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## Prospects for Further Market Access and Protections in China: US-China Bilateral Investment Treaty Developments

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At the most recent US-China Strategic and Economic Dialogue (S&ED) in July 2013 (the ninth round of “technical” discussions since talks resumed in 2008), the United States and China achieved a breakthrough on the negotiation of a high-standard US-China bilateral investment treaty (BIT). The two governments agreed to move from “technical discussions” to “substantive BIT negotiations,” which are expected to proceed this fall. Additionally, China conceded on two key elements that increase the likelihood that a future BIT will be meaningful to US investors.

First, China agreed that, under the BIT, US investors seeking to enter China will be treated no less favorably than Chinese investors seeking to establish businesses in China (subject to negotiated exceptions)—meaning that, in theory, unique restrictions on foreign investors in China should be greatly diminished. Second, China agreed to negotiate the BIT on a “negative list” approach—such that non-discrimination and other protections of the BIT will apply to all sectors, unless China negotiates exceptions.<sup>1</sup> These concessions represent an important departure from China’s existing BITs (which number more than 100).

Underscoring the significance of this development, US Treasury Secretary Jacob Lew remarked at the end of the S&ED: “The commitment made today stands to be a significant breakthrough and marks the first time China has agreed to negotiate a Bilateral Investment Treaty, to include all sectors and stages of investment, with another country.”<sup>2</sup>

The concessions by China, and the apparent renewed commitment by both governments to negotiate an agreement, are significant for US and other multinational businesses—both those seeking to invest in China and those with existing investments.

First, China is committing to engage in a significant negotiation to further open sectors of its economy to US investors, including through elimination or relaxing of investment approval mechanisms. This will provide one of the most significant opportunities to improve market access for US companies in China since China’s negotiations to join the World Trade Organization (WTO) in the late 1990s.

Second, the negotiations offer the possibility of addressing difficult issues that were imperfectly resolved by China's WTO accession—including China's preferential treatment of its state-owned enterprises, "performance" requirements such as technology transfer requirements mandated by national or local Chinese authorities, and newer issues such as cross-border data flows.

Third, while difficult negotiations lie ahead, there are now more concrete prospects for concluding a BIT in the foreseeable future—offering US investors an additional tool to resist inappropriate government action in China, including remedies such as investor-State dispute settlement. (Companies that are incorporated in, or have subsidiaries incorporated in, states that already have BITs with China—e.g., various EU Member States—may be able to invoke investor-State dispute mechanisms under those BITs, but such BITs are more limited than what the United States is likely to negotiate.<sup>3</sup>)

Finally, the Chinese government's recent concessions demonstrate its own affirmative interest in obtaining increased protections for Chinese investments in the United States—underscoring its concern about negative reactions to Chinese investments in the US and recent high-profile transactions that failed to achieve approval by the US government on national security grounds. As China's Vice Premier Wang Yang characterized the BIT breakthrough at the S&ED talks, "The United States pledges to welcome investment from China, including investment of [state-owned enterprises] and sovereign wealth funds. [The] U.S. side also pledged that [Committee on Foreign Investment in the United States (CFIUS)] security review will only...be based on national security rather than other factors."<sup>4</sup> Given China's own interests in concluding a BIT, the United States may have better prospects for negotiating positive outcomes than it does in other fora with China.

While the July S&ED meetings represent an important breakthrough in the negotiation of a US-China BIT, many important points remain open for negotiation, which could take many months (or years) to resolve. Among others, those issues include:

- negotiating which sectors will receive greater or lesser coverage under the BIT—by negotiating the scope of the "negative list" exceptions;
- negotiating provisions that specifically protect investments against actions by state-owned enterprises and other state mechanisms of influence;
- negotiating additional protections against performance requirements (such as forced technology transfer), which have often been imposed on US investors in China; and
- negotiating any provisions that directly or indirectly restrict a state's ability to violate BIT commitments where it claims national security is at stake.

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<sup>1</sup> In a different context, China's recent announcement of the Shanghai Free Trade Zone includes a negative list concept.

<sup>2</sup> US Department of Treasury, *U.S. and China Agree to Negotiate a Breakthrough Investment Treaty*, <http://www.treasury.gov/press-center/news/Pages/U.S.-and-China-Agree-to-Negotiate-a->

[Breakthrough-Investment-Treaty.aspx](#).

<sup>3</sup> At the same time as these important developments on a US-China BIT, the EU and China are also preparing to begin their own BIT talks, following agreement at the 14th EU-China Summit in 2012. European Commission, *Commission Proposes to Open Negotiations for an Investment Agreement with China*, May 23, 2013, [http://europa.eu/rapid/press-release\\_IP-13-458\\_en.htm](http://europa.eu/rapid/press-release_IP-13-458_en.htm). This agreement with the EU would presumably replace the existing BITs between individual EU Member States and China.

<sup>4</sup> US Department of State, *The U.S.-China Closing Statements for U.S.-China Strategic and Economic Dialogue*, <http://www.state.gov/s/d/2013/211850.htm>.

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