

EU-CHINA NEGOTIATIONS ON INVESTOR STATE DISPUTE SETTLEMENT WITHIN THE CAI FRAMEWORK: ARE WE ON THE RIGHT TRACK?

por

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ABSTRACT: This paper begins by presenting some of the main assessments of this controversial EU-China “agreement in principle”, and also weighs up the text’s chances of coming into force. The fact that, according to scholars, the bidirectional FDI flows between the EU and the PRC are still underdeveloped does not seem to be a good enough reason for all EU institutions to endorse its CAI approval on a political level. Section III reflects on the possible reasons why the Comprehensive Agreement, despite its name, did not cover an issue as essential as ISDS from the outset, instead relegating it to later negotiations between the two parties. Seven very diverse hypotheses are addressed by this paper on the above referred absence (ranging from a mere question of time to problematic unilateral strategies, and including bilateral decisions reached on the basis of various possible grounds). Section IV reflects on the possible content of the EU-China Agreement on Investment Dispute Settlement. A very wide range of possibilities opens up again at this point (a permanent standing two-tier mechanism with full-time adjudicators; a multilateral permanent appellate mechanism; a Sino-European mechanism for settling investment disputes; an Asia-centred dispute settlement mechanism linked to the Asian Infrastructure Investment Bank; existing Chinese-led arbitration mechanisms, and the enhancement of other ADR mechanisms). Section V deals with the fact that the BITs that China has signed with almost all EU countries in recent decades are applicable to the claims that Chinese and EU investors could raise before the entry into force of the EU-China IDS Agreement. This section also explains the negative consequences of this supposedly transitory situation and makes a case for completing the IDS negotiations promptly and effectively.

KEYWORDS: EU-China Comprehensive Agreement on Investment (EU-China CAI), EU-China Agreement on Investment Dispute Settlement (EU-China Agreement on IDS), Working Group III UNCITRAL, Multilateral Investment Court (MIC).

SUMMARY: I.- INTRODUCTION. II.- FIRST IMPRESSIONS OF THE COMPREHENSIVE AGREEMENT ON INVESTMENT: A TEXT THAT ARRIVED UNEXPECTEDLY AND IS CURRENTLY FACING AN UNCERTAIN FUTURE. III.- WHY DOESN'T THE CURRENT EU-CHINA “AGREEMENT IN PRINCIPLE” COVER INVESTOR-STATE DISPUTE SETTLEMENT? IV.- WHAT WOULD THE CONTENT OF THE EU-CHINA AGREEMENT ON INVESTMENT DISPUTE SETTLEMENT BE? V. WHAT HAPPENS UNTIL THE EU-CHINA IDS AGREEMENT ENTERS INTO FORCE? VI.- CONCLUSION.

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LAS NEGOCIACIONES ENTRE LA UNIÓN EUROPEA Y CHINA SOBRE RESOLUCIÓN DE CONTROVERSIAS EN MATERIA DE INVERSIONES EN EL MARCO DEL CAI: ¿VAMOS POR EL BUEN CAMINO?

RESUMEN: Este artículo comienza analizando las valoraciones que ha generado el controvertido UE-China "acuerdo de principio" y también sopesa las posibilidades que tiene este texto de entrar en vigor. El hecho de se estime que los flujos bidireccionales de inversión extranjera directa entre la Unión Europea y la República Popular China aún están infradesarrollados no parece razón suficiente para que todas las instituciones de la UE apoyen la aprobación en el plano político del conocido como CAI. La sección III del artículo reflexiona sobre las posibles razones por las que el Acuerdo Global de Inversiones, pese a su nombre, no haya cubierto desde el principio una cuestión tan relevante como la resolución de controversias inversor-Estado y, por contra, lo haya relegado a negociaciones posteriores entre las Partes. Este trabajo desarrolla siete hipótesis muy diversas en relación con la no cobertura de esta materia, que van desde una mera cuestión temporal hasta estrategias unilaterales controvertidas, pasando por decisiones bilaterales basadas en varios motivos posibles. La sección IV de este trabajo profundiza sobre cuál podría ser el posible contenido del futuro Acuerdo UE-China para resolución de controversias en materia de inversiones. En este punto se abre nuevamente una amplia gama de posibilidades (un mecanismo permanente de dos niveles que cuente con decisores a tiempo completo, un mecanismo multilateral y permanente de apelación, un mecanismo chino-europeo para solucionar controversias en el ámbito de inversiones, un mecanismo impulsado por China para solucionar controversias en el ámbito de inversiones conectado con el Banco Asiático de Inversión en Infraestructuras, mecanismos arbitrales preexistentes en el contexto chino y la potenciación de otros mecanismos ADR). La sección V de este artículo argumenta que los APPRI que China y los diversos países de la UE han firmado en las últimas décadas son aplicables a las reclamaciones que inversiones chinos o europeos puedan plantear antes de que llegue a entrar en vigor el Acuerdo UE-China para resolución de controversias en materia de inversiones. Esta última sección también explica las consecuencias negativas de esta situación supuestamente transitoria y defiende la necesidad de completar las negociaciones del Acuerdo UE-China para resolución de controversias en materia de inversiones con efectividad y celeridad.

PALABRAS CLAVE: Acuerdo Global de inversiones UE-China, Acuerdo UE-China para resolución de controversias en materia de inversiones, Grupo de trabajo III de CNUDMI, Tribunal Multilateral de Inversiones.

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I. INTRODUCTION

On 30 December 2020 the European Union (EU) and the People's Republic of China (PRC) announced that they had reached an "agreement in principle" in their investment negotiations.¹ On January 22 the European Commission presented a text consisting of a

¹ As explained by the European Parliament, the "agreement in principle" *"is now undergoing legal scrubbing and will subsequently be translated into all official EU languages - which may take up to one year - before it will be formally submitted to the Council for approval and to the European Parliament for consent"*. EUROPEAN PARLIAMENT, "EU-China Comprehensive Agreement on Investment. Levelling the playing field with China", March 2021,

preamble and six sections (Objectives and General Definitions, Investment Liberalization, Regulatory Framework, Investment and Sustainable Development, Dispute Settlement, and Institutional and Final Provisions) and three annexes to Sections III and V.

Although the text's official title is the EU-China Comprehensive Agreement on Investment (CAI), its current content would seem to imply that this is not actually the most appropriate title. This paper is therefore devoted to one of the major investment areas that this so-called "comprehensive" agreement does not cover: Investor-State Dispute Settlement (ISDS)², a crucial issue, which, together with the no less relevant question of substantive investment protection standards, has remained "in principle" outside the not-so-comprehensive EU-China Investment Agreement.³

However, Article 3 of Section VI, Sub-Section 2 - Final Provisions - establishes that *"The Parties agree to continue, on the basis of the progress already made, their negotiations with a view to negotiate an agreement on investment protection and investment dispute settlement. In such negotiations the Parties shall work towards: a) state of the art provisions in the field of investment protection; b) state of the art provisions in the field of investment dispute settlement, taking into account progress on structural reform of investment dispute settlement in the context of the United Nations Commission for International Trade Law (UNCITRAL). The Parties shall endeavour to complete such negotiations within 2 years of the signature of the present agreement"*.⁴

Starting from these premises, Section II begins by presenting some of the main assessments of this controversial EU-China "agreement in principle", and also weighs up the text's chances of coming into force. The fact that, according to scholars,⁵ the

[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2021\)679103](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2021)679103). (all the websites cited in this paper were last accessed on 1st October 2021).

² It should be noted that the references to dispute resolution mechanisms in the CAI actually refer to state-to-state resolution systems (one general reference -a two-step approach consisting of consultations and recourse to an arbitration panel-, and a second referring to sustainable development), and not to the ISDS.

³ The doubts that some authors have raised regarding the CAI (*"stuck half-way?"*) are symptomatic. BERGER, A., and CHI, M., "The EU-China Comprehensive Agreement on Investment: Stuck half-way?" *Columbia FDI Perspectives*, nº 299, 2021, pages 1-4. On the contrary, the text is properly presented as an investment agreement, marking the fact that it is not a free trade agreement (FTA).

⁴ EU - China Comprehensive Agreement on Investment (CAI), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237>.

⁵ Some economic and legal studies on this bidirectional FDI: ZHANG, X., and CORRIE, B. P., *Investing in China and Chinese Investment Abroad*, Springer, 2018; BUCKLEY, P. J., *Foreign Direct Investment, China and the World Economy*, Palgrave MacMillan, 2010; VAN DEN BULCKE, D., HAIYAN, Z., and DO CÉU ESTEVES, M., *European Union Direct Investment in China*, Routledge, 2003; JIANG, Y., *China Trade, Foreign Direct Investment and Development Strategies*, Elsevier, 2014; PEI, C., and ZHENG, W., *China's Outbound Foreign Direct Investment Promotion System*, Springer, 2015.

bidirectional FDI flows between the EU and the PRC are underdeveloped⁶ does not seem to be a good enough reason for all EU institutions to endorse its approval on a political level. Section III reflects on the possible reasons why the Comprehensive Agreement, despite its name, did not cover an issue as essential as ISDS from the outset, instead relegating it to later negotiations between the two parties. Seven very diverse hypotheses are addressed by this paper on the above referred absence (ranging from a mere question of time to problematic unilateral strategies, and including bilateral decisions reached on the basis of various possible grounds). Section IV reflects on the possible content of the EU-China Agreement on Investment Dispute Settlement. A very wide range of possibilities opens up again at this point (a permanent standing two-tier mechanism with full-time adjudicators; a multilateral permanent appellate mechanism; a Sino-European mechanism for settling investment disputes; an Asia-centred dispute settlement mechanism linked to the Asian Infrastructure Investment Bank; existing Chinese-led arbitration mechanisms, and the enhancement of other ADR mechanisms). A common thread running through all these options is the fact that these crucial negotiations are highly likely to reflect an “*upcoming era of new international law architects*”⁷. Finally, Section V deals with the fact that the BITs that China has signed with almost all EU countries in recent decades are applicable to the claims that Chinese and EU investors could raise before the entry into force of the EU-China IDS Agreement. This section also explains the negative consequences of this supposedly transitory situation and makes a case for completing the IDS negotiations promptly and effectively.

