Research on Multinational Enterprises' Foreign Investment Access and Investment Protection System

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ABSTRACT
Foreign investment acts as a significant part in a country's economic and trade development, which is mainly manifested in the form of multinational companies. Under the influence of the Covid-19 epidemic, international trade has fluctuated greatly, which has had a great influence on foreign investment. In Chinese law, there are mainly the negative effects of the lack of detailed corresponding legal norms, the unclear boundary between foreign investment security review, anti-monopoly review system, and the drawbacks of the "policy first, law lagging behind" mechanism. It is necessary to draw a clear line between the two review systems and optimize the current legal regulation path. In addition, suggestions for the construction of the "Belt and Road" initiative will be provided, and the solution of problems will be given from the perspective of foreign investment. By standardizing the management of foreign capital and continuously improving the level of corporate governance, it may effectively enhance the innovation and profitability of enterprises. Thereby, the competitiveness of multinational companies may increase in the global market. The unfavorable factors and obstacles brought about by the Covid-19 epidemic are expected to be overcome, and a healthier and stronger development of global trade and economy will be promoted.

Keywords: *International Economic Cooperation, corporate governance, multinational enterprise, foreign investment*

1. INTRODUCTION

In recent years, the development of multinational corporations has made a remarkable leap, and their promotion to the world economy's prosperity is also very noticeable. In China, the regulation of multinational corporate governance mainly relies on China's Foreign Investment Law, as well as "soft laws" such as international treaties and international cooperation agreements. Meanwhile, the enforcement and construction of the "Belt and Road" initiative has played an important role in promoting the growth of multinational companies. Additionally, the emergence and outbreak of the Covid-19 epidemic, as well as the different epidemic prevention policies of different countries, have a very important impact on the management, adjustment and development of multinational companies. In view of the problems in the multinational corporations' governance, a new direction will be proposed by this paper for the improvement of the legal regulation theory in the governance of overseas subsidiaries of multinational corporations, so as to provide reference for follow-up research and the governance practice of multinational corporations in the world. Some researches have been done by scholars to make suggestions on the improvement of administration of the multinational enterprises, and the research method of value analysis is used in this paper.

2. ANALYSIS OF THE CURRENT SITUATION AND REASONS

2.1. Problem formulation

2.1.1. The Context of this research

The concept of a multinational corporation can be described as an economic entity which operates in two countries or more or a group of economic entities that operate in two or more countries, regardless of its legal form, country, whether individually management or collective management. Multinational corporate governance is not only a system which supervises the relevance between shareholders and managers, but also a system with high cost and complexity, comparing with general domestic enterprises [1]. Conforming to the

tendency of global multi-polarization and cultural diversification, the “Belt and Road” is a constructive one which promotes the global economic growth. Coordinate policies carry out a wider-scale and higher-level regional cooperation, creating an open, inclusive and universally beneficial regional economic cooperation structure. The construction of the initiative is closely related to the investment and development of multinational companies. In such a case, it is of great necessity to analyze the merits and drawbacks of the application of the foreign investment law of China.

2.1.2. The Challenges at Present

The first challenge is the soft law. In addition to the existing domestic legislation, international treaties and treaty law are usually used as the main reference when dealing with legal disputes of multinational companies in China. The second one is the Covid-19's impact on the multinational companies. The impact of epidemic is mainly reflected in the hindering effect of the prevention and control of it. With the global pandemic of the epidemic and the persistence of the international community's fight against it, this unprecedented public health crisis is bound to have a huge negative impact on the economic and trade cooperation [2]. In line with the data from the United Nations Conference, the world’s economy may not return to growing until 2022 [3]. For multinational companies, the biggest impact is reflected in the transformation and impact of the operation methods brought about by the epidemic prevention measures of various countries.

2.2. Analysis of the problem: the status quo and deficiencies of the foreign investment adjustment model

2.2.1. Current Situation and Deficiencies of Normative Mechanisms

The spirit of China's Foreign Investment Law is that, apart from the ever-shrinking negative list and exceptions stipulated by laws, regulations, and the State Council, there should be no differences in regulatory standards between domestic and foreign investment based on differences in identities in principle. According to the principle of competitive neutrality which was mentioned many times by the State Council of China, state-owned investment, private investment and foreign investment should enjoy equal treatment in supervision. Among them, China adopts the basic mode of "dual-track system" in the application of foreign business treaties. However, during the implementation of this system, some drawbacks and deficiencies have been highlighted. The Foreign Investment Law and the implementing regulations of it created a unique dual-track system for treaty application which is known as the investment access and the investment protection. The birth of the system has created more potential problems to the intricate and treaty mechanism which has already caused a lot legal theories disputes. It has become the key to understanding and applying the system that whether the application of the dual-track system to treaties will lead to conflicts within the legal system and between systems [4], and how to alleviate or even eliminate such conflicts.

