CHALLENGES FOR THE UNITED STATES IN NEGOTIATING A BIT WITH CHINA: RECONCILING RECIPROCAL INVESTMENT PROTECTION WITH POLICY CONCERNS

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TABLE OF CONTENTS

I. INTRODUCTION 204

II. BIT AND FTA INVESTMENT CHAPTER EXPERIENCE IN THE UNITED STATES ... 210
A. Origins and Historical Development 210
B. U.S. Focus on BITs with Developing Nations 213
C. Sobering Experience of NAFTA and NAFTA-Experience-Driven Changes 214
D. The 2012 U.S. Model BIT 216
1. Distinctions Between BITs and FTA Investment Chapters 216
2. Revising the Model BIT in the United States 217
E. Evolution of U.S. BIT and FTA Investment Chapter Practice 218
1. Limiting Foreign Investor Benefits to those Afforded U.S. Citizens Under U.S. Law 218
2. Minimum Standard of Treatment 219
3. Broad National Treatment Protections 220
4. Indirect or "Creeping" Expropriation 221
5. Addressing State-Owned Enterprises and Performance Requirements 222
6. Enhanced Transparency 223
7. Severing Jurisdictional Issues from Decisions on the Merits 224
8. Notice of Intent to File 224
9. Changes in Environmental and Labor Provisions 225
10. National Security 226
11. An Appellate Mechanism for Review of Arbitral Awards? 226

III. CHINA'S BIT EXPERIENCE 228
A. Early Evolution of Chinese BITs 228
B. Recent Chinese BITs with Developed Nations 230
C. The 2012 China-Canada FIPA 232
1. History and Rationale for the FIPA 232
2. Canada's 2004 Model FIPA/BIT 233
3. Canada's FIPA Negotiations with China 234
4. Key Features of the Canada-China FIPA 235
5. Assessing the FIPA 240

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IV. CHALLENGES IN CONCLUDING A U.S. BIT WITH CHINA 240
A. The Substantive Issues 241
B. The Politically Sensitive Challenges of the U.S.-China Relationship.....242
C. Political, Business, and Civil Society Constraints and Conflicts 243

V. CONCLUSION.....247

APPENDIX: LIST OF APPREVIATIONS.....249

I. INTRODUCTION

The United States faces unprecedented challenges with regard to current negotiations of BITs[1] and investment chapters in free trade agreements. The Obama Administration, recently with the participation of Canada, is entering the fourth year of Trans-Pacific Partnership (TPP) negotiations and has initiated what will be difficult and complex negotiations of a "Transatlantic Trade and Investment Partnership" (TTIP) with the European Union.[2] Both of these are to contain investment protection chapters, some provisions of which will be hotly contested. However, perhaps the greatest challenge for the United States is in negotiating an acceptable BIT with China, after five years of informal discussions[3] with, at best, modest progress over nine sessions (as well as extended periods in which no meaningful discussions were taking place) and a political relationship characterized by competing interests. As one Chinese scholar has suggested, "the BIT negotiation [between the United States and China] is destined to be the most difficult one in history . . . ."[4] Canada, in contrast, completed its own BIT with China in September 2012;[5] that agreement, while controversial in Canada, may serve at least in part as a model for a U.S. BIT with China.

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[1] The appendix provides a list of abbreviations for all the terms used in this article.

[2] *See* Howard Schneider, *After Buoyant Debut, U.S.-E.U. Trade Talks Face a Growing List of Issues*, WASH. POST (May 13, 2013), http://www.washingtonpost.com/business/economy/after-buoyant-debut-us-eu-trade-talks-face-a-growing-list-of-issues/2013/05/13/c85bb6c0-bc05-11e2-9b09-1638acc3942e_story.html (discussing challenges such as U.S. resistance to the entry of foreign businesses and contractors).

[3] The term "negotiations" is not used by U.S. officials. *See* Len Bracken, *China Makes Market Access Concession Toward Investment Treaty with the United States*, INT'L TRADE DAILY (BNA) (Jul. 11, 2013) (noting that to date there have been no talks toward a "formal legal agreement" but only discussions through various bilateral joint committees).

[4] Quingjiang Kong, *U.S.-China Bilateral Investment Treaty Negotiations: Context, Focus, and Implications*, 7 ASIAN J. OF WTO & INT'L HEALTH L. & POL'Y 181, 181 (2012).

[5] *See* Prime Minister's Office, Explanatory Memorandum on the Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (Sept. 26, 2012), *available at* http://thetyee.ca/Documents/2012/10/14/Canada-China%20FIPA%20and%20Explanatory%20Memorandum%208532-411-46(OCR).pdf; Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and

The benefits of enacting a binding set of legal obligations to protect U.S. investors in China have been apparent for many years. Investing in China is a complicated process, fraught with uncertainties, particularly where "foreign control agreements" of questionable legality are used as a means of avoiding some of the investment restrictions of Chinese law, as in education, finance, media, and technology.[6] Foreign investors in fields as diverse as pharmaceuticals, dairy products, computers, and fast food have been attacked by the government, media, or both during 2013 alone.[7] Other proposed U.S. investments blocked by the Chinese authorities include efforts by U.S. banks in China to trade bonds in the inter-bank market and 2006 regulations on mergers and acquisitions for offshore investments in domestic financial companies.[8] Still, in my view, many U.S. enterprises have considered a Chinese presence to be an economic imperative over the past twenty years; it is thus no surprise that U.S. private investment in China, 2000-2010, is estimated to be more than U.S. $60 billion.[9]

At the same time, and despite the concerns of many Americans, the potential job creating and other economic benefits of Chinese investment in the United States for the U.S. economy cannot be ignored. China has made an estimated U.S. $781.5 billion worth of foreign investments as of March 2014, including an estimated U.S. $63.6 billion in the United States and U.S. $37.8 billion in Canada,[10] even though the U.S. government has blocked various proposed Chinese investments in the United States, such as the bid by CNOOC to acquire Unocal.[11] It seems almost certain that with or without a BIT, Chinese

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Reciprocal Protection of Investments (Sept. 9, 2012) [hereinafter Canada-China FIPA], *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng.

[6] *See* Neil Bough, *In China, Concern about a Chill on Foreign Investments*, N.Y. TIMES (Jun. 2, 2013), http://dealbook.nytimes.com/2013/06/02/in-china-concern-of-a-chill-on-foreign-investments/?_php=true&_type=blogs&partner=rss&emc=rss&_r=0 (discussing a recent court case depriving a Hong Kong investor of her shares in a Chinese bank).

[7] *See, e.g.*, Simon Denyer, *Amid Attacks by Chinese Government and Media, Foreign Companies get Mixed Signals*, WASH. POST (Aug. 9, 2013), http://www.washingtonpost.com/world/asia_pacific/amid-attacks-by-chinese-government-and-media-foreign-companies-receive-mixed-signals/2013/08/09/b02eea48-00d6-11e3-8294-0ee5075b840d_story.html (mentioning, among others, Kentucky Fried Chicken, McDonalds, and Applebee's).

[8] Kong, *supra* note 4, at 184.

[9] *U.S. Direct Investment Position Abroad on a Historical-Cost Basis by Selected Country, 2000 to 2010, Table 1296*, U.S. CENSUS BUREAU, http://www.census.gov/compendia/statab/2012/tables/12s1296.pdf (last visited Mar. 4, 2014). This excludes approximately U.S. $54 billion of U.S. investment in Hong Kong, some of which likely indirectly finances investments in China.

[10] *China Global Investment Tracker*, HERITAGE FOUND., http://www.heritage.org/research/projects/china-global-investment-tracker-interactive-map (last visited Mar. 4, 2014).

[11] *See* Paul Eckert, *Despite the Politics, Chinese Investment in U.S. Grows*, REUTERS (UNITED STATES), Jun. 9, 2013, at 2, *available at* http://www.reuters.com/article/2013/06/09/us-usa-china-investment-idUSBRE95805X2

investments in the United States will increase in the future and Chinese enterprises will benefit from a set of specific rules governing investment in the United States.

Moreover, China and the United States, despite many rivalries, have become steadily more economically interdependent in areas going beyond foreign investment. China relies on the United States to take approximately twenty-five percent of its exports; total bilateral trade is valued at approximately U.S. $500 billion.[12] China holds over U.S. $1.2 trillion of U.S. government debt, some eight percent of the total.[13] Professor Noah Feldman, who refers to this complex economic and security relationship as a "cool war," notes that as a result, "the United States and China constantly cooperate to facilitate their mutually advantageous economic relationship."[14] Feldman further notes that like a manufacturer, an exporter has to pay attention to its customers and a debtor to the state of its creditors. Also, "[i]f China wants to invest in American companies, it must have assurances that it will be treated as well as any other investor."[15] These factors suggest that despite political and security friction, a very strong mutual interest exists in facilitating and protecting investors in one nation that are investing in the other, a consideration which perhaps more than any other bodes well for the eventual conclusion of a BIT.

Under such circumstances, a BIT seems logical, as Simon Lester has suggested, not simply to promote investment between the two countries (that does not seem to be necessary), but to "remove barriers to foreign investment, so that investors can decide on their own where to invest."[16] It is thus not surprising that the negotiations are continuing, with the two governments in June 2013 agreeing to "actively push forward negotiation and provide a fair, transparent and stable policy framework for two-way investment."[17]

Still, as discussed in Part III, China's past history with regard to opening up the Chinese market to foreign investors under BITs is not promising. While China in recent years has agreed in BITs to investor-state arbitration, it has balked at extensive national treatment requirements including those relating to the pre-investment approval process, limitations on performance requirements, and various efforts to rein in privileges for state-owned enterprises, let alone protection of labor rights and the environment (as are now part of the standard requirements). Today, there are indications that China may have become more flexible in its willingness to compromise, in part because of the growing volumes

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0130609 (also discussing many smaller and non-controversial Chinese investments in the United States).

[12] NOAH FELDMAN, COOL WAR: THE FUTURE OF GLOBAL COMPETITION 6 (2013).

[13] *Id.*

[14] *Id.* at 7.

[15] *Id.*

[16] Simon Lester, *Do We Need an Investment Treaty with China?*, NAT'L INT. 2 (Dec. 3, 2012), http://nationalinterest.org/commentary/do-we-need-investment-treaty-china-7799.

[17] *Yang Jiechi's Remarks on the Results of the Presidential Meeting Between Xi Jinping and Obama at the Annenberg Estate*, CHINESE MINISTRY OF FOREIGN AFF. (June 9, 2013), http://www.fmprc.gov.cn/eng/zxxx/t1049263.shtml.

of Chinese FDI in the United States and the continued substantial holdings of U.S. Treasury securities by the Chinese government.[18]

The U.S.-China BIT negotiations are taking place at a time of political friction between the United States and China that is unprecedented in recent years. The Chinese hacking of both commercial and governmental websites in the United States has become a serious national security issue, and U.S. authorities are increasingly direct in accusing the Chinese government of stealing military and other technology.[19] With the Edward Snowden disclosures, Chinese authorities have a reciprocal argument to make. Smoldering Chinese territorial disputes over islands in the East and South China Seas with Japan, the Philippines, South Korea, and Vietnam threaten to embroil the United States in the event that any of the directly involved nations overreacts.[20] Nor, in the view of the United States, has the Chinese government done enough to quell the aggressiveness of its client state, North Korea.[21] In the past five years, the United States has initiated more than ninety antidumping and countervailing duty investigations against a variety of Chinese products, including various iron and steel goods, solar panels, wind towers, shrimp, and citric acid.[22] These unfair trade actions are viewed by China, rightly or wrongly, as having political as well as economic motivations. Also, China clearly perceives the TPP as an economic and political threat,[23] an important part of the Obama Administration's "pivot" toward a more aggressive

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[18] *See* SUSAN V. LAWRENCE, CONG. RESEARCH SERV., R41108, U.S.-CHINA RELATIONS: AN OVERVIEW OF POLICY ISSUES 37-40 (Aug. 1, 2013) (quoting Chinese Commerce Minister Gao Hucheng), *available at* http://www.fas.org/sgp/crs/row/R41108.pdf.

[19] *See* Jane Perlez, *Hagel, in Remarks Directed at China, Speaks of Cyberattack Threat*, N.Y. TIMES, Jun. 2, 2013, at A8 (quoting U.S. Secretary of Defense Chuck Hagel speaking of "growing threats" of cyber attacks, "some of which appear to be tied to the Chinese government and military").

[20] Under Article 5 of the Japan-U.S. Security Treaty, dated January 19, 1960: "Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and security and declares it would act to meet the common danger in accordance with its constitutional provisions and processes." The extent to which this mutual defense obligation would apply to territories under disputed Japanese territorial claims is unclear.

[21] *See* George Gao, *U.S., China Seek Common Ground on North Korea,*, INTER PRESS SERV. (June 3, 2013), http://www.ipsnews.net/2013/06/u-s-china-seek-common-ground-on-north-korea/ ("China and the U.S. have different visions of the Asia-Pacific moving forward. China hopes for stability on the Korean peninsula and has taken a less coercive approach to North Korea.").

[22] *See Antidumping and Countervailing Duty Investigations Initiated After January 01, 2000*, U.S. DEP'T. OF COM., http://ia.ita.doc.gov/stats/inv-initiations-2000-current.html (last updated Mar. 15, 2012). Prior to 2006, only anti-dumping duty actions were initiated; after that date, countervailing duty actions were brought in the United States as well.

