

How to Protect the Interest of Developing Countries in the Process of Multinational Company Investment

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Abstract: With the development of the economic globalization, the amount of international investments is growing, and the conflicts between host state and the investors have also increased. Since the twentieth century, multinational company invested in the developing country continuously. However, the terms and contents of International Protection Agreement are not perfect, they are unequal and involve economic exchange between countries. Sometimes, it cannot protect the developing countries very well. This paper analyses three types of the International Protection Agreements and reasons why the existing investment protection agreements cannot achieve specific purposes and ideas for solving status and nature of international investment in multinational companies to give the host state a right to sue the foreign investors. Developing country interests may be hurt by inequality terms in the agreement. The global economic investment may be in a mess when the foreign investors exploit the host state. Meanwhile, a justical concept is necessary, which is protecting the interests of developing country.

Keywords: International Protection Agreement, Multinational Company, Developing Countries.

1. Introduction

Under the economic globalization, foreign investment and the development of multinational company are crucial roles in advancing world economic growth. According to the World Bank's World Development Index, the average trade dependence of all economies increased by 28.7 percent from 1990 to 94.8 percent in 2018. Among all these economic entity, 37.8 percent of them grew by more than 50 percent, and 20.1 percent of them, by more than 80 percent, and 13.3 percent by 100 percent. [1] Some developing countries give up some policies and legal interest, which they should have received. Strong developed countries carry out sanction on developing countries to force them accept the agreements. If they do some things damage the interests of host state, the deposits will be confiscated. However, the amount of deposits is far less than the actual loss of the developing countries. A better way to protect the interest of developing countries is to give a legal status for the foreign investors. If the multinational can be a legal entity, the host state can sue directly to get compensation.

In recent years, due to the impact of the epidemic, the economic pressure is becoming bigger and bigger. The host state establishes many national securities examines to preserve national security and

protect national interest and audit multinational companies with foreign investment with the help of national legislation. For all appearances, there seems to be a law, but its implementation is random, opaque and open. In the process of balancing the global economy, every country tends to proceed from their own interests and takes every kinds of actions to restrict import and foreign investment. They encourage the export and foreign investment to enhance international competitiveness. When they protect themselves to the maximum extent, trade and investment protectionism have also become the method and tool to protect national interests and rebalance the global economy.

2. Status and Shortages of Major Existing Investment Protection Agreements Related to Multinational Company

2.1. Status and Shortages of Friendship Commerce Navigation

Friendship Commerce Navigation Treaty is usually Unequal Treaty. It may hurt the interest of the public in the developing countries and the national interests. The developing countries give up some policy interests to attract other multinational companies from the developed countries to invest in their countries. In Unequal Treaty, capital-export states have most of the power while those capital-import states must abide by the rules and regulations. Actually, the nations in the capital-import state loss their human rights. Sometimes, developed country write some unfair clauses, however, the developing must agree with it, because they have no status or power to argue with the developed country. For instance, in the Sino US Friendship and Mutual Assistance Treaty, Nationals of the State Party enjoy the most frequent protection and safety of their body and property throughout the territory of the State Party. In this regard, it must be fully protected and secured in accordance with international law. In most cases, capital-export countries always conclude and sign agreements with capital-import countries, so developed country may put strain on developing countries because of their stronger economic power and military power. What is more, Friendship Commerce Navigation Treaty is usually Unequal Treaty. It may hurt the interest of the public in the developing countries and the national interests. The developing countries give up some policy interests to attract other multinational companies from the developed countries to invest in their countries. In Unequal Treaty, capital-export states have most of the power, while those capital-import states must abide by the rules and regulations. Actually, the nations in the capital-import state loss their human rights. Sometimes, developed country write some unfair clauses, however, the developing must agree with it, because they have no status or power to argue with the developed country. This paper will take the Friendship Commerce Navigation Treaty between China and America in 1946 as the example. On the legal status of foreign companies, the two sides decided to draw on each other' s proposal, re-draft provisions. The draft United States proposes that the legal status of any company or association formed under that party 's law shall be recognized by the other party, whether or not there is a business establishment. According to the company law promulgated by the National Government, the establishment of relevant institutions by foreign companies in China must first be recognized by China. It is difficult for the two sides to reach consensus. Article 3(3) is the treatment of foreign corporate associations in China. The report considers this paragraph to be the most important provision in the treaty. The United States requires that all corporate associations engaged in business manufacturing, processing, finance, science, education, religion and charity shall be accorded national treatment. In accordance with the provisions of the original paragraph, due to separate corporate laws in all states of the United States Federation, China cannot in fact enjoy national treatment and can only enjoy the treatment of other states, which is significantly different from that of the state especially the bank. Based on the facts, China advocates that in order to take full account of the facts, the principle of treatment of other states has to be reluctantly accepted. However, for the financial item, it should be deleted and the national treatment shall be treated equally by Chinese and foreign companies in accordance with the

