

Problems and Solutions of Negative List System of Foreign Investment Access in China

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Abstract: Negative list system is a vital legal system in the field of international investment. The Foreign Investment Law of 2019 established the legal status of negative list of foreign investment in China, which is of great significance to Chinese international investment field. However, in view of the complicated situation of foreign investment, there are some legal problems in the existing negative list system that need to be solved urgently, including opaque legal basis, incomplete negative list system and imperfect supporting legal supervision mechanism. This paper lists and analyzes the legal problems in the negative list system and puts forward corresponding solutions.

1. Introduction

The concept of foreign investment is closely related to international investment. International investment realizes the transnational operation of capital and is the main way to realize the development of economic globalization [1]. In the early years, the western capitalist countries headed by the United States developed into big international investors relying on their economic advantages. In recent years, with the acceleration of the process of economic development and globalization, the process of Chinese opening to the outside world has also improved year by year, the field of international investment has been continuously developed, and international investment laws have been gradually improved. With the continuous development of international investment, the licensing of foreign investment between countries appears. However, the host country's restriction on foreign investment is a legal act of that country [2]. Therefore, the admission of foreign capital reflects the degree of the country's economic opening to the outside world to a certain extent.

Negative list, also known as negative list, is a blacklist of areas where a country restricts or prohibits foreign investment access in international investment. As Hobbes mentioned in his book *Leviathan*: "In all acts not prescribed by law, people have the freedom to do what reason thinks they should do [3]." Pre-admission national treatment is to give international investors the same treatment as their own nationals. The negative list is actually an exception to the principle, following the explanatory logic of "unless it is prohibited by law, it is permitted by law", which embodies the legal concept of "freedom without law prohibition" [4]. With the increase of the total

amount of international investment, the negative list system of foreign investment access is more and more accepted by more countries. Since the establishment of Shanghai Pilot Free Trade Zone in 2013, China has continuously explored and improved the negative list system of foreign investment access. The existing Special Administrative Measures for Foreign Investment Access (Negative List) (2021 Edition) contains 12 areas and 31 special administrative measures [5], which involves 21 prohibitions and 10 restrictions. Chinese Foreign Investment Law was proclaimed in 2019, which defined the pre-entry national treatment plus negative list management system at the legal level for the first time [6].

2. Legal Issues of Negative List System

2.1. Specific Issues on the Legal Basis of the Negative List System

Although the Foreign Investment Law has been enforced for more than two years, the legal provisions concerning the negative list system are not detailed. For example, Article 30 of the Foreign Investment Law [5] defines that foreign-invested enterprises should go through the licensing formalities according to law to make investments, but it does not clearly indicate what relevant laws need to be based on. Article 34 stipulates the information reporting system as follows: “The content and scope of the foreign investment information report shall be determined according to the principle that it is really necessary” [5], without listing or instructing the necessary principles. Article 35 mentions the security review system [5], but the specific process of security review is not listed. Lack of detailed and specific provisions will affect the operability of negative list system in practice and easily lead to investment disputes.

2.2. Transparency of Negative List System

The principle of transparency is an important principle of the World Trade Organization. It requires WTO members to publish trade measures to ensure the stability and predictability of the investment environment, which plays a key role in the realization of fair trade and competition [7]. A more transparent negative list system will improve the predictability of investors to the investment country system, improve the transaction efficiency between the two sides, and reduce the occurrence of trade friction to a certain extent. As an important part of trade measures, laws and regulations related to trade measures should be published in the negative list system. However, the existing special management means for foreign investment access (negative list) in 2021 only listed the serial numbers and fields of special management measures, but did not list the corresponding legal and regulatory basis. For another example, in the negative list of the 2021 edition, it is mentioned that “medical institutions are limited to joint ventures” and “market research on leasing and business services is also limited to joint ventures”, but there are no specific provisions on the form of joint ventures.

2.3. The Problem of Perfect Legal Supervision Mechanism

In 2019, “The Guiding Opinions of the State Council on Strengthening and Regulating Post-event Supervision” mentioned that in order to give full play to the decisive role of the market in resource allocation and the role of the government, more administrative resources should be engaged in pre-approval to strengthen post-event supervision [8]. From the pre-approval system to the after-the-fact supervision system after applying the negative list system, the approval procedures for foreign investors have been simplified, the approval efficiency has been improved, the openness of the negative list has gradually increased, the enthusiasm of foreign investors has been improved,

and more and more enterprises have invested. However, the post-event supervision system actually requires higher supervision ability of the state, because it does not mean "laissez-faire supervision". On the contrary, if we want to insure the enforcement of the negative list of foreign investment access, we must take the supervision mechanism after the event as the guarantee.

First of all, it is inevitable to establish and improve the legal system of post-event supervision. The existing Foreign Investment Law establishes the principle of national treatment before admission and the negative list system, and the Implementation Regulations of the Foreign Investment Law make more specific provisions from the opposite side of investment promotion, investment protection, investment management and legal responsibility. However, there are not many laws and regulations related to supervision, such as Articles 32, 33, 34 and 35 in the Foreign Investment Law [9], and more detailed and specific provisions in Articles 37, 38, 39 and 40 in the Implementation Regulations of the Foreign Investment Law [10]. It can be seen that the number of in-process and post-event supervision legal systems supporting the negative list system is small, the supervision system is still incomplete, and the relevant regulations are not enough to cover the current foreign investment field in China, which is prone to investment risks and supervision problems.

