BIT BY BIT: THE CASE FOR A Bilateral Investment Treaty

By Katherine Baker

***Resolved: The United States Federal Government should substantially reform its policies toward the People’s Republic of China.***

A Bilateral Investment Treaty (BIT) is an agreement between two nations that governs how investments and investors in both countries will be treated when they invest in the other nation.  It guarantees that an investor’s stake in property in the other country will not be taken away by the foreign government or unfairly regulated or damaged by their government’s actions.    If allegations of mistreatment do occur, there is a legal process for settling the issue and compensating the investor for his losses.

A BIT is not a Free Trade Agreement (FTA).  For example, an FTA would reduce or eliminate trade barriers on importing boatloads of shoes from China into the U.S.  A BIT would reduce barriers and guarantee legal protection for a US investor who wanted to build a shoe factory in China.   Be careful to understand the differences before reading evidence into the round that is talking about something your case isn’t doing.

The US and China have been negotiating a BIT for a long time but the conclusion always seems to be just over the horizon.  This case argues that there are huge economic benefits to a US/China BIT because it would accelerate both US investment in China and Chinese investment in the US.  The plan overcomes the final barrier, accepting China’s last offer, and concludes the BIT.

Be prepared for Negative arguments that BITs don’t really add much to the economy and that businesses don’t actually use the presence or absence of a BIT in their foreign investment decision-making.  And based on past experience with other BITs, it would open the door to big taxpayer ripoffs by allowing Chinese investors to sue the US government for any decisions or laws it makes that they claim harm their business interests.

BIT BY BIT: THE CASE FOR A Bilateral Investment Treaty 3

OBSERVATION 1. DEFINITIONS 3

Substantial: 3

Reform: 3

Policy: 3

Bilateral Investment Treaty or B.I.T.: 3

Negative list: 3

OBSERVATION 2. The Voting CRITERION. 3

OBSERVATION 3. INHERENCY, or the conditions of the Status Quo. 4

FACT 1. The “Negative List” 4

It’s the only issue remaining issue blocking completion of the B.I.T. 4

FACT 2. US refusal. 4

US negotiators declined China’s offer, preventing completion of the B.I.T. 4

FACT 3. US businesses impaired. 4

US companies today face harsh restrictions in China without BIT 4

OBSERVATION 4. The PLAN, to be implemented by the President, Commerce Dept., and the US Senate 4

OBSERVATION 5. The ADVANTAGES 5

ADVANTAGE 1. Improved US/China relations 5

The Link is that: BIT would improve relations with China 5

And the Impact is: US ­China cooperation is key to solving global problems 5

ADVANTAGE 2. Economic growth 5

The Link: US investors disadvantaged in the Status Quo would have opportunities opened by a BIT with China 5

And the first Impact is: US company revenue. Investment abroad is a huge source of revenue for US companies. 6

And the second Impact: Jobs. Investment abroad leads to high-paying US jobs. 6

2A EVIDENCE: Bilateral Investment Treaty 7

DEFINITION / BACKGROUND 7

Definition of B.I.T. 7

INHERENCY 7

US isn’t satisfied with China’s current position on BIT 7

US wants more ambitious negative list 7

BIT will not pass through Congress during the Obama presidency, and won’t be a priority for the next Administration either 8

China wants BIT with the US, but Status Quo won’t get it done 8

Chinese President wants BIT 8

China has offered a BIT 8

US companies are blocked from potentially lucrative business sectors without the BIT 9

“Trade with China is already booming” ­ Response: Gaps in current law mean a BIT would still provide improvements over the Status Quo 9

[Only valid until Jan 2017] Obama is blocking: Even if a BIT were completed, Obama wouldn’t submit it for ratification until after TPP is done 9

SOLVENCY  / ADVOCACY 9

US Chamber of Commerce supports US-China BIT 9

US expert, Chinese government, Chinese and US business communities advocate early conclusion of a BIT 10

94 CEO’s advocate quick conclusion of BIT with China 10

How will disputes be settled under BIT?  By the ICSID 10

ADVANTAGES 11

US/China BIT protects US investors 11

BIT = Level playing field for US investors in China and opens new investment opportunities 11

Equal ground with other countries. 11

BIT = No more ambiguities that block investment 12

BIT Impact: Increased investment, jobs, and economic growth 12

BIT improves US/China relations [contextually talking about US/China BIT; see the citation article title] 12

BIT would benefit US companies and create US jobs 12

US companies benefit: greater access to markets and fairer competition 13

DISADVANTAGE RESPONSES 13

“China’s Negative List” ­ Response:  China has made huge progress on reducing the Negative List 13

China offers small Negative List 13

“FDI Bad” - Response: Chinese investment creates jobs in the US, and we need more of it 13

“Discriminatory treatment” – Response: Defined boundaries. Any exceptions are defined in the BIT 14

“Discriminatory treatment” – Response: BIT prohibits 14

“Discriminatory treatment” - Response: BIT reduces discrimination, not increases. 14

Works Cited: CaseTitle 15

BIT BY BIT: THE CASE FOR A Bilateral Investment Treaty

A US-China Bilateral Investment Treaty would bring substantial benefits to both nations, but changes in current policy are needed to make it happen. Join us as we affirm that: : The United States Federal Government should substantially reform its policies toward the People’s Republic of China

OBSERVATION 1. DEFINITIONS

Substantial:

“large in amount, size, or number” (*Merriam Webster Online Dict. 2016* <http://www.merriam-webster.com/dictionary/substantial)>

Reform:

“to improve (someone or something) by removing or correcting faults, problems, etc.” (*Merriam Webster Online Dict. 2016* [*http://www.merriam-webster.com/dictionary/reform*](http://www.merriam-webster.com/dictionary/reform)*)*

Policy:

“a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body” (*Merriam Webster Online Dict. 2016* [*http://www.merriam-webster.com/dictionary/policy)*](http://www.merriam-webster.com/dictionary/policy))

Bilateral Investment Treaty or B.I.T.:

Gene Johnson and Phuong Le 2015 (journalists for Associated Press) 23 Sept 2015 “Investment treaty between China and US key business goal” http://bigstory.ap.org/article/6f62326742264704ab8bba82613ff8e1/investment­treaty­between­china­and­us­key­bu siness­goal­0

Bilateral investment treaties provide the rules of the road for companies doing business in other countries, and can help ensure that the rights of foreign investors are protected and that foreign companies operate on a level playing field with domestic ones.