The reason for the insufficiency of the dual-track system mainly comes from the structure itself of the China's legal system. The main legal text for the application of treaties in China is the Law of the Application of Law for foreign-related Civil Relations, which offers a crucial reference to the system. However, there is no supporting and systematic legal mechanism that operates in tandem with international treaties. At the legislative level, China currently lacks an independent law on the application of treaties, especially the direct application of international civil and commercial treaties in China is largely limited to the scope of foreign-related legal relations. As a result, Chinese courts cannot invoke treaty provisions to make judgments in cases without foreign-related elements, and Chinese citizens or legal persons cannot directly invoke treaty provisions to assert their rights in litigation without foreign-related elements. Due to legislative technical problems, especially the complexity of the application of international treaties, Chinese domestic law hasn’t made provisions on the application of international treaties and international practices in the Law on the Application of Laws for Foreign-related Civil Relations. In the absence of new provisions on the application of international treaties and international practices in the Law on the Application of Laws for Foreign-related Civil Relations, the Chinese domestic law is still applied, which has resulted in the dilemma of the application of international treaties and international practices.

In China's judicial practice, judges have different understandings on how to apply international civil and commercial treaties, which also leads to the confusion in the application of treaties. Some judges maintain that the direct application of treaties must be invoked by China's domestic law, because legal conflicts can only arise between laws of the same level of effectiveness. When an international treaty is in conflict with domestic laws of the same level, according to the current law, the international treaty has a priority legal status, except for the clauses that China has declared reservations about. However, these only reflect the tendencies of legislative policies rather than constitutional provisions with universal binding force [5]. It is not reasonable to deduce general legal provisions from limited individual legal provisions. Before the Chinese Constitution clearly stipulates the priority effect of international treaties in China, any international treaties that have entered into force for China internationally which conflict with domestic laws do not have the priority to be applied,

unless the departmental laws have clearly stipulated the priority effect of the conflicting international treaties. Some judges argue that it is not necessary to invoke domestic law, which leads to inconsistencies in the application of treaties [6].

2.2.2. The boundary between the two systems is not explicit

China's Foreign Investment Law clearly stipulates the establishment of a foreign investment security review system, and the country has already established this system in certain fields and scopes. The foreign investment security review is primarily based on two documents issued by the General Office of the State Council of China. However, the two documents have their own shortages. 2011 “Notice on Establishing a Security Review System for Foreign Investors' Mergers and Acquisitions of Domestic Enterprises" is applicable throughout China, while it is only applicable for cross-border mergers and acquisitions, and it does not involve other forms of investment such as newly established enterprises. Besides, the 2015 “Trial Measures for the National Security Review of Foreign Investment in Pilot Free Trade Zones” covers various forms of foreign investment, but it only applies to Pilot Free Trade Zones.

Although Article 33 of China's "Foreign Investment Law" clearly stipulates that if a foreign investor acquires a cooperation in China or takes part in business operators’ concentration in other ways, it shall be subject to the concentration of business operators in line with the provisions of the "Anti-Monopoly Law". The specific connection with the anti-monopoly review is not considered. In view of the fact that after the full implementation of the principle of pre-establishment national treatment, there is no longer an access authority in a general sense, either as an approval authority or a filing authority to serve as a unified docking authority for foreign investment access. Thus, the connection between the anti-monopoly review mechanism and the foreign investment access requires more clear guidelines and procedural norms [7]. Therefore, clearly defining the boundary and improving the legal regulation system are significant to ensure the vitality of foreign investment which should be clarified as soon as possible.

2.2.3. Negative effects of "policy first, law lagging behind"

Based on national conditions and fundamental development needs, China generally adopts the model of "policy first, laws lagging behind". There are both merits and disadvantages of this model, and the deficiency will be explained below.

Overall, it has been proved to be slow in developing operative international codes, from different perspectives of the multinational enterprises. These codes are regarded by some governments as a way to improve the international environment for such enterprises, while the codes are also seen as a way to regulate them more effectively by other countries. Thus, it is possible for the national policies to keep on to remain leading with international approaches which operate as a supplementary role [8]. At present, thanks to the country's emphasis on promoting global trade, the construction of the initiative has been steadily advanced, which has promoted the economic growth of most countries in the world greatly. But at the same time, the objective situation of "policy first, legislation lagging behind". Although this situation is conducive to the rapid development of the market economy, its disadvantages are also more obvious.