II. FIRST IMPRESSIONS OF THE COMPREHENSIVE AGREEMENT ON INVESTMENT: A TEXT THAT ARRIVED UNEXPECTEDLY AND IS CURRENTLY FACING AN UNCERTAIN FUTURE

In spite of seven years of negotiations and 35 rounds of talks the EU-China “agreement in principle” on December 30 2020 still had the capacity to surprise many who had been looking out for these EU-China negotiations. The CAI’s sudden appearance has generated a great many academic papers and comments in the specialized press over recent months. Even though some of them are certainly

⁶ The latest reports on the matter indicate that: “*the cumulative value of EU-27 since 2000 stood at \$176 billion at the end of 1Q 2021. The cumulative value of Chinese FDI in EU-27 since 2000 stood at \$155 billion at the end of 2Q 2021*”. RHODIUM GROUP, “Cross Border Monitor, People’s Republic of China. European Union. Direct Investment, 2Q 2021”. <https://trade.ec.europa.eu/doclib/html/159761.htm>.

⁷ SLAWOTSKY, J., “He Who Makes the Rules Owns the Gold. The Potential Ramifications of the New International Law Architects”, in CHAISSE, J., (ed.) *China’s International Investment Strategy. Bilateral, Regional and Global Law and Policy*. Oxford University Press, 2019, pages 413-429.

favourable where the Agreement's content and intentions are concerned⁸, most take a less positive tone which ranges from reasonable doubts to fierce criticism. The opposition generated by the CAI originates in arguments such as the following: some of the new advantages that the European Commission claims for CAI⁹ would not in fact be so new, since the PRC would already have granted them - to non-European investors as well - by means of national regulations such as the 2020 Foreign Investment Law¹⁰ (e.g. when dealing with forced technology transfers); Germany, a key country in the European Union, may have promoted the Agreement on the basis of national interests that are not necessary perfectly aligned with EU supranational interests¹¹; in connection with a Germany's possible desire to crown its 2020 EU Presidency with a "major coup", it is feared that the European Union has in fact taken a wrong step, and that the feeling of being ostracised that the new Biden administration may have experienced - stunned by the CAI's sudden appearance,¹² may degenerate into the impossibility of creating a

⁸ WANG, L., and LI, Y., "The negotiation of EU-China comprehensive agreement on investment and its potential impact in the post-pandemic era", *Journal of Chinese Economic and Business Studies*, 2020, pages 365-372; DUAN, X., and SONG, X., "Turning pressure into opportunity: CAI an the future of China's structural reform", *Asia-Europe Journal* 2021, pages 1-6; DADUSCH, U., and SAPIR, A., "Is the European Union's Investment Agreement with China underrated", *Policy Contribution*, April 2021, <http://bruegel.org/reader/is-the-european-union-s-investment-agreement-with-china-underrated#>.

⁹ Some of the documents that the Commission has made public to publicise the benefits of the CAI take such a "marketing" approach" that they seem to dent its credibility. Godement states that: "the EU-China CAI has been oversold and underpowered". GODEMENT, F., "Wins and Losses in the EU-China Investment Agreement (CAI)", *Institut Montaigne*, <https://www.institutmontaigne.org/en/publications/wins-and-losses-eu-china-investment-agreement-cai>.

¹⁰ Foreign Investment Law of the People's Republic of China, https://en.ndrc.gov.cn/policies/202105/t20210527_1281403.html. LAPTEVA, A., and SKVORTSOV, O., "China's Investment Law Reform: Revolution or Evolution?" *China and WTO Review*, 2021, vol. 7, n° 1, pages 95-112.

¹¹ In May 2021, when the conflict over human rights between the two powers was in full escalation, Chancellor Merkel was still backing the CAI: "Despite all the difficulties that will surely arise with the ratification, it is a very important undertaking." KOTY, A. C., "European Parliament Votes to Freeze the EU-China Comprehensive Agreement on Investment", 27 May 2021, <https://www.china-briefing.com/news/european-parliament-votes-to-freeze-the-eu-china-comprehensive-agreement-on-investment/>. Various authors highlight German companies' dependence on China. The latest economic data on the EU website shows that: "Germany (\$1.13 billion) was the largest European investor in China in 2Q 2021 (\$243 million), accounting for almost 70% of total investment. Prominent investors include Volkswagen, BASF and BMW. Germany was also the largest recipient of Chinese FDI in 2Q 2021, accounting for 24% of total investment with continued investment from battery cell manufacturer Svolt". RHODIUM GROUP, "Cross Border Monitor, People's Republic of China. European Union. Direct Investment, 2Q 2021", <https://trade.ec.europa.eu/doclib/html/159761.htm>.

¹² President Biden's National Security Advisor Jake Sullivan declared: "The Biden-Harris administration would welcome early consultations with our European partners on our common concerns about China's economic practices". twitter.com/jakejsullivan/status/1341180109118726144.

"united transatlantic front against China"¹³. It has also been claimed that: "*It is impossible not to see the tactical motivation of China's last-minute concessions, part of an initiative to stave off a better coordinated approach by the incoming Biden administration*"¹⁴, and it is even suggested that the PRC had a hidden objective in accepting the 2020 "agreement in principle", which was in fact to drive a wedge between the EU and the USA.¹⁵

Arguably nonstrategic use of the EU "strategic autonomy"¹⁶ has led to generalized criticism of great societal significance around the CAI: the EU has not only failed to defend its own interests and values in the Agreement, but it has been excessively lax over key aspects such as allowing the PRC's labour and sustainability commitments to be shaped as non-binding - which could even be interpreted as tacit support for certain Chinese policies.¹⁷ The extremely well thought-out and measured, almost fearful wording in Article 4, Sub-Section 3, Section IV referring to international texts banning forced labour, has raised many stakeholders' hackles: "*each Party shall make continued and*

¹³ This author also points out that the trilateral format that has been used with countries like Japan (<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2101>) could also be appropriate in the framework of the relationship with China. VAN DER LOO, G., "Lost in translation? The Comprehensive Agreement on Investment and EU-China trade relations", 3 June 2021, <https://www.epc.eu/en/Publications/Lost-in-translation-The-Comprehensive-Agreement-on-Investment-and-EU-3f9d28>, pages 5 and 15.

¹⁴ GODEMENT, F., "Wins and Losses in the EU-China Investment Agreement (CAI)", *Institut Montaigne*,

<https://www.institutmontaigne.org/en/publications/wins-and-losses-eu-china-investment-agreement-cai>.

¹⁵ Verbeek refers to F-P van der Putten's reflections on this issue. VERBEEK, B.-J., "Unpacking an empty box? The EU-China Comprehensive Agreement on Investment", *Somo*, 8 July 2021, <https://www.somo.nl/unpacking-an-empty-box-the-eu-china-comprehensive-agreement-on-investment/>

¹⁶ Experts state that: "*The EU seems to have realised its lack of political weight compared to its economic weight in a world of increasing great power competition. By introducing the concept of strategic autonomy, lawmakers in Europe want to demonstrate that the EU can decide its place in the world without depending on its long-term ally the US (...) When it became increasingly clear to Europeans that they would be left disappointed by Trump and his administration's decisions and in a climate of increasing strategic competition between the US and China, Europe was put in a position it had not been since the Second World War, that of striving for strategic autonomy, in an effort to avoid being squeezed in the new era of Great Power Competition*". GARCÍA-HERRERO, A., "The EU-China investment deal may be anachronistic in a bifurcating world", *Bruegel*, 6 April 2021, <https://www.bruegel.org/2021/04/the-eu-china-investment-deal-may-be-anachronistic-in-a-bifurcating-world/>

¹⁷ The following 2021 statement, signed by more than 100 experts and human rights activists from China, is devastating: "*CAI is based on a naïve misunderstanding of the Chinese Communist Party, its strategy, and its methods, exposing European nations to an array of unnecessary risks. The agreement sends a signal to Beijing that the European Union is willing to set aside evidence of egregious human rights abuses for the low price of a few vague promises of greater market access. Europe can no longer afford to ignore the politics of the Party while pretending the agreements like the CAI are just about trade.*" HONG KONG WATCH, "100+ China experts and human rights activists slam "naïve". EU-China deal for "entrenching Europe's strategic dependency on China", 25 January 2021, <https://www.hongkongwatch.org/all-posts/2021/1/25/100-china-experts-and-human-rights-activists-slam-naive-eu-china-deal-for-entrenching-europes-strategic-dependency-on-china>.

*sustained efforts on its own initiative to pursue ratification of the fundamental ILO Conventions No 29 and 105, if it has not yet ratified them. The Parties will also consider the ratification of the other Conventions that are classified as "up to date" by the ILO".*¹⁸

Well-meaning political statements such as those from Executive Vice-President and Commissioner for Trade Valdis Dombrovskis: *"We will engage closely with China to ensure that all commitments are fully honoured"* are deemed clearly insufficient.¹⁹

For those who claim that the CAI is a very well-planned smokescreen that gives the PRC breathing space at a time when its international credibility is low for a great many reasons²⁰ (Xinjiang, Hong Kong, Covid-19, cyber-attacks, etc.), the best outcome would be for the Agreement never to be signed or never to enter into force.²¹ According to one scholar: *"CAI is DOA - dead on arrival"*.²² Events over recent months certainly presage a less than bright future for the Agreement; in March 2021 the EU imposed sanctions against Chinese officials due to serious human rights violations and abuses against the Muslim Uyghur minority in the Chinese region of Xinjiang,²³ as a result of which China imposed harsh sanctions on several European entities and individuals in retaliation. This in turn generated the European Parliament resolution of 20 May 2021 concerning Chinese countersanctions on EU entities and MEPs and MPs, which declares that: *"any consideration of the EU-China Comprehensive Agreement on Investment (CAI), as well as any discussion on ratification by the European Parliament, has justifiably been frozen because of the Chinese sanctions in place"*²⁴.

¹⁸ EU-China Comprehensive Agreement on Investment (CAI), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237>.

¹⁹ EUROPEAN COMMISSION, "EU and China reach agreement in principle on investment", 30 December 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541.

²⁰ SILVER, L., DEVLIN, K., and HUANG, C., "Unfavorable Views of China Reach Historic Highs in Many Countries", 6 October 2020, <https://www.pewresearch.org/global/2020/10/06/unfavorable-views-of-china-reach-historic-highs-in-many-countries/>

²¹ DEMPSEY, J., "Judy asks: Is the EU-China Deal a Mistake?", 7 January 2021, <https://carnegieeurope.eu/strategieurope/83572>.