Negative list:

Xinhua news agency 2015 (official Chinese news organization) “China, US commitment to new negative list offers underpins optimism in investment treaty talks” 28 June 2015 <http://english.gov.cn/news/international_exchanges/2015/06/28/content_281475136101020.htm>

The negative list approach means all sectors are open to foreign investment except those specifically listed, while the positive list approach means that only listed sectors are approved for foreign investment.

OBSERVATION 2. The Voting CRITERION.

It’s simple: Comparative Advantage. We expect to earn an Affirmative ballot by proving that doing our plan will be significantly and comparatively better than Status Quo policies are doing right now.

OBSERVATION 3. INHERENCY, or the conditions of the Status Quo.

**We’ll show you several key facts about US policies that are blocking completion of a Bilateral Investment Treaty with China, and how that failure is affecting our foreign trade.**

FACT 1. The “Negative List”

It’s the only issue remaining issue blocking completion of the B.I.T.

Zhang Yugui, 2016 (Yugui is a dean of the School of Economics and Finance at the Shanghai International Studies University) “China-U.S. BIT Matters to the Global Economy” APRIL 7, 2016 <http://www.bjreview.com/Opinion/201604/t20160405_800053736.html>

Chen Deming, China's former Minister of Commerce, said that China-U.S. BIT talks are nearing the final stages of completion, with most of the core issues resolved. The only remaining issue is the negative list, a management model that defines areas restricted for foreign investment.

FACT 2. US refusal.

US negotiators declined China’s offer, preventing completion of the B.I.T.

Reuters News Agency, 2016 (Reporters Koh Gui Qing and Greg Roumeliotis) “Top U.S. official says more work needed on China investment rules” Jun 20, 2016 <http://www.reuters.com/article/us-usa-china-investment-idUSKCN0Z62NK> (brackets added)

Chinese negotiators sent the latest revised draft of the negative list to their U.S. counterparts last week. U.S. officials have said in the past that the number of sectors on the list that are closed to foreigners needed to be greatly reduced for an investment deal, also known as the Bilateral Investment Treaty, to be reached. "We are evaluating the list that we have been given (by our Chinese counterparts) and there is more work to be done," [US Commerce Secretary Penny] Pritzker told Reuters on the sidelines of an investment summit in Washington DC, declining to comment on whether an investment treaty can be signed before November, as some have hoped.

FACT 3. US businesses impaired.

US companies today face harsh restrictions in China without BIT

Coalition of Services Industries 2014, (organization representing the interests of US businesses in the services sector; membership includes major international companies from the banking, insurance, telecommunications, information technology, logistics and express delivery, audiovisual, retail, and other service industries ) “U.S.­China Bilateral Investment Treaty” (ethical disclosure about the date: the article is undated but references dates internally that indicate it was written in 2014 or later) https://servicescoalition.org/negotiations/u­s­china­bit

The BIT aims to “provide more opportunities for U.S. and Chinese companies to compete on a level playing field in each respective market.” While the United States has traditionally offered broad freedoms and protections to Chinese investors in the U.S, the Chinese government has placed many restrictions on American investors working in China. China currently restricts investments in over 100 industry sectors and places harsh and burdensome restrictions on American enterprises investing in China.

OBSERVATION 4. The PLAN, to be implemented by the President, Commerce Dept., and the US Senate

1. The US accepts China’s latest “negative list” offer in order to conclude a Bilateral Investment Treaty.   
   2. The President signs and the Senate ratifies it the day after Presidential signature.   
   3. Funding through existing budgets of existing agencies.   
   4. Enforcement through federal courts following the same procedures as existing BITs with other countries.   
   5. Plan takes effect the day after an Affirmative ballot   
   6. And all Affirmative speeches may clarify.

OBSERVATION 5. The ADVANTAGES

ADVANTAGE 1. Improved US/China relations

The Link is that: BIT would improve relations with China

Deborah Lehr 2015 (Senior Fellow of the Paulson Institute; former Senior Advisor to the Chairman and CEO of Merrill Lynch as well as a Senior Managing Director at the New York Stock Exchange) 13 Feb 2015,"Why a US­China Bilateral Investment Treaty Matters." <http://www.paulsoninstitute.org/paulson­blog/2015/02/13/why­a­us­china­bilateral­investment­treaty­matters/>

A bilateral investment treaty (BIT) with China would benefit the economies of both the United States and China, by creating new streams of two­way trade and investment. The growing and interdependent economic relationship between the United States and China is the underlying fabric that binds our countries together. It provides a foundation that allows us to disagree on specific issues without threatening the overall relationship. As China becomes a more active player on the world stage, it’s important for the United States to work with China and to support their entry and full participation in global, rules­based institutions .

And the Impact is: US ­China cooperation is key to solving global problems

US­China Smart Power Commission 2009 (chaired by former US Defense Secretary William Cohen and Maurice R. Greenberg) March 2009 "Smart Power in US­China Relations," CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES <http://csis.org/files/media/csis/pubs/090309_mcgiffert_uschinasmartpower_web.pdf>

The evolution of Sino­US relations over the next months, years, and decades has the potential to have a greater impact on global security and prosperity than any other bilateral or multilateral arrangement. In this sense, many analysts consider the US­China diplomatic relationship to be the most influential in the world. Without question, strong and stable US alliances provide the foundation for the protection and promotion of US and global interests. Yet within that broad framework, the trajectory of US­China relations will determine the success, or failure, of efforts to address the toughest global challenges: global financial stability, energy security and climate change, nonproliferation, and terrorism, among other pressing issues. Shepherding that trajectory in the most constructive direction possible must therefore be a priority for Washington and Beijing. Virtually no major global challenge can be met without US­China cooperation.