[23] *See* David Pilling, *It Won't Be Easy to Build an "Anyone but China" Club*, FIN. TIMES (May 22, 2013), http://www.ft.com/cms/s/0/08cf74f6-c216-11e2-8992-00144feab7de.html#axzz2vJbanE4N (suggesting that "the unstated aim of the TPP is to create a 'high level' trade agreement excludes the world's second-biggest economy").

role in Asia[24] undeniably designed in significant part to counter-balance Chinese hegemony in the region.

These conflicts make Chinese citizens suspicious of the United States and undermine respect for China among many Americans. China is regularly (if today less accurately than in the past) accused of undervaluing its currency,[25] and many, both in Congress and elsewhere, oppose Chinese investment in the United States because of concerns that the enterprises so established, for example in telecommunications, will be used for spying or other forms of espionage.[26] Even those proposed investments that are totally innocuous from a national security point of view, such as the recent purchase of the Smithfield Ham group by Chinese interests, engender objections by some in Congress.[27] U.S. interests worry that serious air quality problems in China, with Chinese-sourced particulate pollution already affecting California, will carry over to the United States should the Chinese invest in resource development in the United States.[28] Other Americans are simply concerned with abysmal working conditions in the

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[24] *See* David Lerman, *Hagel Cites Navy's Newest Warship as Key to Asia Pivot*, BLOOMBERG (Jun. 2, 2013), http://www.bloomberg.com/news/print/2013-06-02/hagel-cites-navy-s-newest-warship-as-key-to-asia-pivot.html (noting U.S. Defense Secretary Hagel's comments that the Navy's new "Littoral Combat Ship" represents "a new era of partnership" as U.S. military focus shifts toward Asia).

[25] *See, e.g.*, Claire Compton, *Asia's Biggest Economies Tighten Exchange Rate Management, According to Treasury*, INT'L TRADE DAILY (BNA) (Apr. 4, 2013) (quoting a Treasury Department report stating that "the available evidence suggests the RMB [Chinese currency] remains significantly undervalued, intervention appears to have resumed, and further appreciation of the RMB against the dollar is warranted"). *But see The Cheapest Thing Going is Gone*, ECONOMIST (CHINA) (Jun. 15, 2013), http://www.economist.com/news/china/21579488-after-enduring-decade-criticism-its-weakness-chinas-currency-now-looks-uncomfortably (noting that the Yuan has appreciated thirty-five percent against the dollar since June 2003).

[26] *See* Richard McGregor, *Smithfield Bid Tests US Appetite for Chinese Investment*, FIN. TIMES (May 30, 2013), http://www.ft.com/intl/cms/s/0/8158dcd6-c93d-11e2-9d2a-00144feab7de.html (noting that an earlier proposed takeover of Sprint Nextel had been opposed in Congress in part because the Japanese mobile operator's network equipment would be sourced in China).

[27] *See China's Grab of US Hogs Stokes Interest on Hill*, CNBC (May 30, 2013), http://www.cnbc.com/id/100774673 (quoting U.S. Representative Randy Forbes as stating that the agreement requires "robust analysis and review to ensure the safety and security of America's citizens . . . ."). The Committee on Foreign Investment in the United States (CIFUS) approved the Smithfield purchase. *See* Rossella Brevetti, *Smithfield, Chinese Suitor, Say CFIUS Clears Way for Proposed Acquisition*, 20 INT'L TRADE REP. (BNA) 1411 (Sept. 12, 2013).

[28] *See* Joseph Kahn & Jim Yardley, *As China Roars, Pollution Reaches Deadly Extremes*, N.Y. TIMES (Aug. 26, 2007), http://www.nytimes.com/2007/08/26/world/asia/26china.html?oref=login (noting the broad international reach of pollution from China's coal-fired power plants).

electronics industry or in textiles and clothing,[29] or less specific fears of China's overtaking the United States as the world's leading economic power[30] and that nation's emergence as a growing security threat.[31] Further, concerns have been raised regarding the competitive advantage subsidized state-owned Chinese enterprises (SOEs) have over private enterprises in the West when it comes to seeking technology and investments in other countries,[32] as well as within China. Even if the U.S. negotiators are successful in concluding the BIT, they will have to convince U.S. stakeholders, the Senate, and civil society that facilitating Chinese investment in the United States is in the national interest.

Also, related to investment agreements more generally, the negotiations with China come at a time when some observers are seeking to "rethink" current approaches to investor-state dispute settlement,[33] a key element of any BIT with China, as discussed in Part IV(C). These various considerations suggest that despite the expressed intentions of the two governments to continue negotiations and the obvious reciprocal benefits, the level of mutual trust, and perceptions of mutual interest that are necessary for any challenging negotiation are not currently present and may not be so for an extended period of time, perhaps three to five years or more. (It is possible that the nomination and confirmation of current Senate Finance Committee Chairman Max Baucus (D-Montana) as Ambassador to China[34] will increase the possibility of the negotiations moving forward more promptly, given his strong support in the Senate for trade and investment agreements.) I make this assessment despite recent indications that China is prepared to discuss a "high standards" BIT, which would "level the playing

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[29] *See, e.g.*, Charles Duhigg & David Barbosa, *In China, Human Costs Are Built into an iPad*, N.Y. TIMES, Jan. 25, 2012, at A1 (noting a wide variety of harsh working conditions and safety breaches such as explosions in Apple's Chinese suppliers).

[30] *See* Albert Keidel, *China's Economic Rise—Fact and Fiction*, CARNEGIE ENDOWMENT 1 (2008), http://carnegieendowment.org/files/pb61_keidel_final.pdf (stating that "China's likely continued success will eventually bring an end to America's global economic preeminence, requiring strategic reassessment by all major economies—especially the United States, the European Union, Japan and even China itself").

[31] *See, e.g.*, G. John Ikenberry, *The Rise of China and the Future of the West: Can the Liberal System Survive?*, FOREIGN AFF., Jan./Feb. 2008, *available at* http://www.foreignaffairs.com/articles/63042/g-john-ikenberry/the-rise-of-china-and-the-future-of-the-west?page=show (suggesting that China's economic preeminence will cause other countries such as the United States to "see China as a growing security threat").

[32] *See* Heriberto Araújo & Juan Pablo Cardenal, *China's Economic Empire*, N.Y. TIMES, Jun. 2, 2013, at SR1 (discussing the threat represented by Chinese SOEs investing abroad).

[33] *See, e.g.*, Anna Joubin-Bret & Jean E. Kalecki, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, 11 TRANSNAT'L DISP. MGMT. 1 (2014), *available at* http://www.transnational-dispute-management.com/downloads/tdm-v11-01.pdf (discussing such issues as complexity, infringement of states' regulatory powers, erroneous decisions and unfair damages).

[34] *Baucus, Vetter Nominations Head to the Senate*, 31 INT'L TRADE REP. (BNA) 71 (Jan. 9, 2014).

field"[35] by including within its scope sensitive sectors of the economy that prior to July 2013 had been considered by U.S. authorities difficult or impossible to achieve, although the BIT discussions had not been formally re-launched as of that date.[36] Nevertheless, given the importance of U.S. investment in China and growing Chinese investment in the United States, and the somewhat surprising success (to me at least) of Canada's BIT negotiations last year, the negotiations in my view are well-worth pursuing even if the path is long and difficult, or ultimately impossible.

Part II of this article provides a brief history of BIT and FTA investment chapter experience in the United States and the evolution of the U.S. approach post-NAFTA.[37] Part III addresses China's practice with BITs, including the recent Canadian Foreign Investment Protection Agreement (FIPA) with China and the lessons, if any, it may offer to the United States in the latter's negotiations. Part IV addresses the key substantive challenges to reaching agreement with China along the government/congressional and civil society challenges. Part V summarizes my conclusions and assessment.

II. BIT AND FTA INVESTMENT CHAPTER EXPERIENCE IN THE UNITED STATES

A. Origins and Historical Development

The BIT had its origins in the early bilateral commercial treaties, or friendship, commerce, and navigation treaties, which the United States concluded with several dozen countries between the late 19th and mid-20th centuries.[38] The first "modern" BIT is said to be an agreement between Germany and Pakistan concluded in 1959.[39] The expansion in number and scope of BITs, along with the conclusion of the ICSID Convention, arose in the 1960s out of a decade of

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[35] *See Smithfield Prompts an Investment Question*, 53 THE TTALK QUOTES, July 10, 2013, at 3, *available at* http://archive.constantcontact.com/fs139/1101547782913/archive/1114168387977.html (quoting Treasury Secretary Jacob Lew).

[36] *See* Howard Schneider, *China Agrees to Broad Investment Talks*, WASH. POST (July 11, 2013), http://www.washingtonpost.com/business/economy/china-agrees-to-broad-investment-talks/2013/07/11/2d535930-ea63-11e2-a301-ea5a8116d211_story.html (reporting a "breakthrough" as part of the high level bilateral "Strategic and Economic Dialogue" discussions); Bracken, *supra* note 3.

[37] North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (1993), *available at* https://www.nafta-sec-alena.org/Default.aspx?tabid=97&language=en-US (last visited Jan. 30, 2014) [hereinafter NAFTA].

[38] *See* Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investments in Developing Countries*, 24 INT'L LAW. 655, 655 (1990); Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 158 (2005) (both discussing the antecedents of the BIT).

[39] Salacuse, *supra* note 38, at 657.

discussions in the United Nations over the nature and legal structure for the relationships between foreign investors and host countries, and the controversial assertion by most capital-exporting countries that expropriation or nationalization was subject to minimum requirements of international law rather than just the national law of the host country.[40] Fifty years later, these discussions continue despite widespread acceptance of the principle that international law applies to treatment of such investments by host governments.

The United States and most other OECD-based BITs include a broad range of substantive protections for foreign investors, including an expansive definition of "investment" and "investor"; national treatment; most favored nation treatment; a minimum standard of treatment (including fair and equitable treatment); restrictions on performance requirements; free transfer and convertibility of profits and proceeds from sales of assets; flexibility with regard to nationality of management; and protection against both direct and indirect expropriation, among others.[41] Most modern BITs also provide a process, including detailed procedural requirements, for mandatory resolution of investor-state disputes through third-party international arbitration.[42] Virtually all are reciprocal, with substantive rules and investor-state dispute settlement applying to investors of one party investing in the territory of the other.

The number of BITs concluded by both capital-exporting and capital-importing nations has rapidly expanded, with approximately 2,800 BITs and over 300 FTA investment chapters in force by the end of 2011.[43] The proliferation of investor-state disputes is undoubtedly the most important development under BITs during the past twenty-five years. As of the end of 2012, at least 514 known investor-state arbitration cases had been lodged.[44] Of the twenty-five new disputes in a recent year (2010), eighteen were filed with ICSID or the ICSID Additional Facility, four under the UNCITRAL Rules, and one with the Stockholm Chamber of Commerce. Overall, about sixty-three percent of all cases were brought under ICSID or Additional Facility Rules and twenty-eight percent under UNCITRAL Rules.

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[40] *See* Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT'L & COMP. L. 47, 48 (2009) (relating the debate that had taken place in the General Assembly regarding the inclusion of the reference to international law).

[41] *See, e.g.*, Free Trade Agreement, U.S.-S. Kor., Mar. 15, 2012 [hereinafter 2012 KORUS]; 2012 U.S. Model Bilateral Investment Treaty, § A [hereinafter 2012 U.S. Model BIT].

[42] *See,* e.g., 2012 KORUS, *supra* note 41, ch. 11, § B.; NAFTA, *supra* note 37, ch. 11, § B.

[43] *See* UNCTAD, WORLD INVESTMENT REPORT 2012 OVERVIEW 18 (2012), *available at* http://www.unctad-docs.org/files/UNCTAD-WIR2012-Overview-en.pdf; *see also* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 2-3 (2008).

[44] UNCTAD, IIA ISSUES NOTE 2 (2013), *available at* http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf. There are undoubtedly a few cases submitted to arbitration under UNCTAD Rules or other *ad hoc* methods that have been kept secret by agreement between the investor and the host state.

For most nations, there are few viable alternatives to operating under BITs and FTA investment chapters and to resorting to provisions of the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules for investor-state dispute settlement.[45] However, a number of important nations, including Brazil, Canada, Mexico, Russia, Thailand, and Vietnam are not Parties to the ICSID Convention,[46] despite the fact that all except Brazil have concluded numerous BITs. In rare occurrences, countries have chosen to withdraw from the Convention; these include Bolivia (2007),[47] Ecuador (2010),[48] and Venezuela (2012).[49] Despite various efforts over the years, the international community has been unable to conclude a broad multilateral investment agreement. The most recent major effort, the Multilateral Agreement on Investment (MAI), negotiated under OECD auspices, failed in 1998.[50] There is no obvious forum—OECD, WTO, APEC, or UNCTAD among them—for a new effort, despite some suggestions that another try is warranted, perhaps under the sponsorship of interested G-20 nations.[51] For the foreseeable future, at least no new multilateral effort seems at all likely.

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[45] The following multilateral agreement outlines one of the few viable dispute-settlement alternatives available: Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090. As of November 2013, 158 states had signed the Convention and 150 had ratified it. *List of Contracting States and Other Signatories of the Convention*, ICSID (Nov. 1, 2013), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English [hereinafter *List of Contracting States*]. Resort to the ICSID Convention, also known as the Washington Convention, may be made only if both the host country and the foreign investor's home country are parties to the Convention. If one of the two is a party, the Additional Facility Rules may be used. For a discussion of the origins of the Convention, see Lowenfeld, *supra* note 40.

