THE EU-CHINA INVESTMENT TREATY: CHALLENGES, PERSPECTIVES, COMPETENCE

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Abstract

This paper explores the development of EU-China investment agreements as a fundamental paradigm of international investment agreements. Firstly, the paper describes how the European Union has become an assertive global actor in the field of foreign investment by expanding its competence, presence, and initiatives in establishing the new foreign investment legal framework. Moreover, the EU's agreements expand the scope and extent of investment liberalization, address the primary concerns of foreign investors in the contemporary period, and determine the future of investment liberalization rules*. Secondly, it takes a step forward in analyzing China's developments to promote foreign investment and improve investors' protection. China has become the largest global destination for foreign investment and the second-largest outbound investment State. In addition to economic consolidation, China also conducts legislative reforms to offer investors a better level playing field, market access, and transparency through a national treatment standard. By looking into the new Comprehensive Agreement on Investment and the new dispute settlement approach initiated by the European Union, it is argued that the EU-China investments pioneer a radical approach to the preservation of a strong dispute settlement system for investment disputes and market liberalization.*

Keywords: bilateral investment treaty, foreign direct investments, investment policy, comprehensive agreement on investment, dispute settlement.

Chapter 1 - Introduction

According to the 2022 OECD report (OECD, 2022), the EU and China are one of the largest donors and receivers of FDI. Consequently, the EU's FDI outward flows amounted on average to $402 billion, and the FDI inward flows amounted to $413 billion every year from 2012-2017. On the other side, by taking the EU countries individually, China is the highest FDI donor after the US (Ha, Solomon, Sareen, & Sarul, 2021) and became the largest recipient of FDI in 2020 (OECD, 2022). More precisely, China recorded yearly FDI outward flows of $131 billion and FDI inward flows of $166 billion on average during 2012-2017. Compared with the total volume of FDI in the world, the European Union ranks first with 27% FDI outward flows, and 23% FDI inward flows on average. In comparison, China represents approximately 9% of FDI outward flows and 14% of the world's inward flows, considering the volume between 2012-2017. Therefore, the European Union is the leading provider and recipient of foreign investment worldwide (European Commission, 2020). In addition, the EU Member States have more than 1400 bilateral and multilateral international investment agreements (IIAs) in force (UNCTAD, 2022), which is more than half of the total IIAs.

On the other hand, China ranks second only to Germany regarding the number of BITs in force. What is remarkable is that China entered into its first BIT (Bilateral Investment Treaty) in 1982 with Sweden and now has approximately 125 BITs (UNCTAD, 2022), 24 FTAs (Free Trade

Agreement) under construction (Ministry of Commerce, China, 2022), and 22 TIPs (Treaty with Investment Provisions). The volume of FDI correlated with the number of BITs contributes to the belief that BITs contribute to attracting FDI and offer adequate protection of investments. (Yackee, 2010)

The development status of the countries constitutes a significant role in international investment law because international agreements grant differentiated treatment depending on a country's classification. Preferential treatment received by developing and least developed countries are, in fact, one of the fundaments of international economic law (Brownlie, 2008), with the principles of economic sovereignty, permanent sovereignty over resources, and development cooperation.

The classification of economies made under the M49 Standard developed by UNCTAD (UNCTAD STAT, 2022) classifies China as a developing economy and the EU as a developed economy. Under the UNCTAD STAT classification, we can emphasize several differences between the EU and China in the geopolitical context. An essential aspect we need to outline is that the EU achieved the highest level of economic integration than any other cooperation: free trade area, customs union, common market, and partially economic union.

1. The EU:
    - Developed, high-income, industrialized economy and partially emerging industrial economy (Bulgaria, Croatia, Cyprus, Greece, Poland, Romania)
    - Member of: OECD, United Nations, G20, and G7 (France, Germany, Italy)
    - 14 EU countries are members of the African Development Bank
2. China:
    - Developing, upper-middle-income economy, exporter of manufactured goods and primary commodities, Emerging Industrial Economy, Emerging market
    - Member of: United Nations, African Development Bank as a non-regional member, Association of Southeast Asian Nations Plus Three (ASEAN countries + China, Japan, Republic of Korea), Asia-Pacific Economic Cooperation (APEC), Asia-Pacific Trade Agreement (APTA), BASIC, BRICS, G20

Those differences facilitate our understanding of the geopolitical pillars shaping how these two economic superpowers operate in the international context. Moreover, their international relations will ultimately influence their positions in negotiating and signing other investment and trade agreements.

For example, China and some of the EU's countries are part of the African Development Bank. While China is the largest bilateral creditor of African nations, accounting for 20% of Africa's external debt (Xia, 2020), Germany and France are also significant lenders (OECD-Stat, 2021). Being a leading lender has multiple implications:

1. It demonstrates that both China and the EU countries perform extensive operations which consolidate their geopolitical and economic power
2. Even though China is considered a developing economy, it acts as a developed country that heavily invests and offers loans to developing and least developed countries.
3. For the EU and China, it signifies sustainable development through diversification of revenues and bilateral cooperation.

On the other hand, in the geopolitical context, we have the example of the amplified tensions between Russia and Ukraine, which caused multiple other tensions between countries. China, as part of APEC, APTA, BASIC, and BRICS, represents a strategic partner for Russia and India. This fact can deteriorate the international relations with the EU, at least in the short term, which can delay the negotiations for the EU-China Investment Agreement known as the Comprehensive Agreement on Investment (CAI). Previous to this event, the European Parliament decided to freeze the ratification of the EU-China CAI on May 20, 2021, motivated by the tensions raised by some MEPs. (European Parliament, 2021). However, at the EU-China Summit held on April 1, 2022, the leaders reaffirmed their cooperation. President Xi Jinping supported that "China-EU relations have made new progress despite challenges. It has been proved that China and EU share extensive common interests and a solid foundation for cooperation." (China-Embassy, 23rd EU-China Summit, 2022)

1.1. Comparative analysis: EU and China

While ranking first in the market potential index from 2021 (Michigan-State-University, 2021), China outperformed the EU's GDP, reaching $17.7 trillion in 2021 (China-Embassy, China's macro-economy in 2021 shown in figures, 2022). As a developing country, China registers high growth rates in most parts of its economy. At the same time, the EU has never exceeded China's GDP Growth Rate since its formation in 1993 (World Bank, 2022). According to a report from Euromonitor International, 76% of the global GDP growth by 2030 will arise from emerging and developing countries (Boumphrey, 2019, p. 8). The same report shows that the Chinese economy will reach a GDP at PPP of nearly $60 billion. The number seems over-optimistic, but considering a 5% GDP Growth rate (apart from 2020, China has never recorded a GDP Growth Rate lower than 5.9% from 1990 to 2020), the Chinese economy can reach approximately $40 billion GDP at PPP by 2030, which is more than double than the GDP at PPP from 2020. Although the EU's GDP per capita is three times higher than China's (World Bank, 2022), the Chinese market becomes more attractive when comparing the population, which consists of 1.41 billion people compared with 447 million in the EU (World Bank, 2022) The ratio of population to the number of registered businesses also seems to be attractive for foreign investors from the EU since there are 34.7 million registered businesses in China (Ministry of Commerce China, 2019) and 25.9 million in the EU (Eurostat, 2022), which gives a ratio of approximately 40 people to one registered company in China and 17.25 in the EU.

Moreover, while the EU is known for a very good standard of living, infrastructure, and education, China is proving intense competition. In the last years, China decreased its poverty rate to nearly 0% in 2020 (World Bank, 2022) and reached a literacy rate of 97% in 2018 (World Bank, 2022). It might seem natural, but the 0% poverty rate in China implied to lift 800 million people out of poverty over the past 40 years (World Bank, 2022). At the same time, another report from McKinsey shows that “the Chinese consumers accounted for 31% of the global household consumption growth from 2010 to 2017” (Ho, Poh, Zhou, & Zipser, 2019, p. 3). The GDP per capita at Purchasing Power Parity is lower in China than in the EU (World Bank, 2022). However, most of the attractiveness of foreign investments in the EU-China context relies on the fact that China is a good choice for cost reduction and fast growth, while the EU is the best for sustaining the growth and consolidating solid brands. Euromonitor International shows that Chinese consumers have the highest savings ratio among the world's major economies. The same report mentions that Chinese consumers will save 36% of their disposable income by 2040. (Hodgson, 2021, p. 17) This fact might be one more reason why more companies, including EU banks, might consider the Chinese market, a sector that faces multiple openings from the side of China in the EU-China CAI.

In terms of infrastructure, the commercial infrastructure index (2021), which analyzed dimensions such as paved road density, logistics performance index, or airport connectivity, assigned a score of 71/100 to China, while the average commercial infrastructure level of the western European countries was 80/100 (Michigan-State-University, 2021).

1.2. EU-China investment treaties

The bilateral relations between the EU and China have a long history and are sustained by an extensive network of investment agreements. The EU countries are the first partners with whom China initiated its bilateral investment agreements. The first seven BITs signed by China include EU Member States. On the other side, the EU also contributed to enhancing the bilateral relationship by engaging in negotiations, trade and strategic partnerships with China. Currently, 26 out of 27 EU Member States concluded a BIT with China. Seven BITs were replaced by new generations of investment treaties which granted both parties favorable treatment through national treatment, full protection and security, umbrella clause or ISDS provisions. (UNCTAD, 2022) In the recent years, the EU and China initiated a Comprehensive Agreement on Investment which aims at providing a better investment framework for investors. In the next chapters, the paper examines the evolution of both sides investment policy, the development of the EU-China investment relationships.

