Legal Risk in Transnational Investment and Its Countermeasures

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Abstract. In today's world, economic globalization has become an irreversible trend. Various countries and regions are gradually becoming important entities in economic globalization. Transnational investment faces a number of legal challenges and risks, including investment restrictions, differences in legal systems, corrupt practices and dispute settlement mechanisms. To address these issues, investors should have a thorough understanding of the legal differences between their home and host countries, make use of international treaties and agreements, and improve dispute settlement mechanisms in bilateral agreements. To draft a clear and comprehensive investment agreement that defines the rights and obligations of the parties involved and includes dispute settlement provisions, in addition, investors should assess and address potential legal risks through due diligence, diversification of investments, purchase of loss insurance and use of entities that provide legal protection. The need to prioritize legal considerations is essential to successful cross-border investments and to protect investments in global markets.

Keywords: Cross-border investment; legal risk; investment agreements; international treaty.

1. Introduction

When the Washington Convention was first drafted, the signatories did not provide a clear definition of the concept of "investment" in order to adapt it to new types of investment that would emerge in the future, which resulted in a series of subsequent cases in which the parties and the arbitral tribunal attempted to provide a reasonable interpretation of the concept of "investment" in order to protect their rights and interests. Most famously, in Fedax N.V. v. Venezuela, the question of the concept of "investment" was raised for the first time, until Salini et al v. Morocco. The appearance of "investment" under the Washington Convention has gradually taken shape, and the Salini test developed from this case has had a profound impact on subsequent cases. Although not all arbitral tribunals fully adopt the Salini test for analysis, almost all arbitral tribunals use the Salini test as a baseline for analysis. The Salini test. The test includes the following four criteria: the investment of money or assets; to last a certain period of time; risk factors; contribute to the host economy.

In a famous example of cross-border investment, the Moroccan government, through a private company, issued a tender for the construction of a 50 km highway (Rabat highway construction project). Two Italian companies submitted a joint bid and won the project. Subsequently, due to various reasons, the project was delayed, and the two companies completed the project four months after the deadline agreed in the tender, and the Moroccan government refused to pay the relevant costs. After several unsuccessful negotiations, the two Italian companies filed an arbitration application with the ICSID as joint applicants, demanding that the Moroccan government perform the contract and pay the corresponding damages.

Salini contends that regardless of the subjective meaning employed by the parties to the case, the ICSID arbitrator must evaluate whether a disagreement results from a "investment" that complies with the term's objective definition. Salini contends that the parties are not permitted to waive or alter their this contractual obligation. Salini's supporters assert that her position advances the crucial institutional goals of the ICSID. The ICSID can also make Salini fulfil her obligations. These factors, when considered collectively, imply that Salini has duties not only to the case's parties but also to the

ICSID as a whole.Salini's departure from the ICSID for other investor-state courts, however, raises the possibility that this requirement is systemic rather than merely institutional in character. This is a duty that comes with the job of serving the interests of the investor-state conflict system as an arbitrator [1].

The "Salini case" was accepted by ICSID and given a final ruling as a typical foreign-related project contracting case. This judgement had a big influence on how the ICSID tribunal later evaluated its own jurisdiction over the issue. The later ICSID Arbitral Tribunal has likewise continually implemented and modified the "Salini standard," which was derived from the "Salini case," and the debate over the standard in both academic and practical circles has gone on without coming to a resolution up until this point. Therefore, investing internationally carries a high degree of risk.

2. Legal Issues in Transnational Investment

Transnational investment is an important economic activity in the context of globalization, which provides countries with opportunities for economic growth and development, and at the same time gives rise to a series of legal problems, which will be analyzed in the following in terms of the problems faced by the subject of transnational investment and the legal problems in bilateral agreements.

2.1. Problems Faced by Transnational Investment Subjects

Regarding the problems faced by transnational investment subjects, first of all, the investment restriction of investee countries is a major legal problem in transnational investment. Although the modern international investment system generally supports free transnational investment, some countries still set up various forms of investment restrictions, such as foreign investment access restrictions, industry thresholds and so on. These investment restrictions may be motivated by the protection of the national economy or national security considerations, but they also create problems for multinational enterprises. An example is China's Company Law, according to which the shareholding of a foreign investor in a joint venture for automobile manufacturing in China cannot exceed 50 percent at most [1]. By limiting foreign ownership, the Chinese government has weakened the control and participation of foreign investors. This policy aims to protect the domestic automobile manufacturing industry and to enhance the technological level and competitiveness of local enterprises through technology transfer and market access.

