Review Article
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Critical analysis of the new Chinese foreign investment law in the prism of China-EU CAI and China-US bit negotiations

Abstract

The Chinese foreign direct investment legal system prior to 2019 evolved constantly, although it failed to satisfactorily address the main issues for foreign direct investments. The new Chinese Foreign Investment Law of 2019 and its Implementing Rule made a landmark improvement to the legal system. This new reform went hand in hand with the China-EU Comprehensive Agreement on Investment (CAI) and China-US BIT and their negotiations. It played a preparative role for the progress made in these two influential investment agreements. It offered unprecedent solutions in areas such as the pre-establishment national treatment, prohibition of forced technology transfer and the enhanced foreign investment protection. Nonetheless, further reforms on SOEs are still needed. The ratification of the China-EU CAI and the reanimation of the China-US BIT, albeit unlikely to happen anytime soon, would still provide long-desired clarity to the dispute resolution mechanism, national security review system and forced technology transfer issue.

Keywords: Chinese foreign investment law, investment agreement, bilateral investment treaties, market access, dispute resolution mechanism, forced technology transfers

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Introduction

The Foreign Direct Investment (FDI) has played a predominant role and constituted the main source of capital for Chinese economic development and modernisation over the past four decades.[1] The legal system prior to 2019 followed closely China's modern economic reforms and socialist market liberalisation as well as adhering to international trade agreements[2] and bilateral investment treaties (BITs). Nonetheless, it was a patchwork system under the supervision and regulation of various regulatory bodies. It failed to set out a clear framework for dispute resolution, intellectual property rights (IPRs) protection and national security review.

China adopted its new Chinese Foreign Investment Law (the New Law 2019) in 2019. The New Law and the Regulation for Implementing the Foreign Investment Law of the People's Republic of China 2019 (the Implementing Rule 2019) completely overhauled China's FDI legal system. It finally brought the scattered old system to a new FDI era with the aim of meeting the demand of foreign investors and international standards. Being branded as a 'landmark achievement' for China's pursuance of market liberalisation and economic reform, the New Law reshaped China's FDI legal system by dealing with the thorny issues of the old system; it included the key provisions of providing a level playing field, the dispute resolution mechanism and the enhanced investment protection.[3] China used this enactment to build a law-based market environment with stability, transparency, predictability and fair competition.[4]

Both the EU and China started to negotiate the China-EU Comprehensive Agreement on Investment (CAI) from 2013 and concluded the CAI in Principle in December 2020. The China-EU CAI was viewed as one of the most important investment agreements to be signed by the EU, 'almost as important as the China-US BIT'.[5] In comparison, the road to conclude a China-US BIT was a roller coaster, mixed with halts and restarts of negotiations between these two countries after 1982. Despite these challenges, the China-US BIT was touted as being a 'higher-standard and comprehensive',[6] 'the most worthwhile,' and 'the most difficult one in history'[7] for foreign investment. By June 2016 the China-US BIT achieved near completion and addressed some of the main issues to achieve a greater bilateral FDI.[8] The main issues under the China-US BIT negotiation largely coincide with that of the China-EU CAI. This included restricted market access, performance and localisation requirements, discriminatory treatment of foreign investors and a discretionary and opaque national security review mechanism.[9] The China-US BIT talk

[1]Yu Zheng. 'Foreign Direct Investment in China,' in Ka ZENG, ed., *Handbook on the International Political Economy of China*, (Edward Elgar Publishing, ISBN: 978 1 78643 505 7, 2019) at 61& 68.
[2]Zheng (2019), supra n 1, 70.
[3]Weihuan Zhou, Huiqin JIANG and Qingjiang KONG, 'Technology Transfer under China's Foreign Investment Regime: Does the WRO Provide a Solution' (2020) 54(3) Journal of World Trade (2019) UNSWLRS 59, 12; Yawen ZHENG, 'China's New Foreign Investment Law and its Contribution Towards the Country's Development Goals' (2021) Journal of World Investment & Trade 22 (2021) 388-428, 396.
[4]The New Law 2019, Article 3.
[5]Lifeng TAO & Wei SHEN, 'The Gap between the EU and China on the ISDS Mechanisms in the Context of the EU-China BIT Negotiations: Evolving Status and Underlying Logic' (2018) 48, Hong Kong L.J. 1159, 1160; Hannah LEVINGER & Systarn HANSAKUL, 'China and the EU: Where Next in Bilateral Trade and Investment Relations' (2016) China-EU Law Journal, 5, 55-71, Section 'EU Investment in China: Among the Top Sources'; Wenhua SHAN & Lu WANG, 'The China-EU BIT and the Emerging 'Global BIT 2.0' (2015) ICSID Review, Vol. 30, No. 1 (2015) 260-267, 260.
[6]Lauren Gloudeman, Nargiza Salidjanova. 'Policy Considerations for Negotiating A US-China Bilateral Investment Treaty' (August 1, 2016) US-China Economic and Security Review Commission, Staff Research Report, 5.
[7]John Pappas. 'The Future US-China BIT: Its Likely Look and Effects' (2011) 41 Hong Kong Law Journal 857, 857; Jie HUANG, 'Challenges and Solutions for the China–US BIT Negotiations: Insights from the Recent Development of FTZs in China' (2015) Journal of International Economic Law, 2015, 18, 307–339, 307
[8]Gloudeman, Salidjanova. supra n 6, 3; Yuwen LI & Cheng BIAN, 'China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options' (2020) Netherlands International Law Review, (2020) 67:503–551, 523
[9]Gloudeman, Salidjanova. supra n 6, 3

was suspended during Trump's administration and no fresh talks took place after Biden become President. Likewise, the ratification of China-EU CAI was suspended in May 2021 after Beijing's sanctioning of European officials as well as in response to the Chinese government's treatment of the Uighurs in Xinjiang.[10] The formal ratification process was further fettered by the Ukraine war whereby China and the EU differed on their approaches to ending the war.[11] Despite this, China remained committed to pushing forward the progress of BIT talks with the US as of 2020,[12] while still remaining interested in reactivating the suspended CAI with its EU partner.[13] Hence, the China-US BIT and the suspended CAI are no doubt hanging by a thread with little hope for revival in the short term amid the current political uncertainty and the on-going tit-for-tat sanctions from both sides.

The China-EU CAI and the China-US BIT negotiation had a huge influence on the reform of Chinese FDI legal system as well as culminating in the adoption of the New Chinese FDI Law in 2019. The China-EU CAI provided an opportunity to increase China's domestic reforms so to match international standards.[14] At the same time China's recent FDI reforms helped to address major obstacles arising from these negotiations, such as the issues of market access, dispute resolution, and forced technology transfer. The achievement of New FDI Law paved the way for progress made in these two major negotiations. This is evidenced by the fact that Chinese President Xi personally intervened to offer market access concessions to seal the deal of China-EU CAI in 2020.[15] This article critically evaluates the evolution, challenges and limitation of Chinese FDI law in the prism of the main challenges and implications of the China-EU CAI and the China-US BIT negotiations. It provides a focus on how these negotiations promoted open market access, investment protection and their influence on other critical issues, such as SOEs reforms, national security reviews and forced technology transfer. It critically analyses the effectiveness of the New FDI law 2019 for addressing the most contentious challenges highlighted in the China-US BIT negotiations and the China-EU CAI.

The article is divided into four main parts. Part I gives an overview of the evolution of the Chinese FDI law before the New FDI Law 2019 and provides an in-depth critique of the old Chinese FDI legal system and challenges. Part II evaluates the roles of the China-EU CAI and the China-US BIT negotiations and their impacts on China's FDI policy development. It examines the major criticisms of Chinese FDI legal system, and the key issues encountered during these negotiations. Part III critically evaluates the New FDI Law 2019, how the new reforms effectively addressed the issues of the old FDI legal system, and the shortcomings highlighted in these investment agreement negotiations. The adoption of the new FDI law reform and the progress made in these two major foreign investment agreements jointly eliminated some stumbling-blocks, which previously negatively impacted foreign investment among these three parties. This part focuses on three areas of analysis, including market access, investment protection and dispute resolution. Part IV concludes. This article highlights that China should continue their SOE reforms, while continuing to pursue workable Sino-investment agreements. This would provide a long-desired clarity for more market openness, dispute resolution mechanism and national security review.

Evolution of Chinese FDI Law before 2019

This part focused on the evolution and shortcomings of the Chinese FDI legal system prior to 2019, which failed to satisfactorily address the main issues for foreign direct investments. The Chinese FDI legal system experienced the first generation of rudimentary development with a set of restrictive and lack of clarity rules from 1979 to 1992. It comprised a modernisation era in the 90's and 00's with some level of liberation of restrictive measures of the laws, such as increasing market access and transparency for foreign investors. The pre-2019 reform era consists of two major developments in the evolution of Chinese FDI law, including the Free Trade Zone experiment from 2013 and the Draft Foreign Investment Law 2015, both contributed to the official adoption of the 'pre-establishment national treatment plus a negative list' (PNTPNL) in 2019.

First generation FIEs Laws 1979-1992

The beginning of the Chinese FDI law system was marked by the enactment of the Law of the People's Republic of China on Joint Ventures Using Chinese-Foreign Investment (EJV Law) in 1979.[16] Being the first Foreign-investment enterprises (FIEs) related legislation, the EJV Law and its Implementing Regulation 1983[17] provided a basic investment vehicle in China for foreign investors.[18] The EJV Law ensured the government's legal protection for foreign investments in the form of EJVs, which were Chinese entities subject to Chinese law. The EJV must be approved and obtain a special business licence before any formal operation. This law stipulated a set of strict but rather unpopular criteria for foreign investment. For example, the chairman of the board of directors must be a Chinese person.[19] The FIEs must follow mandatory foreign exchange rules in accordance with Chinese regulations on foreign exchange control.[20]

After the initial success of opening-up, Chinese regulators enacted two more regulations: the Wholly Foreign Owned Enterprises Law (WFOEs Law) in 1986 and the Contractual Joint Venture Law (CJV Law) in 1988.[21] Together with their implementing rules they formally legalised more types of foreign investment vehicles in China to meet the incremental appetite from foreign investors. The enactment of these additional foreign investment vehicles added more flexibility for foreign investment. These three Laws and their corresponding Implementing Rules formed the foundation for the first generation

[10]Lily MCELWEE, 'The Rise and Demise of the EU-China Investment Agreement, Takeaways for the Future of German Debate on China' (March 2023) CSIS BRIEFS, 2

[11]Ministry of Foreign Affairs of the People's Republic of China, 'Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on April 1,' (2022) online: https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/202204/t20220401_10663214.html, accessed on 21/04/2023, China heavily blamed NATO for the Russian-Ukraine War.

[12]Premier Keqiang LI, 'Report on the Work of the Government' (May 22, 2020) Delivered at the Third Session of the 13th National People's Congress of the People's Republic of China, 18–19.

[13]MCELWEE, supra n 10, 8; Mission of the People's Republic of China to the European Union, "Ambassador Fu Cong Attends EPC's Sixty-Minute Briefing" (10/02/2023) online: http://eu.china-mission.gov.cn/eng/mh/202302/t20230210_11022926.html.

[14]Wei Yin. 'Challenges, Issues in China-EU Investment Agreement and the Implication on China's Domestic Reform' (2018) Asia Pacific Law Review, Vol 26, No. 2, 170-202, 187 & 200

[15]MCELWEE, supra n 10, 1.

[16]The Law of the People's Republic of China on Chinese-Foreign Joint Ventures, Promulgated July 1, 1979, [hereinafter the EJV Law 1979]; Wei JIA, 'Tidal Changes in Chinese Foreign Investment Laws and Policies' (1994) 2 Tul. J.Int'l & Comp. L. 23 (1994), 24.

[17]Regulations for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Venture 1983 [hereinafter the EJV Law Implementation Regulations].