²² HAMILTON, D. S., "CAI is DOA", *Asia Europe Journal*, June 2021, pages 1-4.

²³ EUROPEAN COUNCIL, "EU imposes further sanctions over serious violations of human rights around the world", 22 March 2021, <https://www.consilium.europa.eu/en/press/press-releases/2021/03/22/eu-imposes-further-sanctions-over-serious-violations-of-human-rights-around-the-world/>

²⁴ The European Parliament goes on to state that: *"(it) demands that China lift the sanctions before Parliament can deal with the CAI, without prejudice to the final outcome of the CAI ratification process; expects the Commission to consult with Parliament before taking any steps towards the conclusion and signature of the CAI; calls on the Commission to use the debate around the CAI as leverage to improve the protection of human rights and support for civil society in China and reminds the Commission that Parliament will take the human rights situation in China, including in Hong Kong, into account when asked to endorse the CAI"*. EUROPEAN PARLIAMENT, Resolution of 20 May 2021 on Chinese countersanctions on EU entities and MEPs and MPs (2021/2644(RSP)). https://www.europarl.europa.eu/doceo/document/TA-9-2021-0255_EN.html.

Despite all this some scholars believe that the CAI will revive and emphasize the need for the PRC to lift these sanctions²⁵ so that the EU legislative process to ratify the Agreement can be resumed.²⁶ Even if this did not come about, it has also been pointed out that there is a major distinction between the formal ratification procedure for the CAI in the EU context (currently "frozen and disrupted") and the transactional and technical work (which "has not stopped").²⁷ If the CAI continues to be fine-tuned, the parties may present an Agreement on Investment Dispute Settlement (IDS)²⁸ in the future, which would breathe life into Article 3, Sub-Section 2, Section VI.

Interest in the CAI - and therefore this paper's relevance and objectives - definitely remains intact, since it is clear that Sino-European investment relations cannot turn their back on everything that has happened - and will quite possibly continue to happen - during these turbulent years.

III. WHY DOESN'T THE CURRENT EU-CHINA "AGREEMENT IN PRINCIPLE" COVER INVESTOR STATE DISPUTE SETTLEMENT?

As has emphasised in preceding sections, the CAI is a work in progress, a very *sui generis* investment agreement that is currently toothless when it comes to an issue as crucial for international investors as ISDS. Given the fact that the parties have not made an official statement regarding the ISDS-void in the January 2021 text, and that we are therefore moving in the shifting sands of hypotheses, this section presents some brief reflections on the reason for the Agreement's lack of coverage of ISDS. The best answer to the above question may come not from just one of the suppositions presented, but instead from a combination of various of them.

²⁵ However, there is an unfavourable precedent in this regard, which has led the PRC to refuse to review the China-Australia Free Trade Agreement. BIRTLES, B., "Beijing suspends China-Australia Strategic Economic Dialogue", 6 May 2021, <https://www.abc.net.au/news/2021-05-06/china-suspends-economic-framework-activities-with-australia/100121002>.

²⁶ HU, W., "The EU-China Comprehensive Agreement on Investment. An In-Depth Reading". *CEPS Policy Insights*, May 2021, <https://www.ceps.eu/ceps-publications/the-eu-china-comprehensive-agreement-on-investment/>

²⁷ The words belong to Cui Hongjian, Director of the Department of European Studies at the Chin Institute of International Studies. YEPING, Y, "China, EU still making preparations or investment deals despite hurdles", *Global Times*, 8 July 2021, <https://www.globaltimes.cn/page/202107/1228191.shtml>.

²⁸ This paper uses the expression "investor-State dispute settlement" (ISDS) in a general sense, since it is the one used most in the scholarly field. However, the term "investment dispute settlement" (IDS) will be used when referring specifically to the future EU-Chinese agreement, since this is the term used in the CAI.

1) A mere matter of (lack of) time

The possibility that the parties chose to present an incomplete CAI on the basis of the saying "something is better than nothing" should not be ruled out. As the negotiations were becoming somewhat protracted, and not only the PRC and EU but also the multiple stakeholders were growing impatient, it would not seem unreasonable for the parties to choose to focus on the better-developed aspects during the last stretch of the negotiations and, *sensu contrario*, temporarily shift attention away from those that were still in a more embryonic state.

Texts such as the conclusions of the 8th High-Level Trade and Economic Dialogue (HED) held in July 2020 show that different internal speeds had been generated within the CAI negotiating process, some of which were daunting: *"The EU registered the significant progress made on level playing field-related issues, while highlighting that here is still equally significant work to be done on key issues such as market access and sustainable development. On market access, the EU reiterated its call for improvements in the supply of China in the telecommunications sector and the Information technology, health, biotechnology and new energy vehicle sectors. Regarding sustainable development, the EU highlighted the political importance of significant commitments in this area and the need for China to increase its ambition and commitment. Regarding market access, the EU recalled its request to China to authorize exports of agricultural products from member states that are currently awaiting export authorization, such as the beef sector. The EU also expressed concern about the new restrictions introduced on food exports, for reasons of control of the coronavirus pandemic, which has led to a greater number of inspections, controls and requests for unjustified certificates on exports of agricultural products of the EU".*²⁹

2) A legal strategy to facilitate the CAI's entry into force

It is a well-known fact that labelling an investment agreement either an "EU-only agreement" or a "mixed agreement" entails fundamental practical consequences,³⁰ since

²⁹ EUROPEAN COMMISSION, "EU and China discuss trade and economic relations", July 28, 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1419.

³⁰ CHAISSE, J., "Promises and Pitfalls of the European Union Policy on Foreign Investment—How will the New EU Competence on FDI affect the Emerging Global Regime?" *Journal of International Economic Law*, 2012, vol. 15, n° 1, pages 51-84; REINISCH, A., "The future shape of EU investment agreements" *ICSID review*, 2013, vol. 28, n° 1, pages 179-196. Some scholars argue that, there is still a *de facto* strong competence struggle between the EU and its Member States in the area of negotiation and conclusion of international investment agreements, despite the transfer of competence over foreign direct investment to the EU achieved by the 2009 Treaty of Lisbon, and that this may explain situations that call into question EU legitimacy, such as national ratification hurdles. BASEDOW, R., "The EU's International Investment Policy Ten years on: the

in the latter case each member state needs to sign and ratify the agreement, and the EU already has a wealth of experience in the history of uncertainties and delays resulting from such circumstances.³¹

As European Court of Justice Opinion 2/15 clearly specifies that ISDS is a mixed competence,³² one logical consequence would be that agreements such as CAI included no ISDS provisions³³ so that the European Commission could present it as an EU-only agreement³⁴ in an attempt to facilitate its entry into force - although, as already pointed out, the chances that the European Parliament will ratify the Agreement have been looking ever slimmer in recent months.

From this perspective the EU-China "agreement in principle" would take a new "business as usual" approach, effectively imposed by CETA's labyrinthine ratification process;³⁵ this approach has been used in negotiations such as those leading up to the EU-Japan Economic Partnership Agreement (EU-Japan EPA). With respect to this latter text the Commission stated that: *"The agreement does not cover the protection of investment, on which negotiations are ongoing between the two sides for a potential agreement on the protection of investments. The EU has also tabled to Japan its reformed proposal on the Investment Court System. For the EU, it is clear that there can*

Policy-Making Implications of Unintended Competence Transfers", *JCMS: Journal of Common Market Studies*, 59.3, 2021, pages 643-660.

³¹ WESSEL, R. A. and VAN DER LOO, G. "The non-ratification of mixed agreements: legal consequences and solutions", *Common Market Law Review*, 2017, vol. 54, no 3, pages 735-770.

³² The Courts Opinion states: *"The Free Trade Agreement between the European Union and the Republic of Singapore falls within the exclusive competence of the European Union, with the exception of the following provisions, which fall within a competence shared between the European Union and the Member States: - the provisions of Section A (Investment Protection) of Chapter 9 (Investment) of that agreement, in so far as they relate to non-direct investment between the European Union and the Republic of Singapore; - the provisions of Section B (Investor-State Dispute Settlement) of Chapter 9; and - the provisions of Chapters 1 (Objectives and General Definitions), 14 (Transparency), 15 (Dispute Settlement between the Parties), 16 (Mediation Mechanism) and 17 (Institutional, General and Final Provisions) of that agreement, in so far as those provisions relate to the provisions of Chapter 9 and to the extent that the latter fall within a competence shared between the European Union and the Member States"*. EUROPEAN COURT OF JUSTICE, Opinion 2/15 of the Court, 16 May 2017, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN>.

³³ This is why scholars talk of the "demise" of ISDS in EU texts. GANTZ, D. A., "The CETA Ratification Saga: The Demise of ISDS in EU Trade Agreements", *Loy. U. Chi. LJ*, 2017, vol. 49, page 361.

³⁴ It is thus deemed *"unlikely that the Commission will propose to apply the agreement provisionally after the signature and before the ratification by the Council and European Parliament"*. VAN DER LOO, G., "Lost in translation? The Comprehensive Agreement on Investment and EU-China trade relations", 3 June 2021, <https://www.epc.eu/en/Publications/Lost-in-translation-The-Comprehensive-Agreement-on-Investment-and-EU~3f9d28>, page 13.

³⁵ BUNGENBERG, M., REINISCH, A., (eds), *CETA Investment Law. Article-by-Article Commentary*, Beck, 2021.

be no return to the old-style Investor to State Dispute Settlement System (ISDS)".³⁶
Looked at like this, the CAI would simply be following the same path.

3) A consensual strategy in pursuit of more efficient bilateral results

ISDS negotiations between the EU and the PRC's may in fact have been more advanced than could be perceived from Sub-Section 1), but that even so the parties chose to leave this issue out of the "agreement in principle". Awareness of the multiple opinions generated at international level by the January 2021 text is a very powerful tool for both the EU and the PRC, as it allows them to adapt their positions on such fundamental issues as ISDS and investment protection to the feedback received after the first round of the CAI. That is, it would be worth waiting in order to be able to produce a text that were better adapted to both the parties' expectations and current economic-political circumstances - which, as we all know, change extremely quickly.

