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# UNCERTAIN COSTS, UNCLEAR BENEFITS: CHINA'S SOCIAL INSURANCE SYSTEM AND FOREIGN WORKERS

ERIC CHU\*

**Abstract:** China's fairly recent implementation of a social security insurance scheme that includes foreign workers has generated unintended uncertainties and inconsistencies both for foreign companies in China and for Chinese companies working outside China, without generating clear benefits for foreign workers. This Note provides an overview of the new scheme, which requires, for the first time, all foreign workers and their employers to pay into the social security insurance system. Weaknesses in this new scheme include inconsistent implementation, scattered timelines, and incomplete information on coverage. In the face of these and other shortcomings, China should focus on the benefits of reciprocity and totalization by implementing more bilateral social security agreements as well as clarifying the existing social insurance system.

## INTRODUCTION

For companies with a global outlook, establishing a foothold in China is a necessity, not a choice.<sup>1</sup> A 2014 survey by the U.S.-China Business Council<sup>2</sup> showed that 22% of responding American companies view China as their top priority for growth, while 71% say China is among their top five priorities.<sup>3</sup> These same companies, however, list human resources—particularly

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<sup>1</sup> See Mona Chung, *Doing Business with China Is a Necessity, Not a Choice*, THE CONVERSATION (Oct. 20, 2011, 12:56 AM), <http://theconversation.com/doing-business-with-china-is-a-necessity-not-a-choice-3930> [perma.cc/SG8K-ZLSB]; Gady Epstein & Robyn Meredith, *U.S. Companies That Invest Big in China*, FORBES (July 5, 2010, 9:30 AM), <http://www.forbes.com/2010/07/05/us-investments-china-markets-emerging-markets-fdi.html> [perma.cc/S9D9-M9PC]; Ian Rose, *How to Win in China: Top Brands Share Tips for Success*, BBC (July 24, 2013), <http://www.bbc.com/news/business-23364230> [perma.cc/5G9T-TFLU]; Edward Tse, *The Globe: Is It Too Late to Enter China?*, HARV. BUS. REV. (Apr. 2010), <https://hbr.org/2010/04/the-globe-is-it-too-late-to-enter-china> [perma.cc/H3W7-C74H].

<sup>2</sup> The U.S.-China Business Council is a private, nonpartisan, nonprofit organization of roughly 220 American companies. *About the US-China Business Council*, US-CHINA BUS. COUNCIL, <https://www.uschina.org/about> [perma.cc/NJB9-AUG5] (last visited Feb. 11, 2016).

<sup>3</sup> *USCBC 2014 China Business Environment Survey Results: Growth Continues Amidst Rising Competition, Policy Uncertainty*, US-CHINA BUS. COUNCIL, 4, fig. 3 (2014), [https://www.uschina.org/sites/default/files/USCBC\\_2014\\_China\\_Business\\_Environment\\_Survey\\_Results\\_\(English\)\\_0.pdf](https://www.uschina.org/sites/default/files/USCBC_2014_China_Business_Environment_Survey_Results_(English)_0.pdf)

local talent recruitment and retention—as a top challenge of operating in China.<sup>4</sup> Foreign companies' rapid expansion in China and the relative scarcity of highly trained local talent mean that many foreign companies find it necessary to import talent for their Chinese operations.<sup>5</sup> For the past five quarters, Chinese economic growth has slowed to the lowest rate in twenty-five years.<sup>6</sup> As the Chinese economy diversifies yet slows, foreign workers offer a resource that is frequently irreplaceable through domestic means.<sup>7</sup>

According to the 2010 census, there are more than 600,000 foreigners living on the Chinese mainland.<sup>8</sup> In fact, over the years, China has become one of the most desirable locations for expatriates and the companies that employ them.<sup>9</sup> Being an expatriate in China, however, is not always easy, especially in light of the country's fast-changing regulatory system.<sup>10</sup>

[perma.cc/R2AR-R4GK] [hereinafter *USCBC 2014 China Business Environment Survey Results*]; see Teo Kermeliotis, *Doing Business in China: Five Tips for Success*, CNN (Oct. 21, 2011, 10:46 AM), <http://www.cnn.com/2011/10/21/business/china-business-investors-culture/> [perma.cc/WSU4-HT6L]; Gong Li, Henry Egan & Andrew Sleigh, *Making China Your Top Priority*, EUROPEAN BUS. REV. (July 22, 2012), <http://www.europeanbusinessreview.com/?p=2515> [perma.cc/2KS6-BR8G] (“China is the number one or number two market for automobiles, PCs, mobile phones, luxury goods, home appliances[,] and consumer electronics.”).

<sup>4</sup> See *USCBC 2014 China Business Environment Survey Results*, *supra* note 3, at 14–16, figs. 23, 27 (demonstrating the competition among wages with domestic companies for Chinese employees and the high turnover); Anthony Goh & Matthew Sullivan, *The 5 Biggest Challenges Businesses Face When They Expand to China*, BUS. INSIDER (Dec. 13, 2010, 3:42 PM), <http://www.businessinsider.com/the-five-biggest-practical-challenges-for-foreign-smes-in-the-chinese-market-2010-12> [perma.cc/W6EQ-LPR5].

<sup>5</sup> See *A Tale of Two Expats*, ECONOMIST (Dec. 29, 2010), <http://www.economist.com/node/17797134> [perma.cc/2QA9-ST9T]; Matt Durnin, *China Is Still a Jobs Hotspot for Expats*, BBC (Feb. 12, 2014), <http://www.bbc.com/capital/story/20140212-get-hired-in-china> [perma.cc/Q9TH-GU4M].

<sup>6</sup> See Jethro Mullen, *China Posts Slowest Annual Economic Growth in 25 Years*, CNN MONEY (Jan. 19, 2016, 2:44 AM), <http://money.cnn.com/2016/01/18/news/economy/china-2015-gdp-growth/> [perma.cc/M72U-PT8Y].

<sup>7</sup> See Ian Bremmer, *These 5 Facts Explain the Global Impact of China's Impending Slowdown*, TIME (Aug. 28, 2015), <http://time.com/4014687/these-5-facts-explain-the-global-impact-of-chinas-impending-slowdown/> [perma.cc/63C2-N5LD]; Mullen, *supra* note 6.

<sup>8</sup> See Calum MacLeod, *U.S. Expatriates Pursue American Dream in China*, USA TODAY (July 12, 2011 10:19 PM), [http://usatoday30.usatoday.com/news/world/2011-07-12-Americans-China-dreams-transplants\\_n.htm](http://usatoday30.usatoday.com/news/world/2011-07-12-Americans-China-dreams-transplants_n.htm) [perma.cc/8R2S-4RCB]; Chen Xin, *China's Social Security to Cover Expats*, CHINA DAILY (May 31, 2011), [http://www.chinadaily.com.cn/china/2011-05/31/content\\_126080012608000000000000/635b7646-8ba3-675.htm](http://www.chinadaily.com.cn/china/2011-05/31/content_126080012608000000000000/635b7646-8ba3-675.htm) [perma.cc/3P36-3N66].

<sup>9</sup> See David Bolchover, *Up or Out: Moves for the Modern Expatriate*, ECONOMIST INTELLIGENCE UNIT 5 (2010), [http://graphics.eiu.com/upload/eb/lon\\_pl\\_regus\\_web2.pdf](http://graphics.eiu.com/upload/eb/lon_pl_regus_web2.pdf) [perma.cc/6U2J-CLVZ] (“The most popular destination of all for expatriates is China, with 35% of respondents believing it to be one of the top three destinations for their company's overseas representatives.”); Francesca Donner, *The Best Places to Be an Expat*, WALL ST. J.: AT WORK (Oct. 22, 2014, 3:27 PM), <http://blogs.wsj.com/atwork/2014/10/22/the-best-country-to-be-an-expat/> [perma.cc/KUU9-FBJL].

<sup>10</sup> See Justin Harper, *Expats in China 'Confused' by Social Insurance Payments*, TELEGRAPH (Oct. 19, 2011, 9:40 AM), <http://www.telegraph.co.uk/finance/personalfinance/expat-money/>

In 2010, China's Standing Committee of the National People's Congress issued the Social Insurance Law (SIL).<sup>11</sup> The SIL, which came into effect on July 1, 2011, established a national social insurance framework for employees across the People's Republic of China (PRC).<sup>12</sup> The SIL requires that all employers in China enroll each employee, including foreign workers, in five insurance programs: pension insurance, medical insurance, work-related injury insurance, unemployment compensation, and maternity insurance.<sup>13</sup>

The new law was a sudden departure from the prior business environment, as SIL effectively increased annual employment costs for companies with expatriate employees in larger cities by approximately \$8000 per expatriate employee.<sup>14</sup> It also mandated an additional charge of approximately \$2400 against individual expatriates' annual earnings.<sup>15</sup> Although the new law applies nationwide, it is still subject to local implementation.<sup>16</sup> As is often the case with new laws in China, some cities and localities have moved faster than others in establishing contribution rate schedules and implementing guidelines.<sup>17</sup> With implementation details still unclear, expatriates and their employers face uncertain financial and procedural hurdles, which will in turn affect foreign companies' investments—of both financial and human capital—in China.<sup>18</sup>

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8834058/Expats-in-China-confused-by-social-insurance-payments.html [perma.cc/L9KG-6NHT]; Wang Xiaoying, *Social Insurance Program Leaves Expats Confused*, CHINA DAILY (Jan. 24, 2014), [http://www.chinadaily.com.cn/2014-01/24/content\\_17255392.htm](http://www.chinadaily.com.cn/2014-01/24/content_17255392.htm) [http://perma.cc/Y68R-SF86].

<sup>11</sup> See generally Shehui Baoxian Fa (社会保险法) [Social Insurance Law] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective July 1, 2011) (Lawinfochina) (China) [hereinafter SIL].

<sup>12</sup> *Id.* art. 2.

<sup>13</sup> *Id.* art. 2, 4.

<sup>14</sup> See Patti Waldmeir, *China Eyes Expatriate Insurance Fees*, FIN. TIMES (May 31, 2011), <http://www.ft.com/cms/s/0/635b7646-8ba3-11e0-a725-00144feab49a.html#axzz3zhv9XvGF> [perma.cc/69ZM-RSS6] (calculating approximate annual cost based on monthly contribution).

<sup>15</sup> See *id.*

<sup>16</sup> See David Tring, *Social Insurance for Foreigners—Was It Enforced?*, CHINA L. & PRAC. (Mar. 29, 2012), <http://www.chinalawandpractice.com/sites/clp/2012/03/28/social-insurance-for-foreigners-was-it-enforced/> [perma.cc/L6DZ-88DJ] [hereinafter Tring, *Social Insurance for Foreigners*]; Leah Hyslop, *Shanghai Delays Expatriate Social Insurance Payments*, TELEGRAPH (Jan. 12, 2012, 6:25 PM), <http://www.telegraph.co.uk/finance/personalfinance/expat-money/9010445/Shanghai-delays-expat-social-insurance-payments.html> [perma.cc/3Q9P-YT2F].

<sup>17</sup> See, e.g., David Tring, *How GE's Labour Counsel Copes with Local Authorities: Interview*, CHINA L. & PRAC. (Sept. 21, 2012), <http://www.chinalawandpractice.com/sites/clp/2012/09/20/how-ge-labour-counsel-cope-with-local-authorities-interview/> [perma.cc/9AZC-5UWT]; Tring, *Social Insurance for Foreigners*, *supra* note 16; Hyslop, *supra* note 16; Adam Livermore, *Social Insurance Law Implementation Differences Across China*, CHINA BRIEFING (Oct. 7, 2011), <http://www.china-briefing.com/news/2011/10/07/social-insurance-law-implementation-differences-across-china.html> [perma.cc/P8UG-THEW].

<sup>18</sup> See James T. Areddy, *China Considers New Tax for Foreigners*, WALL ST. J. (June 1, 2011), <http://www.wsj.com/articles/SB10001424052702304563104576357250866060010> [perma.

