

Analysis on Legal Safeguard Mechanism for Chinese outward Investors -Taken China-ASEAN Investors for Example

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Abstract. With Chinese government's advocacy for further deepening the reform, broadening the opening-up and the Belt and Road Initiative, policies are made to promote various firms, especially non-state firms to invest in foreign countries. Increasing Chinese investors rapidly making investments overseas nearly in all areas are facing diverse problems. Starting from the current situation of Chinese outward investment (esp China-ASEAN), this article tries to analyze nuisances facing by Chinese outward investors and how to set up and perfect legal safeguard mechanism to ensure the safety of outward investment.

Keywords: China-ASEAN; legal safeguard mechanism; Chinese outward investors.

1. Why Legal Safeguard Mechanism Should be Set up and Perfected?

1.1 Functions of Legal Safeguard Mechanism

Legal safeguard mechanism usually includes a series legal principles, norms and regulations. The legal safeguard mechanism has the characteristics of transparency, openness, stability, authority, which could not just guarantee the results of international economic intercourse, but also strengthens the confidence of investors and partners, and insures the security of transactions and the predictability of interests [1]. What's more, legal safeguard mechanism is a necessary means of dispute settlement and risk precaution. In view of the current lack of legal cooperation mechanism for China-ASEAN investment and new geopolitical risks and policy uncertainty, government would better construct and improve legal safeguard mechanism for outward investment, esp investors, without further delay.

1.2 Current Situation of Chinese outward Investment

China's outward direct investment soared to 187 billion dollars in 2016, which was less than America only [2]. In 2017, China's foreign investment cooperation business maintained a steady, healthy and orderly development situation, and the desire of investors to do outward investment enhanced duo to government's advocacy, initiatives and policies. Ministry of Commerce of the People's Republic of China's statistics showed that outward investment spread over 156 countries and zones in the world and the amount accumulated to 86.3 billion dollars from January to October of 2017, net increased 5410, and enterprises making non-financial direct investment and the irrational outward investment was effectively contained [3]. Whereas, international trade remains depressed and the uncertainties such as Brexit have triggered considerable turbulence in international financial markets.

China's outward investment faces a grim situation, because the world is in a period of great development, transformation and adjustment. These three major contradictions of insufficient global growth momentum, unbalanced development and lagging economic governance are far from being resolved. What's more, the United States' withdrawal from TPP, Brexit and other black swan events marked the rise of the trend of thought of anti-globalization. Domestically, China's economy is at a crucial stage of transforming development pattern, optimizing economic structure and transforming the motivation of economic growth. Because of the changeable internal and external situation, there are still many risks for Chinese enterprises to "go global". In general, China's outward investment is faced with unprecedented challenges, but it is also a good time for foreign investment and economic structure to be upgraded, and the opportunities outweigh the challenges. Therefore, it's urgent for government to set up and perfect legal safeguard mechanism in abroad and at home.

The flow of outward investment, the subjects and regions of investment and investment approaches was diversified. In term of aggregate investment, China reelected second in the world, further narrowing the gap between China and the United States, which ranked first. The proportion of aggregate investment increased by 3.6 percentage points globally and outward direct investment far exceeded actual use of foreign capital in 2016. Compared with America, however, China's total investment is less than 100 billion dollars, and the outward investment stock is less than 5 trillion dollars [4]. The gap between China and developed economies is still large, and the scale of investment needs to be further expanded.

Investment entity is optimized, the structure tends to be perfect, but it's still unreasonable. As China's outward investment is basically synchronized with reform and opening up. Thus, China's outward investment has a color of planned regulation at the beginning. What's more, the long-term investment cycle of outward investment made state-owned enterprises as the outward investment entity leader. In China's total outward investment, non-stated enterprise accounted for 68 percent; as for the stock of investment, state-owned enterprises accounted for 54.3 percent and non-state-owned enterprises for 45.7 percent, which is tend to be flat. Nevertheless, the proportion of China's state-owned enterprises in outward investment is still relatively larger than in developed economies.

China's outward direct investment (OFDI) industry tends to be abundant in 2016, covering 18 major sectors of the national economy. Among the 18 sectors, outward investment in leasing and business services topped to 65.78 billion dollars and other sectors include manufacturing, wholesale, retail, information transmission and information technology services, real estate and finance, but emerging industries, such as education, and neighborhood services, had a very low proportion. China's outward investment is widely distributed, covering both developed and underdeveloped regions, and outward investment flows increased significantly in developed regions such as North America and Europe, but Asia is still the main area. However, because of the government's "going out" strategy, the "Belt and Road" initiative and geographical advantages, Asia is still the largest region for China's outward direct investment, especially Southeast Asia.