[46] *List of Contracting States*, *supra* note 45. Canada and the Dominican Republic signed the Convention in 2006 and 2000, respectively; however, Dominican Republic has not completed the ratification process. *See id.*

[47] *See id.* Ecuador's withdrawal was effective January 7, 2010, six months after notification. *Id.* Article 71 of the Washington Convention establishes that every contracting state has the right to denounce the Convention through a written notification directed to the depositary thereof, with the denunciation being effective six months after the notification. ICSID, *ICSID Additional Facility Rules*, art. 71, Doc. No. ICSID/11 (2006), http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf.

[48] *List of Contracting States*, *supra* note 45.

[49] *Id.*

[50] *See Multilateral Agreement on Investment: Documentation from the Negotiations*, at *Introduction*, OECD, http://www.oecd.org/daf/mai/intro.htm (last visited Feb. 16, 2014).

[51] *See* Karl P. Sauvant & Frederico Ortino, *The Need for an International Investment Consensus-Building Process*, 101 COLUM. FDI PERSP. 2 (Aug. 12, 2013), http://www.vcc.columbia.edu/files/vale/print/No_101_-_Sauvant_and_Ortino_-_FINAL.pdf.

B. U.S. Focus on BITs with Developing Nations

The United States was a relative latecomer in instituting its BIT program, with the first (Panama) concluded in 1982; approximately forty were in force as of mid-2013.[52] The most recent BITs were concluded with Uruguay (2005) and Rwanda (2008).[53] All to date have been concluded with developing countries, presumably because of concerns that weaknesses in the rule of law would pose serious risks for U.S. investors. Most of these BITs were concluded with relatively small nations except for Argentina, Bangladesh, and Egypt, although several of the Parties are at minimum in transition economy status (e.g., Estonia, the Czech Republic, Latvia, Lithuania, and Slovakia).[54] (A BIT concluded with Russia in 1992 has never entered into force.) None of these has resulted in investor claims against the United States.

The potential impact of the nations with which the United States has recently expressed interest in a BIT,[55] China as well as Brazil, India, Russia, and Vietnam (four of which not coincidentally are among the BRICS[56]), is significant because all are much larger economies than the historical norm, but are still developing countries except perhaps for Russia. As far as can be determined, little progress has been made on any of these—and it is not clear that Brazil is even interested—in the years since the 2012 model BIT was released, even though exploratory talks had occurred with India and Vietnam several years earlier. If, and when negotiations move forward, it will be in a context where U.S. negotiators and policy-makers are well aware that the BIT will establish *de facto* as well as *de jure* reciprocity. In some respects, the negotiations with China—since they are first—may be complicated given the fact that if the United States departs significantly from its high-standard-of-investor-protection with China, it will not likely be able to return to this model in future negotiations with other BRICS or Vietnam.

It would be misleading to suggest that the nearly twenty-year drought (1994-2013) in U.S. BIT negotiations (except for Uruguay and Rwanda) has reflected a lack of broader U.S. government interest in investment protection for its citizens and enterprises. In fact, since NAFTA, the United States has concluded FTAs with Australia, Bahrain, Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, South Korea,

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[52] *See United States Bilateral Investment Treaties*, U.S. DEP'T OF STATE, http://www.state.gov/e/eb/ifd/bit/117402.htm (last visited Mar. 6, 2014).

[53] *Id.*

[54] *See id.*

[55] *See* Charlene Barshefsky et al., *United States to Resume Bilateral Investment Treaty Negotiations on the Basis of a Revised Model Treaty*, WILMERHALE PUBS. & NEWS (May 15, 2012), http://wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=89748 (suggesting that with the release of the 2012 model BIT, the United States was prepared to initiate or continue BIT negotiations).

[56] The "BRICS" countries are Brazil, Russia, India, China, and South Africa.

Morocco, Nicaragua, Oman, Panama, Peru, and Singapore.[57] All of these except the FTAs with Bahrain and Jordan included investment protection chapters; both of those nations had concluded BITs shortly before the FTA negotiations.[58] (The FTA with Australia includes investor protections, but not investor-state dispute settlement.[59]) These agreements were largely the work of the Bush Administration under the leadership and encouragement of U.S. Trade Representative Robert Zoellick. The Obama Administration concluded no new FTAs or BITs during the 2009-2013 term, but obtained Congressional approval for earlier FTAs with Colombia, South Korea, and Panama (all including investment chapters) in November 2011 as part of the Administration's national export initiative.[60]

C. Sobering Experience of NAFTA and NAFTA-Experience-Driven Changes

The lack of U.S. and Canadian concern with the reciprocity aspects of BITs changed with NAFTA. While Chapter 11 was designed primarily to protect U.S. and Canadian investors in Mexico, in practice all three governments have been respondents in multiple challenges, and Canada as well as Mexico (but not the United States to date) have paid awards in at least five cases each.[61] In several

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[57] *See Free Trade Agreements*, OFF. OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreementsa (last visited Feb. 16, 2014).

[58] *See United States Bilateral Investment Treaties*, *supra* note 52.

[59] Free Trade Agreement ch. 11, U.S.-Austl., May 18, 2004, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf.

[60] *See* Rachel Boehm, *President Obama to Sign TAA, FTAs with Korea, Panama, Colombia*, 28 INT'L TRADE REP. (BNA) 1693 (Oct. 20, 2011) (discussing the approval of the FTAs by Congress and the President's decision to sign them).

[61] For Mexico, the list, with total payouts of about U.S. $200 million, includes the three soft drink tax actions. *See* Archer Daniels Midland Co. v. Mex., ICSID Case No. ARB(AF)/04/05, Award (Nov. 21, 2007) [hereinafter *ADM*]; Cargill, Inc. v. Mex., ICSID Case No. ARB(AF)/05/02, Award (Sept. 18, 2009); Corn Products Int'l, Inc. v. Mex., ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (Jan. 15, 2008). Earlier, Mexico paid awards in *Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)99/1, Correction and Interpretation of the Award (June 13, 2003), and *Metalclad Corp. v. Mexico,* ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), 40 I.L.M. 36 (2001).

Canada agreed to pay awards or negotiated settlements in the following five cases: *Ethyl Corp. v. Canada*, Award on Jurisdiction (June 24, 1998), 38 I.L.M. 708 (1999); Affidavit of Vernon McKay ¶¶ 67-68, *Hupacasath First Nation and The Minister of Foreign Affairs Canada and The Attorney General of Canada*, 2013 F.C. 900 (Can.) (Court File No. T-153-13) (on file with author) [hereinafter MacKay Affidavit]; *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2 (Apr. 10, 2001), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/pope-phase-21.pdf; *S.D. Myers, Inc. v. Canada*, Final Award (Dec. 30, 2002), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/myers-36.pdf; and *AbitibiBowater, Inc. v. Canada*, Consent Award (Dec. 15,

arbitrations, *Methanex Corp. v. United States*[62] and *Loewen Group, Inc. & Loewen v. United States*,[63] the well-founded fear that the United States might lose was more than sufficient to convince many in Congress and civil society that agreeing to investor-state arbitration in NAFTA was a mistake for the United States that should not be repeated.[64] The vicarious experience of the United States' exposure through consultation and comment to the tribunals[65] reviewing cases against Canada, and Canadian losses, also affected U.S. policy makers. No one can reasonably anticipate that BITs with China are likely to engender a greater number of investment disputes between Canadian or United States investors and China than the reverse.

As a result of both the United States and Canadian experience as respondent governments under NAFTA Chapter 11, most BITs and FTA investment chapters concluded by both countries since 2002 have incorporated more host-state-friendly provisions as well as many NAFTA innovations. The most recent U.S. BITs and FTA investment chapters, including the Korea-U.S. FTA[66] and the 2012 U.S. Model BIT are thus somewhat more government-friendly and less investor-friendly than many of those concluded by other major capital exporting countries. These changes reflect the NAFTA experience as well as modifications mandated by Trade Promotion Authority (TPA) narrowly granted to President George W. Bush in 2002 with regard to the agreed investment agreement negotiating objectives,[67] and the "Bipartisan Trade Deal" (BTD) of May 2007 between the Bush Administration and the newly-elected Democratic

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2010), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/abitibi-03.pdf. The last accounted for about U.S. $130 million of approximately U.S. $158 million in total Canadian payouts. *See* AbitibiBowater, Inc. v. Can., Consent Award, at 7, ¶ 5.

[62] Methanex Corp. v. U.S., Final Award of the Tribunal on Jurisdiction and Merits, (Aug. 3, 2005), 44 I.L.M. 1345.

[63] Loewen Grp., Inc. & Loewen v. U.S., ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), 42 I.L.M. 811.

[64] For example, anti-NAFTA groups in the United States seized on *Loewen* (even though the United States prevailed) as "an all-out attack on democracy. If successful, it would undermine the jury system, which is fundamental to our system of justice." *NAFTA: Consumer Group Brands Funeral Firm's NAFTA Suit an Assault on U.S. Protections*, INT'L TRADE DAILY (BNA) (Nov. 29, 1998) (quoting Joan Claybrook, President of Public Citizen).

[65] Under NAFTA Article 1128, the NAFTA Parties not involved in the ISD are permitted to make their views known to the tribunals, and the Parties have exercised such rights in virtually every proceeding.

[66] Free Trade Agreement, U.S.-S. Kor., June 30, 2007, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text [hereinafter 2007 KORUS].

[67] Bipartisan Trade Promotion Authority Act, 19 U.S.C. § 3801 (2002) (expired July 1, 2007); *see also Bush Signs TPA Bill After Senate Approval, Will Pursue Free Trade with Other Nations*, 19 INT'L TRADE REP. (BNA) 1369, 1378 (2002) (noting that the House vote was 215-212 and that the Senate approved TPA by a vote of 64-34).

Congress.[68] Most are reflected in the 2004 U.S. Model BIT and all in the 2012 U.S. Model BITs.[69] As Part II(C) indicates, many of the same considerations have affected Canadian practice as well. Still, some of the changes, as discussed below, increase the breadth of protection for foreign investors, particularly those relating to leveling the playing field with regard to discriminatory treatment of foreign investors who are competing with domestic SOEs.

D. The 2012 U.S. Model BIT

1. Distinctions Between BITs and FTA Investment Chapters

As noted earlier, the model BITs (both 2004 and 2012) bear a close resemblance to the typical 2002-2012 U.S. FTA investment chapters. There are, however, some significant differences between negotiating BITs and FTA investment chapters. First, and perhaps most important, with FTAs some provisions that might otherwise be sought for in a BIT by U.S. negotiators, such as labor rights and environmental protection, can be relegated to other FTA chapters. Also, various transparency obligations that appear throughout the typical FTA and are applicable to areas other than the conduct of investor-state arbitration need not be concentrated.[70] (To date, none of the U.S. BITs deal directly with labor rights or environmental protection, although such language is incorporated in the 2012 U.S. Model BIT, as discussed below.)

Second, while FTAs are submitted to both houses of Congress for approval by majority vote under TPA procedures limiting modifications and delays, BIT are submitted only to the Senate for its advice and for consent to ratification by two-thirds of the senators present and voting,[71] and no specific implementing legislation is required. Third, the scope of a BIT is by its nature far narrower than the typical FTA, limited as it is to investment issues, without possibly contentious chapters on reducing barriers to trade in goods and services. In terms of obtaining Senate support, this probably simplifies matters since senators do not have to address the impact, for example, of the elimination of tariffs for a constituent's protected domestic industry. Future BITs with major trading countries such as China, India, Russia, and Vietnam will be much more controversial than prior BITs with small developing nations or even with larger nations such as South Korea, the latter of which already had substantial investments in the United States prior to the conclusion of the FTA.[72]

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[68] *Bipartisan Trade Deal*, OFF. OF THE U.S. TRADE REPRESENTATIVE (May 2007), http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf [hereinafter *BTD*].

[69] *See infra* Part II.D.

[70] *See, e.g.*, 2007 KORUS, *supra* note 66, chs. 19 ("Labor"), 20 ("Environment"), 21 ("Transparency").

[71] U.S. CONST. art. II, § 2.

[72] Through 2011, South Korean investment in the United States was estimated at

2. Revising the Model BIT in the United States

The issuance of a new U.S. model BIT is a time-consuming process, with the public debate and inter-agency bureaucratic process typically consuming two to three years. In the case of the 2012 Model BIT developed by the Obama Administration, the result was largely anti-climactic; in most respects it does not differ significantly from the 2004 version (the latter concluded by the Bush Administration). As one expert, who is an investor-state arbitration counsel, has observed:

> After a review process that lasted three years, expectations ran high for the revised model U.S. bilateral investment treaty ("BIT"), which was released last month [May 2012]. Stakeholders from many parts of society – the U.S. Congress, environmental organizations, labor groups, business groups, trade associations, academia, the public, and investment experts – weighed in during the review process, with wildly divergent opinions and in some cases, hopes for radical changes. In the end, however, the unveiling proved somewhat anticlimactic, as the new model BIT did not diverge greatly from its 2004 predecessor.[73]

Many of these evolutionary changes are relevant either to negotiation of a BIT with China or to broader concerns about the BIT and investor-state arbitration and are discussed in Part E below. Also, some of these issues are likely to be addressed again when the Congress debates renewal of the President's Trade Promotion Authority, presumably before mid-2014.

