WHY CHINA WANTS A BILATERAL INVESTMENT TREATY WITH THE UNITED STATES

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ABSTRACT

The United States and China recently began negotiating a much anticipated, high-level bilateral investment treaty ("BIT") that is intended to significantly increase reciprocal capital flows. The United States believes that a BIT will help "level the playing field" for U.S. companies because many lucrative sectors in China are either completely closed to foreign investment or are subject to substantial restrictions. The United States also believes that a BIT will bring new business opportunities for U.S. companies in China and encourage Chinese companies to establish new companies or acquire existing companies in the United States, which in turn will spur American job growth. Although the benefits to the United States are often touted, there is little analysis in the media or commentary

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about the benefits of a BIT for China. As a one-party state, China may decide to eschew a BIT with the United States not only for economic reasons but also for political, strategic, and policy reasons. This Article identifies three key strategic objectives that China might be able to achieve under a U.S.-China BIT: (1) expansion of the reach and influence of China's massive state-owned enterprises; (2) acquisition of U.S. technology and intellectual property; and (3) evasion or mitigation of the effects of border measures imposed by the United States on imported goods from China. All three objectives are crucial to China's long-term global strategy of becoming a leading power in international business and trade.

INTRODUCTION

With much fanfare, the United States and the People's Republic of China ("PRC" or "China") have re-entered into negotiations concerning a high-level, bilateral investment treaty ("BIT") designed to further open both markets to foreign direct investment ("FDI").[1] For present purposes, FDI means the acquisition of a lasting ownership interest with management control in a business entity located in one nation by a business entity of another nation.[2] Examples of FDI include when Corporation *A*, based in the United States, forms a joint venture in China with a Chinese company;[3]

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[1] *See* Betsy Bourassa, *U.S. and China Breakthrough Announcement on the Bilateral Investment Treaty Negotiations*, U.S. DEP'T OF THE TREASURY, TREASURY NOTES BLOG (July 15, 2013), http://www.treasury.gov/connect/blog/Pages/U.S.-and-China-Breakthrough-Announcement-.aspx (quoting U.S. Treasury Secretary that a high level BIT is a priority for the United States and also noting that for the first time China agreed to negotiate a BIT in all sectors and all stages of investment); *see also* John Frisbie, *Why an Investment Treaty with China Matters*, CHINA BUS. REV. (Mar. 31, 2014), http://www.chinabusinessreview.com/why-an-investment-treaty-with-china-matters; Kenneth Rapoza, *China U.S. BIT on Fast Track*, FORBES (July 10, 2014), http://www.forbes.com/sites/kenrapoza/2014/07/10/china-says-u-s-investment-treaty-on-fast-track (noting that China claims BIT is on "fast track" and that a BIT will even the playing field for the United States); Kenneth Rapoza, *U.S. Financial Service Firms Push for Bilateral Treaty with China*, FORBES (Apr. 5, 2014), http://www.forbes.com/sites/kenrapoza/2014/04/05/u-s-financial-service-firms-push-for-bilateral-treaty-with-china.

[2] *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 366 (2d ed. 2010) [hereinafter CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS] (U.S. law defines FDI as "the ownership or control, directly or indirectly, by one foreign resident of 10 percent or more of the voting securities of an incorporated U.S. business enterprise or the equivalent interest of an unincorporated U.S. business enterprise, including a branch"); *see also* 15 C.F.R. § 801.2(h)(1) (2012).

[3] *See* CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 2,

when *A* establishes a wholly-owned subsidiary in China;[4] or when *A* acquires a Chinese company.[5] Although the United States and China, the world's two largest economies, share an immense trade volume in goods, they have comparatively low levels of reciprocal FDI flows due to legal and political barriers.[6] Proponents of a BIT argue that it will clarify the rules for investment in both countries while removing some of these existing barriers.[7] As a result, a BIT may increase reciprocal FDI flows between both countries. Higher levels of investment trade between the world's two largest economies will also stimulate the entire global economy.[8]

For the United States, a BIT could create new business opportunities. FDI outflows (i.e., U.S. companies that invest capital in China) and FDI inflows from China into the United States should increase.[9] 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.[10] 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.[11] At present, all U.S. FDI outflows to China are governed solely by domestic Chinese law.[12] 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.[13] Another common complaint is that the Chinese government tends to discriminate against foreign companies, including U.S. companies, in granting investment opportunities.[14] A well-designed BIT could create new investment

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at 489-90.

[4] *See id*. at 490.

[5] *See id*. at 369, 489-90.

[6] For statistics, see *infra* text accompanying notes 14-17.

[7] *See* Mark Schwartz, *A BIT of Help for the U.S. and China*, WALL ST. J. (Apr. 2, 2014), http://www.wsj.com/articles/SB10001424052702303532704579476720853893300.

[8] *See id.*

[9] *See id.*

[10] *See* David A. Gantz, *Challenges for the United States in Negotiating a BIT with China: Reconciling Reciprocal Investment Protection with Policy Concerns*, 31 ARIZ. J. INT'L & COMP. L. (forthcoming 2015).

[11] *See* Frisbie, *supra* note 1.

[12] *See* CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 2, at 489-90.

[13] *See* Frisbie, *supra* note 1; Schwartz, *supra* note 7.

[14] *See* Schwartz, *supra* note 7; *see also* Michael Wines, *China Fortifies State Businesses to Fuel Growth*, N.Y. TIMES, Aug. 29, 2010, http://www.nytimes.com/2010/08/30/world/asia/30china.html?pagewanted=all&_r=0 ("Upon joining the World Trade Organization, China committed itself to opening its

opportunities for U.S. companies in China by allowing U.S. companies to invest in sectors that are now restricted.[15]

A BIT may not only create new opportunities for U.S. FDI in China, but it could also increase Chinese investment in the United States.[16] In 2012, China, the world's second largest economy, accounted for only $4 billion or approximately two percent of the $175 billion inbound FDI in the United States.[17] By comparison, the United States imported $440.4 billion in goods from China in 2013.[18] The revenues earned by China through exports provide a vast source of capital that can be used as FDI in the United States.[19] The low levels of FDI inflows from China suggest that there are real or perceived market barriers to Chinese FDI in the United States as China is using the bulk of those earnings to invest in safe non-equity instruments, such as U.S. Treasury bonds.[20] Greater transparency and flexibility under a BIT could result in an increase in FDI inflows from China and many benefits for the U.S. economy.[21] In 2013, Chinese-owned companies provided more than 70,000 full-time jobs in the United States, an eight-fold increase from 2007.[22] Increased inbound FDI from China could augment American job creation even further.[23]

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communications market to foreign joint ventures for local and international phone service, e-mail, paging and other businesses. But after eight years, no licenses have been granted—largely, the United States says, because capital requirements, regulatory hurdles and other barriers have made such ventures impractical."); Henry Sanderson, *China Tells Domestic Companies to Favor Chinese Auditors*, BLOOMBERG NEWS (June 25, 2011), http://www.bloomberg.com/news/2011-06-25/china-tells-domestic-companies-to-favor-chinese-auditors.html ("Last year, China's State-Owned Assets Supervision and Administration, which oversees more than 100 companies controlled by the central government, told state-owned enterprises to strengthen protection of their commercial secrets, which include information about strategic planning, management, public listings, business models, property transactions, financial information and manufacturing processes.").

[15] *See* Schwartz, *supra* note 7.

[16] *See id.*

[17] *See id.*

[18] WAYNE M. MORRISON, CONG. RESEARCH SERV., RL33536, CHINA U.S. TRADE ISSUES 3, 8 (2014).

[19] *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 37 (2d ed. 2012) [hereinafter CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW].

[20] China uses its earnings from imports to purchase safe non-equity investments such as Treasury bonds. As of 2013, China holds $1.317 trillion in U.S. Treasuries. *See* MORRISON, *supra* note 18, at 13-14.

[21] *See* Schwartz, *supra* note 7.

[22] *See id.*

[23] *See id.*

While the economic benefits to the United States are widely known, the benefits to China are not so commonly recognized. On a market level, China could enjoy new business opportunities and see an increase in its FDI outflows and inflows similar to those of the United States. For China, however, increased business opportunities cannot be the sole motivation for entering into a BIT.[24] Any analysis of China's decision to enter into a BIT must consider, in addition to business reasons, factors that relate to the interests of China's Communist Party leadership. The Communist Party governs China and exercises control over all aspects of the State,[25] including state-owned and private companies.[26] The Party endeavors not only to increase commercial gain but also to achieve strategic national policy goals.[27] The State-Party might use state-owned enterprises ("SOEs"),[28] now among the largest multinational companies in the world,[29]

[24] For a discussion of how China is increasingly willing to use trade for the political purposes of the Party, see Daniel C.K. Chow, *How China Uses International Trade to Promote Its Own View of Human Rights*, 45 GEO. WASH. INT'L L. REV. 681 (2013) [hereinafter Chow, *How China Uses International Trade*].

[25] *See* DANIEL C.K. CHOW, THE LEGAL SYSTEM OF CHINA IN A NUTSHELL 118-19 (2d ed. 2009) [hereinafter CHOW, LEGAL SYSTEM OF CHINA].

[26] *See infra* Part II.A.

[27] *See* MORRISON, *supra* note 18, at 27.

[28] "A state-owned enterprise is an enterprise that is owned by the State as opposed to any private entity, individual, or group of individuals." *See* CHOW, LEGAL SYSTEM OF CHINA, *supra* note 25, at 23. All SOEs are under the supervision of the central level. In addition, all SOEs are subject to the supervisory control of the central level State-Owned Assets Supervision and Administration Commission of the State Council ("SASAC"). The SASAC is a majority and controlling shareholder in virtually every leading firm in every important industry in China. "SOEs at the central level include the largest and most important firms in China, concentrated in the energy, aviation, technology, steel, shipping, mining, telecom and financial sectors. These are regulated by [SASAC]." Sara Hsu, *China's Changing State-Owned Enterprise Landscape*, DIPLOMAT (June 25, 2014), http://thediplomat.com/2014/06/chinas-changing-state-owned-enterprise-landscape.
Additionally, more than half of the Chinese companies in the 2012 Fortune Global 500 are SOEs supervised by an organ of the central government. Excluding major banks and insurance companies, controlling stakes in the largest and most important of the firms are owned, ostensibly on behalf of the Chinese people, by the SASAC, which has been described as "the world's largest controlling shareholder." Li-Wen Lin & Curtis J. Milhaupt, *We are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 699-700 (2013) (quoting Marcos Aguiar et al., *SASAC: China's Megashareholder*, BCG PERSPECTIVES (Dec. 1, 2007), http://www.bcgperspectives.com/content/articles/globalization_strategy_sasac_chinas_megashareholder).

