CRITICAL ANALYSIS OF THE NEW CHINESE FOREIGN INVESTMENT LAW IN THE PRISM OF CHINA-EU CAI AND CHINA-US BIT NEGOTIATIONS

Chunping Bush, University of Exeter

ABSTRACT

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

Keywords: Chinese Foreign Investment Law, Investment Agreement, Bilateral Investment Treaties, Market Access, Dispute Resolution Mechanism, Forced Technology Transfers

INTRODUCTION

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

China adopted its new Chinese Foreign Investment Law (the New Law 2019) in 2019. The New Law and the Regulation for Implementing the Foreign Investment Law of the People's Republic of China 2019 (the Implementing Rule 2019) completely overhauled China's FDI legal system (Alexeeva & Lasserre, 2018). It finally brought the scattered old system to a new FDI era with the aim of meeting the demand of foreign investors and international standards. Being branded as a 'landmark achievement' for China's pursuance of market liberalisation and economic reform, the New Law reshaped China's FDI legal system by dealing with the thorny issues of the old system; it included the key provisions of providing a level playing field, the dispute resolution mechanism and the enhanced investment protection. China used this enactment to build a law-based market environment with stability, transparency, predictability and fair competition.

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Both the EU and China started to negotiate the China-EU Comprehensive Agreement on Investment (CAI) from 2013 and concluded the CAI in Principle in December 2020. The China-EU CAI was viewed as one of the most important investment agreements to be signed by the EU, 'almost as important as the China-US BIT'. In comparison, the road to conclude a China-US BIT was a roller coaster, mixed with halts and restarts of negotiations between these two countries after 1982. Despite these challenges, the China-US BIT was touted as being a 'higher-standard and comprehensive', 'the most worthwhile,' and 'the most difficult one in history' for foreign investment (Brown, 2021). By June 2016 the China-US BIT achieved near completion and addressed some of the main issues to achieve a greater bilateral FDI. The main issues under the China-US BIT negotiation largely coincide with that of the China-EU CAI. This included restricted market access, performance and localisation requirements, discriminatory treatment of foreign investors and a discretionary and opaque national security review mechanism. The China-US BIT talk was suspended during Trump's administration and no fresh talks took place after Biden become President. Likewise, the ratification of China-EU CAI was suspended in May 2021 after Beijing's sanctioning of European officials as well as in response to the Chinese government's treatment of the Uighurs in Xinjiang. The formal ratification process was further fettered by the Ukraine war whereby China and the EU differed on their approaches to ending the war. Despite this, China remained committed to pushing forward the progress of BIT talks with the US as of 2020, while still remaining interested in reactivating the suspended CAI with its EU partner. Hence, the China-US BIT and the suspended CAI are no doubt hanging by a thread with little hope for revival in the short term amid the current political uncertainty and the on-going tit-for-tat sanctions from both sides (Du, 2024).

The China-EU CAI and the China-US BIT negotiation had a huge influence on the reform of Chinese FDI legal system as well as culminating in the adoption of the New Chinese FDI Law in 2019. The China-EU CAI provided an opportunity to increase China's domestic reforms so to match international standards. At the same time China's recent FDI reforms helped to address major obstacles arising from these negotiations, such as the issues of market access, dispute resolution, and forced technology transfer. The achievement of New FDI Law paved the way for progress made in these two major negotiations. This is evidenced by the fact that Chinese President Xi personally intervened to offer market access concessions to seal the deal of China-EU CAI in 2020. This article critically evaluates the evolution, challenges and limitation of Chinese FDI law in the prism of the main challenges and implications of the China-EU CAI and the China-US BIT negotiations (Ernst, 2021). It provides a focus on how these negotiations promoted open market access, investment protection and their influence on other critical issues, such as SOEs reforms, national security reviews and forced technology transfer. It critically analyses the effectiveness of the New FDI law 2019 for addressing the most contentious challenges highlighted in the China-US BIT negotiations and the China-EU CAI.