U.S. $18.4 billion. *See U.S.-Korea Direct Investment Statistics*, U.S. DEP'T OF COM., http://www.trade.gov/eastasia/statistics/invest-korea.htm (last visited Feb. 18, 2014). KORUS became effective on March 15, 2012. *New Opportunities for U.S. Exporters Under the U.S.-Korea Trade Agreement*, OFF. OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta (last visited Feb. 18, 2014).

[73] Paolo Di Rosa, *The New 2012 Model BIT: Staying the Course*, KLUWER ARB. BLOG (June 1, 2012), http://kluwerarbitrationblog.com/blog/2012/06/01/the-new-2012-u-s-model-bit-staying-the-course/.

E. Evolution of U.S. BIT and FTA Investment Chapter Practice

This section highlights some of the newer innovations in U.S. practice.

1. Limiting Foreign Investor Benefits to those Afforded U.S. Citizens Under U.S. Law

To date, no investment disputes in post-NAFTA FTAs involving the United States as respondent have reached the stage of investor-state arbitration,[74] but the United States has been named as a respondent in at least twenty NAFTA Chapter 11 proceedings.[75] Because of the significant volume of NAFTA litigation, some in Congress (undoubtedly reflecting constituent interests) remain concerned that foreign investors bringing actions against the United States, or against U.S. states,[76] will receive better legal treatment than U.S. national investors bringing similar claims. The latter, of course, do not have available international arbitration against the U.S. government or its agencies, although they have full access to the U.S. system of courts and constitutional, legal, and administrative remedies.

The result, embodied in the BTD, called for including in the preamble to the FTAs with Colombia, South Korea, Panama, and Peru explicit language to the effect that foreign investors would not be accorded greater substantive rights than are afforded the U.S. investors regarding investment protections within the United States.[77] In application, the language appears designed to avoid reciprocal efforts against U.S. investors seeking arbitration of claims abroad in order to limit protection to what is provided in national law. Thus, the preamble to the KORUS provides in pertinent part that the Parties are:

> *Agreeing* that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, *as in the United States*, protections of investor rights under domestic law equal or exceed those set forth in this Agreement . . . ."[78]

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[74] Several claims, however, have been submitted to arbitration under CAFTA-DR, *infra* note 79, ch. 10. *See, e.g.*, Railroad Dev. Corp. v. Guat., Award, ICSID Case No. ARB/07/23 (June 29, 2012).

[75] *NAFTA Chapter 11 Investor-State Disputes*, CANADIAN CTR. FOR POL'Y ALTERNATIVES: TRADE & INV. RES. PROJECT (Oct. 1, 2010), http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2010/11/NAFTA%20Dispute%20Table.pdf.

[76] The NAFTA national governments are responsible for defending foreign investor actions brought against measures allegedly violating Chapter 11 that have been taken by the states or provinces.

[77] *BTD*, *supra* note 68, at 4.

[78] 2007 KORUS, *supra* note 66, pmbl. ¶ 5 (emphasis added).

As this language suggests, one can reasonably argue that under U.S. law, foreign investors currently possess all the legal rights guaranteed by customary international law, including those explicitly afforded in U.S. BITs and FTA investment chapters and the rights afforded U.S. domestic investors under the U.S. Constitution. The language, even though preambular, may be more troubling if and when an effort is made to apply it on a reciprocal basis, with the BIT or FTA partner governments asserting that *their* local laws also meets or exceeds the requirements of the particular FTA's investment chapter. At a minimum, it may require the arbitrators to resolve any such disagreement, adding to the time and cost of the arbitration.

Interestingly, the limitation does *not* appear in the preamble to the 2012 U.S. Model BIT. Whether a BIT concluded with China without such language would run into difficulties in the Senate (for this reason in addition to others) is uncertain.

2. Minimum Standard of Treatment

In dealing with fair and equitable treatment claims, most post-NAFTA investment chapters, including CAFTA-DR, KORUS, and the 2012 U.S. Model BIT, provide a more detailed explanation of what does—and does not—constitute a denial of fair and equitable treatment.[79] For example, the KORUS specifies:

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. *The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.*

[79] Free Trade Agreement, Dom. Rep.-Central America art. 10.5, ¶ 2(a), Aug. 5, 2004 [hereinafter CAFTA-DR]; 2012 KORUS, *supra* note 41, art. 11.5, ¶ 2(a); 2012 U.S. Model BIT, *supra* note 41, art. 5, ¶ 2(a). Several arbitral awards under NAFTA, such as *Glamis Gold v. United States*, hold that the customary international law standard for fair and equitable treatment is as determined in the 1926 *Neer* arbitration; the threshold for an international law violation has not been lowered, *inter alia*, by arbitration decisions over the past eighty-five years or by more than the 2,000 BITs incorporating fair and equitable treatment. *See* Glamis Gold Ltd v. United States, ICSID, Award, ¶¶ 600, 612-13, 616 (June 8, 2009), 48 I.L.L. 1039 (upholding, essentially, the continued applicability of the *Neer* standard).

> The obligation in paragraph 1 to provide:
>
> (a) "[F]air and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> (b) "[F]ull protection and security" requires each Party to provide the level of police protection required under customary international law.[80]
>
> An annex provides further "clarification:"
>
> The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced . . . results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.5 [quoted above], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.[81]

It is evident that this language was designed to encourage arbitrators to interpret the fair and equitable treatment language narrowly, restricting any findings of a treaty violation to situations where the actions or inactions by the respondent state meet the relatively high standard of customary international law. Not just any arbitrary or unreasonable action by a government rises to the level of a treaty violation.

3. Broad National Treatment Protections

For negotiations with China, the most important aspect of the national treatment provisions of the 2012 U.S. Model BIT is coverage of the "pre-establishment phase" of an investment, so as to preclude discrimination between U.S. investors and Chinese domestic investors, including SOEs, in the reviewing and authorizing process. This is clearly established in the 2012 U.S. Model BIT:

> 1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the

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[80] 2007 KORUS, *supra* note 66, art. 11.5, ¶ 2 (emphasis added).

[81] *Id.* annex 11-A (emphasis added).

> *establishment, acquisition*, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the *establishment, acquisition*, expansion, management, conduct, operation, and sale or other disposition of investments.[82]

One expert suggests that such a prohibition of continuing government discrimination in favor of SOEs against foreign investors would be difficult for China to accept in view of the fact that they have not accepted the requirement in prior BITs.[83] This is likely true; but, it may also cause difficulties for the United States to accept an obligation not to discriminate against Chinese enterprises, particularly SOEs and sovereign wealth funds that seek to invest in the United States, even if exceptions are established in the annexes.

4. Indirect or "Creeping" Expropriation

Post-NAFTA agreements, including the CAFTA-DR and both the 2004 and 2012 U.S. Model BITs also provide several important limitations with regard to claims of indirect expropriation (defined as a "series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure") that did not appear in NAFTA:

> (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> > *(i) [T]he economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;*
> >
> > *(ii) [T]he extent to which the government action interferes with distinct, reasonable investment-backed expectations; and*

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82 2012 U.S. Model BIT, *supra* note 41, art. 3, ¶¶ 1-2 (emphasis added).

83 Kong, *supra* note 4, at 186.

> *(iii) [T]he character of the government action.*
>
> *(b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.*[84]

In sub-paragraph (a), the concept of indirect expropriation is further defined and narrowed by incorporation of the (italicized) criteria based on the U.S. Supreme Court's decision in *Penn Central Transportation Co. v. New York City*.[85] This limitation could be particularly relevant in the context of a BIT with China, since it is reasonable to expect that the government of China will be addressing China's critical pollution problems through increasingly strict regulation over the next several decades. Also, the language in sub-paragraph (b) is designed to be a limiting factor on potential liability arising as a result of the host government's non-discriminatory actions to protect public welfare because of the additional defenses it affords the host state. In addition, in the KORUS, whether the arbitration is direct or indirect, "An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment."[86]

5. Addressing State-Owned Enterprises and Performance Requirements

The 2012 U.S. Model BIT incorporates various additions not found in earlier FTAs or BITs in order to provide additional protection to U.S. investors in nations where much of the economy is managed by the state and where state-owned enterprises (SOEs) play a major role in economic activities.[87] No effort is made to restrict or eliminate SOEs, but all obligations under the BIT would effectively apply to SOEs. Related provisions also expand limitations on

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[84] CAFTA-DR, *supra* note 79, annex 10-C, ¶ 4(b) (emphasis added); *see also* 2012 U.S. Model BIT, *supra* note 41, annex B(4)(b).

[85] CAFTA-DR, *supra* note 79, annex 10-C, ¶ 4(a); *see also* Penn Cent. Transp. Co. v. N.Y. City, 438 U.S. 104 (1978).

[86] 2007 KORUS, *supra* note 66, annex 11-B (1); 2012 U.S. Model BIT, *supra* note 41, annex B, ¶ 2.

[87] Thus, Article 1 defines "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise" and includes language indicating that a "state enterprise" means an enterprise owned, or controlled through ownership interests, by a Party . . . ." Article 2.2 (defining the scope and coverage of the BIT) states that "A Party's obligations under Section A shall apply: (a) to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party . . . ." (This includes situations where almost any type of government authority is transferred to or exercised by the SOE.)

performance requirements, where a host government seeks to condition various benefits to investors to their use of local materials or local technology. Of similar importance is language in the 2012 U.S. Model BIT that provides a ban on requirements "to transfer a particular technology, a production process, or other proprietary knowledge to a person" in the other's territory" or use technology supplied by the host country or its producers where the result is to afford protection to local suppliers.[88] Such restrictions have been of particular concern to U.S. investors in China in the past, and China has frequently failed to comply with its obligations under WTO rules.[89]

6. Enhanced Transparency

A requirement of "transparency of arbitral proceedings"[90] appears in similar form in all post-2002 U.S. BITs and FTAs, in part because pressures for transparency became a requirement in the 2002 TPA. These provisions require a degree of transparency in terms of hearings and dissemination of notices, and all other documents related to arbitration that did not originally exist in NAFTA or in most other countries' BITs.[91] Such transparency, at least initially, may require adjustments to the procedures followed by many other governments that favor a high degree of confidentiality in investor-state arbitration proceedings.

Transparency requirements for investor-state obligations, present in the 2004 U.S. Model BIT, are expanded in the 2012 U.S. Model BIT to include mandatory consultation requirements designed to assist the other Party in improving its transparency practices, particularly in processes that involve the adoption of final regulations and the setting of standards.[92] Experienced observers suggest that such a participation requirement could facilitate the exchange of views between investors and governmental entities at a time when proposed changes can be more easily evaluated, possibly resolving potential disputes before they arise.[93]

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[88] 2012 U.S. Model BIT, *supra* note 41, art. 8, ¶ 1(f), (h).

[89] *See, e.g.*, Agreement on Trade-Related Investment Measures, ¶ 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186.

[90] CAFTA-DR, *supra* note 79, art. 10.21; 2012 KORUS, *supra* note 41, art. 11.21; 2012 U.S. Model BIT, *supra* note 41, art. 29.

[91] *See Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, Annex I (OECD, Working Paper No. 2005/1, 2005), *available at* http://www.oecd.org/daf/inv/internationalinvestmentagreements/34786913.pdf (providing for open hearings in NAFTA Chapter 11 and Chapter 20 proceedings as well as access to documents and opportunities for non-parties to file *amicus curiae* briefs).

[92] 2012 U.S. Model BIT, *supra* note 41, art. 11.

[93] Di Rosa, *supra* note 73, ¶ 2.

7. Severing Jurisdictional Issues from Decisions on the Merits

The most recent U.S. BITs and FTA investment chapters also incorporate language that is designed to encourage arbitral tribunals to decide jurisdictional questions at the outset, rather than joining them to the merits; a process that if properly implemented could provide considerable cost and time savings for the host government if the arbitrators were to dismiss the case for lack of jurisdiction. Thus, CAFTA-DR provides that "without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made . . . ."[94]

8. Notice of Intent to File

Among the most important procedural innovations (a carry-over from NAFTA now applied universally by the United States and Canada) is the requirement that:

> At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify:
>
> > (a) [T]he name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
> >
> > (b) [F]or each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
> >
> > (c) [T]he legal and factual basis for each claim; and
> >
> > (d) [T]he relief sought and the approximate amount of damages claimed.[95]

This language was included in NAFTA at the suggestion of the Canadian negotiators.[96] From a procedural point of view this notice of intent requirement

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[94] CAFTA-DR, *supra* note 79, art. 10.20.4; 2012 KORUS, *supra* note 41, art. 11.20.6; 2012 U.S. Model BIT, *supra* note 41, art. 28.4.

[95] CAFTA-DR, *supra* note 79, art. 10.16.2; 2012 KORUS, *supra* note 41, art. 11.16.2; 2012 U.S. Model BIT, *supra* note 41, art. 24.2.

can be very useful because it ensures that the responsible agency in the host country's bureaucracy will be aware of the controversy at least ninety days before there is a request for arbitration and can plan accordingly to fulfill its responsibilities under national and international law. Otherwise, the agency responsible for managing the defense of investor-state claims may not become aware of a dispute between a foreign investor and another government agency until the notice of arbitration is filed.

