

EU-CHINA OBSERVER

DEPARTMENT OF EU INTERNATIONAL RELATIONS AND DIPLOMACY STUDIES



"EXCHANGING IDEAS
ON EU-CHINA RELATIONS:
AN INTERDISCIPLINARY
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College of Europe
DEPARTMENT OF EU INTERNATIONAL
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InBev-Baillet Latour Chair of
European Union-China Relations



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▲ EU-China Bilateral Investment Treaty (BIT)

CHINA'S OUTWARD DIRECT INVESTMENT IN THE EU: CHALLENGES OF RAPID CHANGE

Duncan FREEMAN

The negotiation of the EU-China Bilateral Investment Treaty (BIT) is taking place in the context of a rapidly changing economic relationship between the two parties. This is especially true in the case of investment. China's outward direct investment (ODI) has grown considerably over the past decade. According to statistics from the State Administration of Foreign Exchange (SAFE), China's ODI flows increased from US\$1.9 billion in 2004 to US\$80.4 billion in 2014. The growth has been global in its reach, and has included the EU. Investment flows have taken on an increasing importance in the EU-China economic relationship, although they are volatile and like global investment flows are strongly influenced by economic conditions in both the source and destination countries. According to Eurostat balance of payments statistics, in 2012, investment flows from China were €9.9 billion, accounting for 2.6 percent of EU inflows.¹ In 2013, inflows from China fell to €4.3 billion and accounted for 1.2 percent of the total for the EU. In relative terms, investment remains a weak link in the EU-China economic relationship compared to trade. In 2013, China accounted for 16.6 percent of the EU's imports and 8.5 per cent of its exports.

Hence, one of the rationales for negotiation of the BIT is to build the framework to allow increased investment flows in both directions between the EU and China by creating a more secure and predictable environment. This paper discusses key aspects of change in China's investment in the EU in both quantitative and qualitative terms. Investment from China now includes many locations and sectors in the EU. This paper highlights one important aspect of China's ODI in general and in the EU in particular. Internal company transactions are becoming more important in Chinese ODI, including those to the EU. This is reflected in data from both Europe and China showing that one important facet of Chinese investment in the EU has been the use of favourable tax jurisdictions. This indicates a degree of sophistication on the part of Chinese enterprises in their awareness of the business environment, and a concern for financial and regulatory risk reduction. The successful conclusion of a BIT would contribute to providing a more certain environment for Chinese investors and hence increasing investment flows to the EU by contributing to risk reduction.

¹ Eurostat, European Union balance of payment statistics, <http://ec.europa.eu/eurostat/web/balance-of-payments/data/main-tables>.

Development of China's ODI

The growth of China's ODI has been rapid in the past decade. According to some claims, China's ODI is approaching and may be on the point of exceeding inward foreign direct investment (IFDI).² This claim is based on investment statistics provided by China's Ministry of Commerce (MOFCOM). According to these figures in 2014 China's "non-financial" outward investment flows were US\$102.9 billion while inward investment flows were US\$119.6 billion. Despite the earlier predictions, data from MOFCOM show that the shift has not yet occurred as in the first six months of 2015 when non-financial IFDI flows were US\$68.4 billion, while ODI flows were US\$56.0 billion.³ In fact, these figures do not reflect the full picture of China's investment flows. Balance of payments (BOP) statistics are normally used to measure international investment flows and in China these are published by SAFE, and show a very different picture to those from MOFCOM. According to the BOP data, inflows remain considerably higher than outflows. In 2014, BOP figures show IFDI was US\$298.1 billion. The main reason for this lies with the failure of the MOFCOM figures, which are based on initial investment approvals, to take account of reinvested earnings, especially in the case of inward investment. The BOP statistics from SAFE show that ODI flows are somewhat lower than those suggested by MOFCOM data. In 2014, according to SAFE, ODI flows were US\$80.4 billion. The lower figure is in large part explained by internal company financial transactions, another factor not taken into account in the MOFCOM figures, but which have become increasingly important in investment flows, especially in the case of ODI. As will be discussed below, these are not just a statistical discrepancy, but play an increasing role in Chinese ODI in the EU.⁴

For most of the period since China initiated reform and opening, government policy concentrated on attracting inward investment. At a very early stage this became a central part of policy related to modernization of the Chinese economy. For instance, China's Equity Joint Venture Law was passed in 1979 and the first Special Economic Zones were established in 1980. By contrast, policy adopted on ODI was almost exactly the opposite.

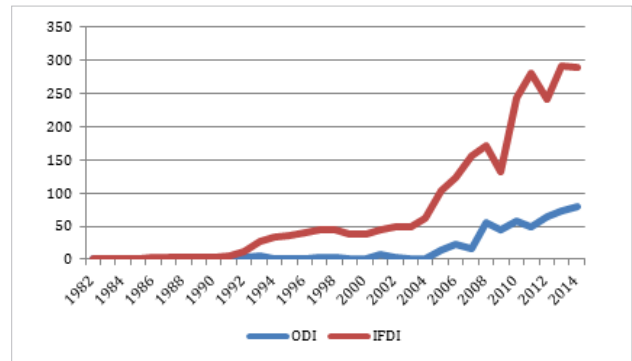


Chart 1: China FDI Flows 1982-2014 (US\$ billion)

Source: SAFE

In addition to economic development priorities, one of the greatest difficulties facing China was macroeconomic. China underwent a severe foreign exchange crisis in the late 1970s and again later in the 1980s. Chinese policy focused on increasing foreign exchange inflows and outward investment flows were tightly controlled through project and foreign exchange approval procedures. This policy in essence remained in effect until after 2000. One of the key factors underlying the change in policy was China's increasing foreign exchange reserves, which coincided with a focus on other broader economic policy aims including the internationalization of Chinese companies.⁵

The introduction of the "go-global" policy in the 10th Five Year Plan adopted in 2001 signalled this change in focus,⁶ although implementation was initially cautious. A gradual relaxation of project and foreign exchange approval procedures followed, while at the same time policies were introduced to support ODI. This resulted in a rapid increase in ODI from China after 2004. However, the development of China's ODI has not only been determined by government policy, but it has also been impacted by factors in destination countries as well as the global economic environment. This is evident after the financial and economic crisis in the US and EU starting in 2008 which resulted in a sharp downturn in global investment flows. At the same time the growth of both China's inward and outward flows paused, although more recent statistics suggest that ODI has begun to grow again in 2013 and 2014.