Chapter 2 - European Union Foreign investment policy

An essential aspect of the relationships between the EU and China in the context of the investment treaties is that the two parties are not treated equally (Matsushita, Schoenbaum, Mavroidis, & Hahn, 2015, p. 373) regarding their legal relation resulting from their agreements. However, China might get favorable treatment as a developing country compared to the EU's considered developed countries. For this reason, the international investment law considers sovereign equality formal equality. (Carreau, Juillard, & Paris, 2009, p. 25)

International and EU investment legislation governs the protection of investments within the EU. Even though the foreign investment was not an official EU competence in the 1990s, the growth of the single market affected investment policy by leveling the playing field for economic activities and establishing a protective legislative framework. (Basener, 2017) In 2009, the Lisbon Treaty transferred the sole authority for regulating foreign direct investment to the EU, hence expanding the EU's influence on investment policy. However, the involvement of the Member States and other legal regimes is still required depending on the type of investment or the investment stage. (Herrmann & Crämer, 2015, pp. 87,90,92)

2.1. The internal market dimension of investments in the EU.

Under the internal market regulations, the EU offers investors substantial protection through fundamental freedoms, most notably the freedom of establishment and the free movement of capital (Herrmann & Hoffmann, 2020, p. 2216). While some scholars support that the freedom of establishment does not constitute the most prevalent source of protection (Basener, 2017, p. 123), articles 49 and 54 of TFEU do not cover third-country nationals or companies (TCN). Instead, they must rely on the free movement of capital (Kellerbauer, Klamert, & Tomkin, 2019). However, TCN businesses established in the EU have the right to exercise the freedom of establishment (Staatssecretaris van Financiën v. X, 2014), except by using a branch or agency in an EU Member State, which is not sufficient. Nonetheless, this decision cannot have broader implications in scenarios where EU enterprises without a common EU parent company are members of a non-EU company group. Moreover, article 52(1) TFEU express the exceptions under which the freedom of establishment through a Member State might be limited.

The CJEU supports the judgment that TCNs cannot rely on the provisions related to the freedom of establishment and also the freedom to provide services. (Felixstowe Company Ltd v. The Commissioners for Her Majesty's Revenue & Customs, 2014) (Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht, 2006) However, according to the judgment, the companies resident in the EU can rely on the freedom of establishment regardless of the origin of their shareholders. (Felixstowe, paragraph 40) Furthermore, the Court rulings prove that TCNs can rely on IIAs and national legislation for establishing and investing in the EU Article 54 TFEU clarifies that the companies must be constituted under civil or commercial law. In addition, it restricts the applicability of the national legislation on private international law by requiring the companies looking to make use of the freedom of establishment by two connecting factors: the formation of the respective company to take place in a Member State and to have a registered office, central administration or principal place of business within the EU.

However, the free movement of capital applies to foreign investors. Article 63 TFEU is regarded as one of the most relevant intra- and extra-EU investment protection (Basener, 2017, p. 118), considering that the Maastricht Treaty also extended this protection to TCNs and firms outside the EU. Therefore, the protection under Article 63 TFEU extends to everyone conducting business within the EU. (Groeben & Schwarze, 2015) Noteworthy, the protection provided to direct investments is offered only to the investments made to establish or maintain "lasting and direct economic links." (Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, 2006) Accordingly, the investments should allow the shareholder to be involved in the management or control of the company. Moreover, the extensive interpretation made by the CJEU concerning the material scope of "capital" includes both monetary and nonmonetary resources (Hein Persche v. Finanzamt Lüdenscheid, 2009), referring to Annex 1 from *Directive 88/361/EEC*. (European Council, 1988)

However, conflict can emerge regarding the application of "most favored nation" (MFN) and "national treatment" (NT) clauses, which might extend the favorable treatment granted to the EU Member States to TCNs (Fecak, 2016, p. 122). Those conflicts are commonly counteracted by including REIO exceptions. REIO clauses exclude the applicability of the principle of MFN treatment granted by a contractual party, a member of the REIO, to other members of that organization and their investors (UNCTAD, The REIO Exception in MFN Treatment Clauses, 2004). In the example of the EU-China CAI, Annex 2 – Schedule of the European Union, Reservation 1 d) addresses this issue by excepting the EU from MFN in the context of its regional economic integration agreements. More reservations have also covered the provisions related to NT or performance requirements.

2.2.The EU Competence for FDI Regulation

2.2.1. Before Lisbon Treaty

Before the Lisbon treaty, the EU had no competence over foreign investment apart from the common commercial policy, trade-related investment measures, and arguably over market access for service providers (Herrmann & Hoffmann, 2020, p. 2229). Through its competence to regulate services, the EU concluded the GATS, which regulated through its provisions on "market presence" the market access conditions for service providers on the EU internal market (Calliess & Ruffert, 2022, p. 30). Moreover, as mentioned previously in the section on the internal market, as FDI represents a subcategory of capital, the EU had the competence to regulate its entry and operation through the provisions on the free movement of capital (Schwarze & Hatje, 2009). Because of that, the European Commission initiated infringement proceedings at the CJEU against Sweden, Finland, and Austria, emphasizing the absence of restrictions in their agreements related to the free movement of capital. Most BITs featured guarantees about the unconditional free transfer of funds related to investment, which were incompatible with the Council's authority to restrict capital movements to and from third countries. In the CJEU findings (Commission v. Kingdom of Sweden, 2009) and (Commission v. Republic of Austria, 2009), the Court supports the validity of the guarantees related to investment: "the free transfer of funds in order to create, manage or extend an investment; the freedom to repatriate the income from that investment; and the freedom to transfer the funds necessary to repay loans and the funds arising from the liquidation or assignment of that investment," the CJEU also recognize the consistency with Article 56(1) EC which provides that "the restrictions on the movement of capital and payments between the Member States and third countries shall be prohibited." However, the Court acknowledges the power of the Council to restrict the movement of capital and payments between the Member States and third countries when following "the general Community interest." CJUE also confirms that the Council could demand the Community comply with its international responsibilities and those of the Member States, where appropriate. Therefore, the CJEU decided that if the agreements are incompatible with EU law, the Member States "shall take all appropriate steps to eliminate the incompatibilities established." (Lavranos N. , 2009, pp. 716–722) Moreover, the CJEU emphasized the supremacy of EU law for the EU Member States, which cannot be undermined by international agreements even if predating their EU accession. (Lavranos N. , 2010, p. 12)

2.2.2. Lisbon Treaty and the grandfathering Regulation

The incorporation of FDI within the common commercial policy comes from the globalized attitude towards international trade and investment. (Stegmann, 2019, p. 3) Art. 3(1)(e) TFEU eventually transfers from the Member States to the EU an explicit exclusive competence to control the common commercial policy, including FDI. Moreover, under Articles 206 and 207 TFEU, the EU can establish foreign agreements and implement independent FDI policies. (European Council, 2010) Despite this new competency, the last-minute decision to incorporate FDI left numerous unresolved problems, including whether current IIAs are valid and the scope of the FDI's substantive competence. As for the continued validity of previously concluded BITs, ultimately, the EU clarified the matter by adopting *EU Regulation 1219/2012* (the "grandfathering regulation"), which established the transitional arrangements regarding extra-EU BITs. (European Parliament; European Council, 2012) The Regulation followed the principle *pacta sunt servanda* of public international law under which the transfer of competencies does not affect the validity of previously concluded treaties.

On the one hand, the grandfathering regulation authorizes the continued validity of existing BITs concluded with TCNs. According to Articles 3, 5, and 6, the BITs will remain in force until the EU replaces them with equally effective agreements. This replacement system would enable a smooth transition and ensure legal certainty for the Member States and investors. Moreover, the Regulation provides legal certainty and protection for contracting parties and their investors (Lavranos N. , 2013). In contrast, Member States are obligated to report existing BITs to the Commission, which would have to assess the BITs' conformity with EU legislation. (Article 2, Regulation 1219/2012) If the Commission determines BIT as incompatible with the Union *acquis*, it can request that the Member States renegotiate, suspend, or terminate the relevant BITs. (Herrmann & Crämer, 2015) Under article 13 of the Regulation, the Commission may also initiate dispute settlements with third parties and intervene in dispute proceedings. Concerning the BITs initiated after the Regulation, the Member States would have been allowed to initiate and conclude BITs only after they fulfilled the authorization procedure imposed by the EC.

Since 2012, the EU has initiated multiple negotiations on investment liberalization and protection with many countries. Besides the CAI with China, the EU has concluded IIAs with Japan, Mexico, and Mercosur. Like China's current investment policy, those agreements are mostly free trade agreements. Moreover, investment agreements were also initiated with Canada (CETA), Singapore, and Vietnam. Multiple negotiations were held with the US for the TTIP and China for the CAI. Unfortunately, the EU and the US did not sign the TTIP, but on the other side, the negotiations with China are still ongoing. Even so, the EU-China CAI specifies that the Agreement does not replace any existing BITs between the Member States and China. Instead, the Member States might be required to terminate their BITs individually after the CAI is ratified, following the "replacement principle." Until now, no EU IIA has entered into force and terminated the Member States' existing BITs. Therefore the Member States' BITs continue to serve as the basis for investment protection of EU domestic and foreign investors.

2.2.3. The substantive scope of the EU's investment competence

Following the concept of conferral, the EU may only conclude treaties or enact legislative acts to the degree that the Member States have conferred competence upon it. Therefore, determining whether the EU may negotiate an IIA on its own or if it requires the Member States to participate as parties to the IIA (so-called "mixed agreements"), it is necessary to understand the scope of the EU's investment protection competence.

First, we need to understand the meaning of the term "foreign direct investment" and what is the applicability of the EU's competence over FDI. The term "foreign direct investment" is not defined under the TFEU. (Chaisse, 2012) However, the term "foreign" clearly indicates third states' participation. To qualify as "foreign investment," the investments must be done by a foreign enterprise in the EU or by a Member State in a third country. (Puig, 2013) In the meanwhile, the distinction between "foreign portfolio investment" (FPI) and "foreign direct investment" (FDI) is more controversial. The primary distinction between FDI and FPI is the intent to build a long-term or a short-term relationship. (Stegmann, 2019, p. 22) In *Directive 88/361/EEC* (European Council, 1988), the definition of direct investments provides that they musth "serve to establish or to maintain lasting and direct links." The CJEU relates explicitly the concept of direct investment to "a form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control" (Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, 2006). On the other side, FPI is assessed as an "acquisition of company securities" intented only financial investment. The definition provided by CJEU to FPI restricts the investments that can give the investor influence over the management or the control of the enterprise. (Opinion 2/15, 2017, p. 227). Furthermore, the Court assumes that an entity must own at least 10% of a company's share capital to qualify as FDI because otherwise the investor cannot aquire an adequate participation in the management or the control of the company. (Haribo, Österreichische Salinen AG v. Finanzamt Linz, 2011, p. 137).

Motivated by the authority to regulate the freedom of capital and payments, the Commission considered that the EU had exclusive competence to conclude IIAs, including FPI (Herrmann & Crämer, 2015, p. 92). Accordingly, in concluding the Free Trade Agreement between the EU and Singapore, the CJEU confirmed the EU's exclusive competence over FDI. (Opinion 2/15, 2017, p. 249) However, the CJEU denied the exclusive competence for FPI, deciding that the FTA must be signed as a mixed agreement since several provisions constituted shared competencies with the Member States. (Opinion 2/15, 2017, p. 305) The shared competencies of the EU with the Member States include the aspects of non-direct investments and the ISDS provisions.