4) A unilateral strategy to reduce the other party's bargaining power

A less well-meaning possibility that may ensue from the approach outlined above is the following: in the view of a large sector of academia, the PRC is the real winner of these 2013-2020 negotiations.³⁷ This would mean that the Celestial Empire would *a priori* be better positioned to occupy more territory than the other player during the second round of negotiations, to use a metaphor from the Chinese strategy board game *Go*. The scholars putting forward this hypothesis argue that it is not the first time that the PRC has offered to make concessions in advance and then pushed for an incomplete agreement, knowing that doing so the other party is put in a position of asymmetrical dependence.³⁸ With respect to CAI, once increased bargaining power has been obtained it is easier to impose one's will during the second round of negotiations, in which the real core of the investment agreement is at stake. Some authors have gone so far as to use expressions

³⁶ EUROPEAN COMMISSION, "Key elements of the EU-Japan Economic Partnership Agreement", 12 December 2018, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_6784.

³⁷ CARAFANO, J., GUPTA, A., and SMITH, J. M., "The Pitfalls of the China-EU Comprehensive Agreement on Investment", 22 January 2021. <https://thediplomat.com/2021/01/the-pitfalls-of-the-china-eu-comprehensive-agreement-on-investment/>

³⁸ For instance: "*the EU will become increasingly reluctant to criticize China on human rights or on the security situation in the South China Sea and Taiwan Strait*". SAMPSON, M. D., "The Downstream Implications of the EU-China Investment Agreement: Lessons from Trade", 1 March 2021, *Balsillie Papers*, <https://balsilliepapers.ca/bsia-paper/the-downstream-implications-of-the-eu-china-investment-agreement-lessons-from-trade/>, page 7.

such as “debt-trap diplomacy”³⁹ and “wolf warrior diplomacy”⁴⁰ to define the Chinese stance during the CAI negotiations, although they also warn that these terms might be exaggerations.

5) A unilateral delaying tactic to avoid addressing crucial pending issues

If Pandora’s box stays open and the PRC’s modus operandi and objectives are questioned, it could be argued that the current EU-China negotiation of new ISDS and investor protection agreements manages to divert observers’ attention from the red flags that are waving vigorously in the CAI text. As already noted, the vague language that avoids pinning the parties down, and the lack of a clear deadline for Chinese compliance with both labour rights and human rights can be described as a victory for China.

The stakeholders that are most critical of the PRC take it for granted that the country will not shoulder international commitments such as those cited in Section IV of the EU-China “agreement in principle”, because: “*The Party’s behaviour under Xi no longer affords any reason to believe it will be constrained by international agreements, much less this investment agreement (...) it is delusional to imagine that PRC will keep promises on these issues of investment and trade when it has broken its promises so regularly in recent years*”.⁴¹

However, from a European perspective it should be noted that votes of confidence of this type have indeed borne fruit in contexts such as the European Union and the Socialist Republic of Viet Nam Free Trade Agreement. Despite the programmatic language in provisions such as Article 13.4.3 of Chapter 13 of the EU-Vietnam FTA (“*Each Party shall: a) make continued and sustained efforts towards ratifying, to the extent it has not yet done so, the fundamental ILO conventions*”)⁴², Vietnam succeed in

³⁹ Sampson refers to the China-Pakistan FTA, which includes Article 83 (“*Unless otherwise agreed by the Parties, they shall negotiate trade in services after the conclusion of the negotiations of this Agreement*”). <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3389/china-pakistan-fta>) and he considers that this fractional negotiation is one of the causes of the very deteriorated currently situation of Pakistan vis-à-vis China (YOUNUS, U., “Pakistan’s Growing Problem with its China Economic Corridor”, 26 May 2021, <https://www.usip.org/publications/2021/05/pakistans-growing-problem-its-china-economic-corridor>).

⁴⁰ OEHLER-SINCAI, I. M., “Pros and Cons of the EU-China Comprehensive Agreement on Investment”, *Romanian Journal of European Affairs*, vol. 21.1, 2021, pages 74-92, page 86.

⁴¹ HONG KONG WATCH, “100+ China experts and human rights activists slam “naïve” EU-China deal for entrenching Europe’s strategic dependency on China”, 25 January 2021, <https://www.hongkongwatch.org/all-posts/2021/1/25/100-china-experts-and-human-rights-activists-slam-naive-eu-china-deal-for-entrenching-europes-strategic-dependency-on-china>.

⁴² Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam. <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

ratifying a significant number of ILO conventions on workers' rights and forced labour⁴³ and approving a new national labour code⁴⁴ in the period between the signature and ratification of the EVFTA. The possibility that the PRC may follow a similar inspiring path should not therefore be completely ruled out at this point.

6) Recognition of the importance and potential of the work being carried out by UNCITRAL Working Group III on ISDS reform

Another plausible hypothesis regarding the non-inclusion of an ISDS system in the January 22nd EU-China "agreement in principle" is that both parties may have decided to wait and see how work on the ISDS reform that UNCITRAL has been promoting since 2017 evolves. This would presuppose that both the EU and the PRC will opt for - or at least not rule out accepting - a new ISDS mechanism. If the EU's openness to change is unquestionable, the Chinese politburo has yet to set a single official position in stone, as discussed in Section IV.

The wording of Article 3 of CIA Section VI, which includes *"the progress on structural reform of investment dispute settlement in the context of UNCITRAL"*, has led some authors to believe that both the EU and the PRC are confident that this initiative will bear fruit. Despite the growing political-diplomatic tension between the two powers, the ISDS negotiations are expected to continue, and are a manifestation of China's *"increasing desire to shape multilateralism (...) as opposed to merely be shaped by it"*.⁴⁵

Another argument in favour of the PRC's accepting the new proposals under consideration in the UNCITRAL Working Group III framework is that the recently published Q&A on the EU website for the EU-China CAI includes an overt reference to the Multilateral Investment Court (MIC), which does not appear in Article 3: *"The common objective is to work towards modernised protection standards and a dispute settlement that takes into account the work undertaken in the context of UNCITRAL on a Multilateral Investment Court"*.⁴⁶

⁴³ ILO, "ILO welcomes European Parliament's approval for free trade deal with Viet Nam", 12 February 2020, https://www.ilo.org/hanoi/Informationresources/Publicinformation/Pressreleases/WCMS_736139/la-ng--en/index.htm.

⁴⁴ NGUYEN, K. D., NGUYEN, D. T., NGUYEN, D. D., and TRAN, V. A. T., "Labour law reform and labour market outcomes in Vietnam", *Asia & the Pacific Policy Studies*, 2021, pages 1-28.

⁴⁵ KONTANTINIDIS, M., "The EU-China Comprehensive Agreement on Investment: a tale of sound and fury", 9 February 2021, <https://www.ejiltalk.org/the-eu-china-comprehensive-agreement-on-investment-a-tale-of-sound-and-fury/>

⁴⁶ EUROPEAN COMMISSION, "Q&A: EU-China Comprehensive Agreement on Investment", 30 December 2020, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2543.

7) Proof that ISDS is a contentious issue between the EU and PRC

The EU has vigorously defended the Multilateral Investment Court (MIC) project in several forums (UNCITRAL, IIAs negotiations, academic meetings, etc.) since making its proposal public in 2015.⁴⁷ There can be no going back after its rejection of traditional ISDS, as some of its last-generation IIAs include a two-instance investment court system, with the hope that they will be replaced by the MIC in the near future.⁴⁸

In contrast to the extremely clear position adopted by the EU, the PRC has not made a direct statement opting for a single ISDS option and ruling out all other alternatives.⁴⁹ The document that best reveals the official Chinese stance on the issue so far is the 2019 submission from the Government of China in preparation for the thirty-eighth session of UNCITRAL Working Group III. However, the text is sufficiently broad and generic to give rise to various plausible interpretations, allowing the Chinese government to vary its position according to time and circumstances. As a starting point, China welcomes the ISDS reform initiative, condensing the main problems of the current ISDS mechanism into five points (arbitral awards lack a suitable error-correcting mechanism, arbitral awards lack stability and predictability, arbitrators' professionalism and independence are questionable, third-party funding affects the balance between parties' rights, and time frames are too long and costs too high). Following this standard presentation of the current state of the art, the Chinese government highlights the fact that it is "*open to possible proposals for improving the ISDS mechanism*" and points out six of the possible proposals that could be considered, stressing that they are non-exhaustive, since the proposals "*that can currently be considered include, but are not limited to (...)*". These six options will be analysed in more detail below, but it is worth noting that while China is fairly receptive to the potential implementing of an ISDS permanent appellate mechanism, the Chinese government also backs the parties' right to appoint arbitrators at the first-instance stage of investment arbitration - one of the distinguishing features of classic ISDS - because it "*is a widely accepted institutional arrangement that is an*

⁴⁷ EUROPEAN COMMISSION, "Investment in TTIP-the path beyond", <https://trade.ec.europa.eu/doclib/html/153408.htm>.

⁴⁸ BROWN, C. M., and GAARTHUIS, E., "Judicialization of ISDS. The European Union's approach to multilateral reform of investment dispute settlement", in LI, Y., QI, T., and BIAN, C. (eds.) *China, The EU and International Investment Law. Reforming Investor-State Dispute Settlement*, Routledge, 2020, pages 71-86.

⁴⁹ Defending this interpretation, CHENG, H., "Reforming ISDS. A Chinese perspective", in LI, Y., QI, T., and BIAN, C. (eds.) *China, The EU and International Investment Law. Reforming Investor-State Dispute Settlement*, Routledge, 2020, pages 100-111.

*important aid to enhancing the confidence of parties to disputes, especially investors, and should be retained in any reform process".*⁵⁰

If the parties' right to appoint arbitrators were to be consolidated as a *sine qua non* requirement for the Chinese government, this would be in direct conflict with the system outlined by the EU in terms of investment adjudicators. This clash of approaches to a not insignificant issue could be a solid base from which to argue that ISDS is currently a contentious issue between the EU and PRC in their negotiations. Various scholars envisage that the EU and China's attempts to reach an agreement on ISDS will run into serious problems;⁵¹ in short, the reality that will inevitably bite in the fields of investor protection and ISDS is the following: "*the radical differences in both parties' regulatory regimes and economic models will present substantial challenges in the implementation of FET, MFN and pre-establishment provisions going forward*".⁵²

IV. WHAT WOULD THE CONTENT OF THE EU-CHINA AGREEMENT ON INVESTMENT DISPUTE SETTLEMENT BE?

Before attempting to answer this question, a brief systemic reflection on the current relationship between the EU and the PRC is needed: is China the EU's friend or foe? The following 2019 European Commission statement has been much commented on and is extremely controversial⁵³ in this regard: "*China is, simultaneously, in different policy*

⁵⁰ GOVERNMENT OF CHINA, A/CN.9/WG.III/WP.177 - Submission from the Government of China, <https://undocs.org/en/A/CN.9/WG.III/WP.177>.