[29] *See* Ivana Kottasova, *Is China about to Take Over Global Business?*, CNN (Sept. 16, 2014), http://edition.cnn.com/2014/07/08/business/fortune-500/index.html?hpt=ibu_c2.

to further China's own national strategic interests through a U.S.-China BIT.[30] China's strategic interests in a BIT, however, appear to have received little attention in the U.S. media and academia compared to the glowing reports concerning the potential economic benefits to the United States from a U.S.-China BIT.[31] This Article identifies three strategic interests that a BIT will promote for the State-Party in China.

First, a BIT may allow China to expand the reach and influence of China's SOEs, which are likely to benefit most from the BIT. China has a national policy of promoting SOEs to become "national champions" that can compete with the world's largest multinational companies.[32] Three of the ten largest companies by revenue in Fortune's Global 500 are from China.[33] Furthermore, China leads the list of newcomers to the Global 500 in 2014 with seven of the twenty-three new companies.[34] U.S. federal laws subject FDI by Chinese SOEs to scrutiny and allow the United States to block such investments unilaterally to protect U.S. national interests.[35] In addition, U.S. politicians can informally pressure U.S. and Chinese companies to abandon various FDI projects. For example, in 2005, the U.S. Congress, citing national security concerns, pressured a Chinese state-owned oil company to withdraw its bid to purchase Unocal, a U.S. energy company.[36] The United States' concern is that SOEs, as instruments of the State and the Communist Party, make their decisions in accordance with policy goals of the State-Party, which may threaten the economic viability

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[30] China has recently entered into a number of BITs and has shown an interest in entering into more. For the view that China's interests in BITs and free trade agreements are designed to advance the State-Party's strategic interests in order to counterbalance the growing influence of the United States, see Chow, *How China Uses International Trade*, *supra* note 24, at 714-18.

[31] The benefits of a U.S.-China BIT for the United States have received attention for years. *See, e.g.*, U.S. CHINA ECONOMIC REVIEW AND SECURITY COMMISSION, EVALUATING A POTENTIAL U.S.-CHINA BILATERAL INVESTMENT TREATY: BACKGROUND, CONTEXT, AND IMPLICATIONS 42-43 (2010). The author has engaged in extensive research and has been unable to find any sources that comprehensively address the strategic and political benefits to China of a BIT.

[32] *See* Daniel C.K. Chow, *China's Indigenous Innovation Policies and the World Trade Organization,* 34 NW. J. INT'L L. & BUS. 81, 82 (2013) [hereinafter Chow, *China's Indigenous Innovation Policies*].

[33] *See Global 500 2014*, FORTUNE, http://fortune.com/global500 (last visited Jan. 21, 2015). Sinopec Group is ranked third, China National Petroleum is ranked fourth, and State Grid is ranked seventh. *Id.*

[34] Kottasova, *supra* note 29.

[35] *See infra* Part I.B.

[36] *See* MORRISON, *supra* note 18, at 24.

of U.S. firms at home and abroad.[37] China asserts, on the other hand, that SOEs make decisions based solely on commercial considerations.[38] Part I.B will examine this issue in further detail.[39] For now, it is important to emphasize that once China enters into a BIT with the United States, it could become more difficult for the U.S. government to block FDI by Chinese SOEs in the United States. 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.[40] 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.[42] 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.

Second, a BIT could help China achieve another major national goal—the acquisition of advanced technology and innovation.[43] When China invests in the United States, China may either set up a greenfield investment (i.e., a new company)[44] or acquire an existing U.S. company through a mergers and acquisitions ("M&A") transaction.[45] As M&A is the most common mode by which FDI occurs today, China will likely acquire

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[37] *See id*. at 19-20.

[38] *See id*. at 20.

[39] *See infra* Part I.B.

[40] The United States concludes all of its BITs based on a model. The U.S. Department of State and the United States Trade Representative along with other agencies completed a 2012 Model BIT. *See Bilateral Investment Treaties and Related Agreements*, U.S. DEP'T OF STATE, http://www.state.gov/e/eb/ifd/bit (last visited Dec. 23, 2014). For the text of the 2012 Model BIT, see *2012 Model Bilateral Investment Treaty*, U.S. DEP'T OF STATE, http://www.state.gov/documents/organization/188371.pdf [hereinafter *2012 Model BIT*] (last visited Feb. 2, 2015).

[41] *See infra* Part II.A.

[42] *See infra* Part I.C.

[43] *See* MORRISON, *supra* note 18, at 29; *see also* Chow, *China's Indigenous Innovation Policies*, *supra* note 32.

[44] *See* CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 2, at 369.

[45] *See id*. at 369-70.

existing U.S. companies instead of setting up greenfield investments.[46] When China acquires an existing U.S. company, China obtains not only the tangible assets (the bricks and mortar) of the company, but also its intangible assets, such as its portfolio of intellectual property ("IP") rights protected by statute (i.e., patents and trademarks), trade secrets, know-how, and confidential business information. In a recent transaction, Huawei Technologies, an SOE and a leading information technology giant, purchased certain intellectual property assets of 3Leaf Systems, an insolvent U.S. technology firm, for $2 million.[47] Leading U.S. officials, including the Secretary of the Treasury, argued that Huawei's acquisition of U.S. technology would pose a threat to U.S. national security interests.[48] Under pressure, Huawei withdrew its application to acquire the IP.[49] Once a BIT enters into force, however, it may be more difficult for the United States to block the acquisition of U.S. IP by Chinese SOEs. A BIT might facilitate the acquisition by China's SOEs of U.S. technology and allow China to further its national goal of becoming a global leader in technology innovation.[50]

Third, a BIT could allow China to accomplish an increasingly important objective: to evade or mitigate the effects of border measures imposed by the United States on imported goods from China. Currently, the United States aggressively pursues a wide array of trade sanctions against imports from China, including anti-dumping duties, countervailing duties, quantitative restrictions (quotas), and safeguards.[51] Moreover, the increasing use of border measures, including double remedies, to prevent the growth of the expanding U.S. trade deficit with China[52] evinces a general reluctance on the part of the U.S. government towards China's trade practices.[53] There are even bills pending in Congress that threaten to

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[46] *See id*. at 370.

[47] *See* MORRISON, *supra* note 18, at 22-23.

[48] *See id*. (quoting former U.S. Treasury Secretary Timothy Geithner).

[49] *See id*.

[50] *See infra* Part II.B. For a discussion of China's comprehensive policies in fostering innovation in technology and intellectual property, see U.S. INT'L TRADE COMM'N, INVESTIGATION NO. 332-514, USITC PUB. 4199, CHINA: INTELLECTUAL PROPERTY INFRINGEMENT, INDIGENOUS INNOVATION POLICIES, AND FRAMEWORKS FOR MEASURING THE EFFECTS ON THE U.S. ECONOMY 5-6 to 5-23 (2010).

[51] *See infra* Part II.C.

[52] *See id.*

[53] *See* Andrew Clark, *US Politicians Threaten Trade War with China*, GUARDIAN (Sept. 29, 2010), http://www.theguardian.com/business/2010/sep/29/us-threatens-tariffs-against-china; Andre Dugan, *Americans View China Mostly Unfavorably*, GALLUP (Feb. 20, 2014), http://www.gallup.com/poll/167498/americans-view-china-mostly-unfavorably.aspx;

subject *every* import from China to punitive trade sanctions.[54] Trade measures are imposed on imports from China at the border and are administered by U.S. Customs authorities.[55] While trade sanctions are authorized by the agreements of the World Trade Organization ("WTO"),[56] any particular U.S. action may be challenged both in the United States[57]

Zachary Keck, *In America, China Is Public Enemy #1*, DIPLOMAT (Feb. 27, 2014), http://thediplomat.com/2014/02/in-america-china-is-public-enemy-1; Damien Ma, *Friend/Foe: The Contradictions in How Americans and Chinese See Each Other*, ATLANTIC (July 13, 2012), http://www.theatlantic.com/international/archive/2012/07/friend-foe-the-contradictions-in-how-americans-and-chinese-see-each-other/259710; Kenneth Rapoza, *Is China's Ownership Of U.S. Debt A National Security Threat?*, FORBES (Jan. 23, 2013), http://www.forbes.com/sites/kenrapoza/2013/01/23/is-chinas-ownership-of-u-s-debt-a-national-security-threat.

[54] *See id.*

[55] U.S. DEP'T OF HOMELAND SEC., U.S. CUSTOMS AND BORDER PROT., CBP PUB. NO. 0000-0504, IMPORTING INTO THE UNITED STATES: A GUIDE FOR COMMERCIAL IMPORTERS 5 (2006), *available at* http://www.cbp.gov/sites/default/files/documents/Importing%20into%20 the%20U.S.pdf.

[56] Anti-dumping duties are authorized by Article 6 of the GATT 1994. *See* General Agreement on Tariffs and Trade 1994 art. 6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187 [hereinafter GATT 1994]. They are also authorized by the WTO Anti-dumping Agreement. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), Apr. 15, 1994, 1868 U.N.T.S. 201. Countervailing duties are authorized by Article 6 of the GATT 1994 and by the 1995 WTO Agreement on Subsidies and Countervailing Measures. *See* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS 231 (1999), 1869 U.N.T.S. 14. [hereinafter GATS]. Quotas are generally prohibited but are permitted exceptionally under Article 11 of the GATT and also under the 1995 WTO Agreement on Safeguards. *See* Agreement on Safeguards, Apr. 15, 1994, 1869 U.N.T.S. 154 (allowing quotas and other sanctions as temporary responses to trade emergencies).

[57] The World Trade Organization has a dispute settlement system in which complaints by members can be brought against other members. The complaints are heard by panels, which function like trial courts, and then by the Appellate Body, which functions as a high court of appeals. The decisions of the panels or the Appellate Body are adopted by the Dispute Settlement Body ("DSB"), which consists of the entire membership of the WTO. Most WTO members follow the decisions adopted by the DSB due to peer pressure and a desire to preserve the WTO as the preeminent body dealing with international trade. The WTO has various measures at its disposal to enforce its decisions, such as ordering compensation by the offending party and authorizing transactions by the offended member against the offending member. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 19, at 63-71.

and before the WTO.[58] A BIT would allow China to establish or acquire U.S. business entities that will manufacture some of the goods that are now the target of U.S. trade sanctions imposed at the border. Of course, goods that are manufactured in the United States are not subject to border measures imposed on imports.[59] In the 1980s and 1990s, Japan followed a similar strategy, successfully shifting manufacturing operations to the United States to avoid the effect of U.S. quotas on imports of automobiles from Japan.[60] Under a U.S.-China BIT, China may be able to emulate this strategy.

This Article proceeds in two parts. Part I examines the current regime that governs FDI on a multilateral level and in China and the United States. Part II analyzes the major strategic advantages of a BIT for China. The additional protections and rights that a BIT would provide for China might (1) negate or impede efforts by the United States to block China's SOEs from acquiring U.S. companies; (2) facilitate the acquisition by China of U.S. technology and IP; and (3) evade the application of border measures or restrictions imposed on Chinese imports by U.S. Customs authorities.