² "China Set to be Net Investor", China Daily, 25 June, 2014. ³ China's Ministry of Commerce (MOFCOM), Business Data Centre, <http://data.mofcom.gov.cn>. ⁴ The difference between the two sets of statistics and the role of reinvestment and internal company transactions has been noted by SAFE for a number of years. See for instance 2007 nian zhongguo guoji shouzhì baogao [2007 China International Balance of Payments Report], SAFE, 5 June, 2008; 2011 Zhongguo guoji shouzhì baogao [2011 China International Balance of Payments Report], SAFE, 31 March, 2012. ⁵ D. Freeman, "China's Outward Investment: Institutions, Constraints, and Challenges", BICCS, Asia Paper, 12 May, 2013. ⁶ Ibid.

Government policy continues to relax controls and also support ODI. Furthermore, recent initiatives from China may bring a new dimension to the EU-China investment relationship. The Chinese government has begun a number of investment-related initiatives such as the New Silk Road or One Belt One Road which may impact investment in the EU. One of the key aims of this project is to build inter-connectivity between China and the EU through both land and maritime routes. The Chinese government has also proposed participation in the Juncker Plan through investment. The real outcomes of these initiatives remain unclear, nevertheless, they imply greater investment in the EU, possibly with significant direct Chinese government participation or support.

In line with the overall increase in ODI from China, both Chinese and EU statistics show that direct investment from China in the EU has increased significantly over the past decade. The following discussion of investment in the EU is based largely on European statistics derived from Eurostat, which allow analysis of certain key aspects of FDI. However, it should be noted that there are considerable problems with all data concerning investment flows and stocks from China. Not only are there gaps resulting from failure to capture investment flows like those as in the case of MOFCOM.⁷ One of the key problems in analysing Chinese investment is the pathways that it takes through intermediaries. For instance, Hong Kong is both the main source and destination of mainland China's inward and outward flows.⁸ The British Virgin Isles and the Cayman Islands are also a major problem, as they also play a significant role in Chinese investment flows.⁹ This has the effect of disguising both the source and destination of some flows. The Eurostat data do not take account of any of these. Despite this gap, for the purposes of this discussion, only Eurostat data on ODI from mainland China will be considered.

Chinese investment in the EU: Recent developments

Eurostat data show the increase in Chinese ODI to the EU over the past decade. As has occurred with the overall

flows from China, both investment flow and stock data show that ODI in the EU only began to increase significantly when Chinese government policy changed substantially in the mid-2000s with the removal of restrictions on and support for outward investment (Charts 2 and 3). Nevertheless, Chinese investment flows are not just determined by government policy. They also take place in the context of global flows, which are determined by economic changes both within China and the rest of the world. Global investment flows have been volatile, and those between the EU and China have been no exception. The crisis which hit the US and EU in 2008 severely impacted global investment flows, including those to and from China. As Chart 1 shows, between 2008 and 2011, ODI flows from China plateaued and only recently began to increase again. A similar pattern is shown in changes of the flows and stock of Chinese investment in the EU. For both Chinese government and companies, risk has become a major issue in ODI,¹⁰ and this was particularly so in the EU. The poor growth prospects and high risk, especially in the Eurozone, have been a significant disincentive to Chinese investment, although more recent data for 2014 suggest that this had begun to change.

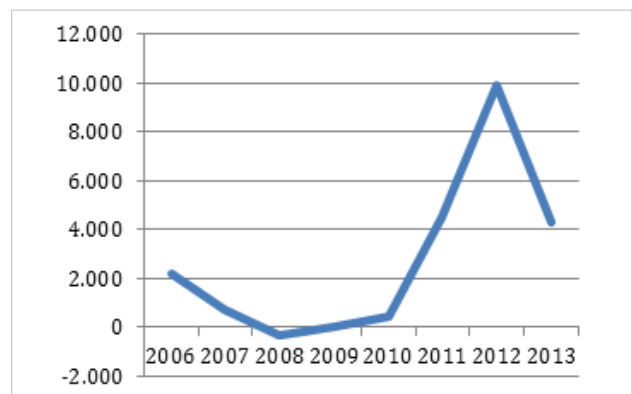


Chart 2: China ODI Flows to EU (€ million)

Source: Eurostat, European Union balance of payments

⁷ Data for China from UNCTAD are based on MOFCOM statistics, rather than balance of payments, which is normally the case. ⁸ The Hong Kong SAR is treated as a separate entity for the purposes of China's statistical data. Eurostat separates investment from Hong Kong in its statistics. ⁹ For ODI flows, much that goes to tax havens like the British Virgin Isles and Cayman Islands and is related to the listing of Chinese companies on stock exchanges outside China. See for instance, D. Sutherland and B. Matthews, "Round tripping or 'capital augmenting' OFDI? Chinese outward investment and the Caribbean tax havens." Nottingham, Leverhulme Centre for Research on Globalisation and Economic Policy (GEP), University of Nottingham, 2009. ¹⁰ D. Freeman, "China's Outward Investment: Institutions, Constraints, and Challenges", BICCS, Asia Paper, 12 May, 2013.