1.3 Analysis of the China-ASEAN Investment

China's outward investment flows to the 10 ASEAN countries were up to 10.279 billion dollars in 2016, of which investment in Singapore was 3.172 billion dollars, accounting for nearly 30%. The top three outward investment stocks are Singapore, Indonesia and Laos with 33.45 billion dollars, 9.55 billion dollars and 5.5 billion dollars respectively, while the least Brunei is 200 million dollars [5]. These figures showed that China's direct investment in ASEAN is mainly in the developed economies, represented by Singapore and Indonesia and Large gap exists in investment stock.

China's outward investments in ASEAN covers 18 major industries. Manufacturing, wholesale and retail industries, leasing and business services are the three major industries, with investment flows of US\$3.544 billion, US\$1.963 billion and US\$1.371 billion respectively and countries in distribution include Indonesia, Vietnam, Thailand, Malaysia, Singapore and Thailand. While education, culture, water and environment industries are less invested and the proportion is almost zero. These less invested fields may be the trend in the future. China's investment in ASEAN's first industry is on the decline. The proportion of secondary industry's manufacturing, mining and quarrying are large because ASEAN is rich in mineral resources, all kinds of raw materials, and has the productions of automotive spare parts, chemical oil, wood products and other aspects of production factors, attracting countless manufacturers to ten ASEAN countries to make investment and set up factories. In the tertiary industry, the proportion of investment in commercial trade activities, financial industry and real estate industry are relatively large. Among them, the growth rate of commercial trade activities is the highest. With the acceleration of the ASEAN regional integration process, a large number of multinational companies have been setting up product and research centers in ASEAN countries, and companies also have been setting up factories in ASEAN and the demand for funds for investment has increased. Accordingly, Chinese banks, such as Bank of China and China Construction Bank have chosen to provide banking services in ASEAN countries.

2. Obstacles to the Construction and Perfection of Legal Safeguard Mechanism

With the expansion of China-ASEAN's investment fields, enrichment of investment types, and the increase in the proportion of non-state-owned enterprises in outward direct investment, coupling with the fierce overseas investment mergers and acquisitions in recent years, the government is bound to demand attaching importance to safeguarding the legitimate rights and interests of non-state-owned enterprises. Additionally, since the agreement on dispute settlement mechanism of the framework agreement between China and ASEAN, and the China-ASEAN Investment Agreement adopted the American-style BIT template, which contains a lot of clauses, and the behavior of binding countries is limited to "measures", namely any universally applicable laws, rules, administrative decisions, and administrative actions that affect investors or investment. Thus, the above provisions of the agreements exclude the specific administrative actions and judicial actions of the host country, and the constraints on the level of state behavior are too narrow [6]. What's more, the BIT between China and ASEAN countries has limited investors to initiate arbitration. The level of mutual legal assistance among countries and the utilization rate of dispute settlement in the China-ASEAN Investment Agreement are pretty low. The lack of dispute settlement mechanism increases the legal risk and cost of investors, which inevitably requires the government to construct and perfect the current legal protection mechanism of overseas investors through international and domestic channels. The legal safeguard mechanism of the region is a whole set of systems formed by various countries through consultation aimed at adjusting social relations and stabilizing the social order and establishing organizations and reaching a series of related principles, norms and rules. The legal safeguard mechanism for outward investment enterprises between China and ASEAN is to guarantee investors to determine their rights and remedies through a series of treaties, agreements, special laws and other legal measures at the international and domestic levels, and provide convenience for investors to make investment abroad.

There are both developed and underdeveloped countries in the ASEAN region. The level of economic development of each country is uneven. Competitive industries, policies and regulations for attracting foreign capital of each country are also different. This kind of reality is bound to affect the establishment and perfection of legal safeguard mechanism.

2.1 Differences in Legal System between China and ASEAN

In the term of legal tradition, there are common law system, civil law system and mixed legal system in ASEAN, which causes the deviation in the special application of laws. Furthermore, differences in socialist and capitalist systems, the level of economic development, degree of openness, religious belief within the ASEAN region and the differences in understanding of government and social relations under the game of great powers may influence the construction of legal safeguard mechanism.

2.2 Low Level of Mutual Legal Assistance among Countries and Low Utilization Rate of Judicial Relief Procedures

Differences in national legal tradition and legislative level cause the single form of mutual assistance and the narrow scope of assistance. Currently, China has signed the bilateral treaties on judicial assistance with 4 of ten ASEAN countries, namely Thailand, Laos, Vietnam and Laos, which makes it difficult to implement mutual legal assistance. In addition, the judicial relief procedures in ASEAN countries are complicated, and the cost of seeking relief is relatively high. That's why the utilization of judicial relief rate is low.