This Note proceeds in three parts. Part I presents the background and development of the SIL, highlighting the current issues of the PRC social insurance programs for foreign expatriates working in China. Part II discusses the role and importance of bilateral social security agreements in the context of the PRC social insurance programs. Additionally, this section explores the difference between U.S. social security agreements and PRC agreements. Part III recommends that China enter into more bilateral social security agreements with totalization provisions. It also analyzes the various benefits available to the PRC government, foreign companies, and expatriate employees as a result of a more certain and reciprocal system.

## I. BACKGROUND

### A. *The SIL and Interim Measures*

One of the most important aspects of the SIL is the purported mandatory inclusion of expatriate employees in the social insurance system.<sup>19</sup> Before the SIL, foreign workers were not required to enroll in the five social insurance systems.<sup>20</sup> Consequently, there was no preexisting procedure for the mandatory inclusion of expatriates in these systems, and many questions about the enrollment of foreigners remained unanswered.<sup>21</sup>

On September 9, 2011, the Ministry of Human Resources and Social Security (MHRSS)<sup>22</sup> promulgated the Interim Measures on Participation in So-

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cc/2WFW-SBXP]; Edward J. Epstein, *Foreigners Caught by China's New Social Security Law*, TROUTMAN SANDERS: NEWS & KNOWLEDGE (June 24, 2011, <http://www.troutmansanders.com/foreigners-caught-by-chinas-new-social-security-law-06-24-2011/>) [perma.cc/Y6AaP-K8Q5]; Livermore, *supra* note 17; see also *Changing Social Security Rules in China Have Employer Implications*, BENEFITS CANADA (Jan. 16, 2013), <http://www.benefitscanada.com/news/changing-social-security-rules-in-china-have-employer-implications-35709> [perma.cc/5JYK-6A4V] (“[C]ompanies in those cities that have implemented the rules make contributions; those where the rules [are not] formally enforced do not contribute. For example, 70% of companies in Beijing were found to be making contributions for foreign workers. In Shanghai, where the local government has not yet implemented the central government’s rules, less than 20% of companies make contributions.”).

<sup>19</sup> See SIL, *supra* note 11. Article 97 provides, “Foreigners employed within the territory of the People’s Republic of China shall participate in social insurance analogically in accordance with this Law.” *Id.* art. 97.

<sup>20</sup> See *Mandatory Social Insurance Registration for Most Foreign Workers*, PRO-LINK GLOB. (Oct. 14, 2011), <https://pro-linkglobal.com/china-mandatory-social-insurance-registration-for-most-foreign-workers> [perma.cc/8GBL-EURF].

<sup>21</sup> See Wang, *supra* note 10 (“How should I draw my pension? Where should I go when I relocate to other cities in China? How can I access unemployment or maternity benefits?”); see also Harper, *supra* note 10.

<sup>22</sup> See *Ministry of Human Resources and Social Security*, PEOPLE’S REPUBLIC OF CHINA STATE COUNCIL, [http://english.gov.cn/state\\_council/2014/09/09/content\\_281474986284102.htm](http://english.gov.cn/state_council/2014/09/09/content_281474986284102.htm) (last updated Sept. 3, 2014, 5:16 PM) [perma.cc/T8DU-APF2]. The Ministry of Human Resources and Social Security is a ministry under the State Council, which is responsible for national labor policies, standards, and regulations and managing the national social security system. *Id.* The

cial Insurance by Foreigners Working in China (Interim Measures).<sup>23</sup> The Interim Measures provide general guidance for foreigners participating in the PRC social insurance scheme.<sup>24</sup> Specifically, they define an expatriate employee as any foreign national who has obtained either (a) a work permit in China<sup>25</sup> and his or her PRC residence permit, or (b) a PRC permanent resident who is presently working in China.<sup>26</sup> Additionally, under the Interim Measures, any entity that has been established in China and employs expatriates is considered an employer for the purposes of the SIL.<sup>27</sup>

On December 2, 2011, MHRSS released the Notice of the Ministry of Human Resources and Social Security on the Relevant Issues Concerning the Participation in Social Insurance by Foreigners Employed in China (Notice), which further clarifies some points of uncertainty.<sup>28</sup> The Notice stipulates that social security contributions for foreign employees working in China must begin on October 15, 2011 or upon the commencement date of their employment in China.<sup>29</sup> Additionally, the Notice expressly states that employers are required to register each expatriate employee with the local social insurance agency after the employee obtains a work permit.<sup>30</sup> Employers who fail to register their expatriate employees and do not make timely contribution payments on their employees' behalf are subject to a late payment penalty of 0.05% of the overdue amount for each day that a payment is overdue.<sup>31</sup>

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ministry was created from the former Ministry of Personnel and Ministry of Labor and Social Security. *Id.*

<sup>23</sup> See Zai Zhongguo Jinne Jiuye de Waiguoren Canjia Shehui Baoxian Zanxing Banfa (在中国境内就业的 외국인 参加社会保险暂行办法) [Interim Measures for the Participation in Social Insurance of Foreigners Employed in China] (promulgated by Ministry of Human Res. & Soc. Sec., Sept. 6, 2011, effective Oct. 15, 2011) (Pkulaw) (China) [hereinafter Interim Measures].

<sup>24</sup> *Id.* art. 3.

<sup>25</sup> *Id.* Article 2 provides that a work permit includes “[e]mployment certificates, such as the Employment Certificate for Foreigners, the Foreign Expert Certificate and the Certificate of Resident Foreign Correspondents . . .” *Id.* art. 2.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* Article 3 provides the following examples: “[E]nterprises, public institutions, social organizations, private non-enterprise entities, foundations, law firms, accounting firms and other organizations which are legally registered in China . . .” *Id.* art. 3.

<sup>28</sup> See Guanyu Zuohao Zai Woguo Jinnei Jiuye de Waiguoren Canjia Shehui Baoxian Gongzuo de Youguan Wenti de Tongzhi (关于做好在我国境内就业的 외국인 参加社会保险工作有关问题的通知) [Notice of the Ministry of Human Resources and Social Security on the Relevant Issues Concerning the Participation in Social Insurance by Foreigners Employed in China] (promulgated by Ministry of Human Res. and Soc. Sec., Dec. 2, 2011) (Lawinfochina) (China).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See *Latest Updates on Enforcement and Collection of Social Security Contributions for Foreigners Working in China*, PRICEWATERHOUSE COOPERS LLP: NEWS FLASH 2 (Jan. 19, 2012), [http://www.pwccn.com/webmedia/doc/634631879752447399\\_chinatax\\_news\\_jan2012\\_3.pdf](http://www.pwccn.com/webmedia/doc/634631879752447399_chinatax_news_jan2012_3.pdf) [perma.cc/4BNT-W9R5]; Woon-Wah Siu & Steve Sun, *China's First Comprehensive Social Insurance Law Now in Effect, Affecting All Employers*, PILLSBURY WINTHROP SHAW PITTMAN LLP: CLIENT

### B. Uncertain Aspects of the SIL and Interim Measures

As it stands, there are various uncertainties associated with the SIL and the Interim Measures.<sup>32</sup> Neither the SIL nor the Interim Measures clarify whether enrollment of a foreigner is voluntary or whether an opt-out option may exist if, for example, the foreigner already has private medical insurance or is enrolled in a pension program in his or her home country.<sup>33</sup> Until this ambiguity is clarified, employers will have to double-enroll expatriates in overseas programs as well as PRC programs and contribute to both schemes.<sup>34</sup> The Interim Measures state, however, that foreign workers can be exempted from enrollment in PRC social insurance programs if there is a bilateral social security agreement between the expatriate's home country and China.<sup>35</sup> Currently, China has entered into bilateral social insurance agreements with six countries.<sup>36</sup>

With the opt-out option aside, a key issue for many foreigners is that they will not likely benefit from enrollment in the PRC social insurance programs.<sup>37</sup> For example, expatriates generally use private, western-style medi-

ALERT (July 13, 2011), [https://www.pillsburylaw.com/siteFiles/Publications/ChinaAlertFirstComprehensiveSocialInsuranceLaw07\\_13\\_11\\_final.pdf](https://www.pillsburylaw.com/siteFiles/Publications/ChinaAlertFirstComprehensiveSocialInsuranceLaw07_13_11_final.pdf) [perma.cc/PD67-BGWY].

<sup>32</sup> See Justin Harper, *China to Introduce Expat Social Insurance Tax*, TELEGRAPH (Sept. 16, 2011), <http://www.telegraph.co.uk/finance/personalfinance/expat-money/8766291/China-to-introduce-expat-social-insurance-tax.html> [perma.cc/BNC6-4GF3] [hereinafter Harper, *Expat Social Insurance Tax*]; *Social Security for 54% of Expats*, SHANGHAI DAILY (Sept. 11, 2012), [http://www.china.org.cn/china/2012-09/11/content\\_26488298.htm](http://www.china.org.cn/china/2012-09/11/content_26488298.htm) [perma.cc/29QE-YBTU].

<sup>33</sup> See Harper, *Expat Social Insurance Tax*, *supra* note 32; *Social Security for 54% of Expats*, *supra* note 32.

<sup>34</sup> See Harper, *Expat Social Insurance Tax*, *supra* note 32; John Huang & May Lu, *The Implementation of Expatriates' Social Security Contribution Rules in China*, MCDERMOTT WILL & EMERY: CHINA L. ALERT (Feb. 8, 2012), <http://www.mwe.com/publications/uniEntity.aspx?xPST=PublicationDetail&pub=7186> [perma.cc/556H-W5SF].

<sup>35</sup> See Interim Measures, *supra* note 23, art. 9.

<sup>36</sup> See, e.g., Agreement Between the People's Republic of China and the Federal Republic of Germany on Social Insurance, China-Ger., July 12, 2001, <http://policy.mofcom.gov.cn/english/gity!fetch.action?id=TOLB000047> [perma.cc/LKS9-9Z2Z] [hereinafter China-Germany Social Insurance Agreement]; *China-South Korea Sign Social Insurance Contribution Agreement and Protocol*, CHINA BRIEFING (Feb. 18, 2013), <http://www.china-briefing.com/news/2013/02/18/china-south-korea-sig-social-insurance-contribution-agreement-and-protocol.html> [perma.cc/SX7G-U6SD]; Jeanette Yu, *China and Switzerland Conclude Bilateral Treaty on Social Insurance*, CMS, CHINA (Dec. 28, 2015), <http://www.lexology.com/library/detail.aspx?g=340d74a2-e317-4465-b4d8-8b933f756d02> [perma.cc/X7WK-ELDV]; *Ministry of Social Affairs, Children and Integration Signs Bilateral Social Security Agreement*, MINISTRY OF FOREIGN AFF. OF DEN. (Oct. 12, 2013) <http://kina.um.dk/en/about-us/news/newsdisplaypage/?newsid=bd54595b-044f-4b0a-a0b0-96df5741df6a> [perma.cc/FQB4-6Y5T].