One of the main effects of legislative lagging is the lack of higher-order norms to deal with the incongruity of institutional arrangements between different jurisdiction. For example, when seeking legal basis, the conflict of law application cannot be well resolved, which may hinder the settlement of disputes. In addition, another important effect is the lack of sufficient rule supply for judicial remedies. For instance, when dealing with trade issues under the new situation, it will lead to the shortcomings of lack of legal norm support, which is not conducive to the solution of emerging problems, and there will be a lack of remedies for the loss of rights. The control force of multinational companies' international investment has a great impact on the country's economic development. Facts have proved that a unified standardization scheme cannot be applied to all developing countries. Multinational enterprises are likely to be a means of enforcing alien policies upon the economic and political life of nations. For instance, The crisis in oil, artificial or not; the likely attempts by producers of bauxite and other industrial raw materials to follow the exhilarating example of OPEC; the recent world shortage of foodstuffs and the U.S. embargo on exports of such commodities as soybeans: all of these ought remind us that the MNE is far from omnipotent, that it may as easily be the instrument of the policy of host as of home governments, and that the time may not yet have arrived for universal conclusions [9].

3. PROPOSING AND OPTIMIZING THE ADJUSTMENT PATH

3.1. Determination of Investment in Other Countries

The determination of investment is the basis of the application of international investment treaties and the jurisdiction of the arbitral tribunal. However, the determination of foreign investment determines whether foreign investors are protected and regulated by the Foreign Investment Law, and whether they can enjoy various preferential treatment. Some international

treaties give a detailed definition at the beginning of the treaty, such as NAFTA. Article 1139 of NAFTA clearly lists specific investment forms and situations that do not belong to investment [10].

3.2. Establishing a normative mechanism for simultaneous follow-up of policies and laws

Although "policy first, legislation lagging behind" is conducive to the rapid development of the market economy, its disadvantages are also quite obvious. The most prominent problem with the current model is that the division of management functions on the negative list is still unclear. At present, the approval of restricted investments on the negative list is the responsibility of the commerce department. It is not clear in the Foreign Investment Law whether this approval system is retained. The “Implementation Regulations” should clarify which department is responsible for reviewing and approving the restrictive conditions for investments restricted in the negative list. Accordingly, the catalogue of pre-approval items of the market supervision department and the Administrative Measures for the Approval and Filing of Enterprise Investment Projects of the National Development and Reform Commission and the relevant catalogues need to be adjusted.

In addition, the construction of this mechanism also needs to solve the problem of further refinement of existing rules, a typical example of which is the relevant provisions of policy commitments [11]. At present, the relevant laws and regulations in China have made a certain degree of refinement on the relevant provisions of policy commitments, prohibiting local governments from changing or violating policy commitments in their own right. It is clearly stipulated that government departments and the staff will be pursued legal responsibility if they do not fulfill the requirements of foreign investors, foreign investment, or make policy commitments beyond its legal authority. However, the above provisions on the assumption of legal responsibility only involve the internal relations of the government, and investors have not been covered, which may lead to the question that what are the legal effects and legal consequences of policy commitments that go beyond the legal authority of local governments or their relevant departments. Furthermore, what standard should the compensation be based on, and is it different from the compensation standard when policy commitments need to be altered considering public interests and national interests? There is no doubt that these issues require further detailed responses during the implementation, application and revision of the law.

Regarding the application of civil and commercial treaties, some provisions have been made, while they are relatively scattered and ineffective. Since the relationship between the Constitution and other laws in China are "mother law" and "sub-law". Only by making provisions in the Constitution can it play an instructive role in avoiding theoretical misunderstandings at the source and regulate related judicial practices. At the same time, it may also be able to help ensure that policies and legal mechanisms operate in tandem.

3.3. Improving the Negative List Management Model

The recognition of foreign investment contracts is mainly affected by the negative list management. Since China implements special management measures for foreign investment access, which involves the exercise of national sovereign power and the intervention of administrative power, it has become more critical to clarify the relationship between the civil effect and administrative liability of “investment contracts” of a civil and commercial nature under the negative list management mode, otherwise there is a risk that registration, restrictive regulations, and other regulations may be overridden.

