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When Europe Dances with the Dragon: Legal novelties and the policy implications of the China–EU investment agreement

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**When Europe Dances with the Dragon:
Legal Novelties and the Policy Implications of the China–EU Investment Agreement***

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Abstract

The main goal of this paper is to analyze the novelties and limitations of the European Union (EU)–China Comprehensive Agreement on Investment (CAI) and examine its policy implications for investment rulemaking in the Asia-Pacific region. As rightly put by the EU side, the CAI is the most ambitious investment liberalization agreement that China has ever concluded with a third party. The CAI aims to improve market access to China’s manufacturing and services sectors, introduces a definition of state-owned enterprise that is even broader than the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP), tightens subsidy regulations, ensures equal participation in standard-setting, prohibits compulsory technology transfers, and requires transparency in the operation of competition law. That being the case, the paper argues that by subjecting China to these groundbreaking obligations, the CAI could be a litmus test for China’s bid for membership in the CPTPP. From the perspective of sustainable development, China committed to making sustained efforts to ratify the fundamental Conventions of the International Labour Organization (ILO). In this regard, effective implementation and ratification of ILO Conventions may show whether China is honest in making labor protection commitments in the wake of its membership bid to the CPTPP. Finally, the CAI does not cover investor–state dispute settlement since the parties decided to continue negotiations on investment protection on a separate track while aiming to complete negotiations within 2 years of the signature of the CAI. If China supports it, then a Multilateral Investment Court based on the approach developed by the EU may increase its influence globally. Although the ratification of the CAI has been frozen indefinitely due to bilateral sanctions, it is still too early to be certain that the CAI has been completely shelved.

Keywords: China, EU, investment protection, market access, level playing field

JEL classification: F18, F21, O34, P45, Q01

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A. Introduction and purpose

Trade lawyers tend to focus on competitive neutrality problems when dealing with Chinese state capitalism. Although this issue has some weight, making China competitively neutral does not address every question. There is more to do with respect to protection, promotion, and the elimination of foreign investment barriers incompatible with basic human rights and sustainable development goals. Until now, free trade agreement (FTA) rules that often target goods and services could not adequately deal with foreign investors' grievances, nor have Chinese investment treaties fully responded.

To everybody's surprise (especially the newly-elected Biden government in the US in early 2020), the Comprehensive Agreement on Investment (CAI) between the European Union (EU) and China was publicized by the EU on January 22, 2021.² The CAI stemmed from 7 years of negotiation with 35 rounds between the EU and China, and apart from the main treaty text, the Annex alone runs to 175 pages. During the annual China–EU leaders' summit in 2020, the EU seemingly decided to take a different path from the US because of the necessity to protect its companies in China from the latter's unfair trade practices. Therefore, what kind of legal implications shall we expect from the CAI if it is successfully ratified and eventually implemented? In this paper, the author examines the legal novelties (breakthroughs), limitations, and implications of the CAI for global rule-making on foreign direct investment

² "EU–China agreement in principle," available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237>.

(FDI) protection and liberalization. The author examines this issue especially from the perspective of the Chinese application to join the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP), and the latter also requires China to meet extremely high standards of trade and investment rules.³

The CAI is the unprecedentedly comprehensive and part of a new generation of bilateral investment treaties (BIT) focused mainly on investment liberalization by providing a level playing field to both partners. It does not focus on dispute resolution and investment protection in traditional ways. Rather than eliminating unfair trade and investment practices, the CAI aims to restore the imbalance between a traditionally closed China and the highly liberalized EU markets.

China openly declared that it pursues the aim to be “a leader of international economic and trade rules.”⁴ To achieve that, China seems to be selectively reshaping both hard and soft law instruments. Through the CAI, the Chinese norm entrepreneurship (rule-making) in investment liberalization and protection reached a new level. The CAI is unique with respect to both its scope and breadth of commitments. One can boldly argue that after adopting CPTPP’s investment chapter, the CAI took the lead in the marathon of investment rule-making. We may also observe active norm entrepreneurship by China in the World Trade Organization (WTO) regarding investment facilitation. China is currently acting as a group coordinator for the Friends of Investment Facilitation for Development at the WTO.⁵ This may also show how China is emboldened by its recent experience in extensive investment treaty-making.⁶ The endeavor of China to expand its norm entrepreneurship in the investment treaty system can be seen in its leading role in approving the Guiding Principles for Global Investment Policymaking during the 2016 G-20 Summit in China. This document should lay a foundation for a process toward a multilateral investment framework (if everything goes smoothly). We should underscore the fact that, as a country with the most international investment agreements (IIAs) in Asia, China actively supported the Regional Comprehensive Economic Partnership (RCEP) agreement. Last year, in September, it started its bid to join CPTPP as well.

The problem is that after more than one and a half years, the CAI still has not been well-studied in the Asia-Pacific region. In contrast to a sophisticated analysis of this critical treaty text on the European continent,⁷ it is hard to find a systematic study of the CAI by regional scholars

³ Iori Kawate, “China officially applies to join CPTPP trade pact,” Nikkei Asia, 16 September 2021, <https://asia.nikkei.com/Economy/Trade/China-officially-applies-to-join-CPTPP-trade-pact>.

⁴ Central Committee of the Communist Party of China and the State Council of China, Several Opinions of the CPC Central Committee and the State Council on Developing a New System of Open Economy (2015), Part VII.

⁵ WTO News, “Investment facilitation agreement negotiators advance work for MC12,” 3 November 2021, available at https://www.wto.org/english/news_e/news21_e/infac_03nov21_e.htm.

⁶ Heng Wang, “Selective Reshaping: China’s Paradigm Shift in International Economic Governance,” *Journal of International Economic Law* 23.3 (2020): 583-606, 598.