provisions of the Company Law, except as otherwise provided by the law. The U.S. initially proposed that under exceptional circumstances, they can give differential treatment to foreign companies. However, China refused to accept this amendment, and the U.S. then proposed another amendment, which stipulated that both parties usually gave national treatment to each other's corporate associations, but when the law stipulated otherwise, it was not limited. The amendment here has been in line with China's new company law. The U.S. still hopes to retain the word finance, and its explanation is it has no need to give national treatment to foreigners according to the above proviso in the U.S. new amendment. Moreover, other undertakings have been reflected in the treaty. If a single financial item is missing, the U.S. commercial banks already in China cannot be treated. In China's opinion, the US amendment has made a little progress compared with the old one. It is proposed that there are bank regulations in addition to the company law. However, since China has not yet promulgated the bank law, it is not clear whether the amendment agreement is consistent with the future bank law. [2]

2.2. Status and Shortages of Investment Insurance and Guarantee Agreement

Aiming to search a more perfect International Protection Agreement, Investment Insurance and Guarantee Agreement was born, but there are still some problems about it. After the World War II, there was a serious breakdown of the economy in Western Europe. George Catlett Marshall carried out the Marshall Plan to give those countries in Western Europe an economic aid, which was about 13.15 billion dollars with 90% grant and 10% loans. When the Marshall Plan was practiced, America concluded and signed Bilateral Investment Agreement with other Western European countries to protect American businessmen investing in other countries. Although the Marshall Plan could promote the economic growth of Western European countries, America gradually controlled the Western Europe economy. After the Second World War, the United States implemented the overseas investment insurance system for the first time according to the international situation at that time. However, without the consent and cooperation of the host country, the right of subrogation of the United States investment insurance agency should not be practiced.

Overseas investment insurance system itself has a strong political bias, especially the American-style bilateralism model, which reflects the government's purpose of guiding and controlling its overseas investment through the establishment of the overseas investment insurance system. [3]

The key of the Investment Insurance and Guarantee Agreement signed between America and developing countries is a formal confirmation by the contracting state of the other party that the insurance institutions in the United States have the right to subrogation and other rights and conditions related to investors. After the occurrence of relevant political risk accidents, foreigners claim against the host government and the insured foreign investors according to the contract. The agreement also provides for processes in the event of a dispute between governments over claims and clarifies the obligation of the other party to make reparation binding under international law. In the Investment Insurance and Guarantee Agreement, foreign investors enjoy national treatment. The host country must give foreign investors treatment and rights, which are the same or better than local investors. Moreover, the host country must limit the host state to provide preferential treatment, host state's support and cultivation to local infant industries for local investors.

Investment Insurance and Guarantee Agreement covers almost all industries. The US Investment Insurance and Guarantee Agreement adopts a "Negative list approach", which means as long as there are no exceptions listed, the host country is required to fully liberalize the policy of the industry. The negative effect of this policy includes that the liberalization process is under the pressure. It is hard for developing countries to fully realize and consider the industries who are unwilling to fulfill liberalization process or the exceptions needed for the separated industries. Moreover, developing countries are unable to predict that those industries need domestic development not the liberalization

process. They are also incapable to forecast that there might be some emerging industries. Therefore, it cannot be included in the exception terms.

However, with the same investment agreement, each rule of the liberalism history appeared to attempt to formulate unified investment agreement. It will eventually be ended in failure because a country accepts an investment agreement which must be based on its economic development level, and the level of economic development in different countries necessarily has a big difference. Countries cannot accept the same level of investment liberalisation. In particular, developing countries are in the initial stage of economic development, so they need to be particularly careful about the strong impact of investment liberalization on their own markets, and should not completely deny their reasonable foreign capital jurisdiction because of their acceptance on investment liberalization. [4]

2.3. Status and Shortages of Investment Promotion and Protection Agreements

The latest International Protection Agreement is Investment Promotion and Protection Agreements, however, the damage to developing country interests still exist. Since the late 1950s, Former Federal Germany, Switzerland and other European countries have realized that Friendship Commerce Navigation Treaty is difficult to protect their investors in other countries. Hence, they extracted some important content and concretize it. They also learn from American Bilateral Investment Agreement to improve the treaty about investment insurance, subrogation right and methods of dispute settlement. [5] Nowadays, developing countries and socialist countries tend to sign Investment Promotion and Protection Agreements. It is more perfect and complete than the first two agreements. Compare to the Friendship Commerce Navigation Treaty, Investment Promotion and Protection Agreements is less political, and it won't be affected by the bad relationship between countries. They are only the corporation on economy. Its signing generally requires formal legislative procedures approved by the highest authority.