Secondly, the regulatory information should be open and transparent. The open and transparent supervision information ensures that the post-event supervision is in line with the laws and regulations, secures the legitimate rights and interests of foreign investors, creates a good business atmosphere and improves the credibility of the Chinese government. In addition, the openness and transparency of post-event supervision information will also improve the efficiency of supervision, strengthen the cooperation ability among supervision departments, and reduce and eliminate the double possibility of missing risks and repeated supervision. Meanwhile, the supervision after the application of big data technology will undoubtedly provide a new development direction for foreign investment access management. However, the effect of big data supervision has not been fully exerted. For example, Guangdong, Chongqing and other free trade zones have already used big data supervision technology to build supervision platforms, but there are still many problems. Some platforms are in the initial stage of construction, which leads to the overhead cooperation among platforms and low data sharing; the authenticity of data uploaded by foreign investors is doubtful, and the progress of data update cycle is slow.

3. Measures to Improve the Negative List System

3.1. Clarify the Legal Basis of the Negative List System

The Foreign Investment Law, officially proclaimed in 2019, is the unification of the "three foreign investment laws", the fourth of which clarifies the national treatment and negative list management system for foreign-invested enterprises in China [9]. This is undoubtedly conducive to the introduction of foreign capital in China. The provisions of the Foreign Investment Law on filing system, anti-monopoly review, information reporting, and national security review system are relatively simple [9]. In the same year, the Regulations on the Implementation of the Foreign Investment Law were more specific, but the number of corresponding clauses matching the negative list system was less. Therefore, we should refine and specify the legal system related to pre-entry national treatment and negative list system, supplement the relevant clauses as soon as possible, such as the specific review process and the setting standards of negative list. This will consolidate the legal status, enhance the predictability of the negative list system, reduce the investment disputes and legal risks arising from "no legal basis" in practice.

3.2. Make the Negative List System Transparent

Chinese negative list system should be more transparent. The negative list of the existing 2021 version has a simple list of special management measures. The corresponding legal basis of 12 items and 31 special management measures in the existing negative list (2021) should be attached, and some specific provisions should also be transparent. For example, the specific form and proportion of joint venture should be pointed out in the relevant "joint venture" provisions, so as to improve the investment interest and confidence of foreign investors and make China's investment market more open, transparent and predictable.

3.3. Establish and Improve the In-process and Post-event Supervision Mechanism

Perfecting the supporting legal system of negative list is one of the important weights to attract foreign investment in China, and we should establish and improve the supervision mechanism during and after the event. Comparatively speaking, the existing laws and regulations supporting the negative list system in European and American countries are relatively complete, with numerous bases, strong transparency and credibility. The legal basis related to China's negative list mainly includes Foreign Investment Law, Implementation Regulations of Foreign Investment Law, Anti-monopoly Law, Guidance Catalogue of Foreign Investment Industries, etc. The legal system is not perfect enough, so it is vital to speed up the introduction of legal system regulations that are suitable for other existing investment environments. Meanwhile, it is inevitable to facilitate the supervision and law enforcement personnel to perform their duties with due diligence, enforce the law fairly, and fully implement the administrative law enforcement responsibility system and accountability system [8].

The Third Plenary Session of the 18th CPC Central Committee put forward: "The overall goal of comprehensively deepening reform is to improve and develop the socialist system with Chinese characteristics and promote the modernization of the national governance system and governance capacity [11]." At present, there are some problems, such as the lack of transparency of regulatory information after the incident and the low cooperation efficiency of various regulatory departments. We should establish and improve the supervision information platform, and all supervision departments should work together and open up the information sharing platform to prevent the problems of repeated supervision or omission of supervision among supervision departments. Today, the country is increasingly relying on online platform tools to achieve offline regulatory goals [12]. Big data regulation is the premise of the state's precise governance in the construction of post-event regulation system [13], efforts should be made to develop the information sharing platform relying on big data technology, and establish an early warning system including key monitoring areas. Open the sharing channels of various platforms, train people who are proficient in big data supervision to ensure that the platform runs and operates correctly, and popularize the significance and operation process of the big data sharing platform for foreign investors. At the same time, we should also further the accuracy of data review on the information sharing platform, avoid uploading false information, and update the updated information uploaded by users in time to prevent the delay of review and dampen the enthusiasm of foreign investors. In the process of promoting government informatization, we must create the institutional conditions of e-government and constantly push forward the reform of administrative system [14].

4. Conclusions

The negative list of foreign investment is an important symbol of the openness of the host country, which is of great significance to both foreign investors and the host country. "Foreign

Investment Law" establishes the principle of pre-entry national treatment and the status of negative list, but there are still some problems in the existing negative list system, such as unclear legal basis of negative list, opaque negative list system, imperfect legal system after the event and meticulous legal provisions, non-disclosure and transparency of regulatory information, and inefficient use of regulatory platforms such as big data. At the same time, this paper gives the perfect measures to solve the legal problems related to negative list, making the existing legal provisions detailed and transparent, building a legal system related to the negative list, paying attention to in-process and post-event supervision, and building a good supervision sharing platform based on the big data information platform. In the future, Chinese negative list system of foreign investment access will be confronted with new problems, especially when foreign investment is introduced under the COVID-19 epidemic, which will put forward new requirements for China's negative list of foreign investment access. Therefore, only by examining the negative list system, constantly solving the new problems faced by the negative list system, and studying the corresponding solutions can we continuously inject new impetus into China's introduction of foreign capital, and better integrate with the international community.

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