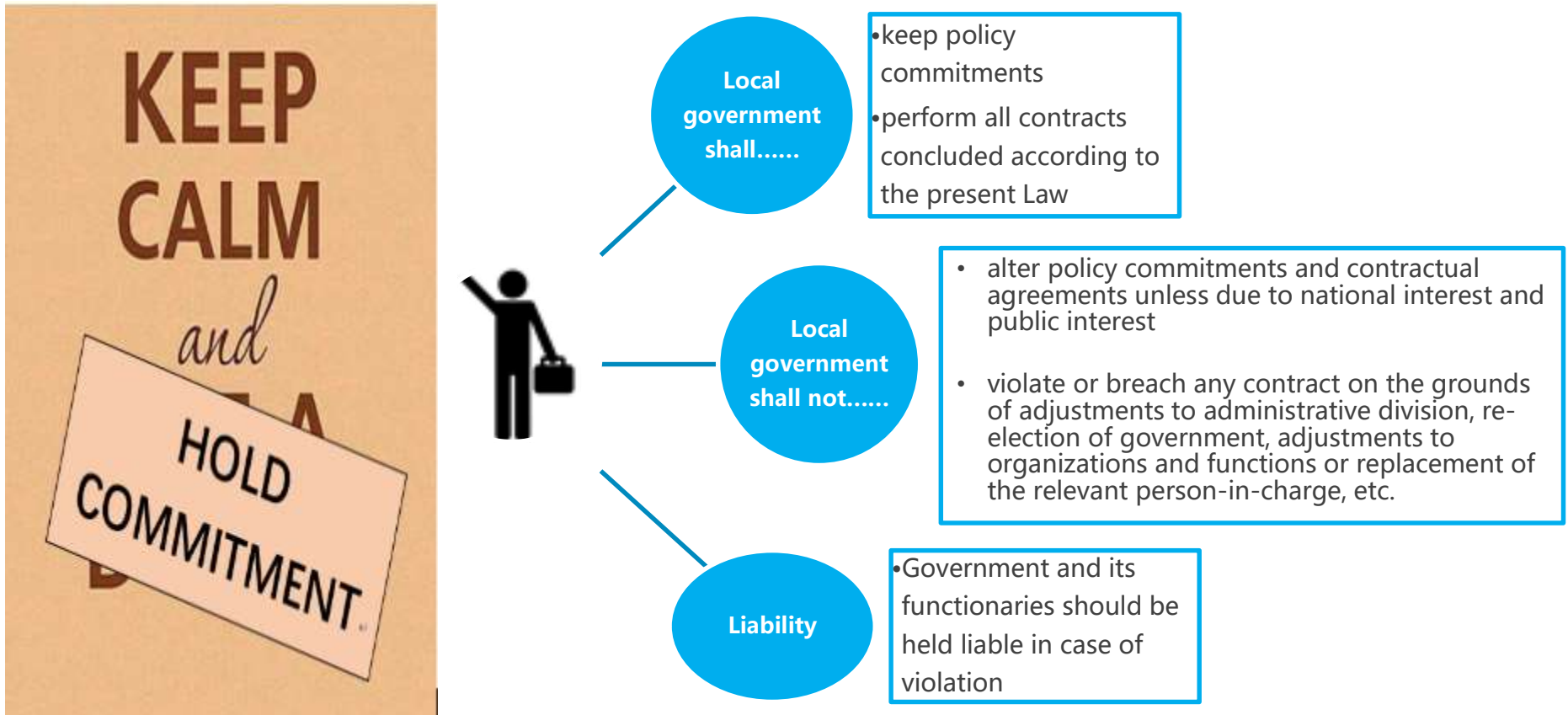
The administrative organ and its functionaries shall keep confidential the trade secrets of FIEs they become aware of in the course of performing their duties

# IP, COMMERCIAL SECRETS AND GOVERNMENT INTERFERENCE

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# Government Commitment



Picture: Source from the Internet

## (4) Transitional period

**Transitional Period: 5 years from effective date  
(Jan. 1 2020)**

### **During Transitional Period, FIEs can:**

- Keep their original organizational forms, etc.
- But If change formalities are not completed within the transitional period, enterprise registration authorities will not process other registration matters for the enterprise, and may disclose the relevant information in the enterprise information publicity system