9. Changes in Environmental and Labor Provisions

The 2012 U.S. Model BIT strengthens the labor and environmental requirements of the 2004 U.S. Model BIT, with provisions that extend beyond those considered in any other BIT, but well short of what the United States currently seeks in its FTAs.[97] Among the most important is a requirement that each Party:

> Ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.[98]

This obligation is, however, newly conditioned (compared to the 2004 U.S. Model BIT) on each Party's "right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities."[99] Similar language appears in the "Investment and Labor" chapter.[100]

In addition, the 2012 U.S. Model BIT carries over language from NAFTA and more recent FTAs, as well as the 2004 U.S. Model BIT, designed to discourage treaty partners from encouraging investment by promoting lax labor or environmental regulation. Thus, the 2012 Model BIT provides:

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[96] Telephone interview with a former member of the international counsel's office, Canadian Dep't of Foreign Affairs & Int'l Trade (DFAIT) (Sept. 2010) (referring to Article 1119) (on file with author).

[97] 2012 U.S. Model BIT, *supra* note 41, art. 12 ("Investment and the Environment").

[98] *Id.* art. 12.2.

[99] *Id.* art. 12.3.

[100] *Id.* art. 13.

> The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in [the Agreement] or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.[101]

Similar language applies to environmental regulations.[102] Under both chapters government-to-government consultation can be requested if a Party deviates from these obligations.[103] However, such issues are *not* subject to state-to-state dispute settlement under the BIT mechanisms.[104] This is in contrast to recent U.S. FTAs, where failure to comply with a list of multilateral agreements or "fundamental labor rights" is subject to state-to-state dispute settlement.[105]

10. National Security

NAFTA's national security provisions closely track GATT, Article XXI, in major respects, with the key being that nothing in the Agreement is to "prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests . . . ."[106] The phraseology in the 2012 U.S. Model BIT is similar, precluding the BIT from being construed "to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security [(a reference to U.N., NATO, OAS, or similar actions)], or the protection of its own essential security interests."[107]

11. An Appellate Mechanism for Review of Arbitral Awards?

The 2012 U.S. Model BIT further waters down any requirement that the Parties seek (or consider seeking) agreement on an appellate mechanism to review

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[101] *Id.* art. 13.2.

[102] *See* 2012 U.S. Model BIT, *supra* note 41, art. 12.2. The state-to-state dispute resolution provisions of BITs, in contrast to the investor-state mechanisms, are rarely used.

[103] *Id.* arts. 12.6, 13.4.

[104] *Id.* art. 37.

[105] *See, e.g.*, 2012 KORUS, *supra* note 41, arts. 20.2 ("Environmental Agreements"), 19.2 ("Fundamental Labor Rights").

[106] NAFTA, *supra* note 37, art. 2102.

[107] 2012 U.S. Model BIT, *supra* note 41, art. 18.2.

arbitration awards, language that has been consistently included in one form or another in U.S. FTA investment chapters, at least since the Chile and Singapore BITs.[108] The 2004 U.S. Model BIT provided highly conditional language (given that there has been no progress at ICSID or elsewhere in creating an appellate mechanism):

> If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 34 in arbitrations commenced after the multilateral agreement enters into force between the Parties.[109]

In the 2012 U.S. Model BIT, the Parties are obligated only to "consider whether awards rendered under Article 34 should be subject to that appellate mechanism" while ensuring that any such mechanism incorporate transparency provisions similar to those found elsewhere in the Model BIT.[110] Since none of the Parties, including the United States, have sought to negotiate an agreement providing for an appellate mechanism under the FTAs containing such a provision the language is for all practical purposes superfluous, but may nevertheless disappoint a few supporters in the Senate and the business and academic communities who are increasingly concerned regarding the lack of consistency (and in some instances correctness) in investor-state arbitral awards.

As discussed in greater detail in Part IV, China likely would oppose some, but by no means all, of these innovations. While the 2012 U.S. Model BIT is only the starting point for a negotiation with China or any other nations, departures from the model are likely to be scrutinized carefully by members of Congress and civil society as it may raise unrealistic expectations, particularly with regard to transparency and labor, as well as environmental requirements and efforts to rein in SOEs.

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[108] *See, e.g.*, 2012 KORUS, *supra* note 41, annex 11-D ("Possibility of a Bilateral Appellate Mechanism"); *see also* David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39 (2006).

[109] 2004 U.S. Model Bilateral Investment Treaty art. 28.10 [hereinafter 2004 U.S. Model BIT].

[110] 2012 U.S. Model BIT, *supra* note 41, art. 28.10.

III. CHINA'S BIT EXPERIENCE

China has been one of the world's most prolific negotiators of BITs, having concluded 130 through May 2012.[111] Of these, more than twenty-five were concluded with OECD members or other developed countries, including France, Germany, Japan, Switzerland, and the United Kingdom.[112] In many cases more than twenty-five years has elapsed since the BITs were originally negotiated.[113] In this section, I discuss China's experience with BIT negotiations and several key BITs. Of these, the most significant for the United States' negotiations is the September 2012 Canada-China FIPA.

A. Early Evolution of Chinese BITs

The prospects of a U.S. BIT with China are somewhat enhanced by the fact that Chinese BIT practice has evolved significantly over the past thirty years, to the point where China has been willing to offer increasingly broad investor protections, no doubt reflecting the fact that China has become a major capital-exporting nation rather than simply a capital importer. The initial BITs concluded by China, beginning in 1982 with a six-page BIT with Sweden,[114] were relatively bare-bones instruments. The BIT with Sweden provided for fair and equitable treatment; MFN treatment; restrictions on expropriation; and repatriation of profits, dividends, royalties, and fees.[115] However, it made no provision for investor-state arbitration or national treatment. China's BIT, concluded with the United Kingdom in 1986, provided national treatment on investment "returns," and "to the extent possible," national treatment regarding the application of laws and regulations to investors and companies of the other Party.[116] The agreement also provided for investor-state arbitration, either through an *ad hoc* arbitrator, a tribunal appointed by the parties, or through arbitration under the UNCITRAL

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[111] *See Total Number of Bilateral Investment Agreements Concluded [by China]*, UNCTAD (June 1, 2012), http://unctad.org/Sections/dite_pcbb/docs/bits_china.pdf.

[112] *Id.*

[113] *See, e.g.*, Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China Concerning the Promotion and Reciprocal Protection of Investments, U.K.-China, May 15, 1986, *available at* http://unctad.org/sections/dite/iia/docs/bits/uk_china.pdf [hereinafter U.K.-China BIT].

[114] Agreement on the Mutual Protection of Investments, China-Swed., Mar. 29, 1982, *available at* http://unctad.org/sections/dite/iia/docs/bits/china_sweden.pdf. A revised agreement between the two nations was concluded on September 27, 2004, but apparently has not been ratified.

[115] *Id.* arts. 2-4.

[116] U.K.-China BIT, *supra* note 113, arts. 3.1-3.3.

Arbitration Rules, but only regarding the amount of compensation due as a result of the alleged taking.[117]

It was not until the late 1990s, when Chinese outward investment began growing rapidly, that China began to consider national treatment guarantees, even of limited effectiveness, and to include investor-state arbitration. Presumably, before that, the government's interest in protecting "infant" industries and SOEs had fully prevailed.[118] Axel Berger suggests that the shift in Chinese thinking first appeared in its 1998 BIT concluded with Barbados.[119] The Barbados BIT, while itself only ten substantive pages and excluding national treatment commitments, does incorporate a more typical investor-state dispute settlement provision giving the investor the right, after six months, to submit the dispute either to ICSID or to an arbitral tribunal operating under UNCITRAL Rules.[120] (Among other important changes, effective February 1993, China had become a member of ICSID.[121]) The Barbados BIT also covers investments made either prior to or after the entry into force of the Agreement,[122] although it does not apply to investments in the establishment phase.

By 2002, China was cautiously expanding coverage of national treatment in its BITs. For example, the BIT with Trinidad provided in pertinent part:

> *Without prejudice to its laws and regulations*, each Contracting Party shall accord to investments or returns and activities associated with the investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments or returns and associated activities of its own investors.[123]

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[117] *Id.* art. 7.2.

[118] *See* Axel Berger, *China's New Bilateral Investment Treaty Programme: Substance, Rational[e] and Implications for International Investment Law Making*, THE POLITICS OF INT'L ECON. L. 8 (Nov. 14, 2008), http://www.asil.org/files/ielconference papers/berger.pdf (discussing the evolution of China's BIT practice).

[119] *Id.* at 10.

[120] Agreement Between the Government of Barbados and the Government of the People's Republic of China art. 9.2, China-Barb., July 22, 1998 [hereinafter China-Barbados BIT], *available at* http://www.investbarbados.org/docs/BIT%20-%20 Republic%20of%20China.PDF [hereinafter China-Barbados BIT].

[121] *See Search ICSID Membership*, ICSID, https://icsid.worldbank.org/ICSID/ FrontServlet?requestType=ICSIDDataRH&reqFrom=Main&actionVal=ViewContractingSt ates&range=A~B~C~D~E (last visited Mar. 5, 2014).

[122] China-Barbados BIT, *supra* note 120, art. 11.

[123] Agreement Between the Government of the Republic of Trinidad and Tobago and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments art. 4.2, China-Trin. & Tobago, July 22, 2002, *available at* http://www.tradeind.gov.tt/Agreements/TradeAgreements/BilateralInvestmentTreaties.aspx (emphasis added).

Substantively, this language leaves much to be desired, since the obligation is conditioned on the host country's law and regulations, in an agreement where the effective protection is far more likely to be invoked by Chinese investors in Trinidad than the reverse. It can be argued under these agreements that because most of China's BIT partners already grant national treatment to foreign investors under their prior BITs, China would enjoy such protections through the operation of the MFN clause in its own agreements, without effectively having to provide national treatment for inward investment into China.[124]

B. Recent Chinese BITs with Developed Nations

Practice has been somewhat different in recent Chinese BITs with developed countries, where investment flows move in both directions. For example, in China's 2001 BIT with the Netherlands, in addition to protection of fair and equitable treatment and against unreasonable and discriminatory measures, a general national treatment and most favored nation treatment provision (somewhat less restrictive than in the past) is included:

> Each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favorable than that accorded to investments and activities by its own investors or investors of any third State.[125]

Additional provisions state that if either Party provides in its law or regulations treatment more favorable for investors in the future than that required by that the BIT investors enjoy, then such is more favorable treatment.[126] However, in the case of Dutch investments into China (but not the reverse), the non-discriminatory treatment, national treatment, and MFN treatment provisions do not apply to pre-existing, continuing, or new non-conforming measures, provided that in the latter cases, there is no increase in the level of non-conformity of the measure.[127] This is in effect a standstill provision that provides foreign investors in China a somewhat higher level of protection against discrimination than in the BITs with developing nations discussed earlier.

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[124] Berger, *supra* note 118, at 12.

[125] Agreement on Encouragement and Reciprocal Protection of Investment Between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands arts. 3.1-3.3, China-Neth., Nov. 26, 2001, *available at* http://unctad.org/sections/dite/iia/docs/bits/china_netherlands.pdf.

[126] *Id.* art. 3.5.

[127] *Id.* at *Protocol*, ad art. 3, ¶¶ 2-3.

Among the most recent (pre-Canada) agreements concluded by China is a 2009 BIT with Switzerland.[128] This agreement contains several refinements, including language making it clear that the Agreement, while covering investment both prior and post entry into force is not "applicable to claims or disputes arising out of events which occurred prior to its entry into force."[129] While the Swiss BIT does not depart significantly from the Netherlands BIT (including the protocol restrictions), the language on fair and equitable treatment, national treatment, and MFN treatment is somewhat expanded to resemble treatment other agreements concluded by OECD nations:

> (1) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment extension of disposal of such investments.
>
> (2) Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment not less favorable than that which it accords to investment or returns of its own investors (national treatment) or to investments or returns of any third States (MFN treatment), whichever is more favorable to the investor concerned.
>
> (3) Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment not less favorable than that which it accords to its own investors (national treatment) or investors of any third States (MFN treatment), whichever is more favorable to the investor concerned.[130]

Over the past two decades China's BIT practice (including the agreement with Canada discussed below) has thus evolved significantly. While it has not yet converged on U.S. "high-standard" BIT practice, it has come closer, except in such key areas as national treatment for the pre-establishment phase of an investment and with respect to existing and future measures, explicit coverage of indirect expropriation, labor, environment, transparency, and SOEs. Other than

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[128] Agreement Between the Swiss Federal Council and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, China-Switz., Jan. 27, 2009, *available at* http://unctad.org/sections/dite/iia/docs/bits/Switzerland_China_new.pdf

[129] *Id.* art. 2.

[130] *Id.* art. 4.

pre-establishment national treatment coverage and indirect expropriation, it should be noted that the rest are not often found in BITs or FTA investment chapters, except those negotiated by the United States.