I. THE CURRENT MULTILATERAL, CHINESE, AND U.S. LEGAL REGIMES GOVERNING FOREIGN DIRECT INVESTMENT

To understand how a BIT would promote investment transactions between China and the United States, it is first necessary to understand the current legal regimes that govern FDI on a multilateral level and in China and the United States on a domestic level. The discussion below begins with an overview of the multilateral legal regime and then examines the applicable features of the domestic legal regimes in China and the United States.

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[58] Because all U.S. trade remedies, such as anti-dumping duties, countervailing duties, quotas, and safeguards, are domestic law implementations of WTO agreements, the question that arises is whether domestic law implementation is consistent with the international legal obligations established under the WTO. For an example of a domestic U.S. anti-dumping law held to be inconsistent with the WTO Anti-dumping Agreement, see Appellate Body Report, United States – Anti-Dumping Act of 1916, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000) (*adopted* Sept. 26, 2000).

[59] There is an exception in anti-dumping cases created by an anti-circumvention measure that allows the United States to impose an anti-dumping duty on goods that are manufactured in the United States but deemed to be imports. *See infra* Part II.C.

[60] For a more detailed discussion of the 1981 Japan automobiles quota case discussed, see *id.*

A. Multilateral FDI Regimes

In the modern global economy, there are four major channels of trade: (1) trade in goods; (2) trade in services; (3) trade in technology (IP); and (4) trade in investment or FDI.[61] Of the four channels of trade, three (goods, services, and technology) are each subject to regulation by a major WTO agreement, which is binding on all 160 members of the WTO, including all of the world's major trading nations (e.g., the United States and China).[62] The General Agreement on Tariffs and Trade ("GATT") regulates trade in goods, the most fundamental channel of trade;[63] the General Agreement on Trade in Services ("GATS") governs trade in services;[64] and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs") governs trade in technology.[65] Of the four channels of trade, only FDI is not governed by a major WTO agreement.[66] Historically, the international trade community has been unable to reach a general agreement to regulate FDI.[67] Currently, the political will necessary to conclude a multilateral WTO agreement on FDI is lacking.[68] As a result, FDI is not subject to any WTO regulation, which means that FDI is not regulated at the multilateral level, except in certain limited and exceptional areas.[69] Unless a regional or bilateral treaty applies, FDI is governed by the domestic laws of the host state.[70]

The practices imposed by the GATT, GATS, and TRIPs are too numerous and complex to discuss in detail in this Article. However, these agreements embody two foundational principles of non-discrimination in international trade that would play a major role in any U.S.-China BIT. These principles, first enshrined in the GATT,[71] now also apply to services

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[61] *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 19, at 1.

[62] *See Understanding the WTO: The Organization Members and Observers*, WORLD TRADE ORG. (Nov. 2, 2014), http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[63] *See* GATT 1994, *supra* note 56.

[64] *See* GATS, *supra* note 56.

[65] *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXT: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183 [hereinafter TRIPs Agreement].

[66] *See* CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 2, at 417-20.

[67] *See id*. at 418.

[68] *See id*.

[69] *See id*. at 419.

[70] *See id*.

[71] *See* GATT 1994, *supra* note 56, arts. 1, 3.

trade under GATS and technology trade under TRIPs.[72] The first is the National Treatment ("NT") principle, which prohibits WTO members from discriminating against foreign goods,[73] services,[74] or technology in favor of their domestic counterparts.[75] In other words, NT calls for equal (or better) treatment of imported goods, services, and technology. For example, suppose that the United States charges an extra sales tax on all imported goods from China but does not levy the same tax on like goods produced by domestic manufacturers.[76] This discriminatory treatment could constitute a violation of the NT principle, and China would be able to bring a dispute settlement proceeding against the United States before the WTO.[77] The second major principle is the Most Favored Nation ("MFN") principle, which requires any privilege or benefit extended by a WTO member to any other country to be immediately extended to all WTO members.[78] In other words, MFN calls for equal treatment of all WTO members and prohibits discrimination against any country. For example, suppose that the United States issues a new law providing that all imported automobiles from Germany will immediately enjoy zero-tariffs (i.e., these automobiles will enter the United States duty free). In the absence of an exception to MFN, such as a free trade agreement,[79] the United States must immediately and

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[72] *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 19, at 129.

[73] *See* GATT 1994, *supra* note 56, art. 3 (applicable to goods). For an analysis of the National Treatment Principle, see CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 19, at 142-72.

[74] *See* GATS, *supra* note 56, art. 17 (applicable to services).

[75] *See* TRIPs Agreement, *supra* note 65, art. 3 (applicable to intellectual property).

[76] A tax on imported liquor but not on like Japanese liquor was held to violate NT. *See* Appellate Body Report, *Japan-Taxes on Alcoholic Beverages*, 32, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (*adopted* Nov. 1, 1996).

[77] The standard for bringing a claim within the Dispute Settlement Understanding ("DSU") would be that there is a denial or "nullification and impairment" of a trade benefit. *See* GATT 1994, *supra* note 56, art. 23. The argument in this example is that denial of NT is a nullification and impairment of a trade benefit.

[78] *See* GATT 1994, *supra* note 56, art. 1. For an analysis of the Most Favored Nation Principle, see CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 19, at 129-42.

[79] There is an exception to MFN for free trade agreements ("FTAs"). *See* GATT 1994, *supra* note 56, art. 24(5). Under Article 24(5), it is possible to set up a FTA under which all members of the FTA (who are also members of the WTO) can trade duty free; they have no obligation to extend duty-free treatment to other WTO countries who are non-members of the FTA under Article 24(5). The basic premise behind Article 24(5) is that FTAs could not exist if each FTA member had the duty to extend duty-free treatment to all other members of the WTO. Thus, the United States, Canada, and Mexico can trade goods duty free among themselves under the North American Free Trade Agreement ("NAFTA") but can impose regular duties on non-NAFTA members. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE

unconditionally extend zero-tariffs to all automobiles from any other WTO country that sells automobiles to the United States.[80] MFN is a rule of external non-discrimination, whereas NT is a principle of internal non-discrimination.[81] These two principles of non-discrimination form the core of the WTO and are the reason why so many countries believe it is imperative to join the WTO in order to enjoy the full benefits of free trade. As noted above, both MFN and NT apply to the first three channels of trade under the WTO (goods, services, and technology), but they do not apply to FDI as no WTO general agreement on investment exists. An explanation of MFN and NT is nevertheless important because both principles would play a central role in protecting the inflow of FDI into the host country as a result of any BIT between the United States and China.[82]

B. Chinese and U.S. Legal Regimes that are Applicable to FDI

With NT and MFN in mind, the issues with FDI in the United States and China become apparent.[83] The lack of any WTO agreement applicable to FDI also means that FDI disputes between WTO members cannot be brought within the WTO dispute settlement system.[84] These disputes must be either resolved on a domestic level within the legal and political systems of the countries involved in the FDI transaction or dealt with through diplomatic negotiations between the two countries.[85]

Countries can, by agreement, usually through a BIT or a chapter within a

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LAW, *supra* note 19, at 129.

[80] Canada extended duty-free treatment to imports of automobiles from only certain manufacturers from certain countries and not others. The Appellate Body found this to be a violation of MFN. *See* Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶¶ 80-81, WT/DS139/AB/R, WT/DS142/AB/R (*adopted* June 19, 2000).

[81] *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 19, at 129.

[82] *See infra* Part II.A.

[83] *See supra* Part I.A.

[84] The WTO dispute settlement system adjudicates claims based upon a "nullification or impairment" of a benefit created under the WTO agreements. *See* CHOW AND SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 19, at 71. With a few minor exceptions, an investment dispute does not arise under any of the WTO agreements and is non-justiciable in the WTO.

[85] For an example of an investment dispute that involved diplomatic negotiations, see Case Concerning Elettronica Sicula S.p.A. (The ELSI Case) (U.S. v. Italy), 1989 I.C.J. 15, ¶¶ 12-46 (July 20). The issue with diplomacy is that it is slow and may not be an effective resolution. In the *ELSI case*, the two governments negotiated for over a decade with no results. The case was finally referred to the International Court of Justice after diplomacy failed to achieve a resolution.

general free trade agreement,[86] subject FDI to the MFN and NT principles and other protections. In the absence of a BIT or free trade agreement, as is the case of the United States and China, FDI is subject to the domestic law of the host state, which is free to discriminate against FDI within the constraints of its own domestic legal system.[87] Currently, in both the United States and China, all FDI is subject to the domestic laws of both countries.[88] No principles of international trade, such as MFN or NT, protect foreign investors or FDI. China imposes a special legal regime for FDI. All FDI must take the form of special business vehicles, called Foreign-Invested Enterprises ("FIEs"),[89] and must be approved by government authorities,[90] the Ministry of Commerce ("MOFCOM"), or its lower-level counterparts.[91] While MOFCOM has incentives to approve FDI, there is no recourse if MOFCOM refuses approval.[92] Moreover, MOFCOM closes off certain sectors to FDI, imposes onerous restrictions on FDI[93] (such as the transfer of technology to a Chinese entity),[94] and

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[86] For example, the North American Free Trade Agreement has chapters on FDI. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 605 (1993), *available at* https://www.nafta-sec-alena.org/Default.aspx?tabid=97&ctl=Section View&mid=1588&sid=539c50ef-51c1-489b-808b-9e20c9872d25&language=en-US. Specifically, see *id.* arts. 1102-1103 (National Treatment and Most Favored Nation Treatment respectively).

[87] *See* CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 2, at 370, 419-21, 489-90.

[88] *See id*.

[89] *See id* at 489.

[90] *See id.*

[91] *See* DANIEL C.K. CHOW & ANNA M. HAN, DOING BUSINESS IN CHINA: PROBLEMS, CASES, AND MATERIALS 93-97 (2012) [hereinafter CHOW & HAN, DOING BUSINESS IN CHINA].

[92] It is possible to appeal an adverse decision of MOFCOM to the State Council, China's highest executive body, but this is not a realistic avenue of relief. In the author's experience, no savvy foreign investor will challenge MOFCOM through an appeal to the State Council because such an action will certainly result in future unfavorable treatment by MOFCOM and other PRC authorities.

[93] For example, the Catalogue for the Guidance of Foreign Investment Industries encourages certain activities (e.g., "[p]lanting of forest trees (including bamboo) and cultivation of fine strains of forest trees and cultivation of new breed varieties of polyploid trees"), restricts certain activities (e.g., "[p]rocessing of the logs of precious varieties of trees (limited to equity joint ventures or contractual joint ventures)"), and prohibits certain activities (e.g., "[p]roduction and development of genetically modified plants' seeds"). *See* Catalogue for the Guidance of Foreign Investment Industries (2011) (promulgated by Ministry of Commerce, amended in 2011) Feb. 21, 2012, http://english.mofcom.gov.cn/article/policyrelease/aaa/201203/20120308027837.shtml (China). The list of encouraged, restricted, and prohibited activities is quite lengthy and detailed.

allegedly exhibits favoritism towards Chinese enterprises.[95] Thus, U.S. companies generally want a BIT to remove some of these barriers to FDI in China.

