



U.S.-China Bilateral Investment Treaty Negotiations

— Fact Sheet —

By Sarah Anderson

1. U.S.-China bilateral investment treaty negotiations have been “expedited”

Six months before leaving office, the Bush administration launched talks for a bilateral investment treaty (BIT) between the United States and China. On November 17, 2009, President Barack Obama issued a joint statement with President Hu Jintao, announcing plans to expedite these negotiations. Similar to the investment chapters of U.S. free trade agreements, BITs give foreign investors the right to bypass domestic courts and sue governments in international tribunals.

On the campaign trail, President Obama responded to concerns about such investment agreements by stating “I will ensure that foreign investor rights are strictly limited and will fully exempt any law or regulation written to protect public safety or promote the public interest. And I will never agree to granting foreign investors any rights in the U.S. greater than those of Americans.”¹ Soon after taking office, the Obama administration launched an inter-agency review of the U.S. model BIT, the template for substantive negotiations. This review is proceeding parallel to BIT negotiations with China, as well as with India and other countries. Such treaties require Senate ratification before going into force.

2. A China deal would be only the 2nd U.S. international investment agreement with a major capital exporter

The United States has been at limited risk of being the target of “investor-state” suits because only one of the 51 countries with which it has entered into this type of investment agreement – Canada — is a significant capital exporter. Through the investment chapter of the North American Free Trade Agreement, Canadian investors have filed more than 15 cases against the United States, demanding compensation for government actions that allegedly reduced the value of their investments. As a result, government lawyers have spent years and countless taxpayer dollars defending environmental protections, land use regulations, and other U.S. laws in international tribunals. American investors do not have access to this dispute settlement mechanism for claims against their own government.

A BIT with China significantly raises the likelihood of more cases targeting U.S. laws and regulations. Seeking to recycle dollars amassed through its trade surplus, China has become the United States' biggest foreign creditor, holding some \$800 billion in federal U.S. debt. China Investment Corporation, the country's sovereign wealth fund, has invested heavily in the U.S. financial industry, including nearly \$2 billion to Blackstone Group, Capula Investment Management, Morgan Stanley, and Oaktree Capital Management. Among other CIC investments in the United States are \$3.2 billion to launch a private

equity fund with New York-based J.C. Flowers & Co. and about \$750 million in a Texas wind farm.² Such investments are likely to expand, given China’s more than \$2 trillion in foreign exchange wealth.³

3. China’s BITs allow much more policy flexibility than U.S. treaties

Corporate lobbyists have argued that a U.S. BIT with China is essential in order to catch up with other countries that have already signed such deals. This is misleading, because while it is true that China has many more BITs than the United States, the content of these agreements differ significantly. U.S. BITs allow foreign investors to sue governments over a wide range of actions that may diminish the value of their investments, including certain public interest regulations and policies to prevent or mitigate financial crisis. The Chinese government has maintained much more policy flexibility to ensure that foreign investment supports national economic strategies.

The United States has BITs with 40 countries and trade agreements that allow investor-state dispute settlement with another 11 nations. As of June 2009, China had signed BITs with 126 countries (see annex for list). Only a handful of these were signed in the past decade. Prior to this period, China gave foreign investors only limited rights to pursue claims in international tribunals. When treaties did include an investor-state arbitration clause, this process was allowed only for disputes over the amount of compensation following an expropriation.⁴ The China-Germany BIT, signed in 2003 and in force since 2005, was the first to give consent for international arbitration for any dispute arising from the treaty.⁵ As illustrated below, even this agreement is much narrower than the current U.S. Model BIT. And no foreign investor has yet filed an international claim against China (at least none that are publicly known).

Key differences between the China-Germany BIT and the current U.S. Model BIT		
Investor “Rights”	China-Germany BIT	U.S. Model BIT
National treatment and most-favored nation treatment	The key “anti-discrimination” provisions requiring a government to treat foreign investors no less favorably than domestic investors or investors from a third state do not apply to existing nonconforming measures in China. The treaty also states that “measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed ‘treatment less favorable.’”	Takes a “negative list” approach, meaning that national treatment and most-favored nation treatment apply to all existing measures at the national and regional level, unless they are explicitly grandfathered in. An exception is granted for government procurement, subsidies and grants.
Pre-establishment rights	The national treatment and most-favored nation provisions apply only <i>after</i> an investment has been established. Registration, licensing, and other steps necessary to establish an investment are outside the treaty scope.	Offers national and most-favored nation treatment with respect to the establishment and acquisition of investments. U.S. corporations have pushed for “pre-establishment rights” as a means of opening up new markets.
Free capital transfer	The treaty stipulates that transfers of the proceeds from the total or partial sale of investments or from the reduction of investment capital must comply with China’s laws on exchange controls. Currently, these laws require government approval for all repatriation of foreign exchange. China also maintains strict controls on outflows from capital markets. Only companies that are	Requires free transfer, without delay, of proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment. Offers no exceptions for measures to prevent or mitigate financial crisis.

