
Risk Analysis for Overseas Investment of State Owned Enterprises from a Legal Standpoint

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Abstract

With the continuous improvement of China's comprehensive national strength, more and more Chinese enterprises are eager to participate actively in the process of economic globalization through overseas investment, especially under the active promotion of 'Go Out' strategy policy. Since twenty-first Century, the overseas investment of Chinese enterprises has been heating up, because of the comparatively smallest impact in the global economic crisis as well as be backed by huge foreign exchange reserves and active capital markets. However, with the changes in the international political and economic situation and unpredictable factors, the risks faced by Chinese enterprises in overseas investment, especially in state-owned enterprises, are always present. How to avoid risks in overseas investment for China's state owned enterprises, it is necessary to analyze and predict the potential risks objectively in advance. The purpose of this article is to analyze the risks for overseas investment of China's state owned enterprises from a legal standpoint.

Keywords

State owned enterprises; Overseas investment; Risks in investment; Legal standpoint.

1. Introduction

Practical experience in developed countries shows that, overseas investment has significance for improving the international competitiveness of a country's enterprises, optimizing the industrial structure as well as promoting the healthy development of the national economy. After the implementation of 'Reform and Opening up', especially since the 'Go out' strategy has taken effect, the overall scale of overseas investment by China's enterprises has expanded rapidly. However, a large number of failure cases of overseas investment illustrates that, China's overseas investment is still in its infancy stage, relevant laws and regulations and supporting policies are imperfect, leading to our enterprises overseas investment is always in a passive position, it seriously restricts the development of overseas investment by Chinese enterprises. Therefore, it is imminent to deeply study the legal risks of China's overseas investment as well as speed up the establishment and improvement of the prevention and control mechanism of overseas investment legal risks.

2. The necessity and possibility for overseas investment of China's State-owned enterprises

Because of the special ownership of state-owned enterprise, deciding that its development and operation are inseparable from the leadership of the state and the government, and its production and operation more reflects the will and needs of the state, its development and management must bear certain state responsibility and social responsibility as well, in one word, the state-owned enterprise is the first officer who carries out the major national development strategy, meanwhile, it is also the main force to promote sustainable development and raise GNP.

2.1 The necessity for overseas investment

For a country, overseas investment is helpful to promote the rapid adjustment of industrial structure, the excessive production capacity of industrial output to overseas, and strive to lower costs to obtain greater profits. China strongly advocates the 'Going Out' policy to China's enterprises, in order to reverse the unfavorable situation at past, which has been passively accepting the transfer backward industries from developed countries. To adopt appropriate measures to vigorously promote foreign investment on the basis of the actual development needs of our country, not only can break the pattern of traditional passive acceptance of industrial transfer, but also can actively provide more information and resources for technological innovation through international competition.

Because of the existence of historical factors, China's state-owned enterprises are still in the process of deepening reform, its political background determines its growth and expansion in the domestic market with the help of strong support from the government's state-owned capital and the protection of tariff policy. However, with the gradual liberalization of China's import and export business rights, in recognition of more flexible private sector competition, the state-owned enterprises should explore the international market through overseas investment as well as expand the international and domestic living space through overseas investment by accumulating experience.

With the continuous development of mankind as well as the progress of society, the scramble and use of resources have entered a specific situation of intense white heat. As an important support for economic development of a country, resources are basic elements of economic development related to national security. On the basis of the implementation of the strategy of sustainable development, state-owned enterprises should get rid of the increasingly tight domestic resource constraints as soon as possible, and promote the diversification of import sources of strategic materials, strengthening the support capability of domestic strategic resources, through overseas investment to strengthen the development and utilization of overseas resources.

After joining WTO, local protectionism and trade barriers have been greatly constrained between members of the WTO. Facing to foreign enterprises and foreign capital, it is better to look at the broader international market, rather than wrestling in its own limited market and competitive environment. For state-owned enterprises, adopting traditional export methods in accordance with defensive motivation seems to be difficult to give full play to its exclusive ownership advantage, which is scarce for some competitors from the host country. Therefore, it is necessary to analyze the market orientation with forward-looking, and proactive search for the right investment environment, in order to access to target markets successfully, resulting in a higher possibility of income from investment than risks.