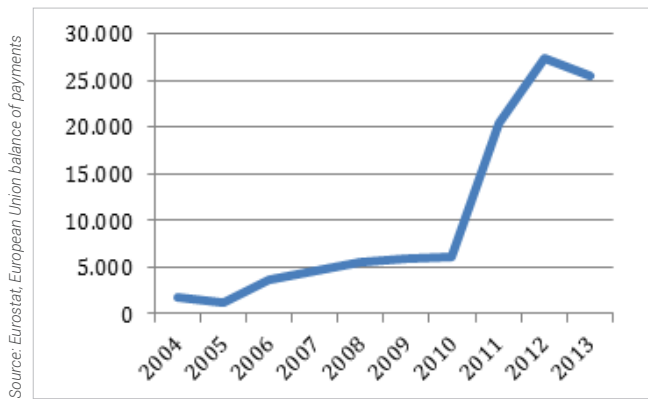


Chart 3: China ODI Stock in EU (€ million)

Despite the increase in ODI flows from China, they remain small compared to total inflows to the EU. With a stock of investment of €1.5 trillion, the US is by far the largest investor in the EU, and several other countries also invest more than China. Given the relatively small amount of investment, single large investments can rapidly change the picture. Thus, the acquisition by Zhejiang Geely of Volvo for US\$1.5 billion at one point made Sweden the largest EU destination for Chinese ODI. More recently, several major investments in Italy have made it a significant destination for Chinese investment in the EU.

Despite its small size and the predominance of a few major investments, Eurostat data and other studies show that Chinese ODI in the EU has been increasingly diversified and complex both in destinations and sectors.¹¹ In addition, the BOP data reveal one aspect of this diversification and complexity that relates to the problem of different sets of Chinese statistics on ODI and the role of internal company transactions referred to earlier. The EU data also suggest that these transactions are one of the key features of the changing nature of Chinese ODI in the EU in particular. One of the trends in global investment has been increasing use of complex financial arrangements by companies, frequently in order to reduce their tax liabilities. This is not a new development, but was brought into public focus as a result of the “Luxleaks” scandal in 2014.¹² The

role of taxation in determining FDI flows has long been the subject of analysis, and it has become an important part of Chinese investment in the EU.

According to Eurostat investment position data, the UK with €4.9 billion in 2013 has the largest stock of investment from China, followed by the Netherlands with €1.3 billion and France with €1.1 billion (Chart 4). The investment position data also show several Member States with negative stocks of FDI from China. These include minor economies like Belgium and Ireland, but major economies such as Italy and Germany have negative investment positions. The negative position for investment from China arises in large part because of internal company financial transactions such as those where the subsidiary company

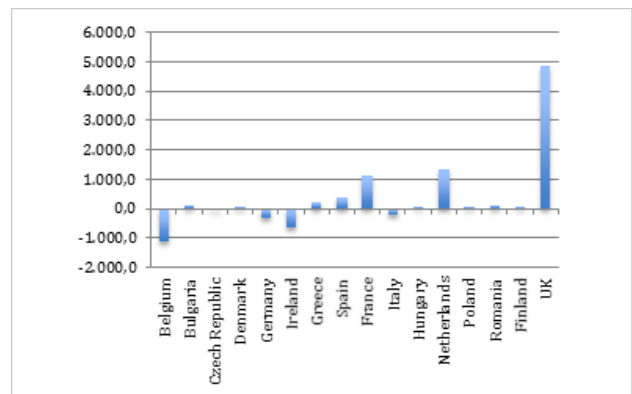


Chart 4: China Net Direct Investment Position in the EU by Member State 2013 (€ million)

established through ODI in the destination country will provide loans back to the parent in the source country. Transactions involving arrangements of this nature are frequently related to internal financing and tax planning by companies. In transactions such as this, for the purposes of the investment position, the initial investment in the destination country is recorded as a liability, while the loan back to the parent company is recorded as an asset. The net position, which is what is most frequently referred to in discussion of ODI, is the difference between the two.

1 xx 2 xx 3 xx 11 See for instance HY. Zhang, Z. Yang, D. Van Den Bulke, “Euro-China Investment Report 2013-2014”, Antwerp Management School, 2013; T. Hanemann, M. Huotari, “Chinese FDI in Europe and Germany Preparing for a New Era of Chinese Capital”, Mercator Institute for China Studies and Rhodium Group, June 2015. 12 The International Consortium for Investigative Journalists, “Luxembourg leaks: global companies’ secrets exposed”, <http://www.icij.org/project/luxembourg-leaks>.

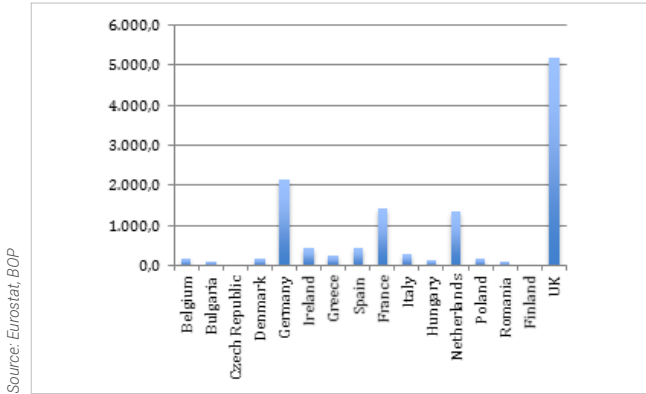


Chart 5: China Direct Investment Position Liabilities in the EU by Member State 2013 (€ million)

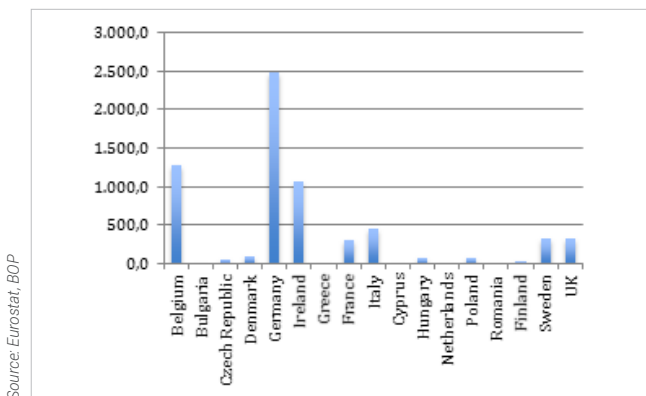


Chart 6: China Direct Investment Position Assets in the EU by Member State 2013 (Euro million)

