



American Intellectual Property Law Association

February 21, 2019

全国人大常委会法制工作委员会  
北京市西城区前门西大街1号  
中华人民共和国  
邮编：100805

Legislative Affairs Commission of the NPC Standing Committee  
No. 1 West Qianmen Avenue,  
Xicheng District,  
Beijing 10085

**Re: Comments regarding Draft Foreign Investment Law  
(外商投资法草案征求意见)**

Dear Sir or Madam,

The American Intellectual Property Law Association (AIPLA) appreciates the opportunity to comment on Draft Foreign Investment Law.

AIPLA is a national bar association of approximately 13,500 members engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

Due to time constraint, AIPLA focused our comments on Articles 21 and 22 of the Draft Foreign Investment Law. The absence of comments with respect to the other articles does not necessarily reflect support or lack of support of such articles by the AIPLA.

AIPLA commends proposals made in the recent Draft Foreign Investment Law that strive to protect the intellectual property rights of foreign investors and enterprises, protect the lawful rights and interests of intellectual property right holders, and encourage technological cooperation based on the principle of voluntariness and business rules. AIPLA welcomes the proposed ban on forced technology transfer.

AIPLA commends proposed Article 21, which would, among other things, allow transfer of intellectual property royalties out of mainland China. AIPLA suggests that Article 21 be clarified to ensure that intellectual property “proceeds” be identified in addition to “royalties”

to cover other forms of payment including without limitation, milestone payments, lump sum payments, or other compensation:

第二十一条 外国投资者在中国境内的出资、利润、资本收益、知识产权使用费、依法获得的补偿或者赔偿等，可以依法以人民币或者外汇自由转出。

*Article 21: Foreign investors' capital contributions, profits, capital gain, and intellectual property right royalties **and any other proceeds** in mainland China as well as the compensation or indemnification they receive in accordance with law may be freely transferred out of mainland China in RMB or foreign exchange in accordance with law.*

AIPLA also commends proposed Article 22, which strives to establish a principle of voluntariness in technological cooperation and to ban forced technology transfer. AIPLA suggests that the language “through administrative measures” be either deleted or clarified by specifying “through administrative **regulations or other** measures.”

第二十二条 国家依法保护外国投资者和外商投资企业的知识产权，保护知识产权权利人和相关权利人的合法权益，鼓励基于自愿原则和商业规则开展技术合作。

外商投资过程中技术合作的条件由投资各方协商确定，行政机关及其工作人员不得利用行政手段强制转让技术。

*Article 22: The State protects the intellectual property rights of foreign investors and foreign-invested enterprises according to law, protects the lawful rights and interests of intellectual property right holders and relevant right holders, and encourages technological cooperation based on the principle of voluntariness and business rules.*

*The conditions for technological cooperation in the course of foreign investment are to be negotiated by the various parties to the investment, and administrative agencies and their officials and employees must not force the transfer of technology through law, rule, administrative **regulation, or other** measures.*

AIPLA remains concerned, however, that the progress in banning forced technology transfer in proposed Article 22 could be undermined by other laws, regulations, practices or informal means, including, for example:

- Article 43 of Regulations for the Implementation of the Law on Sino-foreign Equity Joint Ventures, which limits the term of a tech transfer agreement to ten years, with the right of the transferee to continue using the technology following expiration.
- Discriminatory technology transfer regulations, particularly Articles 24, 25 and 29 of the Regulations on Technology Import and Export Administration, which require foreign licensors (or tech transferors) to indemnify the licensees against infringement claims and otherwise prevent the foreign licensor from exercising the same freedom of contract as between domestic entities.

- Regulatory laws such as environmental, pharmaceutical and medical device regulatory approval requirements, particularly where information is sought more broadly than reasonably necessary to accomplish regulatory review or where the regulatory agencies share submitted information with competitors (such as technical experts employed or affiliated with competitors) or share submitted information with later regulatory applicants (or use it on their behalf).
- Tax benefits such as the High and New Technology Program (HNTE), which are conditioned upon ownership of patents by a local China entity (among other things).
- Provisions of the draft Patent Law that would allow administrative agencies to seize confidential information including trade secrets, which could result in leakage of the confidential information to local competitors, including Article 69 of the Draft Patent Law that would enable administrative seizure of such information, and Article 66 (as it exists now) that requires a defendant to produce proof regarding how their manufacturing process is different than in the patented process without adequate protection of the proof.

AIPLA respectfully requests that Article 22 of the Draft Investment Law include a provision to expressly override any and all of these types of laws or regulations that could otherwise undermine the protection against forced technology transfer. AIPLA also requests that a broad program be initiated to revise laws, rules, and regulations to preserve the protections provided by Article 22 and ensure that other laws, rules, or regulations are consistent with it.

We appreciate the opportunity to provide these comments on the proposed changes to the Draft Foreign Investment Law, and we would be happy to answer any questions that our comments may raise.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Sheldon H. Klein', with a stylized flourish at the end.

Sheldon H. Klein

President

American Intellectual Property Law Association