ADVANTAGE 2. Economic growth

The Link: US investors disadvantaged in the Status Quo would have opportunities opened by a BIT with China

Shaun Donnelly 2015(Vice President for Investment, Trade and Financial Services at the United States Council for International Business, a leading industry association representing the views of American business around the world. USCIB serves as the American affiliate of the Business and Industry Advisory Committee to the OECD, the International Chamber of Commerce and the International Organization of Employers.) “Bit by Bit Won’t Get It Done on the U.S. - China BIT Negotiations” 15 Sept 2015 <http://www.uscib.org/bit-by-bit-wont-get-it-done-on-us-china-bit-negotiations/>

The U.S.­China BIT has the potential to be a win­win agreement to provide broad legal protections, market­opening, and dispute settlement mechanisms for foreign direct investment (FDI) flows in both directions. China already has over 100 BITs with other nations, so current and potential U.S. investors are presently at a disadvantage in competing for investment opportunities in China’s fast­growing economy.

And the first Impact is: US company revenue. Investment abroad is a huge source of revenue for US companies.

US Chamber of Commerce, 2015 (The U.S. Chamber of Commerce is the world’s largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions.) “Secure U.S. Investment Overseas” May 19, 2015 <https://www.uschamber.com/issue-brief/secure-us-investment-overseas>

Americans derive important benefits from U.S. investment abroad. In addition to exporting, U.S. corporations can access new customers in foreign markets by investing abroad, creating foreign affiliates and becoming multinationals in the process. Sales by these foreign affiliates reached $7 trillion in 2012—a sum representing approximately 40% of U.S. multinational corporations’ total sales (latest information available). Many of America’s largest companies earn more than half their revenue in this way.

And the second Impact: Jobs. Investment abroad leads to high-paying US jobs.

US Chamber of Commerce, 2015 (The U.S. Chamber of Commerce is the world’s largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions.) “Secure U.S. Investment Overseas” May 19, 2015 <https://www.uschamber.com/issue-brief/secure-us-investment-overseas>

U.S. firms’ investments abroad bring real benefits to Americans, including on the jobs front. A recent study found that U.S. companies that invest abroad tend to create more jobs in the United States and pay higher wages than companies focused solely on the domestic market. Indeed, the U.S. Department of Commerce reports that U.S. multinational corporations added 289,000 U.S. jobs in 2007-2009 even as the sharpest recession in a generation caused the U.S. economy to shed more than eight million jobs overall. U.S. multinationals have continued to concentrate their high-wage, high-skill jobs in the United States, according to the same report. The trillions of dollars in revenue U.S. multinationals earn through their foreign operations help fund their research and development activities, 84% of which continue to be performed in the United States, according to the U.S. Department of Commerce.

2A EVIDENCE: Bilateral Investment Treaty

DEFINITION / BACKGROUND

Definition of B.I.T.

Coalition of Services Industries 2014 (organization representing the interests of US businesses in the services sector; membership includes major international companies from the banking, insurance, telecommunications, information technology, logistics and express delivery, audiovisual, retail, and other service industries) “U.S.­China Bilateral Investment Treaty” (ethical disclosure about the date: the article is undated but references dates internally that indicate it was written in 2014 or later) https://servicescoalition.org/negotiations/u­s­china­bit

A Bilateral Investment Treaty (BIT) is an agreement between two countries that establishes rules for foreign investors and investments in both countries. BITs are intended to give investors more protection, freedom, and market access when investing in foreign markets. The United States currently has BITs with 42 nations and is working on one with China.

INHERENCY

US isn’t satisfied with China’s current position on BIT

Xinhua, 2016 (Xinhua is the official press agency of the People's Republic of China. Xinhua is the biggest and most influential media organization in China.) “China-U.S. dialogue makes progress in BIT talks, overcapacity, RMB trading” June 10, 2016 <http://www.china.org.cn/world/2016-06/10/content_38638380.htm>

CHINA BIT STILL ALIVE, FOR NOW: There’s “more work to be done” on the bilateral investment treaty with China after the two sides exchanged updated market access offers last week, Commerce Secretary Penny Pritzker told POLITICO on Monday. “I think that both sides have taken trying to negotiate a treaty seriously, but we’re not going to lower our standards just to get something done,” Pritzker said on the sidelines of the SelectUSA Investment Summit. But the negotiations “continue to be productive,” a USTR spokeswoman said in an email. The updated market access offer was supposed to help determine whether the negotiations were still worth pursuing, and one U.S. business source said the fact that negotiations are continuing indicates the new offer was “something in the right direction.”

US wants more ambitious negative list

Li Yan, 2016 (Editor for China Daily, an English-language daily newspaper published in China.) “Revised negative list under discussion” 2016-06-18 <http://www.ecns.cn/business/2016/06-18/214796.shtml>

Jack Lew, U.S. secretary of the treasury, said on Thursday that a sufficiently ambitious negative list — where only exceptions to the treaty are specified — from China could open a pathway to additional progress before the end of the year. "Up until this last round, the negative list we've seen has not been sufficiently ambitious to open enough of the economy for the BIT to have a successful path forward," he told the American Enterprise Institute on Thursday.

BIT will not pass through Congress during the Obama presidency, and won’t be a priority for the next Administration either

Li Yan, 2016 (Editor for China Daily, an English-language daily newspaper published in the People's Republic of China.) “Revised negative list under discussion” 2016-06-18 <http://www.ecns.cn/business/2016/06-18/214796.shtml>

Derek Scissors, resident scholar at the American Enterprise Institute, believes there is no chance of the investment treaty being passed by the U.S. Congress during Obama's remaining months in office. Most experts believe the top priority for the U.S. government is to make a last-ditch effort to push Congress to ratify the Trans-Pacific Partnership, a free trade agreement among 12 Pacific Rim countries that does not include China. Scissors said the environment in the U.S. is now very protectionist, and the immediate priority for the next administration will be domestic issues, rather than any international agenda.