In the United States, there is no special legal regime for FDI. All FDI occurs using the same business entities, laws, and procedures applicable to domestic investment. However, a special regime does apply to some foreign investment transactions. Under the Foreign Investment and National Security Act ("FINSA") of 2007,[96] the Committee on Foreign Investment in the United States ("CFIUS") has authority to conduct an investigation on the effect of an investment transaction on national security if the transaction is a government-controlled transaction, threatens to impair national security, or results in the control of a critical piece of U.S. infrastructure by a foreign person.[97] CFIUS is an interagency committee of high-level officials (including the Secretary of the Treasury) that assists the President in monitoring foreign investment in the United States.[98] The House Committee Report on FINSA emphasized that "[t]he Committee believes that acquisitions by certain government-owned companies do create heightened national security concerns, particularly where government-owned companies make decisions for inherently governmental—as opposed to commercial—reasons."[99] In December 2013, the United States Trade Representative raised similar concerns about the pervasive role of the State in Chinese companies.[100] FINSA decisions that

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[94] *See, e.g.*, Administrative Measures on Technology Prohibited or Restricted from Import, and New Administrative Measures on the Registration of Technology Import and Export Contracts (promulgated by Ministry of Commerce, Feb. 1, 2009, effective Mar. 3, 2009), http://www.wipo.int/wipolex/en/text.jsp?file_id=182589 (China).

[95] *See, e.g.*, Chen Tian, *MOFCOM Aims to Boost Efficiency*, GLOBAL TIMES, Feb. 27, 2014, http://www.globaltimes.cn/content/845216.shtml ("None of the eight companies involved in the deals that MOFCOM approved with conditions last year was a State-owned enterprise (SOE), causing concerns that the ministry may have been more lenient toward transactions proposed by such firms.").

[96] 50 U.S.C. app. § 2170 (2007).

[97] *Id.* § 2170(b).

[98] JAMES K. JACKSON, CONG. RESEARCH SERV., RL31340, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 1 (2014).

[99] H. R. REP. NO. 110-24, pt. 1, at 17 (2010).

[100] The December 2013 U.S. Trade Representative Report stated:

> During most of the past decade, the Chinese government emphasized the state's role in the economy, diverging from the path of economic reform that had driven China's accession to the WTO. With the state leading China's economic development, the Chinese government pursued new and more expansive industrial policies, often designed to limit market access for imported goods, foreign manufacturers and foreign service suppliers, while offering substantial government guidance, resources and

block or condition foreign investment transactions are implemented by CFIUS decisions or by the President and are not subject to judicial review.[101]

Several recent cases indicate that both CFIUS and U.S. policymakers are willing to block investment transactions by Chinese firms, especially when the firms are state-owned or are favored by the State.[102] Note that it is not necessary for CFIUS or the President to issue a formal order to block an investment transaction.[103] Concerns raised by CFIUS may be sufficient to deter parties from going forward with a transaction. For example, in February 2010, Emcore Corporation, a manufacturer of components for fiber optics systems, announced that it had agreed to sell sixty percent of its fiber optics business to a Chinese SOE for $27.8 million.[104] However, in June 2010, Emcore canceled the transaction due to concerns raised by CFIUS.[105] In May 2010, Huawei Technologies purchased IP assets from 3Leaf Systems for $2 million.[106] Members of Congress expressed concerns that Huawei's acquisition of U.S. technology would provide access for the Communist Party to core computer technology and threaten U.S. national security interests.[107] In February 2011, CFIUS formally notified Huawei that it should terminate its offer to acquire the 3Leaf assets.[108] Huawei subsequently withdrew its offer.[109] Note that Huawei is not an SOE but a private company.[110] Although Huawei is a private company, U.S. officials were concerned that Huawei might be a state-favored enterprise due to its close ties to the Party and the Chinese government.[111]

> regulatory support to Chinese industries, particularly ones dominated by state-owned enterprises. This heavy state role in the economy, reinforced by unchecked discretionary actions of Chinese government regulators, generated serious trade frictions with China's many trade partners, including the United States.

U.S. TRADE REPRESENTATIVE, 2013 USTR REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 2 (2013).

[101] *See* 50 U.S.C. app. § 2170(e); CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 2, at 444.

[102] *See* MORRISON, *supra* note 18, at 20-24.

[103] *See id.*

[104] *See id.* at 23.

[105] *See id.*

[106] *See id*. at 22.

[107] *See id.*

[108] *See id.*

[109] *See id.*

[110] *See id.* at 24.

[111] *See id*. In the author's own view and experience, any private company that becomes powerful can do so only with the consent or acquiescence of the State-Party. So under this

The threat of a possible CFIUS investigation and action by the President means that no formal action of any kind by CFIUS, such as the initiation of an investigation, is necessary to derail an investment transaction. Political opposition alone can lead to the unraveling of a deal. In 2005, the China National Offshore Oil Corporation ("CNOCC") made an $18.5 billion bid to purchase Unocal, a U.S. energy company.[112] Some members of Congress expressed concerns that vital energy assets owned by Unocal would come under the control of a Chinese SOE and that China would acquire Unocal's advanced technologies.[113] The political opposition in Congress led CNOCC to withdraw its bid.[114] Another notable incident involved Ralls Corporation, a Chinese-owned U.S. firm. On September 28, 2012, President Obama issued an order requiring Ralls to divest its interests in four Oregon wind farm companies that Ralls had already acquired.[115] The divestiture order was issued due to national security concerns regarding the proximity of the companies to a naval test facility.[116] This action indicates that even investment transactions that have already been completed may be reversed by subsequent divestiture orders by the U.S. government.[117]

The negative scrutiny that Chinese investment draws from politicians and administrative agencies in the United States appears to create disincentives for China to invest in the United States and may be one reason why Chinese FDI inflows into the United States represent only $4 billion out of the $175 billion total FDI inflows into the United States in 2012.[118] Avoiding political controversy in the United States also seems to be the rationale behind the decision by the China Investment Corporation, a sovereign wealth fund with over $200 billion in capital, to keep many of its equity investments in the United States to less than ten percent,[119] the threshold that would qualify the investment as FDI under U.S. law[120] and might trigger review by U.S. authorities.

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view, all powerful companies are either state-owned or state-favored, which means that any acquisition by these parties might be subject to CFIUS review.

112 *See id.*

113 *See id.*

114 *See id.*

115 *See id*. at 22.

116 *See id.*

117 *See id.*

118 *See* Schwartz, *supra* note 7.

119 *See* MORRISON, *supra* note 18, at 19.

120 *See supra* note 2.

C. Effect of a U.S.-China BIT

As noted above, the U.S. legal regime applicable to FDI from China does not include any protections based on international trade law principles, such as NT or MFN.[121] The absence of these principles means that FDI from China is subject to U.S. law, which allows the United States to block or unravel investment transactions that involve China with political pressure and opposition.[122] A BIT between the United States and China could limit the ability of the United States to block or unravel such transactions. To understand how this is possible, we must begin with the assumption that any U.S.-China BIT would likely follow the template provided by the 2012 Model BIT used by the State Department and the U.S. Trade Representative for negotiating all of the United States' BITs.[123] The 2012 Model BIT and all recent BITs entered into between the United States and its trading partners[124] incorporate the following features: (1) NT for foreign investment and investors;[125] (2) MFN treatment;[126] (3) a principle of Minimum Standard of Treatment,[127] including full protection, security,[128] and fair and equitable treatment;[129] (4) protections against expropriations by the state of the property of foreign investors;[130] and (5) dispute

[121] MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL33103, FOREIGN INVESTMENT IN THE UNITED STATES: MAJOR FEDERAL STATUTORY RESTRICTIONS 6, 15 (2013).

[122] *Id*.

[123] *See* MORRISON, *supra* note 18.

[124] *See, e.g.*, Treaty between the Government of the United States of America and the Government of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, arts. 3, 6, 24, Feb. 19, 2008, S. TREATY DOC. No. 110-23, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file743_14523.pdf; *see also* Investment Treaty with Albania, U.S.-Alb., Jan. 11, 1995, S. TREATY DOC. No. 104-19, *available at* http://2001-2009.state.gov/documents/organization/43474.pdf.

[125] *See 2012 Model BIT*, *supra* note 40.

[126] *See id.* art. 4.

[127] *See id.* art. 5. Both NT and MFN require a comparison between how the foreign investor and foreign investment is treated with another by the host state. However, the principle of Minimum Standard of Treatment requires no such comparison; it is a required minimum level of treatment regardless of which each foreign investor and foreign investment is entitled and how any other foreign investment or investors are treated by the host state.

[128] *See id.* art. 5(b). This refers to the level of police protection required under customary international law.

[129] *See id.* art. 5(a). This refers to the obligation not to deny justice in civil, criminal, or administrative proceedings.

[130] *See id.* art. 6. Expropriations are permitted under limited circumstances and prompt, adequate, and realizable compensation must be paid.

resolution provisions,[131] calling for binding arbitration by the ICSID.[132] The 2012 Model BIT also contains other obligations, including transparency,[133] protections relating to trade and the environment,[134] and protections relating to trade and labor.[135] The principles in the 2012 Model BIT are also common in BITs used by other countries, such as the United Kingdom, in concluding investment treaties that do not involve the United States.[136]

Of all the features of the Model BIT, the MFN and NT principles are vital because they would apply to FDI.[137] The dispute resolution provision is also important because a foreign investor can directly bring an action in an international arbitration tribunal as opposed to resorting to litigation in the domestic legal system of the host state,[138] which oftentimes can be an illusory avenue of relief. ICSID awards are final and have binding force on all ICSID members[139] (including the United States and China), and every ICSID member has an obligation to recognize ICSID awards.[140] Under U.S. law, ICSID awards must be given the same "full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several states."[141]

The 2012 Model BIT also contains an exceptions clause: Article 18 provides that the BIT will not prevent any party "from applying measures that it considers necessary for . . . the protection of its own essential security

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[131] *See id.*

[132] *See id.* art. 3. The ICSID is an arbitration tribunal that is part of the World Bank, located in Washington, D.C. *See* CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 2, at 381. The purpose of the World Bank is to lend money to the developing and least developed countries in order to alleviate world poverty. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 19, at 19-29. The World Bank, International Monetary Fund, and WTO work closely together to ensure financial stability and to promote world trade.

[133] *See 2012 Model BIT*, *supra* note 40, art. 11.

[134] *See id.* art. 12.

[135] *See id.* art. 13.

[136] *See* Wena Hotels, Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, 41 I.L.M. 881 (2002) (involving a UK-Egypt BIT with many of the same provisions that currently exist in the U.S. Model BIT).

[137] *See 2012 Model BIT*, *supra* note 40, arts. 3-4.