### **What can be kept?**

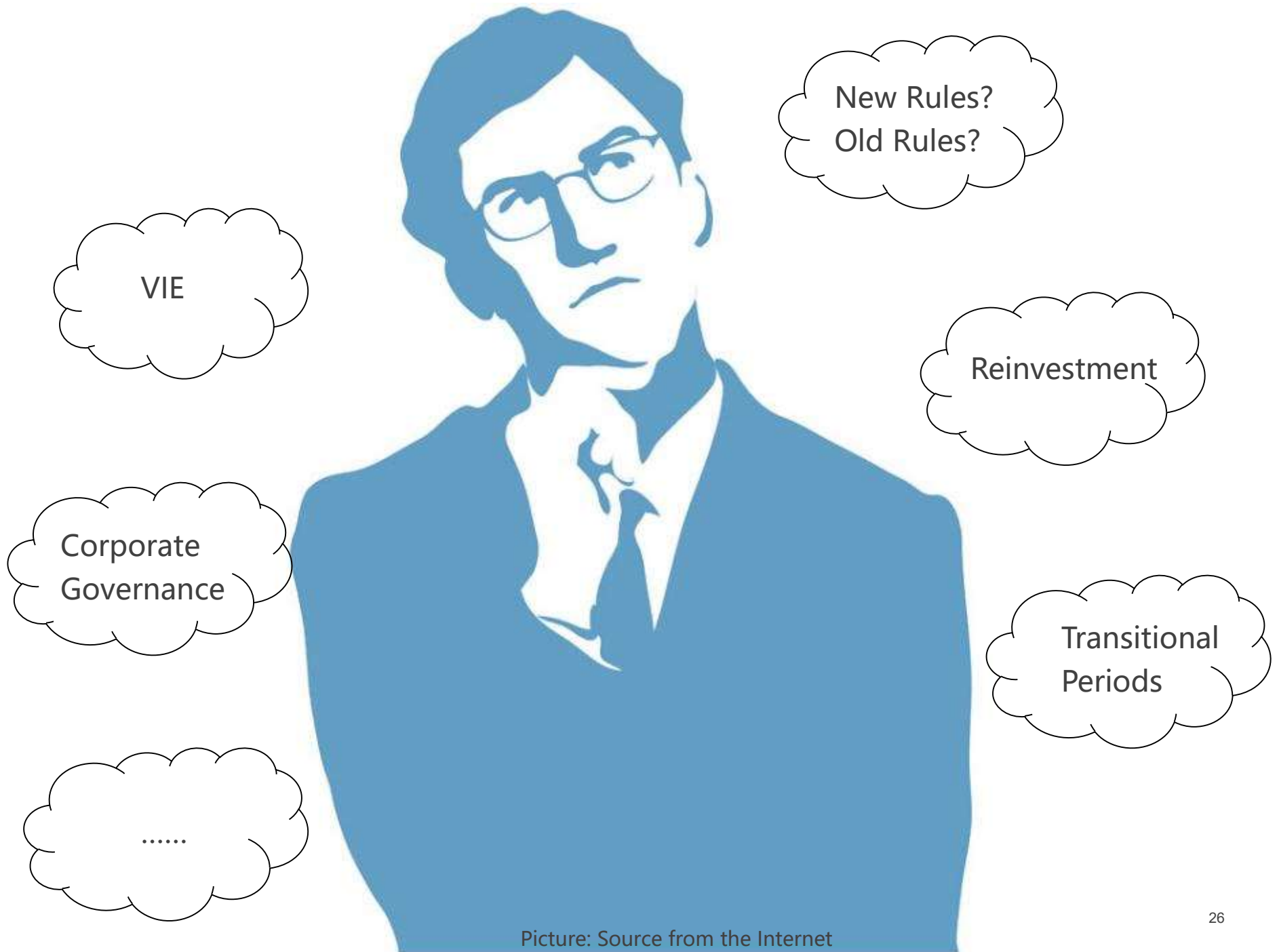
- Upon completion of original organizational forms, equity transfer methods, income distribution methods and distribution methods for the remaining assets agreed in the contracts between the joint venture parties or cooperative joint venture parties to existing foreign-invested enterprises may continue to be handled as agreed





### 3. CHANGES AND CHALLENGES





New Rules?  
Old Rules?

