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China is the largest foreign direct investment (FDI) host and home country among emerging markets, the United States among developed countries. As host countries, both seek to maintain policy space to pursue their own legitimate public policy objectives; as home countries, both seek to protect their investors’ outward FDI. The development of their bilateral investment treaties (BITs) over the past decade reflects this: Chinese BITs have become more protective of investors, US ones more respectful of host country interests. If agreement is reached between both, it would provide a template for future investment agreements.

The two governments began negotiating a BIT in June 2008. With the new US Model BIT released in April 2012 and a May 2012 cabinet-level agreement between the two governments to intensify negotiations, discussions resumed in October 2012. So far, it appears likely (based on publicly available documents) that agreement can be reached that all investors (including state-controlled entities) are covered; the MFN clause applies to substantive provisions only; fair and equitable treatment corresponds to the customary international law minimum standard of treatment; the indirect expropriation clause is circumscribed; and treaty benefits can be denied under certain circumstances.

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Differences are more pronounced regarding performance requirements (the US seeks to expand the TRIMs list, China not; reaffirming China’s WTO accession commitments to leave the use of certain requirements to the parties to a given investment might solve this matter); labor and environment standards (the US desires strong language; side agreements of the China-New Zealand free trade agreement reaffirming commitments already made in other fora and providing for purposeful cooperation between the parties in these areas suggest a compromise); and investor-state dispute settlement (where one could build, in the framework of general agreement, on the September 2012 Canada-China BIT regarding transparency).

Not surprisingly, the most difficult issue concerns the phase of investment to which national treatment (NT) applies: host countries typically want to maintain flexibility relating to when and where they allow FDI into their economies (including given industrial policy considerations), while the US business community seeks strong market-access commitments. Accordingly, the US government seeks pre-establishment national treatment (PENT) with a “negative list” approach (which lists sectors to which NT does not apply), while China has limited its agreements to date to post-establishment NT with carve-outs for existing non-conforming measures. This key architectural question has profound implications for market access.

Perhaps a compromise could be a negative list approach for NT regarding post-establishment and a positive list approach (which lists sectors to which NT applies) regarding pre-establishment (China’s Guidance Catalogue and the US exceptions in BITs may constitute starting points as they identify sectors). In a hybrid approach, the two governments would (1) list the broad sectors to which NT applies pre-establishment (positive list) and (2), within each broad sector, list all sub-sectors to which NT does not apply pre-establishment (negative list).

Either approach would be a major concession by the parties and would require a political decision. This could be facilitated (and hence limit the concession) by grandfathering existing non-conforming measures (including a narrowly defined national security review); agreeing a standstill on new restrictions (to provide transparency, predictability and stability, but perhaps with the flexibility that new restrictions for future investments need to be offset by negotiated new openings) and a commitment to remove non-conforming measures progressively. One could also carve out particularly important sectors and agree on a tailored approach for them. Or one could grant pre-establishment MFN but not PENT (as per the Canada-China BIT). There are many approaches to protect the essential interests of both sides.

US concerns as a host country seem to become more pronounced, reflected in the more active screening of certain incoming investments (see e.g. President Obama’s September 2012 veto, on national security grounds, of a Chinese investment, the first such veto in 22 years), while China has introduced its own FDI national security review (which includes economic security and conceivably also industrial policy) -- making investment entry less predictable. Moreover, China’s outward FDI is rising rapidly and, with it, the desire to protect it. Hence, both countries should be interested in concluding their BIT
negotiations, to put their bilateral investment relationship on a predictable footing. In particular, a BIT would increase the protection that investors from both countries would receive in each other’s territory, provide a mechanism for dispute resolution and likely improve market access.

More generally, a China-US BIT would provide a solution to the challenge of balancing the interests of a given country in its capacity as a (capital-importing) host country with its interests in its capacity of a (capital-exporting) home country. Meeting this challenge would represent a historic compromise between the traditionally quite diverging host and home country positions and (together with other important negotiations, e.g. involving the European Union, Japan, India, and a Trans-Pacific Partnership Agreement) might well become a platform on which, sooner or later, a multilateral framework could be built. These negotiations are therefore of crucial importance not only for the economic relations of the world’s two largest economies, but also for the evolution of the international investment law regime.