[138] *See id.* art. 24 (stating that a claimant is entitled to submit a claim to arbitration). Article 1 defines "claimant" as "an investor of a Party that is party to an investment dispute." *Id.* art. 1.

[139] *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 54(1), Mar. 18, 1965, 575 U.N.T.S. 159.

[140] *See id.*

[141] *See* 22 U.S.C. § 1650(a) (2014).

interests."[142] This last article, modeled on GATT Article 21 (Security Exceptions),[143] is broad enough to permit review of investment transactions under FINSA by CFIUS and the President.

Part II of this Article discusses how several of the protections in the Model BIT could create market access that is currently unavailable for FDI from Chinese SOEs and other firms, including private companies. Part II also explains how these features of a BIT could help China achieve three important strategic objectives: penetration by SOEs into the U.S. market, acquisition of U.S. technology, and evasion of U.S. border measures that apply to imported goods from China.[144]

II. HOW A BIT WITH THE UNITED STATES HELPS CHINA ACHIEVE THREE STRATEGIC POLICY GOALS

The purpose of a BIT is to provide market access and inject international trade law principles into a domestic legal system in order to protect FDI from discriminatory measures in the host nation.[145] A restriction on protectionist measures is expected to increase the flow of FDI to both parties to a BIT. This market access approach underlies the purpose of the 2012 Model BIT. The United States and China could deviate significantly from the Model BIT and exclude some of the basic principles set forth above, but this seems unlikely considering the consistent practice of the United States of basing all recent BITs on Model BITs approved by the State Department.[146] Assuming that the United States and China agree on a BIT that is based upon the 2012 Model BIT, this Part of the article examines in detail how a BIT could (1) limit the ability of the United States to block or unravel investment transactions involving China; and (2) further China's own policy initiatives.

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[142] *See 2012 Model BIT*, *supra* note 40, art. 18.

[143] *See* GATT 1994, *supra* note 56, art. 21(b) (allowing exceptions for security interests). Another GATT Article, the general exceptions clause, allows for exceptions to GATT obligations for civil society matters, such as trade and the environment, and trade and food safety. *See id.* art. 20(a)-(j).

[144] China has many important strategic objectives that it wishes to accomplish through international trade. For an assessment of how China has begun actively to use international trade to blunt the force of U.S. influence, see Chow, *How China Uses International Trade*, *supra* note 24.

[145] *Bilateral Investment Treaties and Related Agreements*, *supra* note 40.

[146] *E.g.*, SHAYERAH ILIAS AKHTAR & MARTIN A. WEISS, CONG. RESEARCH SERV., R43052, U.S. INTERNATIONAL INVESTMENT AGREEMENTS: ISSUES FOR CONGRESS 9 (2013) ("The draft Model BIT was introduced in November 2004 and was used as the basis for the U.S. BITs with Uruguay and Rwanda."); *see also Bilateral Investment Treaties and Related Agreements*, *supra* note 40 ("The United States negotiates BITs on the basis of a model.").

A. Gaining Market Access for China's SOEs to Invest in the United States

Part I of this Article examined several transactions in which opposition by U.S. politicians or review by CFIUS led to the unraveling of an investment transaction in the United States by a Chinese company.[147] How would such transactions be affected by the proposed U.S.-China BIT? Consider the following examples.

Under the 2012 Model BIT, admission of investment into the United States is subject to the MFN and NT principles.[148] The use of political pressure or administrative denials could constitute violations of the MFN principle, the NT principle, or both. For example, suppose that a state-owned enterprise from Canada purchases a U.S. company in the energy or telecommunications sector. A Chinese SOE then makes a bid for a U.S. company in the same sector. Prior to the BIT, the question of whether to permit the Chinese SOE was one of domestic U.S. law.[149] There is nothing in U.S. law that requires equal treatment of Canadian and Chinese companies in FDI or prevents the United States from singling out Chinese FDI for special scrutiny.[150] China could challenge an adverse decision by the U.S. President, but these decisions are not subject to judicial review.[151] However, under a BIT, the MFN principle would require that all FDI be given equal treatment. China could argue that it has suffered discrimination because an SOE from Canada was given better treatment than a Chinese SOE. The SOE whose FDI project was denied can then bring this discrimination claim directly before the ICSID, and if the SOE prevails, the United States would have an obligation to enforce the ICSID decision.[152] Thus, the MFN principle of equal treatment would provide China with protections that do not currently exist under U.S. law.

The exception under Article 18 of the Model BIT for national security purposes applies to every obligation in the BIT. A literal interpretation of this exception would allow the United States to abrogate the MFN Principle and to single out China for special, more restrictive treatment. The issue of whether exceptions under international trade treaties can be used to restrict trade is not novel and has been treated extensively by the WTO and its predecessor organization, the GATT.[153] Although WTO principles would

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147 *See supra* Part I.B.

148 *See 2012 Model BIT*, *supra* note 40, arts. 3-4.

149 *See* SEITZINGER, *supra* note 121, at 6-15.

150 *Id.*

151 *See* CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 2, at 444.

152 *See* 22 U.S.C. § 1650(a) (2014).

153 *See* GATT 1994, *supra* note 56, arts. 20-21 (general exceptions and security

not directly apply to the BIT between the United States and China, the general principle that trade restrictions based upon non-trade considerations are unacceptable would likely influence the ICSID Tribunal.[154] In the ICSID Tribunal, the United States might have to explain why the acquisition of U.S. companies by SOEs from China would pose threats that do not exist in cases concerning SOEs from other states. The arguments would have to be based upon solid evidence and not on conjecture or the general negative, suspicious mood of many U.S. politicians towards China in matters of international trade. The skeptical mood of U.S. politicians bereft of solid evidence appears sufficient in the United States to derail a deal today.[155] Perhaps the United States will prevail in making its case that China must be singled out for special treatment on national security issues, but the United States might not be able to meet this burden. The point is that, under a BIT, the United States could face a completely different and more disciplined process in a neutral tribunal—involving new rights, such as MFN—and would no longer enjoy the great latitude it now exercises under the existing U.S. legal regime to deny the FDI bids of Chinese SOEs.

In addition to MFN, the National Treatment principle also provides additional protections to the admission of investment. Recall that the United States canceled an investment transaction involving the purchase of the fiber optics business of a U.S. telecommunications company by Huawei Technologies, a Chinese telecommunications giant, due to the concerns of CFIUS.[156] Huawei is a private company, not a state-owned enterprise. However, although Huawei was privately owned, CFIUS was concerned that Huawei was a state-favored company with ties to the Communist Party

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exception respectively). Both Articles 20 and 21 are part of the original GATT 1947.

[154] The introductory paragraph (or "chapeau") of Article 20, the general exceptions provision, provides one example of this jurisprudence. The chapeau states that exceptions to WTO obligations may be enforced by WTO members so long as such "measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or as "a disguised restriction on international trade." *Id.* art. 20. In Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Nov. 6, 1998), the United States attempted to prohibit the importation of shrimp caught by methods that also killed turtles. A trade ban (quota) is prohibited under GATT Article 11; however, the United States attempted to justify the restriction under the general exceptions provisions as a measure that was necessary to protect the environment. *See id.* Nevertheless, the Appellate Body rejected the U.S. argument as a violation of the chapeau; the United States never negotiated with its trading partners to take into account their particular circumstances but instead imposed a unilateral trade ban. *See id.* ¶¶ 172-76. As such, it constituted an arbitrary and unjustifiable means of discrimination. *See id.*

[155] *See* MORRISON, *supra* note 18, at 46.

[156] *See supra* Part I.B.

and could assist the Party in acquiring important U.S. assets.[157] Given that China's political system is notoriously non-transparent, it would be difficult for the United States to show hard evidence of "ties" between Huawei or any other private Chinese company and the Party. Furthermore, there would be no paper records or documentary proof available to the United States to prove the existence of such "ties." Under current U.S. law, nothing prevents CFIUS or Congress from deterring the sale of a U.S. company to Huawei or any private Chinese enterprise based upon suspicions that the company has ties to the Communist Party. Under a BIT, however, suppose that a U.S. company purchases fiber optic assets from another U.S. company. Now Huawei could argue that denying its bid to purchase the same type of assets is a violation of the National Treatment principle because NT requires that Chinese companies receive the same treatment as U.S. companies. Huawei (or any private Chinese company) could raise this issue before the ICSID, and the United States would then have to justify the denial of Huawei's bid, and that it was not motivated by suspicions about China's connections to Huawei or by protectionist sentiments favoring U.S. companies over Chinese companies. The United States would need to present sufficient evidence of Huawei's connections to the Party. Suspicions and conjectures which presently suffice would be inadequate before an ICSID tribunal.[158] Also, even if the United States were able to prevail under the NT exception, the process under a BIT would be entirely different from the current U.S. legal regime, which provides broad authority to U.S. administrative agencies and political bodies to block or limit FDI from China.

Note that there is no requirement for CFIUS or the President to take action in the form of an order or even a notice to trigger ICSID review.[159] The same argument that the United States is violating the MFN principle above could apply in the ICSID if Congress held hearings and put pressure on China to withdraw its bid, but did not hold hearings on a proposed FDI

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[157] *See id*.

[158] In a separate transaction in October 2012, the U.S. Congress issued a report recommending that U.S. companies avoid doing business with Huawei and ZTE, another Chinese company, and find other vendors. A press release accompanying the House report states, "[W]e have serious concerns about Huawei and ZTE, and their connections to the communist government of China." Press Release, U.S. House of Representatives, Chairman Rogers and Ranking Member Ruppersberger Warn American Companies Doing Business with Huawei and ZTE to "Use Another Vendor" (Oct. 8, 2012), *available at* http://intelligence.house.gov/press-release/chairman-rogers-and-ranking-member-ruppersberger-warn-american-companies-doing. No hard evidence of these connections was ever adduced despite a series of congressional hearings.

[159] *See 2012 Model BIT*, *supra* note 40, art. 24.

investment from Canada, countries of the European Union ("EU"), or any other country. Similarly, if Congress held hearings on whether to permit a Chinese private company to acquire U.S. assets but did not follow a similar procedure for a U.S. company purchasing the same assets, that may violate the NT principle. Under current law, nothing prevents Congress from holding hearings that single out Chinese FDI projects for special scrutiny because U.S. law does not incorporate MFN or NT.[160]

After the conclusion of a BIT with China, the MFN and NT principles would provide additional significant protections to the admission of FDI into the United States. The United States would then be subjected to basic principles of international trade law concerning how the United States treats FDI from China. A BIT would increase the admission of Chinese FDI into the United States. As SOEs or state-favored companies, such as Huawei, would be the major beneficiaries of a new BIT regime, China may be able to expand the power and reach of SOEs (and state-favored enterprises) in the United States. FDI inflows from China would increase without a BIT; however, that increase would be marginal in comparison to the inflows with the BIT, as inflows are a BIT's primary objective.

