Valentina Sara Vadi: “Law, Culture, and the Politics of Chinese Outward Foreign Investments”

Based on

CHINESE BITS AND ARBITRATION DISPUTES
It is a known fact that countries, in general, decide to establish Bilateral Investment Treaties (BITs) when seeking to invest abroad in particular in developing and Least Developing Countries (LDCs). As such, these treaties would provide protection for either Multinational Companies (MNCs) or Nationally Owned Enterprises (NOEs) of these countries to make investments in new places where domestic legislations do not afford the necessary legal guarantees for foreign companies making investments in unstable or even failed states. Thus, through these BITs, countries in particular those seeking to make huge investments in the south either via their MNCs or NOEs would provide the necessary legal guarantees for their companies to make huge Foreign Direct investments (FDIs) which would, in turn, allow in a way or another these states to enjoy a relatively better position when conducting negotiations with the countries in which these companies are operating. In the chapter Law, Culture, and the Politics of Chinese Outward Foreign Investment, the author Valentina Sara Vadi explored the reasons for which there are a limited number of disputes under Chinese BITs. According to the author, several factors played a role in limiting the role of the dispute settlement mechanisms in Chinese BITs.

These factors range from not referring to the mechanism in the first place in particular in the earlier Chinese BITs or to limiting the scope of investment arbitration to the quantification of compensation for expropriation for instance. That was the case when China was a capital importing country in contrast to now where China is also a capital exporting country as there is a need to protect Chinese investments overseas. Another reason that could explain the scarcity of Chinese disputes before arbitration courts is the general prevailing approach in Asian countries and which in accordance with the Confucianism ideology try to avoid potential conflicts as it disturbs harmony. For this reason, potential conflicts between investors and the state are better to be solved through negotiations and in an amicable manner. This reality is encouraged with the fact that “Chinese BITs commonly require a‘cooling off’ period of three or six months of amicable negotiation to settle the dispute before moved ahead with the arbitration.” Thus, only in the case of a failure to reach a compromise, a case would get to the court. Furthermore, the current investment treaty law remains to a certain extent unknown to foreign investors while multiple Chinese companies do not use BITs when conducting their investments abroad. A such, there is a growing need to ensure that companies are aware of the rules of the game in order to ensure that their rights are protected under BITs where the dispute settlement mechanism would avoid a breach of such treaty. It worth mentioning in this regard, that the few cases that reached the tribunal stage have developed a broader interpretation of the treaties suggesting that “similar Chinese BITs may afford more extensive protection to foreign investments than many had previously assumed.” Thus, one would hope that such approach would be followed in the few case laws that would be presented before the arbitration courts.
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