⁷ Thus far, until now, we can list the following academic inquiries into CAI-related topics. Bickenbach, Frank; Liu, Wan-Hsin; Li, Guoxue (2015): The EU–China bilateral investment agreement in negotiation: Motivation, conflicts and perspectives, Kiel Policy Brief, No. 95, Kiel Institute for the World Economy, available at https://www.ifw-kiel.de/fileadmin/Dateiverwaltung/Ifw-Publications/-ifw/Kiel_Policy_Brief/2018-older/Kiel_Policy_Brief_95_.pdf; Weinian Hu, “The EU-China Comprehensive Agreement on Investment: An in-depth reading” CEPS Policy Insights, No PI2021-07/May 2021, available at <https://www.ceps.eu/ceps-publications/the-eu-china-comprehensive-agreement-on-investment/>; Jurgen Kurtz, Gong Baihua, “The EU–China comprehensive agreement on investment: a model for investment coverage in the world trade organization?”, in B. Hoekman and others eds., *Rebooting Multilateral Trade Cooperation: Perspectives from China and Europe*, Centre for Economic Policy Research (CEPR), 2021, pp. 191-210; Spano, A. “The EU–China Bilateral Comprehensive Agreement on Investment (CAI) and the EU Principle of Effective Judicial Protection: Challenges Ahead.” *Transnational Dispute Management (TDM)* 17.6 (2020); Shan, Wenhua, and Lu Wang. “The China–EU BIT and the Emerging ‘Global BIT 2.0’.” *ICSID Review-Foreign Investment Law Journal* 30.1 (2015): 260-267; Hallinan, David. “The EU–China Bilateral Investment Treaty: a challenging first test of the EU’s

in Asia and America. Given the fact that China is trying to join the CPTPP club, a careful study of CAI and examination of its global and regional implications is a must for all parties concerned in CPTPP. The dearth of studies related to the CAI and the temporary indifference of Asian scholars might be due to the freezing of the CAI ratification process as a result of tit-for-tat sanctions between the EU and China. Nonetheless, the CAI is the result of 7 years of delicate negotiations with 35 rounds, and it evidences possible state practice in investment governance around the globe. Last but not least, the CAI can be a powerful tool for Japan and other CPTPP members to negotiate with China on the regulation of state-owned enterprises (SOE) and establish fair market rules in its market for their own struggling companies.

The purpose of this paper is twofold. While it aims to clarify limitations as well as breakthrough points of the CAI on the one hand, on the other, given the recent expansionary phenomenon of CPTPP and RCEP's entry into force, the paper also analyzes indirect implications of the CAI into the Pacific Rim. Until now, the CAI was examined mainly in a textual context. However, the author believes that it has and should have much larger implications for both Chinese and global future rule-making in investment liberalization and protection. It consists of four parts. First of all, both parties' investment treaty policies and their expectations from the CAI will be expounded, before an analysis of the novelty and limitations of the CAI. Second, the author systematically introduces and discusses legal novelties and limitations of CAI chapters in market access, a level playing field, sustainable development, and institutional innovation. Before the final part, discussion policy implications of the CAI to the wider Asia-Pacific region will be put forward. At the end of the paper, the author also postulates the possibility of the treaty's entrance into force.

B. Parties' BIT policy in a nutshell and their expectations of each other through CAI

2.1 China

This section briefly defines Chinese and EU policies on BITs and their recent directions and clarifies the main goals of concluding the CAI. To describe the Chinese BIT policy in a nutshell, after Germany, China maintains the second-largest BIT network. China signed its first BIT in 1982 with Sweden. According to the United Nations Conference on Trade and Development, China has 106 BITs in force as of March 2022. It also has active FTAs with investment provisions in 21 countries and regions.⁸

Recent scholarly writings have usually categorized Chinese BITs into three to four generations that cover almost four decades of Chinese IIA practice.⁹ In the first generation of BITs (1982–1989), China concluded 24 BITs mainly with European capital-exporting states. The record number of 71 BITs that has been concluded by China belongs to the second generation in 1990–1999. During this period, China also became a member of the International Centre for Settlement of Investment Disputes (ICSID) Convention. During these two periods, China was mainly categorized as the recipient of FDI. With the accession to the WTO and implementation of the “Go abroad” policy, China moved to the third period and started to export capital. China

evolving BIT model.” *China–EU Law Journal* 5.1 (2016): 31-53; Bungenberg, Marc, and Catharine Titi. “11 The Evolution of EU Investment Law and the Future of EU–China Investment Relations.” *China and International Investment Law*. Brill Nijhoff, 2014. 297-371; Chi, Manjiao. “The China–EU BIT as a stepping stone towards a China–EU FTA: a policy analysis.” *European Yearbook of International Economic Law* 2017. Springer, Cham, 2017. 475-490.

⁸ UNCTAD, International Investment Agreements Navigator, China, available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china>.

⁹ Chaisse, Julien, and Kehinde Folake Olaoye. “The Tired Dragon: Casting Doubts on China's Investment Treaty Practice.” *Berkeley Bus. LJ* 17 (2020): 134, 153-154.

signed 46 BITs and 10 treaties containing investment provisions during this era.¹⁰ As China became a net exporter of capital and started a massive infrastructure project called the Belt and Road Initiative, the last decade marked the fourth generation BITs of China. During this period, China concluded a trilateral investment treaty with Japan and South Korea, actively (although unsuccessfully) negotiated a BIT with the US, and paved the way for the successful conclusion of the CAI with the EU. Overall, given the sharp increase of outward FDI of Chinese entities globally, one can easily see a paradigm shift in Chinese IIA practice toward more balanced investment treaties. Notably, China is also active in the United Nations Commission on International Trade Law (UNCITRAL) Working Group on ISDS Reform and is urging countries to “enhance confidence in ISDS mechanism.”¹¹ Notably, until now, China-backed powerful SOEs used not to sue foreign countries; nonetheless, under the China–Sweden BIT (1982) for the first time, Huawei brought a BIT case against Sweden in February 2022 over the latter’s discriminatory attitude toward the Chinese tech giant.¹² This move shows a fundamental shift in Chinese SOEs’ attitude toward investor–state dispute settlement (ISDS).

2.2 EU

In the case of the EU, the European Commission adopted “Toward a Comprehensive European International Investment Policy” in 2010.¹³ According to the consensus reached by the Commission, the Council, and the Parliament, both multilateral and bilateral agreement would be covered by this policy at the EU level where the Commission oversees and negotiates market access for investment, as well as its protection and liberalization. This move is pursuant to Article 2(1) of the Treaty of Lisbon, which notes that “only the Union may legislate and adopt legally binding acts, the member states being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.”¹⁴ If parties ratify the CAI, 25 of the existing BITs of EU members will cease vis-à-vis China. Unsatisfied with an existing web of outdated BITs with China, through negotiation of one whole agreement, the EU mainly aimed to enhance the conditions for European investors in China so they have better market access in China.¹⁵

2.3 Main drivers of the CAI

What are the main drivers of the negotiation of China–EU CAI? To start from very obvious facts, the EU is China’s biggest trading partner, and China is the EU’s second biggest trading partner after the US. From a political viewpoint, from the early 2000s, the EU tried to shape a coherent external policy with China, and the negotiation of a partnership and cooperation treaty (PCA) with China was one of these tools. Nonetheless, the deadlock of PCA negotiation¹⁶ with

¹⁰ Id, at 153.

¹¹ Id, at 192, footnote 437.

¹² Euronews, “Huawei is taking Sweden to court after the country banned its 5G products,” 31 January, 2022, <https://www.euronews.com/next/2022/01/31/huawei-is-taking-sweden-to-court-after-the-country-banned-its-5g-products>.