⁵¹ For instance, "*it seems likely that the PCR would prefer traditional ISDS over the ICS in the EU-China CAI and (...) this would be hardly acceptable for the EU*". BICKENBACH, F., and LIU, W. H., "Chinese Direct Investment in Europe - Challenges for EU FDI Policy", *CESifo Forum*, 2018, <https://www.ifo.de/DocDL/CESifo%20Forum-2018-4-bickenbach-liu-chinese-FDI-december.pdf>, page 21; "*(the CAI) may also contain provisions on sustainable development and make use of the EU's new Investment Court System (ICS), though there is still strong disagreement between the parties regarding these chapters*". HEINRICH BÖLL FOUNDATION, "EU-China comprehensive agreement on investment: A scoping study", 16 December 2020, <https://www.isds.bilaterals.org/?eu-china-comprehensive-agreement&lang=en>; "*China - which has basically accepted WTO dispute resolution because it is a key interest for the world's largest exporter to seek legal protection - is notoriously reluctant towards international legal processes in many areas*". GODEMENT, F., "Wins and Losses in the EU-China Investment Agreement (CAI)", *Institut Montaigne*, <https://www.institutmontaigne.org/en/publications/wins-and-losses-eu-china-investment-agreement-cai>.

⁵² HALLINAN, D., "The EU-China Bilateral Investment Treaty: a challenging first test of the EU's evolving BIT model", *China-EU Law Journal*, 2016, 5, pages 31-53, page 51.

⁵³ Some signs point to a "hot autumn 2021" in the relationship between the EU and the PRC. Josep Borrell, Commission Vice-President in charge of coordinating the external action of the European Union, recently declared: "*After the summer, I will present a report, together with the [European] Commission, to the European Council, analyzing our relationship with China to see if it is necessary to review the current strategy*". In relation to the report's content, it has been stated that "*two senior EU diplomats said the bloc has been under pressure from Beijing - as well as some*

areas, a cooperation partner with whom the EU has closely aligned objectives, a negotiating partner with whom the EU needs to find a balance of interests, an economic competitor in the pursuit of technological leadership, and a systemic rival promoting alternative models of governance. This requires a flexible and pragmatic whole-of-EU approach enabling a principled defence of interests and values".⁵⁴ President of the European Council Charles Michel's remarks in 2020 are also very significant in the CAI context: *"Engaging and cooperating with China is both an opportunity and necessity. But, at the same time, we have to recognize that we do not share the same values, political systems, or approach to multilateralism"*.⁵⁵

These statements show how complex and potentially unstable the current relationship between the EU and the PRC is. What has been revealed so far also shows that different European institutions' positions with respect to the EU-China "agreement in principle" are far from homogeneous (ranging from great satisfaction in the Commission to unveiled criticism in the European Parliament). This scenario, together with the Chinese government's lack of a definitive position on ISDS, makes it difficult to provide answers to questions such as the possible content of the EU-China Agreement on IDS. It should also not be forgotten that during the negotiations that resulted in the text of the CAI "agreement in principle", it was stated that EU member states were not fully informed.⁵⁶ This lack of transparency could also be alleged regarding the IDS Agreement negotiating process and could have negative consequences for the text's future.

This section is thus obliged to operate in the field of hypotheses once again, pointing out possible directions in which the EU-China ISDS negotiation could be directed. Time, and what happens as it passes, will close off some paths and, it is assumed, smooth others. It is therefore unlikely that some of the issues pointed out in the 2019 Chinese submission to UNCITRAL, such as the need to pay further attention to phenomena like third party funding and investment adjudicator/arbitrator conduct, will cause unavoidable differences to arise between the negotiating parties. The issue that could be expected to reflect different worldviews instead is the complex exercise of outlining the overall architecture of the ISDS mechanism that will be applicable to EU and Chinese investors

member countries - to remove its description of China as a systemic rival, though Borrell did not say if this would be part of his consideration". LAU, S., "EU mulls review of China policy, again", 29 July 2021, <https://www.politico.eu/article/eu-china-policy-review/>

⁵⁴ EUROPEAN COMMISSION, "European Commission and HR/VP contribution to the European Council, EU-China - A strategic outlook", 12 March 2019, <https://ec.europa.eu/info/sites/default/files/communication-eu-china-a-strategic-outlook.pdf>.

⁵⁵ EUROPEAN COUNCIL, "EU-China summit via video conference", June 22, 2020, <https://www.consilium.europa.eu/en/meetings/international-summit/2020/06/22/>.

⁵⁶ SZCZUDLIK, J., "Back to the Good Old Days? China's Run of Diplomatic Victories in Europe", 8 February 2021, <https://chinaobservers.eu/back-to-the-good-old-days-chinas-run-of-diplomatic-victories-in-europe/>

in the future. As explained below, the parties will be dealing with different architectural options that could be worlds apart from one another.

1) A permanent standing two-tier mechanism with full-time adjudicators

As is fully evident in the UNCITRAL Working Group III framework, the EU continues seamlessly to advocate the creation of "*a permanent standing two-tier mechanism with full-time adjudicators*", an option that the EU considers to be the only one that "*can successfully respond to all the concerns identified (in the Working Group)*", hence its request "*that this option be further developed by the Working Group, as a matter of priority*".⁵⁷

If the EU-China Agreement on Investment Dispute Settlement included the exact structure advocated by the EU, it would undoubtedly be a great victory, an example that EU had engaged with China, "*robustly defending EU interests and standing firm on our values*", as President Michel stated⁵⁸. This victory would also be the set point that might allow the negotiations carried out since 2013 to be re-analysed from another perspective, as well as being an extremely valuable precedent, not only for the future of UNCITRAL Working Group III but also for the many on-going IIA negotiations and others that could begin in the future. If, on the contrary, the EU renounces structuring the EU-China IDS via a permanent standing two-tier mechanism with full-time adjudicators, this would speak volumes about both parties' true bargaining power.

2) A multilateral and permanent appellate mechanism

Should the EU not obtain PRC support to implement a permanent standing two-tier mechanism with full-time adjudicators, and taking into account both UNCITRAL Working Group III progress and the 2019 Chinese submission to this organization, a plausible option for the PRC would seem to be to support a more moderate reform proposal embodied by means of a permanent appeal mechanism. The European Parliament itself has recently reminded the Commission that "*a number of the EU's major trading partners, including the USA and Japan, express little support for the creation of a MIC*".⁵⁹ Meanwhile, Chinese scholars have recently argued that: "*the two-tiered tribunal system is*

⁵⁷ EUROPEAN UNION "Possible reform of investor-State dispute settlement (ISDS). Submission from the European Union and its Member States", A/CN.9/WG.III/WP.159/Add.1. 24 January 2019, <https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1>.

⁵⁸ EUROPEAN COUNCIL, "EU-China summit via video conference", June 22, 2020, <https://www.consilium.europa.eu/en/meetings/international-summit/2020/06/22/>

⁵⁹ EUROPEAN PARLIAMENT, "Multilateral Investment Court", Legislative Train, June 2021, [https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/a-stronger-europe-in-the-world/file/multilateral-investment-court-\(mic\)](https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/a-stronger-europe-in-the-world/file/multilateral-investment-court-(mic)).

neither necessary on the bilateral level nor practical on the multilateral level (...) It would be neither necessary nor rational to totally abandon the current ad hoc arbitration system".⁶⁰ Besides this, in the IIAS field the PRC has already explicitly shown its support for the creation of an appellate review through texts such as Article 9.23 of the 2015 China-Australia Free Trade Agreement: "*Within three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered under Article 9.22 in arbitrations commenced after any such appellate mechanism is established. Any such appellate mechanism would hear appeals on questions of law.*"⁶¹ On the basis of these indications, maybe Europe should temper its expectations with regard to option contained in subsection 1).

Along with options a) and b), there is also a possibility that the PRC will propose and manage to impose other options - such as c), d) and e) outlined below - which, although far removed from the generalized currents of reform debated in the UNCITRAL framework, would nevertheless be deemed by the Chinese to be options that favoured its interests and worldview. As mentioned above, if reform options that are far removed from the MIC spirit are incorporated into the EU-China Agreement on Investment Dispute Settlement, the European Commission's defence of such a turnaround would be worth listening to in detail.⁶²

3) A Sino-European mechanism for settling investment disputes

In the recent past China has sometimes shown its willingness to intensify interstate cooperation with certain geographical areas through the implementing of regional initiatives on international arbitration. For instance, the China-Africa Joint Arbitration Centre (CAJAC) was created in 2015 as a result of the "*pressing need to establish a China-Africa Dispute Resolution Mechanism in support of mutual trade and investment,*"⁶³ identified in the Beijing and Johannesburg Consensuses. Following the creation of six

⁶⁰ XIAO, J., "Concrete issues in instituting an international investment court", in LI, Y., QI, T., and BIAN, C. (eds.) *China, the EU and International Investment Law. Reforming Investor-State Dispute Settlement*, Routledge, 2020, pages 87-99, especially pages 95 and 98.

⁶¹ China-Australia Free Trade Agreement (ChAFTA) <https://www.dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Pages/official-documents>.

⁶² However, if an appellate mechanism is chosen as a reform option in the UNCITRAL Working Group III framework before the content of the EU-Chinese IDS Agreement is specified, this would lower expectations regarding EU negotiating capacity and responsibility in the bilateral EU-Chinese context.