Second, the difference in the legal systems of the investing parties is also an important legal issue in cross-border investment. In transnational investment, since the two investing parties come from different countries, there are differences in their respective legal systems. Such differences may lead to ambiguities in the understanding and application of legal rules between the two parties to a transaction, increasing the risk of contract enforcement. For example, in 2014, a dispute arose between the French government and Google Inc. over tax requirements. France argued that Google's tax avoidance by setting up a company in Ireland resulted in a loss of tax revenue for France. A series of disputes and lawsuits ensued, culminating in the resolution of the dispute in 2019 through Google paying a €500 million fine [2].

The presence of corrupt practices can seriously jeopardize the environment for cooperation between two parties, interfere with normal investment activities, and may lead to damage to the interests of investors.In 2014, top executives of Brazil's Petrobras were accused of accepting bribes and engaging in corrupt practices in the procurement process. This led to huge financial losses and a fall in share prices, and investors' interests were seriously jeopardized [3].

Finally, in cross-border investment, the choice and effectiveness of settlement and remedial mechanisms can vary as the investing parties are involved in different national judicial systems, and disputes arise. For example, in China, litigation is the primary means of resolving domestic civil and commercial disputes, and the proportion of domestic civil and commercial disputes resolved through

arbitration is relatively low [4]. Against this background, investors may therefore face delays and uncertainty in court decisions. In contrast, international commercial arbitration, as the predominant way to resolve international civil and commercial disputes, is more efficient and flexible in protecting investors' rights and interests, and arbitral awards can be recognized and enforced globally [5]. In addition, the U.S. court system is seen as emphasizing independence and impartiality, and is law-oriented, providing a more stable environment for the protection of investors' rights and interests.

2.2. Legal Issues in Bilateral Agreements

On the one hand, investment protection provisions in bilateral agreements can ensure that investors and investees can enjoy reasonable and fair treatment. Investment protection involves the protection of investors' rights, interests and property. In bilateral agreements, investment protection is usually ensured through terms and provisions in the contract. These terms and provisions may include national treatment, most-favored-nation (MFN) treatment, fair and equitable treatment, and international arbitration [6,7]. National treatment means that the State provides the same treatment to both domestic and foreign investors in order to prevent discriminatory treatment. Most-favored-nation treatment means that the State provides the same treatment to investors from other countries as it does to investors from the most-favored-nation in order to ensure fair competition. Fair and reasonable treatment means that the State should deal with investment disputes in accordance with the principles of international law and due process. International arbitration, on the other hand, means that disputes between investors and States can be resolved through independent international arbitration institutions to ensure that disputes are resolved fairly and expeditiously. These measures for investment protection help safeguard the rights and interests of investors and investees and improve the stability of bilateral investment cooperation.

On the other hand, liability clauses are another important legal issue in bilateral agreements. Liability clauses explain the liability and indemnification of investors and investees. Bilateral agreements usually specify the legal responsibilities of both parties in investment cooperation [8,9]. These responsibilities usually include, but are not limited to, the obligations to be fulfilled by the investor and the protection of the investee's rights and interests to be provided by the investor. This helps protect the legitimate rights and interests of investors and encourages more investors to participate in bilateral investment cooperation. For example, during the U.S.-China trade war, the U.S. government adopted a series of trade restrictive measures, including the imposition of tariffs on Chinese goods. Meanwhile, the Chinese government accused the U.S. of taking these actions in violation of the bilateral trade agreement signed between the two sides and demanded that the U.S. take the corresponding responsibility [10].

All in all, the existence of various legal issues in cross-border investment brings risks and uncertainties to investors. In order to effectively solve these problems, multinational investors should take a series of feasible measures.

3. Solution to Legal Issues Related to Cross-Border Investment

Economic globalisation has led to an increase in cross-border investment, enabling enterprises to expand and utilise new markets. However, engaging in international investment can bring about a series of legal challenges. This article will analyse real case studies to provide practical examples and insights, illustrating the application and significance of solutions in protecting global market investments.