[18]Gao Shan, 'The Evolution of China's Foreign Investment Policy and Law,' (2017) SJD dissertations, Penn State Law Elibrary, 24, 48

[19]The EJV Law 1979, Article 6

[20]Ibid, Articles 10-12

[21]Law of the People's Republic of China on Wholly Foreign-Owned Enterprise 1986, (Hereafter the WFOE Law 1986); Law of the People's Republic of China on Chinese-Foreign Cooperative Enterprises 1988, (the CJV Law 1988)

Chinese FDI legal framework prior to their eventual replacement by the New Chinese FDI Law in 2019. This framework was criticised for being overly tentative, strict and lacking clarity.[22] It did not tackle the lack of a dispute resolution mechanism due to the rudimentary stage of China's litigation system for adjudication.[23]

Second generation FIEs Laws 1990s-2000s

The development of the Chinese FDI investment law after 1992 was distinct from the previous decade. It was dominated by the modernisation of the 'Socialist Market Economy' and industrial reforms.[24] China focused on establishing and improving its socialist market economy with Chinese characteristics during this period of reforms.[25] The second generation FIEs law reform was accompanied with various law reforms and compliance in preparation for China's accession to the WTO in 2001. China pursued an unprecedented liberalisation of the trade system with trading rights being progressively expanded and trading barriers being drastically reduced.[26] These trade reforms constitute 'a long term movement to greater openness and integration into the world economy,'[27] from which China reaped manifolds of benefits over the last two decades.[28]

Following the trading success in 1990s, China also became the world's largest recipient of foreign direct investment and Chinese firms being the major investors abroad.[29] Given the interconnected relationship between trade and foreign direct investment, foreign investors' demands for liberalisation from the centrally planned economy pushed China to enact several legislations, which were market orientated.[30] Alongside this political and legal background, China continued its economic reform by easing restrictiveness, increasing market access and transparency for foreign investors. All FIEs were subject to a complicated approval and registration system by the Ministry of Foreign Trade and Economic Cooperation (MOFTEC). This system was replaced by the online 'Record-filing' system for sectors falling outside the 'Negative list' in 2016. The approval system was onerous and could delay the commencement of FIEs for 4-5 months.

By 2001, the amendment of the EVJ law further relaxed the restrictions by allowing the FIE to purchase insurance, materials and goods from international providers.[31] It added the right to litigate in the Republic People's Courts for FIEs when there was no arbitration agreement.[32] The FIE's net profit after tax and employees' wages could be remitted abroad in foreign currency unrestrictedly, i.e., it eliminated the FIE's obligation to maintain the foreign exchange level.[33] Notably, the second generation FIEs laws carried out the core purpose of an expansion of foreign economic co-operation and technological exchange.

Besides the amendments of the 'Three Laws' and their corresponding Implementing Rules, the Catalogue for the Guidance of Industries for Foreign Investment 1997 and the Interim Provisions on Guiding Foreign Direct Investment 1995 (the Interim Investment Guideline 1995) together formed the most important guidance governing the FIEs since 1995.[34] The Catalogue system divided all Chinese industries into four groups: encouraged, permitted, restricted and prohibited. It adhered to the principle that the Chinese FDI law operates under the dual legal system that FDIs do not enjoy the same national treatment as domestic enterprises. This system works as a mechanism to manipulate foreign investment into industries which are most needed for China's economic development, such as manufacturing and agriculture through government subsidies and tax benefits, etc.[35] It sets out which industries are restricted and prohibited to protect national pilot industries and to preserve rare resources. The FIEs must satisfy some strict requirements before carrying out business in the restricted group. These restrictions include a centralised approval process, 70% of product exportation requirements and Chinese partners being the majority shareholders.[36] To start with, the list for the restricted and prohibited industries are extensive with 97 sectors restricted and 30 sectors prohibited for FIEs. The regulatory department subsequently reduced the items on the restricted and prohibited lists to remove market restrictions for foreign investments. From 2017, this Catalogue was split into the Encouraged list and the Negative list, the latter of which contained the restricted list (35 items) and the prohibited list (28 items).

Pre-2019 reform era

1. Free Trade Zone experiment 2013

Since 2013, the Chinese State showed improved enthusiasm for the development of the modern market system, macro-control system and an open economic system. This followed a series of complaints from foreign investors regarding unfavourable treatment in areas such as the preferential treatment to SOEs, local protectionism to local SOEs and policies supporting national champions.[37] It aimed to establish a unified, open, competitive and transparent market system for a mixed economy. To fulfil this aim, China pledged to remove market barriers and allow all market players to enter areas which are not on the negative list on an equal basis.[38] The development of the FDI law in the 2010s

22 Shan, supra n 188, 51; Barbara Campbell POTTER, 'China's Equity Joint Venture Law: A Standing Invitation to the West for Foreign Investment?' (1993) Univ. Penn. J. Int. Law 12, no.1, 2

23 Shan, supra n 18, 50

24 Edmund C. Duffy, 'Business Law in China: Evolutionary Revolution' (1996) Journal of International Affairs 49, No. 2 (1996): 557-571

25 Yang Fengming, 'Retrospects and Prospects at the 20th Anniversary of China's Accession to the WTO' (2022) Journal of WTO and China, Volume 12, Issue 2, 113

26 Elena Ianchovichina and Will MARTIN, 'Trade Liberalization in China's Accession to WTO' Journal of Economic Integration 16(4), December 2001; 421-445, 424

27 Ibid, 440

28 Fengming, supra n 25, 113; Joseph FEWSMITH, 'The Political and Social Implications of China's Accession to the WTO' (2001) The China Quarterly, No. 167 (Sep 2001), pp. 573-59, 573

29 Nicholas R Lardy, 'Issues in China's WTO Accession' (09/05/2001) online: https://www.brookings.edu/articles/issues-in-chinas-wto-accession/, access on 03/09/2023

30 Wang Yan, *Chinese Legal Reform*, (1st Edition, Routledge, 2002) 13-14

31 Law of the People's Republic of China on Chinese-Foreign Equity Joint Venture 2001, [hereinafter 2001 EJV Law], Articles 9-10

32 Ibid, Article 15

33 Ibid, Articles 11-12

34 Catalogue for the Guidance of Industries for Foreign Investment, Decree No. 7 of the State Planning Commission, the State Economic and Trade Commission and the Ministry of Foreign Trade and Economic Cooperation, December 31, 1997

35 Yongmin Bian, 'A Revisit to China's Foreign Investment Law: With Special Reference to Foreign Investment Protection' (2015) 8 J. E. Asia & Int'l L, 447, 455

36 The Interim Provisions on Guiding Foreign Direct Investment 1995, Articles 9 & 11

37 BIAN, supra n 35, 456; US Chamber of Commerce, 'China's Approval Process for Inbound Foreign Direct Investments: Impact on Market Access, National Treatment and Transparency 2012' (Nov. 11, 2012), at 50; European Chamber, 'European Business in China: Position Paper', 2014-2015, 16-17, available at https://www.europeanchamber.com.cn/en/publications-archive/313/European_Business_in_China_Position_Paper_2014_2015, accessed on 31/07/2021

38 The Third Plenary Session of the 18th Central Committee of the Communist Party of China, 'Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform 2014,' III, S 9 (November 12, 2013)

followed this core principle. It focused on levelling up market access and equal treatment for FIEs, while gradually transitioning from non-national treatment to the management model of PNTPNL.

The Shanghai Free Trade Zone Experiment in 2013 was a 'milestone' for successfully implementing the government strategic reform and opening-up policy in a new era for foreign investment.[39] For the first time China introduced the 'Negative List' approach as opposed to the Positive List approach under the Catalogue system. For industries within the 'Negative List', investment will have to follow the complicated and time-consuming verification approval and registration. For industries outside the 'Negative List', the FIEs can enjoy both preferential or pre-establishment national treatment as domestic enterprises and the SOEs.[40]

This pilot scheme provided a tried and tested framework for nationwide application of the 'National treatment plus the negative list' and the 'Record-filing' system to replace the traditional approval system. The Administrative Measures for the Recording-filing of the Incorporation and Change of Foreign-invested Enterprises formally promulgated the online 'Record-Filing' system for FIEs in 2016. This is applicable for all FIEs not falling into the list of industries with special access administrative measures.[41] For industries falling into the 'Negative List' the approval system still applies. This streamlined online filing system is more efficient compared to the traditional case-to-case approval system as the competent institutions must complete record filing within three days after the FIEs have filed accurate documents online.[42] The 'Record-filing' system is a step forward in removing the rigid approval system and improving market access for foreign investors.

The draft foreign investment law (the "Draft Law") 2015

The Chinese government attempted to revamp the Foreign Investment Law in 2015 by issuing the Draft Foreign Investment Law 2015 (the "Draft Law"), although they never formally adopted Draft Law due to criticism of ambiguity, uncertainty and broad scope. The national security review system under the Draft Law was too strict and at times ambiguous. It failed to find a balance between encouraging foreign investment and protecting national security. For example, the review system was too ambiguous and left room for competition between central and local governments;[43] the definition of national security was 'overly broad', which could have an adverse impact on the flow of foreign investment into China, impeding the opening-up of the FDI market.[44] Despite these criticisms, the Draft Law reinforced China's economic reform agenda, which was committed to relaxing controls on investment access, deepening reform and opening-up, and promoting foreign investment.[45] It was a step forward for the Chinese government in enhancing its commitment to several ongoing China-BIT negotiations with the EU and the US. This led to the adoption of PNTPNL in 2017.

This part analysed the evolution of old Chinese FDI law and the shortcomings remained unresolved in the legal system prior to 2019. Given that the Draft Law was never implemented, the FDI law was still piecemeal in its approach. It sprang out from the old system of the 'Three Laws' and their corresponding 'Implementing Rules,' 'Catalogue' system to the recently adopted FTZ and the national 'Negative list.' Clearly Chinese FDI Law prior to 2019 endeavoured to remove market restrictions and promote equal treatment for foreign investors. Nonetheless, ambiguity and uncertainty remained in the area of national security review in the Chinese foreign investment regime. The old law failed to set out a clear framework for dispute resolution and IP protection for investors.

The Role of China-EU CAI and China-US BIT negotiations in shaping the new Chinese FDI Law

Part II analyses the China-EU CAI and China-US BIT negotiations, major criticism of Chinese FDI laws from foreign investors, key issues and solutions deriving from these negotiations, and the future of these two influential agreements. It carries on discussing the FDI policy responses to these criticisms before the new FDI reform in 2019. Part II aims to provide the basis for the analysis in part III: how the new law addressed these issues from the perspective of China-EU CAI and China-US BIT negotiations.

China-EU CAI

The previous 26 BITs between EU Member States and China contained huge discrepancies in areas of investment protection and post-establishment treatment. At the same time, it left the unfair market access issue unaddressed.[46] It did little to promote investment and could not reflect the demands of both sides.[47] Several obstacles impeded foreign investment between the EU and China under the previous patchwork legal system. The major obstacle was market access restrictions for inflow FDIs in China, including foreign ownership prohibitions and equity limitations, joint venture requirements, screening mechanisms and capital and licensing requirements.[48] Further complaints consisted of discriminatory treatment towards foreign investors and insufficient protection of foreign investment, IP rights and key technologies.[49] This section focuses on the elimination of market access restrictions for FDIs and setting up a unified dispute settlement mechanism. It also critically analysed the future of the CAI after being grounded on a temporary suspension from 2021. The issues of SOEs reforms, national security reviews and forced technology transfers are analysed in Part II.C.

Market access

Historically the unfair market access presented an obstacle for foreign investors in China. The FDI restrictiveness of China, at 0.214, is still much higher than the US at 0.089 and the Organisation for Economic Co-operation and Development (OECD) countries at an

[39]Gladie LUI, 'Shanghai Pilot Free Trade Zone: Shaping of China's Future Foreign Investment Environment' (2014) 40 Int'l Tax J. 31, 31

[40]Shan, supra n 18, 206

[41]Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-funded Enterprises, MOFCOM Order No.3 of 2016, Articles 2 & 5; Catalogue of Industries for Guiding Foreign Investment (Revision 2017), Special Management Measures for Foreign Investment Access (Negative List for Foreign Investment Access) Explanations'

[42]Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-funded Enterprises, supra n 41, Article 11

[43]Meichen LIU, 'The new Chinese Foreign investment Law and its implication on foreign investors' (2018) Northwestern Journal of International Law & Business, 38:285, S. IV

[44]Ibid, 4

[45]'Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform 2014', supra n 38, Section 24

[46]EC, 'Recommendation for a Council Decision, Authorising the Commission to open negotiations on an investment agreement between the European Union and the People's republic of China' (2013) Brussels, Com (2013) 297 Final, 4

[47]Yin, supra n 14, 173

[48]EC, 'Recommendation for a Council Decision, Authorising the Commission to open Negotiations on An Investment Agreement Between the European Union and the People's Republic of China,' supra n 46, 3-4

[49]Ibid, 3-4; LEVINGER & HANSAKUL, supra n 5, Section 'EU Investment in China: Among the Top Sources'

average of 0.068 in 2021.[50] In contrast, the EU is renowned for its open market access for FDIs. The restrictiveness of the China FDI market sparked furious complaints by the EU that their companies did not have equal regulatory treatment and lacked reciprocity in market access for the inflow FDIs to China.[51] The first generation Sino-foreign BITs before 1998 were much more conservative and did not offer 'national treatment' or only offered national treatment subject to national laws.[52] The current China and EU Member States' BITs (Spain, Portugal, The Netherlands, Belgium, Luxembourg, Germany, Czech Republic and Finland) contain a 'national treatment' provision, which is subject to any existing non-conforming rules of the contracting country.[53] Only the China-Seychelles BIT provided a full post-establishment national treatment.[54]

The China FDI investment market started to open at a relatively slow pace after various market restrictions were gradually removed by FDI law reforms. After the implementation of the 'national treatment plus the negative list' and the online 'Record-filing' system prior to the 2019 reform era, China's FDI law system witnessed a remarkable improvement in market access and market liberalisation for foreign investment (discussed in Part I). China showed huge commitment by establishing a unified, open, competitive and transparent market system for a mixed economy in the recent FDI law reforms from 2013.[55] This policy of levelling up market access and equal treatment for FIEs was successfully piloted at the Shanghai FTZ and then implemented nationwide in 2017. Likewise, China started to apply the PNTPNL system across the board from 2017.[56] The FTZ model and the PNTPNL system were later included in the New FDI Law 2019.[57] In addition, both the FTZ's and the national 'Negative List' were massively reduced in recent years allowing foreign investors to enjoy national treatment in more sectors.