VIE

Reinvestment

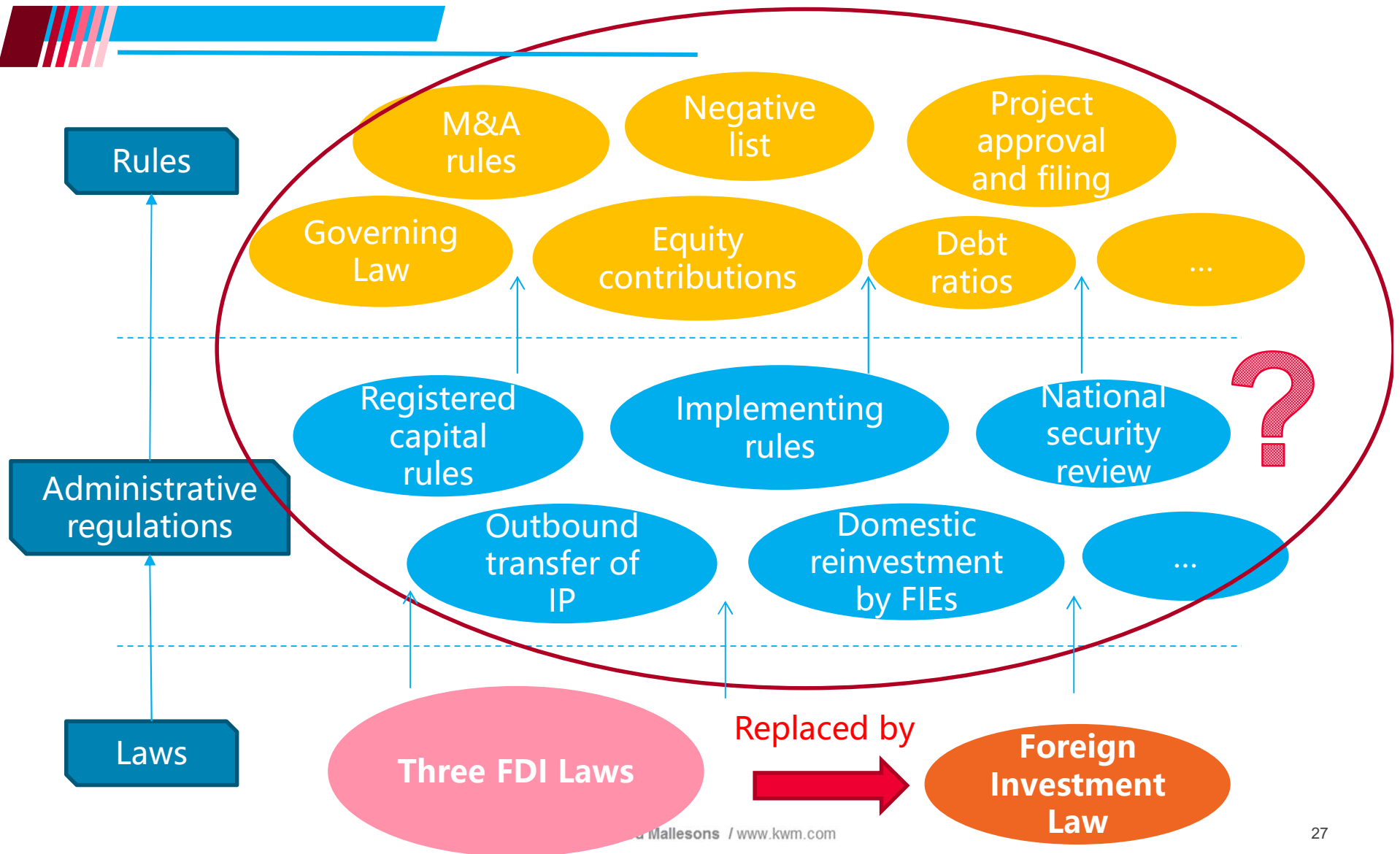
Corporate  
Governance

Transitional  
Periods

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Picture: Source from the Internet

# (1) Necessity Of Reform and Abolishment of Current Regulations and Rules



# Some of the problems.....

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 <p><b>Unanimous consent of equity transfer</b> Unclear whether how transfer of equity will be affected upon repeal of the Three FDI Laws.</p>	 <p><b>Round-trip acquisition</b> The legal basis that subject round-trip acquisitions to MOFCOM approvals will be lost upon FIL' s implementation.</p>
 <p><b>Capital contribution in form of equity and share swap</b> With the repeal of the Three FDI Laws, there are no legal restrictions preventing foreign investors from making capital contribution in equity or conducting acquisition by means of share swap.</p>	 <p><b>Governing law</b> Repealing the Three FDI Laws will cause domino effect repeal of other laws (such as EJV Regulations and CJV Regulations). Affected laws may need to be amended.</p>

