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The China-United States BIT negotiations: A Chinese perspective

by
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The China-US bilateral investment treaty (BIT) negotiations have attracted attention due to the relative size and weight of both economies. Despite broad consensus about the importance of such a treaty, there is considerable debate about its shape and content. The debate is reflected in two recent *Columbia FDI Perspectives*.[1] Donnelly argued that a China-US BIT should be modeled on the US Model BIT without "splitting the difference between Chinese and US positions", and that the possibility of meaningful BIT negotiations are "really up to China at this point".[2]

In this *Perspective*, I add a Chinese perspective to this debate. The negotiation of a successful BIT requires the best endeavors of both sides. The fact that China is moving toward a BIT with higher standards points to increased coherence in the positions of the two countries in the context of their negotiations.

Donnelly proposed that the US Model BIT be used as a template. Yet, a comprehensive BIT between China and the US should not be based solely on the interests of one party. Negotiating a BIT is different from drafting a Model BIT, particularly in the case of China-US negotiations. Over years of concluding BITs with other countries, China has evolved from a participant to a leader in the world economy and the conclusion of BITs.[3] With all her BITs experience, China naturally brings her interests into the negotiations. Furthermore, the US has been flexible on its BIT practice in the past—for example, the Australia-US Free Trade Agreement (which entered into force after the 2004 US Model BIT was published) does not include an investor-state dispute-settlement (ISDS) mechanism. The US also seems to tolerate Australia's rejection of ISDS in the ongoing Trans-Pacific Partnership negotiations.

The failure to conclude the OECD Multilateral Agreement on Investment points to one important fact: it was impossible to accommodate the interests of key stakeholders. If, as Donnelly and Sauvant and Chen suggest, a China-US BIT could provide a template for a multilateral investment framework, it should be an agreement that properly reflects the interests of both parties. For the US, a China-US BIT will also provide an opportunity to perfect its Model BIT, which was intensively criticized by NGOs for its failure to address host countries' public policy concerns.

Moreover, the liberalization of the FDI regime in China is not up in the air. China's new leadership, which took power in late 2012, seeks to improve China's legal regime for FDI and diminish the differences between China and developed countries. In the past few months, China has already taken three important steps toward a more liberal regulatory framework. First, China agreed to pursue substantive BIT negotiations with the US based on pre-establishment national treatment and a "negative list" approach to exceptions to such treatment;[4] this approach is contrary to China's past BIT practice. Second, to promote development and reform (including investment liberalization), the State Council approved a pilot free trade zone (FTZ) in Shanghai and recently released the overall plan for that FTZ. The Shanghai government followed up by unveiling a negative list of exceptions for foreign investment, specifying the different treatment of foreign and Chinese investors in that FTZ.[5] These proactive measures are meant to test new approaches and smoothen changes in the domestic legal regime to accommodate a high-standard BIT. Third, the Decision on Major Issues Concerning Comprehensive Deepening Reform, adopted at the Third Plenary Session of the 18th Communist Party of China Central Committee, affirmed China's efforts to widen market access, step up the construction of FTZs and further open up inland and border areas. It also explicitly provides that China will unify domestic laws and keep investment policy stable, transparent and predictable.[6]

The regime created by a China-US BIT could significantly influence the development of China's domestic regulatory framework and improve governance through spillover effects. These negotiations are therefore colloquially referred to as the "century negotiations" or the "second WTO accession negotiations"—perhaps in the hope that they could accelerate the reform of the Chinese FDI regime, which has slowed down in recent years, and in fact give impetus to domestic reform.

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[1] Karl P. Sauvant and Huiping Chen, "A China-US bilateral investment treaty: A template for a multilateral framework for investment?," *Columbia FDI Perspectives*, No. 85, December 17, 2012; Shaun E. Donnelly, "A business perspective on a China-US bilateral investment treaty," *Columbia FDI Perspectives*, No. 90, March 4, 2013.

[2] *Id*.

[3] Guiguo Wang, "China's practice in international investment law: From participation to leadership in the world economy," 34 *Yale Journal of International Law* 575 (2009).

[4] MOFCOM, "MOFCOM spokesperson Shen Danyang comments on China and US to promote energetically negotiations on bilateral investment agreement," July 16, 2013, http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201307/20130700200566.shtml.

[5] For an unofficial translation of the negative list, *see* American Chamber of Commerce in Shanghai, Negative List for Shanghai Free Trade Zone, http://amcham-shanghai.org/NR/rdonlyres/88D66CDB-B8C8-42C8-BBA0-69E18E02EC72/20131/UnofficialTranslationNegativeListOctober2013.pdf.

[6] Xinhuanet, "The Decision on Major Issues Concerning Comprehensively Deepening Reforms, December 2013," http://news.xinhuanet.com/politics/2013-11/15/c_118164235.htm. A brief about the decision in English is available at, http://www.china.org.cn/china/third_plenary_session/2013-11/16/content_30620736_3.htm.

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