<sup>37</sup> See Harper, *Expat Social Insurance Tax*, *supra* note 32; *PRC Social Insurance for Non-Chinese National Employees*, CHINA SOLUTIONS (Feb. 2012), <http://www.chinasolutionsllc.com/2012/02/prc-social-insurance-for-non-chinese-national-employees/> [perma.cc/73WV-GF7R] (discussing medical insurance benefits); *What Expats Need to Know About China's Social Security*, ORIX INSURANCE (Aug. 12, 2013), <http://orixinsurance.com/what-expats-need-to-know-about-chinas-social-security/> [perma.cc/NQ3B-QTRS] (discussing retirement benefits).

cal facilities—largely due to language barriers and a concern over the standard of care—that are not covered by China's medical insurance scheme.<sup>38</sup> Additionally, the “two-child policy”<sup>39</sup> that applies to PRC nationals does not apply to foreigners, and as a result, it is unclear whether female expatriates can receive maternity insurance benefits for more than two children.<sup>40</sup>

Furthermore, most expatriates work only temporarily in China and therefore are not likely to fully benefit from mandatory contributions to the pension scheme.<sup>41</sup> The SIL indicates that individuals who have made social insurance contributions are entitled to collect a basic monthly pension only if the individual has made pension contributions for a total of fifteen years by the time he or she reaches China's statutory retirement age.<sup>42</sup> Therefore, an expatriate may only receive pension benefits after leaving China, if he or she has met this requirement.<sup>43</sup> On the other hand, if an expatriate employee leaves China before the retirement age and does not intend to work in China again, the portion of the funds in his or her pension account that was funded by individual contributions may be withdrawn for personal use; the problem,

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<sup>38</sup> See Peter Pallot, *Expat Guide to China: Health Care*, TELEGRAPH (Dec. 7, 2010), <http://www.telegraph.co.uk/news/health/expat-health/8186239/Expat-guide-to-China-health-care.html> [perma.cc/YKE9-8T8R]; *PRC Social Insurance for Non-Chinese National Employees*, *supra* note 37; *Shanghai Hospital Tips*, HEALTH & SAFETY IN SHANGHAI <http://www.healthandsafetyinshanghai.com/shanghai-hospital.html> [perma.cc/TY5A-2ZQW] (last visited Feb. 11, 2016); see also Jeremy Carman & Jacquelyn Carman, *What Expats Should Know About Healthcare in China*, GBTIMES (Jan. 22, 2015), <http://gbtimes.com/blogs/what-expats-should-know-about-healthcare-china> [perma.cc/5PJJ-KNNS].

<sup>39</sup> See Chris Buckley, *China Ends One-Child Policy, Allowing Families Two Children*, N.Y. TIMES (Oct. 29, 2015), [http://www.nytimes.com/2015/10/30/world/asia/china-end-one-child-policy.html?\\_r=0](http://www.nytimes.com/2015/10/30/world/asia/china-end-one-child-policy.html?_r=0) [perma.cc/9UDZ-H5GS]; Steven Jiang, Paul Armstrong & Susannah Cullinane, *China Unveils Two-Child Policy*, CNN (Dec. 27, 2015, 8:03 AM), <http://www.cnn.com/2015/12/27/asia/china-two-child-policy/> [perma.cc/X49X-MTKL].

<sup>40</sup> See Jeremy Carman & Jacquelyn Carman, *Does China's One Child Policy Apply to Expats?*, GBTIMES (Jan. 30, 2015), <http://gbtimes.com/blogs/does-chinas-one-child-policy-apply-expats> [perma.cc/YGS6-UA4S]; Wendi Lazar, *New PRC Social Insurance Law: Working in China Becomes More Costly to Foreign Employees and Employers*, OUTTEN & GOLDEN: EMP. L. BLOG (Nov. 22, 2011), <http://www.employmentlawblog.info/2011/11/new-prc-social-insurance-law-working-in-china-becomes-more-costly-to-foreign-employees-and-employers.shtml> [perma.cc/5L86-EPHQ].

<sup>41</sup> See Harper, *Expat Social Insurance Tax*, *supra* note 32; Zhao Huanxin & He Dan, *Foreigners Stay Cool to Insurance*, CHINA DAILY (Dec. 13, 2013), [http://usa.chinadaily.com.cn/china/2013-12/13/content\\_17171343.htm](http://usa.chinadaily.com.cn/china/2013-12/13/content_17171343.htm) [perma.cc/9QNF-8V48]; Lazar, *supra* note 40; *What Expats Need to Know About China's Social Security*, *supra* note 37.

<sup>42</sup> See SIL, *supra* note 11, art. 16. The statutory retirement age is sixty years old for men and fifty-five years old for women. *New Social Security Rules for Expatriates in China*, CMS (Sept. 16, 2011), <http://www.cms-dsb.com/New-Social-Security-Rules-for-Expatriates-in-China-09-16-2011> [perma.cc/4FTS-NQ2T]. This fifteen-year period “does not need to be a continuous period, but an aggregation of all of the time that the employee has validly worked in China.” *Id.*

<sup>43</sup> *What Expats Need to Know About China's Social Security*, *supra* note 37.



however, is that the portion of the funds paid by the employer is essentially forfeited to the government.<sup>44</sup>

Moreover, the benefits to expatriates for making contributions to unemployment insurance remain unclear.<sup>45</sup> Under the SIL, Chinese nationals receive unemployment benefits except under limited circumstances, including if they emigrate to another country.<sup>46</sup> An expatriate who is terminated would lose his right to live in China.<sup>47</sup> Consequently, it would be legally impossible for an expatriate to receive unemployment benefits if he or she were terminated because the employee would have to leave China immediately upon termination.<sup>48</sup>

Additionally, details of the SIL implementation, such as contribution rates, contribution base, and administrative procedures are highly dependent upon local rules, which are issued by local governments and may vary greatly from city to city.<sup>49</sup> For instance, both the SIL and the Interim Measures are silent as to whether the contribution amounts for foreigners will match those for PRC nationals.<sup>50</sup> Because of this ambiguity, it is possible that some local

<sup>44</sup> See Interim Measures, *supra* note 23, art. 5. The Interim Measures do not permit expatriates to withdraw the employer's contributions to the social insurance scheme, which make up the largest percentage of social insurance contributions for expatriate employees. See Adam Livermore, *Mandatory Social Welfare Benefits for Chinese Employees*, CHINA BRIEFING (Feb. 21, 2012), <http://www.china-briefing.com/news/2012/02/21/mandatory-social-welfare-benefits-for-chinese-employees.html> [perma.cc/4VVSF-YQEF].

<sup>45</sup> See *Foreign Business in China: The Coming Squeeze?*, ECONOMIST (Sept. 24, 2011), <http://www.economist.com/node/21530141> [perma.cc/A4PM-H9TA]; Manuela Reintgen, *The Social Security System in China*, ECOVIS: BLOGS (June 27, 2014), <http://www.ecovis.com/focus-china/chinas-social-security-system/> [perma.cc/NK9N-P7E8].

<sup>46</sup> See SIL, *supra* note 11, art. 51.

<sup>47</sup> See *Foreign Business in China: The Coming Squeeze?*, *supra* note 45; Reintgen, *supra* note 45.

<sup>48</sup> See SIL, *supra* note 11, art. 51; *Foreign Business in China: The Coming Squeeze?*, *supra* note 45; Reintgen, *supra* note 45.

<sup>49</sup> See, e.g., *Beijing Details Foreigners' Mandatory Social Insurance Participation*, CHINA BRIEFING (Jan. 11, 2012), <http://www.china-briefing.com/news/2012/01/11/beijing-details-mandatory-foreigner-participation-in-social-insurance.html> [perma.cc/9GCC-F5B6]; *Implementing Rules on Foreign Employees' Participation in Chinese Social Insurance*, GIDE LOYRETTE NOUËL: CLIENT ALERT (Apr. 2012), [http://www.infoclient.gide.com/newsletters/en/china/images/stories/GLN\\_nws1\\_China\\_Implementing\\_Rules\\_on\\_Foreign\\_Employees\\_Participation\\_in\\_Chinese\\_Social\\_Insurance\\_April.pdf](http://www.infoclient.gide.com/newsletters/en/china/images/stories/GLN_nws1_China_Implementing_Rules_on_Foreign_Employees_Participation_in_Chinese_Social_Insurance_April.pdf) [perma.cc/L72W-WRRP]; *Suzhou Details Foreigners' Mandatory Social Insurance Participation*, CHINA BRIEFING (Mar. 6, 2012), <http://www.china-briefing.com/news/2012/03/06/suzhou-details-foreigners-mandatory-social-insurance-participation.html> [perma.cc/D89A-UK48]. See generally *Average Wages and Social Security Caps for Cities Across China*, CHINA BRIEFING (Mar. 27, 2012), <http://www.china-briefing.com/news/2012/03/27/average-wages-and-social-security-caps-for-cities-across-china.html> [perma.cc/3BV8-2FLM] (illustrating the contribution rates in different cities).

<sup>50</sup> See generally SIL, *supra* note 11 (noting the absence of a state-mandated contribution cap in both the SIL and the Interim Measures).

governments might remove the contribution cap, while others might not.<sup>51</sup> For example, the regulations in Dalian, Liaoning do not place a cap on the amount that an employer must contribute to its employees' pension insurance.<sup>52</sup> The regulations are likely to hit employers with expatriate employees the hardest, as expatriates' income levels tend to be relatively higher than those of local employees.<sup>53</sup> Complicating matters further, some cities in China, such as Guangzhou and Shenzhen, apply dual social security contribution systems depending on whether employees hold local residency.<sup>54</sup> Under the dual system, there are often differences between the contribution rates and salary bases that are used when calculating social security contributions.<sup>55</sup> It also remains unclear whether expatriate employees will be treated as non-residents of those cities for the purposes of calculating social security contributions.<sup>56</sup>

Finally, paying dual social insurance contributions is particularly costly for companies that offer tax equalization arrangements for their expatriate employees.<sup>57</sup> A company that sends an employee to work in another country

<sup>51</sup> *The PRC Social Insurance Scheme to Cast Its Net on Foreign Employees and Their PRC Employers*, SIDLEY AUSTIN LLP: CHINA UPDATE (Sept. 30, 2011) [http://www.sidley.com/~media/files/news/2011/09/the-prc-social-insurance-scheme-to-cast-its-net-\\_/files/view-update-in-pdf-format/fileattachment/sidley-china-update-september-2011.pdf](http://www.sidley.com/~media/files/news/2011/09/the-prc-social-insurance-scheme-to-cast-its-net-_/files/view-update-in-pdf-format/fileattachment/sidley-china-update-september-2011.pdf) [perma.cc/TP7L-H6PV].

<sup>52</sup> *Essential Change of Social Security Rules in Dalian*, DELOITTE GLOBAL SERVICES: GLOBAL INSIGHT (Nov. 11, 2011), [http://newsletters.usdbriefs.com/2011/Tax/GIS/al11111\\_3.pdf](http://newsletters.usdbriefs.com/2011/Tax/GIS/al11111_3.pdf) [perma.cc/E2NE-69MA].

<sup>53</sup> See Lingfang Fayol-Song, *Reasons Behind Management Localization in MNCs in China*, in INTERNATIONAL BUSINESS IN CHINA: UNDERSTANDING THE GLOBAL ECONOMIC CRISIS 58, 65 (Robert Taylor ed., 2012); Charlotte Beugge, *Want a Taste of the High Life? Head East . . .*, TELEGRAPH (Nov. 6, 2014), <http://www.telegraph.co.uk/finance/personalfinance/expat-money/11207545/Want-a-taste-of-the-high-life-Head-east.html> [perma.cc/Ry8H-WNFR].

<sup>54</sup> See Bingqin Li, *China's Hukou Reform a Small Step in the Right Direction*, EAST ASIA F. (Jan. 13, 2015), <http://www.eastasiaforum.org/2015/01/13/chinas-hukou-reform-a-small-step-in-the-right-direction/> [perma.cc/EKV9-FG5F]; *Recent Chinese Hukou Reform*, U.S. CONG.-EXEC. COMM'N ON CHINA, <http://www.cecc.gov/recent-chinese-hukou-reforms> [perma.cc/AV4F-5QWJ] (last visited Feb. 11, 2016); Grace Yang, *Social Insurance for China Expats. It Depends*, CHINA L. BLOG (Sept. 17, 2014), <http://www.chinalawblog.com/2014/09/social-insurance-for-china-expats-it-depends.html> [perma.cc/N9RG-FXAN].

<sup>55</sup> See Li, *supra* note 54; Yang, *supra* note 54.

<sup>56</sup> See generally SIL, *supra* note 11 (noting the absence of a description of treatment of foreign workers in dual contribution systems in both the SIL and the Interim Measures).