For this reason, the EU-Singapore FTA and the EU-Vietnam FTA were split into two legal agreements: one representing an Investment Protection Agreement (IPA) covering investment protection and dispute settlement which was concluded as a mixed agreement, and one covering the areas that the EU holds exclusive competence, which was already concluded by the EU. Over the concern of compatibility of the new EU investment agreements with the EU law, the CJEU confirmed that CETA is compatible with EU primary law. (Opinion 1/17, 2019)

As foreign investments are a "two-way street," the EU Member States are not only high exporters of FDI but are also progressively attracting foreign investments from countries such as China and other nations. Therefore, the primary objective of the EC is to provide a level playing field to all EU investors. Noteworthy, Lisbon Treaty not only enlarged EU competence over FDI but also introduced the EP as a new factor that will shape the futur e EU investment policy.

Chapter 3 - The main barriers to EU-China investments

The significant investments and trade between the EU and China provided numerous benefits for the European and Chinese investors, local authorities, and people's welfare. However, according to scholars, the EU investors dealt with multiple challenges while investing in China, including "the lack of a level playing field, limited market access, a lack of transparency and certainty, threats of opportune takeover and the national security impediment." (Bush & Du, 2022, p. 151) The Chinese Government addressed most of these issues in their new legislative measures concerning foreign investments. On the other hand, most discrepancies might be justified when noting the differentiated classification between the EU and China, which recognizes China as a developing country that still has to adopt multiple reforms to improve the discrepancies between the two systems.

3.1. The lack of a Level Playing Field

The EU investors acknowledged the absence of a level playing field in the EU-China investments for a long time. Noteworthily, the restrictiveness for FDIs in China has gradually diminished from 0.436 in 2010 to 0.214 in 2020. Nevertheless, the imbalance between EU-China openness is still substantial. For example, the FIE (Foreign-invested enterprises) has been considered a distinct group in China, facing restrictions before and after its establishment.

3.2. Limited Market Access

The screening policy for foreign investments generates restrictive market access to the Chinese market, which includes limitations on the business's scope, size, and duration. The "Catalogue of Industries Guiding Foreign Investment Industries" (外商投资产业指导目录) is frequently updated and promulgated by the Ministry of Commerce (MOFCOM) and the National Development and Reform Commission (NDRC), including the standards for approving foreign enterprises and projects. The Catalogue has four categories of foreign investment industries: prohibited, restricted, encouraged, and permitted. (China, 2020) The "restricted" category is open for investments only if specific requirements are met, for instance, joint venture ownership or limitation of equity.

The primary investment barriers listed by the impact assessment report of the CAI were: "licensing requirements and procedures, restrictions on foreign ownership, regulatory approval procedures, prohibition on investment, limited business scope, and joint venture requirements." (European Commission, 2013) Additionally, the state-owned enterprises (SOE) and private Chinese companies benefit from more accessible access to subsidies, loans, or public procurements and bidding. (Federation of German Industries, 2019) Before 2010, China offered tax incentives and land use rights to FIEs as part of their program to attract foreign investments. (Jiang, 2014, p. 534) Moreover, barriers are also present for the Chinese investors in the EU market. The most prevailing might be: "unequal licensing, authorization or application standards, the lack of legal transparency, a high administrative burden, and the lack of leveled investment protection." (European Commission, 2013)

China pursued multiple openings over the years by listing more "encouraged" sectors and removing some equity ratio limitations as part of its strategy to promote foreign investment. (Jiang, 2014) Under the aegis of WTO, China released multiple "negative lists" known as "Free Trade Zones" or the economic policies of the "Special Economic Zones" (SEZ), which provide foreign investors with special incentives such as tax incentives, greater independence from the central government. The economic policies also include "4 principles," which define the economic characteristics of the SEZ to be export-oriented, constructed to attract and utilize foreign capital, and economic activities driven by market forces. China's policy towards openings is commonly known for making transactional case-by-case concessions, mutualizing them through a bilateral or multilateral agreement. For example, Tesla was the first car manufacturer to be allowed to have a 100% foreign ownership structure which was followed in 2022 by the opening to the entire passenger vehicle industry starting on January 1, 2022. (Ministry of Commerce of China) This concession is also mentioned in Annex I Entry 6 of the CAI, together with multiple other specific conditions on the concession from different sectors. According to the National Development and Reform Commission of China, China made numerous concessions on the number of Free Trade Zones Negative List by decreasing the restrictions in the last years, from 95 in 2017 to 27 in 2021.

The industries listed in the 2021 negative list are primarily related to national resources, tobacco, transportation, technology, legal, scientific research, education, health, culture, sports, and entertainment. In this context, China should not only analyze the competitiveness of different industries for opening up to foreign investment but also consider the realities of its transitioning economy and the diversity of its economic regions. (Shan & Chen, 2016, p. 233)

In contrast to the reform of forty years ago, which was begun from the bottom up, the free trade pilot zone plan is introduced from the top down. The plan for FTZs is to optimize government authority by boosting market access administrative approvals' openness and automation. (Hu, 2020)

3.3. Lack of Legal Certainty and Transparency

CAI's impact assessment also notes that China's legal system is challenging for foreign investors due to the lack of legal certainty, transparency, and investment protection. Apart from the new legislative reforms targeting foreign investments directly in China, the BITs between China and EU Member States improved both party's investors' protection by including the standard provisions of "fair and equitable treatment," "full protection and security," "non-discrimination" and "investor-to-state dispute settlement." Moreover, establishing a unified agreement as the CAI would benefit Chinese investors, which can have simplified procedures, reduced costs, and enhanced protection. On the other hand, the Chinese investors would be more motivated if the EU organized a One-Stop-Shop (OSS) for foreign investors. An enlarged EU One-Stop-Shop for foreign investors, which would offer them more comprehensive assistance for investing in the EU, might be far from being reached in the short term because of the difficulty of implementing it. However, the EU can provide foreign investors with a website that will help them with helpful information and guidance about procedures, regulations, and tax systems, as well as information about different foreign investment agencies and chambers of commerce that can guide them further.

Chapter 4 - China's New Foreign Investment Legislative Reform

In 2017 President Xi Jinping promised foreign investors pre and post-establishment national treatment as part of China's measures to promote the growth of the foreign investment. The State Council notice aimed to reduce the restrictions on foreign investments, offer fiscal and taxation support policies, improve the investment environment of the national development zones, facilitate the entry and exit of talented persons, and optimize the business environment. (Ministry of Commerce China, 2017)

Notably, as it would be referenced also in *chapter 5.2.2.*, the new approch to foreign investment adopted by China comes as a result of the commitments made through the GATS convention which establishes obligations for its members to provide equal market access and non-discriminatory treatment. (World Trade Organisation, 2022)

The new legislative reforms addressed most concerns of foreign investors by improving the level playing field, market access, and investment protection. The new legislative measures adopted by China included the Foreign Investment Law (FIL or 中华人民共和国外商投资法), Trademark Law, Patent Law, and Anti-competition Law. Previously, foreign companies were set up based on the "Three Investment Laws." Those were the legal basis for the three primary forms of foreign enterprises in China: the Equity Joint Ventures (EJVs or 中外合资企业) and the Contractual Joint

Ventures (CJVs or 中外合作企业), and the Wholly Foreign-Owned Enterprises (WFOEs or 外商独资企业). However, after entering into force of the FIL, the Three Investments Laws were repealed. The new FIL provided that the previous three forms of foreign enterprises would have to adjust their organizational form and structure according to the provisions of the "Company Law" (中华人民共和国公司法, 2018 Amendment) and the "Partnership Enterprise Law" (中华人民共和国合伙企业法, 2006 Revision) by January 1, 2025.

4.1. Establishing a business in China

As part of its commitment to provide national treatment to foreign investors, the business forms adopted in China are now the same for foreign and domestic companies.

The Company Law from China allows the establishment of two types of companies: the Limited Liability Company (LLC or 有限责任公司) and the Joint Stock Limited Company (JSLC or 股份有限公司).

The LLC is the most common for both domestic and foreign investors. The Chinese LLC is very similar to European LLCs, providing limited liability to the extent of shareholders' contribution and a more accessible control and regulatory regime than joint-stock companies. In addition, it can be formed by 1 to 50 persons, and the business becomes a legal person with legal protection and rights.

The JSLC's number of shareholders can range from 2 to 200, but more than half of the shareholders shall have their domicile in China. Therefore, for the JSLC, the establishment and operation procedures are more complex than for the LLC.

The Partnership Enterprise Law establishes three types of partnerships: the general partnership, the limited partnership, and the special general partnership. General partners establish the general partnership with joint and unlimited liability. The limited partnership includes general partners having joint and unlimited liability and limited partners who bear their liability to the extent of their contribution to the capital. The third type of partnership, the special general partnership, is a special form designed for professional service institutions.

4.2. The New Foreign Investment Law 2020

China adopted the New Foreign Investment Law (FIL), addressing the most critical concerns of foreign investors: lack of a level playing field for all businesses from China, market access together with the need for stability, transparency, and fair competition.

4.2.1. A "Negative List" approach to market access

The New FIL implements a "pre-establishment national treatment plus negative list" system, which grants foreign investors "no less favorable" treatment than that of domestic investors for the industries not covered by the negative list (Foreign Investment Law, Article 4). Moreover, Article 4 provides that international agreements prevail over the negative list issued by the State. However, for approval and licensing, the foreign companies shall go through the relevant state regulations and procedures, which will be applied uniformly to foreign and domestic investors (Foreign Investment Law, Article 29, 30).

4.2.2. Enhanced protection of foreign investments.

On the other hand, the FIL provides that expropriation and nationalization can be carried out "under special circumstances" under legal procedures, following a "fair and equitable" compensation. The expropriation and nationalization are one of the sovereign rights every state has over the properties of its citizens or foreigners. (Tache, 2020, p. 151) Despite this, states' exercise of this fundamental right produced many disputes and discussions. As a result, the international arbitration institutions defined that this sovereign prerogative follows the "fair and equitable" provision if it meets the following requirements: (a) it follows public interests; (b) does not involve discrimination; (c) it complies with the legal provisions, and (d) accompanied by total compensation. (Antoine Goetz v. Burundi, 1999) The principle of "fair and equitable" is recognized as a good faith of the host state which should provide better protection for foreign investors. (Tecmed v. Mexico, 2003, p. 153) We can list the key characteristics of this treatment: "compliance with legal rules and procedures, predictability, stability, legitimate expectations, non-discrimination or transparency." (Tache, 2020, p. 150)

The FIL also provides that the FIE can pay the foreign investors within China either through RMB or foreign exchange for their "capital contributions, profits, capital gains, income from asset disposals, intellectual property license royalties, liquidation income" (Foreign Investment Law, Article 21).