¹³ European Commission, “Communication from the Commission: Towards a comprehensive European international investment policy,” COM (2010) 343 final, Brussels, 7 July 2010.

¹⁴ See Treaty of Lisbon, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12007L%2FTXT>.

¹⁵ See European Commission, “Impact Assessment Report on the EU–China Investment Relations,” 2013, available at https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/swd_2013_0185_en.pdf, also see Gisela Grieger, “EU–China Comprehensive Investment Agreement: Levelling the playing with China,” Briefing, March, 2021.

¹⁶ Zhang, Jiao. “The EU–China relationship arriving at a bottleneck—A look at the ongoing negotiation of the PCA.” *EU-China Observer* 4 (2011): 2-8, 7. (prophesized that “If the EU intends to transfer its own values and standards to China regardless of China’s own development mode and national situation, China would be more passive in negotiations”).

China made the EU change its policy from “value-based linkage” such as democracy and human rights to “interests-based engagement” as it successfully did with China in the latter’s accession to the WTO.¹⁷ One more critical driver of the acceleration of treaty negotiation between the two parties despite China’s increasingly heavy handed attitude in Xinjiang, Tibet, and Hong Kong was the US–China trade war. Amid the US–China trade war, the Policy Department of the EU Parliament noted that,

*[The US–China trade war] has not only brought about short-term trade tensions but has also embodied persistent strategic competition. That makes strengthened cooperation with China a practical choice for the EU, notwithstanding that the US is clearly watching Europe and making it increasingly costly for Europe to move away from its historical anchor. However, given China’s growth momentum and (the) sheer size of its market, in the medium-term opportunities for the EU should be greater in China than in the US, based on the very important assumption that China truly opens up to foreign competition. In other words, were China to grant true market access to foreign companies, the benefits for Europe of remaining neutral between the US and China may skyrocket.*¹⁸

However, the most important one is a legal aspect with two prongs. First and foremost, both sides, especially the European side, were dissatisfied due to the Chinese market being less open for European investors.¹⁹ As the EU put it openly,

*China’s market has been traditionally far less open to foreign investment than the EUs, and EU companies operating in China do not benefit from the same levels of transparency and fair competition as those enjoyed by Chinese companies in the EU market. The CAI aims to address this lack of balance.*²⁰

Nonetheless, such dissatisfaction was only a problem for the EU side. From early 2010, Chinese leaders also started to consider flows of FDI between the two sides as “hardly satisfactory” and made a strong appeal for the early conclusion of a bilateral treaty that would give Chinese companies a smoother path to acquiring European counterparts.²¹ The second prong is for the EU side; the problem was (and still is) the lack of a comprehensive framework to remedy the shortcomings of the EU–China investment relationship. The conclusion of the CAI between the EU and China would give both sides the opportunity to harmonize the 26 existing BITs into one set of comprehensive and high-level rules.

In turn, through the CAI, China expected to participate actively in global investment rule-making.²² Moreover, China was concerned about the increasing backlash against its outward investment in Europe and the strengthening of the FDI screening mechanism for national

¹⁷ See Marisi, Flavia, and Qian Wang. “Drivers and Issues of China–EU Negotiations for a Comprehensive Agreement on Investment.” *China’s International Investment Strategy*. Oxford University Press 163–193, 170–171.

¹⁸ EU Parliament, Policy Department, Directorate-General for External Policies, “EU–China trade and investment relations in challenging times,” Report, 25-05-2020, available at [https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU\(2020\)603492](https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU(2020)603492).

¹⁹ See Francesco Tenuta, “The Motivations behind the EU–China Bilateral Investment Treaty Negotiations,” in: *EU–China Observer*, 3/2015, 16–22.

²⁰ EU Commission, “EU–China agreement explained,” https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/agreement-explained_en President of the European Commission, Ursula von der Leyen also said: “*The agreement will rebalance our economic relationship with China.*” <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2233>.

²¹ James Kynge and Christian Oliver, “*Li Keqiang pushes for China–Europe investment treaty: Chinese premier urges study into possible free trade area,*” *Financial Times*, 30 June 2015.

²² See Flavia and Wang, *supra* note 17, at 170–171.

security reasons by EU organs against Chinese investors. Therefore, safeguarding the status quo (openness and legal certainty) of the EU market for Chinese investors was a very important objective for the Chinese side.²³ Finally, behind the negotiation of the CAI, China also tried to ensure that Chinese investors, intra-corporate transferees, and business visitors have access to visas and the granting of work permits in the EU and pursued the creation of inquiry points and one-stop shops designed to provide specific information for investors.²⁴

C. Textual and comparative analysis of the CAI

In this section, the author systematically introduces and discusses the legal novelties and limitations of CAI chapters in market access, a level playing field, sustainable development, and institutional innovation. First, the peculiarity of the CAI structure and its preamble will be discussed.

We have to note that, out of the EU Commission's transparency policy, it published the negotiated outcome for information purposes; nonetheless, because of some changes, parties may slightly change some aspects of the CAI later on. Therefore, at the beginning of each section of the CAI, the EU Commission specifically mentioned that "The text is without prejudice to the final outcome of the agreement between the EU and China."

3.1 Composition of the CAI and its preamble

The "Agreement in Principle" published by the European Commission is shown in Table 1.²⁵

Table 1. Agreement in principle

| |
|---|
| <i>Preamble</i> |
| <i>Section I Objectives and general definitions</i> |
| <i>Section II Investment liberalization (market access and investment liberalization)</i> |
| <i>Section III Regulatory framework (level playing field commitments)</i> |
| <i>Section IV Investment and sustainable development (sustainable development and (the) related mechanism to address differences)</i> |
| <i>Section V Dispute settlement (State-to-State dispute settlement mechanism)</i> |
| <i>Section VI Institutional and final provisions</i> |
| <i>Schedule of commitments</i> |

The structure of the CAI is novel practice for both the EU and China. Notably, it does not include the ISDS mechanism and substantive investment protection and mainly covers level playing field issues that were the main concern for the European side. One can understand the reason for such an approach from the 2013 "Impact Assessment Report on the EU–China

²³ Impact Assessment Report, *supra* note 15, at 2.

²⁴ *Id.*

²⁵ EU-China Comprehensive Agreement on Investment (CAI): list of sections, 22 January 2021, available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237>.

