The EU-China road to the Comprehensive Agreement on Investment[1]

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"The great thing in this world is not so much where we are,
but in what direction we are going."[3]

Abstract

For about ten years, both the European Union and China have decided to embark on a "not easy" road to reach an investment agreement. So, two different cultures, two international powers, set out to regulate the main aspects of the investment mechanism between them. The road to this agreement is perhaps the most difficult in the recent history of the field, largely because of the narrow loopholes through which the negotiating parties must pass. The only good path for the parties on this road is the public international law governing the treaties, while foreign policies should retain their position as auxiliaries with a limited role. This article aims to analyse the legal aspects of the procedure required by such a treaty, taking into account its particularities. The method used for the elaboration of this study is specific to differentiated comparison and introspection.

Keywords*: investment, law, treaty, EU-China Investment agreement.*

JEL Classification*:* F53, F59, K33, P00, P45

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1. Preliminaries

At the 14th EU-China Summit held in Beijing on 14 February 2012, the Premier of the State Council of the People's Republic of China and the President of the European Council together with the President of the European Commission met to mark the progress made in developing EU-China relations in all fields and agreed that their comprehensive strategic partnership has seen significant developments. On this occasion, they agreed that they should strengthen their interaction and cooperation to better respond to the opportunities and challenges in the new bilateral, multilateral, and global framework, with a role in fostering sustainable socio-economic development.

The initiative found and continued in a "multi-fora" legal climate (multi-fora, as used in the literature, as we shall see) consisting of already existing bilateral

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[3] "The great thing in this world is not so much where we are, but in what direction we are going." Quote belongs to Oliver Wendall Holmes Jr.

agreements between EU Member States and the PRC[4] but also of: China - EC Trade and Cooperation Agreement (1985) in the category Treaties with Investment Provisions; and ASEAN (Association of South-East Asian Nations) and EU (European Union)[5]. Both China and many EU Member States are parties to several Investment Related Instruments (Multilateral intergovernmental agreements) such as: TRIPS of 1994 (Agreement on Trade-Related Aspects of Intellectual Property Rights is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994; TRIMS of 1994 (Agreement on Trade-Related Investment Measures); MIGA Convention of 1985 (The Convention Establishing the Multilateral Investment Guarantee Agency); New York Convention of 1958; ICSID Convention of 1965 (International Centre for Settlement of Investment Disputes) and others[6] .

In 2012, both China and the European Union expressed their determination to contribute fully to the cause of making this century one of peace, cooperation and development. Both sides agreed to look positively at each other's development and provide relevant support as they have extensive common interests. Questions remain, however: what did China and the EU feel was missing from the current treaties that would make them want a new one? What is the difference between the international investment law legal relationship between the US and China and between the EU and China? We note from UNCTAD statistics that there is no bilateral investment agreement between the US and China either[7]. In the search for answers, theorists have considered that the answer lies in China's economic reconfiguration as a result of export growth, which has created complex, often tense relations between China and established powers such as the EU and the United States (US), for which multilateral arrangements have provided only partial answers, as concerns about the environment, implications for jobs and working conditions have remained[8].

Theoretically, the affirmation and maintenance of the above desires could take place throughout the process of reaching a comprehensive investment agreement with the EU (hypothetically also with the US) which could be sufficient to overcome the obstacles inherent in any such endeavour.

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[4] PRC is the acronym used in this text for the People's Republic of China.

[5] Agreement on Trade and Economic Cooperation between the European Economic Community and the People's Republic of China - 1985.

[6] According to UNCTAD, China is also party to the following: Fifth Protocol to GATS of 1997 (the General Agreement on Trade in Services); Fourth Protocol to GATS of 1997 and GATS of 1994; UN Code of Conduct on Transnational Corporations of 1983; APEC Non-Binding Investment Principles of 1994 (Asia-Pacific Economic Cooperation); Doha Declaration of 2001; World Bank Investment Guidelines of 1992; ILO (The International Labour Organization) Tripartite Declaration on Multinational Enterprises of 2000, 2006, 1977; Pacific Basin Investment Charter of 1995; Singapore Ministerial Declaration of 1996; UN Guiding Principles on Business and Human Rights of 2011; Permanent Sovereignty UN Resolution of 1962; New International Economic Order UN Resolution of 1974; or Charter of Economic Rights and Duties of States of 1974. We note the constant in these multilateral treaties as the US.

[7] See list of US BITs in UNCTAD International Investment Agreements available here: https://investmentpolicy.unctad.org/international-investment-agreements/countries/223/united-states-of-america, accessed 05.11.2022.

[8] Lorenzo Cotula, *EU-China Comprehensive Agreement on Investment: an appraisal of its sustainable development section*, Business and Human Rights Journal, 6(2), Cambridge, 2021, pp. 360-367.

Interestingly, at the same meeting in 2012, the two sides agreed that if differences persist, they should be discussed and dealt with in a spirit of mutual respect and equality, taking into account mutual concerns.

This is how the road to promoting the global relationship began, taking into account: 1) a strategic perspective; 2) the importance of promoting and protecting human rights and the rule of law; 3) strengthening the EU-China dialogue; 4) a commitment to cooperate with UN human rights mechanisms; 5) a determination to fully exploit the opportunities brought by China's 12th Five-Year Plan and the Europe 2020 Strategy to promote synergies and foster cooperation in all areas; 6) establishing closer economic relations between the EU and China; 7) strengthening and deepening bilateral dialogue and practical cooperation in the areas of macroeconomics, trade, finance and bilateral investment as a cornerstone of the strategic partnership; 8) giving due importance to the efforts to resolve the issue of market economy status in a speedy and comprehensive manner; and 9) leaders agreed that a substantive EU-China investment agreement would promote and facilitate investment in both directions. However, many of these components of the desired comprehensive relationship are already included in various international law instruments currently in force, as I will theorize in this text.