Given that the complaints of unequal treatment towards foreign companies were mainly focused on the preferential treatment to China's SOEs and national champions,[58] the EU parliament intended to remove the unfair advantages received by Chinese SOEs and enhance transparency and governance of SOEs in FDIs.[59] In response to this, China made an ambitious commitment to increase market access for the FDI, in preparation for signing up the China-EU CAI. Before signing up with the China-EU CAI, China also signed up to the Regional Comprehensive Economic Partnership Agreement 2020 (RCEP), containing the 'National Treatment' and the 'Most-favoured-Nation (MFN) Treatment' clauses.[60] The RCEP is the largest free trade agreement in terms of economic output in history, to which China, and 14 other countries signed in 2020.[61] The China-EU CAI followed this approach. It specified that China was committed to removing the quantitative restrictions, equity caps and joint venture requirements in many important sectors, including manufacturing, automotive, financial services, telecommunication/cloud services, computing services, etc.[62]The unprecedented commitment made under the CAI Agreement should have significant impact in foreign investment.

According to the China-EU Investment Negotiations Agreement in Text (subject to final modification) (hereafter Agreement in Text), published in 2021, both parties adopted the national treatment and MFN treatment with respect to FDIs' establishment and operation in its territory.[63] This suggests that China not only embraced an equal treatment for FDIs in comparison to the national enterprise, but also applied the national treatment and the MFN treatment at the establishment stage. This further confirms its recent pledge for a remarkable improvement on market access and liberalisation for foreign investments. The Agreement in Text listed restrictions and prohibitions on both parties to address the complaints regarding the market access issues. These includes the restrictions or the requirement of a specific type of legal entity or joint venture through which an enterprise may carry out its economic activity;[64] the prohibition for transferring technology or production and the interference on the transfer or licensing of technology.[65] While the provisions of the national treatment and the MFN treatment are commendable, they are not absolute because they do not apply to subsidies or grants provided by the state, including government-supported loans, guarantees and insurance.[66] This means the SOEs or Chinese enterprises can still be placed in a more favourable position with government financial support in comparison to the FDIs.

In terms of providing a level playing field, China-EU CAI specifically addressed the more favourable treatment for SOEs; it requires SOEs to act in accordance with commercial considerations without discrimination in the purchases and sales of goods or services and to be subject to dispute resolution under the CAI.[67] The Agreement in Text showed that China was willing to formally achieve these commitments. Accordingly, it requires that the covered entities, which include the enterprises at all levels of government that have direct or indirect control or influence,[68] to act in accordance with commercial considerations in their purchases or sales of goods or services.[69] The same non-discriminatory treatment applies if the SOEs operate in the other party's territory.[70]

[50]OECD (2021), FDI Restrictiveness (Indicator), doi: 10.1787/c176b7fa-en, online: https://data.oecd.org/fdi/fdi-restrictiveness.htm, accessed on 24/07/2021

[51]YIN, supra n 14, 177

[52]Congyan CAI, 'China–US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications' (2009) Journal of International Economic Law 12(2), 457–506, 461

[53]The Protocol to the Agreement on the Encouragement and Reciprocal Protection of Investments (2003) China-F.R.G. Article 3

[54]Bian, supra n 35, 456

[55]'Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform 2014,' supra n 38, III, Article 9

[56]President Xi Jinping, 'Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era' (2017) Delivered at the 19th National Congress of the Communist Party of China October 18, 2017

[57]The New Law 2019, Article 4

[58]BIAN, supra n 35, 456

[59]European Parliament, 'Resolution of 9 October 2013 on the EU-China Negotiations for a Bilateral Investment Agreement' (2013/2675(RSP)); EC, 'Impact Assessment Report on the EU-China Investment Relations' (2013) Commission Staff Working Document, SWD, 185 final.

[60]Regional Comprehensive Economic Partnership Agreement 2020, (came into force in 1st Jan 2022), Articles 10.3 and 10.4

[61]Julien CHAISSE, Manfred ELSIG, Sufian JUSOH and Andrew LUGG, 'Drafting Investment Law: Patterns of Influence in the Regional Comprehensive Economic Partnership (RCEP)' (2022) Journal of International Economic Law, 2022, 25, 110–128, 110

[62]EC, 'Key Elements of the EU-China Comprehensive Agreement on Investment,' (30 December 2020) Press Release, Brussels, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2542, accessed on 07/07/2021

[63]China-EU Investment Negotiations Agreement in Text, Section II, Article 4.1.

[64]Ibid, Section II, Article 2.b

[65]Ibid, Section II, Article 3(1)(f)

[66]Ibid, Section II, Article 1.4

[67]EC, 'Key Elements of the EU-China Comprehensive Agreement on Investment,' supra n 62

[68]China-EU Investment Negotiations Agreement in Text, Section II, Article 3bis.1

[69]Ibid, Section II, Article 3bis 3(ai)

[70]Ibid, Section II, Article 3bis 3(aii) & 3(aiii)

Furthermore, the Agreement in Text improved the transparency and governance of these enterprises. The FDIs can request a disclosure of information from a covered entity regarding its ownership, voting structure, exemptions, immunities and equivalent measures under the other state party's laws and regulations.[71] The foreign investors can require information disclosure about the competent authorities responsible for exercising the government's ownership functions.[72] The covered entities should also adhere to international corporate governance and transparency.[73] The China-EU CAI created an open market for both parties while aligning the practices of Chinese entities with international standards.[74] These provisions should enhance China's previous reform efforts, such as the removal of any unfair advantage of the SOEs and increasing the disciplines of SOEs (see Part II.C(1)). In short, this unprecedented commitment made by China should produce fresh market openness and transparency for FDIs.

Dispute settle mechanism

Setting an effective and efficient mechanism for any disputes between parties is an important but controversial objective of the China-EU CAI negotiation. According to the China-EU CAI, China agreed to a state-to-state dispute settlement (SSDS), coupled with a monitoring mechanism at a pre-litigation phase established at the political level.[75] The disputing parties can use the mechanism of consultation, mediation or arbitration to settle disputes between parties effectively and transparently. The SSDS should serve the common interests of both parties through political leverage and protection.

Both parties avoided the investor-state disputes settlements (ISDS) system, under which foreign investors can bring actions against host states through international investment arbitration.[76] In general, the ISDS plays a critical role in international investment disputes and provides a necessary mechanism for international investors. Without it, investors would have to rely on the host countries' domestic legal systems or diplomatic, military and economic means to settle grievances.[77] The ISDS has some defects of its own which caused discontent among sovereign countries and led to an urgent call for reforms. Countries, including Brazil, India, Indonesia and South Africa took more radical action, such as replacing the ISDS with the SSDS.[78] The China-EU CAI and the RCEP are the two typical examples of how the SSDS was applied to replace the ISDS. The main defect of the ISDS is the lack of balanced protection of investors' interest and the sovereign host countries' interest. It can fetter the regulatory autonomy of the host countries,[79] while placing undue emphasis on the protection of investor's interest resulting in impeding public interests and the sovereignty of host countries.[80]

Moreover, the ISDS does not have an effective process to annul or to correct inconsistent and erroneous decisions.[81] No right to appeal the final award is the distinct feature of the ISDS arbitration, which leaves no room for parties to appeal against erroneous judgment.[82] The disputing parties can only use the annulment mechanism to annul the awards based on fundamental procedural requirements, although it cannot serve as an error-correction mechanism. [83] While there is no appellant mechanism, the tribunals can make different judgments and awards even in similar cases because of the discrepancy existing in different tribunals.[84] This led to the concerns that the decisions of the ISDS tribunals lack coherence and predictability.[85] The other important issues inherent in the ISDS system include the lack of transparency, procedural delays and high cost.[86]

China historically embraced a restrictive approach towards ISDS in BITs. It has since started to broaden its scope and comprehensiveness of provisions and actively participate in the reform of ISDS in recent years. The change of attitude aimed to enhance the protection of its outbound investment as China became a capital-exporting country between 1997 and 2011 on the one hand.[87] Inevitably more demands on the ISDS provisions are expected to increase from Chinese investors to protect their legitimate rights over foreign investments.[88] It expanded the jurisdiction of its existing arbitral institutions to encompass all investment disputes.[89] China curbed the power of the ISDS provisions and aimed to strike a balance between investment protection and the right to regulate. For example, it sought a more balanced approach and added preliminary procedures before international arbitration to prevent investors from abusing procedural rights and also to reduce frivolous claims during this period.[90] For Sino-BITs negotiated between 2007 and 2013, China also excluded the application of ISDS under a 'Negative List' approach, such as excluding the application of the ISDS for prudential measures in the financial sector, taxation measures and a decision made regarding the approval of an investment and a national security review.[91]

[71]Ibid, Section II, Article 3bis 4(a)
[72]Ibid, Section II, Article 3bis 4(a(vi))
[73]Ibid, Section II, Article 3bis 4(b)
[74]China-Australia Free Trade Agreement 2015, Article 2.3, China-Korea Free Trade Agreement 2012, Article 2.3, Both Agreements adopted the national treatment.
[75]EC, 'Key Elements of the EU-China Comprehensive Agreement on Investment,' supra n 62; China-EU Investment Negotiations Agreement in Text, Annex I.
[76]Liang YONG & Daiwei ZHAO, 'The Developments of ISDS Mechanism Initiated by the EU Investment Court System and China's Choice', (2019) 11 INDIAN J. INT'l ECON. L. 127 (2019), 130.
[77]Gloudeman, Salidjanova, supra n 6, 19
[78]EU, 'Submission of the European Union and its Member States to UNCITRAL Working Group III, Establishing a Standing Mechanism for the Settlement of International Investment Disputes', (18 January 2019), online: https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf, accessed on 31/03/2022, 133.
[79]YIN, supra n 14, 179; TAO & SHEN, supra n 5, 1161.
[80]Yong, Zhao, supra n 76, 130
[81]Yin, supra n 14, 179; EU, 'Submission of the European Union and its Member States to UNCITRAL Working Group III, Establishing a Standing Mechanism for the Settlement of International Investment Disputes', supra n 78, 2
[82]Article 53(1) of the ICSID Convention, 'The award shall be binding on the parties and shall not be subject to any appeal or any other remedy except those provided for in this Convention'; Claire WILSON, 'Protecting Chinese Investment Under the Investor– state Dispute Settlement Regime, A Review in Light of Ping An v Belgium', (Oxford University Press, 2019), 475.
[83]Yong, Zhao, supra n 76, 131.
[84]Ibid.
[85]EU, 'Submission of the European Union and its Member States to UNCITRAL Working Group III, Establishing a Standing Mechanism for the Settlement of International Investment Disputes', supra n 78, 2
[86]Yong, Zhao, supra n 76, 131; EU, 'Submission of the European Union and its Member States to UNCITRAL Working Group III, Establishing a Standing Mechanism for the Settlement of International Investment Disputes', supra n 78, 2–3.
[87]Li, Bian, supra n 8, 516; Huiping CHEN, 'China's Innovative ISDS Mechanisms and Their Implications', Symposium on the BRICS Approach to the Investment Treaty System, (2018) AJIL UNBOUND, Vol. 112, 207; Jane WILLEMS, 'Investment Disputes under China's BITs Jurisdiction with Chinese Characteristics?' Julien CHAISSE, ed., China's International Investment Strategy: Bilateral, (Oxford Scholarship Online: April 2019), Regional, and Global Law and Policy, 446, 3; YONG & ZHAO, supra n 76, 129. China became a net capital exporter from 2015.
[88]Wilson, supra n 82, 482; LI & BIAN, supra n 8, 504
[89]Chen (2018), supra n 87, 207; YONG & ZHAO, supra n 76, 149
[90]CAI, supra n 52, 462
[91]China-Canada BIT (2012), Article 20(2), Art. 14, Annex D.34; US Model BIT 2004, Articles 18–21