Charts 5 and 6 show the liability and asset positions of most EU Member States using available data for China from Eurostat. In 2013, the UK (€5.2 billion), Germany (€2.1 billion), France (€1.4 billion) and the Netherlands (€1.3 billion) were the four largest destinations of Chinese investment as shown by their investment position in terms of liabilities alone. At the same time, Germany (€2.5 billion), Belgium (€1.3 billion) and Ireland (€1.1 billion) in particular had significant asset positions in relation to investment from China. Several other economies such as Italy, France, Sweden and the UK also had quite large ODI

asset positions. This left the UK with by far the largest positive net position (liabilities – assets) for investment from China. While Germany had a large liability position, this was counterbalanced by a bigger asset position, leaving it with a negative net investment position in relation to China. It is notable that smaller EU economies like Belgium and Ireland have large asset positions, resulting in negative positions for investment from China. These two, like Luxembourg, are also known for their corporate-friendly

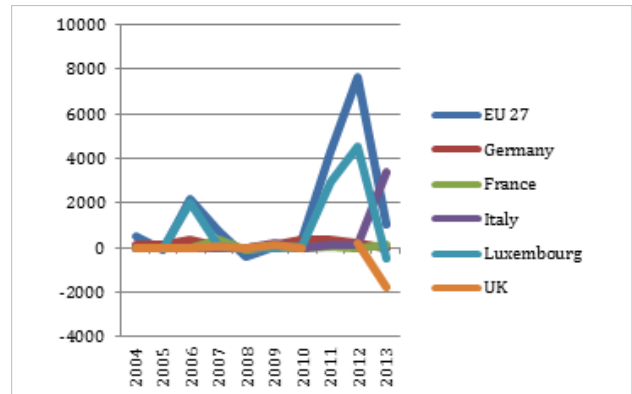


Chart 7: Selected EU Member States FDI Flows from China (€ million)

tax arrangements.

These charts do not include several Member States which do not publish data on their investment positions with China. The most glaring omission is of course Luxembourg.¹³ Although investment position data related to China is not available for Luxembourg, both Chinese and EU statistics show that in recent years, Luxembourg has been the largest destination in the EU for ODI from China (Chart 7). In fact, Eurostat BOP statistics show that fluctuations in Chinese ODI flows to the EU have been largely determined by those to Luxembourg. The importance of Luxembourg is not unique to Chinese investment. In 2012, when investment flows from China peaked, Luxembourg, which accounted for 0.3 percent of EU Gross Domestic Product, received 57.9 percent of total investment flows from outside the EU.

¹³ Other Member States for which data was not provided for China were Cyprus, Austria, Portugal and Sweden.

The role of internal company transactions is also indicated by Chinese statistics. Recent BOP statistics from China show an increasing gap between debit and credit amounts for ODI flows. In 2005, according to SAFE, net ODI from China was US\$ 13.7 billion, the result of a debit amount of US\$14.3 billion and a credit amount of US\$0.6 billion. By 2014, the net ODI had grown to US\$80.4 billion, which was the result of a debit amount of US\$135.9 billion, and credit of US\$55.5 billion. In 2005, credits were 3.9 percent of debits, but by 2014 this had increased to 40.8 per cent, suggesting a greatly increased importance for internal company transactions, which are likely to be typical of the relationship between China and Luxembourg, Ireland and Belgium and other EU Member States. In this regard, China is little different from other investors. As the Luxleaks revelations showed, Luxembourg plays a major global role in this type of transaction. They have become important in international investment flows and Chinese investment in the EU is no exception.

The degree to which Chinese companies use favourable tax jurisdictions and complex internal company transactions in ways similar to other multinationals reflects the increasing complexity and sophistication of investment flows from China. Favourable tax treatment in destination countries is a key incentive used by governments to attract investment flows. It is also a concern from the point of view of the Chinese government, which has signed 100 tax treaties in the past three decades.¹⁴ Several of those with EU Member States have been renewed in recent years. Chinese investment is not driven by tax considerations alone, the motivations of ODI are multiple and there is much real investment in the EU as is evidenced by the acquisition of companies such as Volvo and Pirelli. Access to brands, technology and R&D capacity, distribution chan-

nels as well as manufacturing capacity have been among the main reasons for direct investment in the EU. The role of Luxembourg and other similar economies offering tax advantages represents just one aspect of China's ODI in the EU. Nevertheless, the role of such transactions is an important part of the dynamic background to the negotiation of the BIT.

Conclusion

Investment by Chinese companies in the EU will continue to be determined by factors including the economic conditions in both the source and destination countries. Continued weak growth in the EU and unresolved structural problems in the Eurozone are likely to discourage Chinese investors. On the other hand, one new factor in the equation is the relatively slow growth in the Chinese economy, which will continue in the longer term, and which may encourage companies to seek investment opportunities outside China. In recent years, Chinese investors have benefitted from the strength of the renminbi and the weakness of the euro. A significant devaluation of the renminbi, if the People's Bank of China allows it to occur, may act as a disincentive to investment in the EU.

The Chinese government will continue its policy of removing controls over outward investment and providing support for investors. Chinese government policy and companies show an increasing awareness of risk in all its forms, not just taxation. Against this background, the BIT is important, as it concerns mitigation of risk. The BIT will not determine the development, of China's investment in the EU develops, but it can make a contribution in this regard in as far as it addresses the concerns of the Chinese government and investors. ☉

¹⁴ State Administration of Taxation of The People's Republic of China, Tax Treaty, <http://www.chinatax.gov.cn/2013/n2925/n2955/index.html>.



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THE PROSPECTIVE EU-CHINA BILATERAL INVESTMENT TREATY: WIDER REGIONAL IMPLICATIONS IN EAST AND SOUTHEAST ASIA

Bertram LANG

The prospective Bilateral Investment Treaty (BIT) between the EU and China is an unprecedented bilateral undertaking connecting large parts of the European continent with a country that possesses in itself continental dimensions. However, despite 27¹ EU Member States having concluded BITs with China, the importance of a new contractual basis between China and the EU as a whole will be felt well beyond these two commercial blocks. Based on expert and stakeholder interviews conducted in Brussels and Berlin, this article sets out to discuss these potential implications in the East and Southeast Asian region, with a particular focus on how an EU-China BIT could affect – and be affected by – the ever more complex network of bi- and plurilateral trade and investment agreements in this economically dynamic region.

