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Negotiations on U.S.-China BIT Likely To Be Long, Public Interest Advocate Says

By Amy Tsui
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Despite the expedited schedule on a Chinese bilateral investment treaty announced by the Obama administration, a U.S.-China BIT faces significant hurdles and might take a long time to negotiate, Sarah Anderson, a fellow at the Institute for Policy Studies said at a Dec. 10 meeting on the public interest and BITs.

Anderson said that Canada had been in BIT negotiations with China for several years, and therefore there was precedent for negotiations to take a long time. "There are huge obstacles if the U.S. wants to go forward with the model that it has had in the past," Anderson said.

Anderson, along with other panelists speaking at the Capitol Hill meeting, were part of the Advisory Committee on International Economic Policy which gave recommendations to the State Department and Office of U.S. Trade Representative, part of the administration's review of the U.S. model BIT agreement. Anderson and the other panelists emphasized that their recommendations and comments were not the same as those of other advisory group members. The administration has said that it will issue a new model BIT agreement towards the end of the year.

One of the huge sticking points in U.S.-China BIT negotiations will likely be "preestablishment" rights, which means that existing measures cannot discriminate against U.S. investors in terms of national treatment, Anderson said. She said that other countries had not gotten China to budge on the issue in their BIT agreements with China.

Another sticking point in negotiating the BIT would be capital controls, Anderson said. The U.S. model BIT would require a major opening of Chinese capital markets, and Anderson said by many measures the existing closed Chinese capital markets had been very successful for the Chinese.

While China has BITs with 126 other countries, Anderson said that the Chinese model BIT, and many of the BITs negotiated by China, gave the investor many fewer rights and much more flexibility than the U.S. model BIT agreement. The United States has U.S. BITs and free trade agreements with some 51 countries, according to a fact sheet on BITs developed by Anderson.

BIT Requirement to Open Market Risky

The advisory committee members, and panelists, criticized the U.S. model BIT agreement as lacking sufficient safeguards for the establishment of safety and environmental regulations, provided excessive investor protections, and did not sufficiently take into account the nature of China as a prospective BIT partner.

Anderson, along with the other panelists and advisory committee members, said that the United States should not seek to rush into a BIT with China, despite the desire of the U.S. business community to conclude a BIT with China as quickly as possible.

Other panelists and advisory committee members included Kevin Gallagher, a professor at Boston University, Matthew Porterfield, a fellow at the Harrison Institute for Public Law at Georgetown University, Owen Herrnstadt, director of international affairs for the International Association of Machinists and Aerospace workers, and Linda Andros, legislative counsel at the United Steelworkers, agreed that it was good that the BIT negotiations would be delayed.

“China is a major capital exporter. China is looking to diversify away from Treasury bills and buy real assets,” Gallagher said. He said that China was an entirely different kind of FTA partner as a major capital exporter than previous BIT partners, such as Rwanda.

Gallagher also said that the Chinese economy was a system of capital controls and the system had acted to protect the Chinese economy from meltdown in the global financial crisis. He said it would be dangerous for the Chinese to open their market too quickly and move towards a free capital market.
Excessive Investor Rights

Linda Andros, legislative counsel at the United Steelworkers, said that the U.S. model BIT had been primarily focused on allowing U.S. multinationals to bypass national judicial and administrative systems that were perceived as corrupt, and had primarily been about establishing the rights of U.S. multinational companies to move directly to international arbitration.

With China seeking to be a major capital exporter, Andros said a Chinese investor under the U.S. model BIT could use international arbitration ruling to supplanting U.S. safety and environmental regulations, Gallagher said.

Porterfield said that the issue of bypassing corrupt judicial systems for U.S. multinationals could be answered by including a doctrine of futility in the U.S. model BIT. A foreign investor would be required to exhaust their local and administrative remedies prior to moving to international arbitration—only in those cases with no functioning judicial system could the foreign investor bypass national remedies.

All the panelists said U.S. interests might differ from those of a U.S. multinational company, a factor that the U.S. model BIT should take into account.