C. The 2012 China-Canada FIPA

1. History and Rationale for the FIPA

In recent years, the substantive provisions of Canadian FIPA have generally paralleled that of the United States, presumably due in large part to similar legal systems and the shared experience under Chapter 11 of NAFTA. As noted earlier, Canada, unlike the United States, has been required to pay compensation in several cases before NAFTA Chapter 11 tribunals, an experience that has made the government (and civil society) at least as sensitive to the challenges facing a respondent government as in the United States.[131] Canada also has the historical perspective created by having citizens or enterprises of an enormous foreign power (the United States) owning a large portion of the nation's productive assets, estimated at U.S. $326 billion worth (stock) in 2012, or more than fifty-one percent of total foreign investment in Canada.[132]

The economic rationale for a FIPA with China is self-evident. Canada has enormous mineral and petroleum resources, and Chinese enterprises (including SOEs) are hungry for both. In 2012, Chinese investment in Canada (about U.S. $20 million), mostly in the energy sector, exceeded Chinese investment in the United States (about U.S. $10 million).[133] The investments in 2012 reportedly included some twenty-three separate projects, with the largest in natural gas and the mining sector, where China is seeking nickel, copper, iron ore, and potash.[134] As of 2011 (before the 2012 expansion) Canadian enterprises had

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[131] *See* Michael Knigge, *China Investment Deal Raises Red Flags in Canada*, DW (Apr. 26, 2013), http://www.dw.de/china-investment-deal-raises-red-flags-in-canada/a-16775194 (criticizing the "crucial mistakes" in the BIT and the lack of transparency in the negotiations); Jeffery Atik, *Legitimacy, Transparency, and NGO Participation in the NAFTA Chapter 11 Process*, *in* NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 135 (2004).

[132] *U.S.-Canada Trade Facts*, OFF. OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/countries-regions/americas/canada (last visited Mar. 5, 2014); *U.S.-Canada Trade Facts*, OFF. OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/countries-regions/americas/canada (last visited Mar. 5, 2014); *Foreign Direct Investment Statistics*, FOREIGN AFF., TRADE & DEV. IN CANADA, http://www.international.gc.ca/economist-economiste/statistics-statistiques/investments-investissements.aspx (last visited Mar. 7, 2014).

[133] Knigge, *supra* note 131 (quoting data from Dealogic).

[134] *See* Olesia Plokhii & James Munson, *Canada Top Target for Chinese Foreign Investment Last Year*, IPOLITICS (Feb. 13, 2013), http://www.ipolitics.ca/2013/02/13/canada-top-target-for-chinese-foreign-investment-last-year/.

C$4.5 billion invested in China and China had C$10.9 billion.[135] Chinese investment has generally been welcomed in Canada, in part to diversify resource exports away from the current (heavy) reliance on the United States.[136] Canadian officials also see the Chinese interest in expanded investments in energy as leverage for encouraging the Obama Administration to approve the XL pipeline. As Canadian Trade Minister Ed Fast has bluntly stated:

> We believe that there is a choice the United States has to make . . . . Do they want to continue to purchase oil from countries like Saudi Arabia, Nigeria and Venezuela that don't share the same values as the United States, or does the United States want to have its most trusted trading partner as its partner in energy security?[137]

Overall, as of the end of 2013, Canada had twenty-six FIPAs in force, had concluded another fourteen negotiations (including those with China), and was engaged in negotiations with an additional eleven nations.[138]

2. Canada's 2004 Model FIPA/BIT

Canada began the negotiations with China (as with most recent FIPAs) based on its own 2004 Model FIPA/BIT,[139] which closely resembles the 2004 U.S. Model BIT and explicitly reflects experience with NAFTA.[140] The 2004 Canadian Model FIPA is continuously being updated,[141] with the most recent version (July 2012) still very similar to the 2004 model. However, there are some differences in approach compared to the United States. For example, the 2004 Canadian Model FIPA includes a list of health and environmental exceptions

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[135] *Canada-China Foreign Investment Promotion and Protection Agreement (FIPA) Negotiations*, FOREIGN AFF., TRADE & DEV. IN CANADA, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-chine.aspx (last updated Mar. 5, 2014).

[136] *See* Brian Spegele, *Canada Welcomes More China Energy Investment*, WALL ST. J. (Apr. 16, 2013), http://online.wsj.com/article/SB10001424127887324345804578426504228366868.html (quoting a statement by Canadian Trade Minister Ed Fast).

[137] *Id.*

[138] *Foreign Investment Promotion and Protection (FIPAs)*, FOREIGN AFF., TRADE & DEV. IN CANADA (Dec. 18, 2013), http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng.

[139] 2004 Canadian Model Bilateral Investment Treaty (Foreign Investment Protection Agreement) [hereinafter 2004 Canadian Model BIT], *available at* http://italaw.com/documents/Canadian 2004-FIPA-model-en.pdf (last visited Mar. 5, 2014).

[140] MacKay Affidavit, *supra* note 61, ¶ 25.

[141] *Id.* ¶ 26.

patterned after GATT, Article XX.[142] One scholar has suggested that this language carries the risk that it might be used to establish a negative precedence when earlier FIPAs are being interpreted, with the tribunal accepting a distinction between a FIPA with the general exceptions and those that have no such language.[143] Also, MFN treatment does not apply to treatment afforded others under existing treaties,[144] presumably to discourage treaty shopping by investors in Canada not otherwise covered by the FIPA under negotiation.

As well, the limitations on indirect expropriation are almost identical to those found in U.S. BITs as discussed above.[145] The 2004 Canadian Model FIPA also incorporates the transparency requirement based on the NAFTA understandings, whereby pleadings and other documents are to be publicly available during the arbitration proceedings except where business confidential or privileged documents are involved, and hearings are to be open to the public.[146]

3. Canada's FIPA Negotiations with China

The negotiations with China initially began in 1994, but were suspended until September 2004, well after China's accession to the WTO in November 2001.[147] As with the United States, the Canadian government seeks "high standard" investment agreements and prides itself that such an agreement was concluded with China,

> [W]ith comprehensive scope and coverage and substantive obligations pertaining to national treatment (post-establishment), most-favored-nation treatment (pre- and post-establishment), minimum standard of treatment, transparency, performance requirements, transfers and expropriation. Additionally, this Agreement will grant investors access to investor-state dispute settlement that is governed by detailed rules in the Agreement on standing, procedural requirement and enforcement.[148]

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[142] 2004 Canadian Model BIT, *supra* note 139, art. 10.1.

[143] *See* Andrew Newcombe, *Canada's New Model Foreign Investment Protection Agreement*, ITALAW (Aug. 2004), http://italaw.com/documents/CanadianFIPA.pdf (discussing this and other deviations from prior Canadian practice). The issue does not normally arise with FTA investment chapters. For example, NAFTA contains similar general exceptions. *See* NAFTA, *supra* 37, art. 2101.

[144] 2004 Canadian Model BIT, *supra* note 139, annex 3.1.

[145] *Id.* annex B.13.1.

[146] *Id.* art. 38.

[147] *Canada-China Foreign Investment Promotion Agreement (FIPA) Negotiations*, FOREIGN AFF., TRADE & DEV. IN CANADA, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-chine.aspx?lang=eng (last updated Mar. 5, 2014).

[148] *Id.*

Canadian officials have stated that the Canada-China FIPA is consistent with Canada's "Global Commerce Strategy" that contemplates improving Canada's competitiveness and supporting Canadian firms investing worldwide, with one of the "pillars" being to "[i]ncrease foreign direct investment in Canada and Canadian direct investment around the world."[149]

Under current Canadian practice, an Order of Council is sought for the signature of a FIPA and another for ratification. Treaties, such as the Canada-China FIPA, are tabled in Parliament for twenty-one "sitting" days to permit Members to initiate debate; after that period has expired the Government considers any concerns raised by the Opposition Parties.[150] For the Canada-China FIPA, the twenty-one-day period expired November 1, 2012.[151] Ratification, which would require only an exchange of diplomatic notes with China,[152] has been delayed largely as a result of an application for judicial review brought by one of Canada's First Nations, charging the government's failure to consult prior to concluding the Agreement, a constitutionally-based challenge that the government contests.[153] However, on August 27, 2013, the application was dismissed on the grounds that the adverse impact claims were speculative in nature and that the claimants did not establish a causal link between the alleged adverse impact claims and the FIPA.[154] An appeal has apparently been filed, which will further delay the ratification of the FIPA. As of March 2014, the Canadian government had not approved the FIPA.

4. Key Features of the Canada-China FIPA

Much of the FIPA tracks or closely resembles Canada's updated 2004 Model FIPA, as in the areas of minimum standard of treatment and the right to appoint senior management and boards of directors.[155] Elsewhere, there are significant departures. While the national treatment section of the 2004 Model FIPA applies to the establishment phase of the investment, that pre-investment phase is not covered in the Canada-China FIPA.[156] The Canada-China FIPA scope is limited to the "expansion, management, conduct, operation and sale or

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[149] MINISTER OF PUBLIC WORKS & GOV'T SERVICES CAN., GLOBAL COMMERCE STRATEGY 4 (2008), *quoted in* MacKay Affidavit, *supra* note 61, ¶ 9; *see also* MacKay Affidavit, *supra* note 61, ¶ 6.

[150] MacKay Affidavit, *supra* note 61, ¶¶ 86-90.

[151] *Id.* ¶ 87.

[152] *Id.* ¶ 91.

[153] *Id.* ¶¶ 78-83; Hupacasath First Nation & the Minister of Foreign Affairs Can. & the Attorney Gen. of Can., 2013 F.C. 900, ¶¶ 147-49 (Can.).

[154] *Hupacasath First Nation*, 2013 F.C. ¶¶ 147-50.

[155] Canada-China FIPA, *supra* note 5, arts. 4, 7.

[156] *See* Canada-China FIPA, *supra* note 5, art 6; 2004 Canadian Model BIT, *supra* note 139, art. 3.

other disposition of investments in its territory."[157] Moreover, national treatment of "expansion" (which is not defined in the Agreement, but presumably means additional investment in an existing enterprise or project) "applies only with respect to sectors not subject to a prior approval process" under relevant national laws and guidelines.[158]

Dispute settlement procedures are not applicable to decisions by Canada under the Investment Canada Act or China "under the Laws, Regulations and Rules relating to the regulation of foreign investment."[159] These carve-outs are facially reciprocal. It is difficult to predict whether China will exercise the exceptions more frequently than is the case with Canada, although, as indicated earlier, there appears currently to be much more inward investment into Canada from China than the other way around. The acquisition of the Canadian oil sands energy company, Nexen, by the state-owned Chinese, CNOOC, approved in December 2012, generated controversy in the Canadian Parliament, leading Prime Minister Stephen Harper to express opposition to further oil sands acquisitions by Chinese SOEs.[160]

Although the FIPA does not explicitly mention SOEs, the agreement does apply to them in very limited respects:

> A Contracting Party's obligations under this Agreement shall apply to any entity whenever that entity exercises any regulatory, administrative or other governmental authority delegated to it by that Contracting Party, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.[161]

At the same time, SOEs are afforded a significant exemption to minimum standard of treatment, MFN, and senior management obligations. The exemption applies not only to grandfathered pre-existing measures, but also to:

> [A]ny measure maintained or adopted after the date of entry into force of this Agreement that, at the time of sale or other disposition of a government's equity interests in, or the assets of, an *existing state enterprise or an existing governmental entity,* prohibits or imposes limitations on the ownership or control of equity interests or assets or imposes nationality requirements relating to senior management or members of the board of directors . . . .[162]

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[157] Canada-China FIPA, *supra* note 5, art. 6.1.

[158] *Id.* art. 6.3.

[159] *Id.* annex D.34(1), (2).

[160] Spegele, *supra* note 136, at 1.

[161] Canada-China FIPA, *supra* note 5, art. 2.2; *see also* MacKay Affidavit, *supra* note 61, at 53 ("One particularity of reservations for future measures . . . .").

[162] Canada-China FIPA, *supra* note 5, art. 8.2(a)(ii) (emphasis added).

In a rather "particular" approach, both Canada and China have preserved certain future reservations to MFN treatment, national treatment, and senior management through incorporating, by reference, annexes to their respective FTAs with Peru.[163] Annex II of the Canadian agreement with Peru provides for a series of "Reservations for Future Measures," which are applicable to national treatment, MFN treatment, senior management and boards of directors, and performance requirement obligations.[164]

MFN treatment more generally incorporates a significant additional limitation; it cannot be used to incorporate dispute resolution mechanisms in other investment and trade agreements, whether prior or subsequent.[165] It seems likely that Canada as well as China have had some concerns about the use of MFN clauses by investors to invoke more favorable provisions in other BITs concluded by the same country. This clause will make it more difficult for investors of Chinese or Canadian nationality, respectively, to bring claims based on treaty provisions other than those incorporated in the FIPA between Canada and the investor's home state.[166]

In another significant limitation, performance requirement obligations are limited to those in the WTO Agreement on Trade-Related Investment Measures (TRIMS), rather than to the more expansive coverage found in the 2004 Canadian Model BIT.[167] Given the controversies that have arisen in recent years as a result of China's efforts to force investors to disclose their technology as a condition of investing or use of domestic rather than foreign inputs,[168] the absence of stringent limitations on performance requirements could put Canadian investors at a

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[163] *Id.* annex B.8.

[164] Agreement Between Canada and the Republic of Peru for the Reciprocal Promotion and Protection of Investments annex II, Nov. 14, 2006, Doc. No. E105078, *available at* http://www.treaty-accord.gc.ca/text-texte.aspx?id=105078&page=1.

[165] Canada-China FIPA, *supra* note 5, art. 5.3.

