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The China-EU BIT: The emerging “Global BIT 2.0”?

by

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Since China and the European Union (EU) announced their decision to negotiate a bilateral investment treaty (BIT) at the 14th China-EU Summit in February 2012, the two sides have engaged in two rounds of negotiations. If successful, it will be the first standalone EU BIT, a BIT between the world's largest developed economy and the world's largest developing economy, and will occupy a unique place in the history of BIT negotiations.

Although there are currently BIT arrangements between China and all but one EU member state, the China-EU BIT negotiations would involve far more work than simply consolidating or “[streamlining] the existing BITs between China and 26 EU Member States into a single and coherent text.”¹ Indeed, it can be expected that both parties would seize this opportunity to update and upgrade their investment treaty arrangements, taking into account recent investment treaty practices in general and those of the two parties in particular, including their investment treaty/chapter negotiations with the United States. The most challenging and promising issues are likely to be market access and dispute resolution.

It is well known that both China and EU members used to follow the traditional “European” approach towards BIT, focusing on investment protection without including concrete undertakings regarding investment market access or liberalization. However, this approach seems to have changed dramatically on both sides in recent years. The EU has been very keen to promote investment market access as well as investment protection, as demonstrated by the latest draft of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, which accepts pre-establishment national treatment on the basis of a negative list of reserved sectors.² China also seems to have accepted concrete market access obligations in BITs, as she has announced acceptance of pre-establishment national treatment obligations and the negative list approach in recent BIT negotiations with the United States.³

Against this background, it is possible that the China-EU BIT will contain concrete market access commitments. Nevertheless, this is much easier said than done,

especially since both China and the EU (including its members) have had little experience in making market access commitments in their investment treaties.⁴ The preparation and negotiation of market access commitments are likely to take significant time, since both sides have to assess whether and to what extent each sector and industry is internationally competitive and should be opened up to international investors.⁵

In recent treaty practice, both the EU and China have been active in reforming investor-state dispute settlement (ISDS). Progress has been made, for example, in the draft EU-Canada CETA which establishes “the most progressive system” of ISDS, particularly by providing more details and greater transparency, while improving control over frivolous claims.⁶ On the other hand, the Canada-China BIT contains a relatively new provision requiring financial prudential measures to be jointly decided by financial service authorities of the contracting parties, or through the state-state arbitral mechanism.⁷ China and the EU share many similar concerns regarding ISDS reform, such as refining the scope of ISDS and state-state arbitration, and exploring the possibility of an appeals mechanism. It is therefore possible that they will agree on a progressive and innovative dispute settlement mechanism.

In short, the China-EU BIT is likely to combine investment protection with investment liberalization, while refining both substantive and procedural rules and embracing social concerns, in order to achieve a better balance between the rights of foreign investors and the regulatory needs of the host country. Indeed, it may be the “Global BIT 2.0,”⁸ given that it will be the first new generation BIT that the EU and China conclude on their own initiative and is likely to significantly impact BIT practice worldwide.⁹

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¹ European Commission, “Commission proposes to open negotiations for an investment agreement with China,” May 23, 2013, http://europa.eu/rapid/press-release_IP-13-458_en.htm.

² Draft CETA Investment Text, November 21, 2013, arts. X.7 & X.14, available at <https://www.laquadrature.net/files/CETA-Draft-Investment-Text-Nov21-2013-203b-13.pdf>.

³ MOFCOM, “MOFCOM spokesman Shen Danyang comments on China and US to promote energetically negotiations on bilateral investment agreement,” July 16, 2013, <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201307/20130700200566.shtml>.

⁴ Wenhua Shan and Sheng Zhang, “The potential EU-China BIT: Issues and implications,” in Marc Bungenberg et al., eds., *EU and Investment Agreements* (London: Hart Publishing, 2013), pp. 102–104.

⁵ *Id.*, at p. 104.

⁶ European Commission, “Investment provisions in the EU-Canada free trade agreement”, December 3, 2013, http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf.

⁷ China-Canada BIT (2012), arts. 20(2)(b) and 33(3). A similar arrangement can be found in NAFTA, art. 1415.

⁸ Wenhua Shan and Sheng Zhang, “Market access provisions in the potential EU Model BIT: Towards a ‘Global BIT 2.0’?” *Journal of World Investment and Trade* (forthcoming).

⁹ The EU member states, with 1,400 BITs, have signed around half of the world’s BITs, and China has the world’s second largest BIT network (with over 130 BITs). Together, they easily comprise the

majority of the world's BIT stock. The European BIT prototype has also been followed by the majority of countries in the world.

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