A Catalyst for Economic Growth: The U.S.-China Bilateral Investment Treaty

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The United States and China have one of the largest and most important economic relationships in the world. The United States is China's largest trading partner, while China is the United States' second-largest trading partner and the largest purchaser of U.S. government securities. The two countries are also among the most important engines of global economic growth – generating approximately 40 percent of the world's total GDP growth in recent years.

While U.S.-China economic ties are strong, there is still considerable room for the relationship to grow, and foreign direct investment is a particular area of opportunity. Both the U.S. and Chinese governments recognize the opportunity and for a number of years they have been negotiating a bilateral investment treaty. Such treaties can be a powerful mechanism to promote cross-border investments and can serve as a catalyst for economic liberalization and reform. The commitment last year by both governments to accelerate these negotiations is an important step toward a more mature economic relationship between the two countries. This paper reviews the U.S.-China bilateral economic relationship and outlines the opportunities that an investment treaty presents for both economies.

Bilateral investment treaties

Foreign direct investment (FDI) is fundamental to both global economic integration and the long-term competitiveness of companies and countries. The old economic paradigm of simply trading goods has been transformed into a more complex one where imports and exports depend on the ability of companies to develop outposts of sales and distribution to sell their products. As Matthew Slaughter of Dartmouth's Tuck School of Business points out, "Today companies both large and small increasingly operate within elaborate global supply networks in which final products are made in many stages spanning many countries and companies, all linked together by knowledge, trade, and investment. The gains for companies and countries involved in these networks have been large: more innovation, lower costs, and faster growth of output and jobs."[1]

[1] Matthew Slaughter, "Attracting Foreign Direct Investment through an Ambitious Trade Agenda," Organization for International Investment, July 2013.

Bilateral investment treaties facilitate the growth of foreign direct investment and, in turn, the growth of these networks. There are more than 2,850 investment treaties in existence, involving 180 economies throughout the world. China is a party to 114 such treaties and the U.S. is party to 42. The two countries launched negotiations on a BIT in 2008, during the Bush Administration, and the process has gained momentum in the past year under the Obama Administration. A treaty would create China's largest market opening since its accession to the World Trade Organization in 2001.

Robert Zoellick, a former World Bank president, U.S. Trade Representative and Deputy Secretary of State, has described bilateral investment treaties as "potent tools" that can help foster market reforms and the rule of law. Writing in the *Financial Times* earlier this year, he identified five conditions that an investment treaty must meet:

> First, there must be equal treatment of foreign and domestic companies, to prevent authorities from favoring local investors. Authorities must not discriminate against foreigners when they grant licenses, enforce rules or decide how much of a company an investor can own.
>
> Second, they must prohibit arbitrary and unfair treatment of foreign investors. There must be compensation at fair market value for any nationalization or expropriation. The treaties should ban trade-distorting measures, such as requirements for local content, exports and technology transfer.
>
> Third, investors should be able to transfer funds in or out of the country, without delay, at a market rate of exchange.
>
> Fourth, the agreements should have broad scope. . . .
>
> Finally, any treaty needs a system of international arbitration to enforce its rules and resolve disputes. Private parties, as well as countries, should be allowed to bring claims for monetary damages. Where such mechanisms have been put in place in the past, they have worked well.[2]

A U.S.-China BIT should be able to meet these conditions as a baseline. And assuming the two countries can eventually complete their negotiations and reach a final agreement, the treaty that emerges can serve as a template for investment treaties throughout the world.

The U.S.-China economic relationship

In the 35 years since China began to liberalize its economy, there has been a dramatic deepening of the U.S.-China economic relationship. That relationship began with growth – and eventually

[2] Robert Zoellick, The Financial Times, March 10, 2014. http://www.ft.com/intl/cms/s/0/b8b391ec-a634-11e3-8a2a-00144feab7de.html#axzz35WH6WyKH

rapid growth – in bilateral trade. It then evolved into a portfolio investment relationship. Today, the expansion of foreign direct investment is adding another dimension to the relationship.

