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CPEC and treatment accorded to Chinese investment in Pakistan under bilateral regime

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Abstract: Foreign Direct Investment (FDI) plays a significant role in the development and growth of the countries. In order to attract the foreign investors, States enter into bilateral investment treaties, focusing on the promotion and protection of investment. Pakistan and China are neighbors and enjoy long term economic and political relations. Friendship of China and Pakistan is termed as "all-weather-friendship". Along-with a treaty of friendship and other significant treaties, China and Pakistan have also entered into three major bilateral treaties which specifically focus on the promotion of bilateral trade and investment and provide extended standards of protection for Chinese investment in Pakistan. Long standing relationship of China and Pakistan has been changed to geo-strategic and economic partnership which resulted into the agreements of mega projects under China-Pakistan Economic Corridor (CPEC). Under the said corridor, Chinese companies are investing billions of dollars in Pakistan. With the successful completion of CPEC, both the States will enjoy a lot of economic as well as strategic benefits. Research paper in hand explores CPEC and tries to enlist the treatment accorded to Chinese Investment in Pakistan under various national laws and bilateral agreements, so that Chinese Investor could be made aware of the legal issues involved in the way of foreign investment in Pakistan. Existing treaties between China and Pakistan and local laws of Pakistani that deal with foreign investment have been explored and analyzed for the above said purpose. Our research concludes that although Pakistan contains a quite liberal regime for Chinese investors in the Asian region.

Keywords: China Pakistan economic corridor, Foreign investment, Bilateral treaty, Regime, Nsational laws

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INTRODUCTION

Pakistan appeared on the face of the earth as an independent State on August 14, 1947 (Mohiuddin, 2007). Pakistan with population of 220.1 million, is fifth-most populous country of the World (Hongdao et al., 2018). Pakistan is strategically located in the South East Asia, sharing boundary with China in Northeast, India in the East, Iran and Afghanistan in the West. The Arabian Sea is situated in the south side of Pakistan with a coastline of 1,046 kilometers. The Arabian Sea functions as a central trade route between Pakistan and the world (Ghouri, 2016). Pakistan is situated in an area which has significant strategic, economic and political importance not only in the Asia but also in the whole world. Further, Pakistan being the only Muslim nuclear State has great potential to influence the socioeconomic and political sphere (Adnan & Fatima, 2018). Moreover, Pakistan's importance is enhanced due to its location near the Persian Gulf; where about 65 percent oil in the world is produced.

Pakistan is strategically vital for China as it offers China with access to warm waters of the Arabian Sea through a land route distance of 2500 KM from Xinjiang to Gwadar. More than sixty percent of China's oil comes from Gulf countries. It spends a few months to travel, approximately, 16,000 kilometers to reach the Shanghai port. By using Pakistani sea port Gwadar, this distance will be reduced to just 5000 kilometers (Abid, 2021). This not only reduces the transportation distance, but also cuts shipping costs for China. More importantly, it could enhance China's energy safety also. Furthermore, it will also reduce considerably, the Chinese distance to Africa and Europe.

Various studies have been conducted on CPEC from different angles. For example Mirza and his co-researchers have studied the potential impacts of CPEC for enraging saving (Mirza et al., 2019). Noor and others have tried to measure the impact of CPEC on stock market in Pakistan (Noor et al., 2021). Asif H Qureshi has provided a critical

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analysis based on national and international perspective (Qureshi, 2015). Research is required to be conducted on treatment accorded to Chinese Investment in Pakistan; said gap is intended to be filled through research in hand.

Research Objectives

Followings are the objectives of this research:

- To explore the Bilateral Agreements between Pakistan and China that deal with Protection of Investment
- To encircle Pakistani National Laws dealing with foreign investment
- While focusing on above two objectives, draw a clear picture of treatment accorded to Chinese Investment in Pakistan under the bilateral regime.