Investment Relations.” From that report, we can conclude that to achieve its mandate given by EU Parliament, the EU Commission had considered four policy options on the treaty. They were a standalone investment protection agreement (IPA), a separate agreement combining investment protection with market access, covering both market access and protection in the PCA, and a comprehensive FTA with China including investment protection and ambitious market access for investment.²⁶ As a result, parties seemed to reach an agreement under Option 2 that involved a separate agreement combining investment protection with market access for investment for both the services and non-services sectors.²⁷

In the case of the preamble of the CAI, it is notable in two aspects. First, parties clearly enshrined that they will commit to building their economy “based on openness, reciprocity and mutual benefit, ensuring non-discrimination, a level playing field, transparency, and a predictable and rule-based investment environment.”²⁸ No other new FTA or BIT of the EU in the last decade inserted such a clear-cut notion of competitive neutrality into its preamble.²⁹ Second, parties also tried to show their determination in strengthening “their economic, trade and investment relations in accordance with the objective of sustainable development, and to promote investment in a manner supporting high levels of environmental and labor rights protection, including fighting against climate change and forced labor, taking into account the relevant international standards and agreements.”³⁰ Although EU FTAs tend to mention forced labor issues in their main texts, none of the FTAs or BITs of the EU has ever included such wording in their preamble. This also shows the EU’s strong signal to the Chinese that the EU is highly concerned with the forced labor issue in the Chinese Xinjiang region and elsewhere.

Before textual analysis of the CAI, two additional characteristics of the agreement have to be highlighted. First, for the implementation of rights and obligations under the CAI, parties took an approach that has been taken vis-à-vis the WTO Agreement. Other than very few countries, such as Mexico, the majority of WTO member countries excluded the possibility of direct invocation of WTO obligations in their domestic courts. Similarly, the EU and China also rejected direct invocation of rights and obligations in each party’s domestic courts and tribunals (Art. 14, Final provisions, Section VI). This is an astonishing strategy of the parties given the facts that in many BITs, treaty standards are vulnerable to being applied by a domestic court.³¹ Being the second characteristics of the CAI, the EU Commission aimed to replace CAI with outdated and heterogenous EU member countries’ BIT with China from the beginning. Nonetheless, since the CAI failed to fully embrace investment protection and ISDS mechanisms, parties noted that existing previous agreements between member states of the EU and China will not be superseded or terminated by the CAI (Art. 15, Final provisions, Section

²⁶ Impact Assessment Report, *supra* note 15, at 22-23.

²⁷ *Id.*, at 23. Other options included, in addition to “No policy change” option, Option 2: A standalone investment protection agreement, Option 4: Integrating protection into the current negotiating guidelines for the PCA and thus covering both market access and protection in the PCA, and the Option 5: A comprehensive FTA with China including investment protection and ambitious market access for investment. This Option is mentioned for completeness but it will be not explored further since there is no interest on the side of China to negotiate an FTA with the EU in the nearest future. This scenario cannot therefore be considered as a realistic policy option.

²⁸ CAI, Preamble, 22 January 2021, available at

https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159341.pdf.

²⁹ European Commission, “Negotiations and agreements,” available at

<https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/>.

³⁰ CAI Preamble, *supra* note 28.

³¹ Kaufmann-Kohler, Gabrielle, and Michele Potestà. “The Interplay between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework.” *Investor-State Dispute Settlement and National Courts* (2020): 31-86.

VI). Replacement of the existing 25 BITs with CAI was left to finalization of investment protection talks in the future.

3.2 Market access commitments

In the case of market access, the EU obtained from China comprehensive commitments in both service and manufacturing fields. In particular, market access commitments of China in the service sector are far-reaching. They cover the financial sector,³² telecommunications,³³ health,³⁴ maritime³⁵ and transportation,³⁶ business services,³⁷ environmental services,³⁸ the mobility of specialists,³⁹ and construction areas.⁴⁰ Most of them are either General Agreement on Trade in Services-Plus or newly opened markets for the EU side to rectify the imbalance between the EU and China. Market access in services has the following characteristics. First, China promised no backsliding on the commitments, so they cannot be regressed in the future. Second, commitments are subject to dispute settlement procedure, so for now, it would imply state-to-state dispute settlement. Third, market access commitments in services are extended to WTO members on a most-favored nation basis that is crucial for non-parties of the CAI to keep a level playing field with the EU in the Chinese services market.⁴¹

However, China also committed to liberalizing 30 manufacturing sectors. Notably, manufacturing makes up more than half of total EU investment in China—including 28% for the automotive sector and 22% for basic materials such as electric cars, chemicals, telecom equipment, and health equipment.⁴² To quote from the EU Commission, persuading China to make “far-reaching market access commitments” that the latter has not made with any other partner, the EU achieved new market access openings (new energy vehicles) and commitments such as the elimination of quantitative restrictions, equity caps, or joint venture requirements. For instance, China agreed to completely abolish joint venture requirements in food processing, apparel, textiles, and medical equipment. Chinese commitments in the manufacturing field come with some, although only very limited, qualifications as well. As an example, in the printing and oil refinery sectors, there would be no joint venture requirement, but due to overcapacity concerns, market access restrictions will continue. Importantly, a joint venture requirement was already abolished through the Chinese Foreign Investment Law in 2019 (FIL 2019); nonetheless, CAI brings the FIL standard to an international level that would

³² No more joint venture requirements and foreign equity caps for banking, trading in securities and insurance (including reinsurance), asset management.

³³ Lifting investment ban for cloud services. EU investors up to a 50% equity cap. Binding market access for computer services.

³⁴ No more joint venture requirements for private hospitals in key Chinese cities, including Beijing, Shanghai, Tianjian, Guangzhou, and Shenzhen.

³⁵ Investment in land-based auxiliary activities (cargo-handling, container depots and stations, maritime agencies, etc.).

³⁶ Computer reservation systems, ground handling and selling and marketing services.

³⁷ No more joint venture requirements in real estate, rental & leasing, repair and maintenance for transport, advertising, market research, management consulting/translation, etc.

³⁸ Removal of joint venture requirements.

³⁹ Mobility of business personnel linked to the establishments. Business visitors for establishment purposes may stay up to 90 days in any 12-month period, and intra-corporate transferees (need to be specialists) may stay up to 3 years.

⁴⁰ No project limitations currently reserved in GATS.

⁴¹ European Commission, “China Comprehensive Agreement on Investment,” Presentation, 21 January 2021, available at https://trade.ec.europa.eu/doclib/docs/2021/march/tradoc_159480.pdf.

⁴² Key elements of the EU–China Comprehensive Agreement on Investment, 30 December 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2542.

be a difficult backslide. Last but not least, parties also came to a consensus on not to impose or enforce performance requirements and to accomplish the regulatory authority in an impartial, non-discriminatory, and independent way.