China wants BIT with the US, but Status Quo won’t get it done

Mixin Pei 2015 (journalist) FORTUNE Magazine 28 Sept 2015 “US­China summit: It's time for some cautious optimism” <http://fortune.com/2015/09/28/china­us­obama­xi­jinping­meeting/>

With its struggling economy, Beijing now regards a U.S.­China deal on BIT as a top priority. Chinese leaders think a BIT will signal American confidence in their economy, and American supporters argue that it will make the Chinese market more accessible to U.S. firms. But there are serious obstacles ahead. Most importantly, both sides have yet to agree on sectors in which investments will not be allowed. Even though Chinese and U.S. negotiators have recently exchanged the so­called “negative lists” naming these off­limits industries, the two sides are far apart. At the summit, Obama and Xi reiterated that a “high­quality” BIT will be the most important item on the bilateral economic agenda. But with only 15 months left in office, time is fast running out for Obama to close such a deal.

Chinese President wants BIT

Chu Daye and Zhang Ye, 2016 (Reporters for the Global Times, adaily Chinese newspaper under the auspices of the People's Daily newspaper) “Xi urges earlier BIT signing with the US” 2016-6-7 <http://www.globaltimes.cn/content/987301.shtml>

President Xi Jinping on Monday called for efforts toward a swifter realization of a China-US bilateral investment treaty (BIT) that is mutually beneficial. Xi made the remarks at the joint opening ceremony of the eighth China-US Strategic and Economic Dialogue (S&ED) and the seventh China-US High-Level Consultation on People-to-People Exchanges in Beijing.

China has offered a BIT

Reuters news service 2015 (journalist Krista Hughes and David Brunnstrom) “U.S., China exchange new investment treaty offers ahead of Xi visit” 15 Sept 2015 http://www.reuters.com/article/us­usa­china­investment­idUSKCN0RF2KN20150915

The United States and China have exchanged revised offers for a proposed investment treaty, a spokeswoman for the U.S. Trade Representative said, in the lead­up to Chinese President Xi Jinping's visit to the White House next week. China, which has more restrictions on foreign investment than the United States, is in talks with Washington to reduce the scope of so­called negative lists of sectors closed to the other side's investors. The USTR spokeswoman said revised negative list offers were exchanged at talks in Washington last week

US companies are blocked from potentially lucrative business sectors without the BIT

Prof. Daniel Chow 2015 (Professor of Law, Ohio State Univ. Moritz College of Law) “WHY CHINA WANTS A BILATERAL INVESTMENT TREATY WITH THE UNITED STATES”, April 2015 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL <http://www.bu.edu/ilj/files/2015/04/Chow­Why­China­Wants­a­Bilateral­Investment­Treaty.pdf>

For the past twenty years, many U.S. companies have considered a presence in China to be an imperative. Thus, it is no surprise that U.S. private investment in China is estimated at over $60 billion from 2000 to 2010. Nevertheless, many U.S. companies continue to feel confined by the restrictions of the current Chinese FDI legal climate and the uneven nature of the playing field. At present, all U.S. FDI outflows to China are governed solely by domestic Chinese law. As a result, U.S. companies often find that certain potentially lucrative business sectors are either completely closed to U.S. investment or are subject to burdensome restrictions.

“Trade with China is already booming” ­ Response: Gaps in current law mean a BIT would still provide improvements over the Status Quo

Deborah Lehr 2015 (Senior Fellow of the Paulson Institute; former Senior Advisor to the Chairman and CEO of Merrill Lynch as well as a Senior Managing Director at the New York Stock Exchange) 13 Feb 2015, "Why a US­China Bilateral Investment Treaty Matters." <http://www.paulsoninstitute.org/paulson­blog/2015/02/13/why­a­us­china­bilateral­investment­treaty­matters/>

China’s WTO accession provided a ten­year road map for opening and reform of China’s economy. It outlined how sectors would open to foreign competition. And both countries benefited from this transparency. Low cost Chinese exports to the United States have increased over 330 percent since the signing of the agreement. And US exports to China rose by 533 percent since China’s accession. Yet that ten­year road map ran out four years ago. A high standard bilateral investment treaty can fill the resulting gap. It would bring greater transparency and consistency to the investment environment for both countries.

[Only valid until Jan 2017] Obama is blocking: Even if a BIT were completed, Obama wouldn’t submit it for ratification until after TPP is done

Xinhua news agency 2015 (official Chinese news organization) “China, US commitment to new negative list offers underpins optimism in investment treaty talks” 28 June 2015 <http://english.gov.cn/news/international_exchanges/2015/06/28/content_281475136101020.htm> (brackets added)

“However, President Obama will not send the BIT to Congress until TPP (Trans­Pacific Partnership) is ratified,” [former deputy assistant secretary for international trade at U.S. Treasury Gary] Hufbauer said, referring to the Asia­Pacific trade deal, which covers 40 percent of the global economy and is nearing completion after more than five years of negotiations.

SOLVENCY  / ADVOCACY

US Chamber of Commerce supports US-China BIT

US Chamber of Commerce, 2015 (world’s largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions.) “Secure U.S. Investment Overseas” May 19, 2015 <https://www.uschamber.com/issue-brief/secure-us-investment-overseas>

America’s continued prosperity in a highly competitive world demands that we negotiate additional high-standard investment treaties. The Chamber strongly supports ongoing BIT negotiations with China and India and believes the United States should explore the possibility of BIT negotiations with Indonesia and the East African Community. As other countries around the globe pursue their own BITs, decision-makers in Washington should be wary of how these may place U.S. companies at a competitive disadvantage should the United States lag in its own negotiations.

