Analysis of Chinese Bilateral Investment Treaties: Focusing on Provisions of Performance Requirements and National Treatment

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1. Introduction

1.1. Background

In recent years, the contracting activities in the field of international investment have been increasing rapidly, the discussions over international investment agreements are also heating up. There are three major forms of international investment agreements, which include bilateral investment treaty (BIT), regional and plurilateral investment treaty, and multilateral investment treaty. Post World War II, although a multilateral investment treaty was conventionally considered as the most effective instrument for promoting international investment, the practices of multilateral investment treaty were not successful, the OECD's "Multilateral Agreement on Investment (MAI)" was a representative example. As of today, a comprehensive multilateral investment treaty still does not exist in the world.

Contrast to the stagnation on multilateral investment treaty, the number of the bilateral investment treaties (BITs) has increased rapidly. Since the date when the first bilateral investment treaty was entered into in 1959, the number of bilateral investment treaties has been increasing significantly year by year, and currently the bilateral investment treaty has already become the most popular form of international investment agreements. The number of bilateral investment treaties had been concluded during 1959 to 1989 was less than 400, but in the following 20 years, more than 2,000 bilateral investment treaties had been signed. To the end of 2008, the number of BITs reached 2,676, and 176 countries were involved. [1]At present, bilateral investment treaty is the most widely used form of international investment agreements.

The first Chinese bilateral investment treaty was concluded between China and Sweden in 1982. And according to the news from "*Coping with Financial Crisis, Encourage Enterprises to 'Go Global' Special Press Conference*" which was hold by Ministry of Commerce of the People's Republic of China on 29th April 2009, until then China has signed 125 bilateral investment treaties with more than 100 countries, ranking second to Germany in a global scale. [2] The latest information available about Chinese BITs was news reporting that China and United States of America (hereinafter United States or U.S.) had started the negotiation over bilateral investment treaty in June, 2008. To this date, the negotiation is still in progress. This thesis focuses on several issues in these BITs. United States, in pursuing the liberalization of investment, always in its BITs insists on eliminating performance requirements and extending national treatment to pre-establishment phase. However, the provision of performance requirements rarely appears in Chinese BITs and the national treatment was only granted to foreign investment in post-establishment phase.

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[1] UNCTAD. Recent Developments in International Investment Agreements (2008–June 2009). 2009 available at: http://www.unctad.org/en/docs/webdiaeia20098_en.pdf (Last visited: November 1, 2010).

[2] The data from the website of Ministry of Commerce of the People's Republic of China, available at: http://sousuo.mofcom.gov.cn/query/queryDetail.jsp?articleid=20090506255200&query=%E5%8F%8C%E8%BE%B9%E6%8A%95%E8%B5%84 (Last visited: February 10, 2010).

Therefore in the negotiation of China-U.S. bilateral investment treaty, a problem was created—whether China should adopt extensive prohibition on performance requirements and national treatment in pre-establishment phase in China-U.S. BIT? Or should China adopt extensive prohibition on performance requirements and national treatment applied to pre-establishment phase in Chinese BITs? The following 5 chapters in this focus on discussing this question.[3]

1.2. Literatures

The publications of United Nations Conference on Trade and Development (short for UNCTAD) are important source for the thesis. The "World Investment Report" series focuses on different topics each year and provides official statistics of foreign direct investment (FDI) every year. The data and analysis in "World Investment Report" are helpful for the author to gain knowledge about the growth, changes and trends of the FDI. The "UNCTAD Series on Issues on International Investment Agreements" and the "UNCTAD Series on Issues on International Investment Policies for Development" summarizes key issues on international investment agreements, which help the author to know the history, characteristic, and prospect of bilateral investment treaties. The "Bilateral Investment Treaties 1959-1999" provides a snapshot of the universe of bilateral investment treaties signed from 1959 to the end of 1999. The "Bilateral Investment Treaties 1995-2006" provides more details on issues of the bilateral investment treaties and identified the trends of development of specific elements in bilateral investment treaties. Through both of the documents, the author managed to learn about the particular practices of bilateral investment treaties in international world.

The UNCTAD published the book *"Preserving Flexibility in IIAs: The Use of Reservations"* in 2006, which paid attention to the flexibility in development by stating, "*it is important that IIAs do not unduly constrain the degree of flexibility afforded to national policy makers in the pursuit of development or other national policy objectives*"[4]. The São Paulo Consensus also reminded countries especially developing countries to take note of the loss of policy flexibility because of international disciplines and commitments.[5] *"The Protection of National Security in IIAs"* in 2009 is also related to this issue. Both the materials will be referred to in discussing the balance between investment protection and flexibility in national policy in chapter three of this thesis.