From the EU's perspective, the current ISDS system lacks legitimacy, consistency, transparency and a clear path for review.[92] It rendered that the ISDS clause in Article 8 of the BIT had an adverse effect on the autonomy of the EU law in Case C-284/16.[93] Hence, the adoption of the SSDS should avoid the defects of the ISDS system. While the details of the agreed dispute settlement are still yet to be finalised, the EU intended to modernise protection standards and to establish a dispute settlement in the context of the UN Commission on International Trade Law (UNCITRAL) on a Multilateral Investment Court.[94] This objective follows the EU's call to reform the ISDS system since 2017 by initiating a bilateral Investment Court System, which will eventually be replaced by a Multilateral Investment Court (MIC) to deal with the defects of the ISDS.[95] The MIC would provide an independent system which is based on consistent case-law, transparent procedures and an appellant mechanism.[96] In contrast to the conventional ISDS arbitration the MIC constitutes a tribunal of first instance and an appellant tribunal, which has the competence to review decisions of the tribunal of first instance on the grounds of errors of law, manifest errors in the appreciation of facts or serious procedural shortcomings.[97]

Academics had high hopes for the China-EU CAI to achieve the new generation investment agreements and to incorporate the EU-style MIC, as both parties also have shared aims and approaches.[98] Nonetheless, this optimism is unlikely to be achieved on this occasion. According to the Agreement in Text, the dispute settlement mechanism does not include an appellant tribunal, which was a distinct feature of the MIC. This is contrary to the China-EU CAI Agreement in Principle in 2020, which specified both parties to work towards 'modernised investment protection standards and a dispute settlement that considers the work undertaken in the context of UNCITRAL in a Multilateral Investment Court'.[99]

In recent years China showed increased willingness in the BIT negotiations to resolve investor-state disputes and actively participated in ISDS reforms, including the proposal of an appellate mechanism. Prior to the China-EU CAI Agreement in Principle, the China–Australia FTA (2015) had a similar 'historical' commitment to establish an appellate mechanism to review awards rendered in arbitration, although it did not result in any substantial outcome in the end.[100] It proposed a multilateral appeal mechanism in the UNCITRAL WG III in 2019.[101] China preferred to reform ISDS by combining a multilateral appeal mechanism to address the defects of the current ISDS regime, such as a lack of an error-correcting mechanism, a lack of stability and predictability for arbitral awards and the long and costly procedures.[102] This new approach to reform the ISDS mechanism and to take part in shaping international norms aligns with China's agenda to strengthen its discourse power and safeguard its sovereignty and developing interest.[103] Despite all these favourable factors, China remains cautious of embracing the EU's radically reformed MIC model and the pursuance of a permanent international investment court system.[104] Suffice to say, China is at the same time unlikely to embrace an unreformed ISDS without further modifications.[105]

The China-EU CAI opted for the SSDS system, by which disputing parties need to request their home state to espouse their claims by way of diplomatic protection and subsequently bring a claim against the host state.[106] The SSDS mechanism ironically is also an approach taken under the RCEP.[107] For the China-EU CAI agreement, the SSDS approach may be viewed as a compromised option for both parties contrary to their recent reform efforts regarding the investment dispute settlement. The SSDS system has defects of its own, such as being rarely invoked in the past, i.e., only three cases concerning a declaratory relief,[108] diplomatic protection[109] and the interpretation for abstract and obscure provisions[110] relied on the SSDS mechanism.[111] The cases which invoked the SSDS mechanism were far less when compared to that of the global ISDS, e.g., the total number of ISDS

[92]EC, 'Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' COM (2017) 493 final, 2017/0224 (COD), Section 1

[93]Case C-284/16, *Slowakische Republik v Achmea BV*, Judgment of the Court (Grand Chamber) of 6 March 2018, [59]

[94]EC, 'EU and China Reach Agreement in Principle on Investment' (30 December 2020) Press Release, Brussels, online: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541, accessed on 20/07/2021

[95]LI & BIAN, supra n 8, 523

[96]EC, 'Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes', supra n 92, Section 1; Council of the European of Union, 'Negotiating directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' (1 March 2018) Brussels, 12981/17 ADD 1 ACL 1, Articles 11-15.

[97]Council of the European of Union, 'Negotiating Directives for A Convention Establishing a Multilateral Court for the Settlement of Investment Disputes,' supra n 96, Article 10; EU, 'Submission of the European Union and its Member States to UNCITRAL Working Group III, Establishing a Standing Mechanism for the Settlement of International Investment Disputes' supra n 78, 4

[98]Li, Bian, supra n 8, 524

[99]EC, 'EU-China Comprehensive Agreement on Investment, the Agreement in Principle' (30 December 2020), online: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541, accessed on 06/09/2023

[100]China–Australia FTA (2015), Article 9.23: Within three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered under Article 9.22 in arbitrations commenced after any such appellate mechanism is established. Any such appellate mechanism would hear appeals on questions of law; LI & BIAN, supra n 8, 530

[101]LI & BIAN, supra n 8, 505; YONG & ZHAO, supra n 76, 148

[102]United Nations, 'United Nations Commission on International Trade Law WG III (investor-State Dispute Settle Reform)' (14-18 October 2019), A/CN.9/WG.III/WP.177, 2-3

[103]CHEN (2018), supra n 87, 210

[104]Yong, Zhao, supra n 76, 156

[105]Wilson, supra n 82, 484

[106]Micheal Ewing-Chow, Junianto James Losari, 'The RCEP Investment Chapter: A State-To-State WTO Style System for Now' (December 8, 2020) Kluwer Arbitration Blog

[107]CHAISSE et al, supra n 61, 110

[108]*Empresas Lucchetti, S.A. and Lucchetti Per, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 3 (Feb. 7, 2005). Peru was unable to displace investor-state arbitration on the same issue and abandoned the state-to-state arbitral proceedings thereafter.

[109]*Republic of It. v. Republic of Cuba, Sentence Pr liminaire* [Interim Award] (Mar. 15, 2005), 62-63, This case concluded that the investor-state arbitration was not available under the Italy-Cuba BIT and any disputes between investors and the host state would have to be resolved through state-to-state arbitration mechanisms.

[110]*Chevron Corp. (U.S.) and Texaco Petroleum Co. (U.S.) v. Republic of Ecuador,* PCA Case No. 34877, Partial Award on the Merits, 249 (Perm. Ct. Arb. 2010), Ecuador filed a request for state-to-state arbitration pursuant to Article VII(1) of the US- Ecuador BIT in 2011. The tribunal dismissed the case for a lack of jurisdiction.

[111]Yong, Zhao, supra n 76, 159; Jarrod WONG, 'The Subversion of State-to-State Investment Treaty Arbitration' (2014) Columbia Journal of International Law, 53(1), 21-22; There three cases are: *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru, ICSID Case No. ARB/03/4, Award, 3 (Feb. 7, 2005)., Republic of Italy. v. Republic of Cuba, Sentence Finale [Final Award] (Jan. 15, 2008), and Republic of Ecuador v. U.S., PCA Case No. 2012-5 (Perm. Ct. Arb. 2012).*

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cases in investment arbitrations was 608 by 2014.[112] It is uncertain whether the SSDS could fulfil the demand of investment protection for both parties given its limited usage.

Meanwhile, states are less willing to go through the complicated submitting process as well as being wary of leveraging political influence in a charged dispute deleterious to both state parties.[113] Apart from the unwillingness of the state to be involved in a commercial investment dispute, the remedy for injured investors may only be limited to a monetary compensation award, to which the home state is not even obligated to pass it on.[114] The SSDS leans heavily on the home state's political leverage for an investor seeking redress in foreign investment disputes. According to Wong, the adoption of ISDS previously aimed to displace the diplomatic protection of the SSDS system, which is the predominate mechanism to resolve territorial boundary disputes and post-conflict settlements.[115] The Convention on the Settlement of Investment Disputes between States and National of Other State (ICSID) prioritised the ISDS over SSDS in order to depoliticise the dispute resolution process and to avoid inconsistent awards.[116] Returning to the SSDS would undoubtedly undo this work and lead to a reliance on the state's political protection of investors.

The current scope of this dispute settlement under the Agreement in Text is nonetheless wide ranging. It applies 'to any dispute concerning the interpretation and application of the provisions of this agreement, except as otherwise provided.'[117] This wide scope may send a strong signal that the SSDS would be the dominant settlement mechanism to replace the ISDS in any dispute, not limited to territorial boundary and post-conflict settlements.

Lastly, the Agreement in Text granted the state parties the right to adopt measures for the protection of public morals, protection of humans, animals, or to secure compliance with laws or regulations which are not inconsistent with provisions of this agreement.[118] This means that the state parties retain the right to regulate these specified areas to balance the protection of the investor's interest with the regulatory autonomy of the host countries. The China-US CAI gave some attention to the issues surrounding the SSDS and the ISDS. Time will tell how effectively the SSDS can fulfil the expectation of 'modernised investment protection standards and dispute settlements;' or even whether the state parties would be willing to lever their political power to solve these paramount foreign investment dispute cases on a rarely invoked SSDS mechanism.

Future of China-EU CAI

The direction of the China-EU CAI is influenced by the rapid changes in trading and political relationship between these two parties in more recent year. The China-EU foreign investment relationship was previously viewed in the EU as a strategic one which can achieve sustained economic growth and bring mutual benefits for the cooperation of these two economic areas.[119] The EU's FDI market from China is potentially huge as the EU is the most favoured destination for the Chinese FDIs and China being a vital trading partner with the EU.[120] Chinese investors can access technologies with a low level of market access restrictions.[121] The China-EU CAI achieved a landmark for both countries. It encompassed wide areas, such as increased transparency, a level playing field in China, ambitious market access commitments for European investments, sustainability and technology protection. If fully ratified by the EU, it would replace all other existing 25 member states' BITs with China.[122]

Despite these benefits, the China-EU relationship has rapidly shifted during the recent global development in the last three years. The EU suspended the ratification temporarily in May 2021 due to the political turmoil between China and the EU. The temporary suspension was an initial reaction to Beijing's sanctions of European officials and the human right issue of the Uighurs in Xinjiang.[123] The EU was also critical that China did not advance a peace plan to support Ukraine's sovereignty and territorial integrity in the Russian Ukraine war.[124] The EU prioritises ending the Ukraine war, whilst China reiterated their focus on building an open economic market and international cooperation in addressing global issues.[125] This omission of China inevitably could steer the un-ratified China-EU CAI in a different direction. A few obstacles must be resolved given that both parties' interests lie widely apart, amidst continuous conflicts and tension within these two countries.

Despite this undesirable halt, the China - EU CAI is, on one level, a widely-welcomed move to deal with the critical issues concerning the continuity and reciprocity for both parties in trade and investment, comprising a level - playing field, transparency of subsidies, forced technology transfer and sustainable development.[126] In response, China has spontaneously implemented a new FDI Law 2019 and reformed other domestic laws to achieve these objectives. At the same time, the China - EU CAI gave specific attention to promoting

[112]UNCTAD, 'Investor–State Dispute Settlement: Review of Developments in 2014' (15 July 2015) IIA Issue Note, No 2, 2015, 1; WILSON, supra n 82, 480; WONG, supra n 111, 9

[113]YONG & ZHAO, supra n 76, 160; WONG, supra n 111, 16

[114]WONG, supra n 111, 16

[115]WONG, supra n 111, 20; ICSID Convention Regulations and Rules, Article 27(1)

[116]WONG, supra n 111, 31

[117]China-EU Investment Negotiations Agreement in Text, Section V, Article 1.2

[118]Ibid, Section VI, Article 4

[119]Ann SAARELA, European Parliament, 'A New Era In EU-China Relations: More Wide-Ranging Strategic Cooperation?' (2018) Policy department, PE 570.493, 5; EC, 'Recommendation for a Council Decision, Authorising the Commission to open negotiations on an investment agreement between the European Union and the People's republic of China' supra n 46, 2

[120]EC, 'Speech by President Von Der Leyen on EU-China relations to the Mercator Institute for China Studies and the European Policy Centre' (30 March 2023) Online: https://ec.europa.eu/commission/presscorner/detail/en/speech_23_2063

[121]Levinger, HansakuL. supra n 5, Section 'Chinese Investment in the EU: Soaring from Small Levels'; YIN, supra n 14, 171.

