

# Understanding “Foreign Enterprise Investors” in Chinese Laws: A Suggested Standard for Identification

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Identifying foreign investors is a precondition for the application of the Foreign Investment Law of the People’s Republic of China, but this law does not specify the standard for such an identification. At present, there is no uniform standard or practice in international society. The existing standards for identifying foreign investors in modern countries are the place of incorporation standard, the place of domicile standard, the actual control standard, and the compound standard. The major difference underlying these changing standards is how to confirm the actual connection between foreign investors and host countries. In the era of globalization, multinational enterprises gradually weaken their national identity, becoming closer and more consistent with the interests of domicile. Therefore, the place of domicile standard can best reflect the actual connection between investors and the country, and this standard also gives consideration to the stability and flexibility of the law. As a result, the place of domicile standard has gradually become the main standard by which many countries identify foreign investors. The identification standard of foreign investors in Chinese legislation and international investment treaties is quite confusing, but there is little doubt that the main standard is the place of incorporation standard, which leads to many problems in practice. In order to adapt to the situation of international investment, China should take the implementation of the Foreign Investment Law as an opportunity to unify domestic legislation with the place of domicile standard. At the same time, it should pay closer attention to the convergence of domestic law and international law to achieve its legislative purpose by expanding opening-up and promoting foreign investment.

*Keywords:* the Foreign Investment Law, foreign enterprise investors, the place of incorporation standard, the place of domicile standard, actual connection

## Introduction

The Law of the People’s Republic of China on Foreign Investment (hereinafter referred to as the Law on Foreign Investment) came into force on January 1, 2020, and has attracted much attention at home and abroad. This law is positioned as a unified basic law on foreign investment, which will end the previous decentralized legislative model of “tripartite confrontation”<sup>1</sup> for foreign investment in China. The concept of “foreign investor”

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<sup>1</sup> They are the Law of the People’s Republic of China on China-foreign equity ventures, the Law of the People’s Republic of China on Sino-foreign Cooperative Joint Ventures, and the Law of the People’s Republic of China on Wholly Foreign-owned Enterprises. After the “Foreign Investment Law” formally implemented, the aforementioned three foreign investment laws have been abolished at the same time.

is the basis for the establishment of foreign investment legal relations, with the identification of foreign investors being the precondition for the application of this law. However, there is no clear definition of a “foreign investor” in the Foreign Investment Law or the simultaneous implementation of the Regulations on the Implementation of the Foreign Investment Law. In 2015, the Ministry of Commerce of the People’s Republic of China issued the “Foreign Investment Law of the People’s Republic of China (Draft for Solicitation of Comments)”; Article 11 used “nationality” as the standard by which to identify the different types of foreign investors but ultimately failed to be adopted by legislation. The Foreign Investment Law stipulates in Article 2 that foreign investors include foreign natural persons, enterprises, or other organizations, but there are no clear standards on how to identify foreign natural persons, enterprises, and other organizations. The enterprise is the most basic organizational unit of the market economy and the most important and common type of transnational investor in today’s international society. Thus, identifying foreign investors mainly refers to how to identify foreign enterprise investors. This is related to the implementation of the Foreign Investment Law and the judging standards for subsequent disputes. It is, therefore, necessary to study and discuss the identification standards for foreign enterprise investors.

Even though identifying foreign enterprise investors is essential for international investment and trade, very few English studies have focused on this problem. Almost all of them mention identifying foreign enterprise investors incidentally when discussing other issues, such as eliminating the tax privileges of foreign enterprise investors in China (Zhang, 2007), cracking down on foreign investors’ agency behavior (Weller, 1998), and how foreign investors affect China’s institutional changes (Wilson, 2009). Chinese scholars’ research on this subject is mainly focused on the issue of the nationality of foreign companies; the scope of the research is very narrow, and they fail to put forward a universal standard to identify foreign enterprise investors (Chen, 2006; Zhang & Sun, 2007; Mei, 2015). This paper aims to make up for the above academic gaps and provide suggestions for relevant Chinese legislation. The paper is divided into three parts to achieve this goal. The first part discusses the legal significance of the identification of foreign investors from the perspective of domestic and international law. The second part sorts and explores the current legislative status and existing problems of the identification standard of foreign enterprise investors. The third part focuses on the legislative proposal for the identification standard of foreign enterprise investors. This article proposes that the way to solve the current Chinese legislative dilemma is to adopt the place of domicile standard and then determine the domicile of foreign enterprise investors by using the principal place of business, about which we can learn from the experience of Americans.