## (2) Transitional period

Foreign Invested Entities established before the effectiveness of FIL are required to change its formality in accordance with the Company Law and Partnership Enterprise Law, which means:

- Amendment of contracts and the articles of association;
- Establishment of shareholders' meeting;
- Adjustment of the rules of the board of directors;
- Rules of share transfer, income distribution, etc. and .....
- **NEW NEGOTIATION!!!**



Picture: Source from the Internet



## How to change a Joint Venture' s shareholder under FIL...



## (3) “Indirect Investment” and Implementation of Negative List

Seems that indirect investment should also be governed by negative list, but need more detailed rules and regulations

For example: different regulatory standards between SAMR and MIIT towards FIEs reinvestment

### □ Three FDI Laws

- only regulate the first-layer investment activity by foreign investors in China

### □ The Interim Provisions on Investment inside China by FIEs

- only regulates the second-layer foreign investment in China and no existing regulations regulating the down-stream foreign investments

### □ FIL

- no further explanation on “indirect investment”

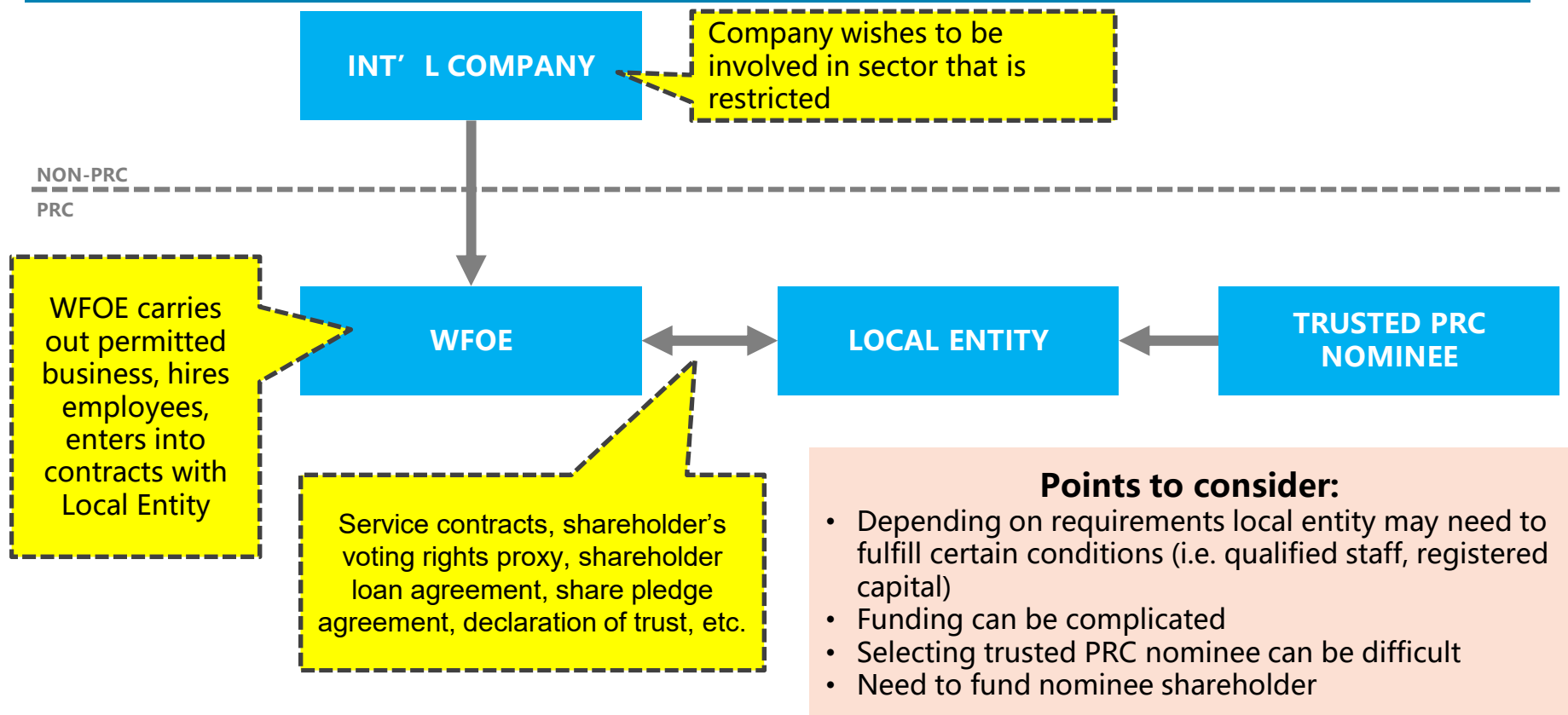
### □ Implementation Regulation

- FIEs reinvesting domestically in China is governed by FIL and Implementation Regulation