For these goals of the meeting, both sides agreed that negotiations to conclude this agreement would include all issues of interest to both sides, without prejudice to the final outcome[9].

On 30 December 2021, the EU-China Comprehensive Agreement on Investment[10], the Agreement in Principle, was published with the statement that "the agreement in principle is based on a text that still requires *technical work*. Any agreement referred to in this text will be considered *ad referendum.*"[11] From a comparison of the draft Comprehensive Agreement and the investment clauses contained in all other treaties between China and the EU, it can easily be seen, without much effort to demonstrate, that there is a similarity. It is from this perspective that all the blockages we find on this path become difficult to understand.

2. Architecture of the agreement in principle

The structure agreed in principle by the parties' concerns: 1) preamble, objectives and definitions; 2) market access and investment liberalization; 3) level playing field: a. state owned enterprises; b. forced technology transfers; c. transparency in subsidies; 4) domestic regulation; 5) transparency and standard

[9] See Joint Press Communiqué of the 14th EU-China Summit, Beijing, 14 February 2012, 6474/12, prepared by the Council of the European Union, pp. 1-4.

[10] In the following, this article will use the acronym CIT for the EU-China Comprehensive Investment Agreement (the treaty), thus highlighting the notion and the characteristic features of the treaty, as BIT stands for bilateral investment agreements.

[11] EU-China Comprehensive Agreement on Investment, the Agreement in Principle is available on the European Commission's website: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en, accessed on 02.09.2022.

setting; 6) financial services; 7) sustainable development; 8) state to state dispute settlement mechanism; and 9) institutional and final provisions.

Both sides agreed to continue negotiations on investment protection and the settlement of investment disputes, to be completed within two years of the signing of the agreement. More concretely, exactly the part of the treaty that is obviously governed by international law has been left for later, so we should be right at the point where the international law rule is being developed. According to information on the European Commission's online page, at the time of writing: "the two sides committed to work towards state-of-the-art protection standards and a dispute settlement mechanism that takes into account the work undertaken on structural reform of investment dispute settlement in the context of the United Nations Commission on International Trade Law (UNCITRAL). The EU's objective remains to replace Member States' existing bilateral investment treaties with China with a single modernised EU-wide agreement", and under the heading "What are the next steps?" we find the following explanation: "Both sides are now working to finalise the text of the agreement, which will need to be legally revised and translated before it can be submitted for approval by the EU Council and for ratification."[12]

In the Preamble, both parties agreed, *inter alia*, to reaffirm their commitment to the Charter of the United Nations (26 June 1945), bearing in mind the principles articulated in the Universal Declaration of Human Rights (10 December 1948). In addition, both parties agreed to promote investment in a manner that upholds high levels of environmental protection and labour rights, including the fight against climate change and forced labour.

This part also contains several provisions that apply horizontally, such as the objectives of the agreement, the reaffirmation of the right of the parties to regulate to achieve legitimate policy objectives (such as the protection of public health, social services or privacy and data) and the list of definitions of concepts used in the agreement.

An analysis of the content of the EU-China Comprehensive Agreement in Principle on Investment[13] and the positions of the parties stated during the negotiations leads to the conclusion that this agreement is not a traditional trade or investment agreement but has the potential to be the most ambitious agreement ever concluded by China with a third party subject to international law. In addition to rules against forced technology transfer, the AP will, upon ratification, be the first agreement to include obligations on the conduct of state-owned enterprises, comprehensive transparency rules for subsidies and commitments on sustainable development. Other important provisions of the AP aimed at regulating :improving

[12] See EU-China agreement explained, official positions available here: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/agreement-explained_en, accessed 07.11.2022.

[13] AP will be the acronym used in the text of the article for the EU-China Comprehensive Agreement in Principle on Investment.

the level playing field - fairer investment[14], transparency of subsidies[15], standard setting, licensing, and transparency (transparency, predictability and fairness in licensing), the agreement will include transparency rules for regulatory and administrative measures, to enhance legal certainty and predictability, as well as for procedural fairness and the right to judicial review, including in competition cases are related to: integration of sustainable development into the investment relationship, commitments in the areas of labour and environment, not to lower protection standards to attract investment, not to use labour and environmental standards for protectionist purposes, and to respect its international obligations under relevant treaties, as well as environmental and climate commitments, including to effectively implement the Paris Climate Agreement.

To this is added the commitment of the Chinese side to work towards ratifying the ILO (International Labour Organisation) core conventions on forced labour which it has not yet ratified, and finally, an enforcement mechanism is established (inter-state dispute settlement coupled with a politically agreed pre-contentious monitoring mechanism) which will allow problems to be resolved as they arise (including through an emergency procedure).

Through the aims and objectives of the agreement are pursued: consolidation of Chinese investment liberalisation over the past 20 years; clear market access conditions for EU companies and independent of China's domestic policies; allowing the EU to use the dispute settlement mechanism in the agreement in case of breach of commitments; removal of quantitative restrictions, equity capital caps or joint venture requirements in a number of sectors; and public comments highlight that the content of the AP preserves EU sensitivities such as energy, agriculture, fisheries, audio-visual, public services, etc.