[122]LEVINGER & HANSAKUL, supra n 5, Section 'Chinese Investment in the EU: Soaring from Small Levels'; European Parliament, 'Resolution of 9 October 2013 on the EU–China Negotiations For A Bilateral Investment Agreement' (2013) 2013/2674(RSP), Article 47; TAO & SHEN, supra n 5, 1160

[123]European Parliament News, 'MEPs Refuse Any Agreement with China Whilst Sanctions are in Place' (20/05/2021) online: https://www.europarl.europa.eu/news/en/press-room/20210517IPR04123/meps-refuse-any-agreement-with-china-whilst-sanctions-are-in-place, accessed on 06/09/2023

[124]EC, 'Speech by President von der Leyen on EU-China relations to the Mercator Institute for China Studies and the European Policy Centre,' supra n 120

[125]'Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on April 1,' supra n 11 , China reiterated 'The spirit of openness, inclusiveness and mutual benefit… building an open world economy and sharing development opportunities with other countries.'; China Mission to EU, 'Special Edition: China-EU Dynamics Newsletter on China's "Two Sessions"' (13/03/2023), online https://missionofchinatotheeu1. createsend.com / campaigns/ reports/view Campaign.aspx?d= d&c=52A7D681FC161228& ID=633288277022E6372540EF23F30FEDED& temp=False&tx=0, accessed on 21/04/2023

[126]Gisela GRIEGER, 'EU-China Comprehensive Agreement on Investment, Levelling the Playing Field with China' (2021) PE 679.103, European Parliamentary Research Service, 10-11

environmental and labour standards[127] as well as securing investment dispute settlement mechanisms for contracting parties and investors. The CAI aimed to rebalance the relationship between China and EU on the principle of 'transparency, predictability and reciprocity'.[128] Therefore, to reanimate the suspended ratification should aid these objectives and solve foreign investment issues. The China-EU summit in April 2023 saw some warm exchanges from both parties. For example, China supports peace talks and intends to 'enhance coordination and cooperation in multilateral affairs' and to enhance China-EU ties.[129] China expressed some interests in re-activating the CAI agreement based on the principle of mutual benefits in February 2023.[130] In exchange, the EU has no intention to decouple from China, but to engage in a high-level Economic and Trade Dialogue, although little has been discussed about future of CAI.[131]

The conclusion of the China-EU CAI signified the EU's determination to exercise its sovereignty and to promote their competitiveness in the world by establishing strategic relations with China. This deal was largely pushed through under Markel's leadership to pursue close economic ties with China, being an important trading partner to Germany.[132] This previously favoured deal would be largely downgraded under the current three-party coalition of the German government, two of which argued against the ratification in its current form and in response to China's assertive diplomacy over Hongkong and Xinjiang issues.[133] The same sentiment is also shared by the French President Emmanuel Macron.[134]

Hence, the EU is likely to tread very carefully in this decision. From the EU's perspective, ratification would require re-assessment of the CAI in light of the EU's current policy of 'de-risking' towards China by recognising the changes in China's economic and security strategies; it would also require a settled approach of China in several global and domestic issues, including the Ukraine War, the lifting of sanctions on EU officials and the human right issue in Uyghur population.[135] The EU and China started a high-level of EU-US Dialogue on China in May 2021 to increase regular dialogues; this suggested that EU and US tried to form a cooperative alliance under Biden's administration on China and its assertive diplomacy.[136] Therefore, The EU and US would be unlikely to take a different stance towards China regarding investment agreements under the current international political realm.

China-US BIT

The main issues under the China-US BIT negotiations largely coincide with that of the China-EU CAI. These include restricted market access, performance and localisation requirements, discriminatory treatment of foreign investors, plus a discretionary and opaque national security review mechanism.[137] Suffice to say that China prioritised making progress in the China-US BIT negotiations in 2016.[138] China also set concrete commitments towards foreign investment. These included promising a 'higher-standard, opening up and stabilising the overall performance of foreign trade and foreign investment'; it would 'actively participate in the reform of the WTO' and 'work with the US to implement phase one of the China-US economic and trade agreement.'[139]

From the US's perspective, the BIT presented an opportunity to force China to engage in domestic FDI reforms and to address major issues existing in China's foreign investment regimes, namely, market access barriers, the unclear regulatory and legal enforcement problem plus the forced technology transfer issue.[140] These negotiations were regarded as the 'century negotiations' which could accelerate China's FDI reform process.[141] From China's perspective, a workable BIT should facilitate its ability to explore the lucrative US investment market, particularly at a time when China's outflowing FDIs into the US gradually outpaced the US's inflowing FDIs into China.[142] To remove any unfair treatment over China's overseas investments under the US FDI review system, the Committee on Foreign Investment in the United States (CFIUS) also constituted a key motivation for China's commitment to the negotiation.[143] The next three sections examine the latest development of the China-US BIT in the promotion of open market access, clear dispute resolution mechanism, SOEs reforms, national security reviews and forced technology transfers.

Market access

The promotion of fair market access and pre-establishment of national treatment is a key objective of the China-US BIT. The US companies were critical of the restrictiveness of the Chinese FDI legal system and the uneven playing field whereby certain business sectors were closed or subject to burdensome restrictions.[144] To achieve increased market access in China constitutes a crucial benefit for US companies.[145] The 2012 US Model BIT formed the starting point for negotiation, including Article 3(1), the national treatment for foreign investors and Article 4, the MFN treatment.[146] Both Articles

[127]EU-China Investment Agreement in Text, 2020, Section IV, Article 1

[128]EC, 'Speech by President Von Der Leyen on EU-China relations to the Mercator Institute for China Studies and the European Policy Centre,' supra n 120

[129]Ministry of Foreign Affairs of the People's Republic of China, 'President Xi Jinping Holds China-France-EU Trilateral Meeting with French President Emmanuel Macron and European Commission President Ursula Von Der Leyen' (60/04/2023) Online: https://www.fmprc.gov.cn/eng/zxxx_662805/202304/t20230406_11055596.html, accessed on 21/04/2023

[130]MCELWEE, supra n 10, 8; Mission of the People's Republic of China to the European Union, 'Ambassador Fu Cong Attends EPC's Sixty-Minute Briefing' supra n 13

[131]'President Xi Jinping Holds China-France-EU Trilateral Meeting with French President Emmanuel Macron and European Commission President Ursula Von Der Leyen', supra n 129

[132]MCELWEE, supra n 10, 9

[133]Ibid, 3

[134]Jamil ANDERLINI, 'Europe's Disunity Over China Deepens' (April 24, 2023) Politico, onlone: https://www.politico.eu/article/europe-germany-france-olaf-scholz-disunity-over-china-deepens/, accessed on 06/09/2023

[135]EC, 'Speech by President von der Leyen on EU-China relations to the Mercator Institute for China Studies and the European Policy Centre,' supra n 120

[136]MCELWEE, supra n 10, 9

[137]GLOUDEMAN & SALIDJANOVA, supra n 6, 3

[138]Premier Keqiang LI, 'Report on the Work of the Government,' (March 17, 2016) online: http://news.xinhuanet.com/english/china/2016-03/17/c_135198880_3.htm, accessed on 17/07/2020

[139]Keqiang LI, supra n 12, 18-19

[140]Gloudeman, Salidjanova. supra n 6, 3; Office of the U.S. Trade Representative, 'United States Concludes Review of Model Bilateral Investment Treaty', (April 2012) online: https://2009-2017.state.gov/r/pa/prs/ps/2012/04/188198.htm, accessed on 31/07/2021.

[141]Sheng ZHANG, 'The China-United States BIT Negotiations: A Chinese Perspective' (2014) Vale Columbia Centre on Columbia Centre on Sustainable International Investment, Columbia FDI Perspectives, No. 112, 2

[142]Daniel C.K. CHOW, 'Why China Wants a Bilateral Investment Treaty' (2015) Boston University International Law Journal 33 (April 23, 2015), 103

[143]Gloudeman, Salidjanova. supra n 6, 6; Gary Clyde HUFBAUER, Sean MINER, and Theodore MORAN, "Committee on Foreign Investment in the United States and the US-China Bilateral Investment Treaty: Challenges in Meeting China's Demands," in Toward a US-China Investment Treaty, (Peterson Institute for International Economics, February 2015), 34

[144]CHOW, supra n 142, 103 & 114

[145]GLOUDEMAN & SALIDJANOVA, supra n 6, 22

[146]U.S. Model Bilateral Investment Treaty 2012, Article 3(1) & 4(1)

apply to the 'establishment' stage. These two provisions have a much wider scope than past practices of China in other BITs and free trade agreements as China's international investment agreement practice only provided national treatment subject to host countries' national laws or nonconforming measures before 2008.[147] China still limited the national treatment provision to the post-establishment phrase in its most recent BIT.[148] If this scope under the 2012 US Model BIT were adopted it would offer similar market access to the provisions of National Treatment and MFN treatment under the Agreement in Text, which includes the establishment stage.[149] The 2012 US Model BIT also contains provisions which prohibit specific performance requirements, such as the prohibition of forced technology transfers.[150] It does not impose any prohibition on the specific types of legal entity or joint venture for foreign enterprises as it did in the China-EU CAI Agreement in Text. Nonetheless, it does not specifically address the transparency and governance issues of the SOEs. It does not have provisions to require SOEs to make transactions in accordance with commercial considerations. SOEs have no obligation to disclose additional information about ownership and voting structure if the entities are directly or indirectly influenced by the state party. Hence, the China-US BIT would have to carve out some provisions to address these gaps.

At the same time, the situation for the China-US BIT would have become clearer after China committed a national treatment at all stages of investment and at all sectors with a negative list approach to prohibited or restricted sectors in 2013.[151] Notably, from the same year, China actively implemented measures to deepen the socialist market reforms, such as the Shanghai FTZ pilot scheme. The recently enacted New FDI Law 2019 embraced an expansion of a new pattern of an all-round opening-up and vigorously promoted foreign investment.[152] It implemented PNTPNL for foreign investment across all stages.[153] Both the removal of market access and competition obstacles in China's domestic law and the strong political will expressed by the Chinese government paved the way for a high-standard China-US BIT. Moreover, the China-EU CAI and the RCEP already achieved unprecedented openness for market access. Both contained some identical provisions for national treatment and MFN treatment with the same exclusion clause for government procurement, subsidies together with the prohibition of specific performance requirements.[154] Hence, it would be entirely achievable for the China-US BIT to reach a similar conclusion regarding market access.

Dispute resolution mechanism

Little conclusion can be drawn as to whether the China-US BIT would pursue the same dispute resolution mechanism as the China-EU CAI, i.e., the SSDS mechanism. Like the EU and China, the US legislators heavily criticised the harshness of the ISDS provision, which can challenge domestic legal processes and interfere with the supremacy of domestic law.[155] It ensures that the ISDS provision will 'not impinge on the federal, state and local governments to maintain (or adopt) measures that they deem necessary.'[156] Both the Trans-Pacific Partnership Agreement (TPP) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which adopted the US-style ISDS rules should shed some light on the China-US BIT negotiations. These free trade agreements are expected to serve as a point of reference for other free trade agreement negotiations.[157] Moreover, the US had a huge influence on the TPP Agreement because it was an original member of the TPP from 2005. It initiated the talks for the Agreement, which later led to the CPTPP, albeit the US withdrew from the TPP during the Trump era in 2017. Additionally, China recently applied to join the CPTPP in 2022. The ISDS mechanism has been China's salient approach for China's BITs with added momentum in the last decade as well as a sign of further modernisation in more recent free trade agreement negotiations.[158] Hence, the US-style ISDS adopted under the TPP and CPTPP should be achievable if both parties can find their synergies. The US is unlikely to abandon the current ISDS system. Hence, it is unlikely to adopt the EU-model MIC system, given that that the US has achieved some positive outcomes as a respondent state in the past under the ISDS system.[159] In addressing the issue of the lack of appellate mechanism and the error-correction mechanism for the current ISDS system, the US, as the reformist, would probably seek a reformed ISDS, which contains an appellate system and measures to improve the procedural rules and transparency.[160] While China is in the middle ground between the incrementalities and the systemic reformers, its ISDS reform proposal could lead to the adoption of a reformed ISDS system with a standing appellate body, although not as far as a radical EU-style MIC system.[161]

In terms of the protection of the state's regulatory autonomy, the US Model BIT includes safeguards to deter frivolous challenges to legitimate public interest measures and limited arbitral panels to monetary compensation for a treaty breach.[162] Like the US, China began to pursue a balanced approach to prevent frivolous claims from 2006.[163] The China-New Zealand FTZ 2008 set a good example by which any claim or award would have to satisfy the admissibility

