



ICSID Arbitration Initiated Against China as Negotiations Move Ahead on U.S.-China Bilateral Investment Treaty

Arbitration proceedings have been initiated against China for only the second time at the International Centre for Settlement of Investment Disputes (ICSID), an international arbitral institution that is a member of the World Bank Group. In this new case, a Korean company has reportedly brought an arbitration claim against China on the basis of the bilateral investment treaty (BIT) entered into by China and South Korea in 2007. (The case is *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25.)

The claim alleges that Chinese local government entities interfered with the company's investment in a country club and golf course by failing to transfer all of the land needed for the construction of the project and by failing to prevent the construction of a nearby unlicensed golf club. As a result, the Korean investor alleges that it was forced to sell its property at a significantly reduced value. The allegations made in the arbitration therefore focus on actions taken by a local government in China, not the central government.

BITs typically provide foreign investors with the ability to bring arbitration claims directly against host governments either at ICSID or through ad hoc arbitration for violations of substantive protections set forth in the BIT. These substantive protections often include, among others, fair and equitable treatment, compensation for expropriations, full protection and security, most-favored-nation treatment, national treatment, and free transfer of funds related to investments.

The arbitration will be watched closely for what impact it may have, if any, on China's attitudes towards the investor-state dispute settlement mechanisms in its BITs. This issue is of particular interest to U.S. parties as China and the United States are currently negotiating such an agreement.

During a joint U.S.-China press conference held in Beijing on Nov. 12, 2014, both countries announced that significant progress was being made towards the conclusion of a BIT. In particular, China's President Xi announced that the two countries "agreed to accelerate the negotiations of the BIT" and would "make efforts to reach agreement on the core issues and the major articles of the treaty text" and commence negative list negotiations in 2015.

While the specific terms of a U.S.-Chinese BIT remain to be negotiated, the entry into force of such an agreement would be a significant development in business relations between the world's two largest economies. The U.S.-Chinese BIT will likely contain traditional investor-state dispute settlement mechanisms. These mechanisms, as alluded to above, would enable U.S. entities with investments in China to bring arbitration claims directly against the Chinese Government, including for actions by local governments in China's provinces, for violations of the BIT. The same would be true of Chinese investors in the United States.

According to the United Nations Conference on International Trade and Development, China currently has 106 BITs with other countries that are in force. In some cases, U.S. (and other) companies may be able to take advantage of these BITs by structuring their investments in China through a subsidiary incorporated in a country that has a BIT with China.

Greenberg Traurig has an experienced team that advises clients on investment protection and investor-state disputes at ICSID and other international arbitration venues.

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