3. Theoretical approach. Legal technique eclipsed by political technique?

If we look separately at these EU sensitivities presented in the final paragraph of point 2 of this article, we see that there is no problem of non-regulation in principle. The multitude of international instruments - both binding and non-binding - are circumstances that give rise to consequences and are related to the legal order.

If, for the time being, China is a signatory to a larger number of declarations or other instruments which, although they are precisely aligned with the key issues addressed by the EU, do not directly create rights and obligations, nevertheless, the manifestation of the force of these factors, their legal effect, can be linked to a determined interest of the Chinese state, which can be translated into the norm of

[14] China undertakes to provide, upon request, specific information to allow the assessment of the compliance of the behaviour of a particular enterprise with the obligations agreed under the Agreement.

[15] The agreement will oblige China to engage in consultations to provide additional information on subsidies that could have a negative effect on EU investment interests. China is also obliged to engage in consultations to try to address these negative effects.

international law. Let us take the field of energy as an example. Both China and EU Member States have already signed the International Energy Charter (2015)[16]. This is just one example. In the International Energy Charter of 2015 we can find clear intentions on investment starting with the affirmation of objectives, such as: "Determined to promote closer, mutually beneficial commercial relations and investments in the energy field"; (...) "They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies to achieve the above objectives"; (...) "creating a favourable environment for investments, including joint venture investments, for design, construction and operation of energy installations"; (...) "sharing of best practices on clean energy development and investment"; (...) "promotion and protection of investments in all energy sectors (Chapter 4)" and so on.[17]

Given that we find in other treaties (already signed between China and EU Member States) perhaps more comprehensive provisions on the key issues to be included in the Comprehensive Agreement on Investment, we cannot help but notice that at least from a legal point of view something does not fit. Analysts are of the opinion that this is a *sui generis* agreement containing elements of trade in services and investment. It lacks the coverage and depth of a free trade agreement (FTA) - for example, it does not comprehensively cover trade in goods, procurement, technical standards, trade remedies or intellectual property rights - nor does it contain substantive investment protections (such as expropriation or fair and equitable treatment) or the investor-state dispute settlement (ISDS) mechanisms usually included in bilateral investment treaties (BITs), omissions that run counter to the EU's negotiating objectives, which included an investment protection agreement designed to replace the BITs that all EU member states (except Ireland) have with China, which will now remain in force[18].

Virtually all the tension and nervousness surrounding the negotiations of the new comprehensive agreement appears to be rushed in this context. Recent work has noted some similar issues and developed them to a greater or lesser extent. Some

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[16] The International Energy Charter is a declaration of political intent to strengthen energy cooperation between signatory states and carries no legal obligation or financial commitment. However, it sets out common principles for international energy cooperation. It reflects the full scope of multilateral energy documents and agreements developed over the last two decades. The focus is on the "trilemma" between energy security, economic development, and environmental protection.

[17] In addition to the Energy Charter Conference, the International Energy Charter (available here: https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_Certified_Adopted_Copy.pdf, accessed 05.11.2022) promotes mutually beneficial energy cooperation between nations from all continents for energy security and sustainability. Negotiations on the modernisation of the Energy Charter Treaty started in July 2020, finalised in June 2022. The agreement in principle to close the negotiations will trigger a so-called silence procedure on the final text between the ECT contracting parties. If no contracting party breaks the silence, the text can be formally adopted at the Energy Charter Conference, scheduled for November 2022. Once approved and ratified, the modernised Energy Charter Treaty will facilitate sustainable investment in the energy sector and provide legal certainty, while reflecting the clean energy objectives of the transition.

[18] Simon F.S. Li, *Putting the Comprehensive Agreement on Investment (CAI) into perspective: Five key points*, article published in the Institute for International Trade of the University of Adelaide, Australia on 02.02.2021.

authors have pointed out that considering the legal and political frameworks of both the EU and China, the content of the Agreement in Principle "blurs the lines" with other areas of law, including environmental law, labour law and public international law[19].

The same issues of the degree (legal force) of regulation can also be found to some extent in the examples of market access commitments undertaken by China in the following sectors, much of which is regulated at least in principle in various other instruments signed by China: manufacturing (e.g. transport and telecommunications equipment, chemicals, medical equipment, etc.); automotive (China will commit to market access for new energy vehicles); financial services (joint venture requirements and foreign capital ceilings have been removed from banking, securities trading and insurance (including reinsurance), and asset management); health (China will provide further market opening by lifting joint venture requirements for private hospitals in major Chinese cities, including Beijing, Shanghai, Tianjin, Guangzhou and Shenzhen); C&D (bio-resources sector, where China has agreed not to introduce new restrictions and to pass on to the EU any lifting of current restrictions in this area that may take place in the future) ; telecoms/cloud services (China has agreed to lift the investment ban on cloud computing services, subject to a 50% equity cap); IT services (China has agreed to link market access for IT services and will include a "technology neutrality" clause, which will ensure that capital caps imposed on value-added telecoms services will not apply to other services such as financial, logistics, medical, etc., if they are offered online); international shipping (China will allow investment in relevant ancillary land-based activities, allowing EU companies to invest without restrictions in cargo handling, warehouses and container stations, shipping agents, etc.); air transport-related services (China has agreed to open up in the key areas of computerised reservation systems, ground handling services and sales and marketing services. China has also removed the minimum capital requirement for leasing and renting of unmanned aircraft, thus going beyond the GATS provisions); business services (China has agreed to remove joint venture requirements in real estate services, rental and leasing services, transport repair and maintenance, advertising, market research, management consultancy and translation services etc.); environmental services (China will eliminate joint venture requirements for environmental services such as sewerage, noise abatement, solid waste disposal, exhaust gas cleaning, nature and landscape protection, sanitation and other environmental services); construction services (China will remove project limitations currently reserved in its GATS commitments); and managers and specialists from EU companies will be able to work for up to three years in Chinese subsidiaries, with no restrictions present, and EU investor representatives will be allowed free visits before making an investment.