	approved by the Chinese government as “Qualified Foreign Investment Institutions” may invest in the country’s domestic securities exchanges. QFIIs that are closed-end funds may remit capital only after three years, in installments of no more than 20% of the total each time, at intervals of one month or more. Other QFIIs may remit capital only after one year, in installments of no more than 20% of the total, and at intervals of at least three months. ⁶	
Performance Requirements	Not mentioned in the treaty.	Prohibits governments from imposing a number of performance requirements on foreign investors, such as requirements to: <ul style="list-style-type: none"> • export a given level or percentage of goods or services; • achieve a given level or percentage of domestic content; • purchase, use, or accord a preference to goods produced in its territory; • transfer a particular technology or production process.
Dispute Settlement	German investors may submit a dispute for international arbitration only after first referring the issue to an administrative review procedure according to Chinese law.	Investors can proceed directly to an international tribunal.
Treaty termination	Either government may terminate the treaty at the end of an initial 10-year period by giving one year’s written notice. For 20 more years, the treaty’s provisions continue to be effective for investments established prior to termination.	Either government may terminate the treaty at the end of an initial 10-year period by giving one year’s written notice. For 10 more years, the treaty’s provisions continue to apply to covered investments established or acquired prior to termination.

4. U.S.-China negotiations are proceeding at a time of rising resistance to excessive investor protections

For years, many civil society organizations, legal experts, and policy makers in this country and around the world have raised strong concerns about the social and environmental impacts of the current system for resolving investment disputes. One sign of the backlash: more than 125 members of the U.S. House of Representatives have endorsed a bill (HR 3012) that would eliminate investor-state dispute settlement in U.S. trade agreements. In light of the global economic crisis, it is even more important to consider whether these “investor protections” go too far in restraining responsible government actions. The U.S.-China BIT negotiations create an opportunity to shine a brighter spotlight on this issue and develop a fresh approach to U.S. international investment policy that supports the public interest.

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Annex

Bilateral Investment Treaties signed by China (Total: 126 countries)⁷

Albania (1995), Algeria (not ratified), Argentina (1994), Armenia (not ratified), Australia (1988), Austria (1986), Azerbaijan (1995), Bahrain (2000), Bangladesh (1997), Barbados (1999), Belarus (1995), Belgium (not ratified), Belize (not ratified), Benin (not ratified), Bolivia (1996), Bosnia and Herzegovina (2005), Botswana (not ratified), Brunei Darussalam (not ratified), Bulgaria (1994), Cambodia (2000), Cameroon (status unclear), Cape Verde (2001), Chile (1995), Colombia (not ratified), Congo (not ratified), Congo, Democratic Republic of (not ratified), Costa Rica (not ratified), Cote D'Ivoire (not ratified), Croatia (1994), Cuba (2008), Cyprus (2002), Czech Republic (2006), Denmark (1985), Djibouti (not ratified), Ecuador (1997), Egypt (1996), Equatorial Guinea (not ratified), Estonia (1994), Ethiopia (2000), Finland (2006), France (not ratified), Gabon (not ratified), Georgia (1995), Germany (2005), Ghana (1991), Greece (1993), Guinea (not ratified), Guyana (2004), Hungary (1993), Iceland (1997), India (2007), Indonesia (1995), Iran (2005), Israel (2009), Italy (1987), Jamaica (1996), Japan (1989), Jordan (not ratified), Kazakhstan (1994), Kenya (not ratified), Korea (2007), Kuwait (1986), Kyrgyzstan (1995), Lao People's Democratic Republic (1993), Latvia (2006), Lebanon (1997), Lithuania (1994), Luxembourg (together with Belgium) (not ratified), Macedonia (1997), Madagascar (2007), Malaysia (1990), Mauritius (1997), Mexico (not ratified), Moldova (1995), Mongolia (1993), Morocco (1999), Mozambique (2002), Myanmar (2002), Namibia (not ratified), Netherlands (2004), New Zealand (1989), Nigeria (not ratified), North Korea (not ratified), Norway (1985), Oman (1995), Pakistan (1990), Papua New Guinea (1993), Peru (1995), Philippines (1995), Poland (1989), Portugal (2008), Qatar (2000), Romania (2009), Russian Federation (not ratified), Saudi Arabia (1997), Serbia (1996), Seychelles (not ratified), Sierra Leone (not ratified), Singapore (1986), Slovakia (2007), Slovenia (1995), South Africa (1998), Spain (2008), Sri Lanka (1987), Sudan (1998), Swaziland (status unclear), Sweden (not ratified), Switzerland (not ratified), Syria (2001), Tajikistan (1994), Thailand (1985), Trinidad and Tobago (2004), Tunisia (not ratified), Turkey (1994), Turkmenistan (1994), Uganda (not ratified), Ukraine (1993), United Arab Emirates (1994), United Kingdom (1986), Uruguay (1997), Uzbekistan (1994), Vanuatu (not ratified), Vietnam (1993), Yemen (2002), Zambia (not ratified), and Zimbabwe (1998).