After the Second World War, the former Democratic Republic of Germany recovered rapidly and its investment in developing countries increased rapidly. Under such circumstances, it was difficult to meet the growing demand for foreign investment on the basis of respecting friendship, trade and shipping treaties. Therefore, Germany and other European nations have formulated contents of conventional friendship treaties since the late 1950s. Trading and shipping are related to the protection of foreign investment. The content of these agreements is detailed. Meanwhile, the combination of substantive and procedural provisions has the advantages of Friendship Commerce Navigation Treaty and investment insurance and guarantee agreements. However, the policy of developing countries is affected by prohibiting expropriation and investment dispute settlement mechanism. Germany Investment Promotion and Protection Agreements includes direct and indirect expropriation especially the latter one. The policy, which is adopted by the host state about socio-economic development, education and environment protection may be affirmed as indirect property expropriation to foreign investors, but the investment dispute settlement mechanism includes a direct mechanism for foreign investor to sue the host state.

Investing in developing countries is the first choice for developed countries to maximize profits in the world-wide. Developing countries need these types of investment urgently such as strategic resources. However, such business activity may cause developing countries being in an unfair situation in the world. As a result, developing countries can achieve certain economic development, but the development can only stay at a low level. [6]

There are several disadvantages. The host state cannot take any action that might lead to indirect expropriation. Host countries are reluctant to introduce the policies that are unwelcome to foreign investors for fear of being sued, even if they believe that policy will have no expropriation. From the actual case of Investment Promotion and Protection Agreements, the direct sue mechanism from

foreign investors in the international court will make host state suffer huge economic losses. Intellectual property right is also included in the above agreements. When the foreign investors find their own intellectual property are expropriated indirectly, they can use the clauses in the agreement to ask home state for compensation or sue directly the home state government.

3. The Reason Why the Existing Investment Protection Agreements Cannot Achieve Specific Purposes

3.1. Deviation in the Concept of International Law on Investment Protection

In the early stage of the formation of multinational companies, the host state is relatively closed, and multinational companies forcefully intervene under the political intervention of the home country. Finally, the operation of multinational companies in the host country actually becomes a tool of the home country government to extend its economic and political jurisdiction. [7] The challenges given to the host country's foreign jurisdiction by Bilateral and multinational investment legislation is all-around and deep. There is a big change in methods and strategies of developed countries to exploit the developing countries. They are no longer be satisfied with drafting or concluding treaties only used in the small area in western countries. They would like those strict and powerful bilateral and multinational investment. In the past, developing countries aimed to economic growth. They were forced to accept the foreign investment from the developed countries and sometimes, they might give up some interests. It had been proved by some studies that multinational companies had multiple motives in their direct investment behavior. From the overall perspective of national economic development, this motivation has negative effects, and the specific impact depends on the degree of the investment country's grasp of its own economic development situation. [8]

Multinational companies encroach largely the interests of the developing countries. Developing countries as host states should not give up policy interest and citizen interest. There are some problems of their previous ideas about attracting foreign investment. This may cause the exploitation from the developed countries. Developed countries know the developing countries will give up some interests, so they may depict some clauses, which may damage the interest of developing countries. From the whole concept of international investment, the exploitation form developed countries are harmful to the whole international investment. At last, they will be arbitrated by the arbitral institution.

3.2. Lack of a Unified Investment Protection Mechanism in International Commercial Law and Need for New Development Mechanisms

As the international community is in a state of anarchy, and the existing economic system is incomplete and weak. The benefits enjoyed by all countries in the process of globalization differ greatly according to the law of market economy, and the less developed countries with weak economic foundation may be at an inferior position in the international market. [9]

In the process of attracting foreign investment, developing countries inevitably have to compete fiercely. However, using other people's brands can only be a temporary decision, not a long-term strategy. If the enterprise's attitude towards the brand does not change rapidly, it will delay the development of the enterprise. The company in the host country may have the risk of losing the right independent control of enterprises. The merger of multinational companies and large and medium-sized companies in developing countries can not only obtain complete production equipment and skilled labor at a lower cost, but also break the restrictions of industrial policies standards of the host country. The multinational company can occupy a considerable market share by merger with the company. However, intellectual property protection in some developing countries is not reasonable. Imperfect interrelated rules and regulations will bring about unapparent economic growth effect of intellectual property protection. [10]

The developing countries should take some actions to prevent intellectual property dispute. In fact, intellectual property is a system, which can both promote and delay the development of domestic industries. Intellectual property protection system is the youngest among all these important systems in the market economy, and there are many imperfections. This paper will take the Trademark Law in China as an example. On the term, the trademark law in china use trademark exclusive right. Meanwhile, trademark law in most of the countries and areas in the world use the right of trademark. after the trademark is registered, its owner enjoys all the rights more than the trademark exclusive right. In fact, the owner can also allow others to use it and transfer the possession of the trademark right to others. These rights are not trademark exclusive right. [11] The meaning of the trademark exclusive right is narrower than the meaning of the trademark right.