### **The Legal Significance of Identifying “Foreign Enterprise Investor”**

Against the background of economic globalization, investment liberalization is a top trend in the field of international investment, and the basic guarantee of this trend is the principle of national treatment. “National Treatment” requires that foreign investors and nationals of host countries have the same legal status in terms of rights and obligations, that is, the treatment given by the host country to foreign investors and foreign investments should be equal to the treatment given to domestic investors and investments. If the principle of national treatment can be fully implemented in the field of international investment, there is no need to distinguish between domestic and foreign investors. However, in the current practice of international investment, it is still an idealized desire to achieve complete national treatment. Based on its own economic development level and its

own interests, each country has the right to choose whether to grant foreign investors national treatment as well as the degree of that “national treatment”. Therefore, when the principle of national treatment has not been fully realized, especially in the case that domestic and foreign investment legislation is different in one country, how to identify foreign enterprise investors has important legal significance.

From the perspective of domestic law, it is important to identify foreign investors. First, identifying foreign investors can help avoid the ineffectiveness of policies and incentives for attracting foreign investment. The investment of foreign enterprises plays an important role in promoting the economic development of host countries; thus, most developing countries have provided various incentive policies and preferential measures for foreign investment. As is well known, capital is profit-seeking; if the identification standards for foreign investors are not clear, these preferential terms and policies will be used by various false foreign investments, which deviates from the original intention of the host country. Second, the accurate identification of foreign enterprise investors can prevent foreign investment from evading regulation and industrial policy. Foreign investments are a double-edged sword for the host country as they can promote the economic development of the host country but also bring harm. Most countries have certain guidance for or supervision of foreign investment to limit the negative impact of foreign investments, especially in industries involving national security, and more attention should be paid to identifying foreign investors. Third, defining foreign investors reasonably can protect the economic interests of the host country. Regarding the host country’s economic interests, such as tax benefits, the tax base of domestic enterprise investors is their global income, while foreign enterprise investors only pay taxes on their host-country income; if the qualitative investors are confused, it will inevitably lead to the loss of domestic tax sources.

From the perspective of international law, identifying foreign enterprise investors also has important legal significance. First, it has meaning for international investment laws. The clearest example in this aspect is to avoid the abuse of investment agreements. To attract foreign investment and improve the investment environment, governments of various countries have actively concluded a large number of bilateral and multilateral investment agreements. According to the statistics of the United Nations Conference on Trade and Development (UNCTAD), at the present time, there are 2,903 bilateral investment agreements signed by various countries and 416 multilateral treaties with investment clauses (UNCTAD, 2021). These investment agreements give contracting countries wider access areas and higher investment treatment, but investors from non-contracting states may free-ride by setting up a shell company in one of the contracting states, which leads to the abuse of investment agreements. Therefore, it is necessary to accurately identify foreign investors to exclude third-country investors from enjoying the benefits of investment agreements. In addition, identification of foreign enterprise investors is also the basis for determining international investment dispute settlement methods and jurisdiction. Currently, a large number of investment agreements stipulate international arbitration as an investment dispute settlement mechanism. An important prerequisite for its application is to determine whether the party of the dispute belongs to a foreign investor, such as the International Investment Dispute Settlement Center (ICSID) under the World Bank Group.<sup>2</sup> Second, identifying foreign investors is significant for private international laws. Confirming whether a party is a foreign enterprise investor is an important factor in judging

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<sup>2</sup> The International Centre for the Settlement of Investment Disputes (ICSID) was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965). Article 25 of the Convention stipulates that investors who are eligible for the jurisdiction of the Center must be nationals of another country, namely foreign investors.

whether the relationship is a foreign-related civil or commercial legal one in order to determine the enterprise investor's capacity for civil rights, capacity for civil conduct, organizational structure, shareholders' rights and obligations, and other matters according to their *Lex Personalis*. Third, identification matters for public international laws. The identification of foreign enterprise investors is also the premise for the home country exercising diplomatic protection of multinational investors. Transnational investment has become a common form in the international community, and foreign enterprise investors may suffer losses due to the illegal acts of the host country at any time. Especially in the aspects of nationalization and expropriation, foreign enterprise investors must often seek diplomatic protection from their home country. The process of identifying the investors of foreign enterprises will also become the focus of disputes between the host country and the investor's home country.