Gwadar Port and CPEC

In the 16th and 17th Century, Makran coast, which included Gwadar, was occupied by the Portugese and the area of Gwadar was gifted to the Sultan of Oman in the 18th century by the Khan of Kalat which was later on purchased back by Pakistan in 1958. Pakistan finalized the idea of a port at Gwadar in 1993 and it was approved by the Executive Committee of the Cabinet (ECC) in June 1994 (Zaheer, 2006). Gwadar Port is a deep-sea port located on the warm-waters of the Arabian Sea, in the Balochistan province of Pakistan (Anwar, 2010). It is about 120 km from Iran on one side and the other side is Oman which is about 380 kilometers across the Arabian Sea. Gwadar Port is situated at the opening of Persian Gulf, near the Strait of Hormuz, which is a hub shipping route in the region (Majid, 2017). Being one of the world's deepest seaports, Gwadar is becoming an attractive destination for visionary investors. In the beginning of the year 1996, the Government of Pakistan released PKR 2 billion for the construction of Gwadar deep sea port. In 2002, Pakistan signed an agreement under which China Harbor Construction Company was assigned the construction project of the 1st phase of the port at the cost of 248 million US dollars. Work under 1st phase at Gwadar completed in 2006 (Kardon et al., 2020).

The cost of the development work of 2nd phase of the Gwadar deep sea port was estimated to be US $840 million. For the purpose of second phase, In the year 2007, an agreement for the development and operations of Gwadar port was signed between the Pakistan and Port of Singapore Authority (PSA), but after failure of PSA to develop the port within stipulated period of time, the Construction, management and operations agreement was transferred by Government of Pakistan from PSA to China Overseas Port Holding Company Ltd (COPHCL) in February 2013 (Nicolas, 2015). In order to connect Gwadar Port with Xinjiang province of China via roads, railways including a pipeline for the oil, Pakistan and China planned China-Pakistan Economic Corridor project (CPEC) (Ahmar, 2014). Construction of an International Airport at Gwadar was also a part of the project (Ahmar, 2014). According to the proposed plan, CPEC will start from Kasghar City in Xinjiang province of China, after passing through the major cities of Pakistan; it will end at Gwadar Seaport in the Balochistan province of Pakistan with estimated length of 2700 Kilometers (Group, 2018).

China Pakistan Economic Cooridor

Li Keqiang, the premier of China, was amongst the founding advocates of the CPEC project; since that time the current Chinese President Xi Jinping, the former President of Pakistan Asif Ali Zardari, former Pakistani Prime Minister Mian Muhammad Nawaz Sharif and Current Prime Minister of Pakistan Mr. Imran Khan have become the strongest supporters of this project. The inauguration ceremony of CPEC Secretariat was held on August 27, 2013 in Islamabad (Ali, 2020). Chinese President Xi Jinping suggested building "China-Pakistan Community of Shared Destiny" during his meeting with Pakistani counterpart Mamnoon Hussain on Feb 19, 2014 (Khan, 2015). In November 2014, the government of China pronounced her resolve to provide the Chinese companies with funding for infrastructure and energy projects worth 45.6 billion US dollars to execute the projects in Pakistan which were essential for CPEC (Hussain & Khan, 2017). Initially, China agreed to invest around $33.8 billion and 11.8 billion US dollars in multiple energy projects and infrastructure projects respectively. The deal also included the 622 million US dollars, specifically assigned to the Gwadar port project (Hussain, 2017). Pakistan and China also planned to build eight special economic zones along the CPEC including one in Gwadar and one in Kashgar (Ahmar, 2014).

Pakistan has encouraged Chinese enterprises to set up in Pakistan for developing import and export processing industries, manufacturing industries, agriculture, and infrastructure construction (Menhas et al., 2019). According to the deal, the government of China and Chinese banks, including China Industrial and Commercial Bank (ICBC) and China Development Bank, and other commercial banks, would grant loans to Chinese companies, who would invest in the projects as commercial ventures (Malik, 2014). In this way Chinese companies are going to invest about 62 billion US dollars which was initially planned for 46 billion (Adawi et al.). Under the CPEC project, construction and completion of the projects were divided into three main phases. The estimated date of completion of short-term projects was by 2017; medium-term projects in second phase were set to be completed by 2025, and long-term projects would be implemented by 2030 (Ranjan, 2015). Foreign investment of China in Pakistan has increased rapidly in recent years.

Vision Behind CPEC

Vision behind the establishment of CPEC is to raise the living standards of the people of China and Pakistan by constructing a joint corridor promoting regional connectivity, bilateral construction, bilateral trade, investment and people to people contact (Chattha & Sayed, 2019). It includes:

- Infrastructure Development
- Socio-Economic Development
- Cooperation in Energy Sector
- Agricultural Development
- Financial Cooperation
- Cooperation in Livelihood Areas
- People to People Communication
- Tourism Development
- Human Resource Development

China Pakistan Economic Corridor Authority Act, 2020 has also been enacted by the legislature of Pakistan to effectively supervise and execute the projects under CPEC (Hussain, 2019).