4.2.3. National Security Review

Regulators try to balance national security with openness toward foreign investments. (Liu, 2018, p. 287) Because of that, investment risk control has significant importance for every country. Consequently, EU law and the new FIL from China include provisions for a national security review. Article 35 confers to the Chinese government the authority to undertake a security review for foreign investments. In March 2019, the EU introduced *Regulation (EU) 2019/452*, a framework for screening foreign direct investments into the EU for security or public order reasons. This Regulation allows the Member States to develop their screening systems and holds them accountable for preserving their national security interests. (European Parliament; European Council, 2019)

4.3. Intellectual property protection

Thirdly, the new Law enhances foreign investors' protection of intellectual property (IP). Article 22 of the FIL provides that the State protects the IP rights of foreign investors while also prohibiting forced technology transfers, encouraging "technical cooperation" determined through equal negotiation and the principle of fairness. The legislative measure also include provisions about the administrative bodies, which shall keep confidential any business secrets they learn from FIE. Moreover, the recent amendments of the new Trademark Law (2019) imposed punitive damages of up to five times the amount of actual damages or up to RMB 5 million if the damages are doubtful (Trademark Law, Article 63). In addition, the new Patent Law (2019) also included damage awards, but the amount was more limited: from RMB 10,000 to 1 million. (Patent Law, Article 21(3) and 65(2))

In addition to the legislative reform, the Supreme People's Court established an Appellate-Level IP Tribunal, which will act as the Court of final appeal for cases involving IP (Supreme

People’s Court, ‘Regulations on Several Issues Regarding IP Tribunal’《最高人民法院关于知识产权法庭若干问题的规定》). This updated system demonstrates China’s intention to create an efficient investment environment to facilitate scientific and technological innovation. Promoting technology advancements is one of China’s leading development policies and strategies, which constantly added more advanced technology industries in their latest Catalogue of Encouraged industries for foreign investments. (Catalogue of Industries for Encouraging Foreign Investment 《鼓励外商投资产业目录》, 2019)

Chapter 5 - EU-China Bilateral Investment Treaties

5.1. Mapping EU-China BITs

The EU has 26 BITs in force with China, out of which 8 represent the second BIT concluded between the respective Member State and China. The information was extracted from investmentpolicy.unctad.org (UNCTAD, 2022), an initiative between UNCTAD and universities of law to map the content of international investment agreements.

Definitions

All BITs provide an asset-based definition, and neither BIT excludes portfolio investments from their investment definition. Unlike the CAI, neither BIT include any reference to the right of the state to regulate.

Almost all BITs define the term "investment" with a list of elements, such as "movable, immovable property; shares... etc." In addition, the China-Czech Republic BIT defines the word "returns" as "amounts produced by investments, including earnings, dividends, interests, capital gains, royalties, and fees" While the term "related activities" is not defined under BITs, courts might utilize it to widen the scope beyond investments. (Abgaryan, 2019, p. 26)

National treatment clause

The BITs of the EU Member States and China have two approaches to the national treatment clause:

1. Granting national treatment post-establishment: Belgium, Luxembourg, Cyprus, Czech Republic, Finland, France, Germany, Latvia, Malta, Netherlands, Portugal, Slovakia, Slovenia, and Spain
2. Not referring to the national treatment clause: Bulgaria, Croatia, Denmark, Estonia, Greece, Hungary, Italy, Lithuania, Poland, Romania, and Sweden.

The renewed treaties with China conferred the Member States more favorable treatment as the BITs with the following countries did not provide national treatment before Belgium, Luxembourg, Finland, France, Netherlands, and Portugal. Nevertheless, neither treaty includes references to the “like circumstances” treatment.

Most favored nation clause

Concerning the most favored nation clause, all BITs include this clause offered post-establishment, but neither of them provides a reference to the „like circumstances” standard. Finland benefits from a favorable exception for the MFN standard as the BIT provides a pre- and post-establishment MFN treatment. Applying the MFN clause during the "establishment" and "acquisition" phases of investment, as is the case with China-Finland BIT, aims to prevent the selective liberalization of market access requirements for the investments. (OECD, 2005, pp. 30-35)

As for the exceptions from MFN obligation, the Sweden-China BIT is the only one not referring to any exception. At the same time, the BIT with Denmark provides exceptions for taxation treaties but does not provide exceptions for procedural issues (ISDS). Except for Sweden and Denmark, all other BIT provides exceptions for economic integration agreements (REIO clause) and taxation treaties.

Foreign investments are subject to MFN obligations under all Chinese BITs concluded with the EU Member States. Consequently, foreign investors subject to investment protections of older EU-China BITs can enjoy the additional protection of subsequent treaties by using the MFN provision, at least to a significant degree, and if no limits or exceptions are provided otherwise.

Fair and equitable treatment clause

The significance of FET clauses is easily proven by the fact that the majority of foreign investment lawsuits successfully brought against respondent nations involve FET standard violations. (UNCTAD, 2022)

The investment treaty with Austria and Finland qualifies for "fair and equitable" treatment (FET). At the same time, BITs which include references to FET combined with NT or MFN, are the ones concluded with: Bulgaria, Czech Republic, Hungary, Poland, Romania, and Slovenia.

Full protection and security clause

Almost all treaties benefit from the "full protection and security" clause, except Cyprus, Ireland, Romania, Slovakia, and Sweden. In addition, four newly revised BITs introduced this clause, which was not covered in the previous treaty: Belgium, Luxembourg, Czech Republic, Finland, and Germany.

The majority of EU-China agreements include a "protection and security" clause for foreign investors. The fact that „complete protection and security" has in many circumstances been paired with the FET provision may be one of the reasons why some tribunals have construed the FET clause to exclude the protection afforded by the "protection and security" clause. In the Occidental v. Ecuador case, for instance, the court held that „...a treatment that is not fair and equitable obviously includes a lack of complete protection and security for the investment." (Occidental Petroleum Corporation v. The Republic of Ecuador, 2015)

Prohibition on unreasonable, arbitrary, or discriminatory measures

This clause is included especially by western and developed European countries in their BITs with China: Austria, Belgium, Luxembourg, Cyprus, Denmark, Finland, Germany, Greece, Latvia, Malta, Netherlands, and Spain.

Umbrella clause

The clause requires the Contracting Parties to "observe any other obligation it has assumed" related to foreign investments. (Wong, 2006, pp. 144,150) Also known as the „pacta sunt servanda" principle, it is assumed by the BITs concluded by China with 13 EU Member States: Austria, Belgium, Luxembourg, Cyprus, Denmark, Finland, Germany, Greece, Latvia, Malta, Netherlands, Poland, and Spain.

By including an umbrella clause into an investment treaty, the investors benefit from better investment protection as the Parties raise their commercial responsibilities to obligations under international law. (Weiler, 2005, p. 32)

Transparency clauses

Concerning transparency, only the BITs with Finland and Latvia include references to transparency concerning the obligation to publish laws and regulations. This is justified by the fact that investment agreements do not usually include transparency provisions. For example, the obligation of the state to publish laws and regulations is mentioned only in 364 out of 2574 investment agreements. (UNCTAD, 2022) On the other hand, approximately 5-15% of the investment treaties include provisions related to transparency: health and environment, labor standards, the right to regulate, CSR, and the obligation not to lower the standards related to environment or labor.

Scheduling and reservations

A few treaties include exceptions from the provisions through schedules or reservations. For example, the BIT with Belgium and Luxembourg includes a positive list of commitments. On the other side, reservations are made through a negative list in the BIT with the Czech Republic, Finland, France, and Germany.

Dispute settlement

Regarding the scope of the claims in the ISDS, most treaties cover any dispute relating to the investment. However, a few BITs mention ISDS only in the context of treaty claims: Austria, Bulgaria, Denmark, Hungary, and Malta.

In connection with the ISDS options, the following options are usually mentioned: domestic courts of the host state, ICSID, UNCITRAL, and other forums.

Domestic courts of the host state

Most of the treaties recommend that the dispute settlements be resolved through the domestic courts of the country where the investment is made. However, a few BIT do not reference domestic courts as an option for dispute settlements: Austria, Bulgaria, Germany, Hungary, and Spain. The BIT with Greece is also inconclusive in connection with the option of domestic courts.

ICSID

The most preferred option for dispute settlement in the EU-China BITs is ICSID. The only BIT which does not include provisions about this dispute settlement option are those concluded with the following countries: Bulgaria, Hungary, Poland, Portugal, Slovakia, and Slovenia.

UNCITRAL

The UNCITRAL option for dispute settlement is also included in most of the treaties concluded by China with the EU. The BITs which do not include provisions for this option are Belgium, Luxembourg, Croatia, Cyprus, Denmark, Estonia, Hungary, Italy, Latvia, Lithuania, Poland, Romania, and Slovenia.

Other forums

Most investment agreements do not include other forums than those mentioned previously. However, the BIT concluded that the following EU countries might allow the investor to initiate the dispute settlement at other international forums: Croatia, Cyprus, Greece, Hungary, Lithuania, and Poland.

Relationship between forums

As for the relationship between forums, the agreement has the following approaches:

a) Preserving the right to arbitration after domestic court proceedings: Finland, Netherlands, Spain
b) Local remedies first: Denmark
c) Fork in the road: Belgium, Luxembourg, Croatia, Cyprus, Estonia, France, Portugal, Romania, Slovenia, and Spain. The "fork in the road" principle can be expressed by the latin maxim "una via electa non datur recursus ad alteram" which in our case means that once the dispute settlement option is chosen, the choice is final. (Kaufmann-Kohler & Potestà, 2020, p. 39)
d) Waiver clause (No "U" turn): Germany. Unlike "fork in the road" clauses, the waiver clause permit investors to opt for international arbitration after addressing their claim to the domestic courts. Nonetheless, if the investor chooses to submit a claim to international arbitration under the dispute settlement clause of the IIA, it must stop domestic court proceedings or forgo its right to commence new ones. (Kaufmann-Kohler & Potestà, 2020, pp. 39-40)

Survival clause length

Providing the length that the provisions of the treaties remain applicable for the investments (covered investments) made prior to the termination of the agreement, 18 BITs between the EU and China include a survival clause of 10 years. However, the BIT concluded with Italy refers to a length of 5 years, while seven other BITs provide lengthier periods. The investment agreement concluded by China with Bulgaria, Netherlands and Sweden mention a survival clause of 15 years, while the BITs with Finland, France, Germany, and Greece relate to a survival length of 20 years.