3.3 A level playing field commitment

An improvement of the level playing field under the CAI is worth attention from the following five angles. First of all, under the CAI, China has to prevent so-called forced technology transfers. Therefore, now, it is prohibited to interfere with freedom of contract in technology licensing. According to the CAI,

Neither party may, in connection with the establishment or the operation of all enterprises in its territory, impose or enforce any requirement or enforce any commitment or undertaking: ... (f) to transfer technology, a production process, or other proprietary knowledge to a natural person or an enterprise in its territory.

Notably, the word “to transfer” also includes licensing or to otherwise make available. Furthermore, CAI prohibits applying for the technology transfer on the condition of obtaining an advantage as well. The obligation of the prohibition on technology transfer will cover both the manufacturing and services sectors.

Second, China has reportedly pressured foreign companies to license their technology on unfavorable terms if they want to participate in the standard-setting process, and despite already-existing standards in several high tech industries, China still wants to set up its own.⁴³ By “allowing enterprises ...to participate in the development of standards by its central government bodies ...on terms no less favorable than those it accords to its own enterprises,” standard-setting commitments provide equal access to standard-setting bodies for both parties.

Third, CAI adopts a very comprehensive definition of SOEs. Using a somewhat broad notion, “covered entity,” the CAI applies this notion to all levels of government in the following entities:

- (a) An enterprise in which a party directly or indirectly,*
- (i) owns more than 50% of the share capital;*
- (ii) controls, through ownership interests, the exercise of more than 50% of the voting rights;*
- (iii) holds the power to appoint a majority of members of the board of directors or any other equivalent management body; or*
- (iv) holds the power to control the decisions of the enterprise through any other ownership interest, including minority ownership.*

Fourth, the CAI also enhances the predictability and transparency of administrative measures of host countries. As an example, it also disciplines arbitral application of competition law and policy:

In the application of its rules on competition, including the control of mergers and acquisitions, each Party shall ensure that the prohibitions, penalties and or any other remedies provided for in these rules shall be imposed only following the adoption of a formal decision by the competent competition authority, a non-confidential version of which shall be published.

Such protection is equally important for Chinese investors operating in the EU market to maintain their existing rights under the increasingly strict application of EU competition law.

⁴³ Dadush, U. and A. Sapir (2021) “Is the European Union’s investment agreement with China underrated?” *Policy Contribution* 09/2021, Bruegel.

Finally, the CAI contains an obligation on transparency in industrial subsidy notification as well (Annex to Section III Subsection II Article 8). Under the CAI, China is now under an obligation to engage in consultations to provide additional information on subsidies that could have a negative effect on the investment interests of the EU. In addition, the coverage of subsidies for eligible services sectors is large, and if one party considers that the subsidy concerned has a significant effect, upon consultation, the other party has to use its best endeavors to find a solution. In other words, the CAI does not a priori require parties to abolish the subsidy concerned.

3.4 Sustainable development

According to its common policy based on the Lisbon Treaty, the EU also tried to embed sustainable development issues within the CAI. In the case of a relationship between investment and the environment, while parties agreed not to decrease environmental standards to attract foreign investment, the other parties also took the obligation not to apply domestic environmental laws for the purpose of disguised restriction of investment and unjustified discrimination. Similarly, the CAI also prohibits parties from failing to effectively enforce their labor laws as an encouragement for investment. Importantly, the CAI also requires parties to avoid the protectionist use of labor standards:

The parties recognize that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labor standards cannot be used for protectionist purposes. A party shall not apply domestic labor laws in a manner that would constitute a disguised restriction of investment or an unjustified discrimination between investors and investments of the parties.

One should admit that vis-à-vis China, the EU's biggest achievement in the CAI is the Chinese commitment to work toward effectively implementing ILO Conventions that it has already ratified and also "make continued and sustained efforts on its own initiative to pursue" the ratification of the outstanding ILO fundamental Conventions. In particular, China took a legally binding obligation to ratify No. 29 and No. 105 of ILO Forced Labor Conventions that it has not yet ratified. Finally, the relevant provisions of "Investment sustainable development" are subject to a specifically tailored implementation mechanism to address differences with a high degree of transparency and the participation of civil society.

3.5 Institutional aspects of implementation and enforcement of the CAI

Given the bitter past experience of investment exporter nations to China, one may question whether China will keep its promise and effectively implement the CAI. In this respect, a critical contribution of EU–China BIT to the global empire of BITs is an Investment Committee included in the CAI. To ensure effective monitoring of its implementation, a critical role would be played by its institutional framework, the so-called "Investment Committee." If the CAI successfully enters into force in the future, the institutional oversight will be established at the level of Vice Premier for China and Executive Vice President for the EU (Art. 1(1)). The Investment Committee will meet once a year as part of the EU–China High-level Economic and Trade Dialogue with an agenda agreed in advance (Art. 1(2–3)).

The Investment Committee is vested with strong authority such as ensuring the proper functioning of the CAI and supervising and facilitating the implementation of the CAI (Art. 1(4)). Furthermore, as a subsection of the Investment Committee, both parties shall establish

two working groups: a Working Group (WG) on Investment at a Vice-Ministerial level and a Working Group on sustainable development with senior officials. While the WG on Investment will meet once every 6 months and prepare the meetings of the Investment Committee, the WG on sustainable development can meet only once a year and is responsible for facilitation and effective monitoring of the CAI's provisions on sustainable development issues (Art. 4). In addition to that, the implementation mechanism of the Investment Committee will ensure the involvement of civil society (through regular dialogue), enhance information sharing between the parties, and include the ability to call ad hoc meetings of the co-chairs of the Investment Committee at short notice to address urgent matters related to the implementation of the agreement.

D. Overall evaluation

In this section, I try to evaluate the novel contributions and limitations of the CAI to international investment law and policy-making. As a completely new generation of BIT, the CAI differs significantly from traditional investment protection treaties. Rather than covering substantive provisions of investment protection, it aims to re-balance market access conditions with China under the EU's value-based external trade policy. China also simultaneously continued domestic regulation of foreign investment. Through FIL 2019, China moved to a negative list approach, aimed to give non-discriminatory treatment to foreign investors, and prohibited forced transfer of technology.⁴⁴ At this moment, the CAI binds China's liberalization of domestic regulation of investments until the present and prevents it from backsliding.

