Negative: Bilateral Investment Treaty

By Katherine Baker

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

NEGATIVE BRIEF: Bilateral Investment Treaty 3

TOPICALITY 3

1. No substantial policy reform 3

Status Quo policy is to develop a Bilateral Investment Treaty with China– in fact, we have been negotiating it for years 3

Impact: No Affirmative team. 3

INHERENCY 3

1. US/China Bilateral Investment Treaty (BIT) is already underway. 3

US and China are already negotiating a B.I.T. 3

2. Don’t need a treaty: Chinese investment in the US is setting new records today without one 4

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1. Must wait for China/Korea FTA. 4

We have to wait a few years for China-Korea FTA negotiations to finish before we will know whether US/China differences can be resolved, and even then it’s not a sure thing. C. Fred Bergsten advocates a US/China investment agreement, but he admitted in February 2015 that we can’t do it yet: 4

2. Five blocking issues, none of which can be solved by an Affirmative ballot. 5

Status Quo is negotiating an investment treaty, but 5 issues are blocking Chinese agreement. An AFF ballot can’t make the Chinese government change its negotiating position 5

3. Investment agreements don’t add much to the investment climate 5

Companies already have private agreements in place, so International Investment Agreements (IIA) don’t do much 5

4. Chinese Cheating 6

Investment treaties will not open Chinese markets because China will cheat on any agreements 6

5. BIT alone isn’t enough without social reforms that uphold respect for property rights 7

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6. Plan vagueness: AFF plan has no specifics on the dispute resolution process. 8

Link: No dispute mechanism specified in the plan, but they are vital to the process. 8

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Link: Foreign investors in China face discriminatory treatment, while Chinese investors here would have to be treated like US companies 10

Link: China will use its power to frustrate foreign investors in any dispute 10

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Link: One of the goals of a Bilateral Investment Treaty (BIT) is increasing foreign direct investment. AFF probably agrees with this, but if proof is needed: 11

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3. Taxpayer ripoffs 12

Foreign companies operating in the US can file a complaint with an Investor-State Dispute Settlement (ISDS) process, and collect hundreds of millions of taxpayer dollars, whenever they believe their profitability has been harmed by any policy of the US government 12

Works Cited: Bilateral Investment Treaty (NEG) 13

NEGATIVE BRIEF: Bilateral Investment Treaty

TOPICALITY

1. No substantial policy reform

Status Quo policy is to develop a Bilateral Investment Treaty with China– in fact, we have been negotiating it for years

Sara Hsu 2015 (journalist) 18 Sept 2015 THE DIPLOMAT “The China-US Bilateral Investment Treaty: Next Week?” <http://thediplomat.com/2015/09/the-china-us-bilateral-investment-treaty-next-week/>

China and the U.S. have been negotiating a bilateral investment treaty (BIT) for years, getting closer after exchanging revised offers just before President Xi Jinping’s visit to D.C. next week. The BIT, which some believe will be a priority discussion topic between the two presidents and may even be concluded, would expand American firms’ access to investing in China and do the same for Chinese firms investing in the U.S.

Impact: No Affirmative team.

Since the team claiming to be Affirmative just wants to speed up an existing policy, there’s no one in the debate round who is really affirming that we should substantially change anything. That means there’s no Affirmative team in the room because no one’s affirming the resolution. No matter who wins, you should write Negative on the ballot.

INHERENCY

1. US/China Bilateral Investment Treaty (BIT) is already underway.

**There’s no reason to start over with a new agreement. And in our solvency evidence, we’ll show that we have to finish the BIT before we can move on to other trade issues.**

US and China are already negotiating a B.I.T.

Doug Peterson 2015 (president and CEO of McGraw Hill Financial) 27 July 2015 China And The U.S. Need To Come Together--At Least Economically, FORBES magazine <http://www.forbes.com/sites/realspin/2015/07/27/china-and-the-u-s-need-to-come-together-at-least-economically/>

That’s why leaders from both countries gathered last month for the seventh session of the U.S.-China Strategic and Economic Dialogue. The talks come at a crucial time for both countries, as China and the U.S. face economic challenges that greater cooperation could help mitigate. The U.S. has reached 36-year lows in economic growth and labor force participation; China is wrestling with a “new normal” of slower economic growth and rising public sector debt. Both countries share a competitive spirit that’s alive and well among their people, and both want policies to match that enthusiasm. These dialogues were the right place for finding solutions, and the last six meetings have helped make progress on critical issues such as a bilateral investment treaty.