US expert, Chinese government, Chinese and US business communities advocate early conclusion of a BIT

Chen Weihua 2015 (journalist) CHINA DAILY USA “2014 ends on positive note for US, China” 2 Jan 2015 <http://usa.chinadaily.com.cn/us/2015­01/02/content_19222744.htm>

David Dollar, a senior fellow at Brookings, agreed. An expert on Chinese economy and US­China economic relations, he noted that a successful Bilateral Investment Treaty (BIT) will greatly help open the Chinese service industry market to US companies. The Chinese government hopes that a BIT could help better protect the growing Chinese foreign direct investment in the US, which many Chinese see as subject to unfair and nontransparent review by the Committee on Foreign Investment in the United States (CFIUS), an inter­government agency in the US. Senior Chinese officials have called for an early conclusion of the BIT negotiations, a move that is widely supported by the business communities in both China and the US.

94 CEO’s advocate quick conclusion of BIT with China

Xinhua Finance, 2015 (Xinhua is the official press agency of China) “U.S. business circle calls for spurring investment treaty talks with China” 2015-09-16 <http://en.xinfinance.com/html/World/2015/142564.shtml>

In a letter sent to U.S. President Barack Obama and Chinese President Xi Jinping, which was signed by 94 American chief executive officers (CEOs), U.S. business leaders expressed their firm support for "the rapid conclusion of a meaningful and high-standard BIT" between the two countries, and asked the two presidents to underscore the importance of the BIT during Xi's upcoming state visit to the United States. "As we look at the range of issues on the bilateral agenda, a high-standard BIT -- with clear provisions providing equal treatment to each country's investors and a short list of exceptions -- is one of the key items that could make an immediate and tangible impact on both of our economies," the business executives said in the letter jointly issued by the U.S.-China Business Council (USCBC) and the Paulson Institute. "We believe that increased cross-border investment flows will create economic growth and jobs, lending new momentum to the commercial relationship and fortifying the economic foundation already built," they said, hoping that "significant progress can be made on this historic agreement during President Xi's visit" next week.

How will disputes be settled under BIT?  By the ICSID

Prof. Daniel Chow 2015 (Professor of Law, Ohio State Univ. Moritz College of Law) WHY CHINA WANTS A BILATERAL INVESTMENT TREATY WITH THE UNITED STATES, April 2015 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL <http://www.bu.edu/ilj/files/2015/04/Chow­Why­China­Wants­a­Bilateral­Investment­Treaty.pdf>

Under the 2012 Model BIT, used by the United States in negotiating all of its BITs, China will acquire rights and protections not currently enjoyed under U.S. law. These new rights and protections could prevent the United States from unilaterally blocking FDI projects by Chinese SOEs.41 Moreover, not only does the Model BIT contain important new rights and protections for foreign investors, but it also offers a dispute resolution mechanism in which the International Center for the Settlement of Investment Disputes (“ICSID”), an international tribunal, resolves investment disputes through binding arbitration. In other words, while the United States currently has the final say on whether to approve a Chinese investment (just as the Chinese government has the final say over FDI in China), once a U.S.­China BIT is effectuated, the final determination could be in the hands of a neutral international tribunal.

ADVANTAGES

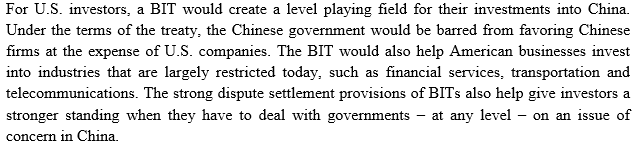
US/China BIT protects US investors

Marney Cheek 2014 (attorney in Covington & Burling’s international arbitration practice. She arbitrates international disputes before tribunals in complex commercial and investment treaty cases and litigates international disputes in U.S. Courts. Investment Policy Central is a center of excellence for accurate, fact-based information that supports an open investment climate globally) Investment Policy Central “Why A U.S.-China Bilateral Investment Treaty Matters” (ethical disclosure about the date: the article is undated on a page bearing copyright 2012, but contains internal reference link to an article published in 2014) <http://www.investmentpolicycentral.com/content/why-us-china-bilateral-investment-treaty-matters>

A U.S.-China bilateral investment treaty (BIT) will serve as the cornerstone for the bilateral economic relationship between these two economic powerhouses for years to come. It puts in place important rules that protect U.S. investors against discrimination and arbitrary treatment, with the United States promising the same for Chinese investments. China remains one of the most challenging markets for U.S. investors. This is a deal worth doing, and worth doing right.

BIT = Level playing field for US investors in China and opens new investment opportunities

Faryar Shirzad and Matthew Rees 2014 (Shirzad: Managing Director, Goldman Sachs. Rees: President. Geonomica. The Goldman Sachs Group, Inc. is an American multinational banking firm that engages in global investment banking, investment management, securities, and other financial services, primarily with institutional clients) “A Catalyst for Economic Growth: The U.S.-China Bilateral Investment Treaty” (ethical disclosure: No date given, but internally cites an article from April 4, 2014). <http://www.goldmansachs.com/our-thinking/our-conferences/us-china-bilateral-investment-dialogue/multimedia/papers/catalyst-for-economic-growth.pdf>



Equal ground with other countries.

Faryar Shirzad and Matthew Rees 2014 (Shirzad: Managing Director, Goldman Sachs. Rees: President. Geonomica. The Goldman Sachs Group, Inc. is an American multinational banking firm that engages in global investment banking, investment management, securities, and other financial services, primarily with institutional clients) “A Catalyst for Economic Growth: The U.S.-China Bilateral Investment Treaty” (ethical disclosure: No date given, but internally cites an article from April 4, 2014). <http://www.goldmansachs.com/our-thinking/our-conferences/us-china-bilateral-investment-dialogue/multimedia/papers/catalyst-for-economic-growth.pdf>



BIT = No more ambiguities that block investment

MARK SCHWARTZ, April 2, 2014 (Mark Schwartz has been a Vice Chairman of Goldman Sachs and Chairman of Goldman Sachs Asia Pacific since rejoining the firm in June 2012. Mr. Schwartz is a member of the Management Committee.), “A BIT of Help for the U.S. and China”, <http://www.wsj.com/articles/SB10001424052702303532704579476720853893300>

A high­standard BIT will help remove ambiguities that detract from greater investment and broader economic activity, and give the U.S. and China increased stakes in each other's success. In the interest of stability and predictability, the BIT should be a strategic imperative for both countries.