Following some general remarks on the regional nature of this intended bilateral agreement, this paper will expound on two distinct case studies. First, the relation between EU-China negotiations and the EU's simultaneous talks with ASEAN countries will be elucidated with reference to Sino-European competition for third markets in Southeast Asia. The second case study will examine the link between the EU-China BIT negotiations and the EU's relations with Taiwan – an issue that has been widely overlooked in this context. In particular, this paper will show how the

Chinese strategy of benign supremacy vis-à-vis Taiwan's international economic relations relates to BIT negotiations and discuss the possibility of concomitant EU-China and EU-Taiwan investment agreements. While the prevailing economic and geostrategic considerations are quite different in those two cases, together they provide a perfect illustration of the wider regional embeddedness and interdependency of this supposedly bilateral EU-China investment agreement.

The EU-China BIT: looking beyond bilateral concerns

Although the EU-China agreement currently under negotiation only covers bilateral investment, it is interpreted at least by Beijing as a stepping stone to eventual free trade and can only be fully understood in its strategic dimensions by looking at the worldwide proliferation of other bi- and plurilateral Preferential Trade and Investment Agreements (PTA) over the last two decades. The present discussion will be confined to the regional ramifications in East and Southeast Asia, i.e. China's economically and strategically ever more important 'wider neighbourhood'.² The meteoric surge of Chinese engagement and influence in East and Southeast Asia – often in direct competition to entrenched US-American, Japanese and European interests – has long been inadequately perceived in Western

¹ While there are 26 different BITs between China and EU Member States, Belgium and Luxembourg concluded a joint BIT, which means that 27 out of the currently 28 Member States have a BIT with China. ² These are of course not the only multilateral implications. Thus, a comprehensive analysis will also need to take into account other PTA projects, notably the EU and China's respective trade talks with the United States and the US-led Trans-Pacific Partnership (TPP), which for now excludes both of them.

countries, although the Chiang Mai Initiative and the China-ASEAN Free Trade Agreement (FTA) concluded in 2002 were remarkable successes of Chinese economic diplomacy, and the Economic Cooperation Framework Agreement (ECFA) concluded with Taiwan in 2010 represented a spectacular shake-up of the East Asian chessboard.

In recent years, the EU has itself become a very active negotiator of PTAs. Shortly after the Free Trade Agreement with South Korea came into force in 2011, another full-fledged FTA was concluded and initiated with Singapore in October 2014. In early August 2015, the Commission announced the successful conclusion of FTA negotiations with Vietnam³ – the pragmatic European reaction to the delays and obstacles that hampered EU-ASEAN FTA talks over recent years.⁴ Furthermore, Italy's Prime Minister Renzi followed up on the EU-Japan summit in May by hinting that a free trade deal with Japan might equally be reached before the end of 2015.⁵

The strategic link between an EU-China BIT and other regional trade negotiations becomes evident when looking back to the official initiation of Sino-European negotiations in October 2013: whereas Beijing had been pushing for a comprehensive FTA with the EU, the Council at that time prudently only conceded to give an investment negotiation mandate to the Commission, while at the same moment extending the negotiation mandate towards an EU-ASEAN FTA to also include investment provisions.⁶ Aside from exposing the Commission's general willingness to make use of its new Lisbon competency, this can also be seen as a move to strengthen the EU's hand in addressing the daunting task ahead: trying to "grant investors fair, equitable and non-discriminatory treatment"⁷ through a strong and enforceable EU-China investment agreement.

Sino-European competition in Southeast Asia

In general terms, the EU's proactive negotiation strategy in East and Southeast Asia certainly fits into its overall 'Global Europe' strategy, adopted in 2006 as a slightly

futile response to the repeated failures of the multilateral Doha Round and the US strategy of competitive liberalization. China, however, is another important factor in this equation. For one thing, the People's Republic has equally engaged in a significant "RTA shopping spree"⁸ across the region, thereby not only rising to the strategic US challenge but also reinforcing the pressure on Europeans to act and embrace bi- or plurilateralism. And for another, the urgency with which the Commission is now trying to conclude trade agreements with virtually all of China's neighbours, partners or competitors in the region can also be explained with the growing frustration of many European investors over the inadequate protection of technological investments in China itself, in particular regarding arbitrary political interference, forced technology transfers and unabated intellectual property rights (IPR) violations.⁹ While the immense potential of the Chinese market continues to attract producers and investors, previous bilateral investment agreements at member-state-level have proven insufficient to protect European companies. This, together with a protracted economic slowdown, has become the main reason for the growing pessimism about the future profitability of doing business in China, according to the EUCCC Business Confidence Survey 2015.¹⁰

As a result, investors in some sectors, such as renewable energies (RE), are already looking for 'exit options' in third markets and seek better protection of their IPR from Chinese competitors through forceful protective clauses in PTAs concluded by the EU with other countries or trade blocs in Asia.¹¹ The Commission's eagerness to start a "dialogue on intellectual property [and] judicial cooperation (especially in international commercial law)"¹² with ASEAN is highly illustrative of this point. Only a significant 'leap forward' in an EU-China investment agreement may reverse this incipient trend and reinvigorate European investors' enthusiasm in China not only as a cheap workbench (which it is ceasing to be) and gigantic consumer market, but also as a high-end production site or even a promising location for research and development.