The vastness of China's portfolio investments speaks to the interdependence of the U.S. and Chinese markets, but these investments fundamentally differ from foreign direct investment. Buying Treasuries is an investment in the broader economy. FDI, by contrast, is focused on long-term capital allocation to specific businesses – tying foreign investors more visibly and tangibly into individual communities and local economies.

Trade in goods and services has grown dramatically over the years. In 1979, U.S.-China trade totaled just $2 billion. Last year, it was $562 billion.

China has also steadily increased its holding of U.S. Treasury securities, rising from less than $72 billion in April 2000 to more than $1.25 trillion as of April 2014. China's holdings narrowly exceed those of Japan and are more than three times greater than the holdings of any other country.

On the FDI front, there is a wealth of data about the investment relationship between the two countries. Starting with Chinese FDI flows into the United States, they can be measured many different ways, and they yielded very different totals for 2012 – with the U.S. government citing figures spanning from $1.4 billion to nearly $2.8 billion.[3] In the first quarter of 2014, Chinese FDI in the United States totaled $1.36 billion – the highest amount ever in a single quarter, according to The Rhodium Group – with more than $8 billion worth of investment pending. While China's FDI flows into the United States have been rising – they totaled just $500 million in both 2008 and 2009 – the U.S. nonetheless accounted for only about two percent of the $101 billion that UNCTAD reports China invested overseas last year.

The total stock of Chinese FDI in the United States, according to the U.S. Bureau of Economic Analysis (BEA), was $5.2 billion at the end of 2012. But using data that reflects FDI in the United States by Chinese investors through offshore locations (such as Hong Kong) drives the figure up to $10.5 billion. (As recently as 2005, the total of Chinese FDI in the U.S. was only $700 million.) And Chinese government data put China's 2012 stock of FDI in the U.S. at $17.1 billion.

Annual FDI flows from U.S. companies into China have typically exceeded Chinese flows into the U.S., but they have been quite volatile in recent years. In 2010, U.S. FDI into China totaled $5.2 billion; the corresponding figures in 2008 and 2007 were $16 billion and $5.2 billion, respectively. But there have also been net declines in a number of recent years: $3.5 billion in 2012, $1.1 billion in 2011, and $7.5 billion in 2009. The total stock of U.S. FDI in China was $51.4 billion at the end of 2012, according to BEA. This is down from $59 billion in 2010.

[3] The Congressional Research Service points out that the lower figure does not include FDI that Chinese investors may have made through offshore locations (such as Hong Kong) to invest in the United States. The larger figure reflects an attempt to measure the level of FDI inflows according to the country of "ultimate beneficial owner" (UBO).

The growth of FDI is important for two reasons: First, it deepens the economic integration between investment partners. Second, as stated above, it is an investment in companies and communities that visibly impacts job creation. According to BEA, U.S. affiliates in China employed 1.4 million workers in China in 2011 (the most recent year available), and 690,000 of the jobs were in manufacturing. And recent research by the Rhodium Group suggests that Chinese-owned companies provided more than 70,000 full-time jobs in the U.S. in 2013, a more than eight-fold increase compared to 2007.[4]

The bilateral benefits of a BIT

"Investments by foreign-domiciled companies and investors create well-paid jobs, contribute to economic growth, boost productivity, and support American communities."

-Barack Obama, June 20, 2011

A bilateral investment treaty involving the United States and China would establish a robust legal framework that facilitates investment in each economy. Such a framework would define the standards that apply to investors and investments from both countries and also bring new levels of transparency and more clarity to the investment approval processes. The common standards will foster confidence and certainty, which in turn will help add momentum to the growth of cross-border investment into the two economies.

A bilateral investment treaty can also build on the reforms China has initiated recently. These include opening the insurance sector to foreign investment, and eliminating the need for most inbound investment of up to $300 million, and outbound investment of up to $1 billion, to be approved by the National Development and Reform Commission. A US-China BIT could also build on the success of investment treaties China has agreed to with other countries. These treaties have helped foreign companies invest with more confidence in China – the country attracted a record $117 billion in FDI last year – while also helping to ensure that Chinese companies investing overseas face a greatly reduced risk of discriminatory treatment.