[19] Chaisse, J., & Burnay, M., *Introduction - CAI's Contribution to International Investment Law: European, Chinese, and Global Perspectives*, The Journal of World Investment & Trade, 23(4), 2022, pp. 497-520.

Therefore, from a legal point of view the premises have been created in different ways and the road is open. The legal fact not only exists, but it is the legal fact that forms the essential premise for the emergence or extinction of the various types of legal relationship under international investment law in this case, which could not have arisen without the production of the legal fact.

Public international law has the advantage of applying a single criterion: the conduct of the parties in order to achieve the content as the object of the legal relationship.

At the beginning of this article, I outlined the intentions that propelled the EU and China towards a Comprehensive Investment Agreement. These intentions have triggered the actions the parties have taken and requested in the process of developing the legal relationship on investment. It is true that, as part of the composition of the legal superstructure, international law relationships are influenced by all material, ideological or political relationships, but this does not mean that legal relationships are absorbed by the influences they bear.

On a practical declarative level, this is the situation, but the above remarks lead us directly to the observation of a visible hyper-politicization and geopoliticization of the China-EU Comprehensive Investment Agreement, which seems to be the most affected of all investment treaties. The obvious hyper- and geopolitisation has transformed the importance of the agreement from a treaty that should have focused predominantly on international investment law legal relations into a symbolic treaty with a strong focus on foreign policy. By politicisation, we refer here to "the increasing polarisation of views, interests or values and the extent to which these are publicly advanced to the policy-making process within the EU"[20].

In other words, politicisation has eclipsed the pure international investment law juridicial relationship. It seems to have been overlooked that only law can, within its specific or specially created institutional framework, define, and regulate rights, obligations and the legal investment relationship, resolve foreign investment disputes, direct, control and encourage international capital flows, improve or diminish the predictability of an investment transaction, or increase or reduce the costs associated with an international investment. The effectiveness of law in influencing human behaviour requires more than written legal regulations. It requires institutions. Institutions, according to Douglass C. North, recipient of the 1993 Nobel Prize in Economics, "are the human-made constraints that structure political, economic and *social* interaction".[21]

For legal researchers, all that remains is to focus their methods on the search for effective solutions to regulate the specific juridical relationship in the maze of external policies that unfortunately proliferate faster than legal developments. These developments could, under certain conditions, adversely affect the very direction of public international law. On the other hand, if the process of drafting and adopting

[20] Pieter De Wilde, *No Polity for Old Politics? A Framework for Analyzing the Politicization of European Integration* (2011) 33(5) Journal of European Integration, pp. 559, 560, apud Chaisse, J., & Burnay, M., *op. cit*. pp. 499-511.

[21] J.W. Salacuse, *The Three Laws of Investment Treaties*, The Oxford International Law Library, 2013, p. 25.

the BIT were to return to its essence with a focus on legal techniques, then the EU-China BIT could be useful for a future multilateral agreement in areas where current WTO rules[22] do not provide sufficient discipline for some states[23]. So, we have two roads that this Agreement can take: one road is the one established by the parties' initial intentions, and the other road is one of external policies marked by influence and leading nowhere.

It becomes absolutely necessary to return to the analysis of the international legal relationship of foreign investment law, in particular to the analysis of the category of international investment relationships regulated by special legal rules, the formation, modification and termination of which are usually brought about by the intervention of a legal act and in which the parties appear as holders of rights and obligations, the enforcement of which is ensured, if necessary, by the coercive force conferred by the jurisdictional mechanisms to be included in the body of the Agreement.

The nature of the China-EU Comprehensive Investment Agreement is legal. It is a treaty, and all negotiations and actions should comply with the definition of the treaty to be signed. A treaty is a *legal act*, however named or in whatever form, which embodies in writing an agreement at state, governmental or departmental level, intended to create, modify, or extinguish *rights and obligations, governed by public international law* and embodied in a single instrument or in two or more related instruments. Above all, therefore, the treaty is a legal act, not a political act. It is governed by public international law and not only by external relations and policies.

In the case of the CIT, as in all investment treaties, we are dealing with an overuse of the virtues of law, caused by the domination of external policies. It is natural that legal technique should be the foundation and not the accessory. In this process, scientific knowledge, legal theory[24] has a fundamental, if not exclusive, role to play, especially in modern societies.

Alongside the legal technique underlying the CIT, we have the legislative technique as part of the legal technique, which is made up of the complex of methods and procedures designed to ensure a form corresponding to the content (substance) of the legal regulation.

It follows from the perspective set out in this section that international law has so far been somewhat neglected in the process of reaching a comprehensive investment agreement. In other respects, the debate on the agreement is partly based on diverging views on the effectiveness of law in addressing deep-seated problems. In this respect, it was felt that it would perhaps be unrealistic to expect a treaty to produce such far-reaching changes[25].

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[22] WTO is the acronym for World Trade Organisation.

[23] See Petros C. Mavroidis & André Sapir, *What is so special about CAI*, Asia Pacific Law Review, 30:2, 2022, pp. 348-366.