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[3] According to the classifications of United Nations Statistics Division and International Monetary Fund, China is a developing country. So China is discussed as a developing country in this thesis.
The classifications are available at: http://unstats.un.org/unsd/methods/m49/m49regin.htm#landlocked and http://www.imf.org/external/pubs/ft/weo/2010/01/weodata/groups.htm#oem. (Last visited: February 28, 2011).
And according to the statistics of UNCTAD and Chinese government, for China, inflows of FDI are much more than its outflows. And many of them are invested in China, Hong Kong. So in Chinese BITs, China is mainly at the position of the host country.
The statistics are available at: UNCTAD, *World Investment Report 2009*, at 51-53 and the website of http://www.fdi.gov.cn/pub/FDI/wztj/default.htm, (Last visited: February 28, 2011).

[4] UNCTAD, *Preserving Flexibility in IIAs: The Use of Reservations*, (United Nations Publication, 2006), at 6.

[5] Ibid. at 15.

Part II of *"The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries"* focuses on the impacts of BITs on flows of FDI. It overviews 15 major econometric studies that had examined the issue of the impact of BITs on FDI flows into developing countries.[6] To obtain the more and specific information, the author has also reviewed other relevant articles, including Chinese literatures. The inconsistent conclusions of these literatures will support the argument of the thesis.

The status of Chinese bilateral investment treaties can be observed from the Chinese bilateral investment treaties and Chinese foreign investment legislations. And there are many books and articles introducing their researches and analysis of Chinese bilateral investment treaties. *International Investment Law (Second Edition)* by Wang Guiguo, a textbook of international investment law, is useful for the author to understand systematically the theories of bilateral investment treaties. *New Developments in International Investment Law and New Practice in China's Bilateral Investment Treaties* by Chen An, and *The New Discussion in International Investment Treaties and Agreements* Lu Yongjin, Yu Jinsong, Qi Chunsheng that analyze the new developments and characteristics of international investment rules and Chinese bilateral investment treaties, which are helpful for the author to understand the specific status of Chinese bilateral investment treaties. Besides the specific Chinese legislations related to performance requirements and national treatment, several Chinese articles and books that analyzed the two issues are also useful for the discussion in chapter five. All the literatures are listed in the Reference

1.3. The Scope and Limitation

It is impossible to discuss all issues of BITs in the thesis due to the limitation on the length of the thesis. Rather than simply and superficially discussing all of the issues, this thesis is intensively analyzing two provisions—the performance requirements and national treatment. Since the performance requirements and national treatment are also important contents of Chinese domestic legal system, this thesis will also review on related Chinese foreign investment laws and regulations

1.4. Methodology

This thesis mainly adopts two steps of study. First, to achieve the objectiveness of the thesis, plenty materials have been researched. The author has collected available publications, official documents from the websites of Ministry of Commerce of the People's Republic of China and United Nations Conference on Trade and Development. The author has also collected materials from the Library of University of Macau. LexisNexis Academic Universe, Westlaw International as well as China

[6] UNCTAD. *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*. (United Nations Publication. 2009), at 33.

Academic Journal Full-text Database are also used to collect e-resources for the study.

Then the author chose some useful materials to conduct analysis, especially historical survey, theoretical analysis and comparative analysis. The thesis studies and analyzes the legal instruments, treaties, and articles that are related to the subject. The author has gained understanding of the history, prospect and substantive issues of the bilateral investment treaties through studying the series of documents in the databases of UNCTAD and several academic articles. The author compares Chinese BITs and U.S. BITs and analyzes practices of India and Argentina to study the subject.

The thesis refers to many BITs especially Chinese BITs. To conserve space and to promote the readability of the thesis, the thesis does not cite any BIT by its full and formal title. For example, the "Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investment" will be cited as the "China-German" BIT. The text of the BITs cited in the thesis can be found on the website of United Nations Conference on Trade and Development (UNCTAD) at http://www.unctad.org. The text of Canadian and U.S. Model BITs could also be found at http://ita.law.uvic.ca and http://www.state.gov. The Chinese laws and regulations in the thesis can be researched at website of "*invest in China*" at http://www.fdi.gov.cn and database of Lawyee at http://www.lawyee.net/.

This thesis is also based on the extensive study of available academic literatures. Most of the resources are collected from Library of University of Macau. And some publications are available at UNCTAD database at http://www.unctad.org. several online databases, LexisNexis Academic Universe, Westlaw International, China Academic Journal Full-text Database and Social Science Research Network, , are also used to gather related academic literatures.

The thesis rarely refers to investor-state dispute arbitral cases but only mentions a few cases in the text or footnote. The text of these case awards can be found on website of International Center for the Settlement of Investment Disputes at http://www.worldbank.org/icsid, the website of Foreign Affairs and International Trade Canada, at: http://www.international.gc.ca/international/index.aspx?lang=eng, and the website of United States at http://www.state.gov.