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A business perspective on a China - US bilateral investment treaty

by
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The recent *Perspective* "A China - US bilateral investment treaty: A template for a multilateral framework for investment" by Karl P. Sauvant and Huiping Chen[1] raises very important issues. I welcome the focus on the US-China investment negotiations and believe Sauvant and Chen are asking many key questions. But their analysis and their recommendations end up, I believe, seriously off-track. I will offer an alternative perspective, one shaped both by my previous life as an international economic policy-maker/negotiator at the State Department and the US Trade Representative's office and my current role at the United States Council for International Business (USCIB), representing global companies on investment policy issues, including investment treaties.

First, I shall highlight broad agreement on the importance of the on-going US-China bilateral investment treaty (BIT) negotiations, the most important investment policy effort anywhere in the world over the past decade. If China, the emerging global investment powerhouse, both as recipient of inward foreign direct investment (FDI) and as a surging source of outward FDI into both developing and developed markets, and the US, the world's leading international investor nation, both inward and outward, and also a driver of global investment policy, can agree on a comprehensive, gold standard, 21st century BIT, it could, repeat could, as Sauvant and Chen suggest, provide a new global template for BITs or even, at some point, a comprehensive multilateral investment agreement. That could be a game-changer. Note I say "could," not "will."

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[1] *Columbia FDI Perspectives*, No. 85 (December 17, 2012).

I agree with Sauvant and Chen at that broadest level, but my sense of what an acceptable US-China BIT would look like, and how one would get there, is very different. Their analysis seems to be that, on key issue after key issue, one must split the difference between fundamental US and Chinese positions -- in other words, you cut the baby in half. I disagree; you do not get to the sort of comprehensive 21st century BIT both sides need by splitting the difference down the middle between an ambitious, market-opening text on one hand and a text allowing for screening, government interventions, protected monopolies, and protected state-owned enterprises (SOEs) and national champions on the other hand.

Make no mistake. China has come an incredibly long way in its investment policies, as in so many other areas, over the past 30 years. China deserves, and generally receives, strong recognition from the international business community. But China has not yet established an open, market-based investment regime. Far from it. Screenings, controls, restrictions, informal pressures, forced localization, and political interventions unfortunately remain central to the Chinese investment system.

Sauvant and Chen suggest that, on areas they identify as "more pronounced" "differences"[2] such as: 1) performance requirements, 2) labor and environment standards, 3) investor-state dispute settlement, 4) national treatment, including pre-establishment, 5) non-conforming measures, and 6) sectoral carve-outs and restrictions, the inevitable way forward lies in splitting the difference between Chinese and US positions.

A "split the difference" approach may offer the best chance for a quick agreement. It does not offer the best path to an agreement that can protect, encourage and catalyze FDI flows between the US and China in both directions. Or to an agreement that would actually give China what it wants in terms of clearer access into the US or building its own economy. Rather, both parties need a high-standard, comprehensive agreement that ensures real protections, real transparency, real dispute settlement, and real market-opening to investors from both sides.

I believe the 2012 US Model BIT provides a template for such an agreement. Obviously in serious negotiations, there will need to be compromises, additions, tweaks, phase-in periods, and limited exceptions. I believe, for example, we need to enhance existing BIT provisions on SOEs and cross-border data flows on any US-China BIT. But simply splitting the differences on core BIT protections as a quick path to a US-China BIT and a possible template for a multilateral investment agreement will not pass the "smell test" with US business, the US Administration or the US Congress. Let us all accept the reality that a US-China BIT is very important for both sides and for the world but it is *not* a short-term deliverable, it is *not* going to be an easy "feel-good" negotiation and it is *not* a split-the-baby proposition.

It is really up to China at this point. If China is prepared to work with the US and other partners to move forward to an open, competitive investment regime, with real transparency, real market access and real rule of law, then a real BIT negotiation is possible, and it deserves the top priority of each side to get it done. But if China still believes that investment -- inward and outward FDI -

[2] Ibid., p. 2.

- needs to be limited, screened, restricted, and subjected to forced localization, then real BIT negotiations will, unfortunately, not succeed. In that case, the US and China should continue an intensive investment dialogue and cooperation -- but meaningful BIT negotiations will have to await a new day.

For further information, including information regarding submitting to the *Perspectives*, please contact: Vale Columbia Center on Sustainable International Investment, Jennifer Reimer, jreimer01@gmail.com.

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