Even more important, a U.S.-China BIT can be a catalyst for implementation of the ambitious reforms agreed to by Communist Party leaders at the Third Party Plenum last year. Those reforms, which include an easing of the country's rules on outbound investment, have the potential to liberalize and modernize the economy and position the country for a new era of global competitiveness.

The importance of the BIT should not overshadow the fact that there are many different approaches to reforming and liberalizing an economy. In China's case, it could pursue international investment commitments by becoming a party to other agreements like the Trans-Pacific Partnership – a regional free trade agreement involving the United States, Japan, and 10

[4] Rhodium Group, "Chinese FDI in the US: 2013 Recap and 2014 Outlook," January 7, 2014. http://rhg.com/notes/chinese-fdi-in-the-us-2013-recap-and-2014-outlook

other countries. It could also unilaterally implement economic reforms that would open the market to foreign investors. But China's current focus on an investment treaty with the United States offers the most immediate opportunity to foster market openings.

China benefits

A bilateral investment treaty with the United States can benefit China in a number of ways.
At a time when China's economic growth rate is slowing relative to the performance of the past two decades, an investment treaty with the United States will send an important signal that the country is opening to foreign investors and committed to rules that establish a predictable and fair environment for investors.

A more open climate for foreign investment also helps with the maturing and transformation of China's economy. The ability of investors to enter the market more freely enables a more efficient and rational allocation of capital. In a Paulson Institute paper, Dan Price and Michael Smart argue that

> By increasing the volume and scope of cross-border investment between the United States and China, the BIT would help China to rebalance its economy away from an overemphasis on investment in fixed assets and toward greater reliance on consumption, especially by households.

A BIT would also help advance the economic reform goals reiterated by China's leaders at the National People's Congress in March. Writing in *The Wall Street Journal Asia*, Mark Schwartz, Chairman of Goldman Sachs Asia Pacific, argues that a BIT

> could help China achieve these goals by increasing capital available to private firms (especially small- and medium-sized businesses), which often rely on informal lending. The foreign capital, and the management expertise that so often comes with it, would promote innovation and entrepreneurship, which are critical to any economy's long-term success. Deploying private capital also helps foster healthy competition, making state-owned enterprises more efficient and better suited to compete in the global marketplace.[5]

The BIT negotiations themselves are also an opportunity for China to conduct a comprehensive assessment of its investment rules in order to identify the range of measures that restrict foreign (and, in many cases, domestic) investors. Having committed to a "negative" list approach to the negotiations – every sector will be subject to the disciplines of the agreement unless China requests a specific carve-out – the government will have to assess and address a wide range of measures. These include thorny issues that have lingered since China's WTO accession, such as China's preferential treatment of its state-owned enterprises and technology transfer requirements.

[5] Mark Schwartz, Wall Street Journal Asia, April 4, 2014.
http://online.wsj.com/news/articles/SB10001424052702303532704579476720853893300

While deeper economic integration between the United States will not eliminate all of the thorny issues in the U.S.-China relationship, the integration would bring greater stability and balance to the relationship. As Price and Smart observe,

> A BIT would place China's investment relations with the United States on a stable treaty basis. This would not only mitigate the uncertainty created by the sometimes shifting political winds on attitudes toward inbound Chinese investment, but would also make American companies more comfortable investing in China.

The U.S.-China BIT is likely to be different – and more comprehensive – than most of China's other investment treaties, as reflected in China's agreement to work with the United States on a "negative list" approach. Moreover, China has indicated it may offer non-discriminatory access to its market at all stages of investment, including the ability of investors to enter the market in the first place. "This would protect pre-investment activities and is expected to open the China market to more U.S. companies and afford greater certainty for investments in various sectors," writes Marney Cheek, of the Covington & Burling law firm.[6]

U.S. benefits

For U.S. investors, a BIT would create a level playing field for their investments into China. Under the terms of the treaty, the Chinese government would be barred from favoring Chinese firms at the expense of U.S. companies. The BIT would also help American businesses invest into industries that are largely restricted today, such as financial services, transportation and telecommunications. The strong dispute settlement provisions of BITs also help give investors a stronger standing when they have to deal with governments – at any level – on an issue of concern in China.