<sup>57</sup> See Edward J. Epstein, *China's Foreign Worker Social Security Rules Are in Force—What's Next?*, TROUTMAN SANDERS: NEWS & KNOWLEDGE (Nov. 1, 2011), <http://www.troutmansanders.com/chinas-foreign-worker-social-security-rules-are-in-force--whats-next-11-01-2011/> [perma.cc/Y6JM-3X3T]; Russell Flannery, *New China Tax on Foreigners to Raise Up to \$10,500 Per Head Annually*, FORBES (Sept. 19, 2011, 10:45 AM), <http://www.forbes.com/sites/russellflannery/2011/09/19/new-china-tax-on-foreigners-to-raise-up-to-10500-per-head-annually-2/#658d168a7d38> [perma.cc/WME8-W7FN]; *Recent Changes to China Individual Income Tax and Social Insurance Laws*, GLOB. TAX NETWORK NEWSL. (Oct. 2011), [http://www.gtn.com/newsletter\\_2011\\_10.php](http://www.gtn.com/newsletter_2011_10.php) [perma.cc/J6GN-KK45]; *U.S. Taxation of Americans Abroad*, KPMG 39–41 (Jan. 2015), <https://www.kpmg>.

often guarantees that the assignment will not result in a reduction of the employee's after-tax income.<sup>58</sup> In this regard, tax equalization ensures that overseas assignment is tax neutral to the expatriate employee; therefore, employers typically agree to pay both the employer's and employee's share of host country Social Security taxes.<sup>59</sup> Under the SIL, employers' tax neutralization obligations will result in an additional financial burden.<sup>60</sup>

In sum, the implementation and coverage issues surrounding the SIL are a disincentive for foreign workers to accept assignments in China.<sup>61</sup> In the aggregate, this generates disincentives for companies to expand operations to China.<sup>62</sup> For Chinese companies seeking a competitive advantage in foreign markets, these issues tend to denigrate the Chinese companies' capacity to recruit foreign talent, which may be necessary to compete outside China.<sup>63</sup>

## II. DISCUSSION

Compulsory enrollment of expatriate employees in PRC social insurance programs under the Interim Measures, if strictly enforced, will decrease expatriate employees' take-home earnings and increase labor costs for companies that employ them.<sup>64</sup> Although concern over increased labor costs is understandable, mandatory enrollment of expatriates in social insurance programs is standard practice in many countries.<sup>65</sup> For example, U.S. law pro-

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com/US/en/IssuesAndInsights/ArticlesPublications/Documents/us-taxation-of-americans-abroad-2015.pdf [perma.cc/KG62-9BPW].

<sup>58</sup> See Tim Lenneman, *Tax Advice*, EXPAT EXCH. (July 15, 2002), <http://www.expatschange.com/lib.cfm?articleID=718> [perma.cc/DJH7-GYEE]; Thomas H. Wilson, *Practice Note: Best Practices for Transferring US Employees Overseas*, PRACTICAL L. CTR. 76 (Mar. 2010), <http://us.practicallaw.com/5-500-6179> [perma.cc/6AFQ-57YJ]. While the expatriate employee is on foreign assignment, the employee will pay approximately the same amount of income and social security taxes as he or she would have had the employee remained in his or her home country, and the employer pays any taxes that exceed that amount. Lenneman, *supra*.

<sup>59</sup> Lenneman, *supra* note 58; see Mary Lou Stockton, *What Is Hypothetical Tax?*, GLOB. TAX NETWORK NEWSL. (Sept. 2010), [http://www.gtn.com/newsletter\\_2010\\_09.php](http://www.gtn.com/newsletter_2010_09.php) [perma.cc/M4MQ-HK6P].

<sup>60</sup> Epstein, *supra* note 57.

<sup>61</sup> See *infra* notes 117–127.

<sup>62</sup> See *infra* notes 129–146.

<sup>63</sup> See *infra* notes 163–174.

<sup>64</sup> See Shan Juan, Li Jing & Peng Yining, *Social Security Set to Cover Foreign Workers*, CHINA DAILY (June 30, 2011), [http://usa.chinadaily.com.cn/epaper/2011-06/30/content\\_12808368.htm](http://usa.chinadaily.com.cn/epaper/2011-06/30/content_12808368.htm) [perma.cc/5249-6YRK]; Eunice Ku & Shirley Zhang, *Social Insurance in China*, CHINA BRIEFING 9–10 (Nov. 2013), <http://www.francisclark.co.uk/files/documents/original/140204153706-SocialInsuranceinChinadigital.pdf> [perma.cc/J88H-4VRR] (“Currently, [the compulsory enrollment of expatriate employees] has been at least partially implemented in 25 major cities including Beijing, Chengdu, Qingdao, Suzhou, Wuhan and Tianjin.”).

<sup>65</sup> See, e.g., *Aliens Employed in the U.S.—Social Security Taxes*, U.S. INTERNAL REVENUE SERV., <https://www.irs.gov/Individuals/International-Taxpayers/Aliens-Employed-in-the-U.S.-Social-Security-Taxes> [perma.cc/MH49-PDFW] (last updated Dec. 2, 2015) [hereinafter *Aliens Employed in*

vides compulsory social security coverage for services performed by an employee in the United States, regardless of the citizenship or country of residence of the employee or employer and irrespective of the length of time the employee stays in the United States.<sup>66</sup> Similarly, in Japan, full-time employees working for a company with more than five employees are automatically enrolled in the Employees' Pension Insurance system, regardless of whether they are Japanese citizens or expatriates.<sup>67</sup> Additionally, effective July 2015, expatriates who work in Indonesia for more than six months are required to enroll in its social security programs, regardless of whether the employees maintain home-country coverage.<sup>68</sup>

Despite the mandatory enrollments, countries like the United States and Japan have established a broad network of social security agreements over time, which coordinate their respective national social security programs.<sup>69</sup> Since the late 1970s, the United States has signed bilateral social security agreements with totalization provisions (Agreements) with twenty-four countries.<sup>70</sup> Similarly, Japan has entered into Agreements with fourteen coun-

the U.S.]; *Employee's Health Insurance System and Employee's Pension Insurance System*, JAPAN PENSION SERV., <http://www.nenkin.go.jp/international/english/healthinsurance/employee.html> [perma.cc/3FMQ-4PL4] (last updated Aug. 19, 2015); *Indonesian Social Security System Changes Require Expatriate Participation*, ERNST & YOUNG: HR AND TAX ALERT (Dec. 2014), <http://www.ey.com/GL/en/Services/Tax/Human-Capital/HC-Alert--Indonesian-Social-Security-System-changes-require-expatriate-participation> [perma.cc/L725-99S6].

<sup>66</sup> See *Aliens Employed in the U.S.*, *supra* note 65; Michiko Saito, *Applications for Extension Under U.S.-Japan Social Security Agreement*, KPMG (2010), <http://www.kpmg.com/us/en/industry/japanese-practice/pages/2010-issue3-article1.aspx> [perma.cc/F9FD-UA4X].

<sup>67</sup> See *Healthcare and Social Security in Japan*, INTERNATIONS, <http://www.internations.org/japan-expats/guide/working-in-japan-15339/healthcare-and-social-security-in-japan-2> [perma.cc/ZA4M-3DH2] (last visited Feb. 11, 2016); JAPAN PENSION SERVICE, *supra* note 65. Monthly contributions depend on one's income level and are automatically deducted from one's paycheck. *Healthcare and Social Security in Japan*, *supra*. Once an expatriate leaves Japan, he or she may get back all Japanese pension contributions in a lump-sum withdrawal, provided he or she has paid them for more than six months. *Id.*

<sup>68</sup> See *Indonesian Social Security System Changes Require Expatriate Participation*, *supra* note 65.

<sup>69</sup> See, e.g., Eduoard Berthier, *Pensions for Expats in Japan*, EXPAT BRIEFING (Mar. 2014), <http://www.expatriebriefing.com/country/japan/financial/pensions-for-expats-in-japan.html> [perma.cc/3ZTQ-K3WM]; Rufus V. Rhoades & Alexey Manasuev, *Practical Tax Considerations Relevant to U.S. Totalization Agreements*, LEXISNEXIS L. NEWSROOM (July 6, 2012, 10:41 AM), <http://www.lexisnexis.com/legalnewsroom/tax-law/b/stateandlocaltaxation/archive/2012/07/06/practical-tax-considerations-relevant-to-u-s-totalization-agreements.aspx> [perma.cc/9HJ4-JTDB]. The Japan-U.S. agreement allows employees working in the host country for five years or less to participate in their home social security system. Saito, *supra* note 66. They will not be required to enroll in the host country's social security system. *Id.*

<sup>70</sup> Rhoades & Manasuev, *supra* note 69. Countries include: Italy, Germany, Switzerland, Belgium, Norway, Canada, the United Kingdom, Sweden, Spain, France, Portugal, the Netherlands, Austria, Finland, Ireland, Luxembourg, Greece, South Korea, Chile, Australia, Japan, Denmark, Czech Republic, and Poland. *Id.*

tries.<sup>71</sup> In contrast, since 2001, China has entered into Agreements with only six countries.<sup>72</sup> Recently, however, many countries have begun negotiations with the PRC government to create similar Agreements with China.<sup>73</sup>

### A. U.S. Bilateral Social Security Agreements

Generally, U.S. Agreements are intended to reduce uncertainties for American expatriates working abroad, for U.S. companies employing American citizens abroad, and for foreign workers working in the United States.<sup>74</sup> To meet these goals, U.S. Agreements broadly serve three purposes.<sup>75</sup> First, they ensure that an individual on an international assignment will not pay social security tax both in their home country and in the host country.<sup>76</sup> Thus, Agreements have the effect of assigning the right to impose social security tax to only one of those two countries.<sup>77</sup> Second, the Agreements provide benefit protection to expatriate employees who have divided their careers between the United States and a foreign country, but lack enough coverage under either social security system to qualify for benefits, despite having paid taxes into both systems.<sup>78</sup> U.S. Agreements include totalization provisions to

<sup>71</sup> Berthier, *supra* note 69. Countries include: Australia, Belgium, Brazil, Canada, Czech Republic, France, Germany, Ireland, the Netherlands, South Korea, Spain, Switzerland, the United Kingdom, and the United States. *Id.*

<sup>72</sup> See Yu, *supra* note 36; see, e.g., China-Germany Social Insurance Agreement, *supra* note 36; China-South Korea Sign Social Insurance Contribution Agreement and Protocol, *supra* note 36; Ministry of Social Affairs, Children and Integration Signs Bilateral Social Security Agreement, *supra* note 36.

<sup>73</sup> See *Bilateral Deals Under Way For Expats' Social Security*, SHENZHEN DAILY (Mar. 8, 2012), [http://szdaily.sznews.com/html/2012-03/08/content\\_1954832.htm](http://szdaily.sznews.com/html/2012-03/08/content_1954832.htm) [perma.cc/GHQ5-LU27]; *Social Security for 54% of Expats*, *supra* note 32; *Social Security in China*, INTERNATIONALS, <http://www.internations.org/china-expats/guide/working-in-china-15406/social-security-in-china-3> [perma.cc/9HWM-YEV4] (last visited Feb. 11, 2016).

<sup>74</sup> See Paul Butcher & Joseph Erdos, U.S. Soc. Sec. Admin., *International Social Security Agreements: The U.S. Experience*, 51 SOC. SEC. BULL. 9, 4 (1988), <https://ssa.gov/policy/docs/ssb/v51n9/v51n9p4.pdf> [perma.cc/N879-GTE8]; *What Is "Totalization"?*, U.S. DEP'T OF STATE, <http://photos.state.gov/libraries/krakow/10474/pdfs/totalization-website.pdf> [perma.cc/KX54-63LH] (last visited Feb. 11, 2016).

<sup>75</sup> See Butcher & Erdos, *supra* note 74; *What Is "Totalization"?*, *supra* note 74.

<sup>76</sup> See Butcher & Erdos, *supra* note 74; *Social Security Tax Consequences of Working Abroad*, U.S. INTERNAL REVENUE SERV., <http://www.irs.gov/Individuals/International-Taxpayers/Social-Security-Tax-Consequences-of-Working-Abroad> [perma.cc/JB5U-2ARB] (last updated Sept. 2, 2015).