5.2.China's Bilateral Investment Treaties

5.2.1. The evolution of China's Investment Policy

China's bilateral investment regulation is shifting, affecting its international investment law practice. China's position has transformed from capital importer to the position of both capital importer and exporter. This shifts China's BIT policy from investment promotion to FDI control and protection. Previously, China has "cautiously defended its state sovereignty" (Tao, 2019, p. 95) through reservations and lower standards of treatment for foreign investors.

First, as a capital exporter, China has a stronger incentive to strengthen investor protection. Moreover, since the foreign investment inflows stagnated over the past years, China is offering better standards of treatment and regulations to promote FDI. Second, China, similarly to the EU, is willing to develop external economic relations beyond investments, and because of that, it concentrates more on FTAs rather than signing new BITs. Third, China is developing extensive

FDI programs such as the Belt and Road Initiative (BRI), signing a Memorandum of Understanding with approximately 146 countries (Nedopil, 2022). The BRI is an extra-regional initiative involving investments from the side of China in other countries. The investments are mainly targeting infrastructure development, and 18 countries of the EU signed the BRI with China.

5.2.2. The Evolution of China's BITs

Some scholars have different classifications of the evolution of China's BITs. For example, some consider the period after 1998 to represent the new generation of China's BITs since those provide better investment protection and provisions related to national treatment or ISDS through international arbitration. (Bush & Du, 2022, p. 149) However, we would consider the following classification from the point of view of the political and economic development of China's BIT program (Wang & Wang, 2020, p. 2379):

1. **First phase: 1980s–1990s**

China concluded during this period BITs with the following EU countries: Sweden (1982), Germany (1983, replaced), Belgium-Luxembourg Economic Union (1984, replaced), Finland (1984, replaced), France (1984, replaced), Austria (1985), Denmark (1985), Italy (1985), Netherlands (1985, replaced), Poland (1988), Bulgaria (1989).

The late 1970s was the first time China decided to open its foreign investment policy by opening its economy, attracting FDI, and promulgating laws and regulations in the field of FDI. In 1982 China included in the Constitution provisions related to its commitment to foreign investment protection. (Article 18) (Constitution of People's Republic of China《中华人民共和国宪法》 2004 Amendment, 1982) Moreover, China considered that by concluding BITs, the foreign investors would be more motivated to invest in China, given the international legal commitments made by China with their country of origin. Therefore, until 1985 China concluded BITs with multiple developed countries, following BITs diversification with developing countries from 1986. Some authors support the belief that the primary objective of Chinese BITs at that time was to promote inward FDI. (Gallagher & Shan, China, 2013, p. 132)

The early Chinese BITs were more "conservative" (Gallagher & Shan, 2009, p. 37) regarding the national treatment and ISDS. Therefore, neither BIT with EU countries included national treatment standards and only two of them (Austria and Denmark BITs) prohibited unreasonable, arbitrary, or discriminatory measures. However, some included basic FET provisions, MFN, and protection against expropriation. Consequently, the BITs from this period included ISDS provisions referring primarily to the compensation for expropriation rather than including a broad ISDS coverage.

2. **Second phase: 1990s–2000s**

China concluded during this period BITs with the following EU countries: Czech Republic (1991, replaced), Hungary (1991), Slovakia (1991), Greece (1992), Portugal (1992, replaced), Spain (1992, replaced), Croatia (1993), Estonia (1993), Lithuania (1993), Slovenia (1993), Romania (1994)

This period was influenced by the ratification made by China of the ICSID Convention in 1993, the adoption of the GATS in 1994, and the implementation of the "Going Abroad" strategy. The 10th Five-Year Plan for National Economy and Social Development presented the desire to "encourage enterprises with comparative advantages to invest abroad." Therefore, China started to shift its strategy towards outward direct investment. Four out of eleven BITs concluded with EU countries in this period included the national treatment standard. Regarding ISDS, only the BIT concluded with Hungary (1991) covered dispute settlements related to treaty claims instead of any dispute related to investment. Moreover, following 1993, only the BITs signed with Slovenia (1993) and Portugal (2005) did not include a reference to ICSID as an alternative for dispute settlement.

3. **Third phase: after the 2000s**

China concluded during this period BITs with the following EU countries: Cyprus (2001), Netherlands (2001, new treaty), Germany (2003, new treaty), Finland (2004, new treaty), Latvia (2004), Belgium-Luxembourg Economic Union (2005, new treaty), Czech Republic (2005, new treaty), Portugal (2005, new treaty), Spain (2005, new treaty), France (2007, new treaty), Malta (2009).

Following China's accession to WTO in 2001, China began to enter into FTAs and include even more favorable provisions in its BITs. First, all BITs concluded with EU countries in this period included the national treatment standard. Second, most BITs included the prohibition of unreasonable, arbitrary, or discriminatory measures and the umbrella clause. Moreover, most of the BITs signed in this period replaced the old treaties with better provisions for the investors.

After 2009, the EU Member States did not renew or sign any other BIT with China. However, the EU and China initiated extensive negotiations for BITs or FTAs with multiple countries after 2010. Scholars consider this new generation of investment treaties the fourth generation of Chinese BITs or the "Global BIT 2.0" (Shan & Wang, The China–EU BIT and the Emerging 'Global BIT 2.0', 2015). China became for the first time a net exporter country in 2016 (OECD, 2022, p. 12), following its ascending trend of becoming one of the largest foreign direct investors.

5.3.The evolution of the EU investment policy

The evolution of EU investment policy has been marked by several milestones in the past decade. First, the EU received exclusive authority over FDI when the Lisbon Treaty entered into force. In 2010, the Commission made clear its ambition to construct a comprehensive EU investment strategy by gradually taking control of this domain from the EU Member States. (European Commission, 2010) The EU was already negotiating FTAs, which included investment in addition to trade matters. The EU was looking to integrate "investment protection with investment liberalization" as part of its trade policy. (European Commission, 2010, p. 5) In this context, the EU created a new investment standard, establishing a new agenda for investment protection and ISDS. Second, under *Regulation 1219/2012*, the EU aimed to provide a seamless transition from Member States BITs to future EU IIAs.

Furthermore, the EU's involvement in ISDS is part of the most controversial aspects of EU investment policy. The EU *Regulation 912/2014* presents the allocation of financial responsibility between the Member States and how they can act as respondents in dispute settlements under EU investment agreements. Third, the EU concluded in the last years multiple IIAs or FTAs with investment provisions, subject to whether or not they should be concluded as mixed agreements with the Member States. Multiple agreements were then split into two legal agreements depending on whether or not the EU had exclusive competence over the parts of the agreement. Moreover, the new EU investment policy differentiates by integrating a new mix of institutional actors involved in the decision-making. The European Parliament had a highly prominent role in defining investment policy. The EP was a strong advocate of the right to regulate and the initiative to increase the legitimacy and transparency of ISDS.

The BITs of the EU Member States indicated a general tendency to establish high standards for investor protection without concentrating too much on public policy objectives. As the EU gained competence over FDI, Member State BITs or the "gold standard" that MSs incorporated became only a source of inspiration for defining the best practices that serve the goals of EU investment policy. (Lavranos N. , 2013, p. 5)

Moreover, the autonomy of EU law imposes a significant constitutional limitation on the content of EU IIAs, notably concerning ISDS. While the CJEU accepted ISDS under CETA (Canada; The EU-Member States, 2017) does not conflict with the principle of autonomy (Opinion 1/17, 2019), its decision was based on the unique provisions and characteristics of ISDS under CETA that allowed it to reach this determination. As the Court has made clear, ISDS does not contravene the concept of autonomy if an investment protection treaty follows two criteria envisaged in paragraph 119.

Regarding the first criteria established by the CJEU, the principle of autonomy requires that ISDS under EU IIAs have a limited jurisdiction that excludes EU (and national) law as relevant law. The CJEU has emphasized the significance of Article 8.31 CETA, which stipulates that EU law can only be considered as facts by arbitral tribunals and that any interpretations given by EU courts to EU internal law must be fully respected. The first condition imposed by the CJEU aims to safeguard the exclusive jurisdiction of the CJEU to determine the validity and interpretation of EU law. In this regard, EU IIAs cannot provide investment tribunals with any chance to use or interpret EU legislation in exercising their authority. Excluding EU and national law from the jurisdiction of investment tribunals might represent a considerable obstacle to their effective operation. Although it is well-known in international law that domestic law is treated as fact (Decision on Jurisdiction, Applicable Law and Liability, Electrabel SA v. Hungary, 2012, p. 129), investment tribunals might not be able to avoid evaluating domestic law problems. In the framework of NAFTA, where domestic law is excluded from the scope of applicable law, tribunals were often required to address domestic law issues to interpret NAFTA provisions appropriately. (Decision on Liability and on Principles of Quantum, Mobil Investments Canada v. Canada, 2022, pp. 109-118)

Concerning the second limitation posed by the CJEU on ISDS, the principle of autonomy significantly restricts the authority of investment tribunals to assess the conformity of EU measures with EU IIAs standards. More precisely, the CJEU states that the treaty shall not "structure the powers of those tribunals in such a way that they may issue awards which have the effect of preventing the EU institutions from operating under the EU constitutional framework." As a result, compliance with international law might weaken the substantive validity of EU acts by forcing EU institutions to withdraw or amend an act (Dimopoulos, 2020, p. 2271). The Court found that such a restriction is incompatible with the autonomy principle of EU law, as it would undermine the capacity of EU institutions to determine the level of protection of public interests required by EU law. To verify that CETA does not contradict the concept of autonomy, the Court reviewed the clauses establishing the right to regulate, FET, indirect expropriation, and investment protection exceptions. (Opinion 1/17, 2019, pp. 152–159)

Furthermore, some scholars assume that the CJEU assumes "a hegemonic role" by preventing international tribunals from exercising their legitimate authority. (Witte, 2014, p. 33) On the other hand, it follows the principle of each state's sovereignty to establish its legislative framework, which would not be undermined by international courts arbitrations other than having regard to the rules and principles of the applicable international law. In any case, investors' protection shall not be altered, but at the same time, each country shall have the right to preserve its rights as long as both parties act in good faith.