2.2 The possibility for overseas investment

In comparison with private enterprises, state-owned enterprises' political advantage is self-evident, they shoulder the responsibility of advancing the modernization of the country as well as the historical responsibility of safeguarding the common interests of the people, and they are important materials and political foundations for the development of the ruling party and the state of our country. [1] Even though the reform of China's state-owned enterprises has achieved some success, it still needs to be based on national conditions, the integration with the management mechanism of foreign enterprises is not equal to ignore the core position of Party organizations in state-owned enterprises, because party organizations in state-owned enterprises are the primary organizations of the Communist Party of China, which has advanced theoretical guidance and value pursuit, a sane organizational system and working mechanism, strict organizational discipline and good style of work, a broad mass base and influence, and these are the unique Party organization and Party members of the state-owned enterprises as the political advantages embodied in the political resources.

In aspect of the current operation of China's state-owned enterprises development, although some state-owned enterprises are still lack of cohesion, the management ability of Scientific Development Co., internal business team uneven quality deficiencies, it is significant to adhere to the core position of the party organizations in state-owned enterprises, accelerate the transformation of the political

advantage of state owned enterprises to the core competence of enterprises and create a road of modern enterprise with Chinese characteristics, thus it can be better help more state-owned enterprises 'going out' immediately.

In comparison with the private enterprises in China, the core competitiveness of state-owned enterprises is mainly embodied in the cohesion of enterprises, management leadership, the implementation of the strategic principles and the ability to cope with risks. China's state-owned enterprises have obvious political advantages, to gradually transform the ideological superiority of the ruling party into cohesive force through the construction of enterprise value concept, [2] to transform the advantages of Party organizations into advanced leadership through the 'political quality', 'operational performance', 'unity and cooperation', 'style image' of good team building, to fully mobilize the team's execution through the construction of qualified personnel, and to transform the supervision superiority of the ruling party into the control power to deal with the risks of overseas market investment through the internal anti-corruption construction.

In addition, since the establishment of the 'Reform and Opening up' policy, China's state-owned enterprise reform has won initial success after nearly thirty years, and it gradually got rid of the shackles of the institutional mechanism of self-development through internal and external linkage, constantly optimizing the allocation of domestic resources, and it also accumulated substantial resources, technologies and talents, as well as experience, due to less effect by the worldwide economic crisis.

3. Risk analysis on overseas investment of state-owned enterprises

The perspective of this essay is mainly aimed at the legal risk of overseas investment for China's state-owned enterprises, which is due to the unpredictable change of external legal environment or not perfect legal mechanism (mainly refers to the domestic laws and regulations and bilateral treaties and other uncertain factors) may lead to direct losses or negative legal consequences to state-owned enterprises.

3.1 The survey of overseas investment by state-owned enterprises

In the early 70s and 80s, at the preliminary stage of the 'Reform and Opening up' policy, the main part of overseas investment is undertaken by state-owned enterprises, because of the lack of sufficient cognition and anticipation for the international market, and the difference between the management idea of the state-owned enterprises and the overseas market, the overseas investment is mostly a failure or loss. In the past twenty years, with the strength of opening up, the socialist market economic system has constantly established, with the continuous efforts of the ruling party and the government, China has become a full member of WTO, and the overseas investment of China's state-owned enterprises has been developing rapidly.

After Chinese held the eighteenth National Congress of the Communist Party, with Xi Jinping as general secretary of the CPC leadership with particular emphasis on diplomatic issues in our country, state-owned enterprises overseas investment is elevated to a new height of the national strategy, putting forward more specific requirements of state-owned enterprises, in order to provide strong support for the a country of China's diplomacy.

3.2 Current status of overseas investment legislation

In the early 80s, the initial stage of China's overseas investment, the Ministry of foreign trade supposed to actively and steadily carry out the pilot work of the joint venture, setting up in foreign enterprises, the Ministry of foreign affairs agreed to the 'Interim Provisions' on the opening of the joint venture in foreign countries, this is the first certain effect administrative regulations in aspects of overseas investment for China's enterprises. Following with the development of China's overseas investment deeply, a series of laws and regulations have also been introduced; In addition, China also signed bilateral investment protection agreement with more than 100 sovereign countries and regions, participated and concluded 'The Multilateral Investment Guarantee Convention' and 'Solve the country and other country's investment dispute Convention', 'Trade related investment agreement' and

other multilateral treaties as well, in order to further legal guarantee for the healthy development of overseas investment for China's enterprises.