U.S. BITs and Free Trade Agreements that allow investor-state dispute settlement: (Total: 51 countries)⁸

Albania (1998), Argentina (1994), Armenia (1996), Azerbaijan (2001), Bahrain (BIT - 2001, FTA - 2006), Bangladesh (1989), Bolivia (2001), Bulgaria (1994), Cameroon (1989), Canada (1994), Chile (2003), Congo, Democratic Republic of (1989), Congo, Republic of (1994), Costa Rica (2009), Croatia (2001), Czech Republic (1992), Dominican Republic (2007), Ecuador (1997), Egypt (1992), El Salvador (2006), Estonia (1997), Georgia (1997), Grenada (1989), Guatemala (2006), Honduras (BIT - 1992, CAFTA - 2006), Jamaica (1997), Jordan (BIT - 2003, FTA - 2001), Kazakhstan (1994), Kyrgyzstan (1994), Latvia (1996), Lithuania (2001), Mexico (1994), Moldova (1994), Mongolia (1997), Morocco (BIT - 1991, FTA - 2006), Mozambique (2005), Nicaragua (2006), Oman (2006), Panama (2001), Peru (2008), Poland (1994), Romania (1994), Senegal (1990), Singapore (2004), Slovakia (1992), Sri Lanka (1993), Trinidad And Tobago (1996), Tunisia (1993), Turkey (1990), Ukraine (1996), and Uruguay (2006).

¹ See: http://www.citizenstrade.org/pdf/QuestionnairePennsylvaniaFairTradeCoalition040108FINAL_SenatorObamaResponse.pdf

² See: <http://online.wsj.com/article/SB125390976193641883.html> and http://www.businessweek.com/globalbiz/blog/eyeonasia/archives/2009/11/_late_last_week.html

³ Bill Powell, "It's China's World," *Fortune*, October 26, 2009. http://money.cnn.com/2009/10/07/news/international/china_natural_resources.fortune/index.htm

⁴ See: Rostislav Pekar and Ondrej Sekanina, Squire, "China's Bilateral Investment Treaties with EU Member States," *China Law and Practice*, September 2007. <http://www.chinalawandpractice.com/Article/1690147/Channel/9930/Chinas-Bilateral-Investment-Treaties-with-EU-Member-States-Gaining-a-Competitive-Advantage-Through.html>

Mark A. Cymrot, "Investment Disputes with China," *Dispute Resolution Journal*, August-October 2006.

http://findarticles.com/p/articles/mi_qa3923/is_200608/ai_n16779631/

Luke Eric Peterson, *Investment Treaty News*, Feb. 17, 2006. http://www.iisd.org/pdf/2006/itn_feb17_2006.pdf

⁵ Some legal scholars have pointed out that it remains uncertain whether an international tribunal would have jurisdiction over claims against China other than those related to the amount of compensation following an expropriation, since the Chinese government granted consent to arbitration only for that particular type of dispute when it acceded to the ICSID Convention. See: <http://www.globalarbitrationreview.com/reviews/2/sections/4/chapters/19/china-bits/>

⁶ International Monetary Fund, "Annual Report on Exchange Arrangements and Exchange Restrictions," 2009.

⁷ See UNCTAD Investment Instruments online: <http://www.unctadxi.org>

⁸ For a list of BITs currently in force, see: http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp. For trade agreements, see: <http://www.ustr.gov/trade-agreements/free-trade-agreements>. Note: U.S.-Australia FTA not included as it lacks an investor-state dispute settlement clause.