Issues of Bilateral Investment Treaties under “the Belt and Road”

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ABSTRACT

A bilateral investment treaty is a treaty between two countries to promote and protect the two-way investment. With the continuous and in-depth upgrade of “the Belt and Road”, the requirements for bilateral investment treaties are also increasing. The existing bilateral investment treaties under “the Belt and Road” mainly are concluded at the end of the 20th century, which can no longer meet the requirements of the existing two-way investment. This paper will examine and sort out the problems existing in “the Belt and Road” bilateral investment treaty, such as the text expression, the lack of pre-entry national treatment, the coordination with domestic laws and international agreements, etc., which will be beneficial to the introduction of foreign investment and foreign investment under “the Belt and Road”.

Keywords: *the Belt and Road, Bilateral Investment Treaties, BIT Template, National Treatment.*

1. INTRODUCTION

The bilateral investment treaty is a written agreement between contracting countries with rights and obligations to advance and safeguard international private investment.[1]“The Belt and Road” (abbreviated as B&R) are the “Silk Road Economic Belt” and “21st-Century Maritime Silk Road”, which is a cooperation initiative put forward in 2013.[2]Bilateral investment treaties provide essential protection for Chinese investment in “the Belt and Road” countries and offer solutions to investment disputes.

“The Belt and Road” cooperation has been implemented for nine years. In 2020 and 2021, the non-financial direct investment of Chinese enterprises along the “the Belt and Road” was USD 17.79 billion and RMB 130.97 billion respectively, up by 18.3% and 6.7% respectively.[3][4]Moreover, even under the influence of the global economic downturn and the global epidemic, the number of China's foreign investment did not show a significant downward trend.

The time when China endorsed “the Belt and Road” bilateral investment treaties was basically in the 1980s or 1990s. For example, China's bilateral investment treaties with 45 countries, including Thailand, Singapore, Kuwait, Malaysia, and Pakistan, were signed at this time, accounting for nearly 80% of the countries along the route that have signed bilateral investment treaties. The closest one is the bilateral investment treaty signed by Turkey and China in 2015. In recent years, the demand of Chinese investors for overseas investment has gradually increased, and the existing bilateral investment treaties can no longer satisfy investors concerning “the Belt and Road”. In the process of “going out”, Chinese enterprises are still faced with investment risks such as investment access barriers, asset losses and defaults.[5] As a big country of two-way investment in the world, it is urgent to examine existing bilateral investment treaties under “the Belt and Road” and improve the relevant legal texts, which will benefit to the development of two-way investment activities in China.

If we examine and analyze “the Belt and Road” bilateral investment treaties, we will find that more than 50 bilateral investment treaties signed by China are relatively old, some clauses can't adapt to the existing investment environment, some treaties lack some important clauses, and the expressions of treaties in different countries are different and inconsistent. At the same time, there are still some legal problems such as the consistency between China's bilateral investment treaties, domestic laws and international agreements. Therefore, this paper will analyze and discuss the existing legal problems from the legal perspectives of the text of the "the belt and road initiative" bilateral investment treaty, the lack of national treatment clauses before entry and the coordination with domestic laws and international laws.

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2. THE TEXT EXPRESSION OF BILATERAL INVESTMENT TREATIES BETWEEN CHINA AND COUNTRIES ALONG THE BELT AND ROAD

When we carefully examine existing bilateral investment treaties along the "the Belt and Road", we can find that the expressions of many agreements are inconsistent which are prone to ambiguity. For example, the definition of "investor" is expressed differently in different national treaties. In the bilateral investment treaties with Thailand, Kuwait, and other countries, "investor" refers to any natural person or a legal person of a Contracting State that invests in the territorial area of the other Contracting State. And "Natural person" means the natural person in any Contracting State who has the nationality of that country according to its laws. In the bilateral investment treaty between China and Kazakhstan, it is "natural persons permanently resident in its territory as citizens in accounting with the laws and regulations of one Contracting State." There are two types of definitions for investors: "nationality" and "citizen".

For another example, the provisions of the "levy" clause are different in "the Belt and Road" bilateral investment treaty signed by China. For example, in the text of the bilateral investment treaty between China and Malaysia, the levy conditions and the calculation rules of levy compensation are stipulated. Comparatively speaking, the detailed rules of "levy" in bilateral investment treaties between China and other countries are relatively rough, as can be seen from the treaties signed with Pakistan, Kyrgyzstan, Indonesia and other countries.