## (4) VIE Structure Continues To Be In The Grey Area

The variable interest entity ( "VIE" ) structure, also known as "agreement control" or "contractual arrangement"

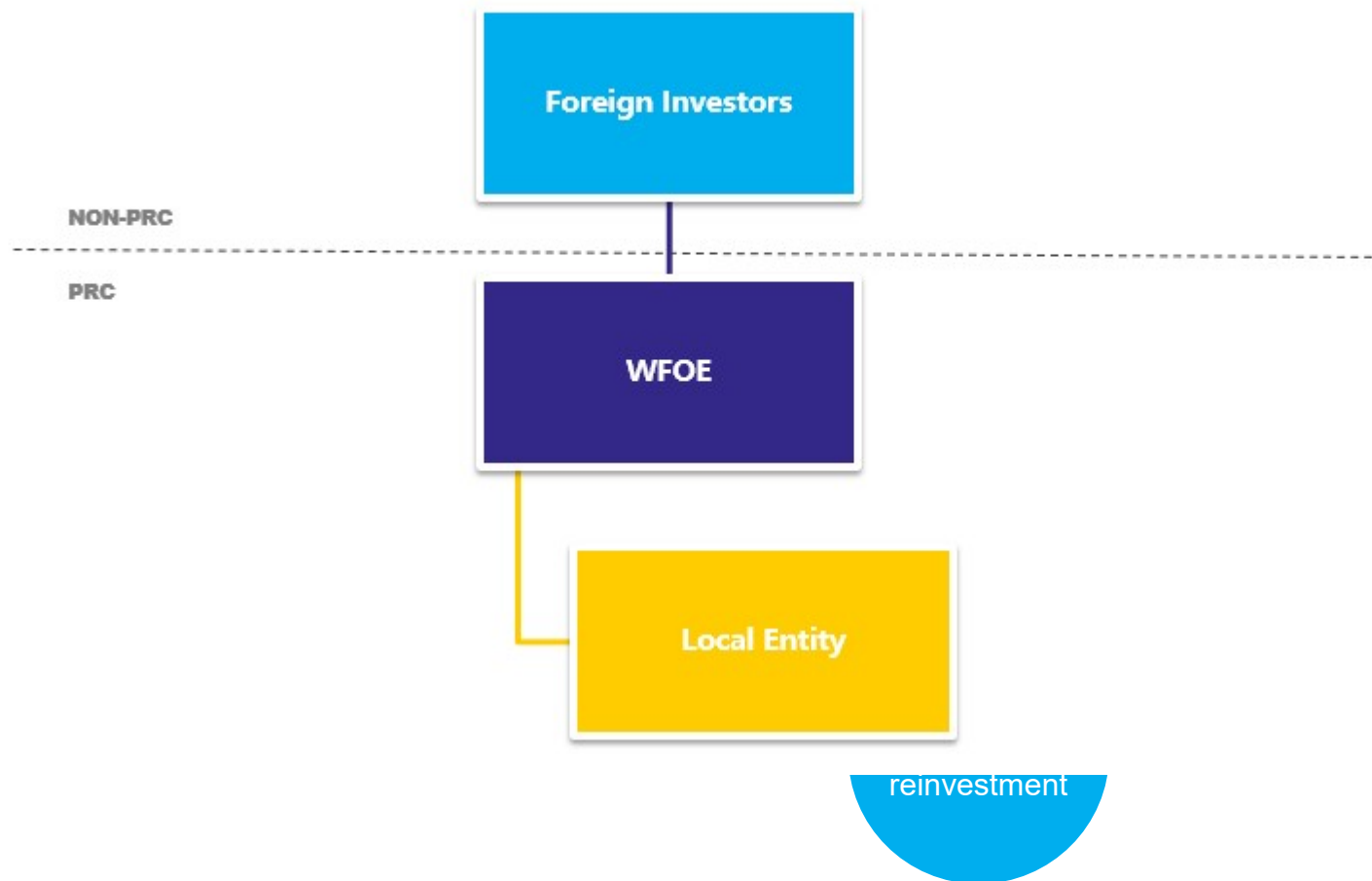
- refer to the use of a series of agreements, rather than equity ownership, to achieve actual control of domestic operating.
- widely used in foreign investment-restricted or -prohibited industries;





# Any Good Sign For VIE Structure?

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# Attitude of the Authority towards VIE?