It can be seen that the main objective of identifying foreign investors is to solve the problems of protection, promotion, and management of transnational commercial entities, which involve conflicts and balances of interest between countries and enterprises. It is thus of great significance in domestic and international law. At present, the identification of foreign enterprise investors mainly relies on the legal provisions and relevant practices of various countries, and the identification standards are not consistent, mainly including the place of incorporation standard, the place of domicile standard, the actual control standard, and the composite standard. The place of incorporation standard takes the place of incorporation of the enterprise as the standard for judging the nationality of an enterprise, an approach that originated in the practice of Britain in the 18th century and was mainly adopted by countries with common law systems. The place of domicile standard takes the place of domicile as the standard for determining the nationality of an enterprise. It was utilized by France and Belgium in the 19th century and was mainly adopted by countries with a civil law system. The actual control standard uses capital control or shareholder nationality as the standard to determine the nationality of an enterprise and was put forward against “Hostile Legal Persons” during the two world wars. In addition, some countries adopt composite standards; they require enterprises to have at least two of the above-mentioned standards at the same time, so as to avoid disadvantages of using a single standard in identifying the nationality of enterprises. However, with the development of globalization, the organizational form and operation mode of enterprises are becoming increasingly complex, even if the composite standards cannot satisfy all situations. Identifying the investors of foreign enterprises has become a common problem faced by all countries.

### **Current Status of China's Legislation on the Standard for Identifying “Foreign Enterprise Investor”**

After China's reform and opening-up, the earliest laws enacted include the Law of the People's Republic of China on Sino-foreign Equity Joint Ventures (“Sino-foreign Equity Joint Ventures Law”), which was promulgated in 1979, but this law did not define foreign investors. In 1983, the State Council promulgated Regulations for the Implementation of the Sino-foreign Equity Joint Ventures Law; Article 2 of these regulations stipulated that Sino-foreign joint ventures established in China approved in accordance with the Sino-Foreign Equity Joint Ventures Law are Chinese legal persons and shall be subject to the jurisdiction and protection of Chinese laws. This is the first provision that adopted the place of incorporation standard to identify Chinese and foreign enterprises as legal persons. The place of incorporation standard was also adopted by the Law of the

People’s Republic of China on Sino-foreign Co-operative Enterprises and the Law of the People’s Republic of China on Wholly Foreign-owned Enterprises.<sup>3</sup> In 1986, China promulgated the General Principles of Civil Law of the People’s Republic of China (“General Principles of Civil Law”); Article 41(2)<sup>4</sup> of the law and Article 184(1)<sup>5</sup> of the opinions of the Supreme People’s Court on Several Issues Concerning the Implementation of the General Principles of Civil Law (for Trial Implementation) issued in 1987 also adopted the standard of place of incorporation for identification of enterprise legal persons, clearly stipulating that the enterprise legal person registered in China is a legal Chinese person, and the enterprise legal person established outside China shall have its place of registered nationality as their nationality. In 1993, the National People’s Congress passed the Company Law of the People’s Republic of China (“Company Law”); Article 192 of the law also adopted the standard of place of incorporation for the identification of foreign companies.<sup>6</sup> However, it is worth noting that China’s domestic legislation has begun to introduce the standard of domicile in recent years. In 2007, the Corporate Income Tax Law of the People’s Republic of China (“Enterprise Income Tax Law”) was promulgated. This law adopted two standards for the identification of resident enterprises: the place of incorporation standard and the place of domicile standard. If an enterprise has one of the two, it can be recognized as a Chinese resident enterprise; for non-resident enterprises, the place of domicile standard is adopted. Furthermore, on the issue of how to identify the place of an enterprise’s domicile, the law adopted the standard of the location of business place or economic center place.<sup>7</sup> In 2010, the Law of the People’s Republic of China on the Application of Laws to Foreign-Related Civil Relations (“Law on Application of Laws to Foreign-Related Civil Relations”) was implemented. Article 14 of the law adopted the mixed identification standard for *Lex Personalis* of legal persons, which takes the place of incorporation standard as a general principle and the place of domicile standard as a supplementary standard.<sup>8</sup> Based on the above-mentioned analysis, domestic legislation pertaining to the

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<sup>3</sup> Law of the People’s Republic of China on Wholly Foreign-owned Enterprises, Article 2: As mentioned in this Law, “foreign capital enterprises” refer to those enterprises established in China by foreign investors, exclusively with their own capital, in accordance with relevant Chinese laws. The term does not include branches set up in China by foreign enterprises and other foreign economic organizations. Law of the People’s Republic of China on Sino-foreign Cooperative Joint Ventures, Article 2(2): A contractual joint venture which meets the conditions for being considered as a legal person under the Chinese law, shall acquire the status of a Chinese legal person in accordance with law.