At the same time, the same clause is repeatedly expressed in different bilateral investment treaties. For example, in the bilateral investment treaty concluded with Mongolia, Article 3 has clearly stipulated MFN treatment, but Article 4 repeatedly mentions the application of MFN treatment. Another example is that the bilateral investment treaty with Uzbekistan stipulates the national treatment clause and the MFN treatment clause, but the same provisions are mentioned again in the loss and compensation clause.

In addition, there are some problems in the overall structure of some bilateral investment treaties. For example, Article 6 of the bilateral investment treaty between China and Tajikistan lists the exchange rate as a separate item, but in other bilateral investment agreements such as China-Uzbekistan, China-Indonesia, China-Vietnam and other countries, the exchange rate is stipulated in the investment repatriation clause. Separate listing of exchange rate issues will make the overall structure of bilateral investment treaties lack of coordination and consistency.

3. THE LACK OF PRE-ENTRY NATIONAL TREATMENT CLAUSES IN BILATERAL INVESTMENT TREATIES WITH COUNTRIES ALONG THE BELT AND ROAD

Chinese bilateral investment treaties also have the problem of missing new clauses. For example, the national treatment clause is an important clause missing in the current bilateral investment treaties of China. At present, the mainstream bilateral investment treaties stipulate the pre-entry national treatment clause, but Chinese bilateral investment treaties signed in 1980s and 1990s do not have this clause.

National treatment is one of the critical clauses of bilateral investment treaties (BITs), and it is also the fundamental legal principle for concluding BITs. Looking back at the history of China's bilateral investment treaties, from the absence of national treatment clauses in the early days, to the post-entry national treatment clauses in the 1990s, and then to the pre-entry national treatment clauses in recent years, the national treatment clauses have been developing along with China's opening-up and investment.

With the remarkable transformation of China from a net capital importer to a net capital exporter, it has become an inevitable historical development trend to add the pre-entry national treatment clause in bilateral investment treaties. As far as existing bilateral investment treaties under "the Belt and Road" are concerned, there is a general lack of pre-entry national treatment clauses. In particular, under the anti-globalization and trade protectionism policies, the pre-admission national treatment principle and negative list mode will not only protect our overseas investors but also improve our foreign investment environment and gradually integrate with international rules.

4. COORDINATION OF BILATERAL INVESTMENT TREATIES AND FREE TRADE AGREEMENTS WITH COUNTRIES ALONG THE BELT AND ROAD

Through nearly 20 years of efforts, China has signed 19 free trade agreements with 26 countries and regions[6], such as China-ASEAN Comprehensive Economic Cooperation Framework Agreement and China-New Zealand Free Trade Agreement, and other free trade zones such as China-GCC, China-Japan-Korea and China-Mongolia are under negotiation or study. In the upcoming day, the scope of China's free trade zone will proceed to expand. However, there are some coordination problems between bilateral investment treaties and free trade agreements, such as investment regulations and dispute settlement mechanisms.

The controversial settlement mechanism between the Contracting States is different. In the Chinese bilateral investment treaty with Singapore, the scope of dispute is defined as "compensation amount caused by levy, nationalization or other initiatives correspond to levy and nationalization", and many bilateral investment treaties limit the scope of controversy to this. In the CSFTA, the scope of debate is defined as "the measures taken by the central or local government or competent department of one party that affect the compliance with this Agreement." At the same time, the bilateral investment treaty with Singapore also mentions that the applicable law is the effective law in the territorial area of the Contracting State where the treaty and the investment are located. For another example, bilateral investment treaties and free trade agreements have different provisions on investment treatment. For example, the China-Korea Free Trade Agreement stipulates national treatment. In contrast, bilateral investment treaties between Korea and China in 2007 only stipulate that most-favored-nation treatment is granted to the contracting parties. Therefore, coordinating the different provisions of bilateral investment treaties and free trade agreements between the same countries is a critical issue to be solved in the future to push forward Chinese opening up to the world.

Meanwhile, China is a member and applicant of many multilateral agreements, and there is no provision of preferential applicability between multilateral international agreements and "the Belt and Road" bilateral investment agreements. For example, there are more than one definition, scope and settlement mechanism of disputes between the two sides, which may lead to disputes about the applicability of dispute settlement methods.