Level playing fields, market access, and enforcement

Despite its many imperfect features,⁴⁵ the CAI undoubtedly strengthens WTO-plus obligations on China and helps to solve the major concerns of foreign investors that do business in China. First, as for market access issues, Dadush and Sapir rightly pointed out, "CAI is the first investment-only liberalization agreement" that China became a party to.⁴⁶ While some may view its market access commitments as very modest given the recent domestic reforms in China, it is a treaty worth having for the EU and the wider world, because, while on the one hand it cements Chinese domestic reforms at an international level, on the other hand, investors from EU also may enjoy national treatment in China. However, caution remains necessary. The CAI should not impact the FDI screening mechanisms of both parties, which have generally been tightened especially in Europe in recent times. Second, to better integrate China into the rule-based multilateral economic system in the long term, the level playing field commitments of the CAI are especially important compared to the above market access commitments. Apparently, relying on the CAI, the EU tried to rectify the limitations of the WTO commitments on transfer of technology, SOE, and subsidies' regulation. As shown in Table 2, the CAI provisions impose strong and sweeping disciplines on all three problematic areas of *status quo* international economic law. Third, the success of the CAI lies in its proper enforcement, and the EU is fully aware of that. One of the major advancements of the CAI is

⁴⁴ The Foreign Investment Law of the People's Republic of China, adopted at the Second Session of the 13th National People's Congress on March 15, 2019, is hereby promulgated for implementation as of January 1, 2020, available at https://en.ndrc.gov.cn/policies/202105/t20210527_1281403.html.

⁴⁵ For a skeptical analysis of the CAI, see Alicia Garcia-Herrero, "Europe's disappointing investment deal with China: Why rush a deal that is so inherently complex?", Nikkei Asia, 1 January, 2021 and François Godement, "Wins and Losses in the EU-China Investment Agreement (CAI)," Policy Paper, Institut Montaigne, January 2021, available at <https://www.institutmontaigne.org/en/publications/wins-and-losses-eu-china-investment-agreement-cai>.

⁴⁶ Dadush and Sapir, *supra* note 43, at 2.

its sophisticated enforcement mechanism to deal with unfair Chinese trade and investment practices. Notably, the consultation mechanism of the CAI on subsidies given to both goods and services is also a major improvement. Viewing it as a crown jewel in the CAI, the EU expects much from this tailor-made compliance mechanism, and at some point, it can be a model for an imperfect CPTPP compliance monitoring system as well.⁴⁷

Table 2. Comparative chart of the CAI and other Asia-Pacific trade-investment deals⁴⁸

| | CAI | US–China (Phase 1 deal) | RCEP | CPTPP |
|--------------------------------|--|----------------------------|---------------------|--------------|
| Market access | | | | |
| • Financial services | ✓ (same as Phase 1) | ✓ | ✓ (same as Phase 1) | ✓ |
| • Other economic sectors | ✓ | – | ✓ (below CAI) | ✓ |
| Level playing field | | | | |
| • SOEs | ✓ (below CPTPP) | – | – | ✓ |
| • Subsidies | ✓ (transparency only) | – | – | ✓ (NCA only) |
| • Forced technology transfers | ✓ | ✓ | – | ✓ |
| Intellectual property | – | ✓ | ✓ | ✓ |
| Sustainable development | ✓ | – | – | ✓ |
| • Labor | ✓ (below CPTPP) | | – | ✓ |
| • Environment | ✓ | | | ✓ |
| Purchase commitments | – | ✓ | – | ✓ |
| Enforcement | ✓ (SSDS; monitoring of implementation) | – (political process) | ✓ (SSDS) | ✓ (SSDS) |

Dispute settlement and the CAI

As for the CAI, it seems that the EU intentionally avoided concluding the so-called “mixed agreement,” which necessitates the ratification of each EU member country. Therefore, the CAI does not cover investment protection and the ISDS mechanism. Against such a background, as for negotiations on investment protection and investment dispute settlement, parties agreed to continue negotiating separate agreements on investment protection and ISDS. Importantly, the EU and China came to an understanding that the negotiation of such a separate agreement shall pursue the state-of-the-art provisions in both fields of investment protection

⁴⁷ See Tsuyoshi Kawase, “Chugoku/Taiwan no CPTPP kanyushinsei to Nihon no taio (China and Taiwan’s Applications to Join the CPTPP and Japan’s Response),” *Gaiko (Diplomacy)*, Vol. 70 Nov./Dec. 2021, pp. 66-71, <https://www.rieti.go.jp/en/papers/contribution/kawase/09.html> (noting that current CPTPP compliance monitoring system is far from perfect and arguing that the effectiveness of autonomous compliance monitoring shall be guaranteed).

⁴⁸ Author’s revision and update partly based on European Commission, “China Comprehensive Agreement on Investment”, Presentation, 21 January 2021, https://trade.ec.europa.eu/doclib/docs/2021/march/tradoc_159480.pdf.

and investment dispute settlement. They also noted that such negotiations should consider progress on the structural reform of ISDS in the context of UNCITRAL in a Multilateral Investment Court (MIC)⁴⁹ (Art. 3, Section VI). The CAI parties shall endeavor to complete negotiations within 2 years of the CAI's signing.

Will China then join the EU's proposal on a MIC and help the EU overhaul the ISDS mechanism? Since 2016, the EU has started to vociferously promote the establishment of a MIC that would replace all other dispute settlement mechanisms for investor states. The EU and its member states support the establishment of a MIC, composed of a court of first instance and an appellate tribunal staffed by full-time adjudicators. The UNCITRAL talks on ISDS reform started in 2017. In April 2019, the WG finalized the list of concerns regarding the current ISDS system and agreed that it was desirable to work on reforms. One may argue that coming to a consensus on MIC with China might be a thorny issue for China; nonetheless, China has already taken a close position with the EU on reform of the ISDS system in UNCITRAL talks, and it may show flexibility on this matter. Given the scale of its economy and the sharp increase in its overseas investment, China has become an eager proponent of ISDS.

E. Regional implications

Since the CAI involves the two most proactive investment treaty negotiators globally, as noted by Bungenberg and Titi, the “conclusion of an EU–China investment agreement is significant for investment policy-making beyond the confines of the two continents.”⁵⁰ Because of its major innovations, it may emerge as “a major source of inspiration for a new generation of trade and investment treaties worldwide.”⁵¹ Apart from the WTO, the CAI is one of the very few economic agreements that China has so far reached with the EU up to this moment. Although the CAI may be left as an agreed but not ratified treaty draft, we shall not forget the impact of the multilateral agreement on investment (MAI). Even the MAI failed to materialize due to French and American opposition; however, it became a role model and source of inspiration for many later BIT negotiations.⁵² Against this background, this paper will assess the potential impacts of the CAI on the Asia-Pacific region and set out lessons that can be learned from the CAI. This task would be extremely important to CPTPP member states who are wary of the Chinese attempt to join this trade pact.