[24] Nicolae Popa, *General Theory of Law*, ed.5, Ed. C.H. Beck, 2014, p. 173.

[25] Lauge N Skovgaard Poulsen, *The EU-China Investment Deal and Transatlantic Investment Cooperation*, paper presented at the Shapiro Geopolitics Workshop on 'Transatlantic Disruption', organized by the University of Pennsylvania on 26 January 2021, material available here:

Other authors find that in some respects the CIT shows little faith in legal processes, effectively leaving labour and environmental disputes to conciliation backed by analysis and illustrating how the 'power of law' can be unevenly deployed for different policy objectives. Issues of effectiveness emerge as an empirical matter, and socio-legal methods can help measure outcomes[26].

4. *Status quo*

In the meantime, as is already known, various Chinese investment deals are taking place on the territory of some EU Member States while reaching an Investment Agreement is delayed[27] . The "candy on the cake[28]" is the often-promoted view that strengthening ties with China would mean strengthening Russia's hand in Europe amid the Russian-Ukrainian war, which would lead to a weakening of the West's collective ability to defend itself against attacks on democratic principles. The main bottlenecks in the path of the CIT are the well-known political ones, which we will not go into now. But what is the legal situation?

Theoretically, where we do not have an investment agreement, then we have a very hard negotiated contract, usually between the host state of the investment and the foreign investor. So, the investors have the contract as the basis for their international investment. In China we have met state contracts. A state contract is an agreement entered into by the state or government, as well as ministries or other central government authorities, with another state, government, international organisation, i.e., with financial institutions or other entities that are not subject to international law in the economic, commercial, financial, and other fields, and which is not governed by public international law.

In this context we cannot help but stop to look at the specific regulatory landscape, and at the same time take a look back reflecting on the fact that many Member States have foreign investment laws and bilateral agreements with China in their domestic law. As J. Chaisse noted, "the context of the agreement requires a brief review of PRC and EU investment regulatory practices. All the highly industrialised blocs/states are now pursuing what might be called multi-pronged trade and investment policies[29]". In this popover on the regulatory framework, a

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https://www.laugepoulsen.com/uploads/8/7/3/0/87306110/the_eu_china_deal_poulsen_23jan.pdf, accessed 07.11. 2022.

[26] Smith, A., Harrison, J., Campling, L., Richardson, B., & Barbu, M., *Free Trade Agreements and Global Labour Governance: The European Union's Trade-Labour Linkage in a Value Chain World* (1st ed.), Routledge, 2020, pp. 41-63.

[27] In Germany, the acquisition of a 24.9% stake in a terminal in Hamburg, Germany's largest port, by Chinese state-owned COSCO has been approved, despite reports of security risks associated with the Chinese investment. I recall that there is a bilateral investment treaty between Gemania and China.

[28] Coliva is a dessert made from wheat cooked by the Christians only on the occasion of funerals.

[29] Chaisse, J., & Burnay, M., *Introduction - CAI's Contribution to International Investment Law: European, Chinese, and Global Perspectives*, The Journal of World Investment & Trade, 23(4), 2022, pp. 497, 498. The article notes that these include continued interest in multilateral trade negotiations within the World Trade Organization (WTO), efforts to address issues at the plurilateral

source of inspiration and reflection is provided by the effects of the Termination Agreement for bilateral investment treaties between the Member States of the European Union of 2020[30]. The intervention of this treaty precludes the existence of any agreement at the bilateral level between EU Member States and had certain premises that can now be comparative sources of our analysis as we shall see below.

Many Member States have bilateral investment agreements with China and can conduct investment relations based on these agreements. So will the EU-China Comprehensive Investment Agreement, if signed, mean the end of all such bilateral agreements? According to UNCTAD, China is currently party to 106 bilateral investment treaties in force and is party to 23 treaties in force containing investment provisions[31]. We note that there are European countries that still have bilateral treaties in force with China. These include BITs between: China and Germany since 2003, China and Hungary since 1991, China and Romania since 1994, etc.

In reality, what is to be the fate of BITs between EU member states and China post Comprehensive Agreement on Investment? The question is based on the following: 1) the fact that Member States, by virtue of their obligation to ensure the conformity of their legal orders with Union law, must assume the consequences deriving from Union law as interpreted in the case law of the Court of Justice of the European Union (CJEU judgment in case C-284/16 Achmea); 2) the removal of possible incompatibilities between existing BITs and a possible EU-China Investment Agreement; 3) and the fact that, when exercising one of the fundamental freedoms, such as freedom of establishment or free movement of capital, investors in Member States act within the scope of Union law and therefore enjoy the protection provided by those freedoms and, where applicable, by the relevant secondary legislation, by the Charter of Fundamental Rights of the European Union and by the general principles of Union law, which include in particular the principles of non-discrimination, proportionality, legal certainty and the protection of legitimate expectations (CJEU judgment in Case C-390/12 Pfleger, paragraphs 30-37). Where a Member State implements a measure which derogates from one of the

level (i.e. between like-minded trading partners), promotion of regional agreements (in the case of the EU), region-to-region foreign policy negotiations), bilateral agreements (in the case of the EU: Association Agreements, Free Trade Agreements (FTAs) or other forms of cooperation, including Regulatory Cooperation Agreements/Mutual Recognition Agreements) and unilateral agreements, such as the Generalised Scheme of Preferences (GSP), unilateral liberalisation or the use of trade instruments.

[30] In the Official Journal of the European Union, L 168/1 of 29 May 2020, the Agreement on the termination of bilateral investment treaties between Member States of the European Union was published. The signatory States are: the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia and the Slovak Republic.