2. Don’t need a treaty: Chinese investment in the US is setting new records today without one

Dr. Derek Scissors 2015 (master’s degree in economics from the Univ of Chicago, doctorate in international political economy from Stanford Univ; Adjunct Professor in Chinese Economy, Department of Economics, George Washington Univ) 9 July 2015 The Chinese Investment That Really Matters <http://www.nationalinterest.org/feature/the-chinese-investment-really-matters-13288>

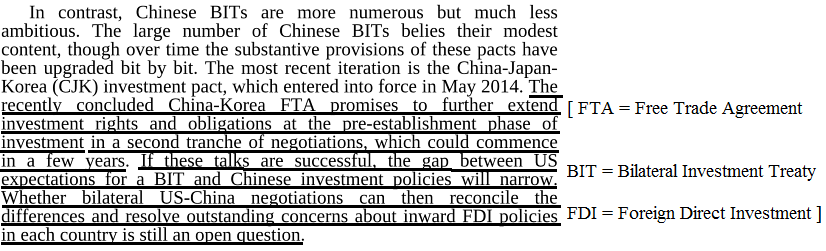
Yet without a BIT or reciprocity, Chinese investment in the United States has repeatedly set new annual records over the past few years.  
On the Horizon  
Looking forward, China Inc. has plenty of money and an increasing desire to head overseas as the home economy slows. Chinese investment of more than $1.25 trillion over the next decade, with perhaps $150 billion in the United States, is only a mildly optimistic scenario. In this case, energy investment will diversify away from conventional oil to shale, nuclear, and alternative. Real estate investment will recede, as overly exuberant Chinese investors are burned the same way Japanese investors were burned in the 1980’s. But Chinese banks will seek more profitable opportunities overseas than are available at home.

SOLVENCY

1. Must wait for China/Korea FTA.

We have to wait a few years for China-Korea FTA negotiations to finish before we will know whether US/China differences can be resolved, and even then it’s not a sure thing. C. Fred Bergsten advocates a US/China investment agreement, but he admitted in February 2015 that we can’t do it yet:

C. Fred Bergsten 2015 (PhD from Fletcher School of Law and Diplomacy; former assistant secretary for international affairs at the US Treasury Dept.) February 2015 TOWARD A US-CHINA INVESTMENT TREATY <https://books.google.fr/books?id=t2CVBgAAQBAJ&pg=PT6&lpg=PT6&dq=%22sean+miner%22+trade&source=bl&ots=I8znutErAB&sig=sDFtO95Ku2MbqjPKqs8DbryTUAc&hl=en&sa=X&ved=0CFQQ6AEwCWoVChMI8O71nMbxxwIVxLQaCh0mZAc2#v=onepage&q=%22sean%20miner%22%20trade&f=false> (brackets added)



2. Five blocking issues, none of which can be solved by an Affirmative ballot.

Status Quo is negotiating an investment treaty, but 5 issues are blocking Chinese agreement. An AFF ballot can’t make the Chinese government change its negotiating position

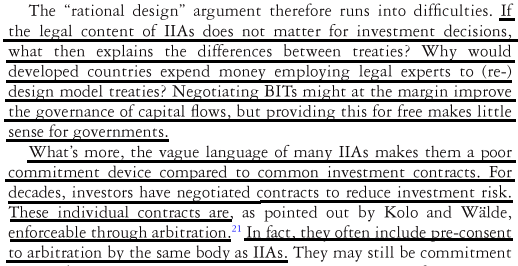
Jeffrey J. Schott and Cathleen Cimino 2015 (Schott – senior fellow at the Peterson Institute for International Economics. Cimino – research associate at the Peterson Institute for Intl. Econ.) TOWARD A US-CHINA INVESTMENT TREATY “The China-Japan-Korea Trilateral Investment Agreement: Implications for US Policy and the US-China Bilateral Investment Treaty” (brackets added) <https://books.google.fr/books?id=t2CVBgAAQBAJ&pg=PT6&lpg=PT6&dq=%22sean+miner%22+trade&source=bl&ots=I8znutErAB&sig=sDFtO95Ku2MbqjPKqs8DbryTUAc&hl=en&sa=X&ved=0CFQQ6AEwCWoVChMI8O71nMbxxwIVxLQaCh0mZAc2#v=onepage&q=%22sean%20miner%22%20trade&f=false>