A successful conclusion to the US-China BIT would also help reduce the likelihood that U.S. investors will face unequal treatment relative to investors from other countries. China has been pursuing investment liberalizing agreements with other major economies, and these agreements could create asymmetries in the treatment of foreign investors that have competitive implications for American investors. China, for example, has a trilateral investment agreement with Japan and Korea, which was completed in 2012 and is now being implemented, and they are negotiating a BIT now with the European Union, though the work on that remains at the early stages as of this writing.

The U.S. government certainly recognizes the benefits of investment liberalization, and has set it as an important objective in their international economic agenda. "I want more American products being sold in your countries," said President Obama said in an October 2013 speech to representatives of foreign companies, "and I want your companies investing more here in the United States of America." In 2011, Vice President Biden was even more explicit in praising

[6] http://www.investmentpolicycentral.com/content/why-us-china-bilateral-investment-treaty-matters

FDI: “President Obama and I, we welcome, encourage and see nothing but positive benefit from direct investment in the United States from Chinese businesses and Chinese entities. It means jobs. It means American jobs.”

Foreign direct investment and national security

Governments have had a longstanding right in trade and investment agreements to review – and even block – foreign mergers or acquisitions on national security grounds. Recent high-profile political controversies in the United States stemming from some of China’s investments have made such national security reviews a source of friction between the two countries and unease in the business community. The controversies have also contributed to a perception of U.S. hostility to foreign investors generally, and Chinese investors in particular.

But these controversies involving foreign investment are not limited to China. In 2006, the proposed acquisition of six U.S. seaports by a Dubai-based company sparked a political outcry on a scale that was perhaps the largest involving a foreign investor in more than a decade. Investors from other countries have also been subject to controversy and politically-driven scrutiny of various magnitudes.

In the United States, the authority to review transactions rests with the Committee on Foreign Investment in the United States (CFIUS), a group composed of the heads of Cabinet departments and offices throughout the federal government. The controversies in the early 2000s were a catalyst for the United States to evaluate the legal authority and procedures behind CFIUS which led to a new law in 2007 that reformed the process and made it more transparent. The investment controversies have subsided in the aftermath of the law’s enactment, as well as foreign investors becoming more sophisticated about educating U.S. political leaders and other key constituencies (like journalists) about the value of individual investments to the U.S. generally, and to specific communities in particular.

Today, the vast majority of China’s direct investment into the U.S., including all greenfield investments, is not subject to national security review. And even when they are subject to review (39 Chinese investments were reviewed in 2012 – the most recent year available), very few are blocked. Indeed, the power to block a foreign merger, acquisition, or takeover on national security grounds rests only with the President of the United States, and that power has only been exercised twice – in 1990 and 2012.

In 2011, China approved so-called “Security Regulations” that establish a general review procedures for foreign investments. According to attorneys at the WilmerHale law firm, these procedures have potentially far-reaching implications:

> The Security Regulations will potentially subject a large number of M&A transactions by foreign investors in China to an additional layer of review. The covered transactions can go well beyond national security, narrowly defined, to include agriculture, infrastructure

> and other industries. They include acquisitions of domestic non-foreign invested enterprises] within the broad subject matter reach of the Security Regulations, and also apply to increases of control and to acquisitions of actual control along one or more dimensions even if ownership is less than 50 percent.[7]

China's authority to conduct investment reviews on national security grounds, like that of the United States, would be preserved under a U.S.-China BIT. While this review mechanism has attracted relatively little scrutiny through the years, given the other government-imposed restrictions on investment, adoption of a U.S.-China BIT could lead to the review process taking on renewed importance as other investment barriers are liberalized and companies from the United States and other jurisdictions make more acquisitions in the Chinese market. For China, the process of negotiating the BIT is an opportunity to take a fresh look at its investment review process and to ensure that it is consistent with the country's commitment to an open investment climate.

Conclusion

The opportunity presented by a U.S.-China bilateral investment treaty is enormous and can help catalyze the development of the bilateral economic relationship to include significant amounts of FDI. Seizing the opportunity depends on the two governments meeting the immediate challenge of not only negotiating a high-quality agreement, but also securing the political support necessary to adopt it.

