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Research Report

The EU-China Comprehensive Agreement on Investment: Stuck half-way

Columbia FDI Perspectives, No. 299

Provided in Cooperation with:

Columbia Center on Sustainable Investment (CCSI) - A joint center of Columbia Law School and the Earth Institute, Columbia University

Suggested Citation: Berger, Axel; Chi, Manjiao (2021) : The EU-China Comprehensive Agreement on Investment: Stuck half-way, Columbia FDI Perspectives, No. 299, Columbia University, Columbia Center on Sustainable Investment (CCSI), New York, NY

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Columbia Center
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Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 299 March 8, 2021

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

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The EU-China Comprehensive Agreement on Investment: Stuck half-way?*

by

Axel Berger and Manjiao Chi**

China and the EU agreed in principle on a Comprehensive Agreement on Investment (CAI) on December 30, 2020, after 35 rounds of negotiations since 2014. In the EU (and the US), critical voices pointed at the uncertain enforceability of key provisions and the negative impact on cooperation between the EU and such key partners as the US vis-à-vis China. For China, the CAI is held as a diplomatic success. In fact, the recently published [draft text](#) suggests that the CAI is less comprehensive than the title indicates, and that important elements remain unresolved.

As Europe is already open to Chinese investors, additional market opening is expected from China. EU efforts mostly focused on issues of limited market access, technology transfer and the regulatory environment. The CAI addresses these issues in the sections on investment liberalization and regulatory frameworks. China commits to opening its markets in some sectors, including electric vehicles and financial and air-transport services. However, one could ask whether China is not already unilaterally opening up these sectors, and the CAI just locks-in those reforms.¹ Arguably, however, preventing the revocation of economic reforms in China is an important achievement in and by itself. Conversely, given Europe's increasing scrutiny of Chinese investments, securing a high level of market access in Europe was high on the China's agenda: while the EU does not make any substantial additional market access commitments to China, it guarantees the existing level of access. Securing market access and locking-in reforms may be important outcomes, but they are unlikely to substantially increase two-way investment flows.

Potentially more important is the prohibition of forced technology transfer and joint venture requirements, which appear more comprehensive than what China agreed to in its WTO accession protocol or in the Phase One Deal with the US. In addition to technology transfer requirements imposed by the state, China and the EU also commit not to "directly or indirectly require, force, pressure or otherwise interfere with the transfer or licensing of technology between natural persons and enterprises".² Furthermore, the CAI includes a number of "level-playing-field" provisions that may improve the transparency of subsidies, enhance procedural transparency, predictability and fairness of regulatory and administrative procedures, and regulate the operations of state-owned enterprises.

The section on sustainable development is an important outcome of the CAI negotiations. While sustainable development sections are common in EU's trade agreements, the CAI is China's first agreement with such a section. As the CAI offers the EU much less leverage compared to a fully-fledged free trade agreement (FTA), the inclusion of such a comprehensive chapter section is a success. But the obligations under this section are mainly based on the parties' existing commitments under other international environmental and labor treaties. Moreover, the wording of several key provisions (providing that the parties "shall strive to ensure" or "shall make continued and sustained efforts") characterize such obligations as "best-effort" in nature.³ However, the section on sustainable development establishes a standalone mechanism to resolve disputes, similar to that included in the EU-Republic of Korea FTA. Under the latter mechanism, an independent panel has recently issued a [decision](#) holding that Korea (i) has violated its commitment to comply with the principle of freedom of association and (ii) should make "continued and sustained efforts towards ratification" of the "key ILO conventions". Whether violations of the sustainable development section provisions under the CAI can lead to the same outcome remains to be seen, in particular as some of the key labor provisions are less binding in nature. In addition to regular government-to-government consultations, the CAI also requires the parties to hold dialogues with civil-society organizations, which could be challenging as [Chinese law](#) has strict limits on such organizations. This section may thus prove crucial for the ratification in the EU. If ratified, its practical effects would depend largely on good will, close cooperation and the usage of dialogue mechanisms.

Lastly, the CAI does not include sections on investment protection and investor-state dispute settlement (ISDS). The EU's insistence to replace ISDS with an [Investment Court System](#), as well as the ongoing multilateral discussions on a reform of ISDS, could explain this omission. While the parties will continue negotiating the sections on investment protection and ISDS and "endeavour" to conclude them [within two years](#) after the signature of the CAI, the 25 bilateral investment treaties (BITs) with outdated ISDS rules between EU members and China remain in force and could possibly lead to unwanted ISDS claims.

The CAI is stuck half-way in the development of China-EU bilateral investment relations. While it addresses important issues of market access, regulatory cooperation and sustainable development, it does not replace the old BITs, nor contribute to the overall reform of the international investment regime. Both parties should use the next two years to remedy this omission.

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¹ See [Lauge Poulsen, "The EU-China investment deal and transatlantic investment cooperation", presented at the Shapiro Geopolitics Workshop, Jan. 25-26, 2021.](#)

² See, e.g., CAI, Article 3(3). See also [Simon Lester, "Forced technology transfer provisions in the CAI and the US-China Phase One deal", in *IELP Blog*, Jan. 24, 2021.](#)

³ See, e.g., CAI, Article 5(2)-(3).

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