The article is divided into four main parts. Part I gives an overview of the evolution of the Chinese FDI law before the New FDI Law 2019 and provides an in-depth critique of the old Chinese FDI legal system and challenges. Part II evaluates the roles of the China-EU CAI and the China-US BIT negotiations and their impacts on China's FDI policy development. It examines the major criticisms of Chinese FDI legal system, and the key issues encountered during these negotiations. Part III critically evaluates the New FDI Law 2019, how the new reforms effectively addressed the issues of the old FDI legal system, and the shortcomings highlighted in these investment agreement negotiations (Haney, 2000). The adoption of the new

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FDI law reform and the progress made in these two major foreign investment agreements jointly eliminated some stumbling-blocks, which previously negatively impacted foreign investment among these three parties. This part focuses on three areas of analysis, including market access, investment protection and dispute resolution. Part IV concludes. This article highlights that China should continue their SOE reforms, while continuing to pursue workable Sino-investment agreements. This would provide a long-desired clarity for more market openness, dispute resolution mechanism and national security review.

Evolution of Chinese FDI Law Before 2019

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

First Generation FIEs Laws 1979-1992

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

After the initial success of opening-up, Chinese regulators enacted two more regulations: the Wholly Foreign Owned Enterprises Law (WFOEs Law) in 1986 and the Contractual Joint Venture Law (CJV Law) in 1988. Together with their implementing rules they formally legalised more types of foreign investment vehicles in China to meet the incremental appetite from foreign investors. The enactment of these additional foreign investment vehicles added more flexibility for foreign investment (Kong, 2023). These three Laws and their corresponding Implementing Rules formed the foundation for the first generation Chinese FDI legal framework prior to their eventual replacement by the New Chinese FDI Law in 2019. This framework was criticised for being overly tentative, strict and lacking clarity. It did not tackle the lack of a dispute resolution mechanism due to the rudimentary stage of China's litigation system for adjudication.

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Second Generation FIEs Laws 1990s-2000s

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

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

By 2001, the amendment of the EVJ law further relaxed the restrictions by allowing the FIE to purchase insurance, materials and goods from international providers (Wang, 2020). It added the right to litigate in the Republic People's Courts for FIEs when there was no arbitration agreement. The FIE's net profit after tax and employees' wages could be remitted abroad in foreign currency unrestrictedly, i.e., it eliminated the FIE's obligation to maintain the foreign exchange level. Notably, the second generation FIEs laws carried out the core purpose of an expansion of foreign economic co-operation and technological exchange.

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

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department subsequently reduced the items on the restricted and prohibited lists to remove market restrictions for foreign investments. From 2017, this Catalogue was split into the Encouraged list and the Negative list, the latter of which contained the restricted list (35 items) and the prohibited list (28 items).

Since 2013, the Chinese State showed improved enthusiasm for the development of the modern market system, macro-control system and an open economic system. This followed a series of complaints from foreign investors regarding unfavourable treatment in areas such as the preferential treatment to SOEs, local protectionism to local SOEs and policies supporting national champions (Zhang & Mitchell, 2022). It aimed to establish a unified, open, competitive and transparent market system for a mixed economy. To fulfil this aim, China pledged to remove market barriers and allow all market players to enter areas which are not on the negative list on an equal basis. The development of the FDI law in the 2010s followed this core principle. It focused on levelling up market access and equal treatment for FIEs, while gradually transitioning from non-national treatment to the management model of PNTPNL.

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

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

The Draft Foreign Investment Law (the "Draft Law") 2015

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

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opening-up, and promoting foreign investment. It was a step forward for the Chinese government in enhancing its commitment to several ongoing China-BIT negotiations with the EU and the US. This led to the adoption of PNTPNL in 2017.