5. COORDINATION BETWEEN BILATERAL INVESTMENT TREATIES WITH COUNTRIES ALONG THE BELT AND ROAD AND CHINA'S DOMESTIC LAWS

The Foreign Investment Law of China has been implemented since 2020.[7]Meantime, China's existing "the Belt and Road" bilateral investment treaty is not fully coordinated with the foreign investment law.

Firstly, the provisions of the current Foreign Investment Law stipulate that the pre-admission national treatment principle and negative list mode shall be implemented for foreign investment. However, the existing bilateral investment treaties along China's "the Belt and Road" are still the principle of post-entry national treatment. Secondly, the dispute settlement mechanisms of the two are different. The early bilateral investment treaties with Pakistan, Mongolia, the Philippines, and other countries and the new bilateral investment treaties signed by China with Uzbekistan, South Korea, and other countries mentioned that the disputes between the contracting parties could be submitted to a special arbitration tribunal for settlement. However, in the Foreign Investment Law[8], it is stipulated that "foreign investors can make complaints through the complaint mechanism of foreign-invested enterprises established in China." However, at present, how the complaint mechanism of foreign-invested enterprises plays a role and how to coordinate and supplement with the special arbitration tribunal have become issues that need attention.

Compared with bilateral investment agreements, China's domestic law is a principled provision, with a broad and vague definition. The provisions of bilateral investment treaties are more specific. At the same time, domestic laws, such as foreign investment law, have been enacted in recent years, while bilateral investment treaties have been enacted for a long time. Therefore, attention should be paid to the intersection and coordination between existing bilateral investment treaties and new domestic laws. For example, Article 22 of the Foreign Investment Law related to intellectual property rights only mentions that intellectual property rights should be protected and acts that infringe intellectual property rights will be investigated for legal responsibility. The provisions on expropriation in Article 20 only mention that foreign investors will not be expropriated. In special circumstances, foreign investors will be expropriated and requisitioned for the sake of public interests, but it does not clearly stipulate what the special circumstances are. At the same time, Article 20 of the Foreign Investment Law does not clarify the specific procedures for expropriation, which may weaken the predictability of investors due to lack of clarity, and have a negative impact on China's foreign investment environment. Therefore, China's bilateral investment agreements and domestic laws need to be further revised and improved. For example, the provisions of the Foreign Investment Law are more principled, and it is necessary to supplement more detailed provisions or point out the details of relevant provisions. The contents of China's bilateral investment agreements and old laws should be updated to avoid the contradictions and conflicts between laws and agreements.

6. CONCLUSION

With the decades of reform and opening up, the treaties signed in the 1980s and 1990s have been signed for a long time, which can't adapt to the global economic structure in the new era and the current situation of two-way investment between China and other countries. With the number of bilateral investment treaties of countries related to "the Belt and Road" increasing steadily, the problems existing in bilateral investment treaties need to be examined and solved urgently, such as the text expression, the lack of national treatment clauses before

entry, and the coordination with domestic laws and international agreements, etc. Sorting out the text structure, revising and supplementing the text expression will help foreign investors understand the relevant systems and rules of Chinese investment; increasing important clauses such as national treatment before entry is conducive to creating a good and open business environment; supplementing the provisions of domestic law to make it more detailed, and repairing the corresponding provisions of bilateral investment treaties and domestic laws will help promote the coordination and consistency between bilateral investment treaties of the belt and road initiative and domestic laws; properly handle the cross relationship between bilateral investment treaties and international agreements such as free trade agreements to avoid the contradiction of rules. This will not only give legal protection to foreign investors and foreign investors in China, so that the legal provisions can really play a role in promoting and protecting international investment, but also make China's foreign investment laws and regulations systematically conform to international standards, enhance China's position in the international investment environment, and strengthen its influence in bilateral investment negotiations. Perfecting “the Belt and Road” bilateral investment treaty is a proper measure under the background of anti-globalization. As the initiator and leader of “the Belt and Road”, it is necessary to examine the legal problems arising from the existing “the Belt and Road” bilateral investment treaties, create a favorable investment environment for foreign investors, and take the lead in promoting the development and improvement of the international investment order. Therefore, the ambiguous text description should be avoided and we should adjust the overall structure of the treaty, add important clauses including the pre-entry national treatment clause, and pay attention to the coordination with domestic laws and international agreements. These will become the inevitable trend of China's investment development.

AUTHORS’ CONTRIBUTIONS

The structure and content of this paper are all completed by the author Nuo Wang.

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