The process will bring challenges, but the implications could be profound: a deeper, more mature economic relationship that delivers not only more investment and more job creation in both countries, but also perhaps a long-term path to a stronger – and more stable – political relationship.

[7] http://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=92913

经济增长的催化剂：
中美双边投资协定

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中美关系是全球最大、最重要的经济关系之一。美国是中国最大的贸易伙伴，而中国是美国的第二大贸易伙伴以及美国政府债券的最大购买国。在推动全球经济增长的引擎中，中美两国扮演着不可或缺的角色 —— 近年来，两国贡献了世界40%的GDP增长。

尽管中美之间有着牢固的经贸关系，双边关系仍有巨大的发展空间，在外商直接投资领域则存在着特别的机遇。中美两国政府均认识到这个机遇，多年来，双方就订立一份双边投资协定展开磋商。作为一个强大的机制，双边投资协定可以推动跨境投资，成为经济自由化和经济改革的催化剂。去年，两国政府承诺加快双边投资协定的磋商，标志着双方向发展更成熟的经贸关系又迈出了重要一步。 本文在梳理中美双边经贸关系的同时，阐述了双边投资协定将为两大经济体带来的机遇。

双边投资协定

外商直接投资对全球经济整合以及对公司和国家的长期竞争力都具有重要意义。旧有的单纯依靠货物贸易的经济模式已经走上更趋复杂化的转型之路， 企业发展销售网点和分销产品的能力已成为它们在进出口业务中取胜的关键。达特茅斯塔克商学院的 Matthew Slaughter 指出，“如今，公司不论大小，都不断地参与到复杂的全球供应网络中，在这些网络中，最终产品可分解为许多阶段，在许多国家由许多公司制造，而贯穿其中的是知识、贸易和投资。参与到这些网络的公司和国家收获颇多：它们得到更多的创新、更低的成本、更快速的产量增长、以及更多的就业机会。”[1]

双边投资协定促进外商直接投资的增长，进而推动全球供应网络的发展。当前，全球的 180 个经济体共签订了 2,850 多份投资协定。中国是 114 份此类协定的缔约方，而美国是 42 份此类协定的缔约方。2008 年，在布什政府主政期间，中美启动了双边投资协定的谈

[1] Matthew Slaughter，《通过远大的贸易计划吸引外商直接投资》，国际投资组织，2013 年 7 月。

判，谈判进程在过去一年（奥巴马政府期间）进一步加快。一份协定将会促成中国做出自2011 年加入世界贸易组织以来最大的市场开放之举。

前世界银行行长、美国贸易代表和副国务卿罗伯特•佐利克将双边投资协定形容为可以促进市场改革和法制的“强有力”的工具。在今年早些时候为金融时报的撰稿中，他提出一份投资协定必须满足五个条件：

> 首先，国外和国内企业必须得到平等的待遇，以防止政府对本地投资者给与照顾。在发放执照、实施规则，或在确定投资者持有公司权益的比例时，政府不应对外国人有任何歧视。
>
> 第二，他们必须制止对外国投资者的肆意、不公平待遇。对于任何国有化或征用行为，必须以公允的市场价格进行赔偿。协定应禁止扭曲贸易的做法，例如对国产化率、出口、技术转让的要求。
>
> 第三，投资者应能够以市场汇率从这个国家转入或转出资金而不受到延迟。
>
> 第四，协议应应用于广泛领域
>
> 最后，任何协定都需要国际仲裁体系以确保规则的实施和纠纷的解决。应允许民营方或国家就财务损害提出索赔。在以往实施此类机制的地区，均取得了良好的效果。[2]

中美双边投资协定应以满足这些条件为基础。如果两个国家能够最后完成磋商并达成最终性协议，形成的协定可作为全球投资协定的模板。

中美经济关系

在中国改革开放的35年中，中美关系得到长足的发展。这种关系始于双边贸易的增长，且最终导致双边贸易的快速增长。之后，它又发展成为一种有价证券组合的关系。如今，外商直接投资的扩大正将这种关系引入一个新的维度。