<sup>77</sup> 20 C.F.R. § 404.1913(b)(1) (2015); see *U.S. International Social Security Agreements*, SOC. SEC. ADMIN., [http://www.ssa.gov/international/agreements\\_overview.html](http://www.ssa.gov/international/agreements_overview.html) [perma.cc/LV4Z-6G47] (last visited Feb. 11, 2016) ("[T]o qualify for benefits under the U.S. Social Security program, a worker must have earned enough work credits . . . to meet specified 'insured status requirements.'").

<sup>78</sup> See Robert Holzmann, Johannes Koettl & Taras Chernetsky, *Portability Regimes of Pension and Health Care Benefits for International Migrants: An Analysis of Issues and Good Practices* 22 (World Bank Social Protection Discussion Paper Series No. 0519, May 2005), <http://site.resources.worldbank.org/SOCIALPROTECTION/Resources/0519.pdf> [perma.cc/7M4Y-795B]; see,

allow such expatriates to combine work credits earned in both countries in order to meet minimum benefit qualification requirements.<sup>79</sup> Third, most Agreements remove the rules that suspend benefits to noncitizens living outside of the benefit-paying country, which improves the portability of social security benefits.<sup>80</sup>

Collection authority of social security contributions is based on the source of income (or employment), meaning that the country where the worker is employed has the primary right to tax.<sup>81</sup> Thus, as a default rule, a foreign expatriate who is working in the United States would contribute to the U.S. social security system and an American expatriate working in a foreign country would contribute to that country's social security system.<sup>82</sup> Agreements do, however, provide exceptions to the source rule.<sup>83</sup> One such exception is the detached worker exception.<sup>84</sup> Under this exception, an employee who is working abroad for no more than five years may be exempt from paying into the social security system of the host country.<sup>85</sup> In this regard, the detached worker exception illustrates that without an Agreement in place, workers may be required to make social security contributions, even if they are only working temporarily in the host country and have no desire to remain within the country after retirement.<sup>86</sup>

Additionally, as U.S. Agreements allow for totalization, workers can combine periods during which they made contributions to more than one country for the purposes of establishing entitlement to benefits and determining the amount of those benefits.<sup>87</sup> Under an Agreement, such workers may qualify for benefits in the country of their choice based on combined work credits from both countries.<sup>88</sup> In order to qualify for benefits in the United

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e.g., Tim Worstall, *The India, US Totalisation Agreement; Difficult to Argue Against Really*, FORBES (Nov. 24, 2014), <http://www.forbes.com/sites/timworstall/2014/11/24/the-india-us-totalisation-agreement-difficult-to-argue-against-really/#14d92f0a4e27> [perma.cc/32EZ-ERUB].

<sup>79</sup> 42 U.S.C. § 433(c)(1)(A) (2012) (detailing the requirements necessary to allow workers to combine their periods of work for the purpose of social security).

<sup>80</sup> See Holzmann et al., *supra* note 78, at 16, 22–23.

<sup>81</sup> Allison Christians, *Taxing the Global Worker: Three Spheres of International Social Security Coordination*, 26 VA. TAX REV. 81, 94 (2006).

<sup>82</sup> *Id.* at 95; see Lisa Vora, *Focus for Employers with Workers Abroad Shifts from Income Taxes to Social Taxes*, GRANT THORNTON LLP: COMP. & BENEFITS BULL. (June 2011), [http://www.grantthornton.com/staticfiles/GTCom/Tax/CBB%20files/GrantThornton\\_CBBulletin\\_11June.htm](http://www.grantthornton.com/staticfiles/GTCom/Tax/CBB%20files/GrantThornton_CBBulletin_11June.htm) [perma.cc/KC8E-GXLX].

<sup>83</sup> Ernest R. Larkins, *Social Security Strategies for U.S. Employees Working Abroad*, 2 J. INT'L TAX'N 220, 222 (1991).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See Christians, *supra* note 81, at 96–97.

<sup>87</sup> 42 U.S.C. § 433(c)(1)(A) (2012); see Christians, *supra* note 81, at 103.

<sup>88</sup> See Christians, *supra* note 81, at 103.

States, the individual must have at least six quarters<sup>89</sup> of coverage under the U.S. social security system.<sup>90</sup> Credits accumulated in a foreign country are not transferred directly to the U.S. system.<sup>91</sup> They will, however, be used to meet the forty quarters required to receive coverage in the United States.<sup>92</sup> The sum of benefits received will be proportional to the contributions made in the United States, not to the employee's total contributions.<sup>93</sup> The foreign jurisdiction may also provide the individual benefits based on credit accumulated in that country.<sup>94</sup> Additionally, benefits are only combined if the individual would not otherwise be covered under either system.<sup>95</sup> Finally, if an individual qualifies for full benefits in both countries, U.S. benefits may be reduced by the amount of foreign benefits received.<sup>96</sup>

### B. PRC Bilateral Social Insurance Agreements

The PRC Agreements share some similarities with U.S. Agreements.<sup>97</sup> In general, PRC Agreements serve a similar purpose: to ensure that an individual on an international assignment will not be subject to dual social security contributions.<sup>98</sup> Additionally, PRC Agreements use the detached worker exception to the source rule.<sup>99</sup> Under the exception, a temporarily detached worker is exempt from certain legislation of the host country if he or she is

<sup>89</sup> See 42 U.S.C. § 413(a)(1) (2012) (“The term ‘quarter’ . . . mean[s] a period of three calendar months ending on March 31, June 30, September 30, or December 31.”).

<sup>90</sup> 42 U.S.C. § 433(c)(1)(A).

<sup>91</sup> See Christians, *supra* note 81, at 104 (“Credits are not transferred from the foreign country to the United States, but remain on record in the foreign country, where the worker may also receive a partial benefit.”).

<sup>92</sup> *Id.* at 103 (explaining that only under certain circumstances are foreign credits allowed to be transferred or combined, such as when an individual would not have enough credits to qualify for benefits under one system).

<sup>93</sup> *Id.* at 104.

<sup>94</sup> See, e.g., *Social Security Tax Information for Foreign Scholars, Workers, and Exchange Visitors*, UNIV. CORP. FOR ATMOSPHERIC RESEARCH HUM. RES., <http://www.fin.ucar.edu/hr/visitors/manual/taxinfo2.html> [perma.cc/BQS5-XUGS] (last visited Feb. 11, 2016) (“That is, a foreign individual may be entitled to a foreign tax credit for the U.S. [Federal Insurance Contributions Act] tax under the income tax laws of his/her home country.”).

<sup>95</sup> See, e.g., *Georgiou v. Apfel*, No. 99-1886, 2000 WL 1694065, at \*2 (8th Cir. Nov. 14, 2000) (holding that because a retiree qualified for benefits under the U.S. system, he was not eligible to combine his work credits from the United States and Greece).

<sup>96</sup> See Christians, *supra* note 81, at 104; see, e.g., *Vanlerbergh v. Apfel*, 82 F. Supp. 2d 1212, 1213 (D. Kan. 2000) (finding plaintiff's benefits were properly reduced due to her receipt of foreign benefits).

<sup>97</sup> See *infra* notes 98–99.

<sup>98</sup> See, e.g., *Main Contents of the Social Security Agreements Between Korea and China*, KOREA NAT'L PENSION SERV., [http://www.nps.or.kr/jsp/page/english/agreement/agreement\\_02\\_05\\_01.jsp](http://www.nps.or.kr/jsp/page/english/agreement/agreement_02_05_01.jsp) [perma.cc/8923-7GUJ] (last visited Feb. 11, 2016).

<sup>99</sup> See, e.g., *id.*; *Sino-Danish Agreement on Social Insurance Exemptions Comes into Force*, BAKER & MCKENZIE: CHINA EMP'T L. UPDATE (Aug. 2014), <http://bakerexchange.com/cv/c8244a45d4ac31a70aa99ee0b1c021be4739a148/p=2784441> [perma.cc/MR3Y-UKEQ].

covered under the legislation of his or her home country.<sup>100</sup> For example, a South Korean expatriate working in China for no more than five years is exempt from contributing to the PRC pension system if he or she is covered by the Korean National Pension Scheme.<sup>101</sup> Similarly, a Danish expatriate working in China for less than three years is exempt from contributing to the PRC pension scheme.<sup>102</sup>

Despite the similarities, there are key differences between the two countries' Agreements.<sup>103</sup> First, PRC Agreements are contribution-only agreements and thus do not include a totalization provision.<sup>104</sup> Moreover, PRC Agreements provide only piecemeal exemptions from the SIL.<sup>105</sup> For example, under the PRC-Germany Agreement, a German expatriate is only exempt from the PRC pension and unemployment insurance systems.<sup>106</sup> Similarly, the PRC-South Korea and the PRC-Denmark Agreements only apply to pension systems, and thus South Korean and Danish expatriates are only exempt from contributions to the PRC pension system.<sup>107</sup> Therefore, German, South Korean, and Danish expatriates must still enroll in the other PRC social insurance programs not covered by the respective Agreements.<sup>108</sup>

### III. ANALYSIS

China should establish Agreements with more countries because the Agreements are beneficial not only for foreign expatriates and foreign companies with operations in China, but also for the PRC government, for Chinese companies with employees outside China, and for PRC nationals work-

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<sup>100</sup> See, e.g., *Main Contents of the Social Security Agreements Between Korea and China*, *supra* note 98; *Sino-Danish Agreement on Social Insurance Exemptions Comes into Force*, *supra* note 99.

<sup>101</sup> *Main Contents of the Social Security Agreements Between Korea and China*, *supra* note 98.

<sup>102</sup> *Sino-Danish Agreement on Social Insurance Exemptions Comes into Force*, *supra* note 99.

<sup>103</sup> See *infra* notes 104–108.

<sup>104</sup> See, e.g., *Main Contents of the Social Security Agreements Between Korea and China*, *supra* note 98. In other words, PRC Agreements do not allow expatriates to combine work credits earned in both countries to meet minimum benefit qualification requirements in a social security scheme. See *id.*

<sup>105</sup> See, e.g., *Sino-Danish Agreement on Social Insurance Exemptions Comes into Force*, *supra* note 99.

<sup>106</sup> See *Update—The PRC National Social Security Law and How It Impacts Foreign/Overseas Workers*, ASIANET CONSULTANTS: KNOWLEDGE, <http://www.asianetconsultants.com/knowledge-CSSupdate.html> [perma.cc/7PYX-M4ZM] (last visited Feb. 11, 2016).

<sup>107</sup> See *Main Contents of the Social Security Agreements Between Korea and China*, *supra* note 98; *Sino-Danish Agreement on Social Insurance Exemptions Comes into Force*, *supra* note 99.

<sup>108</sup> See, e.g., *Sino-Danish Agreement on Social Insurance Exemptions Comes into Force*, *supra* note 99.



ing abroad.<sup>109</sup> Agreements are beneficial because they protect the legitimate rights and interests of expatriates, maintain fair and impartial social security benefits, promote economic development and flow of talent, and foster diplomatic relations between countries.<sup>110</sup>

Additionally, China should modify its existing and future Agreements to include a totalization provision.<sup>111</sup> Totalization provisions are crucial because they assure continuity of benefit protection for employees who have acquired credits under their home country's social security system.<sup>112</sup> With a totalization provision, when an expatriate becomes eligible for benefits under one of the two social security programs—whether at the time of retirement or disability—the employee will receive full credit for the payments he or she made into the systems of both countries.<sup>113</sup> In this regard, totalization assures a worker is not disadvantaged by working abroad.<sup>114</sup>

### A. Expatriates in China

Agreements benefit expatriates currently working in China by eliminating the obligation to make dual social security contributions.<sup>115</sup> For example, in Beijing, a foreign expatriate is required to pay up to approximately 10% of

<sup>109</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-03-993, PROPOSED TOTALIZATION AGREEMENT WITH MEXICO PRESENTS UNIQUE CHALLENGES 16 (2003).