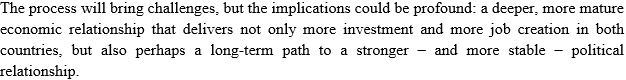
BIT Impact: Increased investment, jobs, and economic growth

Gene Johnson and Phuong Le 2015 (Journalist for the Associated Press) “Investment treaty between China and US key business goal” Sep. 23, 2015 <http://www.businessinsider.com/ap-investment-treaty-between-china-and-us-key-business-goal-2015-9>

Bilateral investment treaties provide the rules of the road for companies doing business in other countries, and can help ensure that the rights of foreign investors are protected and that foreign companies operate on a level playing field with domestic ones. An agreement with China would open up more of that nation's massive market to American companies, provide clearer rules for Chinese investment in the U.S., and create jobs on both sides, supporters say. Such treaties "can be a powerful catalyst for more economic growth," Evan Feigenbaum, vice chairman of the Paulson Institute, which is co-hosting Wednesday's meeting, said Tuesday.

BIT improves US/China relations [contextually talking about US/China BIT; see the citation article title]

Faryar Shirzad and Matthew Rees 2014 (Shirzad: Managing Director, Goldman Sachs. Rees: President. Geonomica. The Goldman Sachs Group, Inc. is an American multinational banking firm that engages in global investment banking, investment management, securities, and other financial services, primarily with institutional clients) “A Catalyst for Economic Growth: The U.S.-China Bilateral Investment Treaty” (ethical disclosure: No date given, but internally cites an article from April 4, 2014). <http://www.goldmansachs.com/our-thinking/our-conferences/us-china-bilateral-investment-dialogue/multimedia/papers/catalyst-for-economic-growth.pdf>



BIT would benefit US companies and create US jobs

Daniel M. Price and Michael J. Smart, 2013 (Daniel M. Price is Managing Director of Rock Creek Global Advisors, an international economic policy advisory firm, where he focuses on international regulatory and policy matters. Michael J. Smart is a Vice President at Rock Creek Global Advisors, an international economic policy advisory firm) The Paulson Institute “BIT by BIT” July 2013 <http://www.paulsoninstitute.org/wp-content/uploads/2015/04/bit_by_bit_pricesmart_english_final.pdf>

US companies would benefit greatly from expanded access to the Chinese market to increase their revenue amid sluggish growth at home and in other advanced markets. For American workers, enhancing the ability of US companies to invest in the Chinese market will create, not eliminate, jobs in America. Academic research has repeatedly found that expansion abroad by affiliates of US multinationals tends to preserve and support their American parent jobs, not destroy them. This is especially true when affiliates expand to serve new customers—long the primary goal of many US multinationals in China. In 2009, the manufacturing affiliates of these companies in China sold about two-thirds of their output to local Chinese customers, not into global markets. Indeed, the share of these Chinese affiliates’ sales back to the United States fell from 16.3 percent in 1999 to just 10.2 percent in 2009.

US companies benefit: greater access to markets and fairer competition

Qian Liwei, 2013 (Qian Liwei is Associate Research Fellow with China Institutes of Contemporary International Relations.) “Why A BIT Is Necessary for Both China and the US” Jul 17, 2013 <http://www.chinausfocus.com/finance-economy/why-a-bit-is-necessary-for-both-china-and-the-us/>

A future BIT based on the mutual respect and mutually beneficial negotiation will also be a great push for Chinese and U.S. companies. More and more Chinese companies are interested in investing in U.S., but they often worry about the politicization of investment with an excuse of “national security” from the U.S. government and Congress. The Former Chinese Minister of Commerce Chen Deming once complained that roughly one of every three dollars China wanted to invest in U.S. got approved. A BIT will definitely reduce such dissatisfaction. U.S. companies in China have been expressing concerns on issues like market access, intellectual Property Rights (IPR) and technology transfer, etc. Although the super-national treatment they enjoyed for decades will soon come to an end, they may have more opportunities to compete with their Chinese counterparts in a more transparent and equitable, fair environment. With greater market access, removal of investment barriers, protections against technology transfer and increased openness, U.S. companies in the services sector and high-end manufacturing will eventually benefit from a more consumption-driven and increasingly mature Chinese market.

DISADVANTAGE RESPONSES

“China’s Negative List” ­ Response:  China has made huge progress on reducing the Negative List

Xinhua news agency 2015 (journalist Gao Pan) 28 June 2015 “China, U.S. commitment to new negative list offers underpins optimism in investment treaty talks” <http://news.xinhuanet.com/english/2015-06/28/c_134361636.htm>

While China’s initial negative list offer “may be longer than the U.S. wants,” the negative list itself is already “a huge progress,” Adam Posen, president of Peterson Institute for International Economics (PIIE), told Xinhua in a recent interview. Zhang Xiangchen, China’s deputy international trade representative and assistant minister of commerce, said Tuesday at a press briefing that “the negative list issue is more difficult for China,” as it “represents a new challenge” and will “fundamentally change foreign investment administration regime in China.”

China offers small Negative List

Reuters News Agency, 2016 (Reporters Koh Gui Qing and Greg Roumeliotis) “Top U.S. official says more work needed on China investment rules” Jun 20, 2016 <http://www.reuters.com/article/us-usa-china-investment-idUSKCN0Z62NK>

The latest negative list submitted by Chinese negotiators has not been made public, although sources told Reuters previously that the number of items on the list in earlier drafts had fallen to between 35 and 40, from around 80 previously.