⁶³ WERKSMANS, "South Africa enters international arbitration stage", 18 August 2015, <https://www.polity.org.za/article/south-africa-enters-international-arbitration-stage-2015-08-18>

CAJACs (Johannesburg, Shanghai, Beijing, Shenzhen, Nairobi and OHADA), a common Set of Rules for the Resolution of China-Africa Disputes was adopted in 2020.⁶⁴

Nowadays, China may also be interested in extrapolating such kind of initiatives to the area of investment arbitration and making them work.⁶⁵ With respect to the CAI, a less global structure than those currently being analysed by UNCITRAL Working Group III could be beneficial to the PRC, which is increasingly showing a desire to leave behind the phase in which it was a mere rule-follower to become a true leader.⁶⁶ Such a drastic change of role is not easy to achieve in the short term in a truly international context. For example, China recently issued some allegations referring to the use of Chinese language under the current ICSID Rules and Regulations Amendment procedure: *“The issue of procedural language is very important in relation to whether the parties and their representatives can use the language to conduct arbitration proceedings and handle arbitration cases. For China, it is necessary to improve the use of Chinese in arbitration as much as possible, or at least to use it as an option. This is beneficial to practitioners in China who are involved in arbitration to learn about international investment arbitration cases, thus improving their professional skills”*.⁶⁷ Requests of this type and those referring to the profile of investment adjudicators would be more likely to find a bespoke response in the context of a prospective Sino-European mechanism for investment dispute settlement, for instance. If China opted to support the creation of a non-global mechanism of this type, which would bring together its national desiderata and would not necessarily

⁶⁴ It has to be indicated that a reading of Article 1 of the Rules (*“[CAJAC] has been established at the instance of the forum of China Africa Cooperation (FOCAC) to administer the resolution of international disputes arising between Chinese and African entities having the main residence, place of business, nationality located in China or a country in Africa”* 2020 CAJAC Rules, <https://cajacjh.com/>) and some legal comments on this initiative (DENTONS, “The China Africa Joint Arbitration Centre”, 26 January 2017, <https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/the-china-africa-joint-arbitration-centre>.) leads to the conclusion that CAJAC is centred on the resolution of commercial disputes.

⁶⁵ No statistics have been found on the number of arbitrations managed by the CAJAC centres. An analysis of the different sections of its web pages - of the centres that do have one - does not give the impression that the initiative has been very successful.

⁶⁶ QUI, T., “China’s policy on ISDS reform. Institutional choice in a diversified era”, in LI, Y., QI, T., and BIAN, C. (eds.) *China, the EU and International Investment Law. Reforming Investor-State Dispute Settlement*, Routledge, 2020, pages 112-123. In more general terms, reflecting on the Chinese role as a “revisionist power”, HUIYUN, F., “Is China a revisionist power?” *Chinese journal of international politics*, 2009, vol. 2, no 3, pages 313-334; ZHAO, S. “China as a Rising Power versus the US-led World Order. *Rising Powers Quarterly*, 2016, vol. 1, no 1, pages 13-21.

⁶⁷ ICSID Rules and Regulations Amendment - Working Papers. Compendium of State and Public Comments on WP #1 - March 15, 2019, <https://icsid.worldbank.org/resources/rules-amendments>, page. 72.

share the characteristics of the EU-promoted MIC,⁶⁸ the outcome could be a confrontation between two powers that both seem to have decided to become rule-makers in the ISDS field.⁶⁹

4) An Asia-centred mechanism for settling investment disputes linked to the Asian Infrastructure Investment Bank

Another option pointed out by commentators is to create an international centre for investment dispute resolution that is linked to the Asian Infrastructure Investment Bank, a multilateral and recently created entity in which China plays a major role.⁷⁰ The proposed structure is based on the ICSID-World Bank relationship⁷¹ and should benefit China because of its Asia-centred approach. It also offers the possibility of creating from scratch a structure capable of surmounting the ISDS legitimacy crisis, modelling an entity that would embody some of the solutions to have emerged from contexts such as UNCITRAL.

There are arguments in favour of believing that now is the ideal time for China to take the lead in creating an Asia-centred mechanism for settling investment disputes that reinforces the country's growing importance in the ISDS context. In a comparative sense it has been stated that: "*China's positive experience in WTO dispute settlement will enhance its self-confidence and capacity in the settlement of investment disputes in a future institutionalized investment court*".⁷²

5) Existing Chinese-led arbitration mechanisms

During the official presentation of the Belt and Road Initiative (BRI) the Chinese government explained that it: "*aims to promote the connectivity of Asian, European and*

⁶⁸ Reflecting of this issue, DU, M., and SHEN, W., "The Future of Investor-State Dispute Settlement: Exploring China's Changing Attitude", in CHAISSE et al. (eds.), *Handbook of International Investment Law and Policy*, Springer, 2021, pages. 1-24.

⁶⁹ Regarding China's evolution, SHAMBAUGH, D., *China Goes Global*, OUP, 2015.

⁷⁰ WANG, H., "The New Development Bank and the Asian Infrastructure Investment Bank: China's Ambiguous Approach to Global Financial Governance", *Development and Change*, 2019, vol. 50, n° 1, pages 221-244.

⁷¹ This author's proposal is materially more ambitious, since it suggests that the Centre should also resolve both state-state disputes and also commercial disputes via dispute boards, establishing contacts through institutions such as FIDIC (the International Federation of Consulting Engineers), the International Chamber of Commerce, and the Dispute Resolution Board Foundation (DRBF). DAHLAN, M. R., "Dispute Regulation in the Institutional Development of the Asian Infrastructure Investment Bank: Establishing a Normative Legal Implications of the Belt and Road Initiative", in QUAYLE, P., and GAO, X., (eds.), *AIIB Yearbook of International Law 2019: International Organizations and the Promotion of Effective Dispute Resolution*, Brill 2019, page 129.

⁷² CHENG, H., "Reforming ISDS. A Chinese perspective", in LI, Y., QI, T., and BIAN, C. (eds.) *China, the EU and International Investment Law. Reforming Investor-State Dispute Settlement*, Routledge, 2020, pages 100-111, page 106.

African continents and their adjacent seas, establish and strengthen partnerships among the countries along the Belt and Road, set up all-dimensional, multitiered and composite connectivity networks, and realize diversified, independent, balanced and sustainable development in these countries. The connectivity projects of the Initiative will help align and coordinate the development strategies of the countries along the Belt and Road, tap market potential in this region, promote investment and consumption, create demands and job opportunities (...).⁷³

Implementing this truly pharaonic project has brought about a dramatic increase in outbound Chinese investment over the past decade, generating Chinese financial interests in more than 70 countries.⁷⁴ The BRI has also caused the Chinese government to reflect more deeply on how to face the legal problems that may arise from BRI expansion in so many and varied foreign countries. In this regard, scholars agree that arbitration is becoming consolidated in China as a mechanism to solve disputes arising from implementing the BRI, not only in the commercial dispute field but also in the investment area.⁷⁵

The following are examples of this trend⁷⁶: in 2016 the Shenzhen Court of International Arbitration (SCIA), which was set up in 1983 to develop China's international commercial

⁷³ STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, "Action plan on the Belt and Road Initiative", 30 March 2015, http://english.www.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm.

⁷⁴ WANG, H. Y., and MIAO, L., "China's Outward Investment. Trends and Challenges in the Globalization of Chinese Enterprises", in CHAISSE, J., (ed.) *China's International Investment Strategy. Bilateral, Regional and Global Law and Policy*, Oxford University Press, 2019, pages 41-55; DU, J., and ZHANG, Y., "Does One Belt One Road initiative promote Chinese overseas direct investment?", *China Economic Review*, 2018, vol. 47, pages 189-205; JOHNSTON, L. A., "The Belt and Road Initiative: what is in it for China?", *Asia & the Pacific Policy Studies*, 2019, vol. 6, n° 1, pages 40-58; DAHLAN, M. R., "Envisioning foundations for the law of the Belt and Road Initiative: Rule of Law and Dispute Resolution Challenges", *Harvard International Law Journal Essay*, vol. 62, 2020, pages 1-21; XING, L., *Mapping China's One Belt One Road Initiative*, Palgrave, 2019.

⁷⁵ TAO, J., and ZHONG, M., "The Changing Rules of International Dispute Resolution in China's Belt and Road Initiative", in ZHANG, W., ALLON, I., and LATTEMANN, C., (eds.) *China's Belt and Road Initiative. Changing the Rules of Globalization*. Palgrave Macmillan, 2018, pages 305-320; NORTON, P. M., "China's Belt and Road Initiative: Challenges for Arbitration in Asia", *U. Pa. Asian L. Rev.*, 2018, vol. 13, pages 72-101; NORTON, P. M., "China's Belt and Road Initiative: Challenges for Arbitration in Asia", *U. Pa. Asian L. Rev.*, 2018, vol. 13, pages 72-101.

⁷⁶ Other interesting initiatives recently developed by China to take on and consolidate competences in the resolution of international commercial disputes remain outside the scope of this article. For instance: a) international commercial courts; b) the CICC's One-Stop Multi-tier Dispute Resolution Platform (<http://cicc.court.gov.cn/html/1/219/208/209/2097.html>); c) the establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions (ICDPASO) (<http://cicc.court.gov.cn/html/1/219/208/210/819.html>); a context in which the principle of diversified dispute resolution is stressed, as also applies to the promotion of the ICC as an institution "ideally placed to resolve disputes arising out of Belt and Road projects" (<https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/>). ZHANG, J., "International Commercial Dispute Prevention and Settlement Organization: A Quick Overview", 15 October 2020, <https://www.chinajusticeobserver.com/a/thing-about-international-commercial-dispute-prevention-and-settlement-organization>.

arbitration, amended its arbitration rules to state that its jurisdiction extended to “*arbitration cases related to investment disputes between states and nationals of other states*”.⁷⁷ Along the same lines, in 2018 SCIA and ICSID concluded a Cooperation Agreement, declaring that “*ICSID and SCIA will provide each other with hearing and supporting facilities as well as translation, case management and other related services. Meanwhile, both sides will jointly promote arbitration, mediation and other ADR methods in the business and legal communities; they will also exchange information and jointly organize events in the above fields.*”⁷⁸ The China International Economic and Trade Arbitration Commission (“CIETAC”) adopted its International Investment Arbitration Rules in 2017, and Article 2 states: “*Based on the arbitration agreement between the parties, CIETAC accepts cases involving international investment disputes arising out of contracts, treaties, laws and regulations, or other instruments between an investor and a State, an intergovernmental organization, any other organ, agency or entity authorized by the government or any other organ, agency or entity of which the conducts are attributable to a State.*”⁷⁹ In 2019 the Beijing Arbitration Commission (BAC) - also known as the Beijing International Arbitration Center (BIAC) - launched its Rules for International Investment Arbitration, which following the opinion of a Chinese scholar, have devised “*a ‘Chinese approach’ to the issues and drawbacks of the current investment arbitration regime*”.⁸⁰ The fact that one of these novelties is the possibility of appealing against investment awards is striking⁸¹.