<sup>4</sup> General Principles of Civil Law of the People’s Republic of China, Article 41(2): A Chinese-foreign equity joint venture, Chinese-foreign contractual joint venture or foreign-capital enterprise established within the People’s Republic of China shall be qualified as a legal person in China, if it has the qualifications of a legal person and has been approved and registered by the administrative agency for industry and commerce in accordance with the law.

<sup>5</sup> Supreme People’s Court on Several Issues Concerning the Implementation of the General Principles of Civil Law (for Trial Implementation), Article 184(1): Foreign legal persons shall take the law of the country where they are registered as their *Lex Patriae*, and their capacity of civil conduct shall be determined in accordance with their *Lex Patriae*.

<sup>6</sup> Company Law of the People’s Republic of China, Article 192: The term “foreign company” as mentioned in this Law refers to a company established outside of the territory of China according to any foreign law.

<sup>7</sup> Corporate Income Tax Law of the People’s Republic of China, Article 2: Enterprises are divided into resident enterprises and non-resident enterprises. For the purposes of this Law, the term “resident enterprises” shall refer to enterprises that are set up in China in accordance with the law, or that are set up in accordance with the law of the foreign country (region) whose actual administration institution is in China. For the purposes of this Law, the term “non-resident enterprises” shall refer to Enterprises that are set up in accordance with the law of the foreign country (region) whose actual administration institution is outside China, but they have set up institutions or establishments in China or they have income originating from China without setting up institutions or establishments in China.

<sup>8</sup> Law of the People’s Republic of China on the Application of Laws to Foreign-related Civil Relations, Article 14: Laws of the registration place shall apply to the capacity for civil rights, capacity for civil conducts, organizational structure, shareholders’ rights and obligations and other matters of a legal person and its branch office. Where the place of principal office of a legal person is different from its place of registration, laws of the place of principal office may apply. The habitual residence of a legal person shall be its place of principal office.

identification of foreign investors is exceedingly scattered, and the identification standards determined by various laws and regulations are not consistent. However, it can still be seen that since the earliest adoption of the place of incorporation standard until the present, it has been the main standard, although there has been a trend of diversification in recent legislation, such as the addition of the standard of place of domicile, which is generally only used as a supplementary standard. Looking at the international investment treaties that China has participated in or concluded, the standards for identifying foreign investment are also rather confusing. China has signed or joined several international multilateral investment treaties. There are only two investment treaties in which China participated that involve foreign investor identification. The first is the Convention for the Settlement of Investment Disputes between States and Nationals of Other Countries, which was signed in 1990. Article 25 of the Convention established two standards for the identification of foreign juridical persons: One is any juridical person who had the nationality of a Contracting State other than the State party to the dispute, and ICSID often adopts the standard of incorporation or domicile to identify foreign juridical persons in practice; another is any juridical person that had the nationality of the Contracting State party to the dispute and whom, because of foreign control, the parties have agreed should be treated as a national of another Contracting State.<sup>9</sup> The second important multilateral investment treaty is the Agreement Establishing the World Trade Organization, in which China participated in 2001. Among a series of annex agreements signed, the General Agreement on Trade in Services (GATS) contains the identification standard of foreign investors. The GATS is formulated for various measures taken by members to affect service trade, but many of its regulations directly involve international investment issues, such as “commercial existence”. The third of the four forms of service trade listed in GATS refers to the establishment, acquisition, or maintenance of various commercial institutions (including enterprises, branches, representative offices, etc.) through foreign direct investment. In Article 28 of GATS, the mixed standard of incorporation and domicile is adopted for the identification of a “juridical person of another Member”, and an actual control standard is adopted for determination of the “commercial presence”.<sup>10</sup> In addition to the multilateral investment treaties, there are 104 bilateral investment agreements that China has signed and that remain valid (The Ministry of Commerce of the People’s Republic of China (MOFCOM of PRC, 2021). The identification standards pertaining to other parties’ investors among these bilateral investment agreements are also major differences and include various standards existing in the international community. However, most still adopt the standards of the place of incorporation standard. For example, in the Agreement between the Government of the People’s Republic of China and the Government of the Kingdom of Sweden on the Mutual Protection of Investments in 1982, the standards of place of incorporation and actual control were adopted for