[2]罗伯特•佐利克，《金融时报》，2014 年 3 月 10 日。 http://www.ft.com/intl/cms/s/0/b8b391ec-a634-11e3-8a2a-00144feab7de.html#axzz35WH6WyKH

中国庞大的证券投资规模反映出中美市场的相互依赖性，但证券投资本质上有别于外商直接投资。购买国债是对广义经济的投资。相比之下，外商直接投资则专注于对具体企业的长期资本配置 —— 让外国投资者以更加可被感知的方式融入到各团体及当地经济中。

这些年，中美货物和服务贸易得到显著增长。1979年，中美贸易仅为20亿美元， 而去年的数字为5620亿美元。

同时，中国稳步增加对美国国债的持有量，持有金额从2000年4月的不足720亿美元，提高至2014年4月的逾12500万亿美元。中国持有美国国债的金额略高于日本，是其他任何国家持有量的三倍之多。

在外商直接投资方面，有大量的数据反映两国间的投资关系。在中国对美直接投资流量上存在多种不同的衡量方式，因而对于2012年的投资总额亦得出迥然不同的结果 —— 美国政府引用的数据介于14亿美元至28亿美元之间。[3] 根据荣鼎咨询的数据，2014年第一季度，中国对美直接投资总计达13.6亿美元，创下单季最高记录，并有逾80亿美元的投资处于待定状态。尽管中国对美直接投资流量持续上升—— 2008年和2009年的总额均仅为5亿美元 —— 根据联合国贸易和发展会议的报告，中国去年的海外投资额达到1010亿美元，而美国仅占其中的2%。

根据美国经济分析局的数据，2012年末，中国对美国直接投资的总存量为52亿美元。但如果加上中国投资者通过离岸地点（例如香港）对美国的直接投资，总额将上升到105亿美元 （就在并不遥远的2005年，中国对美直接投资总额仅为7亿美元）。而来自中国政府的数据显示，2012年，中国对美国直接投资的存量为171亿美元。

美国公司每年对中国的直接投资通常要超过中国对美国的直接投资，但近年则呈现出较大的波动。2010年，美国对中国的直接投资为52亿美元；而2008年和2007年相应的数据为160亿美元和52亿美元。近几年还出现过净下降的情况：2012年为35亿美元，2011年为11亿美元，2009年为75亿美元。根据美国经济分析局的数据，2012年末，美国对中国投资的总存量为514亿美元，从2010年的590亿美元水平回落。

[3] 国会研究处指出，较低的数字未包括中国投资者通过境外（例如香港）对美国的直接投资。而较高的数字则试图按“最终实益拥有人”国别衡量外商直接投资流入量。

外商直接投资的增长具有双重意义。首先，它深化了投资伙伴间的经济整合。其次，如上所述，投资于公司和团体对创造就业具有明显的效果。根据美国经济分析局统计，2011年（可获得数据的最近年份），在华的美国附属企业雇佣了140万名员工，其中69万份工作来自制造业。荣鼎咨询的近期研究显示，2013年，中国企业在美国提供了7万多份全职工作机会，为2007年的8倍之多。[4]

双边投资协定惠及两国

"外国公司和外国投资者的投资能够创造高薪的就业机会、推动经济增长、提高生产率、支持美国社会发展。"

—— 巴拉克•奥巴马，2011 年 6 月 20 日

美国和中国签署双边投资协定将构建出促进两国投资的强有力的法律框架。该框架将对适用于两国投资者及投资的规范标准作出界定，还将使投资审批程序的透明度提升至新高度并增强明晰度。共同标准有助于培育信心、增强确定性，而这有助于推动两国跨境投资的增长。

双边投资协定还可以建立在中国近期启动的改革之上。这些改革包括保险业向外资开放，以及大部分3亿美元以下的外商投资、10亿美元以下的境外投资无需发改委核准。美中双边投资协定还可建立在中国与其他国家成功签订的投资协定基础上。这些协定帮助外国公司增强了投资中国的信心——去年中国吸引了超过1,170亿美元的外商直接投资——同时有助于确保投资海外的中国公司大大降低遭遇歧视性待遇的风险。