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

The Role of China-EU CAI and China-US BIT Negotiations in Shaping the New Chinese FDI Law

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

China-EU CAI

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

Market access

Historically the unfair market access presented an obstacle for foreign investors in China. The FDI restrictiveness of China, at 0.214, is still much higher than the US at 0.089 and the Organisation for Economic Co-operation and Development (OECD) countries at an average of 0.068 in 2021. In contrast, the EU is renowned for its open market access for FDIs. The

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

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

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

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

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

Dispute Settle Mechanism

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

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

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

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

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

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

In recent years China showed increased willingness in the BIT negotiations to resolve investor-state disputes and actively participated in ISDS reforms, including the proposal of an appellate mechanism. Prior to the China-EU CAI Agreement in Principle, the China–Australia FTA (2015) had a similar 'historical' commitment to establish an appellate mechanism to review awards rendered in arbitration, although it did not result in any substantial outcome in the end. It proposed a multilateral appeal mechanism in the UNCITRAL WG III in 2019. China preferred to reform ISDS by combining a multilateral appeal mechanism to address the defects of the current ISDS regime, such as a lack of an error-correcting mechanism, a lack of stability and

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predictability for arbitral awards and the long and costly procedures. This new approach to reform the ISDS mechanism and to take part in shaping international norms aligns with China's agenda to strengthen its discourse power and safeguard its sovereignty and developing interest. Despite all these favourable factors, China remains cautious of embracing the EU's radically reformed MIC model and the pursuance of a permanent international investment court system. Suffice to say, China is at the same time unlikely to embrace an unreformed ISDS without further modifications.

Despite this undesirable halt, the China-EU CAI is, on one level, a widely-welcomed move to deal with the critical issues concerning the continuity and reciprocity for both parties in trade and investment, comprising a level-playing field, transparency of subsidies, forced technology transfer and sustainable development. In response, China has spontaneously implemented a new FDI Law 2019 and reformed other domestic laws to achieve these objectives. At the same time, the China-EU CAI gave specific attention to promoting environmental and labour standards as well as securing investment dispute settlement mechanisms for contracting parties and investors. The CAI aimed to rebalance the relationship between China and EU on the principle of 'transparency, predictability and reciprocity'. Therefore, to reanimate the suspended ratification should aid these objectives and solve foreign investment issues. The China-EU summit in April 2023 saw some warm exchanges from both parties. For example, China supports peace talks and intends to 'enhance coordination and cooperation in multilateral affairs' and to enhance China-EU ties. China expressed some interests in re-activating the CAI agreement based on the principle of mutual benefits in February 2023. In exchange, the EU has no intention to decouple from China, but to engage in a high-level Economic and Trade Dialogue, although little has been discussed about future of CAI.

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

China-US BIT

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

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

Market access

The promotion of fair market access and pre-establishment of national treatment is a key objective of the China-US BIT. The US companies were critical of the restrictiveness of the Chinese FDI legal system and the uneven playing field whereby certain business sectors were closed or subject to burdensome restrictions. To achieve increased market access in China constitutes a crucial benefit for US companies. The 2012 US Model BIT formed the starting point for negotiation, including Article 3(1), the national treatment for foreign investors and Article, the MFN treatment. Both Articles apply to the 'establishment' stage. These two provisions have a much wider scope than past practices of China in other BITs and free trade agreements as China's international investment agreement practice only provided national treatment subject to host countries' national laws or nonconforming measures before 2008. China still limited the national treatment provision to the post-establishment phrase in its most recent BIT. If this scope under the 2012 US Model BIT were adopted it would offer similar market access to the provisions of National Treatment and MFN treatment under the Agreement in Text, which includes the establishment stage. The 2012 US Model BIT also contains provisions which prohibit specific performance requirements, such as the prohibition of forced technology transfers. It does not impose any prohibition on the specific types of legal entity or joint venture for foreign enterprises as it did in the China-EU CAI Agreement in Text. Nonetheless, it does not specifically address the transparency and governance issues of the SOEs. It does not have provisions to require SOEs to make transactions in accordance with commercial considerations. SOEs have no obligation to disclose additional information about ownership and voting structure if the entities are directly or indirectly influenced by the state party. Hence, the China-US BIT would have to carve out some provisions to address these gaps.