3. The Overall Direction of the Legal Safeguard Mechanism for China-ASEAN outward Investors

3.1 Promoting the Integration of Legal System between China and ASEAN

For the sake of the convenience of the judiciary and the certainty of the law, as far as investment is concerned, the most urgent solution in the China-ASEAN region is the establishment of a unified legal system. Governments negotiation and cooperation to draft laws that are suitable for current investment needs, and refine investment access to investment, national treatments of investment, collection and compensation standards, technical standards, and the composition of enterprises and qualified investors are also. Maintaining effective communication among countries, and abolishing and updating obsolete laws and regulations in a timely manner.

3.2 Perfecting Relevant Legislation in Outward Investments Fields

Securing the access of foreign investors, national treatments and the withdrawal of investment can be started at the domestic and international levels. Internationally, the government can sign bilateral investment agreements with host governments and international agreements such as Free Trade Agreements to give investors of two sides to reach agreements on access, investment treatments, taxation and settlement of disputes. At the domestic level, China's outward direct investment law is mainly consisted of three parts, namely encouragement and promotion, supervision and management, prevention and protection. Compared with other countries, which have perfect investment security legal systems, due to the late start of China's foreign investment, tremendous changes in investment, and the lack of legislative experience, China is currently constructing a legal safeguard mechanism with the legislative model of "separate laws before basic law". Some scholars are advocating the perfection of single-line legislation firstly, such as "the outward investment supervision law", "Outward Investment Insurance Law", "Foreign Assistance Law" and "Outward Investment Banking Law" and other separate laws, and reenact the basic Law to prevent, reduce or share the risks of investors[7].

The United Nations Conference on Trade and Development (UNCTAD) divides outward direct investment into mergers and acquisitions(M&A) and greenfield investments. China Cinda Asset Management CO.LTD. acquired 100% stake of Nanyang Commercial Bank with 8.88billion, which is the largest overseas M&A project implemented by Chinese companies "going out" in 2016. China's investment in ASEAN has been increasingly rich in investment in recent years, but the failure rate of outward investment in mergers and acquisitions is extremely high, and it is necessary to get the government to perfect relevant legislation.

3.3 Establishing and Perfecting Risk Precaution Mechanisms and Strengthening Safety Supervision

In addition to traditional risks, the risks of enterprises investing overseas include the political risks, policy risks and natural risks of the host countries. The precaution of risks requires improvement of the legal awareness of the enterprises, and investors to cling to law to solve disputes. When more legal rules are introduced into the business operation and cooperation, the risk can be more effectively reduced. What's more, government should improve various risk assessments and risk precaution mechanisms to provide enterprises with risk precaution assistance, strengthen communication between the government and enterprises, and provide information, law, intellectual property consultations for enterprises to invest abroad in a timely manner. The government shall strengthen the publicity of investment information and regularly inform Chinese enterprises involved in foreign affairs of the security and economic policies and laws of the host countries. For example, on 26 October this year, the China-ASEAN seminar, which is hosted by the China-ASEAN Business and Investment Summit Secretariat, released the world's first comprehensive evaluation of foreign investment key countries. This index system of industrial income and risk is a good reference index for investors. For some enterprises that do not have investment abilities, or projects with low investment returns, the projects in high-risk areas, government should raise the trial standards and

stop losses in a timely manner. Meanwhile, some risks can be shared through overseas investment insurance. In view of the high failure rate of overseas mergers and acquisitions, the government should also perfect related laws and regulations on overseas mergers and acquisitions and improve the financing guarantee system for inter-regional production capacity cooperation.

3.4 Perfecting Coordination and Settlement Mechanism of Legal Conflict and the Legal Safeguard Mechanism of Dispute Settlement

To improve the efficiency of dispute settlement between Chinese and ASEAN investors and the utilization of disputes settlement mechanism, the first step is to perfect the unified conflict rules and the inconsistency of technical standards in the applicable rules of law. Meanwhile, it's necessary to develop and improve a variety of dispute settlement methods and encourage investors to settle investment disputes through arbitration, mediation and other ADR means. In the application of law, the conflict of law and substantive law should be taken in consideration. Disputes shall be settled by means of a combination of separate and unified settlement inf domestic and international law. In view of the current degree of judicial cooperation, it is also necessary to sign more mutual judicial assistance treaties with ASEAN countries, expand the scope of judicial assistance, increase the ways of judicial assistance, and simplify unnecessary procedures for judicial assistance.

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