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中国是新兴市场中最大的 FDI 东道国和母国，美国是发达国家中最大的。作为东道国，中美两国均力图通过维持足够的政策空间来追求自己合法的公共政策目标；作为母国，它们均设法保护投资者的对外直接投资。过去十年中美各自的双边投资协定（BITs）的发展表明：中国的 BITs 更多地保护投资者，而美国的 BITs 更尊重东道国的利益。如果中美两国间达成协议，将为未来投资协定提供一个范本。

2008 年 6 月，中美两国政府开始启动双边投资协定谈判。2012 年 4 月美国发布新的 BIT 范本，5 月两国政府间高层次的协议加强了 BIT 谈判，同年 10 月谈判重新启动。到目前为止，根据我们所掌握的公开文件，双方似乎已同意将所有投资者（包括国有企业）涵盖在内；最惠国待遇仅适用于实体条款；公正与公平待遇仅限于习惯国际法中的最低待遇标准；间接征收条款受到限制；在某些情况下可以拒绝给予某些投资者本协定的优惠待遇。

双方的主要分歧在于：业绩要求（美国力图扩大《与贸易有关的投资措施》（TRIMs）协议中禁止性业绩要求的清单，中国却不愿意。重申中国入世时对业绩
要求承诺的义务，允许缔约方对一些特定投资继续使用某些业绩要求，也许能够解决双方在业绩要求方面的差异这一问题；劳工和环境标准（美国要求使用更强硬的措辞；新西兰—中国自由贸易协定的补充条款重申双方在其他协定中做出承诺，并规定双方在这些领域开展有目的性的合作，这也许是一种折衷方案）；投资者与东道国之间的争端解决（对于框架性的总体规定，可以2012年9月中加双边投资协定中有关透明度的规定为基础）。

不足为奇的是，最困难的议题是国民待遇适用的投资阶段：对于何时何地允许FDI进入本国，东道国通常希保维持一定的灵活性（包括对特定的产业政策的考虑），而美国的商业团体却想得到强有力的市场准入承诺。相应的，美国政府力图使用“负面清单”方法（即列出不给予国民待遇的行业或部门）给予准入前的国民待遇，中国目前仅限于同意给予准入后的国民待遇，而且将现有的不符措施排除在外。这一重要的结构性问题对市场准入有深远影响。

或许存在一个折衷方案：准入后国民待遇可以使用负面清单的方法，而准入前国民待遇则使用正面清单的方法（即列出给予国民待遇的行业或部门）（中国的《外商投资产业指导目录》和美国BITs中罗列的例外也许可以作为出发点，因为它们已经列出了很多行业）。还可以使用一种混合法，即，两国政府可以（1）列出给予准入前国民待遇的大的行业和部门（正面清单）；（2）在大的行业和部门内，再列出不给予准入前国民待遇的子行业和分部门（负面清单）。

这两种方法都将是对两国政府做出的重大让步，而且需要做出政治决定。采取以下做法可能可以加速双方达成一致（因此也限定了让步的范围）：对现有的不符措施（包括狭窄定义的国家安全审查）做出保留；停止使用新的限制措施（同意提供透明性、可预测性和稳定性，但或许可以保留一定的灵活度——如果对未来的投资要施加的新限制，就需要谈判开放其他行业，从而抵消新的限制），并承诺逐步取消不符措施。一方可以排除某些特别重要的行业，但双方要同意采取相应的解决方法。另外，对准入前的投资可以给予最惠国待遇，而不是国民待遇（比如加拿大—中国双边投资协定的方法）。还有很多方法可以保护双方的根本利益。

作为东道国，美国的担忧似乎变得更加明显，表现在对某些入境投资的严格筛选上（比如2012年9月奥巴马总统以国家安全为由否决了一项中国投资，这是22年来总统首次行使否决权），而中国也推出了自己的FDI国家安全审查（包括经济安全和产业政策）——这使得投资准入变得难以预测。此外，中国的对外直接投资迅速增加，与此同时，中国更希望对其施加保护。因此，中美两国都应致力于缔结BITs，以此将各自的双边投资关系建立在一个可预测的基础之上。特别是，双边投
资协定能增强两个国家的投资者在对方国家所得到的保护、提供争端解决机制，还能改善市场准入。

一般来说，中美双边投资协定能够提供一种平衡资本输入型东道国和资本输出型母国之间利益这一挑战的方法。迎接该挑战意味着传统上立场完全不同的东道国和母国要做出一次历史性的妥协，总有一天，中美双边投资协定可能成为一个构建多边框架的平台（还有其他重要的谈判，比如涉及欧盟、日本、印度和跨太平洋伙伴关系协议）。中美间的谈判之所以至关重要，不仅是因为涉及到世界上最大的两个经济体间的经济关系，而且还因为国际投资法制的不断发展。

(Karl P. Sauvant and 陈辉萍，‘中美双边投资协定：多边投资框架的一个范本？’，哥伦比亚国际直接投资展望，No. 85, 2012 年 12 月 17 日。’转载须经维尔哥伦比亚可持续国际投资中心授权。转载副本须发送到维尔哥伦比亚中心的 vcc@law.columbia.edu。)

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