³ "EU, Vietnam reach deal to boost trade", Euractiv, 4 August 2015. <http://www.euractiv.com/sections/trade-society/eu-vietnam-reach-deal-boost-trade-316786>. ⁴ The ASEAN case is the most obvious example of the EU's struggle to strike a balance between its political commitment to inter-regionalism and the often more pragmatic choice of bilateralism. ⁵ "Renzi prévoit un accord de libre-échange UE-Japon d'ici la fin de l'année", Euractiv, 5 August 2015, <http://www.euractiv.fr/sections/leurope-dans-le-monde/renzi-prevoit-un-accord-de-libre-echange-ue-japon-dici-la-fin-de>. ⁶ European Commission, DG Trade, "EU investment negotiations with China and ASEAN", Brussels, 18 October 2013, retrieved 29 July 2015, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=975>. ⁷ *Ibid.* ⁸ H. Gao, "The RTA Strategy of China: A Critical Visit", in R. Buckley et al. (eds.), *Challenges To Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements*, Kluwer Law International, 2008, p. 56. ⁹ Cf. among others, BusinessEurope, "EU-China relations: 2015 and beyond", Brussels, March 2015, retrieved 30 July 2015. <http://www.investmentpolicycentral.com/sites/g/files/g798796/f/201503/CHI-not020315-EU%20China%20Relations%20-%202015%20and%20Beyond.pdf>, pp. 22-24. ¹⁰ European Union Chamber of Commerce in China, *Business Confidence Survey 2015*, Beijing, June 2015, retrieved 25 July 2015, <http://www.europeanchamber.com.cn/cms/page/en/publications-business-confidence-survey/254>. ¹¹ Interviews with an RE expert and an RE industry representative, Berlin (Mercator Institute for China Studies), 6 May 2015.

The same holds true for the other direction, that is, a 'strong' BIT concluded at European level is likely to reinforce the rapid growth of Chinese FDI in the EU and contribute to the "new era of Chinese capital"¹³ in Europe which indeed has only yet begun. In this sense, both the quality of potential new rules and the degree to which they are actually implemented over the coming years will determine how far Europe may be ready to increasingly rely on foreign investors from China. In turn, failure to improve investment conditions and mutual trust by means of a new BIT may incite the EU to look for alternatives and perk up its engagement elsewhere in the region. The same may hold true for the Chinese government, which is in desperate search of safe and profitable FDI destinations for its multinationals to 'go global'. The economic crisis notwithstanding, the EU is attractive both because Chinese investments generally meet fewer political encumbrances than in the US and because Europe is the destined target point for Xi Jinping's epochal New Silk Road strategy.¹⁴ But recent episodes like the back and forth over Cosco's investment in the port of Piraeus¹⁵ have definitely unsettled the Chinese side regarding the EU's capacity to ensure equal investment security in different Member States.

Insofar as the EU and China fail to find an agreement that convinces investors on both sides of the desirability of further expanding their activities in each other's markets, both European and Chinese businesses' interest could increasingly shift towards the promising markets in China's neighbourhood, particularly in Southeast Asia, which in turn would mean significantly increased Sino-European competition – both economically and politically. This could be seen as the preferable outcome only from the perspective of ASEAN states, or Japan and South Korea, as it might allow them to benefit from privileged terms in their respective trade relations with the EU and China. In any case, considering the Commission's declared goal of using the BIT negotiations to better protect European investments in China from arbitrary state interference and IPR violations, the degree of 'ambition' in the EU-China BIT will have clear repercussions on regional investment flows, as well as on the conditions under which European and Chinese investors will compete in third markets in East and Southeast Asia in the future.

The EU, China and the 'Taiwan question'

Another economically and politically crucial aspect to take into account is the possible link between the EU concluding a BIT with the government in Beijing and a potentially similar, though inevitably much more informal agreement with Taiwan. According to several internal sources, the European Parliament, which cultivates a traditional sympathy for Taipei's concerns, is now trying to impose such a causal and temporal link between the two.¹⁶ This, although falling far short of the Taiwanese government's initial ambition to obtain a comprehensive FTA (quite like Beijing), would be of crucial importance not only for Taiwan's diplomatically embattled government, but also for its economy, which is already bearing the brunt of the proliferation of PTAs between all of Taiwan's neighbours. I will therefore briefly outline Taiwanese lobbying efforts for a similar BIT with the EU, before discussing their interrelatedness with Beijing's standpoint on an EU-China BIT.

Taiwanese lobbying for a preferential agreement

There is no doubt that Taiwan's number one foreign policy priority remains the bilateral relationship with its geopolitical guardian angel, the United States. Thus, its eventual accession to the plurilateral Trans-Pacific Partnership – which has been concluded in early October without the participation of either Taiwan or China, but still needs to be ratified by a reluctant US Congress¹⁷ – remains most relevant for Taiwan's diplomatic and economic survival.¹⁸ Yet, the EU as the world's major trade bloc is also high on the list of Taipei's diplomatic priorities – as the very active lobbying strategies and senior staffing of its 'Representative Offices' in Brussels and other European capitals illustrate.¹⁹ Next to the traditional issues of Taiwanese concern, mainly Taiwan's "pragmatic participation" in international organisations²⁰ and the European stance on cross-Strait relations²¹, economic and trade issues have become the major object of Taiwanese lobbying in Brussels.

Despite the Kuomintang administration's far more conciliatory "workable diplomacy"²² approach after 2008 and economic evidence that Taiwan fulfilled all necessary criteria

¹² European Commission, "The EU and ASEAN: a partnership with a strategic purpose", Joint Communication to the European Parliament and the Council, 18 May 2015, p. 6. ¹³ T. Hanemann & M. Huotari, "Chinesische Direktinvestitionen in Deutschland und Europa. Eine neue Ära chinesischen Kapitals" [Chinese Direct Investments in Germany and Europe. A New Era of Chinese Capital], Mercator Institute for China Studies, June 2015, retrieved 31 July 2015. <http://www.merics.org/fileadmin/templates/art/aktuelles/COFDI/Download/PDF/COFDI-DE.pdf>. ²⁰ S. Winkler, A Question of Sovereignty? The EU's Policy on Taiwan's Participation in International Organizations, PhD Thesis, Vrije Universiteit Brussel, July 2011, pp.298-311. ²¹ J. Cabestan, "The New Détente in the Taiwan Strait and Its Impact on Taiwan's Security and Future. More Questions than Answers", China Perspectives, vol.3, 2010, pp.22-33. ²² H. Su, "Taiwan's Strategy towards the EU: From Hallstein Doctrine to Workable Diplomacy", in H. Su (ed.), Asian Countries' Strategies towards the European Union in an Inter-regionalist Context, Taipei, National Taiwan University Press, 2015, pp.94-98.