[147]GLOUDEMAN & SALIDJANOVA, supra n 6, 9; BIAN, supra n 35, 457
[148]GLOUDEMAN & SALIDJANOVA, supra n 6, 10 & 23; China-Tanzania BIT 2013, Article 3(1)
[149]U.S. Model Bilateral Investment Treaty 2012, Article 14(5)
[150]Ibid, Article 8
[151]Office of the U.S. Trade Representative, 'Fact Sheet: 2014 National Trade Estimate Report Major Developments,' (2014) online: https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2014/March/2014-National-Trade-Estimate-Report-Major-Developments, accessed on 20/07/2021; US Department of the Treasury, 'Remarks of Treasury Secretary Jacob J. Lew at the Close of the Fifth US-China Strategic and Economic Dialogue' (2013) online available: https://www.treasury.gov/press-center/press-releases/Pages/jl2008.aspx, accessed on 05/09/2020; GLOUDEMAN & SALIDJANOVA, supra n 6, 12; BIAN, supra n 35, 457
[152]The New Law 2019, Article 1
[153]Ibid, Article 4
[154]Regional Comprehensive Economic Partnership Agreement 2020, Articles 10.2-6
[155]GLOUDEMAN & SALIDJANOVA, supra n 6, 20
[156]Office of the United States Trade Representative, 'The facts on Investment-State-Dispute Settlement: Safeguarding the Public Interest and Protecting Investors' (2014) online available: https://ustr.gov/about-us/policy-offices/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors, accessed on 06/09/2020, Point 3
[157]Heng WANG, 'The Future of Deep Free Trade Agreements: The Convergence of TPP (And CPTPP) And CETA?' (2019) 53(2) Journal of World Trade [2018] UNSWLRS 75, University of New South Wales Law Research Series, 2 & 9
[158]LI & BIAN, supra n 8, 505
[159]YONG & ZHAO, supra n 76, 147
[160]Ibid, 133
[161]LI & BIAN, supra n 8, 530-531; UNCITRAL Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of China, A/CN.9/WG.III/WP.177 (19 July 2019), available at: https://undoc s.org/en/A/CN.9/WG.III/WP, Accessed on 23 September 2020, 177
[162]Office of the United States Trade Representative, 'The facts on Investment-State-Dispute Settlement: Safeguarding the Public Interest and Protecting Investors', supra n 156, point 6; Scott MILLER and Gregory N. HICKS, "Investor-State Dispute Resolution: A Reality Check," (January 2015) Centre for Strategic and International Studies, 13
[163]CAI, supra n 52, 462

requirement to vet out claims which are frivolous or manifestly without merit.[164] Hence, it is likely that both China and the US would push for a restrictive dispute settlement mechanism to curb foreign investors' rights to challenge parties' domestic law in areas concerning environment, labour, taxation public health, financial prudence, national security and public interest,[165] and at the same time to safeguard the regulatory right of sovereign states in these areas.

Other Elements

SOE reform and national security review

The US Model BIT 2012 brought any state enterprise or persons under the jurisdiction of the BIT agreement when it exercises any regulatory, administrative or other government delegations.[166] This provision sets to address the discriminatory treatment of the Chinese government against foreign investors in favour of domestic SOEs. Chinese SOEs played an important role in the outbound FDI overseas in implementing the Chinese government's 'Go Global Strategy.'[167] China was criticised for promoting overseas investment and the acquisition of valuable technology to pursue its industrial policy goals and governmental strategies through various subsidisation schemes.[168] This targeted promotion could disadvantage the US local enterprises which are motivated by economic interests, while the Chinese SOEs are motivated for political and strategic consideration.[169] In addition, the CFIUS and the United States Trade Representative raised national security concerns about the Chinese government-owned companies under China's state-led economic development.[170]

Apart from resourcing a provision in international investment agreements to address the problem of SOEs, the US and the EU, among countries, such as Canada[171] and Australia, began to implement a national security review provision. This would curb some transactions of Chinese enterprises, particularly the SOEs. The US implemented the Foreign Investment and National Security Act in 2007 (FINSA). It empowered the CFIUS to conduct a national security review on transactions, which are controlled by government, threatening to impair national security or resulting in the control of a critical piece of US infrastructure by foreign bodies.[172] The work of CFIIUS led to several unsuccessful investment transactions by Chinese companies.[173]

From China's perspective, the US's national security review placed a barrier to the Chinese SOE's acquisition of US companies, constituting a discriminatory measure against Chinese SOEs in the US.[174] The political controversy and the US's national security review regime attributed the low level of the FDI flows to the US.[175] According to Du, the weaponised national security Review became a major regulatory hurdle for Chinese investors in the US, particularly the US's review system is often criticised for being 'unpredictable, untransparent, discriminatory, politicised and prone to abuse.'[176] As a result, the Chinese officials called for more open and transparent guidelines for the CFIUS process.[177] For Chinese negotiators, the BIT would be an opportunity to provide clarity on national security review and to eliminate discrimination of the system.[178] Under a treaty agreement, Chinese investors can use dispute resolution proceedings in a neutral tribunal under the international investment law to challenge a discriminatory CFIUS blockage if it contradicts the national treatment provision or the MFN principle.[179] Dispute resolution proceedings before international investment tribunals, such as through the ISDS mechanism should be a feasible option for Chinese investors as the US domestic courts are unlikely to overrule the CFIUS's decision.[180] China already began to recourse international investment arbitration to challenge the national security review cases from 2021 as in *Huawei v Kingdom of Sweden* in 2021.[181] Hence, a conclusion of the China-US BIT should facilitate a more open market access for China FDIs and clearer dispute resolution as well as helping to solve the national security issue.

Similarly, the involvement of the Chinese SOEs in FDIs in the EU also raised criticism among European Officials and EU enterprises. The concerns mainly relate to two areas, national security threats and the impediment of fair competition.[182] For the former, the Chinese SOEs gradually penetrated the natural resource sectors and infrastructures in the European markets, which led to national security concerns.[183] For the latter, the SOEs received an unfair advantage regarding tax, subsidies, financing and regulatory preferential treatment.[184] The China-EU CAI negotiations was viewed as an opportunity for the EU not only to achieve a level playing field for investors, but also to push China to expand regulatory reforms regarding the transparency and governance of SOEs.[185] As discussed previously, China made an unprecedented commitment to improving the playing field and transparency requirements regarding SOEs for the first time under the China-EU CAI.[186]

The China-EU CAI did not touch on the security concern issue. Instead, the EU took a unilateral approach and imposed a public security review on foreign investments in 2017, which were owned, controlled or financed by a state. It adopted a framework of screening FDIs in 2019, with each Member State having the sole responsibility for its national security under the principle of transparency and non-

[164]China-New Zealand FTA (2008), Article 154
[165]YONG & ZHAO, supra n 76, 160
[166]US Model BIT 2012, Article 2(2)
[167]Ming Du, 'The Regulation of Chinese State-Owned Enterprises in National Foreign Investment Laws: A Comparative Analysis,' (2016) 5 GLOBAL J. COMP. L. 118 (2016), 123'
[168]GLOUDEMAN & SALIDJANOVA, supra n 6, 18
[169]Ibid, 18; Ming DU, 'The Regulation of Chinese State-Owned Enterprises in National Foreign Investment Laws: A Comparative Analysis' (2016) 5 GLOBAL J. COMP. L. 118 (2016), 131; Ming DU, 'Chinese State-Owned Enterprises and International Investment Law' (2021) 53 Geo. J. Int'l L. 627, 694
[170]U.S. Trade Representative, '2013 USTR Report to Congress on China's WTO Compliance' (2013) online at: https://ustr.gov/sites/default/files/2013-Report-to-Congress-China-WTO-Compliance.pdf, accessed on 26/06/2022, 2; CHOW, supra n 142, 115-16; DU (2016), supra n 169, 3 & 126; Foreign Investment and National Security Act of 2007, Pub. L. No. 1o-49 (July 26, 2007), S 6
[171]DU (2016), supra n 167, 125 & 128
[172]50 U.S.C. app. § 2170(b) (2007)
[173]CHOW, supra n 142, 116-17
[174]Ibid, 122
[175]CHOW, supra n 142, 117; GLOUDEMAN & SALIDJANOVA, supra n 6, 16
[176]DU (2021) supra n 169, 692, 697 & 698
[177]Jiantuo YU, 'CFIUS and Sino-US Bilateral Investment Treaty,' in *Toward a Sino-US Investment Treaty,* (February 2015), China Development Research Foundation, 13; Gloudeman & Salidjanova, supra n 5, 15
[178]YU, supra n 177, 24; GLOUDEMAN & SALIDJANOVA, supra n 6, 15
[179]CHOW, supra n 142, 123
[180]DU (2021) supra n 169, 702
[181]*Huawei Tech. Co. v Kingdom of Sweden*, ICSID Case No ARB/22/2, Procedural Order No. 1 (July 27, 2022)
[182]YIN, supra n 14, 183-84
[183]Ibid
[184]Ibid, 185
[185]Ibid, 185
[186]DU (2021) supra n 169, 718

discrimination. [187] The imposition of the public security screening mechanism inevitably aimed to push China to further open its market besides the protection of national securities.[188] Regarding reciprocity, the European Parliament intended to provide a level playing field and a transparency for public and private companies, at the same time to facilitate a higher level of integration and technological exchange between the two economies for mutual benefits.[189]

In response, China's SOE reforms have been embedded in the market-orientated economic reform agenda since 2013. Chinese regulators committed to abolish all forms of unreasonable regulations and eliminate hidden barriers for non-public enterprises under the principle of quality of rights, opportunity and rules.[190] China aims to further reform SOEs and develop mixed-ownership economic entities,[191] under which both domestic and foreign privately-owned firms can join the SOE reforms by buying stakes and convertible bonds from SOEs.[192] Amidst the implementation of the PNTPNL system, China sought to support the growth of private businesses. This would stimulate the performance of various market entities and eliminate regulations and practices that impede the development of a unified market and fair competition.[193] The SOE reform was not only a response to the China-EU CAI negotiations but to China's accelerated efforts to improve the socialist market economy. Despite various efforts, this SOE reform mainly focused on SOEs which pursue commercial activities, not on SOEs that serve public functions.[194] For the West, this reform fell short of providing a level playing field for private enterprises and did not address the state-owned economic system fully.[195] This limitation is also reflected in the China-EU CAI where provisions for non-favourable treatment of SOEs only focus on commercial considerations in the purchase or sales of goods or services, but not on public services.[196] In this sense the Sino-CAI plays a significant role in reshaping economic reform and deepening SOE reform, albeit a long way from achieving a level playing field for private enterprises and SOEs. On the contrary, the SOE reforms in China intended to make the SOE 'stronger, better and bigger', with improved competitiveness of SOEs and state control over the economy.[197] The reform strengthened the role of the CCP in SOE governance and closely aligned the CCP's strategic goals with the SOE's corporate management.[198] Moreover, China would be unlikely to accept the 'competitive neutrality' of SOEs, given the state-owned economic system remain as the fundamental system in China.[199] To this end, the EU will continue to criticise and demand comprehensive improvement to level the playing field, while further bolstering their investment security screening and anti-foreign subsidy measures to compensate for China's regulatory gap for the time being.[200]

Forced technology transfer

The issue of forced technology transfer in FDIs between China and western countries also attracted some criticism; this triggered complaints to the WTO's Dispute Settlement Body concerning technology transfer issues and discriminatory treatment on FDIs.[201] The US voiced the strongest concern against China's forced technology transfer practices since 2010 by invoking court hearings to challenge these forced technology transfer issues against China. These led to the US-China trade war in 2018 and the imposition of a high tariff of 25 per cent on some Chinese imports in 2019.[202] The US enterprises complained about the direct and indirect requests for technology transfers to obtain investment approval from Chinese authorities.[203] The US had a more drastic approach to curb China's forced technology transfer practice by conducting a series of surveys and court hearings on China's IP issues, which led to several condemning reports and public calls to end this practice.[204] The US Model BIT if adopted in the China-US BIT, would prohibit the performance requirements of transferring a particular technology, a production processes or other proprietary knowledge to persons in the other's territories.[205]

On the contrary the EU Parliament took a more cooperative approach to combat China's IP issues. It pointed out that the practices of strategic technology transfer in China's FDI law promote China's competitive development to the detriment of European industry.[206] It called for further openness on the part of the legal regulators to allow foreign investors to set up with more IPR protection.[207] The EU intended to promote mutual benefits and economic cooperation with a greater degree of integration of the European, new technological

[187]Regulation (EU) 2019/452, Establishing A Framework for The Screening of Foreign Direct Investments into the Union 2019, Articles 1(1) & 2(3)

[188]YIN, supra n 14, 177

[189]European Parliament 'Resolution of 9 October 2013 on the EU-China Negotiations for A Bilateral Investment Agreement' (2013/2675(RSP)), Points F&G, Article 11

[190]The Third Plenary Session of the 18th CPC Central Committee, 'Decision on Major Issues Concerning Comprehensively Deepening Reforms in Brief 2013', Section 8, online available: http://www.china.org.cn/china/third_plenary_session/2013-11/16/content_30620736.htm, accessed on 10/09/2020

[191]'Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era' supra n 56, 29-30

[192]DU (2016), supra n 167, 143

[193]'Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era,' supra n 56, 29-30

[194]YIN, supra n 14, 194

[195]Ibid, 195

[196]China-EU Investment Negotiations Agreement in Text, Section II, Article 3bis 3(ai), (aii) and (aiii). Article 3