Chinese investors would likely be state-owned or state-favored enterprises, as they have the support of the State-Party and access to financial resources to make significant investments. In 2011, the Chinese government reported the existence of 144,700 state-owned or state-controlled enterprises, excluding financial institutions, with assets worth $13.6 trillion.[161] SOEs are likely to receive state support because they generally carry out the policies of the State-Party.

There are two parallel management structures in an SOE.[162] One structure is the corporate management system, consisting of the CEO, Vice CEO, Chief Accounting Officer, and a Board of Directors similar to the corporate management structure of firms outside of China.[163] The other parallel management structure is the Party structure.[164] The Party structure includes a secretary of the Party Committee, several Deputy Secretaries, and a Secretary of the Discipline Inspection Committee[165] (the term "Discipline" is a surrogate for corruption).[166] Persons in the corporate

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[160] *See* SEITZINGER, *supra* note 121.

[161] *See* MORRISON, *supra* note 18, at 28.

[162] *See* Lin & Milhaupt, *supra* note 28, at 737.

[163] *See id.*

[164] *See id.*

[165] *See id.*

[166] *See* Chris Buckley, *China's Anticorruption Campaign Unseats a Powerful Party Chief in Guangzhou*, N.Y. TIMES, June 27, 2014, http://www.nytimes.com/2014/06/28/world/asia/chinas-anticorruption-campaign-moves-to-

management structure also simultaneously hold positions in the parallel Party structure, and the rank of the positions are approximately equal in stature. As the Party members within an SOE meet on a regular basis, they can carry out policies of the Party in their role as senior executives of the SOE. Note that this parallel system of management is not unique to Chinese SOEs but exists in all Chinese government organizations[167] and in virtually all other organizations including law schools and universities in China.[168] In all parallel organizational structures, it is the Party position, not the corresponding organizational position, which is the most powerful.[169]

In addition, all SOEs are subject to the supervisory control of the central level State-Owned Assets Supervision and Administration Commission of the State Council ("SASAC").[170] The SASAC is a majority and controlling shareholder in almost every leading firm and industry in China.[171] Not only is the SASAC a controlling shareholder in all critical SOEs, but the SASAC also routinely exchanges personnel on a rotating basis with the SOEs over which it exercises supervision.[172] The purpose of this rotation is to deepen cooperation between SOEs and the PRC government.[173] Because almost all high-ranking government officials in China are Party members,[174] it is

a-powerful-party-seat.html (stating that the Communist Party's anticorruption agency is the Central Commission for Discipline Inspection).

[167] This parallel structure exists in the central government as well all lower level (provincial and local) governments. The current paramount leader of the PRC is Xi Jinping. Xi holds three positions: President of the PRC, General Secretary of the Central Committee of the Communist Party, and Chairman of the Central Military Commission. *See Xi Jinping*, CHINAVITAE, http://www.chinavitae.com/biography/Xi_Jinping%7C303 (last visited Feb. 4, 2015). The position of President of the PRC is largely ceremonial; the General Secretary of the Central Committee of the Communist Party is considered to be the highest post in the Party; and the Chairman of the Central Military Commission (another Party organ) controls the People's Liberation Army. Party positions provide China's paramount leaders with their power, not their government posts. *See* CHOW, LEGAL SYSTEM OF CHINA, *supra* note 25, at 127-28. The same parallel structure holds within all levels of government from provincial to municipal. *See id.* at 130.

[168] For example, every university has a President as well as a Party Secretary. In China, the Party Secretary, not the university President, is the highest authority at the university. The title of Party Secretary is often translated as "Provost," as it seems to be a title that is more palatable to officials from U.S. universities.

[169] *See* CHOW, LEGAL SYSTEM OF CHINA, *supra* note 25, at 119.

[170] *See* Lin & Milhaupt, *supra* note 28, at 734-35.

[171] *Id.*

[172] *See id.* at 726.

[173] *See id.* at 727.

[174] *See* CHOW, LEGAL SYSTEM OF CHINA, *supra* note 25, at 130.

likely that the SASAC and SOE officials that are part of this personnel rotation are also Party members. This exchange of personnel further foments Party control over SOEs. Thus, because it is likely that SOEs are subject in significant part to State-Party control, SOEs are likely to be given the resources and incentives that they need to engage in FDI to promote the State-Party's long-term investment and economic objectives. By giving rotating Party members key management and executive positions in SOEs, the Party is able to control the most important sectors of the economy. By providing resources to Party-controlled SOEs, the Party can then also realize its long-term economic objectives.

B. Obtaining U.S. Technology and Intellectual Property Assets

A BIT with China will also enhance the ability of Chinese companies to acquire U.S. technology and intellectual property. As previously noted, FDI most commonly occurs through one of two methods: establishing a greenfield investment (a start-up enterprise) or by acquiring an existing company in the host nation.[175] Chinese companies have an interest in acquiring U.S. companies;[176] hence, most FDI occurs through mergers and acquisitions.[177] There are many advantages to acquiring an existing company in the host state: an established business with a respected reputation, existing distribution networks, and an established customer base are merely a few.[178] For the purposes of this Article, the most important point is that acquiring an existing business through an M&A transaction results in the ownership of the target's intangible assets, including its IP rights in the form of patents, trademarks, and copyrights. When Company *A*, a Chinese entity, purchases Company *B*, a U.S. company, Company *A* now owns, in addition to the bricks and mortar of Company *B*, the entire non-tangible assets of Company *B*, including Company *B*'s intellectual property portfolio.[179] The patents or trademarks registered in the U.S. Patent and Trademark Office would still be in Company *B*'s name, but as Company *A* now owns Company *B*, it also owns those patents and

[175] *See* CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 2, at 369-70.

[176] *See supra* Part I.B.

[177] *See* CHOW & HAN, DOING BUSINESS IN CHINA, *supra* note 91, at 200-01.

[178] *See* CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 2, at 370.

[179] In the modern economy, one can argue that a company's IP assets are its most valuable business property. *See* DANIEL C.K. CHOW & EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES, AND MATERIALS 442 (2d. ed. 2012) (discussing the value of brands and trademarks to the modern multinational company).

trademarks.

Further, when a Chinese investor purchases a U.S. company, the Chinese investor also acquires the U.S. company's trade secrets, which include confidential know-how, financial information, and management strategies.[180] This confidential proprietary information is valuable commercial knowledge and may have value on par with the company's registered patents. For various business reasons, some U.S. companies prefer to protect intellectual property rights as trade secrets rather than as patents due to the limited term of a patent, whereas a company may protect a trade secret indefinitely.[181] The Chinese investor also acquires important know-how that might not qualify as a protectable trade secret because the know-how information was not kept secret, but, nevertheless, is still highly valuable. Such know-how includes the accumulated knowledge and experience of the U.S. managers who would remain with the company and train new employees. One should not underestimate the importance of know-how and experience of skilled management despite the fact that it might not technically qualify as protectable intellectual property. Acquiring this know-how and experience would certainly benefit China in the global marketplace.

China understands the importance of innovation and advanced technology and has made acquiring advanced technology a national priority.[182] China plans to transform itself from its current status as a global

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[180] For a discussion of the value of trade secrets and the attempts by Chinese companies to steal them, see Daniel C.K. Chow, *Navigating the Minefield of Trade Secrets in China*, 47 VAND. J. TRANSNAT'L. L. 1007 (2014).

[181] Patents are subject to a twenty-year term under U.S. law after which they become part of the public domain. 35 U.S.C. § 154(a)(2) (2014) ("[S]uch grant shall be for a term beginning on the date on which the patent issues and ending 20 years from the date on which the application for the patent was filed in the United States. . . ."). By contrast, trade secrets have no limits on their protection, provided that they are kept confidential. *See* UNIF. TRADE SECRETS ACT § 1(4)(ii) (amended 1985), 14. U.L.A. 531 (1979) (indicating that trade secrets persist so long as reasonable efforts are used to maintain their secrecy). One famous example of a choice to use trade secrets is the decision by Coca-Cola to protect its formula indefinitely via trade secrets rather than by patent. *See Trade Secrets versus Patents: The Coca Cola Story*, INVENTION RES. INT'L, http://www.inventionresource.com/index.php?option=com_content&view=article&id=37 (last visited Dec. 23, 2014).

[182] *See, e.g.*, *National High-Tech R&D Program (863 Program)*, PRC MINISTRY OF SCI. & TECH., S&T PROGRAMS, http://www.most.gov.cn/eng/programmes1/200610/t20061009_36225.htm (last visited Dec. 23, 2014).

> Objectives of this program during the 10th Five-year Plan period are to boost innovation capacity in the high-tech sectors, particularly in strategic high-tech fields,

center of low-technology manufacturing into a major center of innovation by 2020 and a global leader in innovation by 2050.[183] China may achieve these goals by developing advanced technology through its own research and development efforts or by acquiring existing advanced technologies from innovator countries. Developing advanced technology through research and development requires the investment of significant financial resources and, perhaps more importantly for China, a much longer period of time than acquiring existing advanced technologies by purchasing the assets. China's ambitious plans to become a leader in innovation provide an incentive to accelerate China's development process through the acquisition of existing advanced technology. In fact, the United States has criticized China for policies that are designed to force U.S. companies to transfer their technologies to China as a requirement of doing business in China.[184] Under a BIT, as explained above, the MFN and NT principles would facilitate the admission of Chinese FDI into the United States. Such investment may enable China to achieve its ambitious goal of becoming a global leader in innovation.

C. Evading or Mitigating the Effects of Border Measures

A U.S.-China BIT might also allow China to shift manufacturing operations to the United States to avoid U.S. border measures imposed on imported Chinese goods. In 2013, the United States purchased $440.4 billion in imported goods from China while it exported $122 billion in goods to China, a $318.4 billion trade deficit.[185] A long-term trade deficit means that a country is spending more (i.e. buying more imports) than it is earning (i.e., selling exports) from international trade, and, unless other growth factors are present, the importing country will either begin to experience a decline in wealth or will need to borrow money from the exporting country to sustain its current levels of consumption.[186] Borrowing from the exporting country means that the importing country is selling more of its capital assets (such as Treasury bonds) to the exporting

> in order to gain a foothold in the world arena; to strive to achieve breakthroughs in key technical fields that concern the national economic lifeline and national security; and to achieve "leap-frog" development in key high-tech fields in which China enjoys relative advantages or should take strategic positions in order to provide high-tech support to fulfill strategic objectives in the implementation of the third step of our modernization process.

Id.

[183] *See* MORRISON, *supra* note 18, at 29.

[184] *See* Chow, *China's Indigenous Innovation Policies*, *supra* note 32, at 91-94.

[185] *See* MORRISON, *supra* note 18, at 3.