Although China has actively avoided overseas investment risks through legal channels, however, overseas investment by China's state-owned enterprises still faces the corresponding legal risks. First of all, in recognition of the law level, the current level of the effectiveness of the relevant legislation about overseas investment is comparatively lower that it should be, they are only formed in general principles of rules and regulations, which were promulgated by the State Council and almost all ministries, the rank and the level of effectiveness is not as rigorous as law, and no corresponding specific measures and implementation details of the individual even because of the lack of connection between the provisions necessary for the specific implementation process caused obstacles. Secondly, there is no supervision mechanism, the main focus is still on the initial stage of approval, due to the lack of strict supervision mechanism of late, leading to serious loss of state-owned assets caused by human factors, and there is no supporting measures timely to recover and remedy for damage had been caused. Thirdly, it is lack of scientific and effective legal system of overseas investment insurance, especially for direct investment in many developing countries like Latin America and Africa regions, the likelihood of political risk is far greater than that of developed countries due to political instability, regime change and policy inconstant. Thus, it is urgent to establish and perfect our corresponding legal system in time, on the basis of the experience of the overseas investment insurance legal system in developed countries.

3.3 Legal risks of overseas investment to state-owned enterprises

The so-called legal risks of overseas investment to state-owned enterprises understandably refer to that state-owned enterprises are unable to exercise rights and perform obligations strictly following the provisions of the law or the international treaty, or negative legal consequences for investors due to the imperfect and changes of the external legal environment in host countries. [3] In accordance with the main body that participates in overseas investment activities, investment risk can be divided into three categories, namely the legal risk to the home country of state-owned enterprises by overseas investment, the legal risk of the state-owned enterprises itself by overseas investment and legal risks of investment activities in the host country. The specific legal risks exist in the form of diversification, and there are different legal risk divisions from different aspects: each stage has different risks from its establishment, management, and then to exit; and there are different risks in the choice of establishment mode, the selection of controlling share, and all aspects of enterprise management. [4] This essay intends to analyze the legal risks of China's state-owned enterprises' overseas investment in a logical sequence.

First of all, the legitimacy of enterprise access risks may arise due to the territorial jurisdiction of the host country. In aspects of the level of international law, the host country can choose the scope and extent of opening its own market, taking into account its bilateral sovereignty or economic development and planning objectives, while respecting bilateral or multilateral treaties. Typically, host country will adopt qualification limit, scope of investment limit, investment period limit for foreign investors, and there are also provisions in accordance with the laws and policies in the host country to strictly exam and approval the access right for foreign investors. It is universally acknowledged that the market is constantly changing, if it does not specify the cooperation intention of the host country's counterpart project in advance, and cannot fully predict about the delicate relation between the approval cycle of the host country and the market price trend, the risks of investment will be increased, which refers to missing the bungled opportunities to maximize the benefits of the investment, or even cause breach of contract and bear corresponding legal consequences, paying huge damages for breach of contract.

Secondly, in the daily operation stage for enterprise, due to the differences of the laws and regulations between the home country and the host country, the legal risk will inevitably arise. Among these, the most important is the risk of legal protection of labor rights, which is mainly focused on the adjustment of human resources by local mergers and acquisitions and the employment of local labor in foreign direct investment the construction of factories, if it violates the law in the host country,

investors will obviously undertake more legal risks than domestic enterprises, overseas investors will arise local labor organizations to review or even impose fines by neglecting the local labor laws, cause the huge economic interest loss and affects the enterprise reputation, and even stoppages, shelved projects and even bankruptcy due to large-scale labor disputes. Additionally, legal risk of intellectual property should also be laid emphasis on. In comparison with developed countries, China's independent research and development and innovation ability is relatively backward, developed countries form local monopolies to maximize profits by adopting exclusive use of their sophisticated inventions, invented patents and proprietary technologies, China's overseas investment may cause infringement and bear the corresponding legal liability for infringement if come across intellectual property rights barriers that are set up by other countries. Furthermore, almost every host countries extremely lay emphasis on the legal risks that caused by the issue of environmental protection, overseas investment, especially for building factories and resources mining, is easy to offend the barriers set by host countries from the perspective of environmental protection, therefore, it will be subject to the implementation of the policy of prohibiting or restricting imports, levy and other unreasonable export quotas set up artificially by the host countries.

