

Research on Overseas Investment Insurance System

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Abstract: On April 17th, 2020, Government of India has reviewed the extant Foreign Direct Investment policy for curbing opportunistic acquisitions due to the COVID-19 pandemic shows that overseas investment may face some uncertain political risks. As a natural barrier against risks, the insurance system should play an important role in protecting investors and financial institutions from economic losses. Compared with the following developed countries' models, the United States, Japan and German, the history and status quo of overseas investment insurance system are first discussed, and second the necessity of development. Then system's deficiencies are basically analyzed from four aspects, namely insurance model, insurance coverage, single assurer and construction of specific legal rules. Lastly some relevant proposes of system construction are made respectively.

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1 Introduction

Overseas Investment Insurance (hereinafter referred to as OII) is established to greatly contribute investment through protecting investors and financial institutions from economic losses mainly resulting from political risks. The investor shall apply for insurance, and issuer will first pay claims in accordance with the contract, and then claim from host government with subrogation which involves international economic field. The legal relationship between home country and the host country is which between insurer and the requested party. In addition, not only basic functions such as credit rating promotion and risk management, but also financial one which is beneficial to market development.

1.1 History and Development

It's first established by America in 1948 and then developed countries such as Japan, Germany have followed by virtue of American success. China founded Export & Credit Insurance Corporation (hereinafter referred to as SINOSURE) in 2001 which officially operated relevance business independently. Recently, with a new round of opening up, insurance projects are in increasing number which expresses strong appetite for the investment firewall in society. And in the new era, state has to attach more attention to system's optimization so as to make it continuously effective in practice.

Then, China established an insurance investment fund to finance domestic strategic projects and outbound investment in 2015 under the Belt and Road Initiative (hereinafter referred to as BRI) as a professional platform and has brought major projects pertaining to energy construction, international capacity cooperation and so forth. This initiative has obvious advantages for both insurer and state. Insurers can get more project opportunities and be sufficiently supported relying on increased premiums, which makes contributions to industrial development, policy implementation and market guidance. Moreover, during financing, China can gain experience from Citibank, HSBC, etc. abide by *the Equator Principles*, and deliberately assess social and environmental risks.

1.2 Status Quo

As a state-owned policy insurance company funded and established by the state, SINOSURE is the only insurer in the field of overseas investment in China. It resolutely implements national decisions but also serves the open economy as an independent legal person. When it comes to insurance coverage, state risks and buyer risks are mainly covers within twenty

years. Nevertheless, where an act is recognized by or attributable to the insurer or exists before the contract, it is not in the coverage^[1]. Moreover, China takes still unilateral model of insurance which insurer cannot directly obtain subrogation right based on bilateral agreements despite China has signed agreements with more than a hundred countries along the Belt and Road. The first overseas investment policy to *Indonesian Sinochem Palembang Power Plant* can be taken as an example. Whether this model is suitable and sufficient with the rapid development of overseas investment is worth discussion.

2 Necessity of Development

Although Chinese overseas investment has grown rapidly recently and *Fuyao Group*, *CRRC* can be taken as fruits, the total amount is relatively small. In addition to economic benefits, the distrust between countries makes Chinese enterprises sometimes suffer political risks. For example, investment in Latin America with rich oil resources is prone to face resource curse. Some countries there doubt that Chinese investment may affect their economic security and then tend to reduce rights and interests of Chinese petroleum corporation via policies in order to consolidate their status. Above all, where Chinese enterprises mainly invest is developing countries whose laws and economic policies haven't been complete, even some suffer political volatility. The numerous risks they may face are expropriation, exchange restrictions, war and political riot and breach of contract. For instance, Myanmar Authority declared to stop the *Myitson Dam Project* of 3.6 billion dollars for 'public opinion' and seven countries along the Belt and Road like Sri Lanka and Yemen are usually caught in political dilemma^[2]. The reports of *Riskon International* and *Verisk Maplecroft* have shown that lots of countries around the world lack professional safety assessment and suffer credit risks.

The insurance to investment is what guard to a team. As a consequence, it's high time to establish a well-organized OII system with clear logic by analysis *ex ante* to mitigate underwriting risks to a great extent.

3 Deficiencies and Optimization

With impetus to BRI, SINOSURE has assisted more investment projects. Then the more deficiencies of system appear, the more optimization the system need. And investment in Libya which made losses of more than 10 billion dollars for the war with merely about

one percent recoveries by subrogation can teach us a lesson. As a matter of fact, there're still deficiencies in rulemaking. For example, there're more rules to protect foreign investment in China than overseas investment just like Foreign Investment Law of the PRC passed by NPC last year^[3]. Nowadays with status transformed from host country to home country, it's urgent to put system construction on the agenda and it's a good choice to learn something from the model of America, Japan and Germany.