<sup>110</sup> See *id.*; U.S. Social Security Totalization Agreements and the Proposed U.S.-Danish Agreement, AM. CHAMBER OF COM. IN DEN. 1, [http://amcham.dk/dl/po/Totalization Agreement FAQs.pdf](http://amcham.dk/dl/po/Totalization%20Agreement%20FAQs.pdf) [perma.cc/34XT-FJNF] (last visited Feb. 11, 2016); see, e.g., *Canada and the Republic of Latvia Sign Social Security Agreement*, PR NEWSWIRE (June 29, 2005), <http://www.prnewswire.co.uk/news-releases/canada-and-the-republic-of-latvia-sign-social-security-agreement-154666405.html> [perma.cc/6YDJ-KNQZ]; *Social Security Agreement Between Canada and the Republic of Serbia—Agreement Comes into Force December 1, 2014*, CNW (Dec. 1, 2014), <http://www.newswire.ca/en/story/1456061/social-security-agreement-between-canada-and-the-republic-of-serbia-agreement-comes-into-force-december-1-2014#> [perma.cc/HC7Z-SYFZ]. See generally David C. John & Stephen Johnson, *How a U.S. Social Security Agreement Can Benefit Both Nations*, HERITAGE F. (Jan. 16, 2003), <http://www.heritage.org/research/reports/2003/01/how-a-us-mexico> [perma.cc/DLQ5-EVJP] (stating that a totalization agreement could strengthen the economy and give expatriates the same opportunity they would have if they worked in their home country).

<sup>111</sup> See, e.g., *Main Contents of the Social Security Agreements Between Korea and China*, *supra* note 98. But see, e.g., SOC. SEC. ADMIN., PUBL'N NO. 05-10197, TOTALIZATION AGREEMENT WITH KOREA (Jan. 2004), [https://www.ssa.gov/international/Agreement\\_Pamphlets/korea.html](https://www.ssa.gov/international/Agreement_Pamphlets/korea.html) [perma.cc/UQJ7-BAM7].

<sup>112</sup> See Butcher & Erdos, *supra* note 74, at 4; Worstall, *supra* note 78.

<sup>113</sup> See Butcher & Erdos, *supra* note 74, at 5, 12.

<sup>114</sup> See *id.*

<sup>115</sup> See U.S. *International Social Security Agreements*, *supra* note 77; see also Stan Hinden, *What Happens to My Social Security Benefits if I Work Abroad?*, AARP (July 2014), <http://www.aarp.org/work/social-security/info-2014/work-abroad-retirement-benefits.html> [perma.cc/T5BL-GVL9]; Steven Weiser, *Understanding Social Security Tax, Totalization Agreements and Your Benefits*, SISKIND SUSSER PC (May 21, 2013), <http://www.visalaw.com/understanding-social-security-tax-totalization-agreements-and-your-benefits-by-steven-weiser/> [perma.cc/5456-BGA7].

his or her monthly income into the PRC social insurance fund.<sup>116</sup> Because the United States does not have an Agreement with China, a U.S. expatriate working in Beijing would be required to contribute to the U.S. social security program as well.<sup>117</sup> On the other hand, if China had an Agreement with the United States, American expatriates would not be required to pay into the PRC social insurance programs, provided they contribute to the U.S. social security system.<sup>118</sup>

Additionally, many expatriates in China would not benefit from the PRC social insurance programs.<sup>119</sup> Currently, only local PRC hospitals and clinics are covered under the mandatory medical insurance scheme into which expatriates must contribute.<sup>120</sup> Expatriates and their families, however, tend not to visit these hospitals; instead, they only visit hospitals and clinics that are set up for foreigners due to language issues and concerns over the quality of care.<sup>121</sup> Thus, in the absence of an Agreement, expatriates are required to pay into a medical insurance scheme that they likely would not use, and they would have to pay for additional health insurance coverage in order to receive medical care in China.<sup>122</sup> Agreements ensure that expatriates are not forced to pay into a social insurance program from which they might not benefit and allow them to maintain their home country's social security benefits, which

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<sup>116</sup> See Linda Liang, *How Do I Handle My Employees' Social Insurance Payments? The Beijing Perspective*, in CHINA L. & PRACTICE L. & EMP'T TOOLKIT 10, 11, [http://www.chinalawandpractice.com/assets/CLP\\_labour\\_toolkit\\_2015\\_1.pdf](http://www.chinalawandpractice.com/assets/CLP_labour_toolkit_2015_1.pdf) [perma.cc/2XPT-FF3M] (last visited Feb. 11, 2016) (chart illustrating employees' proportion of contribution); *Beijing Details Foreigners' Mandatory Social Insurance Participation*, *supra* note 49.

<sup>117</sup> See *US Expat Taxes Explained: Social Security*, GREENBACK EXPAT TAX SERVICES: EXPATRIATE TAX BLOG (July 4, 2012), <http://www.greenbacktaxservices.com/blog/us-expat-taxes-social-security/> [perma.cc/K39A-885U].

<sup>118</sup> See *Beijing Details Foreigners' Mandatory Social Insurance Participation*, *supra* note 49; *see, e.g.*, SOC. SEC. ADMIN., PUBL'N NO. 05-10518, TOTALIZATION AGREEMENT WITH DENMARK (Oct. 2008), [https://www.ssa.gov/international/Agreement\\_Pamphlets/denmark.html](https://www.ssa.gov/international/Agreement_Pamphlets/denmark.html) [perma.cc/9DTV-FEGR]; TOTALIZATION AGREEMENT WITH KOREA, *supra* note 111; SOC. SEC. ADMIN., PUBL'N NO. 05-10199, TOTALIZATION AGREEMENT WITH THE UNITED KINGDOM (May 2005), [https://www.ssa.gov/international/Agreement\\_Pamphlets/uk.html](https://www.ssa.gov/international/Agreement_Pamphlets/uk.html) [perma.cc/D7WQ-P2L4].

<sup>119</sup> See Harper, *Expat Social Insurance Tax*, *supra* note 32; *PRC Social Insurance for Non-Chinese National Employees*, *supra* note 37; *Social Security for 54% of Expats*, *supra* note 32; *What Expats Need to Know About China's Social Security*, *supra* note 37.

<sup>120</sup> See Juan et al., *supra* note 64; *What Expats Need to Know About China's Social Security*, *supra* note 37.

<sup>121</sup> See Pallot, *supra* note 38; *PRC Social Insurance for Non-Chinese National Employees*, *supra* note 37; *Shanghai Hospital Tips*, *supra* note 38; *see also* Carman & Carman, *supra* note 38.

<sup>122</sup> See Juan et al., *supra* note 64. *See generally* *Foreigners Remain Lukewarm to China's Social Security Scheme*, LOST LAOWAI (Dec. 16, 2013), <http://www.lostlaowai.com/news/foreigners-remain-lukewarm-chinas-social-security-scheme/> [perma.cc/V66P-WP2R] (quoting an interviewee who "gave up claiming for medical expenses after he realized the procedure was too complicated when he went to a hospital in Shanghai").

include coverage or partial reimbursement for visiting hospitals for foreigners.<sup>123</sup>

Moreover, for those expatriates who worked both in their home country and in China and are now retired or disabled, Agreements with totalization provisions could allow the payment of benefits to the worker or the worker's family that they would not otherwise receive.<sup>124</sup> In many countries, in order to collect pension at retirement, an employee must have contributed to the pension scheme of that country for a certain number of years.<sup>125</sup> In the absence of an Agreement, an expatriate who has worked in China but is now retired may not be able to collect pension from his home country because the years he worked abroad would not count towards pension eligibility.<sup>126</sup> Similarly, the same expatriate may also not be eligible to collect pension benefits from China for the same reason.<sup>127</sup> Agreements with a totalization provision ensure expatriates receive benefits by allowing them to combine all possible credits towards their home country's pension scheme regardless of where they work.<sup>128</sup>

### *B. Foreign Companies with Operations in China*

For foreign companies with operations in China, an Agreement with the PRC would favorably affect their profitability and competitive position by reducing the cost of doing business in China.<sup>129</sup> Foreign companies have long been the top choice for both China's local talent and for foreign expatriates because of the more competitive salaries, training, and travel opportunities.<sup>130</sup>

<sup>123</sup> See *U.S. International Social Security Agreements*, *supra* note 77.

<sup>124</sup> See Butcher & Erdos, *supra* note 74, at 12.

<sup>125</sup> See, e.g., SOC. SEC. ADMIN., PUBL'N NO. 05-10035, RETIREMENT BENEFITS (Jan. 2015), <http://www.socialsecurity.gov/pubs/EN-05-10035.pdf> [perma.cc/5UD6-T7EF] (describing the requirement of forty credits, or ten years, for United States pension or retirement benefits); *National Pension System*, JAPAN PENSION SERV., <https://www.nenkin.go.jp/international/english/nationalpension/nationalpension.html> [perma.cc/FV8D-FGSU] (last updated Mar. 31, 2015) ("To be qualified, your total coverage periods need to be 25 years or more.").

<sup>126</sup> See Holzmann et al., *supra* note 78, at 22.

<sup>127</sup> See New Social Security Rules for Expatriates in China, *supra* note 42.

<sup>128</sup> See 42 U.S.C. § 433(c)(1)(A) (2012); Butcher & Erdos, *supra* note 74, at 5; Christians, *supra* note 81, at 102–03.

<sup>129</sup> See, e.g., *Canada-Brazil Social Security Agreement Comes into Force*, GLOBALPOST (Aug. 1, 2014, 2:45 PM), <http://www.globalpost.com/dispatch/news/xinhua-news-agency/140801/canada-brazil-social-security-agreement-comes-force> [perma.cc/8QJ6-2SL3]; *NASSCOM Efforts Around Totalisation Agreements Directly Benefiting Indian Companies*, NASSCOM: GLOBAL TRADE DEVELOPMENT, <http://www.nasscom.in/nasscom-efforts-around-totalisation-agreements-directly-benefiting-indian-companies> [perma.cc/WE6K-THXB] (last visited Feb. 11, 2016).

<sup>130</sup> See Jan De Silva, *The War for Talent in China*, IVEY BUS. J. (Sept./Oct. 2012), <http://iveybusinessjournal.com/publication/the-war-for-talent-in-china/> [perma.cc/TGJ6-27H7]; *Top Chinese Talent Preferring Chinese Firms*, PARAGON RELOCATION (Sept. 26, 2012), <http://www.paragonrelocation.com/relocation-news/index.php/top-chinese-talent-preferring-chinese-firms/> [perma.cc/X8U4-5K8B].

Yet now, many foreign companies face fierce competition from domestic companies, especially PRC state-owned enterprises (SOEs), which offer more stability and, increasingly, competitive pay.<sup>131</sup> The belief that foreign companies create more career opportunities is no longer true.<sup>132</sup> In fact, many PRC firms are now global, multinational companies and offer similar, if not better, opportunities than foreign companies.<sup>133</sup>

Many experts connect China's current slowing economic growth rates with the overdevelopment of major capital projects and overprotection of SOEs.<sup>134</sup> Although those interrelations are beyond the scope of this Note, the lessons of SIL implementation appear to be exemplar of the issues experts believe contribute to slow growth.<sup>135</sup> SIL appears designed to protect Chinese companies and SOEs yet may actually harm these companies by inuring them too much from market forces.<sup>136</sup> Strong Chinese companies—whether state-owned or private—that can successfully compete for global talent will drive future economic expansion.<sup>137</sup> Yet the SIL, implemented in its current form, weakens the very companies China needs by placing them at a competitive disadvantage for non-Chinese talent.<sup>138</sup>

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<sup>131</sup> See Adam Jourdan, *US Companies Are Getting Squeezed Hard in China*, BUS. INSIDER (Feb. 28, 2013, 7:19 AM), <http://www.businessinsider.com/us-companies-in-china-facing-lower-profits-as-competition-stiffens-2013-2> [perma.cc/CKW7-BPV7]; *Top Chinese Talent Preferring Chinese Firms*, *supra* note 130.

<sup>132</sup> See, e.g., Angela Doland, *How China's Tech Giants Are Luring Big Hires from Western Companies*, ADVERT. AGE (Sept. 25, 2014), <http://adage.com/article/global-news/chinese-tech-giants-luring-big-global-hires/295133/> [perma.cc/CV6Y-9UT6].