“FDI Bad” - Response: Chinese investment creates jobs in the US, and we need more of it

Qian Liwei, 2013 (Qian Liwei is Associate Research Fellow with China Institutes of Contemporary International Relations.) “Why A BIT Is Necessary for Both China and the US” Jul 17, 2013 <http://www.chinausfocus.com/finance-economy/why-a-bit-is-necessary-for-both-china-and-the-us/>

After the shock of the financial tsunami in 2008, the American economy suffered the most serious recession since the Great Depression in the 1930’s with the unemployment rate over 10 percent. With its economic deleveraging and “manufacturing regression”, the U.S. needs heavy overseas funding to jump-start its economy and to alleviate the unemployment. Chinese investment is so welcomed across America that state and local governments are providing a series of preferential policies including cheap land, low taxation and relaxed regulations. Dozens of U.S. governors and mayors crowded into major Chinese cities to promote trade and investment and this will revitalize the local economy, add government revenue and reduce the unemployment. Rhodium Group (RDG), a prominent investment consulting firm, reported that Chinese investment has covered more than thirty-five states, and has created 32,000 jobs in U.S. as of the first quarter of 2013.

“Discriminatory treatment” – Response: Defined boundaries. Any exceptions are defined in the BIT

Daniel M. Price and Michael J. Smart, 2013 (Daniel M. Price is Managing Director of Rock Creek Global Advisors, an international economic policy advisory firm, where he focuses on international regulatory and policy matters. Michael J. Smart is a Vice President at Rock Creek Global Advisors, an international economic policy advisory firm, where he focuses on international trade and investment policy, including market access and regulatory matters.) The Paulson Institute “BIT by BIT” July 2013 <http://www.paulsoninstitute.org/wp-content/uploads/2015/04/bit_by_bit_pricesmart_english_final.pdf>

But it would overstate the two sides’ potential differences to view a US BIT as requiring China to eliminate immediately all discriminatory restrictions on US or other foreign investors. When the United States negotiates BITs and FTAs, it typically accommodates market access restrictions imposed by the other party by making the obligation subject to expressly defined, negotiated exceptions for measures, sectors, or activities in which the partner reserves the right to discriminate against US investors. Including the market access obligation in the US-China BIT, subject to specified exceptions, would have significant benefits. It would: (1) provide transparency and legal certainty about which sectors are open to US investment; (2) establish a “floor” under the current level of market access, preventing China from imposing additional restrictions on sectors in the future; and (3) create an opportunity during the negotiations for China to consider, and the two sides to negotiate, whether existing restrictions could be liberalized

“Discriminatory treatment” – Response: BIT prohibits

Daniel M. Price and Michael J. Smart, 2013 (Daniel M. Price is Managing Director of Rock Creek Global Advisors, an international economic policy advisory firm, where he focuses on international regulatory and policy matters. Michael J. Smart is a Vice President at Rock Creek Global Advisors, an international economic policy advisory firm) The Paulson Institute “BIT by BIT” July 2013 <http://www.paulsoninstitute.org/wp-content/uploads/2015/04/bit_by_bit_pricesmart_english_final.pdf>

A BIT would help to level the playing field for US firms competing with Chinese companies and prohibit China from using regulations to favor Chinese firms, whether private or state-owned. Most important, the non-discrimination obligation would prohibit the Chinese government from giving special advantages to Chinese state-owned firms (as well as private firms) that are not available to US investors. In fact, the non-discrimination obligation would address one of the most persistent and widespread concerns of US companies operating in China.

“Discriminatory treatment” - Response: BIT reduces discrimination, not increases.

Daniel M. Price and Michael J. Smart, 2013 (Daniel M. Price is Managing Director of Rock Creek Global Advisors, an international economic policy advisory firm, where he focuses on international regulatory and policy matters. Michael J. Smart is a Vice President at Rock Creek Global Advisors, an international economic policy advisory firm) The Paulson Institute “BIT by BIT” July 2013 <http://www.paulsoninstitute.org/wp-content/uploads/2015/04/bit_by_bit_pricesmart_english_final.pdf>

According to the US-China Business Council, favoritism toward Chinese companies, both private and state owned, is a factor in five of the top ten challenges that US companies face in the China market: administrative licensing, competition with Chinese enterprises, uneven enforcement and implementation of laws and policies, investment restrictions, and standards and conformity assessment procedures. A BIT would prohibit any Chinese government measures adopted in one of these areas, or in any other area of regulation, that discriminate against US investors.