[197]DU (2021) supra n 169, 651

[198]DU (2021) supra n 169, 652

[199]YIN, supra n 14, 195

[200]MCELWEE, supra n 10, 9

[201]USTR, 'Findings of the Investment into China's Acts, Policies and Practices Related to Technology Transfer Intellectual Property and Innovation under Section 301 of the Trade Act of 1974,' (Section 301 Report I), (22 March 2018), 36-43; USTR, 'Update Concerning China's Acts, Policies and Practices related to Technology Transfer, Intellectual Property and Innovation,' (Section 301 Report II), (20 November 2018), 1-6; USTR, '2017 Report to Congress on China's WTO Compliance' (December 2017), at 107-17; WTO, 'China–Certain Measures on the Transfer of Technology, Request for Consultations by the European Union,' (6 June 2018) WT/DS549/1; European Commission, 'EU Steps up WTO Action against China's Forced Technology Transfers,' (20 December 2018), online at: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6882, accessed on 27/06/2022

[202]Jyh-An LEE, 'Forced Technology Transfer in the Case of China,' (2020) B.U.J.SCI. & TECH. L. Vol 26:324, 322-33, 327

[203]American Chamber of Commerce in China, 'China's Investment Environment: Overcoming Impediments to the U.S.-China BIT,' October 2015, 18; Economist Intelligence Unit, 'Evaluating a Potential U.S.-China Bilateral Investment Treaty' (March 30, 2010), Prepared for the U.S.-China Economic and Security Review Commission, Online: http://origin.www.uscc.gov/sites/default/files/Research/EIU_Report_on_US-China_BIT--FINAL_14_April_2010.pdf, accessed on 31/07/2021, 36–37; GLOUDEMAN & SALIDJANOVA, supra n 6, 17

[204]ouse Hearing, 111 Congress, 'Will China Protect Intellectual Property? New Developments in Counterfeiting, Piracy, and Forced Technology Transfer' (2010) Hearing Before the Cong.-Exec. Comm'n on China; USTR, 'Section 301 Report I', supra n 201, 19; USTR, 'Section 301 Report II', supra n 201, 19

[205]US Model BIT 2012, Article 8

[206]European Parliament 'Resolution of 9 October 2013 on the EU-China Negotiations for a Bilateral Investment Agreement' (2013/2675(RSP)), Article 7

[207]Ibid, Article 7

capability sharing and existing technologies updating in China.[208] The China-EU CAI clearly prohibited forced technology transfers, such as compelling technology transfer through investment requirements, interfering in contractual freedom of technology licencing and the unauthorised disclosure of confidential business information collected by administrative bodies.[209] Suffice to say China responded to these criticisms swiftly by repealing the old FDI law system as well as amending other infringing regulatory provisions. It implemented the New Law which prohibited the forced technology transfer.[210] (More analyses see Part III).

In short, the China-EU CAI achieved a landmark for both countries and comprised wide areas, such as increased transparency, a level playing field and ambitious market access commitments for European investments. The full extent of its impact is still subject to formal ratification by the EU. Owing to China's unprecedented commitment, the China-EU CAI achieved a new level of market openness for FDIs, particularly for the SOEs which would now be subject to non-favourable treatment to some extent and international good practices of corporate governance and transparency. For dispute resolution, the China-EU CAI adopted a more amicable approach and the SSDS mechanism. Despite this achievement, the China-EU CAI is still an opportunity missed because it neither achieved a reformed ISDS nor the EU-style MIC system. It is uncertain whether the adopted SSDS could fulfil the demand of investment protection for both parties because of limited international usage and the reliance on politic leverage.

The main issues under the China-US BIT negotiation largely coincide with that of the China-EU CAI. The opportunity to conclude a high-standard and influential BIT faced a fresh challenge under Biden's administration. The Administration openly criticised China being repressive at home and aggressive abroad, in particularly China's 'defence of President Putin's war'.[211] It indicated the 'invest, align and compete' strategy, which endeavours to form network of allies and partners with common purpose and to compete with China.[212] This relationship was further dampened due to several unfolding events, including the wayward Chinese surveillance balloon event, exchanges in the Munich Security Conference and McCarthy's Taiwan visit in 2023.[213] On the flip side, Treasury Secretary Yellen called for a 'healthy economic engagement that benefits both', however this alone would not be enough to improve this hardened relationship anytime soon.[214] The most recent development of settling robust US-China guardrails (subject to compliance) managed to stabilise the 'floor' for the relationship with each other in the short term before the 2024 US presidential election.[215] Hence, the reanimation of the China-US BIT negotiation remains as 'wait-to-see' for the watchful world of foreign investors.

Nonetheless, these negotiations heavily influenced China's FDI reform process, such as promotion of market access and adoption of pre-establishment of national treatment. China-US BIT would still need to address the reform and governance of SOEs. In comparison, the China-EU CAI contributed to the reforms of SOEs although the scope of reforms was only limited to commercial sales. For dispute settlement mechanism, the US and China are likely to push for a restrictive approach and to safeguard the regulatory right of a sovereign state. A reformed ISDS system with a standing appellate body can still be achievable. As it currently stands, each national state took a unilateral approach in setting their own national security review system. Both investment agreements and negotiations go hand in hand with China's foreign investment law reforms to curb forced technology transfer practices. Nonetheless, a conclusion of the China-US BIT, although it is unlike to happen anything soon in the current political turmoil, should provide some long-desired clarity on the dispute resolution mechanism, national security review system and forced technology transfer.

The promise and limitations of the new FDI Law 2019

The enactment of the New Chinese FDI Law 2019 is a welcome move from the Chinese government. China made substantive improvements on market access and SOEs before 2019. Nonetheless, it failed to set a clear framework for disputes and IP rights protection. Instead, foreign investors relied heavily on trade agreements and BITs. China showed an unprecedented commitment in implementing the new FDI law system. Following the enactments of the New FDI Law 2019, the MOFCOM and the State Administration for Market Regulation (SAMR) issued the Foreign Investor Information Reporting Measures 2019 and the Notice Regarding Foreign Investor Information Reporting Related Matters 2019 to effectively implement the New Law. This part focuses on three areas of the analyses, including market access, investment protection and dispute resolution. It evaluates how effectively the New Chinese FDI Law 2019 addresses issues existing in the old system and shortcomings highlighted in the China-EU CAI and China-US BIT negotiation.

Market access

National treatment

The New Law significantly improved market competition and reduced market barriers for foreign investment. It set out further details on opening market access. These include shortening the Negative lists, relaxing or abolishing restrictions on foreign investment in the financial sector, ensuring equal treatment for manufacturers of new energy vehicles and optimising the environment for fair competition.[216] While continually promoting an opening-up policy and encouraging foreign investments in China, they formally adopted the PNTPNL for foreign investment. National treatment is now equally applied to foreign investment outside the negative list from the investment access stage.[217] This new move should clear any doubts as to whether foreign investment would enjoy the same national treatment as other domestic investors at the entry point. It moved China's foreign investments from the post-establishment national treatment era to the pre-establishment national treatment era. This should make way for the Sino-investment agreements to achieve the 'pre-establishment national treatment.'

[208] Ibid, Article 8

[209] EC, 'EU-China Comprehensive Agreement on Investment, The Agreement in Principle', supra n 99, 3

[210] The New Law 2019, Articles 22, 23 and 39

[211] US Department of State, 'The Administration's Approach to the People's Republic of China' (26/05/2022) Speech by Antony Blinken, online: https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china/, accessed on 05/09/2023

[212] Ibid

[213] Sourabh GUPTA, "US-China Relations: US- China Effort to Set "Guardrails" Fizzles with Balloon Incident," Comparative Connections, Vol. 25, No. 1, pp 33-46, 33

[214] Ibid, 39

[215] Sourabh GUPTA, ICAS, 'Settling robust US–China guardrails after Blinken's and Yellen's China visits' (7/07/2023) East Asia Forum, Economics, Politics and Public Policy in East Asia and the Pacific

[216] State Council, 'Opinion on Further Improving Work for the Utilisation of Foreign Capital (Guo Fa [2019] No. 23)

[217] The New Law 2019, Articles 4 & 28

The Implementing Rule 2019 added 14 provisions for the purpose of promoting foreign investment, under which it could either enjoy national or preferential treatment. These provisions provide national treatment for FIEs with regard to the government's funding arrangement, land supply, tax and fee reduction and exemption, qualification licensing, development of standards, project application and human resource policies.[218] The FIEs are entitled to fiscal, financial, land use and other preferential treatment.[219] In terms of the compulsory standards developed by the State, it should not impose higher technical requirements on the FIEs than the national standards.[220] The Implementing Rule prohibited any obstructions and restrictions which would lead to different or discriminatory treatment on FIEs and foreign enterprises for entering the government procurement market, such as to impose ownership limitation and the organization form, etc.[221]

These provisions should deal with the unfair treatment which the FIEs often complain of, particularly the favourable treatment of SOEs, such as a range of subsidies and privileges which are not available to privately owned domestic enterprises. China's recent SOE reform promoted mixed-ownership economic entities. Nonetheless, critics argued that this SOE reform did not go far enough.[222] It did not eliminate the favourable treatment of SOEs over non-SOEs. The Implementing Rule did not differentiate national treatment between the SOEs and non-SOEs. The New Law did not cover the preferential treatment granted to SOEs and the exemption of SOEs in certain industries from the anti-monopoly review.[223] Hence, without a clear stipulation in the law, the national treatment offered under the New Law is unlikely to align the financial privileges with the non-financial privileges, which are enjoyed by the SOEs.

At the same time, the China-EU CAI did not offer sufficient redress for this gap. In comparison, the scope of the China-EU CAI is too narrow because it only emphasises the commercial consideration of SOEs. The China-EU CAI provides a more open market and level playing field for FDIs in several ways, although it does not recognise that non-SOEs would still have different treatment from SOEs under the domestic law. This problem can be exacerbated due to the national treatment and MFN treatment under the China-EU CAI not being appliable to subsidies or grants provided by the state parties.[224] Moreover, the recent SOE reform failed to strip off CCP's party influence on SOE's corporate management and economic performance. This runs contrary to the initial call for reform by foreign investors (discussed in Part II). Therefore, to even up market competition and reduce market barriers, the emphasis in any future law reform should be given to the unequal treatment between SOEs and non-SOEs and the heightened state control over SOEs, in addition to the financial and non-financial benefits received by SOEs.

Enterprise registration system and information reporting system

Following the New Law, the 'Record-filing system' was replaced by the Enterprise Registration System for foreign investment enterprises and the Information Publicity System under the competence of the MOFCOM and the SAMR.[225] Foreign investment must be registered through the Enterprise Registration System for the initial establishment.[226] Without leaving any guess work for the registration body, the SAMR's Notice also issued a clear review procedure for the registration application. Notably, the review procedure requires the authority to review and approve a foreign investment application by the same standards as the domestic enterprises when the application refers to a sector outside the Negative List.

The New Law improved transparency of the business operation of foreign investment in China by requiring foreign investors to submit information to an information reporting system.[227] Foreign investors must file the information about the initial establishment, subsequent changes, annual reports and deregistration with the Information Publicity System. The unified information reporting system strengthened the government's oversight of the operation of FIEs and foreign enterprises. The current registration system eliminated the requirement for product exportation and technology transfer of FIEs. Instead, it enhanced technology protection because the SAMR must protect the commercial secrets and investment information in accordance with the law.[228] The registration system for foreign investment has evolved continuously from the approval system, the 'Record-filing' system to the current Enterprise Registration System. The frequency of this change undoubtedly created uncertainty for the parties concerned. It suggests that China embraced a flexible approach to develop a system, which is now more effective, transparent and fits for purpose.

Enhanced IPR protection and prohibition of technology transfer

First, the New Law enhanced protection of investors' intellectual property rights and also rights of intellectual property holders. The administrative agencies and staff must not use administrative means to force any technology transfer; instead, the new law encourages technical cooperation based on the principle of parties' autonomy, fairness and commercial rules.[229] Administrative departments must not divulge any trade secrets to the public to address the sensitive issue of technical information being disclosed in the administrative review and licencing processes.[230] These provisions deal with the complaints of forced technology transfer and IPR infringements. Alongside the New Law, the most recent Negative List 2021 also removed restrictions in the manufacturing of the automobiles and the financial sectors, including a 50 percent restriction on foreign ownership of joint ventures.[231] The Negative List 2021 eliminated these two categories from the list. Thus, the pre-establishment national treatment will apply for foreign investment in these sectors. This significant upgrade of the negative list is mostly welcome for foreign

[218] The Implementing Rule 2019, Article 6

[219] The Implementing Rule 2019, Article 12

[220] Ibid, Article 13

[221] Ibid, Article 15

[222] DU (2016), supra n 150, 143

[223] ZHENG (2021), supra n 3, 426

[224] China-EU Investment Negotiations Agreement in Text, Section II, Article 1.4

[225] Announcement No. 62 of the Ministry of Commerce, 'Announcement on Matters Relating to Foreign Investment Information Reporting 2019' (MOFCOM Bulletin 62/2019); Announcement of the Ministry of Commerce, 'The State Administration for Market Regulation and the State Administration of Foreign Exchange on the Submission of Annual Reports for Foreign Investment Information Reporting 2019' (MOFCOM Bulletin 72/2019), Article 1; Measures for the Reporting of Foreign Investment Information 2019, Article 2.