<sup>133</sup> See Ruth Reader, *Why 3 Google Execs Have Left for Chinese Companies in a Year*, VENTUREBEAT (Aug. 14, 2014, 8:15 AM), <http://venturebeat.com/2014/08/14/why-3-google-execs-have-left-for-chinese-companies-in-a-year> [perma.cc/4CGX-FTMR]; *The Emergence of Chinese Multinational Corporations (MNCs): Local and Global Implications*, KPMG: CHINA 360, at 5 (2013), <http://www.kpmg.com/IM/en/IssuesAndInsights/ArticlesPublications/china-live/Documents/China-360-Issue13-201310-emergence-of-Chinese-MNCs-Local-and-global-implications.pdf> [perma.cc/G9KY-S3A4].

<sup>134</sup> See Ben Bland, *China Plans Shake-up of State-Owned Enterprises to Boost Growth*, FIN. TIMES (Sept. 13, 2015, 12:28 PM), <http://www.ft.com/intl/cms/s/0/af90924-5a01-11e5-9846-de406ccb37f2.html#axzz40C0PZFS> [perma.cc/2V7J-3XZG]; Clifton B. Parker, *China's Economy Would Benefit from Market Reforms*, *Stanford Scholars Say*, STANFORD REP. (July 13, 2015), <http://news.stanford.edu/news/2015/july/china-slowdown-experts-071315.html> [perma.cc/BZ2W-TT3K].

<sup>135</sup> See Bland, *supra* note 134; Jourdan, *supra* note 131; Parker, *supra* note 134.

<sup>136</sup> See Gwynn Guiford, *China's Latest Refusal to Fix Its State-Owned Companies Is Bad News for the Global Economy*, QUARTZ (Sept. 16, 2015), <http://qz.com/503160/chinas-latest-refusal-to-fix-its-state-owned-companies-is-bad-news-for-the-global-economy/> [perma.cc/RM6V-6RWU].

<sup>137</sup> See Joie Ma, *State-Owned Enterprises: Partners and Competitors*, CHINA BUS. REV. (Jan. 1, 2012), <http://www.chinabusinessreview.com/state-owned-enterprises-partners-and-competitors/> [perma.cc/PLU6-A2T3].

<sup>138</sup> See *infra* notes 174–177.

For foreign companies, this increased competition translates into higher costs and thus requires greater efforts to recruit and retain talent.<sup>139</sup> To remain competitive, foreign companies have had to negotiate better compensation to attract new talent and to keep their expatriate employees from leaving.<sup>140</sup> Additionally, foreign companies may have to negotiate a package that offers to pay portions of their expatriate employees' contributions to the PRC social insurance programs.<sup>141</sup> Under the SIL, foreign employers in Beijing are already required to contribute up to approximately 30% of an expatriate employee's monthly income.<sup>142</sup> Consequently, if these types of packages are offered to expatriate employees, then foreign companies may be liable to pay up to 40% of expatriate employees' income to the PRC social insurance programs.<sup>143</sup> These rising personnel costs are not insignificant and will likely lead to a decrease in profitability and possibly force foreign companies to reduce their foreign staffs in China.<sup>144</sup> Under an Agreement, however, foreign employers and expatriate employees would not be required to contribute to the PRC social insurance program.<sup>145</sup> As a result, foreign companies would be better able to manage and likely reduce their personnel costs, which is especially important in light of the increasing competitiveness of doing business in China.<sup>146</sup>

### C. Chinese Expatriates Working Abroad

Agreements also provide reciprocal benefits to Chinese expatriates working abroad.<sup>147</sup> In 1999, in an effort to promote Chinese investment

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<sup>139</sup> See Conrad Schmidt, *The Battle for China's Talent*, HARV. BUS. REV. (Mar. 2011), <https://hbr.org/2011/03/the-battle-for-chinas-talent> [perma.cc/5MCA-32Q5].

<sup>140</sup> See *id.*; see, e.g., Reader, *supra* note 133.

<sup>141</sup> See Lesli Ligorner, Gordon Feng & Mitchell Mosvick, *The New PRC Social Insurance Law and Expatriate Employees*, CHINA BUS. REV. (Jan. 1, 2012), <http://www.chinabusinessreview.com/the-new-prc-social-insurance-law-and-expatriate-employees/> [perma.cc/2BJM-M2YV].

<sup>142</sup> See Liang, *supra* note 116 (chart illustrating employers' proportion of contribution).

<sup>143</sup> See *id.*

<sup>144</sup> See Ken Moriyasu, *China's Dalian May Charge Foreign Residents Social Security Premiums*, NIKKEI ASIAN REV. (Aug. 27, 2014, 7:00 PM), <http://asia.nikkei.com/print/article/47336> [perma.cc/Y6LR-48D3].

<sup>145</sup> Interim Measures, *supra* note 23, art. 9; see, e.g., Ministry of Social Affairs, *Children and Integration Signs Bilateral Social Security Agreement*, *supra* note 36 ("Danish companies are exempt from paying the major part of social security contributions . . .").

<sup>146</sup> See Simon Zhang, *China's Rising Costs*, CHINA BUS. REV. (July 1, 2012), <http://www.chinabusinessreview.com/chinas-rising-costs/> [perma.cc/F5DA-2DTX]; see, e.g., Ministry of Social Affairs, *Children and Integration Signs Bilateral Social Security Agreement*, *supra* note 36 ("The agreement will have a positive effect on Danish companies in China as it will remove an economic burden.").

<sup>147</sup> See *A Tale of Two Expats*, *supra* note 5; see, e.g., U.S. Social Security Totalization Agreements and the Proposed U.S.-Danish Agreement, *supra* note 110, at 1.

abroad, the PRC government initiated the “Go Out Policy.”<sup>148</sup> Since the inception of the policy, the Chinese economy has made tremendous progress.<sup>149</sup> Overseas investment by Chinese companies has increased significantly, including by the Chinese SOEs.<sup>150</sup> According to the PRC Ministry of Commerce, by the end of 2011, approximately 18,000 private Chinese companies and SOEs had set up operations in 178 countries and regions around the world.<sup>151</sup> The rapid expansion of overseas investment has resulted in a rising number of Chinese expatriates working abroad.<sup>152</sup> In particular, these companies, including SOEs, have sent a large number of their Chinese employees overseas to gain international experience before promoting these employees to management positions.<sup>153</sup>

Concluding more bilateral social insurance agreements would maximize Chinese expatriates’ foreign take-home income by eliminating dual social security contributions.<sup>154</sup> In the absence of an Agreement, Chinese expatriates are required to make contributions to the social security funds of both China as well as the host country in which they work.<sup>155</sup> For example, because the United States does not have an Agreement with China, a Chinese expatriate working for either a private Chinese company or a SOE in the United States would be required to contribute to both the U.S. and PRC social security pro-

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<sup>148</sup> *China’s “Going Out” Strategy: Increasing Overseas Expansion*, PINKERTON: BLOG (July 21, 2014), <http://www.pinkerton.com/blog/china-going-out-strategy> [perma.cc/5Z7G-W3VQ].

<sup>149</sup> *Id.*

<sup>150</sup> See Allen T. Cheng, *Chinese Companies Are the New Force in Global M&A*, INSTITUTIONAL INV. (Aug. 28, 2014), <http://www.institutionalinvestor.com/Article/3374735/banking-and-capital-markets-emerging-markets/chinese-companies-are-the-new-force-in-global-m-a.html#VODKvbB4oRwZ> [perma.cc/EFE9-YMEX]; Bob Davis, *China’s Investments Prompt Call for New Rules*, WALL ST. J. (Jan. 6, 2013), <http://www.wsj.com/articles/SB10001424127887323706704578225491466912844> [perma.cc/FUL3-L7GE]; Zijing Wu & Jonathan Browning, *Lenovo Heeds Jiang’s ‘Go Out’ Call in Second China M&A Wave*, BLOOMBERG BUS. (Mar. 26, 2014, 3:19 AM), <http://www.bloomberg.com/news/articles/2014-03-25/lenovo-heeding-jiang-s-go-out-call-in-second-china-wave-of-m-a> [perma.cc/86TP-6QSY].

<sup>151</sup> *Iceland Deal Shows Chinese Companies “Going Global” an Unstoppable Trend*, CHINA MINISTRY OF COM. (Sept. 20, 2012), <http://english.mofcom.gov.cn/article/counselorsreport/asia-report/201209/20120908348926.shtml> [perma.cc/LMM2-3A4V].

<sup>152</sup> See Bao Chang, *Regulation Protects Overseas Workers’ Rights*, CHINA DAILY (July 31, 2012), [http://usa.chinadaily.com.cn/business/2012-07/31/content\\_15633543.htm](http://usa.chinadaily.com.cn/business/2012-07/31/content_15633543.htm) [perma.cc/UQP3-JYKB] (“[A]s Chinese enterprises expand more quickly overseas[,] . . . an increasing number of workers are sent abroad.”); Jacob Zenn, *Chinese, Overseas and Insecure*, ASIA TIMES (Sept. 6, 2012), <http://www.atimes.com/atimes/China/NI06Ad02.html> [perma.cc/745H-C99Y] (“Officially, China sends about five million workers and 350,000 students abroad each year . . .”).

<sup>153</sup> See *A Tale of Two Expats*, *supra* note 5; *China’s Emerging Trends*, GLOB. BUS. NEWS, <http://www.globalbusinessnews.net/story.asp?sid=736> [perma.cc/XD2X-VSU8] (last visited Feb. 11, 2016); see also Fang Lee Cooke, *Talent Management in China*, in *GLOB. TALENT MGMT.* 132, 143 (Hugh Scullion & David G. Colling eds., 2011).

<sup>154</sup> See *A Tale of Two Expats*, *supra* note 5.

<sup>155</sup> See *id.*

grams.<sup>156</sup> On the other hand, if China had an Agreement with the United States, Chinese expatriates working in the United States would not be required to pay U.S. social security taxes.<sup>157</sup>

Additionally, Agreements with a totalization provision would allow Chinese expatriates to move between China and the host country knowing that their rights to social security benefits are recognized and protected in both countries.<sup>158</sup> Most Chinese expatriates working for Chinese companies and SOEs are sent abroad on temporary assignments and intend to return to China after a few years.<sup>159</sup> Under the SIL, in order to receive pension benefits, an individual must have contributed for at least fifteen years by the time that he or she reaches retirement age.<sup>160</sup> Without totalization, Chinese expatriates' contributions into host countries' pension schemes cannot be combined with their existing PRC contributions to qualify for either country's pension eligibility requirement.<sup>161</sup> In contrast, totalization would allow Chinese expatriates to combine all of their credits towards the PRC pension program, regardless of the location of their work assignment.<sup>162</sup>

#### D. Government of the PRC

Finally, Agreements would bring economic benefits to China by promoting economic development and flow of talent.<sup>163</sup> In the last few years, in an effort to increase the education level of China's work force and to develop an innovation economy, the PRC government has been actively recruiting top

<sup>156</sup> See *Aliens Employed in the U.S.*, *supra* note 65.

<sup>157</sup> See, e.g., TOTALIZATION AGREEMENT WITH DENMARK, *supra* note 118; TOTALIZATION AGREEMENT WITH KOREA, *supra* note 111; TOTALIZATION AGREEMENT WITH THE UNITED KINGDOM, *supra* note 118.

<sup>158</sup> See, e.g., TOTALIZATION AGREEMENT WITH DENMARK, *supra* note 118; TOTALIZATION AGREEMENT WITH KOREA, *supra* note 111; TOTALIZATION AGREEMENT WITH THE UNITED KINGDOM, *supra* note 118.

<sup>159</sup> See *China's Emerging Trends*, *supra* note 153 (stating that Chinese companies are "sending executives abroad to gain global exposure and bring back advanced management skills"); Sara Miller Llana et al., *Reverse Brain Drain: Economic Shifts Lure Migrants Home*, CHRISTIAN SCI. MONITOR (Oct. 21, 2012), <http://www.csmonitor.com/World/Global-Issues/2012/1021/Reverse-brain-drain-Economic-shifts-lure-migrants-home> [perma.cc/5F3F-QEUL].