5.3.1. Investment liberalization

Their emphasis on investment liberalization distinguishes the new EU IIAs as it becomes equally essential to investment protection within IIAs. Unlike Member State BITs, which lacked liberalization provisions, EU IIAs integrate investment protection within a separate chapter, reflecting its rising role in global FDI policy. Other essential characteristics of the new EU IIAs are the introduction of market access provisions, the provisions of specific exceptions to liberalization commitments, and excluding the liberalization commitments from the scope of ISDS.

For example, in EU-China CAI, Section 2 is entirely dedicated to the liberalization of investment, including provisions related to market access, NT, MFN, performance requirements, and transparency. However, the EU approach towards investment liberalization was also included in the Association Agreement concluded with Chile in 2002. (Chile, European-Union, 2002) Moreover, Article 5.3 of Section 2 specifies that the MFN treatment does not include ISDS.

Following the GATS approach to liberalization, most EU IIAs adopt a "positive list" approach in which each party declares the amount of liberalization intended in its schedule of commitments. Conversely, some IIAs embrace a negative list approach, liberalizing all sectors except those listed in their express reservation. (Article 8.15 CETA, Article 8.12 EU-Japan FTA) For example, the EU-China CAI follows predominantly a positive list which includes specific requirements depending on the legislation of each jurisdiction as well as specific reservations concerning the obligations assumed in the agreement.

5.3.2. The right to regulate

After investment liberalization, EU IIAs explicitly reference the right to regulate. This approach was initiated by the EU Parliament, which supported the promotion of legal certainty and the EU's right to regulate. (European Parliament, 2011, pp. 23-26) While this is not the case in EU-China CAI, CETA provides that adopting or modifying national laws does not represent an infringement of the obligation under investment protection, even if the effects over the covered investment are negative. (CETA, Article 8.9.2) Those provisions require rather than simply enabling future courts to consider the right of the states to regulate in the context of alleged violations of investor protection requirements.

Moreover, the new generation of EU IIAs provides an exclusive list of what actions are excepted from the FET standard. (CETA, Article 8.10) Once again, this provision is included in CETA but not in CAI.

5.3.3. The new approach to investor-State Dispute Settlement

The third innovation of EU investment agreements is the new approach to ISDS. To increase the legitimacy of ISDS and overcome the shortcomings of arbitration, the EU has advocated the reform of ISDS by introducing an Investment Court System (ICS) as a substitute for a dispute settlement system. The EU has stated that the ICS will remain a permanent component of all future EU investment agreements. (European Commission, 2015) So far, it has been a component of all EU IIAs. The development of the ICS is based on creating a "hybrid" system in the form of an international court, which emphasizes the characteristics of a public court system.

In this sense, forming a permanent two-tier adjudication procedure is a fundamental novelty offered by the ICS compared to investment arbitration. The ICS provides that the resolution of investment disputes should be resolved by arbitral tribunals, which are selected and appointed following a set of requirements. It requires the contractual parties to establish a pool of possible arbitrators along with their obligations and functions. In contrast to commercial arbitration, in which the parties select arbitrators, the new system resembles the procedures utilized in WTO dispute settlement.

As a result of the UNCITRAL provisions on transparency in investment arbitration, the EU IIAs introduce commitments that attempt to increase the transparency of dispute resolutions. In this regard, the EU allows public access to all proceedings-related documents, mandates public hearings, and permits third parties to file *amicus curiae* briefs. (CETA – Annex 29-A; CAI – Section IV) Therefore, EU IIAs not only follow the international trends but also expand the scope of ISDS transparency.

Chapter 6 - The EU-China Comprehensive Agreement on Investment

The European Commission referred to the CAI with China as "the most ambitious agreement that China has ever concluded with a third country." (European Commission, 2020) Presented as an agreement between two major economies which registered cumulative foreign direct investment flows over the last 20 years of €140 billion for the EU side and €120 billion from China to the EU. However, the press release presents only the main advantages the EU will gain from signing the agreement. The CAI targets three pillars: market access, improving the level playing field, and embedding sustainable development in the investment relationship.

The draft of the CAI was published as a result of the EU-China agreement in principle on December 2020. Even if the European Commission aimed to sign the agreement until 2020, the agreement is still delayed due intense negotiations and geopolitical considerations. (European Commission, 2021)

Analyzing the content of the EU-China Comprehensive Agreement on Investment

The preamble of the EU-China CAI agreement in principle mentions a joint commitment toward promoting corporate social responsibility, determined to fight "climate change" and "forced labor" while strengthening the bilateral economic, trade, and investment relations by promoting investment and sustainable development. (European Commission, 2021)

Even though the investment agreement aims at strengthening the bilateral relations between the EU and China, the Treaty also reaffirms the commitment to the UN Charter and the Universal Declaration of Human Rights. This comes as a result of the international commitments made by both parties towards sustainability, transparency and human rights. (European Commission, 2022)

The ratification of the CAI could improve the EU's position as a significant power while increasing its autonomy from the United States. However, Theresa Fallon adds that for China, "it is a way to drive a wedge between the EU and the United States." (Fallon, 2021)

Referring to the EU negotiations with the United States for concluding the Transatlantic Trade and Investment Partnership (TTIP), the MEP Reinhard Bütikofer addressed criticism concerning the lack of transparency, saying that he was not allowed to quote from the texts or to obtain the assessment of experts. (Bütikofer, 2020) While the TTIP negotiations failed after three years, the EU-China CAI negotiations are still ongoing. Afterward, the EU and China reached an agreement in principle on investment in December 2020. Noteworthy, the target year for concluding the agreement set by the EU-China Summit in April 2019 was 2020 (European Commission, 2022).

Through the Comprehensive Agreement on Investment, the EU and China aim to address the main barriers faced by European and Chinese investors: improving the level playing field, market access, investment protection and transparency. The new model of IIAs proposed by the EU in relation with their negotiation parties brings multiple innovations in the international investment law. The new generation of BITs or FTAs concluded in the last years represent extended adaptation of investment treaties which strengthen investment protection, but also the right of the States to regulate. Furthermore, the new agreements include commitments towards sustainable development according to the UN 2030 agenda, transparency and national treatment for foreign investors. (European Commission, 2020)

Improving the level playing field

According to the European Commission, "Improving level playing field" aims to "make investment fairer," including obligations imposed on enterprises and provisions on transparency and forced technology transfers. In Article 2, Section II: Liberalisation of investment, for the market access, it is mentioned that neither Party shall adopt or maintain limitations on the number of enterprises allowed to perform certain economic activities, numerical quotas related to transactions or assets, the quantity of output, number of operations or the total number of natural persons employed. The exceptions, however, are mentioned in Section II, Article 1.2.

Under Article 3, Performance requirements, the enterprises will not face requirements such as: conditions to export a certain level of goods or services, achieve or supply a given level of domestic goods or services, purchase or accord preferences to goods or services provided, produced or sold by domestic enterprises or natural persons. (Section 2 – Liberalisation of investment, Article 3.) Moreover, the section provides no requirements for headquarters location or achieving a certain percentage of research and development in either Party's territory. Concerning technology transfers, the agreement also mentions the production process or "other proprietary knowledge," which neither commitment nor undertaking will be required to transfer to a natural person or an enterprise from either Party's territory. According to the agreement, the technology transfers shall result from voluntary market terms and mutual agreement.

Market access

The market access commitments by China included in the CAI provide openings in the following sectors: manufacturing, automotive, financial services, private hospitals, research and development on biological resources, telecommunication/cloud services, computer services, international maritime transport, air transport services, business, construction, and environmental services. At the same time, the managers and specialists of EU companies will be offered access to work for up to three years without restrictions in the Chinese subsidiaries.

Significantly important is that unlike the provisions of the BITs concluded by China and EU, the new CAI provides a better treatment for foreign investors by including the national treatment alongside with the "like situations" provision. Most of the BITs concluded by the EU MS with China did not provide any reference to the "like situations" provision. Therefore, even if the jurisprudence has shown that including this provision in the BITs makes the arbitration decision in favor of the investors to be more complex, (S.D. Mayers Inc. v. Canada, Decision from 13 November 2000, par. 250) this provision can provide better protection against discrimination for foreign enterprises. Similarly, the article related to the MFN treatment provides the same provision.

Legal certainty and transparency

Further, Paragraph 3 related to non-discrimination and commercial considerations" from Article 3bis, explains that the Parties shall ensure that their covered entities "act in accordance to commercial considerations" and accord equal treatment to foreign and domestic investors and enterprises in the matter of purchases and sales.

In the matter of transparency resulting from Paragraph 4 of the Agreement, each Party can request the other Party to provide information about a covered entity. The paragraph also mentions that each party shall ensure that the covered entities follow the international practices related to transparency and corporate responsibility.

Regarding transparency of subsidies, the subsidies offered shall be following Article 1.1 and Article 2 of the WTO SCM Agreement. Exceptions are drawn for allowances less than 450,000 SDR, the compensations for losses caused by natural disasters, fish and fish products, audio-visual services, and the services mentioned in Annex 1 from China's schedule. Each party will have to publish transparent information about the subsidies offered. The Parties can enter into consultations if certain subsidies granted by one Party could harm the other Party. Furthermore, according to Section II, Article 1.4, the clauses related to NT, MFN Treatment, Boards of Directors, Senior Management, and Entry of Personnel are excepted from the provisions related to subsidies or grants.

Sustainable development

The third pillar of the agreement, sustainable development, includes labor, climate change, and corporate social responsibility provisions. The Parties mutually recognize "the right to regulate" as a consequence of each Party's sovereignty in adopting or modifying laws or policies concerning this section. The Parties commit to promoting investment while following their objective of promoting sustainable development. Both Parties will have to promote sustainable development through their laws and policies. No Party can derogate from their environmental regulations as an encouragement for investors. For example, the Parties should facilitate and encourage "investment in environmental goods and services."

Essential to this section is that both Parties recognize relevant international documents and institutions and commit to implementing multiple multilateral environmental agreements. We can recall the UN 2030 Agenda for Sustainable Development, the International Labour Organisation, the United Nations Framework Convention on Climate Change, the Paris Agreement, and the United Nations Environment Program.

Considerations about the CAI

Negotiations between China and the European Union for a Comprehensive Agreement on Investment will consolidate the legal framework governing foreign investors' ties with China and the EU. It appears that the parties will seek to offer a better balance between investor rights protection and the national interests of the countries, on the one hand by providing adequate protection against political risks in these jurisdictions and, on the other hand, by avoiding the implementation of requirements that can negatively impact the volume of investments. (Abgaryan, 2019, p. 32)

Chapter 7 - EU-China Dispute Settlement

Most of the time, international arbitration is referenced as the primary option for dispute settlement in the context of investment treaties. However, companies can often solve the issue by appealing to domestic courts or mediation.