set out in the Commission's RTA strategy,²³ the European side shied away from vexing Beijing by including Taiwan in its list of potential FTA partners. Indeed, the pragmatic, low-key Kuomintang diplomacy may have reassured Beijing and facilitated EU-Taiwan relations on administrative levels,²⁴ but it has also contributed to a growing neglect of the 'Taiwan question' by European decision-makers, at a time when the economic imperatives of cooperating with China are already eclipsing normative considerations in EU foreign policy.

Today, it has become generally acknowledged even by the staunchest Taiwan supporters in the European Parliament that no treaty or agreement can be concluded with Taiwan before a similarly ambitious deal has been reached with China.²⁵ In this sense, the EU-China BIT may have positive repercussions for Taiwan, whose economic champions are more concerned about competition from South Korea and Japan than from mainland China. However, a significant improvement of EU-China bilateral relations through a BIT might also further debase the economic line of argument chosen by both Taiwanese diplomats and Taiwan supporters in Europe in favour of a PTA, i.e. that Taiwan could be a promising regional hub for European trade and investment in East Asia and especially the Chinese market.²⁶ Taiwan, it seems today, would only be useful as an 'access point' to China insofar as direct EU-China exchanges are seriously restricted by objective barriers or mistrust.

Another important element of uncertainty is the growing popular resentment in Taiwan against Ma Ying-jeou's landmark project: the ECFA. Due to the scarcity of alternative, non-governmental Taiwanese 'channels of influence' in Europe, European decision-makers' vision is heavily influenced by the Kuomintang's official representation, which for instance did everything to downplay the importance of the 'Sunflower movement' last year. But the

growing popular resistance to cross-Strait rapprochement in Taiwan also challenges the Commission/EEAS strategy to insist on better cross-Strait relations as a precondition for improved EU-Taiwan relations,²⁷ while excluding the bothersome Taiwan question from bilateral relations with China. This strategy is built solely upon the scenario of continued smooth, incremental cross-Strait integration and the fact that "Taiwan is, mistakenly, no longer considered a dangerous flashpoint".²⁸ However, EU-China relations might equally be put to a hard test as soon as the current "highly militarised détente"²⁹ in the Taiwan strait is shaken.

Beijing's potential reaction to an EU-Taiwan agreement

As for all negotiations with Taiwan, no matter how informal, the EU as a trading partner will have to account for the now omnipresent "China factor"³⁰, by anticipating Beijing's potential resistance to any act that might be seen as upgrading Taipei's international standing. Indeed, the extremely cautious European echoes to any kind of trade or investment agreement proposed by Taiwan reflect the EU's general tendency to give more and more ground to Beijing on the Taiwan issue.³¹ Due to the opaqueness surrounding this sensitive issue,³² it is hard to tell how much informal pressure Chinese diplomats are actually exerting on their European counterparts in order to prevent them from proceeding too rapidly in negotiations with Taiwan. China's potential degree of 'tolerance' can, however, be inferred from comparable recent cases.

First, while generally trying to limit Taipei's diplomatic space in any possible way, Beijing has recently accepted FTAs to be concluded in a semi-official manner with Taiwan by Singapore and New Zealand.³³ Both countries had previously concluded FTAs with China – an indication that Beijing's primary occupation is to stay one step ahead of Taipei in any bilateral relationship. Consequently, it will be

²³ P. Messerlin, *The EU Preferential Trade Agreements: Defining Priorities for a Debt-Ridden, Growth-Starving EU*, Sciences Po, Groupe d'Économie Mondiale, GEM Working Paper, January 2012. ²⁴ Interview with a Taiwanese diplomat, Taipei Representative Office, Brussels, 20 April 2015. ²⁵ Interview with a parliamentary assistant, European Parliament, 20 April 2015; Interview with an EP official, European Parliament, via video call, 26 April 2015. ²⁶ M. Okano-Heijmans, S. Wit & F. van der Putten, *Cross-Strait Relations and Trade Diplomacy in East Asia. Towards Greater EU-Taiwan Economic Cooperation?*, Clingendael, Clingendael Report, 2015, pp. 41-42. ²⁷ Interview with an EEAS official, European External Action Service, Brussels, 27 March 2015. ²⁸ D. Pilling, "Taiwan resolves to resist China's embrace", *Financial Times*, 5 November 2014, retrieved 20 April 2015, <http://www.ft.com/intl/cms/s/0/9652d026-6412-11e4-8ade-00144feabdc0.html>. ²⁹ J. Cabestan, *The New Détente...*, op.cit., p. 25. ³⁰ R. Solomon (ed.), *The China factor. Sino-American relations and the global scene*, Englewood Cliffs, Prentice-Hall, 1981. ³¹ N. Noesselt, *Die Beziehungen der EU zu China und Taiwan. Hintergründe und Perzeptionen [The EU's relations with China and Taiwan. Background and Perceptions]*, Hamburg, Kovac, 2008, p. 72. ³² This sensitivity has been clearly evident from the reactions and remarks of all official European and Taiwanese interviewees in Brussels to questions in this regard. ³³ J. Hsu, & A. Poon, "Taiwan, Singapore Sign Free-Trade Pact. Island Seeks to Lessen Its Dependence on China", *Wall Street Journal*, 7 November 2013; A. Fensom, "Taiwan-Singapore FTA", *The Diplomat*, 8 November 2013. ³⁴ "Xi Welcomes Taiwan Effort to Join China's Infrastructure Bank", *Bloomberg*, 4 May 2015, retrieved 31 July 2015, <http://www.bloomberg.com/news/articles/2015-05-04/china-s-xi-meets-with-taiwan-ruling-party-chairman-xinhu>. ³⁵ J. Morrison, *International Business: Challenges in a Changing World*, London, Palgrave Macmillan, 2009, p. 220.