<sup>160</sup> SIL, *supra* note 11, art. 16.

<sup>161</sup> See, e.g., *Social Security Agreement: Objectives*, KOREA NAT'L PENSION SERV., [http://www.nps.or.kr/jsppage/english/agreement/agreement\\_01\\_01.jsp](http://www.nps.or.kr/jsppage/english/agreement/agreement_01_01.jsp) [perma.cc/SR5K-NPV7] (last visited Feb. 11, 2016) ("Without totalization of the periods, [expatriates] may not acquire benefit eligibility under one country's pension system, as a result of an insufficient period of coverage.").

<sup>162</sup> See, e.g., TOTALIZATION AGREEMENT WITH DENMARK, *supra* note 118; TOTALIZATION AGREEMENT WITH KOREA, *supra* note 111; TOTALIZATION AGREEMENT WITH THE UNITED KINGDOM, *supra* note 118.

<sup>163</sup> See, e.g., *France-China Joint Fact Sheet on 2nd High Level Economic and Financial Dialogue*, FR. MINISTRY FOR ECON. & FIN. (2014), [http://www.economie.gouv.fr/files/files/PDF/2014\\_0915\\_china\\_france\\_fact\\_sheet.pdf](http://www.economie.gouv.fr/files/files/PDF/2014_0915_china_france_fact_sheet.pdf) [perma.cc/3NSV-7C36]. See generally John & Johnson, *supra* note 110 (stating that a totalization agreement could strengthen the economy).

talent from around the world.<sup>164</sup> Although China is still considered one of the most desirable locations for foreign expatriates, one study has indicated that twice as many expatriates left China than entered the country in 2014.<sup>165</sup> Factors like soaring levels of air pollution and rising costs of living have contributed to the gradual increase in the number of expatriates exiting China.<sup>166</sup> Compulsory enrollment in the PRC social insurance programs, which results in lower take-home salaries for expatriates, coupled with existing problems in China will not only push current expatriates out the door but also will likely deter qualified foreign workers from moving to China in the future.<sup>167</sup> With an Agreement, expatriates would be exempt from making dual social security contributions, which would maximize their take-home salary.<sup>168</sup> Additionally, totalization would make foreign expatriates feel more comfortable knowing that their rights to social security benefits are not disadvantaged simply because they have worked in two different countries.<sup>169</sup>

Agreements would help China achieve its goal of revitalizing its economy, which is particularly relevant in light of the recent slowdown in China's economic growth.<sup>170</sup> Global talent is key for Chinese economic growth.<sup>171</sup>

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<sup>164</sup> See *China Aims to Draw More Overseas Talents: Official*, XINHUA (Apr. 9, 2014), [http://news.xinhuanet.com/english/china/2014-04/09/c\\_133249601.htm](http://news.xinhuanet.com/english/china/2014-04/09/c_133249601.htm) [perma.cc/X4WE-8CV7]; Amanda Vermeulen, *Expats in Top Demand for Chinese State-Owned Enterprises*, EFINANCIALCAREERS (Jan. 6, 2014), <http://news.efinancialcareers.com/uk-en/159769/expats-in-top-demand-for-chinese-state-owned-enterprises/> [perma.cc/BKL2-WXJQ]; Vivek Wadhwa, *China Opens Doors of State-Run Companies to World's Top Talent*, WASH. POST (Nov. 16, 2011), [http://www.washingtonpost.com/national/on-innovations/china-opens-doors-of-state-run-companies-to-worlds-top-talent/2011/09/14/gIQA1BmpQN\\_story.html](http://www.washingtonpost.com/national/on-innovations/china-opens-doors-of-state-run-companies-to-worlds-top-talent/2011/09/14/gIQA1BmpQN_story.html) [perma.cc/DU67-XFXL].

<sup>165</sup> See David Bolchover, *supra* note 9, at 5; Anjie Zheng, *Twice as Many Expatriates Leaving China Than Arriving, Moving Company Says*, WALL ST. J.: CHINA REAL TIME (Feb. 9, 2015), <http://blogs.wsj.com/chinarealtime/2015/02/09/twice-as-many-expatriates-leaving-china-than-arriving-moving-company-says/> [perma.cc/YMJ9-W4QH].

<sup>166</sup> See Jamil Anderlini, *'Aipocalypse' Drives Expats Out of Beijing*, FIN. TIMES (Apr. 1, 2013), <http://www.ft.com/intl/cms/s/0/46d11e30-99e9-11e2-83ca-00144feabdc0.html#axzz40COPIZFS> [perma.cc/A94H-ML7B]; Clifford Coonan, *Expats Leaving China as Economic Growth Stalls*, IRISH TIMES (Feb. 23, 2015), <http://www.irishtimes.com/business/personal-finance/expats-leaving-china-as-economic-growth-stalls-1.2114198> [perma.cc/2HAN-4DN2]; Linda Yu, *Trouble in the Air*, AM. CHAMBER OF COM. IN SHANGHAI: INSIGHT 27 (July/Aug. 2013), [http://www.amcham-shanghai.org/amchamportal/InfoVault\\_Library/2013/INSIGHT-Trouble-in-the-Air.pdf](http://www.amcham-shanghai.org/amchamportal/InfoVault_Library/2013/INSIGHT-Trouble-in-the-Air.pdf) [perma.cc/7FVX-6MPT].

<sup>167</sup> See *China's Smog Splits Families as Toxic Pollution Extracts*, BLOOMBERG (Apr. 7, 2014), <http://www.bloomberg.com/news/articles/2014-04-07/china-s-smog-splits-families-as-toxic-pollution-extracts-costs> [perma.cc/4TWT-P8NK]; Juan et al., *supra* note 64.

<sup>168</sup> See Juan et al., *supra* note 64.

<sup>169</sup> See Holzmann et al., *supra* note 78, at 126.

<sup>170</sup> See Stephen Roach, *Will China's Shift to a Consumer-Oriented Economy Succeed?*, PBS (Jan. 28, 2016, 3:39 PM), <http://www.pbs.org/newshour/making-sense/will-chinas-shift-to-a-consumer-oriented-economy-succeed/> [perma.cc/8WYH-94QF].

<sup>171</sup> See *The Global Talent Index Report: The Outlook to 2015*, ECONOMIST INSIGHTS 8, 12, <http://www.economistinsights.com/sites/default/files/downloads/GTI%20FINAL%20REPORT%205.4.11.pdf> [perma.cc/LQ3R-TKTY] (last visited Feb. 11, 2016).



Chinese companies seeking to sell finished goods and value-added services abroad need to build global brands, yet many of the strongest global brands are not Chinese.<sup>172</sup> The SIL, as it stands today, makes more sense for the export-driven Chinese economy of 2004 than for the current and future global competitive landscape.<sup>173</sup> Agreements with totalization provisions would not only reduce uncertainties but also send a clear signal to global markets that China is open for business.<sup>174</sup>

Moreover, Agreements will reinforce China's political and strategic interests.<sup>175</sup> Agreements will foster China's diplomatic relations by further strengthening bilateral relations between China and other countries.<sup>176</sup> Since the establishment of the PRC-Germany Agreement in 2001, China and Germany have expanded their cooperation to include areas like research, technology, and innovation.<sup>177</sup> The success of China and Germany's bilateral relationship illustrates how an Agreement can help develop a long-term partnership between two nations.<sup>178</sup> In this regard, establishing Agreements with more countries would not only help to demonstrate China's willingness to cooperate with other nations but also begin to internationalize its relatively new social insurance system.<sup>179</sup>

The PRC government has aggressively pursued so-called soft-power influence in the world over the past two decades, achieving few notable wins.<sup>180</sup> That non-Chinese expatriates who leave China tell their colleagues about an uncertain, expensive system that leaves them and their families

<sup>172</sup> See Angela Doland, *Chinese Brands Want to Go Global; Here's Why It's Still So Tough*, ADVERT. AGE (Aug. 31, 2015), <http://adage.com/article/cmo-strategy/tough-chinese-brands-global/300101/> [perma.cc/XRZ7-VPMY].

<sup>173</sup> See Jürgen Wiemann, *Sharing Global Responsibility: The Role of the Middle Classes on the Way to a Just and Sustainable Global Economy*, 27 EUR. J. DEV. RES. 205–16 (Apr. 2015).

<sup>174</sup> See Yanzhong Wang & Anan Wei, *Issues of China's Social Security Internationalization Development*, CHINESE ACAD. OF SOC. SCI. 23 (Nov. 11, 2009), [http://www.kas.de/wf/doc/kas\\_18073-544-2-30.pdf?091111045913](http://www.kas.de/wf/doc/kas_18073-544-2-30.pdf?091111045913) [perma.cc/ZHS6-Q6YC].

<sup>175</sup> See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 109; *Canada and the Republic of Latvia Sign Social Security Agreement*, *supra* note 110; *Social Security Agreement Between Canada and the Republic of Serbia*, *supra* note 110.

<sup>176</sup> See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 109.

<sup>177</sup> See *Innovation, Cooperation Highlight Upgraded Sino-German Partnership*, CHINA DAILY (Oct. 11, 2014, 3:29 PM), [http://www.chinadaily.com.cn/world/2014lvisitgrl/2014-10/11/content\\_18723968.htm](http://www.chinadaily.com.cn/world/2014lvisitgrl/2014-10/11/content_18723968.htm) [perma.cc/Z3HK-RMDG].

<sup>178</sup> See Quentin Peel & Simon Rabinovitch, *China and Germany to Forge Closer Ties*, FIN. TIMES (Apr. 20, 2012, 5:50 PM), <http://www.ft.com/cms/s/0/20b68c7c-8a0d-11e1-87f0-00144fea b49a.html#axzz3V8FLEyvX> [perma.cc/J2N6-MNGU]; *Innovation, Cooperation Highlight Upgraded Sino-German Partnership*, *supra* note 177.

<sup>179</sup> See *Innovation, Cooperation Highlight Upgraded Sino-German Partnership*, *supra* note 177; Wang & Wei, *supra* note 174. See generally John & Johnson, *supra* note 110 (stating that a totalization agreement can benefit a nation and serve as a model for that nation's social security reform).

<sup>180</sup> See DAVID SHAMBAUGH, *CHINA GOES GLOBAL: THE PARTIAL POWER* 207–16 (2013).

without a social safety net—which they ironically pay for twice—seems the antithesis of the soft-power influence the Chinese government seeks in the global community.<sup>181</sup>

### CONCLUSION

The Chinese miracle—moving more humans out of poverty than any prior system in human history in little more than a generation—remains an experiment due to government planning and market limitations. Chinese policy on topics as diverse as the former one-child policy and private ownership of land and capital have been revised when needed to ensure economic opportunity and development. Similarly, it seems clear that the current social security system in regards to foreign workers must be re-evaluated.

The modern social security system is a consequence of the nation-building process. Social security is one of the most important policy tools a government can use to improve its citizens' quality of life and to promote social stability and development. The PRC social insurance system was created less than twenty years ago and lacks a track record of international cooperation. As a result, the internationalization process of the PRC social insurance system is still in its initial stage. With China entering a new phase of development, bilateral social security agreements with totalization provisions are imperative as the country looks to improve and perfect a social insurance system that could benefit more than one billion Chinese nationals worldwide.

Reducing the double social security taxation of employees lowers costs for expatriate employees and employers, and it helps businesses operating in both China and in foreign countries to become more efficient. Allowing workers who split their careers between two countries but do not qualify for full benefits in either country's system to claim partial benefits or totalize the benefits relating to the amount of their contributions is a more suitable policy. By enhancing the ability of employees to take foreign assignments, bilateral social security agreements with totalization provisions nurture opportunities for economic exchange and develop positive relations between countries. In short, establishing more bilateral social security agreements with totalization provisions would represent a positive step forward for economic growth in China, strengthen diplomatic relations, and integrate social security systems of participating countries for the benefit of employees and employers.

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<sup>181</sup> See *id.*