[31] UNCTAD China International Investment Agreements List is available here: https://investment policy.unctad.org/international-investment-agreements/countries/42/china and was accessed on 05.11.2022.

fundamental freedoms guaranteed by Union law, that measure is subject to Union law and the fundamental rights guaranteed by the Charter also apply (CJEU judgment in Case C-685/15 Online Games Handels, paragraphs 55 and 56); 4) ideally, a more predictable, stable and clear regulatory environment for stimulating investment in the internal market would be created; 5) and, last but not least, in the light of the ECOFIN Council conclusions of 11 July 2017, the Member States and the Commission have agreed to intensify their discussions without delay in order to better ensure full, robust and effective protection of investment within the European Union. Those discussions include an assessment of existing dispute settlement processes and mechanisms, as well as the need - if confirmed - to include means to create new or improve existing relevant instruments and mechanisms under Union law.

4.1 About the law on foreign investment in China

On the other hand, China has a new legislative framework for regulating international investment.

As developed in a previous paper, in early 2015, China's Ministry of Commerce (MOFCOM) released the draft of the new Foreign Investment Regulatory Law, which was subsequently approved on 15 March 2019 by the 3,000 delegates to China's National People's Congress (NPC)[32]. The proposed law was aimed at significantly reducing barriers that might arise to foreign investment and increasing control of foreigners attempting to evade investment regulations in restricted industries. Instead of regulating different types of foreign legal entities investors, the new Foreign Investment Act creates a new definition for the term foreign investment[33]. Article 2 states, "For the purposes of the Act, foreign investment refers to investment activity carried out directly or indirectly by a foreign natural person, enterprise or other organization ("foreign investors"), including the following circumstances: 1) a foreign investor establishes a foreign-funded enterprise in the territory of China, independently or jointly with any other investor; 2) a foreign investor acquires shares, stocks, ownership shares or any other similar rights and interests of an enterprise in the territory of China; 3) a foreign investor makes investment to initiate a new project in the territory of China, independently or jointly with any other investor; and 4) a foreign investor makes investment in any other manner prescribed by laws, administrative regulations or provisions of the State

[32] Cristina Elena Popa Tache, *Introduction to International Investment Law*, Ed. Adjuris International Academic Publisher, 2020, pp. 66-69.

[33] See the definition in the *draft of the* new law: "Regarding the Foreign Investor, on the one hand, the definition of "foreign investor" is based upon an "actual control" test, i.e., enterprises (whether based onshore or offshore) under the control of foreign investors will be treated as foreign investors. On the other hand, investments made by foreign investors within the territory of China but controlled by Chinese domestic investors, shall be deemed as the investment made by the Chinese investors. Regarding the Foreign Investment, it covers investments on green areas, investments through merger and acquisition, medium- and long-term financing, investments on exploration and exploitation of natural resources, acquiring the control over domestic enterprises via contracts or trusts etc.".

Council. For the purposes of the Law, a foreign-financed enterprise refers to an enterprise that is incorporated under Chinese laws in the territory of China and is invested in whole or in part by a foreign investor."

Article 3 of the new investment law states that "The State shall adhere to the basic State policy of opening up and encourage foreign investors to make investments in China. The State will implement policies on high-level investment liberalization and convenience, establish and improve the mechanism to promote foreign investment, and create a stable, transparent, predictable and fair market environment". The Foreign Investment Law of the People's Republic of China was adopted at the second session of the 13th National People's Congress on March 15, 2019 and promulgated for implementation from January 1, 2020.

Until the advent of this law clarifying the definition of foreign investment, as well as the definition of foreign investor, there were several regulations in China leading to a definition of foreign investment but lacking an unequivocal codification of these terms[34]. There was therefore no unified legal basis. After promulgation, the Foreign Investment Law replaced the three existing foreign investment laws[35] governing the legal regime of foreign enterprises investing in China, and created a unified basis, regardless of their mode of organisation. At the time, some voices argued that the Chinese government seemed to have rushed to adopt the investment law as an *olive branch for the US* amid *trade war* negotiations[36]. However, many in China's business community see this law as a set of intentions rather than a specific set of rules. There is concern that it could open the door to different forms of interpretation. Only case law practice in the coming years will prove the effectiveness of the new law. From this point of view, it is important to have international bi- or multilateral rules to clarify some of the problems that could arise from these interpretations.

It should be known that in 1978 the Chinese state laid the foundations for a policy of reform and opening up to the outside world. As a result of these policies, from 1981-1990, China received more foreign direct investment than any other developing country, so that between 1993 and 1995, the flow of foreign investment to China was the second highest in the world, second only to foreign investment in the United States.

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[34] For example, see *Law of the People's Republic of China on the State-Owned Assets of Enterprises and Provisions on the Foreign Exchange Administration of the Overseas Direct Investment of Domestic Institutions* issued by the State Administration of Foreign Exchange ("SAFE"), where in Art. 2 states that "the term Overseas Direct Investment refers to a domestic institution's overseas formation of an enterprise or project or overseas acquisition of the ownership of, the controlling stake in, or the business management right to an existing enterprise through formation (in the form of exclusive investment, joint investment or cooperation), merger, acquisition or purchase of shares, upon the approval of the competent administrative department of overseas direct investment".

[35] Thus, the new law is intended to replace the three existing legal provisions in China: the trio of the Sino-foreign Equity Joint Venture Enterprise Law, the Sino-foreign Cooperative Joint Venture Enterprise Law and the Wholly Foreign-invested Enterprise Law as well as its implementation rules and ancillary regulations (collectively, the "Three FIE Laws").