Thirdly, it is the legal risk of anti-monopoly that goes through the whole process for overseas investment of China's state-owned enterprises from entry to exit. Host countries' governments always stipulated from form to substance for the issue of monopoly before attracting foreign investment. In comparison with overseas investment by private enterprises, China's state-owned enterprises have all aspects of strength, if investment projects launched on a grand scale, it is bound to touch the red alert line of the anti-monopoly law of the host government, various review will be adopted by the host country, enterprises will be faced with a quandary during this period, and even bungled opportunities to gain maximum benefit.

Fourthly, it is about the legal risks that enterprises may face when they conclude the operation of overseas investment. The two major forms of risk are expropriation and nationalization, host countries seek for assistance in the development of resources and to speed up public infrastructure construction through opening up to introduce foreign capital and advanced technology in special fields on the basis of their own development, then the host country may adopt the form of expropriation or nationalization on the basis of the protection of public interest, as well as control and limit tangible property of foreign enterprises at a price below market quotation.

4. Avoidance suggestion to legal risks of overseas investment of state owned enterprises

In view of the legal risks that China's state-owned enterprises may face in their overseas investment and management activities, how to effectively and reasonably avoid them is a top priority. The so-called evasion of legal risks, that is, avoiding the occurrence of legal risks on the premise of abiding by laws and regulations.

First of all, it is necessary to accelerate the construction of a legal system for overseas investment, so as to strengthen the effectiveness of existing laws and regulations level and rank, to incorporate all China's enterprises participated in overseas investment business activities including private enterprises into the system, so as to better avoid the healthy development legal risk, protection of overseas investment activities in such more feasible legal system. [5] Specifically, it is significant to form a multi-level, multi domain jurisdiction of the legal system, which should be based on the existing laws and regulations mentioned in the previous chapters, combined with bilateral and multilateral treaties signed by China's experience, and also make a macro level 'overseas investment law' and establish 'overseas investment insurance law' and other legal regulations to support the legal system, it can be reference to the United States 'The Foreign Assistance Act'.

Moreover, the investment and management activities of state-owned enterprises represent the will of the state and the ruling party, so relevant departments of the state and government had better concern more about the scope of investment protection, the investment treatment, the specific provisions for collection and compensation, and the settlement of investment disputes should be discussed, through

active consultation and suggestions exchange in accordance with possible legal risks with reasonable comments, in order to achieve more reasonable bilateral or multilateral investment agreements and treaties, which will carry out effective legal guarantee for the public interests of overseas investment enterprises and host countries. Bilateral and multilateral investment agreements and treaties have kept record on the legal risks to overseas investment management from entry to exit for enterprises, but also gave guidance and norms for China's state-owned enterprises to invest overseas. [6] In addition, As a member of the WTO, 'Agreement on trade related investment measures', 'The general agreement on trade in services' and 'The agreement on trade related aspects of intellectual property rights' under the framework of the WTO agreement have direct or indirect effects on overseas investment activities, China's government should fully understand and grasp the basic contents of relevant agreements and agreements, providing opinions and suggestions on decision making for overseas investment activities of state-owned enterprises.

Thirdly, it is essential to establish a comprehensive supervision system for overseas investment, to check investment intention of state-owned enterprises strictly from the very beginning, perfect overseas investment ideal standard and strictly implement the project approval procedures; it is also necessary to set up special regulatory bodies to provide comprehensive information consultation and risk prevention services in advance, for investment activities, including cross-border mergers and acquisitions; [7] And it is important to establish a regular reporting mechanism for overseas enterprises, which does well in standing by special regulatory agencies momentarily for timely supervision of investment, management, financial and income status of overseas investment projects of state-owned enterprises, in order to detect problems in a timely manner and put forward reasonable rectification plan to avoid possible legal risks.

Finally, it is necessary to establish a perfect overseas investment insurance system. Although the role of the insurance system is that it can compensate for the losses caused by overseas investment as soon as possible after the risk occurs, and risks can not be avoided from the very beginning, however, the actual effect is also to minimize the impact of overseas investment risk on China's state-owned enterprises, and it is also an effective emergency mechanism for circumvention of legal risk measures.

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