Chinese scholars point out that resolving investment disputes through Chinese institutions such as those mentioned above would show that their “*high efficiency and low cost*” make them very attractive global alternatives in the future of ISDS.⁸² If this is the case, does it really pay for China to be convinced by the legislative options currently being pondered in UNCITRAL (a permanent standing two-tier mechanism with full-time

⁷⁷ SCIA Arbitration Rules. <http://www.scia.com.cn/en/index/rulelist.html>.

⁷⁸ SCIA, “SCIA Concludes Cooperation Agreement with ICSID in Washington, D.C.”, <http://www.scia.com.cn/en/index/newsdetail/id/3582.html>.

⁷⁹ CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, International Investment Arbitration Rules For Trial Implementation. <http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en>.

⁸⁰ CHEN, Y., “International Investment Arbitration: A Chinese Approach to the Concerns over Investment Arbitration Regime”, 20 March 2019, <http://arbitrationblog.kluwerarbitration.com/2019/03/20/new-2019-bac-rules-for-international-investment-arbitration-a-chinese-approach-to-the-concerns-over-investment-arbitration-regime/>

⁸¹ Article 46 and Appendix E. https://www.bjac.org.cn/page/data_dl/2019%E6%8A%95%E8%B5%84%E4%BB%B2%E8%A3%81%E8%A7%84%E5%88%990905%20%E8%8B%B1%E6%96%87.pdf.

⁸² CHENG, H., “Reforming ISDS. A Chinese perspective”, in LI, Y., QI, T., and BIAN, C. (eds.) China, *the EU and International Investment Law. Reforming Investor-State Dispute Settlement*, Routledge, 2020, pages 100-111, page 104.

adjudicators, a multilateral and permanent appellate mechanism, etc.)? Wouldn't it be more beneficial for China to expand the application of its existing China-led arbitration mechanisms to future ISD Agreements such as the EU-China Agreement?

Some observers feel that the BRI is creating the right ecosystem for China “as an engine of not only economic power, but also soft power transformation in pioneering international legal norms”.⁸³ In a nutshell, a global and “institutional competition on Investor State arbitration”⁸⁴ may be about to emerge, and perhaps for this reason the provisions regarding the submission of arbitration claims in recent China-negotiated FTAs, together with the classic references to the ICSID Convention and the UNCITRAL Arbitration Rules have also included the following option: “if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.”⁸⁵ The EU-China ISD Agreement could well include a similar reference.

6) Less confrontational ISDS mechanisms

These reflections on the possible content of the EU-China Agreement on IDS should include a brief reference to other ADR mechanisms such as mediation, which are very important in China. Chinese scholars emphasize that mediation is highly thought of at national level, and they also stress the positive outcomes resulting from the specific “mediation+arbitration”⁸⁶ institution in China.⁸⁷ so much so that some Chinese institutions already offer this combined model to settle international investment disputes. For example, Article 43 of the CIETAC International Investment Arbitration Rules outlines a combination of conciliation⁸⁸ with arbitration in which the arbitral tribunal itself also

⁸³ GU, W., “China’s Belt and Road Development and a New International Commercial Arbitration Initiative in Asia”, *Vand. J. Transnat’l L.*, 2018, vol. 51, pages 1305-1352, page 1305.

⁸⁴ QI, T., “China’s policy on ISDS reform. Institutional choice in a diversified era”, in LI, Y., QI, T., and BIAN, C. (eds.) *China, the EU and International Investment Law. Reforming Investor-State Dispute Settlement*, Routledge, 2020, pages 112-123, page 116.

⁸⁵ Article 8.24.3 of the 2019 China-Mauritius FTA (signed but not in force), <https://www.mcci.org/en/global-marketplace/trade-agreements/mauritius-china-fta/>; Article 9.12.4 of the 2015 China-Australia FTA, <https://www.dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Pages/official-documents>; Article 12.12.3 of the 2015 China-Korea FTA, <https://aric.adb.org/fta/peoples-republic-of-china-korea-free-trade-agreement>.

⁸⁶ The term mediation + arbitration is used here because it is used in CIETAC, but it should be noted that most authors use the term Arb-Med, denoting the fact that mediation is usually used once the parties have entered into arbitration.

⁸⁷ GU, W., “Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med (-Arb) and Its Global Implications”, *Wash. Int’l LJ*, 2019, vol. 29, page 117; CHENG, H., “Reforming ISDS. A Chinese perspective”, in LI, Y., QI, T., and BIAN, C. (eds.) *China, The EU and International Investment Law. Reforming Investor-State Dispute Settlement*, Routledge, 2020, pages 100-111, page 106.

⁸⁸ It is beyond the scope of this paper to take a close look at the debate on whether mediation and conciliation should be considered different or comparable mechanisms. The term mediation is used

undertakes the conciliation unless the parties object.⁸⁹ Article 48 of the SCIA Arbitration Rules also provides that: “*Where the parties wish to mediate, the arbitral tribunal may conduct mediation during the arbitration proceedings. If the parties agree that the arbitrator(s) conduct the mediation, the arbitrator(s) who have conducted the mediation can continue to serve on the arbitral tribunal in the subsequent arbitration proceedings, unless otherwise agreed by the parties or provided by the applicable laws.*”⁹⁰ This kind of mediation + arbitration model might be one of the options addressed by Chinese negotiators in the EU-China IDS Agreement context.

With the aim of showing the importance that it attached to mediation⁹¹ the Chinese government’s 2019 submission to UNCITRAL Working Group III expressly supported the establishing of a more effective investment conciliation mechanism, arguing that: “*investment conciliation emphasizes the value of harmony and can offer the host country and investors a high degree of flexibility and autonomy. Conciliators also have more opportunities to adopt creative and forward-looking methods to promote the settlement of investment disputes, thereby helping the parties to achieve mutually beneficial results as well as avoiding lengthy arbitration processes and high litigation costs. From the broader perspective of practical dispute resolution experience, adopting alternative dispute resolution measures is more advantageous for maintaining long-term cooperative relationships between investors and host Governments. In addition, it helps host countries to protect foreign investment through appropriate measures, thus serving the purpose of averting disputes and avoiding intensification of conflicts.*”⁹² This approach is perfectly aligned with the various recently developed international initiatives (ICSID’s Proposed Mediation Rules, IMI Competency Criteria for Investor-State Mediators, the Singapore Convention on Mediation, etc.) in order to attach greater practical importance to mediation in the ISDS context.

here (except when a legal text that uses the term *conciliation* is reproduced) and it is understood that when *conciliation* is used in the investment dispute context, the choice of the term is largely influenced by original ICSID terminology.

⁸⁹ CIETAC International Investment Arbitration Rules.
<http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en>.

⁹⁰ SCIA Arbitration Rules,
[http://www.scia.com.cn/files/fckFile/file/SCIA%20Arbitration%20Rules%20\(effective%20from%20Feb_%202021,%202019\).pdf](http://www.scia.com.cn/files/fckFile/file/SCIA%20Arbitration%20Rules%20(effective%20from%20Feb_%202021,%202019).pdf).

⁹¹ MCLAUGHLIN, M, “Investor-State Mediation and the Belt and Road Initiative: Examining the Conditions for Settlement”, *Journal of International Economic Law*, 2021 (advance articles) <https://doi.org/10.1093/jiel/jgab028>.

⁹² GOVERNMENT OF CHINA, A/CN.9/WG.III/WP.177 - Submission from the Government of China, <https://undocs.org/en/A/CN.9/WG.III/WP.177>.

All these signs ultimately point to the notion that mediation, whether conceived as an autonomous ADR⁹³ or in a combination such as med + arb, may play a vital role in the EU-China IDS Agreement, without being an issue that could in principle create discord between the parties. Taking into account the importance that the Chinese government also attaches to other mechanisms such as pre-arbitration consultation procedures⁹⁴, a scenario can be pictured in which the current quasi-monopoly of investment arbitration is replaced by a much more plural and varied panorama.⁹⁵

V. WHAT HAPPENS UNTIL THE EU-CHINA IDS AGREEMENT ENTERS INTO FORCE?

Having reflected on two crucial questions regarding the CAI (Why doesn't the current EU-China "agreement in principle" cover ISDS? and what would the content of the EU-China Agreement on IDS be?), it is now necessary to return to the present and its realities, with the aim of providing a succinct answer to the question: what happens until the EU-China IDS Agreement enters into force - assuming that this actually happens?

First of all, it should be made clear that if we abide by the provisions of the CAI text itself, the parties will endeavour to complete their IDS negotiations within two years after the Agreement is signed. However, there are some question marks hanging over this time frame's feasibility. Some authors have pointed out that "*there are no real incentives to bring the parties to the negotiating table and make them seek consensus (e.g., a provision that the whole CAI expires if a solution on this issue is not reached)*".⁹⁶ Additionally, it should not be forgotten that the 2013 mandate adopted by the European

⁹³ ZHAO, C., "Investor-State Mediation in a China-EU Bilateral Investment Treaty: Talking About being in the Right Place at the Right Time", *Chinese Journal of International Law*, number 17, 2018, pages 111-135.

⁹⁴ The Chinese government stated: "*China supports the inclusion of pre-arbitration consultation procedures, specifying that the investor and the central Government of the host country are the consultation principals, and stipulating consultation as a compulsory obligation of both parties. Similar rules have been incorporated in many international investment agreements and have played a very positive role in resolving investment disputes. Three to six months of consultation prior to the commencement of arbitration proceedings will be helpful for settling investment disputes. Investors and host countries can use this procedure to gain a clearer understanding of each other's claims, the measures involved and the legal provisions of the host country, as well as to explore possible solutions in order to avoid having disputes escalate to arbitration proceedings*". GOVERNMENT OF CHINA, "A/CN.9/WG.III/WP.177 - Submission from the Government of China", <https://undocs.org/en/A/CN.9/WG.III/WP.177>.

