

## Legal Uncertainty in the Chinese Environment for Foreign Investment

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The legal environment for foreign direct investment (FDI) has been marked by *rolling uncertainty* since 1979. Some causes can clearly be identified: During the 1980s and 1990s both the laws that introduced new institutions and the laws or administrative regulations subsequently issued to implement them were marked by tentativeness. Implementing laws or regulations often appeared only long after the laws they were intended to clarify, and were framed in very general language; legislative and rule-making processes have been opaque; and the agencies that have applied them exercise very broad discretion. Policies and, sometimes, conflicting policies have impacted the application of norms in practice. Institutional weaknesses have been severe: A multiplicity of legislative bodies and administrative agencies issue norms, but the means for maintaining legislative coherence and consistency among them have been lacking; judicial institutions have been weak, subject to local protectionism, and staffed by poorly educated judges. The uncertainty is understandable in view of the novelty of the institutions being created, the size of the tasks facing the reformers, and the lack of clarity about the long-term aims of the economic reforms.

Regardless of the causes of uncertainty, throughout the first two decades of FDI foreigners and Chinese officials alike were driven to devise strategies for coping with it. Some of these included seeking approval, overt or otherwise, from powerful officials to engage in activities not clearly permitted by law (e.g., Rupert Murdoch, investors in CCF telecommunications operations); simply ignoring national law while making arrangements much welcomed by local officials (e.g., Carrefour); and violating the law with complicity of local officials (e.g., in countless contracts for FIEs that evade approval thresholds).

In recent years, uncertainty with regard to the longest-established institutions has generally diminished as norms have multiplied and experience has been accumulated. New institutions, however, are still introduced tentatively. Uncertainty continues to mark law-making due to the impact of changing policies, long-standing drafting practices, the wide discretion of bureaucrats, local disregard for national laws and policies, and the opacity of bureaucratic decision-making. Institutions for establishing and maintaining coherence and order among national and local norms have only recently begun to function. The courts remain hampered by their lowly position in the Chinese governmental apparatus and by the grip of local governments, although professional standards for judges are rising. Relative certainty should increase as the web of rules applicable to FDI thickens and deepens, and the extent of uncertainty ought to be less than in the nineteen-eighties and nineteen-nineties, but recent experience suggests that it still persists.

Although new laws are being drafted under the aegis of both the State Council and the NPC, legal reform generally is likely to proceed only very slowly and unevenly. Out of caution or lack of political will, China's leaders seem unwilling to accelerate legal reform, and legal culture can only change very slowly in the midst of the current crisis in values involving the very legitimacy of the Party-state as it is presently constituted.