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## • **Draft of Foreign Investment Law (2015)**

- defined VIE structures as a form of foreign investment



## **First draft in 2018 of the Foreign Investment Law**

removed all provisions referring to "agreement control" or "actual controller " and a "catch-all" clause – "through other means"



## **Draft for Comment of Implementation Regulation**

Exemption — examination by the relevant competent department of the State Council and approval by the State Council (**deleted in finalized version**)

- 
- **FIL and its Implementation Regulation seem to shelve the issue of VIE structures**



Picture: Source from the Internet

# Partner

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## **MO, Haibo (Bob)**

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### Practice

Mr. Mo, joining King & Wood Mallesons in 2005, is one of the partners heading the corporate team of KWM International Center (Shenzhen, Guangzhou and Hong Kong), and specializes in corporate merger and acquisition, FDI, capital markets, banking and finance. Mr. Mo has been admitted to the All China Lawyer Association and CPA Australia.

### Experience

Mr. Mo has extensive experience in multinational enterprises' foreign direct investment projects and well-known domestic enterprises' outbound investments. He has participated in and headed many establishment, reorganization, restructuring and merger, bonds issuance, assets securitization and IPO projects involving financial institutions.

Mr. Mo is currently retained as external general legal counsel by many well-known multinational corporations. He also possesses an in-depth knowledge about the capital market in HK, and has represented clients in a variety of industries such as High-tech, internet, education, cross-border ecommerce, mass consumption, catering, advertising, convention and exhibition, real estate and manufacturing, with respect to the PE investments, pre-IPO investment, IPO projects (via red-chip structure or VIE structure) and the post-IPO acquisitions.

Mr. Mo has been selected for the Legal Talents Scheme in Foreign-related Business (2013-2016) launched by All China Lawyers Association, and has completed his offshore training course in Europe in 2014 and 2017. Mr. Mo has been selected as one of the Top 1000 Legal Talents in Foreign-related Business by Ministry of Justice of the People's Republic of China. Mr. Mo has further participated in the preparation of the book with the name of "Guidance of Laws of the 'Silk Road Economic Belt and the 21st-Century Maritime Silk Road' ( 'B&R' ) Countries and Regions for Investors" with respect to the Australia sector. Mr. Mo has been recognized by Chambers in 2020 Asia-Pacific Guide as up and coming lawyers in Corporate and M&A areas.



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### Practice

Ms. Li, joining King & Wood Mallesons in 2012, is a senior foreign legal consultant and specializes in FDI, cross-border mergers and acquisitions, private equity investments (overseas and domestic), capital markets and other corporate matters. She has advised a number of listed companies, multinational companies on their legal matters.

### Experience

Ms. Li has participated in various projects concerning foreign direct investment and cross-border merger and acquisition in a wide range of business sectors, including infrastructure, financial institute, manufacturing, real estate, distribution and retail and fast moving consumer goods. She has advised a number of renowned foreign enterprises in their investments in China, including Mitsui & Co, Allianz Group, Trave Guard Group of AIG, Morgan Stanley, Citibank, Macquarie Capital, Domtar Corporation, Convenience Retail Asia Limited.

Ms. Li has extensive experience in M&A Matters. She was one of the core members of the legal team in advising Healthcare Co., Ltd. (603313) on its acquisition of Mor Furnitures (constituting Major Assets Restructuring) . She also represented China Hainan Rubber Industry Group Co., Ltd. ( 601118) in its acquisition of R1 International Pte Ltd., a Singaporean rubber trading company with subindustries in Singapore, Malaysia, Thailand, Vietnam, Indonesia, Cambodia, India, the US, Japan and China; represented Jiashili Group (01285. HK) on its acquisition of Silang Food, a food production and sales company incorporated in the PRC

In IPO and Capital Market Matters, Ms. Li is acted for HK listing of Hingtex Holdings (01968.HK) and acted for Guangzhou Finance Holding Group Co., Ltd. On its issuance of USD bonds amounting to USD 250 million.



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**Thanks!**

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