3.1. Legal Differences Among Investment Subjects

Having a thorough understanding of the legal and regulatory differences between the investor's home country and the location of the investor is crucial for successful cross-border investment. The case of Uber Technologies Inc. v. Transport for London illustrates the importance of understanding these differences. In November 2019, The Uber company lost its licence to operate in the U.K. capital

because drivers had worked under fake identities. In June 2018, TfL identified a pattern of failures by the company including several breaches that placed passengers and their safety at risk, the driver can control Uber's account easily [11]. Due to variations in regulations and restrictions on carpooling services, Uber faces challenges in different countries. Investors must identify any restrictions on capital flows, foreign ownership, or intellectual property in the target country to assess their potential impact on investment feasibility and profitability. Additionally, reasonable utilisation of international treaties and agreements, such as bilateral or multilateral agreements, can provide a legal framework for cross-border investment and offer protection for investors.

3.2. Improvement of the Existing Dispute Resolution Mechanism and Ensuring Fair Treatment Between Investing and Invested Countries

The case of Philip Morris International v. Uruguay highlights the importance of assessing the applicability of these mechanisms. Philip Morris International v. Uruguay was an investor-state dispute settlement case that began on 19 February 2010 and ended on 8 July 2016, Philip Morris International (PMI) is a multinational company, a producer of cigarettes, of which it owns seven out of twenty global brands [12]. PMI's says that Uruguay's anti-smoking legislation devalued its cigarette trademarks and investments in the country [13]. Philip Morris filed a lawsuit against Uruguay's anti-tobacco regulations. On 8 July 2016, after 6 years, the ICSID ruled in favour of Uruguay, forcing PMI to pay the expenses of the defendants and the court [14]. Factors such as enforceability, speed, cost, and neutrality must be evaluated to select the most suitable mechanism. Investing in countries with a sound legal system and a good record of complying with international agreements can give investors confidence in the effectiveness of dispute resolution mechanisms. The inclusion of selected mechanisms in investment agreements provides a clear and transparent framework for resolving potential legal disputes.

3.3. Drafting a Clear and Comprehensive Investment Agreement

The Chevron v. Ecuador case highlights the significance of reaching a clear agreement. Chevron is embroiled in a lengthy legal battle over disputes related to environmental pollution. Clearly defining the rights and obligations of all relevant parties, as well as recognizing and resolving legal differences, can minimise potential disputes. Dispute resolution clauses, which specify the applicable law governing legal disputes and the choice of jurisdiction, provide a clear road map for resolving conflicts. Additionally, incorporating specific case clauses such as arbitration or mediation clauses can expedite the resolution process.

3.4. Assessment and Response to Legal Risks

To achieve success in cross-border investment, assessing and responding to potential legal risks will assist investors. These risks may include expropriation, breach of contract, discriminatory treatment, and challenges related to dispute resolution mechanisms. By conducting due diligence and analysing the legal protection intensity of the target jurisdiction, investors can develop strategies to mitigate these risks. Such strategies may involve diversifying investments in multiple countries, obtaining insurance against potential losses, or constructing investment structures through entities that provide legal protection, such as special-purpose vehicles.

The legal environment for managing cross-border investment requires careful planning and consideration. By evaluating and responding to legal risks, understanding the legal differences among investment entities, and improving dispute resolution mechanisms, investors can protect their investments in the global market. Real case studies demonstrate the practical application of these solutions, highlighting their importance in mitigating legal issues. As cross-border investment continues to shape the global economy, companies must prioritise legal considerations to ensure the success and protection of their international businesses.

4. Conclusion

Legal issues in transnational investment have an important impact on international economic development. This thesis has explored the legal issues in cross-border investment in terms of differences in investment entities, bilateral agreements, etc., and through case studies has pointed out the challenges and opportunities of these issues for both investors and states. While these legal issues may lead to some disputes and uncertainty in transnational investments, they also provide opportunities to promote international economic cooperation and sustainable development. By improving existing dispute settlement mechanisms and ensuring fair treatment between investor and investee countries, drafting clear and comprehensive investment agreements, and assessing legal risks, among other measures, legal issues in transnational investment can be better addressed to promote win-win cooperation and development.

Authors Contribution

All the authors contributed equally and their names were listed in alphabetical order.

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