The validity of foreign investment contracts is determined based on the negative list management. However, the 2020 version of the negative list does not explicitly stipulate how to determine the validity of contracts involving cultural, financial, administrative approval, qualifications and other fields which are not listed in the negative list. Since the above types of contracts involve administrative matters, so if they are identified according to the determination rules in Article 3 of the new Judicial Interpretation, it will result in weakening the effectiveness of the executive power in an unreasonable way. Therefore, a relatively flexible method should be adopted to determine the validity of the contract according to the circumstances in practice [12]. The author argues that the investment contract identification model can be based on the basic principle of "identifying the contract as valid as possible", and the negative list system should be strictly implemented. The nature of the contract should be determined based on a dynamically adjustable negative list. On the premise of maintaining and safeguarding the foreign investment management order consistent with the law, the effective fulfillment of investment contracts should be encouraged as much as possible, which may maximally preserve the investors’ legitimate rights and interests.

A prominent problem of the current model is that the division of management functions on the negative list is still unclear. At present, the approval of restricted investments on the negative list is the responsibility of the commerce department. It is not clear in the Foreign Investment Law whether this approval system is retained. A "point-to-point" working mechanism should be implemented to clarify which department of the government is in charge of the approval of the restrictions on investments restricted by the negative list. Accordingly, the catalogue of pre-approval items of the

market supervision department and the Administrative Measures for the Approval and Filing of Enterprise Investment Projects of the National Development and Reform Commission and the relevant catalogues need to be adjusted.

3.4. Clarifying the Boundaries between Foreign Capital Access Management and Anti-monopoly Investigations

Regarding the boundary between foreign investment access management and anti-monopoly investigation, one feasible solution is to promulgate the specific implementation measures of the first article of China's Foreign Investment Law with the cooperation of the State Administration for Market Regulation and the Ministry of Commerce of China [13]. Another one is the connection between the Foreign Investment Law and the investment chapters in the BIT and FTA signed by China. Although the Foreign Investment Law is largely consistent with the BIT and FTA, it still needs to be further coordinated to avoid conflicts between domestic and international laws. Take the foreign investment access management system as an example, the Foreign Investment Law stipulates the management system of pre-establishment national treatment plus a negative list, while the national treatment granted to investors by China's new generation BIT has not yet involved the access stage. In essence, it is essentially an access post-national treatment.

Western scholars have discussed the role and value of state intervention before, and some scholars maintain that problems are likely to be produced by the national approaches [14]. A lot of countries try to utilize various financial incentives to attract foreign enterprises and strive to secure the most favourable domestic terms by making a requirement of production, employment, and many other effects. Whereas, it may cause the risk of inviting retaliation from other host countries and from the home countries and enables the firms to play off one state against another. Apart from that, purely national approaches on affairs have already aggravated the relations between states. For instance, the international monopoly effects has dramatically affected international relations. International approaches are so appealing for most countries that national policy approaches may appear to be less valid in some perspectives and cause more problems.

The author argues that once a foreign investment that has entered the foreign investment security review process fails to pass it, the corresponding investment contract's validity should be determined through specific judicial procedures, rather than the administrative act of foreign investment security review. Besides, the determination of its validity should belong to the jurisdiction of the judicial authority, because the contract's validity is civil legal relationship. Granted, the types of investment contracts need to be further classified. There is no denying that the right to determine the validity of certain contracts should belong to the administrative organs. For instance, the contracts of state-owned enterprises and contracts involving rights to use state-owned land require the approval of the Chinese administrative organs. The validity of foreign investment contracts should be accurately determined according to different types of contracts. In addition, when specific problems arise, investment disputes can be resolved through ISCID and the provisions in bilateral trade agreements can be followed. The ICSID rule is a critical step towards the process of inserting public input into the procedure of investment arbitration, equipping the tribunal with the power of assessing an amicus's interest so as to determine whether the extra expenses of amicus involvement are reasonable. Likewise, to restrict the number of briefs filed, the rule provides for the filing of joint briefs by numerous amici, and it prevents amici from acquiring party status and permits them only finite participation [15].

Meanwhile, it is necessary to establish an effective connection between the judicial power and the administrative power, such as to set up a cooperation office of the China Foreign Investment Security Review Working Mechanism Office and the court, and to strengthen the dialogue and communication between the administrative and judicial organs. On the premise of ensuring the safety of national assets, so that administrative and judicial acts have a substantial legal basis. At the same time, before the decision of foreign investment security review is made, the basic principle of contract law that the contracts become effective upon establishment should be implemented for investment contracts of the record type.