3.1 Insurance Model and Agreements Signature

There're three main models. Firstly, the bilateral model of OII is represented by America whose premise is agreements which can protect the rights and abilities from individual to state level due to good faith. So both diplomatic and lawful channels can benefits if host country breaches the contract. However, limited numbers and details of BITs cannot cover all parties. Secondly, under the unilateral model needs no agreements insurer only can seek recoveries in accordance with domestic laws and diplomacy which weakens acquisition of subrogation right. For instance, Japan's Ministry of International Trade and Industry (MITI) doesn't care whether to receive recoveries from host country following its compensation. Thirdly, Germany pursues a mixed model considering both contracting and non-contracting parties showing the Golden Mean^[4]. However, the unclearly specific application of provisions puts forward higher requirements for officers' discretion and profession.

3.1.1 Deficiencies

Chinese OII has adopted a unilateral model which covers more but without direct legal basis. Moreover, diplomacy is only alignment with while necessity for some restrictions and divergences of itself which tend to make civil issues to state level. And the protection cannot well adapt to the trend that China has been the second largest home countries and then confidence and enthusiasm of investment are inevitable lost. Secondly, numbers of agreements can be more for disputes with non-contracting countries alongside like Brunei and Bhutan during cooperation may be harder to resolve. Thirdly, rulemaking needs more experience to upgrade the quality. On one hand, provisions and definition of political risks are not specific enough or clear and implements for subrogation lack operability. On the other hand, most agreements China signed ago are simple and abstract, concerning more on host countries'

benefits for its status at that time. Nowadays with the rapid development of overseas investment, it's high time to pay more attention on investors in BITs.

3.1.2 Optimization

As mentioned above, German's mixed model which considers bilateral model as primary and the unilateral as secondary is worth learning from. Above all, bilateral model is far more effective in practice for providing directly legal basis in subrogation right. Moreover, since China has signed agreements with 126 countries alongside and the number is prone to increase, the construction of bilateral is ripe. Anyway unilateral model works too. Firstly, the wider coverage with non-contracting countries is absolutely benefits in initial state. And personal jurisdiction is demonstrated well. The Golden Mean follows our tradition and may be more effective.

After choosing a reasonable model, a specific and perfect bilateral agreement is of necessity. The subjects, procedures, recoveries, institutions, etc. should be discussed prudently to reduce ambiguity and legal loophole and avoid troubles while implement. At present, bilateral agreements signed between China and Australia have been the model whether normative content or various categories, which shows development of bilateral in China^[5].

3.2 Insurance coverage

Insurance coverage directly determines the scope of protection of investors' rights and interests, and then has great influence on investment enthusiasm. In accordance with laws of various countries, there're numerous causes for foreign exchange insurance, commonly host country's policy change, such as control of foreign exchange, or sometimes incident like war which makes the business impossible. However, insurance coverage is not the same each country.

3.2.1 Deficiencies

Nowadays, protection and control mechanism is in perfect, however definition of insurance coverage isn't specific enough which may do harm to enterprises for inconsistent legal interpretation. For example, interpretation of 'other warlike operation' in war risks depends on SINOSURE's discretion. Secondly, underwriting coverage of some types of insurance is relatively low. For example, losses caused by conflicts and wars of the neighboring countries of host countries

aren't in protection and investment of entity enterprises beyond equity interest isn't within business interruption insurance. Thirdly, due to politics risks such as poor continuity of policies among countries under the Belt and Road, such as CHALCO's failed acquisition of Ivanhoe's SouthGobi for authority transition and amendment of investment law, the protection of putting terrorism risks into special coverage beyond the war risks seems not enough.

3.2.2 Optimization

To cope with various new risks with development and reduce difficulty in getting recoveries, there's nothing better than clearly defining insurance coverage and expanding underwriting business. For example, the US Foreign Assistance Act and USAID have laid legal foundation and guarantee contracts made by OPIC have explored in-depth the area of expropriation. Meanwhile we shall clarify the political risks not underwriting to reduce probability of disputes, such as considering the consistency of interpretation and feasibility of provisions under miscellaneous provisions like 'other warlike operations'.

In addition, two types of special coverage insurance are paid attention to. Firstly, it's feasible to put terrorism insurance into basic one for usually massive losses of investors since terrorists make trouble with them for the purpose of politics^[6]. Secondly, to receive recoveries under the risks of breach of the contract easily, some limited rules in MIGA can be referred to. For instance, projects can only be underwriting when investors who cannot get judicial remedy, arbitration or enforcement in the host country for a period of time.