[226] Notice on Implementing the Foreign Investment Law and the Registration of Foreign-invested Enterprises 2019, SAMR Notice 247, Article 1.1

[227] The New Law 2019, Article 34

[228] Notice on Implementing the Foreign Investment Law and the Registration of Foreign-invested Enterprises 2019, SAMR Notice 247, Article 2.3

[229] The New Law 2019, Article 22

[230] Ibid, Article 23

[231] Special Management Measures for the Market Entry of Foreign Investment (Negative List) (2021 Version) (2021 Foreign Investment Negative List)

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investors, not only for the purpose of combating forced technology transfer, but also to remove the barriers for foreign investment in these two important Chinese markets; China is ranked first for passenger car production in 2020,[232] and the second largest bond market in the world in 2020.[233] For the latter, China strategically pushed for a more open domestic bond market to encourage foreign investment to these lucrative investment opportunities. These in turn generate increased sophistication and innovation in the Chinese financial market.[234]

This was the first time China imposed a blanket ban on forced technology transfer either through the operation of joint ventures with foreign investments or the administrative approval and licensing process.[235] These were the two main ways of facilitating forced technology transfer in China. This prohibition reinforced the US-China Economic & Trade Agreement, which ensured effective protection for trade secrets, confidential business information and the prohibition of misappropriation of trade secrets through administrative means.[236] Under this Agreement parties can only agree to technology transfer under voluntary and mutual agreement based on market terms. Notably, the China-EU CAI and the New Law promote the same approach to facilitating technology transfer under voluntary and mutual agreement based on fair commercial considerations.[237] Moreover, administrative agencies and staff would face criminal liabilities for breaching these rules.[238] In contrast, China had been defensive and denied any wrong doings for IPR infringements in the past.[239] The New Law inevitably brought investment protection into a new era, whilst embracing an open and fair litigation approach for IPR infringement complaints.[240]

Dispute settlement mechanism

The New Law took an entirely different approach for dispute resolution compared to the old law, providing a complaint mechanism, domestic court system and an international arbitration system.

First, it predominantly asks the foreign investors to resort to a complaint mechanism[241] under the salient approach of negotiation and mediation. This can be an effective method to minimise the cost and impact on foreign investment and international relations.[242] Under the old 'Three Laws' system, China set out a multiple structure to settle foreign investment disputes. The disputing parties would dissolve disputes through negotiation or mediation in the first instance before instigating an arbitration either with a Chinese arbitration organ or an international arbitration organ.[243] Notably this is the approach adopted in the China-EU CAI agreement, whereby the parties should seek for an amicable solution to the dispute before invoking a formal litigation. This complaint mechanism facilitates coordination and resolution promptly for foreign-funded enterprises and investors, which suffer from infringement by administrative department or staff members.[244] It is a system of negotiation and mediation resonating from the old law, although there is no obligation for foreign investors to recourse a domestic complaint mechanism.

Secondly, the parties can also bring dispute to a Chinese court.[245] The Chinese People's Courts have general jurisdiction in civil cases involving foreign investments.[246] Traditionally, the Chinese national civil court system had exclusive competence regarding civil cases concerning foreign investments.[247] This competence was carried into the Civil Procedure Law of the People's Republic of China 2017 (CPL 2017). It states that the Chinese people's courts have jurisdiction over major cases involving foreign parties,[248] except for provisions covered by an international treaty concluded by China.[249] The CPL 2017 explicitly stated that the people's court has exclusive jurisdiction over disputes concerning EJVs, CJVs and Chinese-foreign cooperative exploration and development of natural resources.[250]

Moreover, the Chinese Civil Procedure Law opens a channel for foreign investors to resort to arbitration institutions internationally or locally as a dispute resolution.[251] Additionally, the People's Supreme Court's interpretation allowed the parties to select a foreign court via a written agreement in dispute litigation.[252] Foreign investors are likely to use this as a leeway to avoid the Chinese national court system. This is because foreign investors would probably prefer arbitration under the international tribunals to litigation in the Chinese domestic court system.[253] In a default position, the New Law would subject any dispute of FIEs and foreign enterprises to the domestic legal system if there is no written agreement or no existing international investment treaty.[254] Henceforth, foreign investors would push for an arbitration clause to be concluded in BITs or investment agreements, as it did in the current China-EU CAI.

In general, the New Law is a step in the right direction in protecting FDIs. Nonetheless, adoption of the domestic approach in dispute resolution is unlikely to be welcomed by foreign-funded enterprises and foreign investors due to concerns with the Chinese legal system. For this reason, foreign investors could rely on a written agreement in dispute litigation to avoid the domestic court system for dispute

232Statista, 'Estimated Passenger Car Production in Selected Countries In 2020', (2021) online available: https://www.statista.com/statistics/226032/light-vehicle-producing-countries/, accessed on 30/04/2022

233Chunping BUSH, 'The Chinese Credit Rating Industry: Internationalisation, Challenges and Reforms' (2022) Journal of Economics and Business, 118 (2022) 106032Bond market size' (2020) ICMA analysis using bloomberg data. Retrieved from https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Secondary- Markets/bond-market-size/, accessed on 21/09/2021

234BUSH, supra n 233, 3-4

235Jyh-An LEE, 'Shifting IP Battlegrounds in the US-China Trade War' (2020) 43 COLUM. JL&Arts 147, 166, 174

236U.S.-China Economic & Trade Agreement 2020, Articles 1.3-1.4

237China-EU Investment Negotiations Agreement in Text, Section 2, Article 3.3; The New Law 2019, Article 22

238The New Law 2019, Article 39

239Office of the State Council in China, 'The Facts and China's Position on China-US Trade Friction' (2018), online available: https://china.usc.edu/sites/default/files/article/attachments/Chinese%20WP%20Sino-Am%20Trade.pdf, S.2, accessed on 06/09/2023

240Ministry of Foreign Affairs of China, 'Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on May 20, 2019,' (2019), online available: https://perma.cc/A9CZ-4X63, accessed on 10/09/2020

241The New Law 2019, Article 26

242Jessica Zoe Renwald, 'Foreign Investment Law in the People's Republic of China: What to Expect from Enterprise Establishment to Dispute Resolution' (2006) 16 Ind. Int'l & Comp. L. Rev. 453 (2006), 471

243Law of the People's Republic of China on Chinese-Foreign Cooperative Enterprises 2000, Article 25(1); Law of the People's Republic of China on Chinese-foreign Equity Joint Ventures 2001, Article 15(1)

244The New Law 2019, Article 26(2)

245Law of the People's Republic of China on Chinese-Foreign Cooperative Enterprises 2000, Article 25(1); Law of the People's Republic of China on Chinese-foreign Equity Joint Ventures 2001, Article 15(2)

246Mo Zhang, 'International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System' (2002) 25 B. C. INT'l COMP. L. REV. 59, 63

247Civil Procedure Law of the People's Republic of China 1991, Article 246

248Civil Procedure Law of the People's Republic of China 2017, Article 18(1)

249Ibid, Article 260

250Civil Procedure Law of the People's Republic of China 2017, Article 266

251Ibid, Article 271

252The Supreme People's Court, 'Interpretation of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China 2015', Article 531

253RENWALD, supra n 242, 470

254ZHANG (2002), supra n 246, 72

resolution. This means that a suitable dispute settlement mechanism in investment agreements remains important for FDIs under the current New Law.

In addition, the New Law stipulated that foreign investment which affects or possibly affects national security will be subject to the State's safety review.[255] The national security review on foreign investments would follow the newly enacted Measures for the Security Review of Foreign Investments 2020. This new Measures for the Security Review of Foreign Investments set out detailed requirements and procedures for security reviews. This is similar to the review system in developed countries, such as the US CFIUS's system.[256] Under the 2011 Circular the cutting off point is based on whether the foreign investor becomes the controlling shareholders or actual controllers of the domestic enterprise.[257] In comparison the current system has a wider scope enabling both direct and indirect foreign investments in China, such as investment through offshore transactions.[258] It continues to review the foreign investors who are the de facto controlling parties in the critical sectors, including critical agricultural products, energy and resources.[259]

The New Law and Measures for Security Review of Foreign Investments 2020 took a similar approach to the EU and US, which brings China's security review system for FDIs in line with these countries, although there are significant differences between China's approach and the US and EU. The China-EU CAI achieved a high level of discipline and transparency of SOEs to deal with the national security issues arising from the Chinese SOEs.[260] Likewise, the US Model BIT addresses the discriminatory treatment of the Chinese government against foreign investments in favour of Chinese SOEs.[261] Both the EU and US took a unilateral approach to deal with the public security issue of FDIs and shifted the responsibility to national states. Apart from the security review on critical infrastructure, key sectors and technologies, China focuses on investment controlled by foreign investors. In contrast, the US and the EU focus on the transactions controlled and financed of foreign governments, which directly address the national security concerns caused by SOEs. The EU's approach, which is based on principles of reciprocity, transparency, and non-discrimination[262] should be a feasible model to overcome the public security concerns and facilitate open market access for all parties. Given that the US's unilateral approach led to a blockage of Chinese FDIs in the US market, it is still desirable for China and the US to pursue a BIT, which promotes open market access for both parties as well as solving the national security problem.

[255]The New Law 2019, Article 35

[256]Baker MCKENSLE, 'Chinese Enacts New Foreign Investment Security Review Measures' (04 Jan 2021), online: https://www.bakermckenzie.com/en/insight/publications/2021/01/china-enacts-new-foreign-investment-security, accessed on 08/09/2021

[257]Circular of the General Office of the State Council on the Establishment of Security Review System Regarding Merger and Acquisition of Domestic Enterprises by Foreign Investors 2011, (the 2011 Circular), Article I(III)

[258]Mckensle, supra n 256; Measures for Security Review of Foreign Investments 2020 (China), Article 2

[259]Measures for Security Review of Foreign Investments 2020 (China), Article 4

[260]See Part II (A)(1), The Agreement in Text Improved the Transparency and Governance of Foreign Investments.

[261]See Part II (C)(1)

[262]YIN, supra n 14, 183-84

Conclusion

In short, both Sino-investment agreements and their negotiations significantly impacted upon the Chinese FDI legal system and its reforms. In return, the latest FDI law reform has led to progress being made in these two agreements and their negotiations. If ratified, the China-EU CAI would set a milestone for an open and reciprocal market for FDIs, including non-favourable treatment for SOEs to some extent. It adopted a more amicable approach for disputes, although the effectiveness of the SSDS remains to be seen. The final ratification of China-EU CAI and conclusion of China-US BIT should provide some long-desired clarity on dispute resolution mechanisms, national security review system and forced technology transfers.

The new FDI law reform had for the first time overhauled the old FDI legal system and offered a systematic response to the criticisms arising from the investment agreement negotiations. Together, with other enactments, the new FDI law system established a comprehensive framework to achieve the objectives of FDIs market. First, it levelled up market competition and reduced market barriers for foreign investment. The new law increased transparency and oversight of business operation for foreign investment in China. China took unprecedented measures to reform SOEs and to provide equal market access for FIEs. Nonetheless, China's national reform of SOEs does not go far enough to ensure equal treatment for SOEs and non-SOEs in China and to lessen state controls.

Secondly, the New Law and other domestic law reforms improved protection for foreign investment significantly and systemically addressed the issue of IPR protection and forced technology transfer. It imposed a blanket ban on forced technology transfer and adopted the cooperation principle and market rules regarding technology transfers based on parties' autonomy. China, the EU and the US resorted to a unilateral approach by setting up their own security review systems to address national security concerns. These approaches resulted in treatment disparities, uncertainty and restrictiveness of market access, especially with the US's security review system. Therefore, foreign investment agreements should be a feasible mechanism to resolve national security issues of FDIs. Thirdly, the New Law unified the dispute resolution mechanism, offering the choice of a domestic compliant mechanism, Chinese national courts or international arbitrations. Given domestic approaches are less favoured by foreign investors, the China-EU CAI and the China-US BIT have a significant role to play in clarifying the scope, standards and procedure of dispute settlement mechanisms.

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Conflicts of interest

The authors declare that they have no conflicts of interest related to the present work.

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