[166] *See* Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored Nation Clauses and Dispute Settlement provisions in Bilateral Investment Treaties*, 32 YALE J. INT'L L. 125 (2007) (providing a detailed discussion of several ISD decisions in which the MFN clause was used for this purpose); Aaron M. Chandler, *BITS, MFN Treatment and the PRC: The Impact of China's Ever-Evolving Bilateral Investment Treaty Practice*, 43 INT'L LAW. 1301, 1308-10 (2009) (discussing mid-2000 China practice with MFN clauses in BITs).

[167] *Compare* Canada-China FIPA, *supra* note 5, art. 9, *with* 2004 Canadian Model BIT, *supra* note 139, art.7.

[168] "[T]he majority of industry representatives interviewed for this study clearly stated that technology transfers are required to do business in China . . . ." Kathleen A. Walsh, U.S. DEP'T OF COMM., U.S. COMMERCIAL TECHNOLOGY TRANSFERS TO THE PEOPLE'S REPUBLIC OF CHINA, at iv, (1999), *available at* http://www.bis.doc.gov/index.php/forms-documents/doc_view/71-u-s-commercial-technology-transfers-to-the-people-s-republic-of-china-1999.

significant disadvantage. China is also permitted with some limitations to maintain existing formalities for exchange controls under domestic law.[169]

The expropriation language negotiated by Canada applies to indirect expropriations (measures with "an effect equivalent to expropriation"),[170] explicit coverage that goes beyond what China has been willing to accept in most BITs in the past, although intellectual property issues, including compulsory licensing and the revocation or creation of intellectual property rights, are generally excluded as in 2004 Canadian Model FIPA.[171] The China FIPA also includes a detailed annex along the lines of those found in recent U.S. and Canadian BITs/FIPAs, defining indirect expropriation, adopting the *Penn Central* criteria discussed earlier, and including the language providing that:

> [E]xcept in rare circumstances . . . a non-discriminatory measure or series of measures of a Contracting Party that is designed and applied to protect the legitimate public objectives for the well-being of citizens, such as health, safety and the environment, does not constitute indirect expropriation.[172]

Investment disputes are subject to international arbitration, with some pre-conditions that are not found in some other U.S. or Canadian BITs/FIPAs, including special provisions for financial services disputes.[173] With regard to arbitration procedures, the FIPA retains the "notice of intent to file" requirement, originally found in NAFTA and other U.S. and Canadian BITs and FTA investment chapters, but is limited to four months instead of six months in advance of filing for arbitration.[174] The concept of exhaustion of local remedies is treated differently in China than in Canada. In China, an investor cannot seek arbitration without first making use of the "domestic reconsideration procedure" with the provision that if the dispute has not been resolved through this procedure within four months, the claim may be submitted to arbitration.[175] In addition, any actions filed before Chinese courts must be withdrawn before a claim can be submitted to arbitration.[176] For Canada, the condition precedent generally tracks the waiver of domestic administrative or court action consistently with earlier practice.[177]

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[169] Canada-China FIPA, *supra* note 5, annex B.12.

[170] *Id.* art. 10.1

[171] *See* 2004 Canadian Model BIT, *supra* note 139, art. 13.5; 2012 Canadian Model Bilateral Investment Treaty art. 10.5 [hereinafter 2012 Canadian Model BIT].

[172] Canada-China FIPA, *supra* note 5, annex B.10.3; *see also* 2004 Canadian Model BIT, *supra* note 139, annex B.13)(1).

[173] Canada-China FIPA, *supra* note 5, art. 20.2(b)-(c).

[174] *Id.* art. 21.2(c); *see* NAFTA, *supra* note 37, art. 1119.

[175] Canada-China FIPA, *supra* note 5, annex C.21(1).

[176] *Id.* annex C.21(2).

[177] *Id.* annex C.21(3); *see* 2004 Canadian Model BIT, *supra* note 139, art. 26.1(e).

Some transparency provisions are more extensive than in many BITs and resemble the language of some U.S. and Canadian FTAs.[178] These include advance publication and accessibility requirements, along with comment opportunities. In detail, although not in general concept, the requirements go beyond GATT, Article X. However, the transparency of the investor-state arbitral process itself is considerably restricted compared to the post-NAFTA practice of Canada and the United States. While the awards must be made publicly available, other documents are to be made public only "where a disputing Contracting Party determines that it is in the public interest to do so and notifies the Tribunal of that determination . . . ."[179] Similar language provides that after consulting with the disputing investor, the hearings may made public.[180] This approach allows the Canadian Government to make documents and hearings public when Canada is the respondent in an ISD, while the Chinese Government may keep proceedings confidential when the ISD is brought by a Canadian investor against China. Chinese policy here presumably reflects the lack of civil society influence on the government.

China apparently had no objection to the hallmark provision which excludes "cultural industries" from the scope of the FIPA, but the term is spelled out in much greater detail than in the 2004 Canadian Model FIPA/BIT, with the exclusion explicitly applicable to printed matter, films, audio and visual recordings, music and radio communications.[181] Other exceptions in the FIPA include a number reflecting GATT, Article XX (including those relating to human, animal or plant life and health and exhaustible resources), and the now widespread "reasonable measures for prudential reasons" if non-discriminatory, related to the financial industry.[182] Measures relating to monetary, credit, and exchange rate policies are also largely excluded from BIT obligations, but the language does not permit deviations from the free transfer of financial assets provided elsewhere.[183]

While the 2004 Canadian Model FIPA contains no termination provisions, the China FIPA provides for an initial fifteen-year period of validity without any specified procedure for earlier termination, with the Agreement subsequently subject to termination upon one year's notice.[184] For investments made during the period of the FIPA, the provisions of the agreement protecting them continue to be effective for another fifteen years.[185] It is unclear who

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[178] *See, e.g.*, Canada-Costa Rica Free Trade Agreement ch. XII, Nov. 1, 2002, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/costarica/12.aspx?lang=en.

[179] Canada-China FIPA, *supra* note 5, art. 28.1.

[180] *Id.* art. 28.2; *see also* 2004 Canadian Model BIT, *supra* note 139, art. 38 (mandating hearings open to the public).

[181] Canada-China FIPA, *supra* note 5, art. 33.1; *see* 2004 Canadian Model BIT, *supra* note 139, art. 10.6.

[182] Canada-China FIPA, *supra* note 5, art. 33.3.

[183] *Id.* art. 33. 4. See also *id.* art. 12, on transfers.

[184] *Id.* art. 35.

[185] *Id.*

suggested the fifteen-year period; the 2012 Canadian Model FIPA calls for a FIPA to be force indefinitely, subject from the outset to termination after a year's notice, but with a fifteen-year period thereafter applicable to then-existing investments.[186] However, some Canadian FIPAs (e.g., Poland, Hungary) provide for an initial period of validity of ten years.[187]

5. Assessing the FIPA

The Canada-China FIPA represents a compromise, as does any BIT/FIPA between parties that are both capital importers and capital exporters. From the Canadian point of view, DFAIT failed to gain coverage of pre-investment measures as well as the broad national treatment provisions they likely would have preferred and language that might in some degree have reined in the preferential treatment of state-owned enterprises, including but not limited to those in the financial sector. SOEs remain largely undisciplined, except when the SOE is exercising a governmental function. Additionally, there is no mention of labor and environmental obligations beyond the limited language in GATT, Article XX, or the reciprocal level of transparency that up to now has been the norm in Canadian FIPAs and FTA investment chapters. At the same time, the FIPA goes well beyond what China was willing to offer Switzerland only a few years ago.

One should also keep in mind that a country that is as concerned about regulating inward investment as it is about protecting outward investment, may well view the exceptions required by China to be acceptable, if not welcome, for treating Chinese investment in Canada. After NAFTA, the United States is moving in the same direction; the U.S. BIT with China will require a capital-importing-nation mentality by the U.S. negotiators as never before.

IV. CHALLENGES IN CONCLUDING A U.S. BIT WITH CHINA

The United States authorities (the State Department and USTR) face three groups of issues in deciding how to conduct the negotiations, all of which are related. These consist of the substantive text of various provisions, as discussed in Parts II and III; addressing government-to-government complications, such as hacking and territorial claims in the South and East China Seas; and public skepticism or outright opposition among some members of the Senate and civil society.

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[186] 2012 Canadian Model BIT, *supra* note 171, art. 42.3.

[187] MacKay Affidavit, *supra* note 61, ¶ 74.

A. The Substantive Issues

The United States has had nearly two decades to adjust to the brave new world of reciprocity, beginning with Canadian and U.S. claims lodged under NAFTA, but this will be only the third BIT with a major capital exporting nation (KORUS was the second, but no investment disputes have been lodged in the year and a half the agreement has been in force). One of the key questions for the U.S. negotiators is what further measure or actions by the host countries should be excluded from review under the BIT and the extent to which, if any, the "essential security" provisions in the 2012 U.S. Model BIT should be expanded.

Given the progress made by Canada in its FIPA, and assuming that China will be willing to agree to similar terms in an agreement with the United States, the areas where China is likely to resist further concessions in its BIT practice include:

- U.S. proposals for broader national treatment requirements with fewer exceptions (including those that protect SOEs);
- Other aspects of non-discrimination by and for SOEs;
- Transparency, particularly with regard to U.S. investor actions against China;
- Any substantive treatment of labor and environmental requirements;
- Coverage of the pre-investment phase; performance requirements; and
- The lists of exceptions existing and future exceptions to market access obligations.

Coverage of financial services is also likely to be among the contentious issues at a time when banks in China are all owned and controlled by the government[188] and remain important tools for subsidizing favored industry sectors and implementing other policies in an economy where growth and exports have slowed in the past two years.

In the July 2013 bilateral discussions, China reportedly indicated to U.S. officials a greater willingness to consider liberalizing access to the Chinese market in the "pre-establishment" phase of investments, where the rule in many sectors has been strong preference for SOEs and other Chinese owned firms.[189] China was also said to be willing to consider a "negative list" approach to market access, under which all sectors not explicitly excluded from foreign participation in the

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[188] *Chinese Banks and Banking Practices*, FACTS & DETAILS, http://factsanddetails.com/china.php?itemid=353&catid=9 (last updated Aug. 2012) ("State-control remains the norm in Chinese banking. The Communist Party appoints all the senior bankers. The banks often lend money or don't based on what the government tells them.").

[189] *Treasury Official Touts New Chinese Investment Commitments at S&ED*, WORLD TRADE ONLINE, July 12, 2013 (quoting a senior Treasury Department official).

annexes would be open to foreign investment.[190] Also, although such mechanisms would not be required under the BIT, China also recently announced plans to establish a pilot program for free trade zones, which would permit non-discriminatory access by foreigners to investments within the zone.[191] Such zones, if established without long lists of exceptions, would in many ways operate in a similar manner to the *maquiladoras* permitted by Mexico within the border zone for nearly three decades before NAFTA, where the severe restrictions on foreign ownership under Mexico's 1973 Foreign Investment Law did not apply.[192]

Discussion of national security exceptions, particularly with regards to the manner in which the United States exercises reviews of proposed foreign investments under the Committee on Foreign Investment in the United States (CFIUS)[193] and reviews for anti-trust/anti-competitive implications, are also likely to be major sources of controversy. Although in this respect, it may be that the United States will require, for political as well as economic reasons, a significant level of government discretion, even though inward investment into the United States is far less restricted than foreign investment into China. Chinese enterprises have been denied the opportunity to invest in the United States on several recent occasions, as with an effort by CNOOC to purchase U.S. petroleum producer and refiner, Unocal.[194] Dealing with Chinese sovereign wealth funds will also be a particular challenge for the United States. Restrictions on inward investment are very much a reciprocal concern, suggesting that both nations have an interest in furthering a reasonable system of review. However, the problem is far more insidious with China, and some experts have flatly stated that China will not agree to refrain from discriminating between U.S. and Chinese investors in the establishment of new investments.[195]

B. The Politically Sensitive Challenges of the U.S.-China Relationship

As suggested in the introduction, the most serious challenges to the successful negotiation of a BIT probably relate as much or more to economic, security, and political rivalries between the United States and China. In reporting

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[190] *Id.*

[191] *Id.*

[192] *Law on the Promotion of Mexican Investment and the Regulation of Foreign Investment*, *Diario Oficial*, Mar. 9, 1973; *see also* DAVID A. GANTZ, NAFTA, ARTICLE 303, PROSEC AND THE NEW MAQUILADORA REGIME IN MEXICO, *in* THE AUTO PACT: INVESTMENT, LABOUR AND THE WTO 137 (2004).

[193] *See* section 721 of the Defense Production Act of 1950, 50 U.S.C. §§ 2061-172; *Committee on Foreign Investment in the United States*, U.S. TREASURY DEPT., http://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx (last visited Mar. 5, 2014).

[194] *See* Eckert, *supra* note 11, at 2.

[195] *See* Kong, *supra* note 4, at 186 (emphasizing China's likely unhappiness with the U.S. model BITs for this reason).

on the June 2013 summit between President Obama and Chinese Premier XI JinPing, David Sanger noted that the two leaders emerged from their talks "declaring their determination to keep disputes over cyber-espionage and territorial claims in the Pacific from descending into a cold war mentality and to avoid the pitfalls of a rising power confronting an established one."[196] Whether such issues can be sufficiently kept under control to permit the BIT negotiation to move toward a successful completion remains to be seen. Unless the two governments deal constructively with the inevitable future sources of political friction between them, those controversies are likely to delay or derail the negotiations.