更为重要的是，美中双边投资协定可能推动雄心勃勃的改革计划的实施，该计划是中国领导人在去年召开的三中全会上制定的。包括放松境外投资监管在内的改革措施有望推动经济的市场化和现代化，帮助中国做好准备迎接全球竞争的新时代。

双边投资协定的重要性不应掩盖其它众多改革和开放经济的方式这样一个事实。中国可以通过加入其它协议而寻求国际投资承诺，比如跨太平洋伙伴关系协定 (TPP) ——由美国、日本和其它十国参与的地区性自由贸易协定。中国可以单方面实施向外国投资者开放市场的经济改革。但中国当前对中美投资协定的关注带来了促进市场开放的最近在眼前的机会。

[4] 荣鼎咨询《中国对美国的直接投资：2013 年回顾与 2014 年展望》，2014 年 1 月 7 日。
http://rhg.com/notes/chinese-fdi-in-the-us-2013-recap-and-2014-outlook

对中国的益处

与美国签署双边投资协定可以使中国在许多方面受益。

当下中国的经济增速相对过去 20 年的表现正在放缓，与美国签署投资协定将向全世界发出这样的重要信号：中国正在向外国投资者开放，且致力于为投资者构建可预见和公平环境的规则。

更开放的外商投资环境还对中国经济的成熟和转型有所助益。投资者能够更自由地进入市场提高了资本配置的效率和合理性。Daniel Price和Michael Smart在保尔森基金会(Paulson Institut)的一篇论文中表示，

> 通过推动美国和中国间跨境投资的规模和范围，双边投资协定将帮助中国经济从过度依赖固定资产投资转向由消费、尤其是居民消费驱动的模式。

双边投资协定还将有助于推进中国领导人在3月份人大会议上重申的经济改革目标。高盛高盛公司亚太区董事长的Mark Schwartz在《华尔街日报亚洲版》发表的文章中表示双边投资协定:

> 可能通过增加私营企业（尤其是中小企业）可获资金帮助中国实现这些目标，而私营企业通常依赖民间借贷获得资金。外国资金和通常随之而来的专业管理知识将推动创新和企业家精神，这对任何经济体的长期成功至关重要。配置私人资本也有助于促进良性竞争、提升国有企业效率并增强其在全球市场的竞争力。[5]

双边投资协定谈判本身还是中国全面评估其投资规则、进而确认对外国投资者（在许多情况下包括国内投资者）限制措施的机会。由于对谈判采取了“负面”清单方式——每个行业将受协定准则的制约，除非中国提出例外请求——因此政府将评估并解决一系列的广泛问题。其中包括自中国加入 WTO 以来长期存在的棘手问题，比如中国对其国企的优惠待遇和技术转让要求。

尽管与美国经济一体化程度的加深将不会消除所有美中关系中的棘手问题，但经济融合将为中美关系带来更大的稳定性和平衡。正如Daniel Price和Michael Smart所述，

[5] Mark Schwartz，《华尔街日报亚洲版》，2014 年 4 月 4 日
http://online.wsj.com/news/articles/SB10001424052702303532704579476720853893300

> 双边投资协定将使中美投资关系趋于稳定。这不仅会缓和政治风向在中国对美投资态度上的变换所带来的不确定性，还会使美国公司在对华投资问题上更加从容。

美中双边投资协定可能不同于——而且覆盖面更广——大部分中国其他的投资协定，这从中国同意与美国以“负面清单”方式展开谈判可以看出。此外，中国表示可能对所有阶段的投资提供无歧视准入，其中首先包括允许投资者进入市场。“这将保护投资前活动，预计将向更多美国企业开放中国市场，并对各领域投资给予更大的确定性，”Covington & Burling 律师事务所的 Marney Cheek 表示。[6]

对美国的益处

对美国投资者而言，双边投资协定将为对华投资创造公平的竞争环境。协定规定，中国政府不得以牺牲美国企业的利益为代价偏袒中国公司。双边投资协定还将帮助美国企业在金融服务、交通运输和电信等当前尚未放开的领域投资。当投资者在中国因一些困扰而不得不面对各级政府时，双边投资协定强有力的争端解决机制还有助于投资者处于更有利地位。