A new generation of BITs and implications for Chinese CPTPP accession

First of all, for the author, the most significant effect of the CAI is that through its ratification, a new generation of treaties, so-called investment liberalization agreements (ILAs), have started to emerge. Until now, international investment rule-making focused solely on very narrowly defined IPAs that include only the pre-establishment phase, but, through its extensive coverage and invasive character, the CAI expresses itself as a novel type of treaty. From now on, we might have start seriously thinking about separating ILAs from IPAs altogether. In addition to that, during the hard-negotiated CAI, China showed incredible flexibility in accepting far-reaching commitments. In the ongoing US–China trade war, no doubt political

⁴⁹ EU–China Comprehensive Agreement on Investment, The Agreement in Principle 30 December 2020, available at https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159242.pdf.

⁵⁰ Bungenberg and Titi, *supra* note 7, at 298.

⁵¹ Julien Chaisse, “FDI and sustainable development in the EU-China investment treaty: Neither high nor low, just realistic expectations,” *Columbia FDI Perspectives*, January 24, 2022.

⁵² In 1998, the Japan Association of International Economic Law dedicated a whole session to the discussion of MAI negotiations and their possible impact worldwide.

factors also played a key role. Despite several hurdles for China being a member of the CPTPP, the CAI brings China closer to the CPTPP level in many aspects. What is essential is that existing member states of CPTPP shall also set demanding standards for China.

Investment protection: As of March 2022, China has either BITs or FTAs with investment chapters such as RCEP or ASEAN–China Investment Framework Agreements with CPTPP members.⁵³ However, none of them can compete with CAI on market access and level playing fields. Against such a background, using their subsidiary companies in EU markets, Japan and other Asia-Pacific countries may also benefit from the CAI vis-à-vis China. While, recently, Japanese investors also started to rely on ISDS for the Japan-related BITs, there is an argument that Japanese investors have been quite active in their indirect involvement in investor–state claims.⁵⁴ Japanese companies have already started to experience ISDS from *Saluka v. The Czech Republic* in 2001, where Saluka Investments (BV), a Dutch company and simultaneously subsidiary of Nomura Europe (a subsidiary of a Japanese group company), effectively used the Netherlands–Czech Republic BIT. Furthermore, the Indonesian mining company Newmont Nusa Tenggara, partly owned by the Sumitomo Corporation, commenced arbitration against Indonesia in 2014 that was subsequently withdrawn.⁵⁵ There are also instances of Japanese investors using the threat of arbitral proceedings to secure favorable settlements. In 2014, Nippon Asahan Aluminium, a joint venture comprising 12 Japanese investors, threatened the Indonesian government with an (ICSID) claim when the parties failed to reach an agreement on the value of the joint venture’s assets. Shortly afterward, a resolution was achieved. Tire-maker Bridgestone also tried, although unsuccessfully, to protect its subsidiary’s trademark against Panama through the Panama–US FTA (2007).⁵⁶ Therefore, if the CAI and a separate investment protection treaty of EU with China come into force in the future, Asia-Pacific companies may also use their umbrella since international investment law practice shows that genuine subsidiary companies, not shell companies, may legitimately use ISDS (although it depends on each BIT’s wording).

WTO reform: For many analysts, the CAI advances the EU’s WTO reform agenda on a number of procedural issues and provides a possible basis for negotiating investment policy disciplines in the WTO on a plurilateral basis.⁵⁷

Global investment rule-making: The CAI is a BIT between one of the two biggest trade and investment countries in the world. China negotiated a BIT for a long time, although unsuccessfully, with the US government under the Obama administration.⁵⁸ Trade talks between the US and the EU under TTIP also entered a deep freeze after former President

⁵³ China–Canada BIT (2012), Japan–China–Korea Trilateral investment treaty (2012), China–Mexico BIT (2008), China–Peru BIT (1994), Chile–China BIT (1994), China–Vietnam BIT (1992), China–New Zealand BIT (1998), China–Malaysia (1988), Australia–China FTA with investment chapter (2014), Brunei–China (2000, not yet in force).

⁵⁴ Christopher Bailey and Flora Jones, “Japan: A Sleeping Sword—Protection for Japanese Corporations Investing Outside of Japan,” 25 January 2017, <https://www.mondaq.com/international-trade-investment/560038/a-sleeping-sword-protection-for-japanese-corporations-investing-outside-of-japan>.

⁵⁵ Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia, ICSID Case No. ARB/14/15.

⁵⁶ Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama (ICSID Case No. ARB/16/34), Award, 14 August 2020.

⁵⁷ Kurtz and Baihua, *supra* note 7. Hu, *supra* note 7.

⁵⁸ Congyan, Cai. “China–US BIT negotiations and the future of investment treaty regime: a grand bilateral bargain with multilateral implications.” *Journal of International Economic Law* 12.2 (2009): 457–506.

Trump's victory. Only the CAI could reach the final stage. Through it, the global architecture of trade and investment agreements that disciplines China will be strengthened.

Multilateralization of Multilateral investment court (MIC)/ Investment court system (ICS):

If the EU and China normalize their relations on the CAI, then within 2 years of its ratification, parties have to reach an agreement on a high-level investment protection treaty as well. As I have already mentioned, the parties already agreed to adopt high-level investment protection and investment dispute settlement on the basis of the UNCITRAL MIC.⁵⁹ In that case, that consensus between two of the biggest players in the world might have greater effect for the EU to multilateralize its original initiative on international investment court. In particular, it may give greater leverage to the EU for negotiating a forthcoming separate IPA with Japan. We all know that the EU–Japan Economic Partnership Agreement came into force on February 1, 2019. Parties agreed to continue to negotiate separately for an IPA. Importantly, while the substantive provisions have been agreed upon, the EU proposal on Investment Court System is still not accepted by Japan. The last discussions on the IPA occurred on March 20–22, 2019 in Tokyo. For the time being, no further discussions are foreseen.⁶⁰ Fukunaga postulated that the hesitation of Japan toward reform of ISDS might be due to its minimal involvement with ISDS.⁶¹ My point is that by reaching an agreement on an IPA with China on MIC/ICS, the EU will have the upper hand in globalizing its ISDS model. However, given the absence of any practice based on MIC/ICS, for the moment, the current approach of Japan that tends to avoid jumping into no-practice MIC/ICS seems prudent.

⁵⁹ China in particular supported the study of a permanent appeal mechanism as a reform proposal for resolving the main problems in the current ISDS regime. See UNCITRAL, Working Group III, Investor-State Dispute Settlement Reform, Submission from the Government of China, A/CN.9/WG.III/WP.177, 19 July 2019, available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/073/86/PDF/V1907386.pdf?OpenElement>.