[36] According to the article *China foreign investment: How doing business will change,* published by Stephen McDonell at BBC News, Beijing on 14.03.2019, available here: https://www.bbc.com/news/business-47550559, accessed 05.11.2022.

In 1979, the Chinese-Foreign Capital Joint Venture Law was enacted, setting up free zones where foreign investors were given incentives to invest if they could prove that all their production would be exported. Foreign investors were allowed to joint venture with Chinese investors to sell on the Chinese market. Proposals for such joint ventures were considered more seriously and were only approved if they served significant national interests, for which China had to seek outside help. Gradually, China's dependence on the world economy increased. China increased the number of free zones, allowing wholly foreign-owned enterprises to operate. However, these are still rare because (a) foreign companies realise that they will be treated more harshly by Chinese public authorities, and (b) they have to deal with more red tape than their Chinese counterparts. It should be pointed out that in China "investments" usually take the form of *joint ventures*, where the foreign partner owns 49% and the Chinese partner 51%, as in Romania before 1990. In April 2010, the Chinese government published a document entitled "Opinions of the State Council on Further Improving Work on the Use of Foreign Investment". Broadly speaking, the document contains a trend towards national treatment of foreign investment and favours those investments that bring very high added value as well as more efficient operations, particularly in the western and central regions of China. It should be noted that the State Council's "Opinions" document has formed the framework basis for the next revised edition of the "Catalogue of Foreign Investment in Industry", which provides further guidance on various types of investment. China is not a member of the 2014 WTO Government Procurement Agreement, so it does not have to open up government procurement to non-Chinese companies. The Government Procurement Agreement (GPA 2012) consists of 21 parties (covering 48 WTO members, including the European Union and its 27 member states as a single party)[37]. China has made impressive progress in developing a regulatory framework to attract and promote investment over the past three decades. Policies to encourage FDI[38] have been successful. Despite competition from other investment destinations in recent years, China continues to be cited in foreign investor surveys as a favourite destination for FDI[39].

However, following WTO accession in 2001, China moved towards "national treatment" of foreign investors, which means equal treatment for foreign investors vis-à-vis domestic investors. According to official public information, this was the reason why China proposed a new revision of its Government Procurement Law (GPL), the law that applies to the conduct of procurement at all levels of the

[37] At an informal meeting of the WTO Committee on Government Procurement Agreement (GPA) on 23 October 2019, China presented to the parties to the agreement its sixth revised market access offer in the context of its GPA accession negotiations. The revised offer was transmitted to the GPA parties on 21 October. Canadian President Carlos Vanderloo called this "a very significant development" and the parties also welcomed China's revised offer, although they said they needed more time to review it. WTO members are not obliged to join the GPA, but the United States strongly encourages all WTO members to participate in this important agreement. Several countries, including China, Russia and the Kyrgyz Republic, are currently negotiating accession to the GPA.

[38] MOFCOM-Ministry of Commerce of the People's Republic of China.

[39] For example, China ranked first from 2002 to 2012 in the A.T. Kearney FDI Confidence Index, A.T. Kearney (2010).

Chinese government. The proposal appears to extend, for the first time, to procurement by state-owned enterprises. Thus, the importance of state-owned enterprise coverage and a new provision on international treaties have been considered.

On July 16, 2022, China's Ministry of Finance requested comments on a revised draft of the GPL with a deadline of August 14, 2022. The new proposal revises the ministry's 2020 GPL revision proposal, which has not been implemented.

GPL currently applies to procurement activities carried out with fiscal funds by state bodies, institutions, and organisations. The proposed revision of the GPL would extend its scope to other procurement entities that use tax funds or other state-owned assets to procure goods, construction, and services under contracts for the performance of their own duties or the provision of public services (Article 2). It defines "other governmental entities" as state-owned public assistance enterprises that engage in public utilities or operate public infrastructure or public service networks for public purposes (Article 12).

The apparent application of the Public Procurement Law to state-owned enterprises would represent a significant change to China's procurement regime. Currently, the GPL does not cover procurement of enterprises or construction projects that are subject to China's other procurement law - the Bidding Law. The WTO Secretariat has referred to that law, in a trade policy review, as the de facto law for state-owned enterprise procurement.

Another provision in the revised MOF that relates to international treaties may be of particular interest to the international community. It provides that in government procurement, China shall accord other contracting parties and participants most-favoured-nation treatment, national treatment and other treatment in accordance with international treaties and agreements it concludes or accedes to (Article 118). This provision seems to indicate that China is preparing the legal framework to enter into international agreements with procurement commitments, such as the WTO Agreement on Government Procurement (GPA) or the Comprehensive and Progressive Trans-Pacific Partnership (to date, China has not made any market access commitments in the agreements). Such a provision could give the Chinese government the authority to implement procurement commitments in an international agreement, such as waiving the GPL "Buy China" requirement for covered purchases.

One area of concern with the proposed new review is its retention of a national security review regime for government procurement, which was proposed in 2020. Under this regime, all government procurement activities deemed to have national security implications will be subject to review. This has raised concerns in the foreign business community because of its potential scope and uncertainty over its application[40].

The advent of the new foreign investment regulation means an overhaul of the national security system[41], which will lead to the strengthening and expansion of

[40] See Jean Heilman Grier, *China Proposes New Revision of Procurement Law*, article published on 28.07.2022 in Perspectives on Trade. Perspectives and Observations, available online here: https://trade.djaghe.com/?tag=china-gpa-accession, accessed 06.11.2022.