[186] *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 19, at 30.

country, and, thus, the exporting country begins to own more of the importing country's economy, which could prove risky to the importing country in the long term.[187] In addition, a common perception is that the effect of U.S. consumption of cheap Chinese imports instead of American-made products leads to the decline of manufacturing industries in the United States, causing a loss of American jobs and a shift of these jobs to China.[188] Such a shift puts pressure on U.S. politicians to reduce the U.S. trade deficit with China. The staggering size of the U.S. trade deficit with China makes it a major political concern. In 2012, it was larger than the *combined* U.S. trade deficits with fifty other major trading states: the EU (twenty-eight countries), the Organization of Petroleum Exporting Countries ("OPEC") (twelve countries), and the Association of Southeast Asian Nations ("ASEAN") (ten countries).[189] A perception that is igniting further controversy and anger among some politicians is that China cheats in creating advantages for its exports.[190] As a result, the U.S. government is increasingly using various trade measures to block or impede the influx of imports from China. In fact, arguably the United States is using every possible trade sanction available to stem the growth of imports from China in order to decrease the trade deficit or slow down its growth,[191] and there are currently bills in various stages in Congress that are designed to subject *all* imports from China to trade sanctions in the form of additional tariffs.[192]

Among the remedies implemented by the United States to alleviate China's perceived exporting inequities are anti-dumping duties, which are additional tariffs imposed on top of normal U.S. tariffs on artificially low-

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[187] *Id.* at 48-49.

[188] Danielle Kurtzleben, *Report: America Lost 2.7 Million Jobs to China in 10 Years*, U.S. NEWS, Aug. 24, 2012, http://www.usnews.com/news/articles/2012/08/24/report-america-lost-27-million-jobs-to-china-in-10-years ("Manufacturing was the hardest-hit industry, with fabrication of high-tech goods like semiconductors and electronics suffering the most, accounting for more than half of the $217.5 billion increase in the trade deficit between 2001 and 2011."); Michele Nash-Hoff, *How Free Trade Agreements Lead to Job Loss and Wealth Gaps*, HUFFINGTON POST (Aug. 5, 2011), http://www.americanjobsalliance.com/content/how-free-trade-agreements-lead-job-loss-and-wealth-gaps; Charles B. Stockdale & Douglas A. McIntyre, *10 States Losing the Most Jobs to China*, NBC NEWS, Sept. 28, 2011, http://www.nbcnews.com/id/44673674/ns/business-careers/t/states-losing-most-jobs-china/#.U850taPD91M ("China is taking American jobs, labor unions, politicians and economists, have accused for some time.").

[189] *See* MORRISON, *supra* note 18, at 2.

[190] *See* Daniel C.K. Chow, *Why China Opposes Human Rights in the World Trade Organization*, 35 U. PA. J. INT'L L. 61, 84-88 (2013) [hereinafter Chow, *Why China Opposes Human Rights in the WTO*].

[191] *See id.*

[192] *See* MORRISON, *supra* note 18, at 45-46.

priced imports from China. Goods are "dumped" in the United States when they are sold for less than their normal value, which is defined as the price of a like product sold in the home market.[193] Dumping is harmful because once the exporter gains a market niche in the United States, the exporter can raise its prices or lower the quality of its goods. Dumping also harms domestic U.S. producers of the like product as they lose market share.[194] The anti-dumping duty offsets the harmful effects of dumping by adding a tariff that is equal to the margin of dumping.[195] The United States also imposes countervailing duties on imports when the imports benefit from a government subsidy, i.e., a financial contribution from a foreign government that allows the exporter to sell the goods at a lower price and obtain a competitive advantage in the target import market.[196] The countervailing duty is an additional tariff that offsets the effect of the subsidy.[197] The United States may also impose a quota, a quantitative restriction (no more than 1,000 units) on imports.[198] The United States has shown a tendency to use these trade remedies aggressively against foreign imports, and China is one of the most frequent targets of U.S. trade remedies.[199] In fact, the United States has imposed both anti-dumping and

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[193] *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 19, at 445, 448.

[194] *See id*. at 445.

[195] *See id*. at 449-50.

[196] *See id*. at 518-20.

[197] *See id*.

[198] Although quotas are generally prohibited, see GATT 1994, *supra* note 56, art. 11, stating that they may be permitted temporarily as a "safeguard" to deal with a putative trade emergency. *See* GATT 1994, *supra* note 56, art. 19; Agreement on Safeguards, *supra* note 56. Additionally, as the text further notes, the United States will also pressure countries into a "voluntary" export restraint, which has the same effect as a quota.

[199] A U.S. company has the following avenues of relief in light of unfair trade practices:

> If a U.S. industry believes that it is being injured by dumped or subsidized imports, it may request the imposition of anti-dumping or countervailing duties by filing a petition with both the Department of Commerce and the United States International Trade Commission (ITC). Import Administration is the agency within Commerce's International Trade Administration that investigates foreign producers and governments to determine whether dumping or subsidization has occurred and calculates the amount of dumping or subsidization.

How does Commerce's Anti-dumping and Countervailing Duty Investigation Process Work?, U.S. DEP'T OF COMMERCE (Mar. 20, 2012), http://www.commerce.gov/blog/2012/03/20/how-does-commerce's-anti-dumping-and-countervailing-duty-investigation-process-work. For example, in 554 cases brought for investigation to the Department of Commerce's International Trade Administration by U.S.

countervailing duties on the same products from China, leading China to challenge this action before the WTO, which ruled in China's favor that the use of double remedies violates WTO rules.[200] Although the United States acknowledged the WTO position, the United States appears to have left open the possibility that double remedies—both anti-dumping and countervailing duties on the same imports from China—are still a possible option.[201]

How would a BIT help China evade or mitigate the effects of these border measures? Anti-dumping duties, countervailing duties, and quotas are imposed on imports at the border and do not apply to goods produced domestically in the United States. An example of the use of FDI to evade the effect of a border measure is the case of the 1981 quota on imported automobiles from Japan.[202] After negotiations, Japan "voluntarily" agreed to limit its exports to 1.68 million passenger vehicles to the United States[203]—a Voluntary Export Restraint ("VER") under which the exporting country, usually as a result of political pressure or threats from the importing country, "voluntarily" agrees to limit exports, which has the same effect as a quota imposed by the importing country.[204] Soon after the

companies, 158 targeted China. IA ACCESS, https://iaaccess.trade.gov/index.aspx (last visited July 22, 2014). The remaining 396 cases were brought against 39 other countries. *Id.* The second closest country in terms of the number of International Trade Administration-initiated investigations is India with a mere 34 cases. *Id.*

[200] *See* Chow, *Why China Opposes Human Rights in the WTO*, *supra* note 190, at 100-01. China challenged the use of double remedies (countervailing duties and anti-dumping duties on the same import) and subsequently won in the WTO, *See* Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, W/T/DS379/AB/R (Mar. 11, 2011). The WTO Appellate Body specifically found that assessing both anti-dumping and countervailing duties on the same product was inconsistent with Article 19.3 of the WTO Agreement on Subsidies and Countervailing Measures of 1995. *Id.* ¶¶ 605-06.

[201] Subsequent to the WTO's decision, President Obama signed into law on March 13, 2012, Public Law No. 112-99, which states that when the U.S. Department of Commerce applies both countervailing duties and anti-dumping duties to the same product, if the Department of Commerce can *reasonably* detect any double counting, then it should reduce the duties to compensate for the double counting. *See* Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112-99, § 2, 126 Stat. 265 (2012). In the author's view, this language leaves open the possibility of double remedies.

[202] *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 19, at 247.

[203] *See id.*

[204] At the time, quotas were illegal under Article 11 of the GATT, but VERs, which had the same effect as quotas, were not illegal. So if the United States imposed a quota on automobiles from Japan, the United States would have to justify the quota under some type of exceptions provision in the GATT. By contrast, as a VER was not illegal, the United States could pressure Japan into providing a VER with no legal ramifications under the

1981 quota went into effect, Honda, a Japanese car manufacturer, opened its first manufacturing plant in Marysville, Ohio.[205] By 1991, the economic impact of the quota was zero because the number of cars imported from Japan was well below the quota limit.[206] In fact, Japan had shifted manufacturing to plants in the United States and was able to supply the U.S. market in part with domestically manufactured automobiles, which were, of course, not subject to the quota. Since the 1990s, Japanese and other foreign car manufacturers have opened several new manufacturing plants in the United States to meet the high U.S. demand for their products.[207]

Can China follow a similar strategy to avoid the effect of border measures, and would it be a savvy business decision for China to shift some of its manufacturing to the United States? Shifting the manufacturing of low-value, labor intensive products, such as toys, games, and apparel to the United States, might not be a shrewd business decision because China enjoys a comparative advantage in low labor costs. However, China has been shifting its focus from manufacturing low-value, labor intensive products to exporting more high-value, technologically advanced products, for which low labor costs are not essential to generate profits.[208] Locating some of the manufacturing of advanced technology products in the United States may allow China to avoid the imposition of anti-dumping duties on these products.

GATT. As of today, VERs are no longer permitted under the WTO. *See* Agreement on Safeguards, *supra* note 56.

[205] Dan Gearino, *Grown in Ohio: Honda's Accord*, COLUMBUS DISPATCH, Oct. 21, 2012, http://www.dispatch.com/content/stories/business/2012/10/21/grown-in-ohio.html ("Honda's Accord became the first Japanese car built in the U.S., rolling out of Marysville in November 1982.").

[206] *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 19, at 247.

[207] Dep't of Commerce, *Foreign-Based Companies Investing in the U.S. Auto Industry*, INT'L TRADE ADMIN. (2007), http://trade.gov/static/auto_reports_foreignautoinvestment.pdf ("Over the last twenty years, foreign-based manufacturers have steadily added production capacity in the United States."). Additionally, "[a]lmost every major European, Japanese, and Korean automaker has produced vehicles at one or more U.S. assembly plants. . . . Toyota, Nissan, Hyundai-Kia, BMW, Mercedes-Benz, Mazda, Mitsubishi, and Subaru all have U.S. manufacturing facilities." *The Automotive Industry in the United States*, SELECTUSA, http://selectusa.commerce.gov/industry-snapshots/automotive-industry-united-states (last visited Dec. 23, 2014). "In May 2011, Volkswagen opened a new U.S. plant, bringing the manufacturer count to 13." *Id.*; *see also* Daniel Gross, *Big Three, Meet the "Little Eight,"* SLATE (Dec. 13, 2008), http://www.slate.com/articles/business/moneybox/2008/12/big_three_meet_the_little_eight.html.

[208] *See* MORRISON, *supra* note 18, at 8.