3.5. Improving the social risk prevention and response mechanism

German sociologist Ulrich Beck put forward the theory of risk society. At present, the risks faced by Chinese society contain not only the economic risks brought about by the necessary prevention and control measures, but also the financing risks in the management of multinational companies. A problem brought by the preferential measures is the improper competition in local investment promotion policies. Some local authorities may exceed their statutory authority to grant preferential policies for foreign investment. In light of the social risk theory, this will be detrimental to maintaining the consistency of national economic policies.

In the field of multinational companies, it is the trade barrier effect that is mainly reflected. After the outbreak of the Covid-19, the import and export authorities generally implemented stricter inspection and quarantine procedures for the needs of epidemic prevention and

control, and even adopted measures such as banning flights and blocking borders when the epidemic worsened. The restrictive measures will lead to obvious trade-inhibitory effects, the direct consequence of which may be to weaken the degree of trade liberalization between countries, leading to higher market access barriers, sharper rise in trade costs, and possibly even cause trade protectionism. The import and export authorities generally implemented strict inspection and quarantine procedures for the needs of epidemic prevention, and even adopted measures such as banning flights and blocking borders.

Foreign investment insurance legal system is closely related to multinational corporations. The improvement of the system includes many aspects, which can be constructed based on the risk society theory. In the first place, it is significant to adjust the coverage of insurance. At present, China's foreign investment insurance covers four categories including expropriation, exchange restrictions, war and political riots, and government default. In order to mitigate the impact of epidemic prevention policies and isolation measures, the epidemic should also be included in the coverage of the investment insurance system. The second is the establishment of a dispute settlement mechanism. For disputes between investors and the host country government, compared with seeking domestic remedies in the host country, making full use of the ICSID arbitration method can reduce the cost of dispute resolution. China's current legislation does not clearly stipulate how to deal with disputes between investors and guarantee institutions. The particular status of insurance institutions makes it impossible for them to have a truly equal relationship with policyholders. In view of this, the legislative level should fill the institutional gap in handling disputes, and a special institution should be established to resolve disputes between investors and guarantee institutions to serve the countries involved. It may be constructive to consider the establishment of a regional dispute settlement mechanism between investors and guarantee institutions in the “Belt and Road”. In June 2018, in order to provide fair and efficient judicial services and legal protection for the construction of the initiative, the First and Second International Commercial Courts of the Supreme People's Court of China were inaugurated and opened in Shenzhen and Xi'an respectively, which indicated that the service of the initiative has made a great achievement [16]. Additionally, the approval and operation of "China Credit Insurance" should be also separated. In other words, the approval of the insurance business shall be carried out by the state agency, and the operation of the insurance business shall be carried out by China Export & Credit Insurance Corporation.

The risks China's overseas investment is confronted with can be various. From the perspective of the state in which the investment is situated, there are dominantly the investment environment risk; while the financing risk and investment decision-making risk occupy the majority from the aspect of the enterprise, the extent of which is affected by the investment’s environment, government supervision, preservation and service [17]. In European countries, the complementary utilization of a comprehensive approach supply by MNEs may bring extra advantages to them in the way of the chance to use group-level skill extensively. Therefore, a positive correlation has been demonstrated by researches of FDI determinants between a variable measuring the universality of multiplant operations in an industry and tendency of it for overseas investment, which indicates that the places of firms that have developed an expertise in operating a network of such separate facilities, and the chance to apply this skill to a new integrated environment such as Europe extensively may be beneficial and conducive to the increase of FDI, providing possible reference for other countries [18]. From the perspective of risk society theory, it is necessary to establish a universal theoretical framework [19], with the purpose of constructing a community with a future which is shared by all the human beings. Accurately recognizing and evaluating the existing social risks is an effective way to resolve trade disputes.

4. CONCLUSION

In this paper, Implementation of China's Foreign Investment Law is summarized, and the basic path and insufficiency of China's regulation of multinational companies is analyzed under the background of the “Belt and Road”. In addition, based on the impact of the Covid-19 epidemic on world trade, the article proposes solutions to the problems of foreign investment access and protection including establishing a normative mechanism for simultaneous follow-up of policies and laws, improving the negative list management model, and clarifying the boundary between foreign capital access management and anti-monopoly investigation. The improvement of China's social risk prevention and response mechanism is also analyzed, based on Baker's "risk society theory". It is worth noticing that a more universal solution is proposed from the perspective of countries along the initiative and others. There is no denying that there are still some deficiencies in this paper, for example, the refinement of the new adjustment path optimization scheme needs to be further strengthened. The author hopes it will be able to provide help for experts and scholars in related fields including foreign investment, international trade, international law and economics and so on.

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