41 National Security Review (NSR).

the National Security Regulations (NSR). Thus, the new law significantly expands the scope of the NSR to cover any foreign investment that "endangers or is likely to endanger" national security. In doing so, the range of industries subject to the NSR is significantly expanded, although in applying the existing NSR regulations, MOFCOM has given a broad interpretation to the term "key industries" to include certain technology-related market sectors with no apparent national security-related significance in order to scrutinize a proposed transaction deemed to be "high-profile" based on the involvement of a foreign multinational or a sensitive domestic industrial sector. The new law also provides that an NSR decision cannot be challenged, either administratively or in court.

4.2 China-EU investment agreement negotiations - schedules of China, updated to September 2022

In the meantime, amidst discussions for the BIT, China has determined under Articles 7 (Non-Conforming Measures and Exceptions), China's existing measures that are not subject to some or all of the obligations imposed by: (a) Article 4 (National Treatment); (b) Article 5 (Most Favoured Nation Treatment); (c) Article 3 (Performance Requirements); or (d) Article 6 (Senior Management and Boards of Directors). According to the submissions, it is also specified for greater certainty, in the case of China, that a change in the level of government at which a measure is administered or implemented does not, by itself, reduce the compliance of the measure with the obligations referred to in Article 7.1.

For example, several restrictions are ready to be removed after 2022, as follows: 1) in the manufacture of transport equipment: special administrative measures for market access of foreign investment (negative list) (2019 edition), Article 9; 2) for foreign investors' investment in the manufacture of complete automobiles (passenger cars), the shareholding percentage of the Chinese party shall not be less than 50%. After 2022, foreign investors' investment in passenger car manufacturing will not be subject to shareholding percentage restrictions.

A foreign investor may set up less than two joint ventures (included) producing complete automobiles of the same category (passenger cars) in China, however, this limitation of two enterprises does not apply if the investor acquires other domestic auto manufacturers jointly with the Chinese party to the joint venture. After 2022, China will no longer reserve non-conforming measures under paragraph 2 of this heading.

The measures listed here do not apply to investments by foreign investors in the manufacture of new energy cars and special purpose cars.

4.3 EU China Comprehensive Agreement on Investment - Schedule of the European Union, Annex I - Reservations as of September 2022

As far as the EU is concerned, certain clarifications have been made: a reservation made at EU level applies to an EU measure, to an EU Member State at national level, and to a measure of a government of an EU Member State, unless the reservation excludes an EU Member State.

On the other hand, a reservation taken by a Member State of the European Union applies to a measure of a government at national, regional, territorial, or local level in that Member State. For example, for the purposes of Belgium's reservations, the national level of government covers the federal government and the governments of the regions and communities, since each of them has equivalent legislative powers. For the purposes of the reservations of the EU and its Member States, a regional level of government in Finland means the Åland Islands.

In terms of applicability, it covers the territories in which the Treaties establishing the European Union (EU) apply and under the conditions laid down in those Treaties and is relevant only in the context of trade relations between the EU and its Member States with China. It does not affect Member States' rights and obligations under EU law.

From the analysis of the set of more or less realized or/and achievable initiatives, it becomes clear how China wants to be globally present. China's dual role vis-à-vis FDI[42], thanks to its three-pronged investment strategies (bilateral, regional, and global), aims at "further opening up to the outside world and facilitating local reforms" and effectively transforms itself in the global economic landscape as a trusted rule maker[43].

5. Conclusions

There will most likely be many more initiatives for both the EU and the PRC to reach different economic treaties, given the multiple forum practice of these two large trading blocs. For example, although the China-EU Comprehensive Investment Agreement only covers bilateral investment, it may pave the way for a potential free trade agreement between the parties and has the potential to serve as a model for other international law topics[44] . In this process of negotiating a Comprehensive Agreement on Investment, both sides, and in particular the European Union, must,

[42] FDI stands for foreign direct investment.

[43] For a comprehensive analysis of China's investment strategies, see Julien Chaisse, *Introduction: China's International Investment Law and Policy Regime-Identifying the Three Tracks*, in Julien Chaisse (ed.), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy*, International Economic Law Series (Oxford, 2019; online edn., Oxford Academic, 17 Apr. 2019), pp. 1-57, accessed 7 Nov. 2022.

[44] Marisi, Flavia, and Qian Wang, *Drivers and Issues of China-EU Negotiations for a Comprehensive Agreement on Investment*, in Julien Chaisse (ed.), China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy, International Economic Law Series, Oxford, 2019, pp. 163,164.

first and foremost, ignore any influence of any kind from international rivals (traditional rivals, in particular). Under no circumstances should the dialogue partners aim for personal victories[45]. On 31 October 2022, a European politician said: "Clearly, the EU needs China, just as China needs the EU to prosper. A new cold war stemming from the EU's heightened tendency to echo Washington can never be the solution in 2022"[46] .

In this whole process, the priority is the legal relationship of international investment law, and only secondarily should the auxiliary role of foreign policy be felt. The European Union needs an economy with a solid chance of progress, especially at a time when theorists are calculating increasingly unfavourable prognoses. A crisis in negotiations can lead to mistakes, mistakes can lead to damage, and damage attracts international responsibility.

Only a balanced and even-handed approach to all the elements, using the right legal technique, can lead to the agreement we have analysed. Only by paying more attention to cooperation and the specific international legal relationship could the parties avoid saying with regret in the end: "It could have happened".

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