3. Investment agreements don’t add much to the investment climate

Companies already have private agreements in place, so International Investment Agreements (IIA) don’t do much

Prof. Mark S. Manger 2011 (Assistant Professor at Munk School of Global Affairs at Univ of Toronto, Canada) Improving International Investment Agreements, Chapter 5 <https://books.google.fr/books?id=KZNeIw0vH3EC&pg=PA116&lpg=PA116&dq=TIA+trade+investment+agreement&source=bl&ots=QVnYKUqTY1&sig=Frxnd-siIG8whD7KWVVwPZj8uyA&hl=en&sa=X&ved=0CCcQ6AEwAWoVChMI9M_9jZLxxwIVBV0aCh3cLwmX#v=onepage&q=TIA%20trade%20investment%20agreement&f=false>



4. Chinese Cheating

Investment treaties will not open Chinese markets because China will cheat on any agreements

Dr. Derek Scissors 2014 (master’s degree in economics from the University of Chicago, and a doctorate in international political economy from Stanford University; Adjunct Professor in Chinese Economy, Department of Economics, George Washington Univ.) 19 Aug 2014 Stop the US-China Bilateral Investment Treaty (BIT) Talks <https://www.aei.org/publication/stop-the-us-china-bilateral-investment-treaty-bit-talks/>

American business can be [short-sighted](http://www.cnn.com/2006/BUSINESS/01/25/google.china/) in its approach to China (though others can apparently be [worse](http://www.smh.com.au/national/mr-china-no-more-clive-palmer-out-of-luck-again-20140819-105yhb.html)). Believing a bilateral investment treaty (BIT) is a solution to the current bout of mercantilism would be exceptionally short-sighted. Looking backward, the lesson from China’s WTO accession is clear: do not sign an agreement hoping to bind the PRC when the Party [has another development path in mind](http://www.economist.com/node/21538159). Looking forward, the recent policy shift – what China wants – indicates that any BIT concessions – what the US wants – would be imaginary. They would shortly be finessed, sidestepped, or simply ignored. A BIT signed in 2015, for example, would see American business in 2018 complaining that the Chinese are cheating and calling for a free trade agreement to create a truly open market. Again.

5. BIT alone isn’t enough without social reforms that uphold respect for property rights

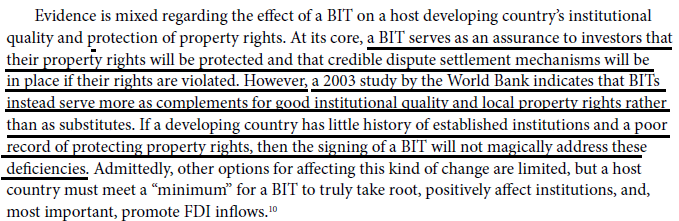
Link: China has poor protection of property rights

Prof. Ilya Somin 2014 (Professor of Law at George Mason University ) 8 Aug 2014 WASHINGTON POST “The conflict over takings and property rights in China and its parallels with that in the United States “ <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/08/the-conflict-over-takings-and-property-rights-in-china/>

Another important distinction is that the Chinese government only officially recognized private property in land in 2007, and most rural Chinese do not have full-fledged legal property ownership, which officially remains in the hands of the government. This makes it easier for the state to displace them. Finally, in China’s authoritarian society, it is very difficult for victims of takings to get redress in either the courts or the political process.