成功缔结美中双边投资协定还有助于降低美国投资者在面对来自其它国家的投资者时受到不平等待遇的可能性。中国一直寻求与其他主要经济体签订投资开放协议，这些协议可能造成外国投资者待遇的不对称，并对美国投资者造成竞争性影响。比如，中国与日本和韩国签有三边投资协定（2012年达成，目前已经实施），目前正与欧盟就双边投资协定展开谈判，尽管该文件刚刚开始起草。

美国政府当然认识到了投资开放的好处，而且在国际经济日程表中将其视为重要目标。“我希望更多美国产品在你们的国家销售，”2013年10月，奥巴马总统向外国企业代表讲话时表示，“我希望你们的企业在美国更多投资。”2011年，副总统拜登在谈及中国对美直接投资的好处时更加直截了当，“奥巴马总统和我欢迎和鼓励中国企业和中国实体的对美直接投资，我们认为这只会带来积极的推动。这意味着就业，意味着美国的就业。”

外国直接投资和国家安全

长期以来，贸易和投资协定规定政府有权以国家安全为由审查——甚至阻止——外资并购。近期在美国由一些中国投资引发的引人瞩目的政治争议使得国家安全审查成为中美两国摩

[6] http://www.investmentpolicycentral.com/content/why-us-china-bilateral-investment-treaty-matters

擦和商界不安情绪的来源。这些争议也促使人们认为美国对外国投资者抱有敌意，对中国投资者尤其如此。

但这些与外国投资相关的争议并不仅限于中国。2006年，一家迪拜公司提出收购6个美国港口的交易引发了巨大的政治风波，这场风波的规模可能是十几年来外国投资者相关交易最大的一次。来自其它国家的投资者也遭受了程度不一的争议和出于政治目的的严查。

在美国，审查交易的权力掌握在美国外国投资委员会(CFIUS)手中，该委员会由联邦政府各部部长和官员组成。21世纪初的争议是美国评估CFIUS法律权威及程序的推动因素，这促使美国在2007年通过了一项改革审查过程、提高透明度的新法令。该法令生效后，也因为外国投资者在向美国政治领导人和其他关键支持者群体（如记者）宣传每笔投资对美国、以及对具体社区的价值时更富经验，这些投资争议逐渐平息。

今天，大多数中国对美直接投资，包括所有绿地投资，并不需要经过国家安全审查。即便需要审查（2012年[可获得的最近年份数据]审查中国投资39笔），最终受阻的也是极少数。的确，只有美国总统有权因国家安全而阻止外资合并、收购或兼并，这一权力仅在1990年和2012年运用过两次。

在2011年，中国批准了所谓的“安全审查制度”，该制度为外国投资制定出一套总体的审查程序，WilmerHale律师事务所的律师认为，这些程序可能有着深远的潜在影响：

> 安全审查制度可能使得外国投资者在华的大量并购交易面临额外审查。所包含交易可能大大超出国家安全范畴，从狭义上说，可能包括农业、基建和其他行业。该制度将对国内[非外商投资]企业的收购包含在安全审查的广泛题材范围内，还根据一个或多个标准应用于增加持股及取得实际控股权，即便持股比例低于50%。[7]

与美国类似，中国以国家安全为由进行投资审查的权力在美中双边投资协定下也将得到保留。但是在中国政府的其它投资限制下，该审查机制多年来得到的关注相对十分有限，而随着其它投资限制规定的放开，以及来自美国和其他地区的公司在中国市场展开更多收购，达成美中双边投资协定将会使得该审查机制的重要性将再度凸显。

对中国来说，双边投资协定的谈判过程是重新审视其投资审查程序、确保其符合中国创造开放投资环境承诺的一个机会。

[7] http://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=92913

结论

美中双边投资协定带来的机会是巨大的，并且有助于推动在双边经济关系的发展中包括大规模的外商直接投资。把握机遇取决于两国政府能否战胜眼前的挑战，不仅协商出高质量的协议，还要确保得到付诸实施的政治支持。

这个过程将带来挑战，但影响可能是巨大的：这一更深厚、更成熟的经济关系不仅将带来更多的投资和就业机会，还可能在长期内带领我们实现更紧密、更稳定的政治关系。