⁹⁵ Highlighting the relevance of mediation in the BRI context, see for instance the *Beijing Joint Declaration, for the Belt and Road Initiative (BRI)*, <https://www.bimacc.org/joint-declaration-for-the-belt-and-road-initiative-bri/>

⁹⁶ THE POLISH INSTITUTE OF INTERNATIONAL AFFAIRS, "EU-China Agreement on Investment: political and economic implications for the European Union", March 2021, https://pism.pl/publikacje/EUCHINA_COMPREHENSIVE_AGREEMENT_ON_INVESTMENT_POLITICAL_AND_ECONOMIC_IMPLICATIONS_FOR_THE_EUROPEAN_UNION.

Council for the Commission to negotiate an investment agreement with the PRC on the EU's behalf indicated that “*the aim would be to complete negotiations no later than two and a half years after they have started*” - yet the “agreement in principle” still took more than seven years. Therefore, the two-year post-signing period envisaged for the Agreement's completion could well turn out to be merely wishful thinking.

These uncertainties make it more necessary to specify that until the EU-Chinese IDS Agreement exists in a formal sense, the ISDS provisions contained in the various EU member state and PRC BITs continue to apply. IIAs databases show that all EU countries except Ireland currently have a BIT with the PRC in force.⁹⁷ These texts differ in fundamental aspects, not only with respect to the date of their entry into force (e.g., the BIT with Norway has been in force since 1985, while that with France came into force in 2010), but also regarding their ISDS content. Scholars studying Chinese policy on IIAs at both European and international level organise the evolution of Chinese practice vis-à-vis IIAs into various phases.⁹⁸ All agree that the first-phase Chinese BITs were very restrictive; some of the first-generation BITs between EU countries and China do not include the option of using international arbitration to settle disputes between investors and the host state - e.g., the 1988 Austria-China BIT- while others - e.g., the 1991 China-Hungary BIT, do allow this but limit it to certain matters - e.g., the exactness of the amount of compensation for expropriation - and block the arbitration option for all other possible investment claims - e.g., disputes over substantive protection standards other than expropriation. It is clear from subsequent generations of BITs between EU member states and the PRC that this initially restrictive approach has become more flexible, and more recent ISDS provisions - e.g., the 2005 China-Germany BIT - have broader ISDS clauses. This is a logical legal development based on the evolution of Chinese FDI policy, as in the last three decades the PDR has gone from being a developing country receiving

⁹⁷ For instance, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china>.

⁹⁸ Depending on the author, there have been either three or four generations of Chinese BITs and scholars do not always agree on the periods in which they were created: LI, Y. and BIAN, C., “China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options”, *Netherlands International Law Review*, 2020, vol. 67, no 3, pages 503-551; BERGER, A., “China and the global governance of foreign direct investment. The emerging liberal investment treaty approach”, 2008, https://www.die-gdi.de/uploads/media/DP_10.2008.pdf; ABGARYAN, S., “EU-China comprehensive agreement on investment in the context of Chinese bilateral investment treaty program with the EU countries”, *Indian Journal of International Law*, 2018, vol. 58, no. 1, pages 171-203; WENHUA, S. “The international law of EU investment in China”, *Chinese J. Int'l L.*, 2002, vol. 1, pages 555-613, pages 601-611; YAMADA, H., “Forgotten Promises: Bilateral Investment Treaties Between CEE and China”, 6 November 6 2020, <https://chinaobservers.eu/forgotten-promises-bilateral-investment-treaties-between-cee-and-china/>; GLOUEMAN, L., and SALIDJANOVA, N., “Policy Considerations for Negotiating a U.S.-China Bilateral Investment Treaty”, 1 August 2016, <https://www.uscc.gov/research/policy-considerations-negotiating-us-china-bilateral-investment-treaty>, pages 9-10.

investment flows from the EU to a superpower with a significant and increasing investment weight within the EU.

The survival of a plethora of EU-Chinese BITs that provide different levels of ISDS protection for investors is therefore a regrettably uncertain factor, not only for EU⁹⁹ but also for Chinese investors - which will sometimes also be State-Owned Enterprises.¹⁰⁰ It has been stated that initiatives such as the BRI are consolidating the PRC's profile as a capital-exporting country, and the near future could see an increase in the number of Chinese investors alleging BIT violations on the part of EU member states, and therefore experiencing the different levels of protection in their treaties.

In principle this flaw could be dealt with by modernizing the EU-Chinese BITs on a case-by-case basis - amending existing BITs and/or negotiating new ones- but the Chinese government's recent submission to UNCITRAL¹⁰¹ demonstrates its conviction that this is not the optimal solution: "(...) believes that among the many problems that

⁹⁹ Although the PRC currently has more than 100 IIAs in force, the number of ICSID claims in which the PRC was the defendant has so far been very low, not only with respect to EU investors but also globally. To be specific, only five claims against the PRC have been reported on the ICSID website (<https://icsid.worldbank.org/cases/case-database>) since China became a signatory party to the ICSID convention in 1993. A study of these cases was carried out by: WILLEMS, J., "Investment Disputes under China's BITs. Jurisdiction with Chinese Characteristics", in CHAISSE, J., (ed.) *China's International Investment Strategy. Bilateral, Regional and Global Law and Policy*, Oxford University Press, 2019, pages 444-461; SHAN, W., *China and International Investment Law. Twenty Years of ICSID Membership*, Brill, 2015; WILSON, C., "Protecting Chinese Investment Under the Investor-state Dispute Settlement Regime. A Review in Light of Ping An v. Belgium", in CHAISSE, J., (ed.) *China's International Investment Strategy. Bilateral, Regional and Global Law and Policy*, Oxford University Press, 2019, pages 462-488. This very low rate of investment litigation against the PRC, known to academics as "the China paradox" (CHAISSE, J., and OLAOYE, K. F., "The Tired Dragon: Casting Doubts on China's Investment Treaty Practice, *Berkeley Business Law Journal*, vol. 17, 2020, pages 134-193, page 187), has been interpreted by commentators in highly diverse ways, some of which are, surprising to say the least: "These BITs, which will remain in place, are hardly used by EU investors in China, arguably because EU companies fear Chinese retaliation against their investments or (future) activities in China". VAN DER LOO, G., "Lost in translation? The Comprehensive Agreement on Investment and EU-China trade relations", 3 June 2021, <https://www.epc.eu/en/Publications/Lost-in-translation-The-Comprehensive-Agreement-on-Investment-and-EU-3f9d28>, page. 10. In the same sense: "European investors anyway indicated during the negotiating process that they would refrain from using ISDS against China due to fears over retaliation". BASEDOW, R., "Putting the China-EU investment agreement in perspective - and assessing the lessons for the UK", <https://blogs.lse.ac.uk/europpblog/2021/03/23/putting-the-china-eu-investment-agreement-in-perspective-and-assessing-the-lessons-for-the-uk/>

¹⁰⁰ The specific legal regime governing Chinese State-Owned Enterprises (SOES) may pose problems in the ISDS context. SPANO, A., "The EU-China CAI Negotiations and ISDS Mechanisms: the Role and Status of Chinese SOEs", *EU-China Observer* 2.17, https://www.coleurope.eu/system/files_force/research-paper/eu-china_observer217.pdf?download=1.

¹⁰¹ Some academics share this critical vision of this type of "legal craft": "Considering the fact that to modernize the large number of Chinese BITs on a treaty-by-treaty basis would be an onerous and formidable task, one may deem that it is in China's long-term interest to support the route of a MIC." LI, Y. and BIAN, C., "China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options". *Netherlands International Law Review*, 2020, vol. 67, no. 3, pages 503-551, esp. page 534.

have come to light, some of the institutional issues tend not to lend themselves to resolution through bilateral investment agreements between Member States. Rather, they need to be resolved by improving the structure of multilateral ISDS rules and mechanisms, along with a review and formulation of balanced rules for dispute resolution."¹⁰² As clearly stated above, the EU also wishes to turn the page regarding the ISDS mechanisms provided for in these BITs. Therefore, contrary to the statement at the beginning of this section - declaring the non-existence of real incentives to negotiate the EU-China IDS Agreement - it seems that in reality there are incentives: as long as the old BITS remain, the risk of unwanted classic ISDS claims increases. The present and future of EU-China investment relations therefore need an IDS Agreement, since the transitory solution suggested by academics (*"lobby policy-makers to take up their grievances under [CAI] state-to-state dispute settlement"*)¹⁰³ cannot and should not become the general rule.

VI. CONCLUSION

There is no official information on the current state of the negotiations for the drafting of an EU-China Agreement on IDS. It is therefore not known whether the European Parliament's decision to block the CAI ratification process in spring 2021 has influenced the progress of negotiations on highly important matters such as the ISDS mechanism, which was not covered by the EU-Chinese "agreement in principle". In turbulent times like these, in which states are facing sometimes unpredictable and usually rapidly mutable global challenges, international investment negotiations such as those that currently link the European Union and the PRC face the challenge of combining principles and goals that are often difficult to marry together. For example, if the EU is to convince the PRC of the benefits of its ISDS model (a permanent standing two-tier mechanism with full-time adjudicators), this requires European negotiators to penetrate their counterparts' "Chinese Wall", when they are internationally renowned for their persistence and toughness. This would also have to be achieved within time frames that could be limited, not only taking into account the indications in the CAI, but also because other international players such as the Biden administration could manage to refocus China's attention on a different investment negotiation that aims to implement a new gold standard in the future ISDS system.

¹⁰² GOVERNMENT OF CHINA, A/CN.9/WG.III/WP.177 - Submission from the Government of China, <https://undocs.org/en/A/CN.9/WG.III/WP.177>.

¹⁰³ BASEDOW, R., "Putting the China-EU investment agreement in perspective - and assessing the lessons for the UK", *London School of Economics*, <https://blogs.lse.ac.uk/europpblog/2021/03/23/putting-the-china-eu-investment-agreement-in-perspective-and-assessing-the-lessons-for-the-uk/>

As argued throughout this paper, the negotiations to determine the ISDS mechanisms in the EU-China CAI are actually reflections of the aspirations to become ISDS global rule-makers of two powers that hold different legal worldviews and whose economic interests are frequently opposed. A well-known image from the of mediation field comes to mind here, in which two icebergs only show the tips of their respective positions, leaving the great mass of each party's real interests below the surface. Going below the surface and discovering the parties' shared interests is not an easy task, but it is essential if a consensual response that satisfies them both is to be achieved. The proposals regarding the possible content of the EU-China IDS Agreement set out here may be useful for lighting the way during the search for shared Sino-European interests in the ISDS field, as well as for translating them into a future Agreement.