Pak-China Bilateral Regime

As investment of China in Pakistan is under discussion, it is important to look into the bilateral agreements that provide bases for Chinese investment in Pakistan. Pakistan and China have long term trade and investment relations. Both Countries have entered into various bilateral agreements which play role in the investment activities. The most important treaties signed between China and Pakistan that subsequently succeeded to build the confidence for projects under China Pakistan Economic Corridor (CPEC) are:

- Pak-China Bilateral investment Treaty BIT, 1989
- Pak-China Free Trade Agreement FTA (in goods and Investment) 2006
- Pak-China Free Trade Agreement FTA (in services) 2009.

Laws Related to Foreign Investment in Pakistan

As this research focuses on the legal issues involved in the way of foreign investment, therefore, it is necessary to figure out the nature of Laws and regulations available in Pakistan which deal with the foreign investment. Since the creation of Pakistan, It has been making laws and regulations to attract the foreign investors and to facilitate them in their investment projects. Currently, following Statutes are in force in Pakistan, which deal with foreign investment:

- Special Economic Zones Act, 2012
- Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011
- The Arbitration (International Investment Disputes) Act, 2011
- The Protection of Economic Reforms Act, 1992
- The Foreign Investment Protection and Promotion Act, 1976
- Foreign Exchange Regulation Act, 1947

Beside mentioned laws, Pakistan has a wide net of investment treaties. Bilateral Investment Treaties (BITs) are regarded as an effective tool for attraction of foreign direct investment (FDI) through providing facilitation and protection to the foreign investors. Pakistan is pioneer of BITS as the world's first BIT was signed by Pakistan with Germany in 1959 (Tache, 2020). So far, Pakistan has concluded 53 BITs with 48 countries of the World (Khan et al.). Pakistan has also signed treaties for the avoidance of double taxation with 66 countries including China (Khan et al., 2019). Investment policy 2013 announced by Federal Government of Pakistan also provides concessions and incentives to foreign investors (Chang & Khan, 2019).

Treatment and Protection Accorded to Chinese Investments Under Pak-China Bilateral Arrangments

China and Pakistan signed bilateral investment treaty in 1989. Furthermore, in 2003, both the countries signed preferential trade agreement which was converted to Free Trade Agreement (Trade in Goods and investments) in 2006 (Khan & Mahmood, 2017). In Pak-China FTA 2006 both the States agreed to continue negotiations for further trade and investment relations, Consequently, Pakistan and China reached to another important Free Trade agreement for trade in services in 2009 (Irshad et al., 2016). China and Pakistan have also signed various memorandums of understanding (MOUs) for the protection and protection of investments. Under the provisions of these above mentioned bilateral agreements, Pakistan provides special treatment to Chinese investors in order to promote, encourage and protect the Chinese investment in Pakistan. Treatment and protection given to Chinese investors under these treaties is discussed as under;

National Treatment

Pakistan being the founding member of the World Trade Organization (WTO) has included the provisions of the General Agreement on Tariffs and Trade (GATT) into its Free Trade Agreements. Under article 15 of Pak-China FTA (Trade in Services) 2009 and article 7, 48 (2) of Pak-China FTA (Trade in goods and investments) 2006, National Treatment has been made available for Chinese Investors in Pakistan. Therefore, Chinese Investors in Pakistan cannot be accorded less favorable treatment than the local investors of Pakistan (Irshad, 2017).

Most Favored Nation Treatment: China is one of the strongest trade partners of Pakistan. Most Favored Nation (MFN) has been to Chinese investors in Pakistan under Article 12 of Pak-China BIT 1989 and 48 (3), articles 50, 55 of China-Pakistan FTA 2006 (Kumar, 2007).

Fair and Equitable Treatment: Chinese investors have also been promised to accord fair and equitable treatment under article 3 of Pak-China BIT 1989 and article 48(1) of Pak-China FTA 2006 (Zaheer, 2006).

Full Protection and Security: Although security and protection of persons and their investments are covered under Constitutional provisional but provisions for the protection and security are provided under bilateral agreements also. These provisions indicate the assurance of contracting parties towards the safety of investments. Under article 47 of Pak-China FTA 2006 and article 3 of Pak-China BIT 1989, security and protection are required to be provided to Chinese Investment in Pakistan (Mirza et al., 2019).