The EU Member States account for many of the ISDS cases initiated through arbitration. Until June 2022, the EU Member States were involved in approximately 45% of ISDS cases as claimants and 23% as respondents. On the other side, China was involved in 1.09% of ISDS cases as a claimant and 0.76% as a respondent. Therefore, the cases of international arbitration for the ISDS cases between the EU and China are minimal, involving 4 cases where the EU MS are the respondents and only one case where China is the respondent. (UNCTAD, Investment Dispute Settlement, 2022)

7.1. International arbitration

The primary benefit of this "internationalization" of the ISDS relationship is the chance for investors to obtain reasonable compensation for expropriation or other treatment inconsistent with the investment agreement. In addition, international arbitration can frequently result in faster dispute settlements and more significant compensation than domestic courts. In contrast to domestic court systems, arbitral rulings are final with a no-appeal procedure, shortening the procedures' duration.

However, the disadvantages of international arbitration are the high costs and the fact that the decisions might be too "investor-friendly," as claimed by some nations that refuse to pay compensation awards, leave the ICSID Convention or terminate their BITs.

As listed in *chapter 5.1*, each BIT concluded between the EU and China provides specific provisions related to the method accepted for dispute settlement. The domestic courts are preferred in most cases and are referenced 25 times, while ICSID and UNCITRAL account for 22 and 17 times, respectively. Other forums are rarely used, being referenced only in 9 EU-China BITs. Moreover, the MFN treatment provided in BITs does not provide an exception for procedural issues ISDS, which allows foreign investors to receive a better position in their dispute settlement issues.

7.2. Domestic courts

The host states frequently promote domestic courts over international arbitration as they can provide faster resolutions in most cases. Moreover, the domestic courts can be a suitable option when the complaints can be addressed based on national law rather than international treaties and principles. In some cases, the claimants appeal to an international court because the national courts cannot provide sufficient compensation for expropriation or infringement of investors' rights. For example, in the new ICSID case involving Huawei and the Kingdom of Sweden, Huawei claims that a favorable judgment from the administrative courts of Sweden would not be sufficient to recover Huawei's initial status. (Written notification of dispute, Huawei Technologies Co., Ltd. v. Kingdom of Sweden, 2022)

7.3. China's approach to dispute settlement

Through the new FIL, China creates a *Complaint Mechanism* that FIEs can use to address their legitimate rights based on coordination and mediation. The FIEs can apply for an administrative review or lawsuit if the Complaint Mechanism fails to resolve the issue. (Foreign Investment Law, Article 26)

Moreover, addressing the lack of certainty and transparency of the FIE and foreign investors in China, the FIL provides that the relevant authorities shall publish foreign investment guidelines to support them with services and convenience. (Foreign Investment Law, Article 18, 19)

7.4. EU's approach to dispute settlement

Most EU MS encourage foreign investors to appeal to the national courts for their complaints. The domestic courts are referenced in 25 out of 27 BITs between the EU and China. Moreover, foreign investors can appeal to the CJEU if they are unsatisfied with the domestic court's judgment. Often, domestic courts request opinions from the CJEU to assess their cases.

7.4.1. The new ISDS system adopted by the EU

As presented in *chapter 2.2*, the evolution of the EU's investment policy and the extended competencies of the EC in the FDI field also has practical implications for the dispute settlement system.

Noteworthy, the EU-China CAI does not have a dedicated section for ISDS yet. Instead, the agreement specifies that the Parties will finish the negotiations concerning ISDS within two years of the signature of the agreement. (CAI, Section IV, Sub-section 2, Article 3) Instead, the EU-China CAI includes an entire section dedicated to State-State Dispute Settlement (CAI, Section V) which is approximately identical to the system introduced by CETA. (CETA, Chapter 29)

Therefore, we will look at the ISDS system of CETA since the EU-China CAI can adopt a similar approach to ISDS following the EC decision that the ICS would replace the existing ISDS mechanism in „all ongoing and future" EU investment negotiations.

The new ISDS mechanism is described in Chapter 8, Section F of CETA. The section provides that the tribunal can address the claims if a Party has breached its obligations related to non-discriminatory treatment or investment protection. Furthermore, Article 8.19 provides the framework for resolving the disputes „amicably" through consultations. The disputing parties can also choose mediation, being required to appoint the mediator or request the Secretary-General of ICSID to appoint one. If the dispute is not settled through mediation or consultation, the claimant can submit his case to the Tribunal. (Article 8.23) The claim can be submitted under the ICSID Arbitration Rules, ICSID Additional Facility Rules, UNCITRAL Arbitration Rules, or any other rules on agreement of the parties. (Article 8.23.2). For the constitution of the Tribunals, the parties would have to appoint 15 members of the tribunal, where five shall be nationals of each Party, and five shall be nationals of third parties. In the case of the EU-China CAI, the number of members of the tribunal might be 12 since the agreement provides the same number in Section V, Article 8 – List of Panellists. Finally, the tribunal will hear cases in divisions of three members, the tribunal having a national of the EU, one of the other party, and one national of a foreign country. The new dispute settlement system also establishes an appellate tribunal that can uphold, modify or reverse the Tribunal's award.

Article 8.29 of CETA refers to establishing the MIC and an appellate mechanism. According to the article, the new mechanism will be used to resolve investment disputes. Moreover, until the new mechanisms are established, the „Joint Committee" will adopt transitional arrangements and the decision upon which the disputes will be decided under the multilateral mechanism. By creating the Multilateral investment court, the EC aims to address traditional international arbitration's shortcomings. First, the MIC would be a permanent international institution compared to traditional ad hoc tribunals. Second, the member states of the MIC would appoint independent judges, compared to allowing disputing parties to appoint their arbitrators. Third, the EC supports that by establishing a permanent court, the judges would deliver consistent decisions, making dispute settlement more predictable. Fourth, the new MIC pledged to be more cost-effective by allowing economies of scale. Lastly, the EC is willing to establish the MIC based on transparency, allowing open hearings to the public, publishing online all details of the rulings, and allowing third parties to submit *amicus curiae* briefs, including NGOs, customers, trade unions, businesses, and associations. (European Commission, 2015, p. 3) The parties are required to select from a list of arbitrators bound by a code of conduct to ensure the arbitrators' independence. (CAI, Section V, Annex II).

Conclusions

The EU's investment policy

On the one hand, the EU investment policy has entered a dynamic phase that has the potential to shape the future of global investment law standards. In contrast to current IIAs, the EU has developed a policy framework for foreign investment that has substantial changes. The EU was able to rewrite substantive rules on foreign investment protection, providing a clearer balance between investors' rights and recipient countries' public policies.

On the other hand, the EU intends to increase legitimacy of the institutional framework on dispute settlement and broaden the scope of investment liberalization, which is significant to European investors. When evaluating the importance of EU's contribution to the future of IIAs, we cannot ignore the fact that investment liberalization becomes equally important as investment protection within investment agreements. Taking into account that market access is a significant investment determinant according to investors, the EU IIA chapters on investment liberalization provide a paradigm for future development of IIAs in the subject. (Bonnitcha, Poulsen, & Waibel, 2017, pp. 172-178)

Nonetheless, the EU's contribution to the development of investment treaty legislation is not straightforward. The EU poses the greatest threat to achieving its goal of improving the international investment law and arbitration. In Opinions 2/15 and 1/17, the CJEU has significantly limited the EU's capacity to conclude extended IIAs alone. As the ratification of CETA in Belgium demonstrates, the decision reached in Opinion 2/15 that EU IIAs should be concluded as mixed agreements imposes extra difficulties on the EU. The split into two agreements: the FTA and the Investment Protection Agreements with Singapore and Vietnam is the result of a radical shift in EU's view of international investment law as part of a larger, comprehensive framework for economic relations. Moreover, Opinion 1/17 reaffirms the importance the CJEU places on the autonomy of EU law and its position as the defender of the autonomy principle.

With its CETA Opinion, the CJEU has opened the way for the development of a new international dispute settlement system, which must meet rigorous conditions. The CJEU will ensure that such a multilateral investment court is consistent with the EU's constitutional character; but it is also possible that the CJEU's relatively high requirements will result into limitations later on. Regardless of the shape it would take, a multilateral investment court could result in more substantive coherence and predictability, as well as legal certainty for all parties involved.

China's investment policy

In recent experience, China's BITs have reflected both interpretive and substantive balance. The interpretative balance reflected the incorporation of the "like circumstances" standard intended to limit the application of non-discrimination provisions. Moreover, the new BITs also provided clarifications to indirect expropriation and the FET obligations. The substantive balance includes the expansion of general exception clauses and the addition of non-investment objectives to the preambles. (Levine, 2019, pp. 213-217) China's revised attitude to the next generation of BITs also has consequences in its current and future negotiations. The Comprehensive Agreement on Investment is the result of multiple commitments from both sides: the EU and China. As a result, the agreement includes previous provisions which were adopted by the parties, introducing the innovations related to liberalization, market access, ISDS, transparency and sustainable development. Therefore, China takes a significant initiative from the position of a capital-exporting country, becoming one of the most important actors in the international investment field.

EU-China Investment Agreements

The EU-China bilateral relations have a long history which is consolidated by a significant network of investment agreements. After granting national treatment through multiple BITs, the EU and China take a step forward by negotiating an extended BIT which aims to resolve the main barriers faced by investors: lack of level playing field, market access, transparency and legal certainty.

The EU-China CAI would likely be influenced by the two regimes of foreign investment policy and economic objectives, such as offering investment protection and allowing effective market access. The EU-China CAI is a preferred economic growth plan for both parties. Since the 2007-2008 Financial Crisis, the EU has sought to attract FDIs and expand the single European market, whereas China has slightly shifted its focus from inward FDIs to promoting outbound FDIs. (European Commission, 2017, pp. 23-25) Notably, as a result of its recent legislative measures, China registered a substantial increase in its FDIs during the past several years, both as an investor as well as a receiver of foreign investments.

With adequate effort, the obstacles in the EU-China investment relationship, such as eliminating the differences in the legislative framework and the leveling the playing field, would be gradually solved. Despite differences and obstacles, the EU and China should pursue a mutual partnership which will maximize their relationship, common interests and impact in the global economy. (European Commission, 2017, p. 6) Consequently, the guiding idea for EU-China CAI discussions should be a framework for foreign investment that allows efficient collaboration, mutual advantages and prevents disengagement.