Impact: BIT fails if property rights are not upheld

Matthew Stokes 2012 (US State Department, visiting fellow at Center for Strategic & International Studies) Nov 2012 BIT AND BEYOND: ADVANCING THE US-INDIA ECONOMIC RELATIONSHIP <http://csis.org/files/publication/121126_Stokes_BITandBeyond_web.pdf>

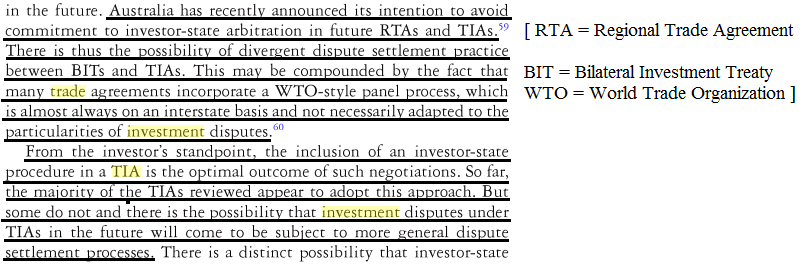


6. Plan vagueness: AFF plan has no specifics on the dispute resolution process.

Link: No dispute mechanism specified in the plan, but they are vital to the process.

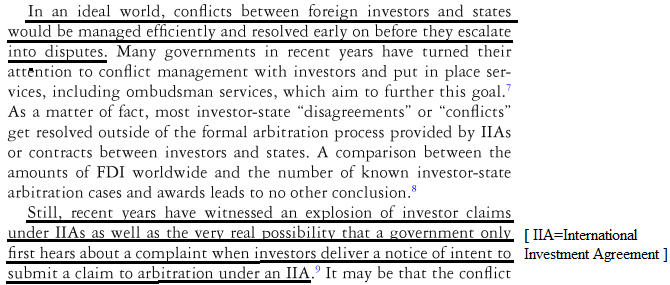
**When a foreign investor believes the agreement has been violated, where does he go to complain and who enforces it? Some TIAs include investor-state dispute resolution, while others have more general dispute settlement process**

Prof. Armand de Mestral and Dr. Alireza Falsafi 2011 (de Mestral - Emeritus Professor, Jean Monnet Professor of Law, McGill University. Falsafi – PhD, McGill University) Improving International Investment Agreements, Chapter 7 <https://books.google.fr/books?id=KZNeIw0vH3EC&pg=PA116&lpg=PA116&dq=TIA+trade+investment+agreement&source=bl&ots=QVnYKUqTY1&sig=Frxnd-siIG8whD7KWVVwPZj8uyA&hl=en&sa=X&ved=0CCcQ6AEwAWoVChMI9M_9jZLxxwIVBV0aCh3cLwmX#v=onepage&q=TIA%20trade%20investment%20agreement&f=false> (brackets added)



Link: Foreign investment disputes are common under international investment agreements

Prof. Armand de Mestral and Dr. Alireza Falsafi 2011 (de Mestral - Emeritus Professor, Jean Monnet Professor of Law, McGill University. Falsafi – PhD, McGill University) Improving International Investment Agreements, Chapter 7 <https://books.google.fr/books?id=KZNeIw0vH3EC&pg=PA116&lpg=PA116&dq=TIA+trade+investment+agreement&source=bl&ots=QVnYKUqTY1&sig=Frxnd-siIG8whD7KWVVwPZj8uyA&hl=en&sa=X&ved=0CCcQ6AEwAWoVChMI9M_9jZLxxwIVBV0aCh3cLwmX#v=onepage&q=TIA%20trade%20investment%20agreement&f=false> (brackets added)



Impact: We have to know the dispute settlement mechanism in order to judge the policy and its impact on society

Joachim Pohl, Kekeletso Mashigo, Alexis Nohen 2012. (Pohl – Legal Analyst, OECD Investment Division. Mashigo – Dept of Trade and Industry of South Africa, assigned to OECD Investment Division. Nohen – consultant to OECD Investment Division) published by Organization for Economic Cooperation & Development (OECD) “Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey”, OECD Working Papers on International Investment, 2012/02, OECD Publishing. <http://dx.doi.org/10.1787/5k8xb71nf628-en>

The textual basis of the investor-state dispute settlement system (ISDS) is found in a set of some 3,000 international investment treaties and in related treaties, rules and conventions (e.g. ICSID Convention and UNCITRAL Rules). With such disperse texts, obtaining a comprehensive picture of ISDS treaty content is a daunting, though necessary, task. Understanding the full range of treaty texts is an important input to policy making in this area because these texts are among the most important tools available to governments as they seek to ensure that ISDS serves to enhance, to the maximum extent possible, the welfare of the societies on whose behalf investment treaties have been concluded.