Transparency: Transparency is an essential element for any transaction in order to conduct its business properly. The elements of malice and corruption are considered to be fatal for every course of business. It is ensured in Pak-China FTA 2006 that transparency requirements and cooperation standard as provided by WTO/TBT agreement shall be observed (Zaheer, 2006). Pakistan has agreed to establish a cooperation mechanism, exchange of information to tackle the risks and designate a point of contact to facilitate the communication process between the parties in case of any conflict arising in the business or investment. Transparency provision is also provided in the Pak-China FTA in Services 2009 (Ranjan, 2015).

Safeguards to Investments in Case of Unfortunate Event: In an event of long term investment, investor and the home state are aware of the fact that any extraordinary situation may arise in the long run. This extraordinary situation may be caused by social disorder, economic setback, war, force majeure or any situation of the emergency in the territory. So a legal framework must be formulated to protect the interest of the investor in such a case (Mohiuddin, 2007). In this regard certain provisions have been included establishing mechanism and ensuring equitable treatment of the investor bearing loss (Khan et al.). The measures provided by Pakistan include restitution, indemnification, compensation and other settlements, suitable to satisfy the loss suffered by the investor in consequence of an unfortunate event (Qureshi, 2015).

Transfer of Funds: In case of trans-national business activities the regulation of inflow and outflow of the capital and current transaction is very important (Siegel, 2002). Most treaties circumscribe the two way transfer of capital, but some treaties only address the inflow or outflow of the investment. As agreed under Pak-China FTA 2006 and Pak-China BIT 1989, Pakistan ensures for the Chinese investors, the transfer of their investments and returns subject to its laws and regulations. It also ensures the free transfer of funds obtained in the form of compensation in case of an unfortunate event (Naz et al., 2018); this transfer shall be subject to its exchange into freely convertible currency at the prevailing market exchange rates. Pakistan also ensures the free transfer of funds under article 10 of the Pak-China FTA in Services 2009 for Chinese investors in the services sector (Malik, 2014).

Safeguards as to Expropriation: There are certain safeguards ensured by Pakistan for the purpose of expropriation of any property which belongs to the foreign investor. The measures and conditions necessary to be fulfilled before the commencement of expropriation or nationalization are given below:

- There must be a substantive purpose of public interest.
- There must be no element of discrimination, prejudice or bias.
- Adequate compensation must be given against expropriation.
- Expropriation must be done according to the procedure given in domestic law on expropriation (Heiman & Nickerson, 2004).

The estimation of the value of property going to be expropriated shall be equivalent to the value of investment right before the expropriation or the time when it becomes public knowledge. Above mentioned compensation is required to be paid, immediately, without delay and in the form of freely convertible currency. In case of delay of compensation, appropriate interest also to be paid to investor in order to compensate the delay (Kwarteng & Botchway, 2019; Qureshi, 2015). If the investor has any objection against the expropriation, he is free to go to the competent court in Pakistan against such expropriation (Hoops, 2016).

CONCLUSION

China and Pakistan have increased collaboration for the construction of China Pakistan Economic Corridor (CPEC). Chinese President Xi's idea of "China-Pakistan Community of Shared Destiny" in order to secure the common interests through jointly favorable partnerships can raise relations of China-Pakistan to an even higher level. The CPEC project will result in a lot of economic and strategic benefits for both China and Pakistan. Therefore, a due diligence and commitment are required to complete these projects as early as possible in order to gather the benefits from them. Currently leadership of both countries is committed to speed up the work for the due and timely completion of these projects designed for the execution of CPEC. In the current security situation of Pakistan, Chinese commitment to invest in Pakistan under multibillion projects will encourage the investors from all over the world, and it will help Pakistan to secure the confidence of Foreign Investors. Pakistan has a liberal foreign investment regime in the region and Pakistani investment laws provide a strong protection to the foreign investments. A lot of advantages and benefits are being provided by the government of Pakistan to foreign investors, especially to the investors of China in order to encourage them. Furthermore, Pak-China bilateral regime provides effective legal cover for the protection of Chinese Investment in Pakistan. If executed successfully, CPEC will not only improve the infrastructure including roads, railways, pipelines etc. but also it will bring economic benefits for the people across the borders.

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