Moreover, the new CAI aims to establish the foundation of the proposed “One-Stop Shop” for investments, referenced in *chapter 3.3.*, by providing transparency and certainty. (CAI, Section II, Article 6ter) By offering national treatment and solving the lack of information by publishing guides clarifying the entry conditions and the relevant laws, the foreign investors can further enhance the development of the future investment partnership between EU and China.

Annexes

Annex 1 – Mapping EU-China BITs: Portfolio investments, NT, MFN

Country	Year	Excludes portfolio investments	NT	MFN
Sweden	1982	No	No	Post establishment
Belgium-Luxembourg (terminated)	1984	No	No	Post establishment
Finland (terminated)	1984	No	No	Post establishment
France (terminated)	1984	No	No	Post establishment
Austria	1985	No	No	Post establishment
Denmark	1985	No	No	Post establishment
Italy	1985	No	No	Post establishment
Netherlands (terminated)	1985	No	No	Post establishment
Poland	1988	No	No	Post establishment
Bulgaria	1989	No	No	Post establishment
Czech Republic (terminated)	1991	No	Post establishment	Post establishment
Hungary	1991	No	No	Post establishment
Slovakia	1991	No	Post establishment	Post establishment
Greece	1992	No	No	Post establishment
Portugal (terminated)	1992	No	No	Post establishment
Spain (terminated)	1992	No	Post establishment	Post establishment
Croatia	1993	No	No	Post establishment
Estonia	1993	No	No	Post establishment
Lithuania	1993	No	No	Post establishment
Slovenia	1993	No	Post establishment	Post establishment
Romania	1994	No	No	Post establishment
Cyprus	2001	No	Post establishment	Post establishment
Netherlands	2001	No	Post establishment	Post establishment
Germany	2003	No	Post establishment	Post establishment
Finland	2004	No	Post establishment	Pre and Post establishment
Latvia	2004	No	Post establishment	Post establishment
Belgium-Luxembourg	2005	No	Post establishment	Post establishment
Czech Republic	2005	No	Post establishment	Post establishment
Portugal	2005	No	Post establishment	Post establishment
Spain	2005	No	Post establishment	Post establishment
France	2007	No	Post establishment	Post establishment
Malta	2009	No	Post establishment	Post establishment

Annex 2 – Mapping EU-China BITs: FET, Full protection and security

Country	Year	FET	FET Modifiers	Full protection and security
Sweden	1982	Unqualified	None	No clause
Belgium-Luxembourg (terminated)	1984	Unqualified	FET combined with NT or MFN	No clause
Finland (terminated)	1984	None	Not applicable	No clause
France (terminated)	1984	Unqualified	None	Standard
Austria	1985	Qualified	None	Standard
Denmark	1985	Unqualified	None	Standard
Italy	1985	Unqualified	None	Standard
Netherlands (terminated)	1985	Unqualified	FET combined with NT or MFN	Standard
Poland	1988	Unqualified	FET combined with NT or MFN	Standard
Bulgaria	1989	Unqualified	FET combined with NT or MFN	Standard
Czech Republic (terminated)	1991	None	Not applicable	No clause
Hungary	1991	Unqualified	FET combined with NT or MFN	Standard
Slovakia	1991	None	Not applicable	No clause
Greece	1992	Unqualified	None	Standard
Portugal (terminated)	1992	Unqualified	FET combined with NT or MFN	Standard
Spain (terminated)	1992	Unqualified	FET combined with NT or MFN	With reference to domestic law
Croatia	1993	Unqualified	None	Standard
Estonia	1993	Unqualified	None	Standard
Lithuania	1993	Unqualified	None	Standard
Slovenia	1993	Unqualified	FET combined with NT or MFN	Standard
Romania	1994	Unqualified	FET combined with NT or MFN	No clause
Cyprus	2001	Unqualified	None	No clause
Netherlands	2001	Unqualified	None	Standard
Germany	2003	Unqualified	None	Standard
Finland	2004	Unqualified	None	Standard
Latvia	2004	Unqualified	None	Standard
Belgium-Luxembourg	2005	Unqualified	None	Standard
Czech Republic	2005	Unqualified	FET combined with NT or MFN	Standard
Portugal	2005	Unqualified	None	Standard
Spain	2005	Unqualified	None	Standard
France	2007	Qualified	By reference to international law/principles	Standard
Malta	2009	Unqualified	None	With reference to domestic law

Annex 3 – Mapping EU-China BITs: Discriminatory measures, Umbrella clause, scheduling and reservations

Country	Year	Prohibition on unreasonable, arbitrary, or discriminatory measures	Umbrella clause	Scheduling and reservations
Sweden	1982	No	No	No
Belgium-Luxembourg (terminated)	1984	No	Yes	Positive list
Finland (terminated)	1984	No	No	None
France (terminated)	1984	No	Inconclusive	No
Austria	1985	Yes	Yes	No
Denmark	1985	Yes	Yes	None
Italy	1985	No	No	No
Netherlands (terminated)	1985	No	Yes	No
Poland	1988	No	Yes	No
Bulgaria	1989	No	No	None
Czech Republic (terminated)	1991	No	No	No
Hungary	1991	No	No	No
Slovakia	1991	No	No	No
Greece	1992	Yes	Yes	No
Portugal (terminated)	1992	No	No	No
Spain (terminated)	1992	Yes	Yes	No
Croatia	1993	No	No	None
Estonia	1993	No	No	None
Lithuania	1993	No	No	No
Slovenia	1993	No	No	No
Romania	1994	No	No	No
Cyprus	2001	Yes	Yes	None
Netherlands	2001	Yes	Yes	No
Germany	2003	Yes	Yes	Negative list
Finland	2004	Yes	Yes	Negative list
Latvia	2004	Yes	Yes	No
Belgium-Luxembourg	2005	Yes	Yes	Positive list
Czech Republic	2005	No	No	Negative list
Portugal	2005	No	No	No
Spain	2005	Yes	Yes	No
France	2007	No	Inconclusive	Negative list
Malta	2009	Yes	Yes	No

Annex 4 – Mapping EU-China BITs: Dispute settlement: scope, the relationship between forums

Country	Year	Scope	Relationship between forums
Sweden	1982	Any dispute related to investment	Preserving the right to arbitration after domestic court proceedings
Belgium-Luxembourg (terminated)	1984	Any dispute related to investment	Waiver clause
Finland (terminated)	1984	Any dispute related to investment	No reference
France (terminated)	1984	Any dispute related to investment	fork in the road
Austria	1985	Treaty claims only	No reference
Denmark	1985	Treaty claims only	Local remedies first
Italy	1985	Any dispute related to investment	No reference
Netherlands (terminated)	1985	Lists specific bases of claim beyond treaty	No reference
Poland	1988	Only for expropriation claims	No reference
Bulgaria	1989	Treaty claims only	No reference
Czech Republic (terminated)	1991	Any dispute related to investment	No reference
Hungary	1991	Treaty claims only	No reference
Slovakia	1991	Any dispute related to investment	No reference
Greece	1992	Any dispute related to investment	No reference
Portugal (terminated)	1992	Any dispute related to investment	fork in the road
Spain (terminated)	1992	Any dispute related to investment	No reference
Croatia	1993	Any dispute related to investment	fork in the road
Estonia	1993	Any dispute related to investment	fork in the road
Lithuania	1993	Any dispute related to investment	No reference
Slovenia	1993	Any dispute related to investment	fork in the road
Romania	1994	Any dispute related to investment	fork in the road
Cyprus	2001	Any dispute related to investment	fork in the road
Netherlands	2001	Any dispute related to investment	Preserving the right to arbitration after domestic court proceedings
Germany	2003	Any dispute related to investment	Waiver clause
Finland	2004	Any dispute related to investment	Preserving the right to arbitration after domestic court proceedings
Latvia	2004	Any dispute related to investment	Inconclusive
Belgium-Luxembourg	2005	Any dispute related to investment	fork in the road
Czech Republic	2005	Any dispute related to investment	Inconclusive
Portugal	2005	Any dispute related to investment	fork in the road
Spain	2005	Any dispute related to investment	fork in the road
France	2007	Any dispute related to investment	fork in the road
Malta	2009	Treaty claims only	Inconclusive

Annex 5 – Mapping EU-China BITs: Dispute settlement options, Survival clause

Country	Year	Domestic courts	ICSID	UNCITRAL	Other forums	Survival clause
Sweden	1982	Yes	Yes	Yes	No	15 years
Belgium-Luxembourg (terminated)	1984	Yes	Inconclusive	No	Inconclusive	10 years
Finland (terminated)	1984	Yes	Yes	No	Yes	10 years
France (terminated)	1984	Yes	Yes	Yes	No	15 years
Austria	1985	No	Yes	Yes	No	10 years
Denmark	1985	Yes	Yes	No	No	10 years
Italy	1985	Yes	Yes	No	No	5 years
Netherlands (terminated)	1985	Yes	No	No	Yes	15 years
Poland	1988	Yes	No	No	Yes	10 years
Bulgaria	1989	No	No	Yes	No	15 years
Czech Republic (terminated)	1991	Yes	No	Yes	No	10 years
Hungary	1991	No	No	No	Yes	10 years
Slovakia	1991	Yes	No	Yes	No	10 years
Greece	1992	Inconclusive	Yes	Yes	Yes	20 years
Portugal (terminated)	1992	Yes	No	Yes	No	10 years
Spain (terminated)	1992	No	Yes	Yes	Yes	10 years
Croatia	1993	Yes	Yes	No	Yes	10 years
Estonia	1993	Yes	Yes	No	No	10 years
Lithuania	1993	Yes	Yes	No	Yes	10 years
Slovenia	1993	Yes	No	No	No	10 years
Romania	1994	Yes	Yes	No	No	10 years
Cyprus	2001	Yes	Yes	No	Yes	10 years
Netherlands	2001	Yes	Yes	Yes	No	15 years
Germany	2003	No	Yes	Yes	No	20 years
Finland	2004	Yes	Yes	Yes	No	20 years
Latvia	2004	Yes	Yes	No	No	10 years
Belgium-Luxembourg	2005	Yes	Yes	No	No	10 years
Czech Republic	2005	Yes	Yes	Yes	No	10 years
Portugal	2005	Yes	No	Yes	No	10 years
Spain	2005	No	Yes	Yes	No	10 years
France	2007	Yes	Yes	Yes	No	20 years
Malta	2009	Yes	Yes	Yes	No	10 years

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