C. Political, Business, and Civil Society Constraints and Conflicts

Even before NAFTA, and certainly in more recent years, the expanding use of BITs and FTA investment chapters has engendered controversy in the United States and elsewhere. As an UNCTAD report suggests:

> In many cases foreign investors have used ISDS claims to challenge measures adopted by States in the public interest (for example, policies to promote social equity, foster environmental protection or protect public health). Questions have been raised whether three individuals, appointed on an *ad hoc* basis, can be seen by the public at large as having sufficient legitimacy to assess the validity of States' acts, particularly if the dispute involves sensitive public policy issues.[197]

There is no hard evidence that any NAFTA claim against the United States has had a chilling effect on legitimate government regulation, although examples by their nature are difficult to quantify. As a Canadian official recently stated with regard to similar allegations raised in Canada, "I am not aware of any evidence suggesting that any of the losses or monetary settlements have implicated or impaired Canada's ability to regulate in the public interest in a non-discriminatory manner."[198] Yet, in the United States, elected officials have frequently criticized investor-state dispute settlement because of its potential impact on "state regulatory, legal and judicial authority."[199] If past history is any

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[196] David Sanger, *Obama and Xi Try to Avoid a Cold War Mentality*, N.Y. TIMES, Jun. 9, 2013, at 1.

[197] UNCTAD IIA Issues Note, *supra* note 44, at 3.

[198] MacKay Affidavit, *supra* note 61, at 69.

[199] *See An Open Letter from U.S. State Legislators to Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement*, CITIZENS.ORG, http://www.citizen.org/documents/State-Legislators-Letter-on-Investor-State-and-TPP.pdf (last visited Mar. 5, 2014) (expressing the views of over 100 state legislators).

indication, such rethinking will ultimately not have much impact on the negotiations, although it could result in delays and give those opposed to the BIT further ammunition for going slow or abandoning the exercise and grounds for opposition to the BIT in the Senate.

Other concerns in addition to issues of legitimacy and transparency include those of consistency and correctness of tribunal decisions; independence of party-appointed arbitrators; and the cost and time required for investor-state arbitrations.[200] While initial claims are typically far above the amounts eventually recovered, the mere filing of a large claim is politically controversial, and payment of a substantial claim even by a large country, such as Mexico or Canada, is at minimum embarrassing to government officials.

Public concerns, particularly in congresses or parliaments, may be further enhanced through the lack of transparency of the investor-state arbitration process. While arbitrations under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) are public because ICSID maintains a registry, arbitrations conducted under the *ad hoc* rules of the United Nations Commission on International Trade Law (UNCITRAL) administered by the Permanent Court of International Arbitration (PCIA) are not. Of eighty-five such arbitrations, only eighteen such awards were public as of the end of 2012.[201] Even with NAFTA, the corn products ISD awards against Mexico were not made public for over a year after the awards are issued.[202] The absence of a transparency requirement for future Canadian investor disputes against China under the Canada-China FIPA is thus troubling.

In the United States, some of those raising concerns regarding overly strong investor protections in traditional BITs did so beginning in 2009, when the U.S.-China BIT negotiations were initially announced. A spokesperson for one such organization, the Institute for Policy Studies, summarized her view of the situation as follows:

> 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

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200 *Id.* at 2-4.

201 UNCTAD, IIA ISSUES NOTE, *supra* note 44, at 3 n.8.

202 *See supra* note 61.

> U.S. international investment policy that supports the public interest.[203]

Not surprisingly, business interests are supportive of a "gold standard, twenty-first century BIT" that could "provide a new global template for BITs or even, at some point, a comprehensive multilateral investment agreement."[204] What some fear is that the negotiation will result in "splitting the difference" on issues in contention, admittedly the best chance for a quick agreement, but not necessarily one that would "protect, encourage and catalyze FDI flows between the United States and China in both directions."[205] The latter approach would mean, as suggested earlier, that the negotiations would be based on a comprehensive agreement as is reflected in the 2012 U.S. Model BIT, assuming of course, China is willing to move beyond the Canada-China FIPA in this direction.

The dichotomy between U.S. business interests that favor strong protection of their investments in China and civil society groups that are skeptical of what they see as one-sided agreements is a continuing one. Even though BITs are not subject to the requirements of Trade Promotion Authority (TPA), which requires that trade agreements, including those with investment chapters, be submitted to both houses of Congress for approval without amendment and under specific time limits,[206] the upcoming debate over renewal of the President's TPA may well affect the Obama Administration's ability to conclude BITs with China and other nations, given the fact that TPA typically incorporates detailed negotiating instructions for the government on provisions relating to investment. For example, in the 2002 TPA, the foreign investment negotiating objectives included many of those that are currently important for a U.S.-China BIT:

> (A) [R]educing or eliminating exceptions to the principle of national treatment . . . ;
>
> (C) [R]educing or eliminating performance requirements, forced technology transfers, and other unreasonable barriers to the establishment and operation of investments;
>
> (D) [S]eeking to establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice . . . ;

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[203] Sarah Anderson, *U.S.-China Bilateral Investment Treaty Negotiations: Expedited Talks with China May Shine a Brighter Spotlight on These Controversial Agreements*, INST. FOR POL'Y STUDIES 3 (2009).

[204] Shaun E. Donnelly, *A Business Perspective on a China-US Bilateral Investment Treaty*, COLUM. FDI PERSP. 1 (Mar. 4, 2013), http://www.vcc.columbia.edu/content/business-perspective-china-us-bilateral-investment-treaty.

[205] *Id.*

[206] Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§3801-13 (expired June 30, 2007).

> (F) [P]roviding meaningful procedures for resolving investment disputes; [and]
>
> (H) [E]nsuring the fullest measure of transparency in the dispute settlement mechanism, to the extent consistent with the need to protect information that is classified or business confidential.[207]

Gaining the legislative renewal of TPA for the purposes of authorizing the conclusion of the TPP and TTIP in 2014 could provide a challenge even with bipartisan support.[208] Further debate on the hot-button issues such as labor rights, environmental protection, the scope of investor protections, intellectual property, and agricultural and apparel imports has begun; stakeholders who were disappointed with the outcome of the 2012 U.S. Model BIT will likely try anew.[209] The process will again place unions, environmental groups, other NGOs, and their mostly Democratic supporters in Congress again at odds with business stakeholders and their supporters. The discussions on the scope of investment protection and both labor and environmental provisions will have direct relevance to ongoing and future BIT negotiations and could even result in further modifications of the 2012 U.S. Model BIT. At the same time, the TPA negotiations within the Congress provide a useful opportunity for government policy makers and others who favor such agreements to explain why it is in the U.S. national interest to conclude them and to consult with and garner support from Members of Congress and others who may be skeptical.

Relatively little civil society commentary has surfaced on the proposed United States-China BIT, other than under circumstances where Chinese interests seek to purchase specific U.S. company assets, as with Smithfield. Comments from some Members of Congress suggest both an inherent skepticism about an agreement that could make it easier for Chinese interests to purchase American assets, while implicitly recognizing that a BIT could be at least a partial solution to the reciprocity problem. Thus, Senator Mike Johanns (Republican-Nebraska)

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[207] *See* 19 U.S.C. § 3802(b)(3).

[208] The chairman of the Senate Finance Committee, retiring Democratic Senator Max Baucus, along with ranking minority member Orrin Hatch (Republican-Utah) and Ways and Means Committee Chairman, Dave Camp (Republican-Michigan), with Administration support, introduced a bipartisan TPA bill on January 9, 2014, after much discussion with Administration officials over the prior six months. Len Bracken, *Trade Promotion Legislation Introduced in Senate, House by Baucus, Hatch, Camp*, 31 INT'L TRADE REP. (BNA) 94 (Jan. 16, 2014).

[209] As of January 2014, organizations such as Public Citizen and the Communications workers had already weighed in opposition, and House Democratic leaders promised to introduce their own version of TPP. *See* Brian Flood, *Baucus, Hatch Push TPA Bill During Senate Finance Hearing*, 31 INT'L TRADE REP. (BNA) 146 (Jan. 23, 2014) (setting out these organizations positions in opposition to past TPA provisions); Len Bracken, *Pelosi, Hoyer Working with Levin on Alternative Trade Promotion Bill*, 31 INT'L TRADE REP. (BNA) 97 (Jan. 16, 2014).

remarked at a hearing to the Smithfield CEO Larry Pope, "Mr. Pope, that [reciprocity] is not a hard question . . . . You know for a fact [that] you could not do in China what they are doing here with Smithfield. The Chinese regulators would laugh at you if you said, 'Oh, I'll just buy Shuanghui.' And to us, that is just very, very difficult."[210] Probably the only hope for a greater degree of reciprocity (and national treatment) in U.S.-China investment is through the BIT.

Beyond this, unrelated negotiations raising some of the same sensitive issues have engendered opposition that is similar to what may be expected if and when the BIT negotiations begin to move forward at a noticeable pace. For example, after the close of the first round of negotiations between the EU and the United States toward TTIP in July 2013, new typical criticisms were lodged. For example, Friends of the Earth issued a statement, criticizing the TTIP negotiating framework as a "wish-list for international financiers and corporate CEOs" and accusing them (and the negotiators) of seeking to roll back environmental and other public interest negotiations.[211] The statement further argued: "It's time for a more thoughtful approach to trade policy-making that preserves government authority to deal with the climate crisis, protect public health and wisely manage our natural resources."[212] Whether it is reasonable for NGOs to blame FTA or BIT negotiations for failing to address effectively issues that have not been adequately treated in domestic legislation (particularly in the United States) is another question.[213]

V. CONCLUSION

The U.S.-China BIT negotiations in the first quarter of 2014 have continued, albeit with a very low profile in the United States. (The negotiators at the U.S. State Department have not commented publicly.) The Chinese Ministry of Commerce (MOFCOM) indicated in March that the negotiations are "progressing smoothly" after two rounds since the beginning of the year. According to the MOFCOM spokesperson, the two parties have agreed to "move

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[210] *See Smithfield Prompts an Investment Question*, *supra* note 35, at 1-2 (quoting Senator Johanns and referring to a question from Senator Debbie Stabenow).

[211] Len Bracken, *U.S., EU Cover all Issues in First Round of Negotiations on Trade, Investment Pact*, INT'L TRADE DAILY (BNA) (July 15, 2013) (quoting Friends of the Earth President Erich Pica).

[212] *Id.*

[213] A significant number of the members of the U.S. House and Senate are climate-change deniers, at least in public. *See Call Out the Climate Change Deniers*, ORG. FOR ACTION, http://ofa.barackobama.com/climate-deniers/#/ (last visited Apr. 5, 2014) (listing several dozen Members of Congress). The "drill baby, drill" group that would pursue energy and resource development regardless of the environmental impact, is probably at least as great. *See* Geoff Koss, *The Realities of Drill, Baby Drill*, ROLL CALL (Oct. 6, 2008), http://www.rollcall.com/issues/54_48/-29298-1.html (discussing pressures in Congress to increase drilling activity, including offshore drilling, for oil.) The latter interest groups are presumably well represented in Canada as well.

toward national treatment principles" and agreed that the annexes listing sectors closed to foreign investment would follow the "negative list" approach.[214]

If the negotiations were concluded successfully, the end result would offer great promise for both encouraging and regulating investment between the world's two largest economies. However, the challenges to success are both legal and political. They are legal because negotiating a comprehensive "high standards" BIT with China will be exceedingly difficult given China's reluctance to provide national treatment in a broad range of sectors, cover SOEs and pre-investment procedures, and in general, impose a high degree of reciprocity, probably somewhat beyond what Canada was able to achieve. They are political because of the distrust of China by many in the government, Congress, and civil society (including doubts as to whether the Chinese would voluntarily comply with the provisions of a BIT) and because of the security concerns inherent in Chinese investment (particularly by SOEs and other government-related entities) into the United States in sensitive sectors. One can hope that the enormous potential economic benefits of additional reciprocal investment are not lost in the debate.

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[214] Michael Standaert, *China Says BIT Negotiations with U.S. Progressing as Investment Flow Increases*, INT'L TRADE DAILY (BNA) (Mar. 20, 2014).

APPENDIX: LIST OF ABBREVIATIONS

APEC	Asia-Pacific Economic Cooperation forum
BIT	Bilateral Investment Treaty
BRICS	Brazil, Russia, India, China, and South Africa [some omit South Africa]
BTD	Bipartisan Trade Deal (United States)
CAFTA-DR	Central America-Dominican Republic-United States FTA
CFIUS	Committee on Foreign Investment in the United States
CNOOC	China National Offshore Oil Corporation
DFAIT	Department of Foreign Affairs and International Trade (Canada)
FDI	Foreign direct investment
FIPA	Foreign Investment Protection Agreement (Canada)
FTA	Free trade agreement
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for the Settlement of Investment Disputes
ISD	Investor-State Disputes
KORUS	Korea-United States FTA
MAI	Multilateral Agreement on Investment
MFN	Most-favored nation treatment
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NGOs	Non-governmental organizations
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
PCIA	Permanent Court of International Arbitration
SOEs	State-owned enterprises
TPA	Trade Promotion Authority (United States) [also “fast-track”]
TRIMs	WTO Agreement on Trade-Related Investment Measures
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USTR	Office of the United States Trade Representative
WTO	World Trade Organization