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<sup>9</sup> Convention for the Settlement of Investment Disputes between States and Nationals of Other Countries, Article 25(2)(b): Any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

<sup>10</sup> General Agreement on Trade in Services, Article 28(m): Juridical person of another Member means a juridical person which is either: (i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or (ii) in the case of the supply of a service through commercial presence, owned or controlled by: (1) natural persons of that Member; or (2) Juridical persons of that other Member identified under subparagraph (i).

Swedish investor identification.<sup>11</sup> In 1986, the Agreement between the Government of the People’s Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Promotion and Reciprocal Protection of Investments adopted the standard of place of incorporation for the identification of British companies.<sup>12</sup> In 1988, the Agreement between the People’s Republic of China and Japan Concerning the Encouragement and Reciprocal Protection of Investment was signed. A mixed standard of the place of incorporation and domicile was adopted for the identification of investors of the other party.<sup>13</sup> The standards in these investment agreements mainly considered the political and economic environment at that time and the different situations of various countries, but they failed to converge with relevant domestic legislation in China. The Chinese Constitution does not provide for the application of international law in China; however, from the perspective of Chinese legal practice, the international investment treaties concluded or acceded to by China will become legally effective in China after being approved by the Standing Committee of the National People’s Congress or approved by the State Council. In this way, the same foreign investor may face the legal dilemma that domestic law, bilateral investment agreements, and multilateral investment treaties have different identification standards.

China mainly adopts the place of incorporation standard but sometimes adopts other standards; the identification standards between domestic laws and international laws are all not unified, and their disadvantages are becoming increasingly obvious today. First, the rigid identification of foreign investors according to the place of incorporation standard has caused a flood of “fake foreign capital” at home, which violates the original intention of the preferential policy for foreign investment and destroys the normal competition order of domestic enterprises. It is not conducive to the protection of overseas investment by Chinese enterprises, leading to a large number of enterprises established abroad by Chinese investors that cannot be protected by China. Second, according to the place of incorporation standard, both enterprises established within the territory of China by Chinese nationals and foreign investors are all Chinese enterprises, but they are different in organizational structure and applicable regulations. Taking the Sino-foreign joint venture as an example, as a limited liability company, it does not have shareholders’ meetings, and the rules for the appointment and removal of directors are also different from the provisions of the Company Law. They are all considered Chinese corporate legal persons, but why is there such a big difference? It is impossible to provide a reasonable explanation in theory and practice. Third, the identification standards for foreign investors are scattered in many laws and are inconsistent with each

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<sup>11</sup> Agreement Between the Government of the People’s Republic of China and the Government of the Kingdom of Sweden on the Mutual Protection of Investments, Article 1(2): In respect of Sweden, any individual who is a citizen of Sweden according to Swedish law well as any legal person with its seat in Sweden or with a predominating Swedish interest.

<sup>12</sup> Agreement Between the Government of the People’s Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Promotion and Reciprocal Protection of Investments, Article 1(1)(d): Companies means: (i) in respect of the United Kingdom: corporations, firms or associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement has been extended in accordance with the provisions of Article 10; and (ii) in respect of the People’s Republic of China: corporations, firms or associations incorporated or constituted under the law in force in any part of the People’s Republic of China.

<sup>13</sup> Agreement Between the People’s Republic of China and Japan Concerning the Encouragement And Reciprocal Protection of Investment, Article 1(4): The term “companies” means: (a) in relation to the People’s Republic of China, enterprises, other economic organizations and associations; and (b) in relation to Japan, corporations, partnerships, companies, and associations whether or not with limited liability, whether or not with legal personality and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations of one Contracting Party and having their seat within its territory shall be deemed companies of that Contracting Party.

other, which makes it impossible to accurately identify foreign investors and to prevent or stop relevant legal evasion behaviors, eventually leading to invalid national industrial policy. At the same time, a large number of the Chinese upper class pretend to immigrate overseas or register their enterprises abroad. Their main income still comes from China, but it cannot be taxed, which leads to the reduction of tax sources for China. Finally, domestic laws and international investment treaties have not been connected and unified, resulting in weak or even invalid investment treaties. The investment treaty cannot effectively protect foreign investments in China or Chinese investments overseas and cannot effectively promote the development of China’s foreign investment legal system.