⁶⁰ European Commission, “Overview of FTA and Other Trade Negotiations,” February 2022, available at https://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

⁶¹ Yuka Fukunaga, “ISDS under the CPTPP and Beyond: Japanese Perspectives,” 30 May, 2018, Kluwer Arbitration Blog, available at <http://arbitrationblog.kluwerarbitration.com/2018/05/30/isds-cptpp-beyond-japanese-perspectives/>.



Figure No.1: China in the web of WTO + obligations

China, CAI, and Taiwan’s investment treaty regime: Does the CAI have any effect on Taiwan–EU investment relationships? After the Chinese assertive policy in Hong Kong and cross-retaliatory sanctions against EU organs and MPs, the EU seems to be moving toward upgrading its relationship with Taiwan and pursuing a comprehensive partnership with that country.⁶² Meanwhile, as a tech powerhouse of semiconductors, Taiwan has become increasingly attractive to the EU. Several steps evidence this. First of all, the EU and Taiwan organized the first-ever European Investment Forum in Taiwan in September 2020. The EU is especially keen to attract such investment, particularly in industries where Taiwan is a leader, namely, critical technologies, including semiconductors, which would support the EU’s efforts to strengthen its microelectronics capacity. Second, the European Parliament passed a first-ever report on October 21, 2021, enhancing EU–Taiwanese relations, including calling on the EU to begin preparing for the possible signing of a Bilateral Investment Agreement (BIA) with Taiwan. It advised the EU Commission to

urgently begin an impact assessment, public consultation and scoping exercise on a Bilateral Investment Agreement (BIA) with the Taiwanese authorities in preparation for negotiations to

⁶² Thorsten Benner, “Europe Is Doubling Down on Taiwan,” 8 November 2021, Foreign Policy.

*deepen bilateral economic ties, as such a BIA would lead to an easing of “own content” requirements by European investors and producers in Taiwan.*⁶³

Labeling Taiwan as a “like-minded international partner,” the EU Parliament recently again strongly urged the Commission to “begin an impact assessment, public consultation and scoping exercise on a BIA with the Taiwanese authorities in preparation for negotiations to deepen bilateral economic ties.”⁶⁴ However, until now, Taiwan has never concluded a BIT with any members of the EU bloc. As the reluctance of the EU Trade Commissioner shows⁶⁵ and Chinese trade pressure on Lithuania over the latter’s warm relations with Taiwan if the EU moves toward BIA, a severe backlash from the Chinese side would be inevitable.

F. Conclusion

Unfair trade practices on the part of China, limited market access, and the lack of a level playing field are still common problems for many foreign investors operating in China. In that sense, the CAI is a stepping stone to correct these hurdles and could be a valuable blueprint for Japan, the US, and other trading partners that aim to do business with China on equal terms on a level playing field. From this point of view, it seems that the CAI would bring much new fresh blood into the law-making of investment treaties. It will not be categorized as investment protection that we traditionally used to know. The CAI covers a wide array of issues ranging from market access to a level playing field and sustainable development commitments. Being truly “the most ambitious agreement that China has ever concluded with a third country,” the CAI can be praised for many innovations.

After 20 years of China’s membership of the WTO, skepticism toward effective implementation of trade and investment rules in China is still very much alive. In that sense, the CAI may be a litmus test for China before it joins the CPTPP. Then, CPTPP member countries could test whether a tailored monitoring mechanism of CAI could keep China in line with its commitments. Nonetheless, the probability of trying this unique moment seems remote given the frozen situation of EU–China investment relations over bilateral sanctions. To progress, China should consider lifting sanctions applied to EU Parliament members first. This would push toward starting the legislative process of the CAI’s ratification in Brussels.⁶⁶ For China, the ball is in Brussels’ court, and to remove the retaliatory sanctions, the EU has to remove the sanctions first.⁶⁷

However, there is still hope. China fears confrontation with the EU as China is facing with the US, to avoid isolation, it is actively courting EU business circles in China.⁶⁸ Although the first

⁶³ European Parliament recommendation of 21 October, 2021 to the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy on EU–Taiwan political relations and cooperation (2021/2041(INI)), available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0431_EN.html.

⁶⁴ European Parliament resolution of 17 February 2022 on the implementation of the common foreign and security policy - annual report 2021 (2021/2182(INI)), available at https://www.europarl.europa.eu/doceo/document/TA-9-2022-02-17_EN.html

⁶⁵ Simon Lester, “European Parliament, Commission Discuss Prospects for Taiwan BIT,” 28 February, 2022, China Trade Monitor.

⁶⁶ Hu, *supra* note 7, at 24.

⁶⁷ Laura Zhou, “China-EU summit: hopes fade for investment deal as Ukraine war dominates talks,” South China Morning Post, 2 April, 2022.

⁶⁸ Frank Tang, “Beijing asks German businesses to ‘help Europe view China correctly,’” South China Morning Post, 29 March, 2022.

EU–China leaders’ online meeting after 2 years focused mainly on Russia’s war in Ukraine, notably, both sides mandated the EU–China High-level Trade and Economic Dialogue to find concrete ways to progress on apparent tensions around the CAI before the summer of 2022.⁶⁹ Moreover, in the EU–China summit, EU leaders warned China against supporting Russia’s ability to wage war. Unfortunately, for the time being, the CAI’s destiny became dependent on the outcome of China’s stand on Russia’s unjust war against Ukraine. One also has to note that, even if parties find a constructive solution for this retaliatory sanction crisis and open the way for the CAI’s ratification, it takes 2–3 years to complete this procedure. Negotiation of a separate investment protection treaty will take another 2 years after the CAI’s ratification. Therefore, the CAI and its sister treaty on investment protection have to prepare for a long journey.

Even though the CAI may not enter into force between two parties in the foreseeable future, the signing of one agreement is important for both parties and the wider world. Despite the many limitations that the CAI contains, it is still noteworthy for an outstanding level playing field, sustainable development, transparency of subsidies, eliminating forced technology transfers and joint venture requirements, and so on. In the case of Japan, it has never obtained such comprehensive commitments from China. This shows China’s readiness for deep and pervasive commitments that can address Asia-Pacific-originated foreign investors’ grievances in China’s market. Against such a background, the CPTPP member countries will not lose sight of the CAI’s merits and boldly urge China to make substantive and reliable commitments in forthcoming CPTPP negotiations.

<https://www.scmp.com/economy/china-economy/article/3172274/china-asks-german-businesses-help-it-get-good-european-union>.

⁶⁹ “The EU pointed to the need to address long-standing concerns related to market access and the investment environment in China, with the view to ensuring a balanced trade and economic relationship. Leaders mandated the High-level Trade and Economic Dialogue to find concrete ways to progress on these issues before the summer.” See EU Commission, EU–China Summit: Restoring peace and stability in Ukraine is a shared responsibility, Press release, 1 April 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2214.