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4. Optimized Path

4.1. Establish a New Concept of International Law on Investment Protection

In the past practice, there are some problems in the concept, which need to be updated. The international society needs a justicial concept, which is protecting the interest of developing countries. As the economic growth in developing countries, they need to be stronger and insist on protecting their own interests to prevent the exploitation from the developed countries. The new concept should contain the idea of being fair. Reaching economic growth is not the only aim of the developing country government, they would like to sign up an agreement, which can both benefit the developed countries and developing countries. They not only need to protect the economic sovereignty of the host country and prevent other people who have some purpose to damage the national interest of the host country, but also make sure the liberalization of investment of the capital exporting countries and supervise and urge the host country to impose unnecessary restrictions on foreign investment and cancel the extreme actions which damage the environment of the investment capital. We can improve relevant regulatory system of the host country first. These new concepts can lead to a more perfect and fair international investment around the world.

4.2. Determine the New Investment Development Protection Mechanism

From the perspective of being fair, international economic globalization needs a more distinctive order. In the future, bilateral and multinational investment legislation should consider the balance between developed countries and developing countries and try to lessen the exploitation of developing countries by developed countries. They should find a coordinated mechanism from the perspective of protecting the foreign jurisdiction of the host country and protecting the rights and interests of foreign investors. Firstly, the host government should establish a supervising and assessment mechanism for multinational companies. Secondly, the host state should protect the public's right to know by enhancing the mandatory disclosure of multinational corporation data. The government need to ban preferential policies or levy discounts instead of reforming measures and investigating the responsibility of the responsible person of multinational companies if anyone violate this duty. [12]

Developing countries should actively develop overseas direct investment. On the one hand, they should strengthen and perfect the construction of domestic legal system. On the other hand, they should actively build international legal system of overseas direct investment, and make full use of international norms to promote the development of investment in developing states. [13] Firstly, it is a good way to underwrite political risk insurance for overseas direct investors of developing countries.

Developing countries have not yet established a special overseas investment insurance system, which often makes the political risk suffered by overseas direct investors of developing countries not effectively compensated. In the long run, the investment enthusiasm of overseas direct investors will be severely discouraged while multilateral investment guarantee agency services make up for the lack of legislation in developing countries. Secondly, the coverage of Convention on multilateral investment guarantee agency is more extensive. In some large-scale natural energy investments such as mining of mineral resources, due to the large amount of construction and high investment cost, multiple investors need to jointly complete the project. At this time, domestic underwriting institutions tend to reject underwriting based on the complexity of nationality, and private investment insurance institutions are unable to afford it because of the underwriting amount. In this case, Convention on Multilateral Investment Guarantee Agency could play a role in underwriting investments by investors of multiple nationalities.

Multinational companies can easily use their advantages in the field of knowledge to monopolize their interests. The developing countries should resist the abuse and unfair protection of intellectual property rights. They should strengthen enterprise risk prevention awareness. From the perspective of the state, the developing countries should put all our efforts to improve the whole economic environment, establish a social credit system and advance the improvement of the legal system. From the perspective of companies, it is necessary to clarify the special legal system of company risk prevention and form a risk-free system.

Developing countries, as the host states, should ask the developed countries to pay for the deposits and establish information base to register the information of the multinational company. In the event of damage to developing countries, the internal control of deposits will be forfeited.

5. Conclusion

Economic globalization is the current trend of the world. Foreign investment has gradually become the economic interconnection of all countries in the world, which is not only the basic way of interdependence, but also become an important part of international competition. This paper talks about three types of international protection agreement and states their shortages, which are the unfair clauses. Developing countries are always located inferior positions and abandon some policy interests that are originally belonged to them to attract foreign investments. Under the exploitation of developed countries, the developing countries cannot restrict the cash inflow and cash outflow from foreign investors. The stability of developing country's financial system will be destroyed by free and unlimited transfer of foreign investor's capital. It is necessary to change the concept of investment protection mechanism, which is to protect interest of developing countries. However, sometimes, home state protects their multinational company. Therefore, developing countries will fail to get the compensation from foreign investors. In the international investment, everyone needs to be treated fairly. The profit maximization should not be the first aim of every foreign investors. Sometime, it may disturb the order of globalization. Being fair need to be the preliminary goal in the international investment activities.

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