Voluntary “Westernization” of the Expropriation Rules in Chinese BITs and Its Implication: An Empirical Study

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I. INTRODUCTION

Compared with many other countries, China is a newcomer in the bilateral investment treaty (BIT) program. However, since China adopted the “Open door” policy in the late 1970s, its BIT practice has been on a fast track. Up to now, China has signed BITs with 128 countries, ranking the second only to Germany on a global scale. Against this background, especially since the Chinese government proposed the “Going abroad” strategy in 1998, Chinese and international scholars began to focus on the policy transition of Chinese BITs, which are generally divided into “two generations”. As compared to the first generation, two major innovations of the new generation BITs are emphasized, i.e., the country’s acceptance of comprehensive investor-state dispute settlement and the inclusion of national treatment standard. As to the reason of China’s policy shift, almost all scholars attribute this to China’s practical needs to protect its emerging overseas investment. For example, Ms. Heymann directly states that “the bilateral investment law relating to China has...
changed over the last years due to China’s economic transformation from a country receiving FDI to a country with outward investment."  

However, when reviewing China’s involving BIT practice, a similar important provision – the expropriation and compensation clause – has been ignored. In fact, expropriation clauses have traditionally been at the heart of BITS. The controversy between the “Hull formula” (prompt, adequate and effective compensation) advocated by the developed countries and the appropriate compensation purported by developing countries once ranked one of the most debated issues in the movement of establishing a new international economic order (NIEO) during the 1960-1970s. The essence of the North-South conflict on expropriation issue is a policy stress between private property rights and national sovereignty. So, a review of the evolution of expropriation and compensation clauses in Chinese BIT practice will be of necessity and help to assess the progress made by the Chinese government to protect private property, as well as to gain a fresh understanding of China’s changing attitude towards international law.

A report released in 2007 by the United Nations Conference on Trade and Development (UNCTAD) pointed out that “one of the most salient trends among recent BITS is that most agreements include language that has the effect of applying the standard of prompt, adequate and effective compensation.” In light of such a trend, this article aims to find out that, as an active participator and promoter of the NIEO movement in history, whether China has in its second-generation BITS abandoned the appropriate compensation standard that it once claimed, but been approaching to the “Hull formula” advocated by the developed countries. The author tries to give an affirmative answer through an empirical study of the 131 Chinese BITS that collected (Part II). Considering the relationship between national law and international law, a review is done on China’s national legal development on expropriation (Part III). Based on this, the author endeavors to explore the coherency and interaction between China’s BIT practice and its national law (Part IV), as well as China’s changing attitude towards international law (Part V).

II. EVOLVING EXPROPRIATION RULES IN CHINESE BIT PRACTICE

In order to protect investors' lawful benefit and to promote the free flow of international investments, expropriation and compensation have been one of the key provisions in a typical BIT. In the 1960-1970s, developed countries – mostly capital-