

The People's Republic of China (PRC) Foreign Investment Law, which took effect January 1, 2020, provides that foreign invested companies (FIEs) may resolve disputes with administrative agencies through a complaint mechanism. Such a complaint mechanism is not a novel invention. In 2006, the PRC Ministry of Commerce (MOFCOM) released an Interim Measures for Processing Complaints of Foreign Invested Companies (the Interim Measures), which established the basic features for complaint processing. On March 23, 2020, MOFCOM released the Draft of Working Measures for Processing Complaints of Foreign Invested Companies for Public Comments (the Draft Measures) as an update to the Interim Measures. This article reviews and analyzes the Draft Measures.

Background

The Draft Measures allow FIEs and their investors (Complainants) to submit complaints and resolve disputes through a complaint mechanism if they consider their interests to have been infringed by the administrative action of any administrative agency or its officials (Respondents). Disputes arising from civil or commercial activities with other natural persons, legal entities or organizations are expressly excluded from the complaint mechanism. The complaint mechanism relies principally on communication, concession and understanding between a Complainant and the Respondent to facilitate the parties in reaching a settlement agreement to resolve the dispute. The process is similar to the method of mediation often used in China to attempt to resolve commercial disputes. The complaint mechanism does not prevent a Complainant from seeking other remedies, such as administrative review or administrative litigation in case a consensus cannot be achieved. Compared with administrative review and administrative litigation, the advantages of the draft complaint mechanism lie in that it can save litigation costs and time, assuming the parties are able to effectively resolve their disputes.

Compared with the Interim Measures released in 2006, the Draft Measures make the updates in the following aspects:

- Draft Measures establish a joint committee as a national coordinator and top supervisor of the complaint work in addition to the existing national complaint center for FIEs and complaint processing agencies at local levels. MOFCOM would be joined by other ministries at the State Council to establish the joint committee, which would be housed under the Foreign Investment Department of MOFCOM.
- The Draft Measures stipulate that the complaint processing agencies must notify a Complainant whether its application is accepted within seven working days, instead of the five working days specified under the Interim Measures. Draft Measures also extend the maximum time allowed for processing complaints from 30 working days to 60 working days. Though Complainants are allowed to withdraw their complaints and seek other remedies at any time during the complaint processing process, for Complainants that would like to obtain the results through the complaint mechanism process before seeking other remedies, the extension to 60 working days could present practical difficulties in exercising their rights to administrative review. According to the PRC Administrative Review Law, the statute of limitations of the administrative review is 60 days starting from the date the applicant is aware of the administrative action. If the complaint mechanism already takes 60 working days to complete the whole process, it is mostly likely that the statute of limitation for the administrative review will be missed. Therefore, we would recommend that the maximum time allowed remain at 30 working days to avoid any negative consequences for the right of the Complainant to seek relief through administrative review.
- The Draft Measures appear to offer a higher level of confidentiality when compared with the Interim Measures, which are only committed to protecting trade secrets. By contrast, the Draft Measures expressly offer confidentiality protection for any trade secrets, commercial credentials and private personal information obtained during the processing of the complaint.
- The Draft Measures offer a withdrawal mechanism to better protect the interests of Complainants. If the working staff of the complaint processing agencies who are responsible for the coordination and handling of the complaint have conflicts of interest with a Complainant or Respondent that may affect the fairness of processing the complaint, such working staff are obligated to withdraw.

- The Draft Measures clarify that any settlement agreement reached between a Complainant and Respondent is binding on both parties. If the Respondent then fails timely to perform its obligations, the Respondent may be held accountable under the Detailed Implementations of Foreign Investment Law to enforce the performance. It remains unclear, however, how this would work in practice and, generally, how a Respondent may be held accountable.

Our Analysis

The Draft Measures seem to offer an improved mechanism for FIEs to resolve their disputes with administrative agencies over what has been available under the Interim Measures. However, if adopted, FIEs will still need to exercise caution in using the complaint mechanism. As previously noted, in order to settle a dispute using the mechanism as proposed, a Complainant may need to make concessions. The Complaint mechanism seems more suited for minor disputes in which a consensus between the parties may be reached through mutual concessions. Furthermore, in case a Respondent fails to perform its responsibilities under a settlement agreement, the Complainant may still be compelled to seek alternative remedies after investing valuable time and money in attempting to resolve the issues. Therefore, Complainants may need to consider providing in their settlement agreements that any concessions agreed will not be binding in the event the Respondent fails timely to perform its obligations, and to establish milestones or other clear and objective measures for assessing a Respondent's compliance with its obligations.

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