Little conclusion can be drawn as to whether the China-US BIT would pursue the same dispute resolution mechanism as the China-EU CAI, i.e., the SSDS mechanism. Like the EU and China, the US legislators heavily criticised the harshness of the ISDS provision, which can challenge domestic legal processes and interfere with the supremacy of domestic law. It ensures that the ISDS provision will 'not impinge on the federal, state and local governments to maintain (or adopt) measures that they deem necessary.' Both the Trans-Pacific Partnership Agreement (TPP) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

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(CPTPP), which adopted the US-style ISDS rules should shed some light on the China-US BIT negotiations. These free trade agreements are expected to serve as a point of reference for other free trade agreement negotiations. Moreover, the US had a huge influence on the TPP Agreement because it was an original member of the TPP from 2005. It initiated the talks for the Agreement, which later led to the CPTPP, albeit the US withdrew from the TPP during the Trump era in 2017. Additionally, China recently applied to join the CPTPP in 2022. The ISDS mechanism has been China's salient approach for China's BITs with added momentum in the last decade as well as a sign of further modernisation in more recent free trade agreement negotiations. Hence, the US-style ISDS adopted under the TPP and CPTPP should be achievable if both parties can find their synergies. The US is unlikely to abandon the current ISDS system. Hence, it is unlikely to adopt the EU-model MIC system, given that that the US has achieved some positive outcomes as a respondent state in the past under the ISDS system. In addressing the issue of the lack of appellate mechanism and the error-correction mechanism for the current ISDS system, the US, as the reformist, would probably seek a reformed ISDS, which contains an appellate system and measures to improve the procedural rules and transparency. While China is in the middle ground between the incrementalities and the systemic reformers, its ISDS reform proposal could lead to the adoption of a reformed ISDS system with a standing appellate body, although not as far as a radical EU-style MIC system.

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

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

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

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

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

CONCLUSION

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

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conclusion of China-US BIT should provide some long-desired clarity on dispute resolution mechanisms, national security review system and forced technology transfers.

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

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

REFERENCES

Alexeeva, O., & Lasserre, F. (2018). An analysis on Sino Russian cooperation in the Arctic in the BRI era. Advances in Polar Science, 29(4), 269-282.

Brown, K. (2021). The EU, US and China: Hybrid multilateralism and the limits of prioritizing values. *Global Summitry e-Journal, Special Issue: Strengthening the G*, *20*.

Du, M. (2024). International Economic Law in the Era of Great Power Rivalry. *Vanderbilt Journal of Transnational Law*, *57*.

Ernst, D. (2021). Supply chain regulation in the service of geopolitics: What's happening in semiconductors? (No. 256). CIGI Papers.

Haney, W. (2000). The myth of the Texas miracle in education. *Education policy analysis archives*, *8*, 41-41.

Kong, Q. (2023). Interaction Between China and International Investment Rules. In *China's Foreign Investment Law Amid Evolving International Investment Rules* (pp. 157-180). Singapore: Springer Nature Singapore.

Shi, W., Pin, A., Witte Jr, J., et al. (2001). TEXAS Volume 55.

Wang, P. (2020). Multilateral Reform of Investor–State Dispute Resolution Mechanism: A Balance between Public Legitimacy Management and Private Efficiency Refinement. *China and International Dispute Resolution in the Context of the "Belt and Road Initiative"(Cambridge University Press, 2020) pp*, 149-184.

Zhang, Q., & Mitchell, A. (2022). Data Localization and the National Treatment Obligation in International Investment Treaties. *World Trade Review*, *21*(4), 391-410.

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