The United States has an anti-circumvention measure,[209] which is designed to prevent foreign companies subject to anti-dumping duties from shipping parts to the United States where simple assembly operations occur. The foreign company might thereby be able to avoid the imposition of an anti-dumping order because the goods are produced domestically by a U.S. company and are not subject to anti-dumping duties imposed at the border. If the foreign company is deemed to have engaged in circumvention, the product, although manufactured in the United States, will be subject to the anti-dumping duty.[210] However, there are several reasons why an anti-circumvention measure will likely have a limited impact on China's ability to avoid border measures. The anti-circumvention measure applies only under the following conditions:

1. The merchandise sold in the United States must be made from parts or components produced in the country subject to the anti-dumping duty order;

2. The value of the parts or components imported from the country subject to the order must be "a significant portion of the total value of the [completed] merchandise;" and

3. The process of assembly or completion in the United States must be "minor or insignificant."[211]

These factors suggest that the statute's purpose is not to deter genuine FDI but to preclude the use of simple assembly operations in the United States and evade the imposition of anti-dumping duties. Moreover, if China did set up a manufacturing facility in the United States, then China may in fact gain a favorable political foothold in the United States. A manufacturing facility creates jobs for the local economy, tax revenue, and support for related local industries (such as the automotive parts manufacturers in the Honda case above). American workers at the Chinese-owned manufacturing facility are likely to oppose additional tariffs on their products, and they could pressure U.S. politicians to fight against such measures.

Establishing manufacturing operations in the United States could also help China evade countervailing duties. Moreover, although there is an anti-circumvention measure that applies to anti-dumping duties, no similar

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[209] *See* 19 U.S.C. § 1677(j) (2006).

[210] *See id.*

[211] *Id.*

anti-circumvention measure exists for subsidies and countervailing duties. A current heated controversy between China and the United States (as well as other countries) concerns China's provision of subsidies for green technologies, i.e., solar panels.[212] The United States and the European Union claim that government subsidies are providing competitive advantages to Chinese companies that manufacture solar panels and other green technologies, and that the financial benefit of these subsidies creates a competitive advantage for Chinese exports.[213] The EU recently settled a dispute with China over low-priced solar panels that almost erupted into a trade war after the EU threatened to impose punitive tariffs on imported solar panels from China.[214] Suppose, however, that China had invested in a manufacturing facility in the United States to produce solar panels that had been sold directly from the U.S. plant. Suppose further that intra-corporate transfers between the Chinese parent company and the U.S. manufacturing subsidiary had allowed the parent company to pass through government financial contributions to the Chinese-owned U.S. manufacturer. This arrangement might have allowed China to avoid the effect of any countervailing duties that may have been imposed on its solar panels because the panels were manufactured domestically in the United States, and, as of the present, no anti-circumvention measure would have applied to subsidies unlike anti-dumping duties. In fact, in 2010, Suntech Power Holdings, the world's largest manufacturer of solar panels, opened a manufacturing facility in Goodyear, Arizona, to produce solar panels in the United States.[215] Other Chinese companies in industries ranging from automotive parts, steel pipes, construction equipment, household appliances, and electronics have made major investments in manufacturing

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[212] Steve Hargreaves, *China Trounces U.S. in Green Energy Investments*, CNN, Apr. 17, 2013, http://money.cnn.com/2013/04/17/news/economy/china-green-energy/index.html; Will Oremus, *The World's Dumbest Trade War*, SLATE (Feb. 19, 2014), http://www.slate.com/articles/technology/technology/2014/02/u_s_china_solar_trade_war_solarworld_case_is_bad_for_green_jobs.html.

[213] *See* Jeffrey Ball, *The Next Battle in Our Trade War with China*, NEW REPUBLIC (Jan. 21, 2014), http://www.newrepublic.com/article/116286/solar-panel-trade-war-china ("[T]he dispute centers on intricate questions about whether China has violated international trade rules in its massive subsidizing of its solar-panel industry. That industry essentially didn't exist a decade ago, and now it dominates the world market. Western companies—many of them in the U.S.—are going out of business.").

[214] See Mark Thompson, *EU Slaps Tariffs on Chinese Solar Panels*, CNN, June 4, 2013, http://money.cnn.com/2013/06/04/news/economy/europe-china-solar/index.html (tariffs as high as 47.6 percent). The dispute was quickly settled by the parties. *See* Charles Riley, *China and EU Strike Deal on Solar Panels*, CNN, June 29, 2013, http://money.cnn.com/2013/07/29/news/economy/china-eu-trade/index.html.

[215] *See* MORRISON, *supra* note 18, at 19.

facilities in the United States. These major investments[216] might be a preemptive move to avoid the effect of anti-dumping duties, countervailing duties, quotas, or a combination of these measures imposed on imports at the border.

Finally, establishing manufacturing operations in the United States could help Chinese companies avoid quotas or quantitative restrictions on imports. Although quotas are generally prohibited under the GATT,[217] quotas may be permitted as a "safeguard," a temporary trade remedy permitted to last for up to four years[218] in the case of a putative trade emergency, such as a sudden surge in exports to the United States that results in disruptions to certain U.S. industries.[219] Because the goods would be manufactured in the United States, the goods would, of course, not be subject to import quotas. Moreover, any effort by the United States to pressure, persuade, or influence China into voluntarily limiting its exports,[220] as in the Japan auto case of 1981,[221] would be ineffective if the goods were manufactured in the United States.

Manufacturing products in the United States may also allow Chinese companies to avoid the effects of federal laws that currently prohibit the U.S. government from buying products and services from countries, such as China, which are not members of the WTO Government Procurement Agreement of 2011 ("GPA").[222] Government procurement is exempt from the NT principle under the GATT[223] and GATS.[224] This allows WTO members to discriminate freely against foreign goods and services in favor of domestically produced goods and services in government procurement. Some countries, however, have voluntarily joined the GPA, which requires

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[216] *See id.*

[217] *See* GATT 1994, *supra* note 56, art. 11.

[218] *See* Agreement on Safeguards, *supra* note 56, art. 7.

[219] *See* GATT 1994, *supra* note 56, art. 19 (the original safeguards provision); Agreement on Safeguards, *supra* note 56, art. 2. The WTO Safeguards Agreement is intended to further amplify Article 29 of the GATT and to install an elaborate set of procedures.

[220] Voluntary Export Restraints are technically illegal under the WTO. *See* Agreement on Safeguards, *supra* note 56, art. 11:1(b). But Article 11:1(b) is unclear on whether any informal agreements or understandings are included within its scope. *Id.*

[221] *See supra* Part II.C.

[222] *See* 19 U.S.C. §§ 2501-2518 (2006). The WTO Procurement Agreement, unlike the GATT, GATS, and TRIPs, is a so-called "plurilateral" agreement, which means that it is not mandatory. Members can choose to join the GPA as they wish. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 19, at 173.

[223] *See* GATT 1994, *supra* note 56, art. 3:8(a).

[224] *See id.* art. 13.

its members to extend NT to the goods and services of other GPA members in government procurement. Under this requirement, the United States, as a GPA member, cannot give preferential treatment in buying goods and services to U.S. companies over companies from other GPA member countries, such as the EU countries. Rather, the U.S. government must treat all bids from U.S. and GPA member companies on an equal basis. China is currently not a member of the GPA; thus, China is free to discriminate against U.S. goods and services in its government procurement, and, in turn, the U.S. government is prohibited by federal law from purchasing goods and services from non-GPA members, such as China (although the GPA countries do purchase substantial amounts of goods and services from China).[225] In 2011, the United States spent $537 billion or about fourteen percent of the federal budget on government procurement;[226] government procurement is therefore a vast and lucrative market. If China establishes or acquires manufacturing subsidiaries in the United States, the products that those subsidiaries make are considered American-made goods. Despite the Chinese ownership of these subsidiaries, they are formed under U.S. law and are U.S. corporations. As a result, goods produced by these Chinese-owned, U.S. subsidiaries are eligible for U.S. government procurement. Additionally, goods that are manufactured in the United States may have a broader appeal to certain segments of U.S. consumers that wish to purchase American-made products rather than foreign products.

China is, of course, aware that Congress is concerned about the massive U.S. trade deficit with China, and that there are several pending bills threatening to impose new unprecedented trade sanctions in the form of countervailing duties on *all* goods of *any kind* imported from China.[227]

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[225] *See* CHOW, *China's Indigenous Innovations Policies*, *supra* note 32, at 84-85.

[226] *See id.* at 86.

[227] *See* MORRISON, *supra* note 18, at 46. There are several bills currently in various stages in the U.S. Congress that would impose a new set of countervailing duties against *all* imports from China. *See id.* The basic premise behind these bills is that China undervalues its currency by not allowing it to float but by pegging it to the U.S. dollar to keep it artificially undervalued and to keep Chinese goods cheap, which inflates the trade deficit. *See id.* If China were to allow its currency to float freely, many experts believe that China's currency would appreciate significantly. Because China's currency is undervalued, U.S. consumers may exchange fewer U.S. dollars for Chinese currency, which makes Chinese goods cheaper to the U.S. consumer and thereby increases the trade deficit. Conversely, Chinese consumers must exchange more Chinese currency for U.S. dollars, making U.S. imports more expensive. Critics argue that the undervaluation of China's currency creates a "subsidy" of up to forty percent for all Chinese goods and that a countervailing duty should be levied on Chinese goods to offset the value of this subsidy. For a discussion of Chinese currency valuation issues, see CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 19, at 43-49.

Due perhaps to the considerations set forth in this Part of the article, a few Chinese companies have already made sizeable FDI investments in manufacturing facilities in the United States;[228] however, Chinese inflows of FDI into the United States, as noted above, make up $4 billion, which is only a fraction above two percent of the $175 billion total FDI inflows into the United States[229] overall due at least in part to what China perceives to be a negative political climate.[230] By developing new protections for FDI inflows from China, a BIT could create significant opportunities to acquire or establish manufacturing facilities in the United States to avoid the effect of border measures imposed on Chinese imports.

CONCLUSION

While the economic benefits of a BIT for the United States are often touted, less attention in the media or commentary has been given to a BIT's potential benefits for China. Benefits for the United States include additional business opportunities; however, an analysis of the benefits of a BIT for China requires going beyond an examination of commercial advantages alone. China is governed by the Communist Party; thus, an analysis of the benefits that a BIT may provide for China must examine the strategic political advantages that a BIT could create for the State-Party. No significant national commitment, such as entering into a BIT with the United States, may occur without the State-Party's consent and, of course, the State-Party will not agree to a BIT unless it believes that the BIT will further the State-Party's long-term political interests. This Article attempts to identify some of the key political and strategic objectives that a BIT may serve for the State-Party. This Article's purpose is not, however, to debate or analyze whether a U.S.-China BIT is in the best interests of either country. That is a complex subject, which requires separate and extensive treatment. However, it is important to realize that the State-Party in China would not agree to enter into a BIT with the United States for new business opportunities alone. Although the State-Party is concerned with new business opportunities, the State-Party will also consider overriding objectives that will help strengthen China's global economic position and enhance China's status as a world power. While the economic benefits of a BIT to the United States and China, such as increased trade, may be apparent, the strategic and political benefits of a BIT to China may not be. This Article articulates the strategic and political advantages of a BIT for China. These important strategic and political advantages, not just

[228] *See* MORRISON, *supra* note 18, at 18.

[229] *See* Schwartz, *supra* note 7.

[230] *See* MORRISON, *supra* note 18, at 20-24.

economic motives, underlie China's desire to enter into a BIT with the United States.