Works Cited: CaseTitle

1. Chen Weihua 2015 (journalist) CHINA DAILY USA “2014 ends on positive note for US, China” 2 Jan 2015 <http://usa.chinadaily.com.cn/us/2015-01/02/content_19222744.htm>
2. Chu Daye and Zhang Ye, 2016 (Reporters for the Global Times, adaily Chinese newspaper under the auspices of the People's Daily newspaper) “Xi urges earlier BIT signing with the US” 2016-6-7 <http://www.globaltimes.cn/content/987301.shtml>
3. Coalition of Services Industries 2014 (organization representing the interests of US businesses in the services sector; membership includes major international companies from the banking, insurance, telecommunications, information technology, logistics and express delivery, audiovisual, retail, and other service industries) “U.S.­China Bilateral Investment Treaty” (ethical disclosure about the date: the article is undated but references dates internally that indicate it was written in 2014 or later) <https://servicescoalition.org/negotiations/u-s-china-bit>
4. Daniel M. Price and Michael J. Smart, 2013 (Daniel M. Price is Managing Director of Rock Creek Global Advisors, an international economic policy advisory firm, where he focuses on international regulatory and policy matters. Michael J. Smart is a Vice President at Rock Creek Global Advisors, an international economic policy advisory firm, where he focuses on international trade and investment policy, including market access and regulatory matters.) The Paulson Institute “BIT by BIT” July 2013 <http://www.paulsoninstitute.org/wp-content/uploads/2015/04/bit_by_bit_pricesmart_english_final.pdf>
5. Deborah Lehr 2015 (Senior Fellow of the Paulson Institute; former Senior Advisor to the Chairman and CEO of Merrill Lynch as well as a Senior Managing Director at the New York Stock Exchange) 13 Feb 2015, "Why a US­China Bilateral Investment Treaty Matters." <http://www.paulsoninstitute.org/paulson-blog/2015/02/13/why-a-us-china-bilateral-investment-treaty-matters/>
6. Faryar Shirzad and Matthew Rees 2014 (Shirzad: Managing Director, Goldman Sachs. Rees: President. Geonomica. The Goldman Sachs Group, Inc. is an American multinational banking firm that engages in global investment banking, investment management, securities, and other financial services, primarily with institutional clients) “A Catalyst for Economic Growth: The U.S.-China Bilateral Investment Treaty” (ethical disclosure: No date given, but internally cites an article from April 4, 2014). <http://www.goldmansachs.com/our-thinking/our-conferences/us-china-bilateral-investment-dialogue/multimedia/papers/catalyst-for-economic-growth.pdf>
7. Gene Johnson and Phuong Le 2015 (Journalist for the Associated Press) “Investment treaty between China and US key business goal” Sep. 23, 2015 <http://www.businessinsider.com/ap-investment-treaty-between-china-and-us-key-business-goal-2015-9>
8. Li Yan, 2016 (Editor for China Daily, an English-language daily newspaper published in China.) “Revised negative list under discussion” 2016-06-18 <http://www.ecns.cn/business/2016/06-18/214796.shtml>
9. MARK SCHWARTZ, April 2, 2014 (Mark Schwartz has been a Vice Chairman of Goldman Sachs and Chairman of Goldman Sachs Asia Pacific since rejoining the firm in June 2012. Mr. Schwartz is a member of the Management Committee.), “A BIT of Help for the U.S. and China”, <http://www.wsj.com/articles/SB10001424052702303532704579476720853893300>
10. Marney Cheek 2014 (attorney in Covington & Burling’s international arbitration practice. She arbitrates international disputes before tribunals in complex commercial and investment treaty cases and litigates international disputes in U.S. Courts. Investment Policy Central is a center of excellence for accurate, fact-based information that supports an open investment climate globally) Investment Policy Central “Why A U.S.-China Bilateral Investment Treaty Matters” (ethical disclosure about the date: the article is undated on a page bearing copyright 2012, but contains internal reference link to an article published in 2014) <http://www.investmentpolicycentral.com/content/why-us-china-bilateral-investment-treaty-matters>
11. Mixin Pei 2015 (journalist) FORTUNE Magazine 28 Sept 2015 “US­China summit: It's time for some cautious optimism” <http://fortune.com/2015/09/28/china­us­obama­xi­jinping­meeting/>
12. Prof. Daniel Chow 2015 (Professor of Law, Ohio State Univ. Moritz College of Law) “WHY CHINA WANTS A BILATERAL INVESTMENT TREATY WITH THE UNITED STATES”, April 2015 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL <https://openev.debatecoaches.org/rest/wikis/openev/spaces/2016/pages/JDI/attachments/BIT%20Aff-Neg%20Starter%20Pack%20-%20JDI%202016.docm>
13. Qian Liwei, 2013 (Qian Liwei is Associate Research Fellow with China Institutes of Contemporary International Relations.) “Why A BIT Is Necessary for Both China and the US” Jul 17, 2013 <http://www.chinausfocus.com/finance-economy/why-a-bit-is-necessary-for-both-china-and-the-us/>
14. Reuters News Agency, 2016 (Reporters Koh Gui Qing and Greg Roumeliotis) “Top U.S. official says more work needed on China investment rules” Jun 20, 2016 <http://www.reuters.com/article/us-usa-china-investment-idUSKCN0Z62NK>
15. Reuters news service 2015 (journalist Krista Hughes and David Brunnstrom) “U.S., China exchange new investment treaty offers ahead of Xi visit” 15 Sept 2015 <http://www.reuters.com/article/usa-china-investment-idUSL1N11L1ZA20150915>
16. Shaun Donnelly 2015 (Vice President for Investment, Trade and Financial Services at the United States Council for International Business, a leading industry association representing the views of American business around the world. USCIB serves as the American affiliate of the Business and Industry Advisory Committee to the OECD, the International Chamber of Commerce and the International Organization of Employers.) “Bit by Bit Won’t Get It Done on the U.S. - China BIT Negotiations” 15 Sept 2015 <http://www.uscib.org/bit-by-bit-wont-get-it-done-on-us-china-bit-negotiations/>
17. US Chamber of Commerce, 2015 (The U.S. Chamber of Commerce is the world’s largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions.) “Secure U.S. Investment Overseas” May 19, 2015 <https://www.uschamber.com/issue-brief/secure-us-investment-overseas>
18. US­China Smart Power Commission 2009 (chaired by former US Defense Secretary William Cohen and Maurice R. Greenberg) March 2009 "Smart Power in US­China Relations," CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES <http://csis.org/files/media/csis/pubs/090309_mcgiffert_uschinasmartpower_web.pdf>
19. Xinhua Finance, 2015 (Xinhua is the official press agency of China) “U.S. business circle calls for spurring investment treaty talks with China” 2015-09-16 <http://en.xinfinance.com/html/World/2015/142564.shtml>
20. Xinhua news agency 2015 (official Chinese news organization) “China, US commitment to new negative list offers underpins optimism in investment treaty talks” 28 June 2015 <http://english.gov.cn/news/international_exchanges/2015/06/28/content_281475136101020.htm>
21. Xinhua, 2016 (Xinhua is the official press agency of the People's Republic of China. Xinhua is the biggest and most influential media organization in China.) “China-U.S. dialogue makes progress in BIT talks, overcapacity, RMB trading” June 10, 2016 <http://www.china.org.cn/world/2016-06/10/content_38638380.htm>
22. Zhang Yugui, 2016 (Yugui is a dean of the School of Economics and Finance at the Shanghai International Studies University) “China-U.S. BIT Matters to the Global Economy” APRIL 7, 2016 <http://www.bjreview.com/Opinion/201604/t20160405_800053736.html>