### **Legislative Suggestions Regarding the Identification Standard for Foreign Enterprise Investors**

With the strong globalization trend, the boundaries of countries across the world have been blurring, leaving the meaning of “foreign” harder to understand. It is no longer a simple concept in the political or national scope. When we discuss investors from a certain country, we do not accurately refer to foreign investors with a certain nationality, but the enterprise has the closest actual connection with a certain country. As for multinational corporations, in order to maximize their own interests, choosing the place of establishment or domicile has become a common business strategy, and nationality has lost its significance as a link of “subordination and loyalty”. With the decline of the faith of multinational corporations in terms of national allegiance, the awareness of serving the place of domicile is increasing. This is because one’s domicile is the main base or central place for corporate activities, and multinational corporations’ interests have become closer and more consistent with their place of domicile. Generally, multinational corporations play an important role in promoting the economic, environmental, and social development of their place of domicile, and in turn, they also benefit from the development of said domicile. This consistency in interest will become more reasonable over time. The domicile standard dilutes all types of complicated political relationships and more objectively presents the actual relationship between the enterprises and a certain country (region). It has thus gradually become the main standard for countries to identify foreign enterprise investors. In recent years, both common-law countries and civil-law countries have begun to reform and improve their own standards for identifying foreign investors. A common trend is to highlight the actual relationship between transnational investors and countries. While common-law countries adopted the place of incorporation standard, a large number of domicile standard practices and legislations that better reflect the actual connection arose. Civil-law countries also constantly improve the place of domicile standard in their legislation, and the standard for identification of the place of domicile is gradually expanded to meet the requirements of the actual connection. China adopted the standards of the place of incorporation standard over a long period of time and mainly considers the principle of actual connection. When the time of the cross-border flow of personnel and capital is not substantial and subject to technical restrictions, such as communication and transportation, most enterprises operate in the place of incorporation and also in their domicile, which renders distinguishing the place of incorporation, domicile, and business-running meaningless. The place of incorporation certainly meets the requirements of actual connection. However, with the change in the international investment environment and the development of China’s economy, the place of incorporation standard has gradually been unable to address the actual connection between enterprises and the country, and its disadvantages are increasingly prominent. Chinese legislators have also



noticed this problem, and the place of domicile standard has been introduced into recent legislation. As mentioned above, the Enterprise Income Tax Law adopts the two standards of the place of incorporation and domicile for identifying a “resident enterprise”. The Law on Application of Laws to Foreign-Related Civil Relations stipulates that the place of registration (place of incorporation) is the general standard and the place of domicile standard is the supplementary standard for identification of the legal person’s status. However, these laws have special backgrounds and legislative purposes. Not only are their identification standards inconsistent, but they also cannot be applied to all cases in which foreign investors are identified.

In view of the problems arising in China’s domestic legislation adopting the place of incorporation standard to identify foreign enterprise investors, the promulgation and implementation of the Foreign Investment Law is a great opportunity to solve the current problems. The Foreign Investment Law is positioned as the basic law in the field of foreign investment in China. Its historic mission is not only to end the chaos of China’s “three laws on foreign investment”, but also to solve the problems of the standards of foreign investors’ identification, such as rules coming from multiple departments and unreasonable standards. In the process of implementing the Foreign Investment Law, a reasonable standard should be defined through supporting legislation or judicial interpretation. The relevant domestic laws and international investment treaties should then be amended, and the unification of domestic law and international law should be ensured. Undoubtedly, the standard of domicile should become the unified standard for identifying foreign investors in the implementation of the Foreign Investment Law, but for some special areas, such as national security protection and nationalization measures, the principle of actual control can be appropriately introduced as a special standard for foreign investors to safeguard the interests of the nation.