3.3 Insurance Company

OPIC, bond between enterprises and the host country, has both public and private nature, which is governed by policies of the State Department and operates based on national treasury on one hand, absorb more enterprises by operation in company system and following the articles of association as a legal person on the other hand, which mitigates direct collision of two states to a great extent.

Enterprises in Japan are underwriting by state agency with financial independence, aiming to insure risks beyond general business. In Germany, only projects approved by the Ministry of Finance can be insured, and then state-owned company operates or issue policies, as the executor of government agencies.

3.3.1 Single Insurer and Demand Diversification

SINOSIUE's support and encouragement for BRI, small and petit business and the Framework Cooperation Agreement benefits a lot. However whether it can meet the increasing investment amount as the single insurer is worth thinking. Moreover, compared with the relationship between fund and stock, comprehensive insurance with multiple risk management is more popular than the single one. However, the state-owned insurer generally only protects for political risks and then enterprises need to search for general property insurance in other insurers. There are chances that content and items coincidence or uncovering, which reduces the possibility of recoveries virtually.

3.3.2 Reasonable Choice

The benefit of SINOSURE is undoubted and the status is unshakable. In addition, studying and optimizing further is inevitable with the increasing demand. Several experiences are as follows. Firstly, reference to OPIC, SINOSURE could be more flexible by taking different measures while facing various political, economic and legal situations of host country. For example, countries alongside can be classified in terms of civil law, common law, Islamic law and Socialist law system and then analyzed and concluded respectively, which not only fulfills commercial rules, but follows national policy. Secondly, insurance institutions in German supervise each other but integration of approval and business operation institutions is the mode in China. Moreover, as a legal person and policy institution, it'll be the trend to recognize and separate administrative functions and commercial tasks. In China, it can operate by a special approval institution established by the State Council, such as the overseas direct investment administration, and the state-owned commercial legal person as the executing agency. The reasons are as follows. Firstly, the separation makes it more professional and systematical to grasp the direction of overseas investment and expand investment amount. Secondly, strengthening supervision promotes the healthy development of the insurance industry. Thirdly, it is an attempt to allow commercial insurance companies and other policy institutions to engage in OII. They can issue comprehensive insurance whose procedure of compensation application is relatively simple for higher insurance coverage and unified management.

3.4 Construction of Specific Legal Rules

3.4.1 Domestic Experience

The rationality of specific legal rules affects the enthusiasm of parties and the promotion of business. If the regulations are too strict, many investors needed protection would be excluded from suitable subjects. Therefore, rules can be softer on the appropriate investors, host countries, insurance conditions or insurance recoveries. And techniques of other laws can be learned from. For example, referring to the flexible criminal rule of 'three to five years of punishment in accordance with circumstances', the insurance law can stipulate the upper limit or lower limit of underwriting amount or setting save clauses. Another suggestion is to study principles of fairness and integrity in civil law, and seem promoting local economy, less damaging regional environment and the security of projects as principles. Moreover, preferential policies can be given to developing countries pursuing for relative fairness, such as lowering the qualification. Lastly, the trend of simplifying procedure and be efficiently in administrative law can be kept with, such as reducing the audit cycle, appropriately reducing the rate and allowing prior review. To sum up, the amendment is not replacement but to search for the optimal solutions.

3.4.2 Foreign Experience

Besides, as the leaders of international multilateral investment, MIGA and ICSID have unique superiority to bilateral agreements, which are worth learning from in underwriting BOT investments or business with large volume, long cycle and so on. Though MIGA stipulates that only developing member countries can be qualified host countries, in fact, once the investment guarantee activities are carried out, it's equivalent to recognize MIGA's subrogation rules^[7]. Therefore, MIGA also works even member countries without bilateral agreements with China. More countries maintain trust in it, such as the EU's decision following assessment. On the one hand, ICSID can be the barrier for the final decision and parties' considering of reputation and World Bank Loan. On the other hand, the arbitration can reduce the risk of disputes politicization in diplomatic channel. Above all, in view of the fact that China has not nationalized foreign investment so far while Chinese enterprises are facing the high risk of nationalization, withdrawing the reservation of Article

25 of the Washington Convention can be discussed^[8]. Therefore, China still needs to actively apply to ICSID and prudently analyze the rules to reduce the risk of passive arbitration and safeguard investors' interests. For example, the success of Beijing Urban Construction v. Yemen has become a model. In the future, China shall take advantages of legislative technologies such as Umbrella Clause, : Fork in the road (FITR), Waiting Period Clause to further increase the possibility of ICSID acceptance^[9].

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