DISADVANTAGES

1. Discriminatory treatment

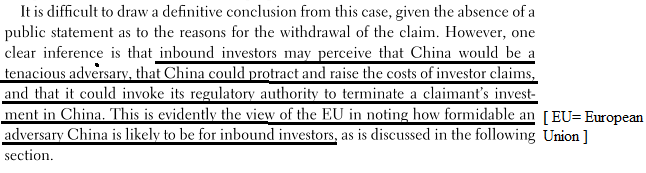
Link: Foreign investors in China face discriminatory treatment, while Chinese investors here would have to be treated like US companies

Axel Burger 2013 (researcher at the German Development Institute in Bonn and works in the department for World Economy and Development Financing;master’s degree from Munich’s Ludwig-Maximilians-Universität in political science, economics and modern history) July 2013, Investment Rules in Chinese Preferential Trade and Investment Agreements <https://www.die-gdi.de/uploads/media/DP_7.2013.pdf> (brackets added)

National treatment provisions included in recent BITs [Bilateral Investment Treaties] between China and developed countries are stronger than the best-effort provisions found in Chinese BITs with developing countries. Remarkably, China is able to make developed partner-countries bear more obligations than it is willing to itself. Whereas Chinese authorities are still allowed to discriminate against foreign investors, Chinese investors can rely on national treatment in the respective partner country. This expansion, however, of national treatment provisions in Chinese BITs, notwithstanding their limited applicability, can be explained by the growing acceptance of national treatment in Chinese law, especially with respect to China’s accession to the WTO (Wang 2005, 778).

Link: China will use its power to frustrate foreign investors in any dispute

Prof. Leon E. Trackman 2015 (professor of law and former Dean of the Faculty of Law at Univ. of New South Wales, Australia. Masters and Doctoral degrees in law from Harvard Law School) China in the International Economic Order: New Directions and Changing Paradigms, “Geo-Politics, China, and Investor-State Arbitration” (brackets added) <https://books.google.fr/books?id=EcniBwAAQBAJ&pg=PA276&lpg=PA276&dq=dispute+resolution+BIT+fail&source=bl&ots=xKzr_NWQzf&sig=4zbDnuUJAF5hCCMopCuiGLejEHI&hl=en&sa=X&ved=0CC4Q6AEwA2oVChMI16OD2tLxxwIVwlkaCh0phAMs#v=onepage&q=dispute%20resolution%20BIT%20fail&f=false>



Impact: Business losses. Example: European companies lost over 21 billion euros due to Chinese government discrimination against foreign businesses in 2013 alone

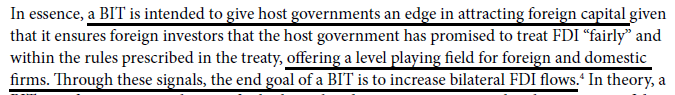
Prof. Oded Shenkar 2015. (Professor of Management and Human Resources, Ohio State Univ.) 28 Jan 2015 “Testimony before the U.S.-China Economic and Security Review Commission” Hearing on the Foreign Investment Climate in China (“EUR” is the euro, the European currency, which was worth $1.13 on 12 Sept 2015. So, 21 billion euros = approx. $23 billion) <http://www.uscc.gov/sites/default/files/Shenkar_Testimony_0.pdf>

The Council’s report states that Chinese government agencies “have considerable leeway to select investigation targets and carry out the investigations.” It also says: “some high profile cases appear to reflect broader Chinese industrial policy concerns on intellectual property standards, and the protection of domestic industries, as opposed to the interests of fair competition.” The European Chamber’s survey provides a broader perspective since it covers a great variety of foreign companies and tends to be somewhat more direct in its observations. The report is explicit about the decline in financial performance of European companies in China, including a decline in profit margin below global averages for the first time in the ten-year history of the survey and a precipitous drop of 33 percent in companies seeing China as their top investment destination. While some of the reasons for the change are such things as rising costs, the survey points out that “European companies still perceive themselves to be discriminated against in the Chinese marketplace. It is estimated that European companies that are members of the European Chamber missed out on EUR 21.3 billion in revenues in FY 2013 due to market access and regulatory barriers.”