Regarding the place of domicile as the standard for identifying foreign investors, the most pressing problem faced is the diversification of identification criteria for the domicile itself. How to determine an enterprise’s domicile has always been disputed between the location of the management center and the location of the economic center. Capital-exporting countries and developed countries tend to use the enterprise management center or headquarters location as the enterprise domicile, while capital-importing countries and developing countries typically use enterprise business centers or economic centers as the enterprise domicile. The reason for this divergence is that both parties are competing for control of multinational enterprises, and they want to bring as many enterprises as possible into their own jurisdiction through the leading formulation of rules. Considering that the management center or headquarters of most multinational enterprises is not located in China, China can use business centers or economic centers as criteria for the place of enterprise domicile in line with the majority of developing countries. Chinese legislation has already laid a foundation for the adoption of domicile identification standards. The Law on Application of Laws to Foreign-Related Civil Relations adopts the “principal place of business” for the identification of the domicile of legal persons. Article 63 of the People’s Republic of China Civil Code (promulgated in 2020) adopts the “principal place of office” for the identification of the domicile of legal persons,<sup>14</sup> and the “principal place of office” is one of the important factors for determining the “principal place of business”. Thus, the Foreign Investment Law can continue to adopt the “main business place” standard. Regarding how to define the “principal place of business”, we can learn something

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<sup>14</sup> People’s Republic of China Civil Code, Article 63: A legal person’s domicile shall be the place of its principal office. If a legal person needs to be registered in accordance with the law, it shall register the place of its principal office as its domicile.

from the experience of the Americans. Article 1332(c)(1) of Chapter 28 of the United States Code stipulates that “a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business”.<sup>15</sup> The federal courts widely used the principal place of business to determine the state status of a corporation, and legislators once considered the concept of the principal place of business to be very simple and clear, specific criteria is not further clarified (Saunders, 2006). However, the court encountered great difficulties in determining the principal place of business of corporation (Kozyris, 1985), and the federal courts of the United States have been arguing for decades over how to define the principal place of business. Overall, the federal court of the United States has formed three standards or methods to determine the principal place of business in practice. The first is the “nerve center” method, which refers to the place where the corporation’s managers make decisions and control the management of the corporation. The second is the “overall activity” standard, which refers to the place where the corporation’s products are produced, the service or sales center, the location of the managers, and the main source of business income. The third is the comprehensive method, which combines the first two methods according to specific conditions (Saunders, 2006). In fact, the first type mentioned above is the standard for the place of the management center or headquarters, the second type is the standard for the business center or economic center, and the third type is not detailed enough and will bring about new uncertainties in practice. As for China, we suggest that the second standard should be adopted in practice, and further refining the identification elements in this way can expand China’s personal jurisdiction.

### Conclusion

The promulgation of the Foreign Investment Law is a key step for China to move from a policy-based opening to an institutional-based opening, which has laid a legal foundation for foreign enterprises to invest and operate more freely and fairly in China. However, as a basic framework law, supporting regulations still need to be formulated for its implementation. Establishing a standard for identifying foreign enterprise investors is an issue that needs to be resolved urgently in such supporting regulations. This paper provides ideas and suggestions for solving this problem. First, this paper discusses the significance of domestic law and international law in the identification of foreign enterprise investors and then clarifies the importance and necessity of establishing an identification standard for foreign enterprise investors. Next, it reviews the current situation of foreign enterprise investor legislation in China and highlights the disadvantages of the place of corporation standard as the main standard for identifying foreign enterprise investors as well as the problem of discordant standards among domestic laws and international laws. Finally, to solve these problems, this paper proposes that China should establish the place of domicile standard as a uniform standard for identifying foreign enterprise investors. Domicile is the main base or central place for investors’ activities and it also gathers various legal relations of investors, which can best reflect the actual connection between investors and a country. The place of domicile standard emphasizes substance rather than form and takes into account the stability and flexibility of the law. It will become the main standard for identifying foreign investors in various countries in the future. In the current international investment field, it is still impossible to achieve complete national treatment, but the establishment

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<sup>15</sup> 28 U.S.C. § 1332(c)(1) (2006).

of the place of domicile standard provides another way to achieve national treatment. This standard weakens numerous complicated political relations, and if all countries (regions) can give equal treatment, equal service, and equal protection to investors as long as their domiciles are located in these countries (regions), then the debate over national treatment in the field of international investment only has theoretical significance. However, as we discussed above, the problem of taking the place of domicile as the identification standard of foreign enterprise investors is the determination criteria diversification for the domicile itself in each country. In the long run, to prevent unfair competition in the legislation of various countries and the legal evasion of transnational investors by using different rules, we can only rely on the international uniform convention, but in the short term, we can solve the relevant problems by constantly revising domestic legislation and strengthening international coordination.

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