2. Increased Foreign Direct Investment (FDI)

Link: One of the goals of a Bilateral Investment Treaty (BIT) is increasing foreign direct investment. AFF probably agrees with this, but if proof is needed:

Matthew Stokes 2012 (US State Department, visiting fellow at Center for Strategic & International Studies) Nov 2012 BIT AND BEYOND: ADVANCING THE US-INDIA ECONOMIC RELATIONSHIP <http://csis.org/files/publication/121126_Stokes_BITandBeyond_web.pdf>



Impact: FDI is bad because it kills jobs and hurts the US economy. It moves US factories away from sourcing their inputs domestically in favor of using imports from the home country

Dr. Robert E. Scott 2013 (PhD economics; Director of Trade and Manufacturing Policy Research at Economic Policy Institute) Transatlantic Free Trade Agreement: Job Claims Are Pure Baloney 1 Nov 2013 ECONOMIC POLICY INSTITUTE <http://www.epi.org/blog/transatlantic-free-trade-agreement-job-claims/>

When foreign multinational companies (MNCs) set up factories in the United States, they tend to import parts from their home country. New foreign plants also often displace domestic plants that would source parts from U.S. suppliers. Thus, for example, in 2010, all U.S. affiliates of foreign MNCs had imports of $518 billion but exports of only $229 billion, for a next foreign MNC trade deficit of $289 billion (44.8% of the total U.S. trade deficit in 2010). Similarly, U.S. MNCs had a trade deficit of $195 billion (30.2% of the total U.S. trade deficit in 2010). So FDI is lose-lose for U.S. trade, jobs and the domestic economy.

3. Taxpayer ripoffs

Foreign companies operating in the US can file a complaint with an Investor-State Dispute Settlement (ISDS) process, and collect hundreds of millions of taxpayer dollars, whenever they believe their profitability has been harmed by any policy of the US government

Lori Wallach 2015 (law degree from Harvard Law School; Director and Founder of [Global Trade Watch](https://en.wikipedia.org/wiki/Global_Trade_Watch), a division of Public Citizen, a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts ) 22 Mar 2015 Investor-State Dispute Resolution: Debunking USTR Public Affairs’ 3/11/15 Q&A Memo to Reporters <http://www.peopledemandingaction.org/privacy-policy/item/292-investor-state-dispute-resolution-debunking-ustr-public-affairs-3-11-15-q-a-memo-to-reporters>

Opponents of ISDS do not claim a foreign corporation can initiate an ISDS case simply because a firm lost profits. But, when a corporation convinces an ISDS tribunal that a domestic law violated one of the panoply of foreign investor rights granted in an ISDS agreement that are not available to domestic firms, then the payment demanded from a government is calculated on the “expected future profits” that the law allegedly impeded. Under such logic, tribunals have ordered governments to pay more than $3.6 billion to foreign corporations under U.S. “free trade” agreements (FTAs) and bilateral investment treaties (BITs) for nondiscriminatory toxics bans, land-use rules, regulatory permits, water and timber policies and more. Meanwhile, in the [20 pending claims under U.S. FTAs alone](http://www.citizen.org/documents/investor-state-chart.pdf), foreign firms are demanding more than $38 billion for environmental, energy, financial regulation, public health, land-use and transportation policies. Due to ISDS tribunals’ increasingly wide interpretations of foreign firms’ rights and increasingly investor-friendly damages calculations, the amounts that tribunals have ordered governments to pay foreign corporations have soared. While just 15 years ago tribunals typically ordered payment of millions of dollars in a given ISDS case, today it is not uncommon for a single lost case to cost a government hundreds of millions of dollars.

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