interesting to see how the issue will now be dealt with in negotiations with the EU, at a moment where the European negotiating stance is weakened by economic difficulties and internal wrangles, but where China is also put under pressure by the ongoing TiSA and TTIP negotiations from which it continues to be excluded. Second, the case of the Asian Infrastructure Investment Bank (AIIB) is also revealing in this regard. After skilful Chinese diplomacy had managed to simultaneously show up the United States (openly hostile to any Western participation) and divide the European Union (with roughly half its Member States declaring their will to join), Beijing displayed a somewhat ambivalent leniency by accepting the Taiwanese bid to join the AIIB project – albeit at the last hour and under restrictive and decidedly non-sovereign conditions.³⁴

From these examples, it seems that with regard to the ‘Taiwan issue’ in international trade and development, Beijing pursues a strategy of benign supremacy which is characterised by 1) tight control over Taiwan’s economic diplomacy, 2) strong opposition against any type of privileged relations between Taiwan and any third country, 3) a strategy geared towards progressively increasing Taiwan’s economic dependency on the mainland by expanding cross-Strait and triangular trade, and 4) cautiously allowing Taiwan to upgrade its economic relations with third countries once they have concluded at least similarly ambitious preferential agreements with China.

In sum, the concomitant negotiations with China and Taiwan are a litmus test for the EU both as a commercial and political power in East Asia. Without prejudice to its One-China policy, the Commission as a negotiator could potentially play the ‘Taiwan card’, i.e. the option of forging ahead with a preferential agreement with Taiwan, to obtain better conditions from Beijing. Conversely, it may succumb to Member States’ increasingly desperate quest

for Chinese capital inflows and deliberately protract the negotiations with Taiwan, which would weaken the EU’s negotiating position but appease China and possibly speed up the conclusion of an EU-China BIT.

Conclusion

It is true that the prospective EU-China BIT is only one of many bi- and plurilateral agreements being negotiated in the aftermath of a perceived “breakdown of multilateralism”³⁵ in the early 21st century. Yet, it is a particularly relevant one, given the sheer economic weight of both partners as well as its character as a potential ‘stepping stone’ for closer strategic cooperation between the EU and China. Thus, the degree of ambition of such a BIT and its perception as a success or failure of common EU-China rule-making will have far-reaching implications well beyond this bilateral relationship.

The present article has illustrated these implications in East and Southeast Asia by discussing two particular cases. First, the fate of an EU-China BIT will decide whether Europe and China will increasingly rely upon each other for growth and innovation perspectives, or develop an increasingly competitive approach which rests upon preferential trading terms in third countries – the emerging markets of Southeast Asia in particular. Second, the BIT is also a test for the Commission’s excessively ‘economised’ China strategy, which hopes to avoid any disturbing normative and geostrategic issues. The link between EU-China and EU-Taiwan negotiations on preferential agreements – now and possibly with regard to a forthcoming FTA over the next years – is crucial in this regard. This case will show whether the EU can develop a capacity to use sensitive political issues strategically both to defend its proclaimed norms and to promote its own relevance in East Asian politics. ©



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BIO

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THE MOTIVATIONS BEHIND THE EU-CHINA BILATERAL INVESTMENT TREATY NEGOTIATIONS

Francesco TENUTA

Introduction

After the outbreak of the economic crisis the European Union (EU) and its Member States, in search of new opportunities to revamp their economies, became very interested in deepening their investment relations with China. At the 16th EU-China Summit, held on 21 November 2013, both parties announced their will to undertake a joint path towards the creation of an EU-China Bilateral Investment Treaty (BIT).¹ The extreme significance of this agreement is not only due to the fact that China is the EU's second largest trading partner, whilst the EU is China's largest trading partner.² This will also be the first BIT negotiated by the EU since the entry into force of the Lisbon Treaty. In light of the new Article 207 of the Treaty on the Functioning of the EU (TFEU), the matter of foreign investment has become a new exclusive competence of the EU, which has accordingly acquired the right to negotiate BITs on behalf of its Member States.³ Both the EU and China pursue the same goal: to revitalise their economies by boosting their underdeveloped investment relations. In fact, "China accounts for just 2-3 percent of overall European investments abroad, whereas Chinese investments in Europe

are rising, but from an even lower base".⁴ However, the motivations that led them to the negotiating table are different. What are the European and the Chinese motivations behind the negotiations? Why are they different? This paper will analyse the divergences of both parties' motivations behind the ongoing EU-China BIT negotiations. While they both agree on the necessity of establishing a unified legal framework to govern their investment relations, the Europeans, underpinned by a strong public support, aim at removing the many regulatory restrictions to foreign investment in the Chinese market. The Chinese, who already enjoy "ample access to EU countries with few restrictions in place (in some countries no restrictions at all)", perceive the conclusion of this agreement not only as a means for facilitating European investment but, primarily, as a means for pursuing several political objectives.⁵

To this end, the European motivations will be analysed first to point out the great importance of the regulatory aspect. Subsequently, the Chinese motivations will be analysed to demonstrate how the political component plays a key role.

¹ "EU and China begin investment talks", European Commission, Brussels, 20 January 2014, retrieved 7 April 2015, http://europa.eu/rapid/press-release_IP-14-33_en.htm. ² "Countries and Regions: China", European Commission, retrieved 02 September 2015, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/>. ³ "Investment and market access in China", European Council on Foreign Policy, 2014, retrieved 3 May 2015, <http://www.ecfr.eu/scorecard/2014/china/2>. ⁴ Countries and Regions: China", op. cit. ⁵ S. Meunier, "Divide and Conquer: China and the Cacophony of Foreign Investment Rules in the EU", Princeton University - Woodrow Wilson School of Public and International Affairs, 2013, p. 10, retrieved 22 September 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2299677.

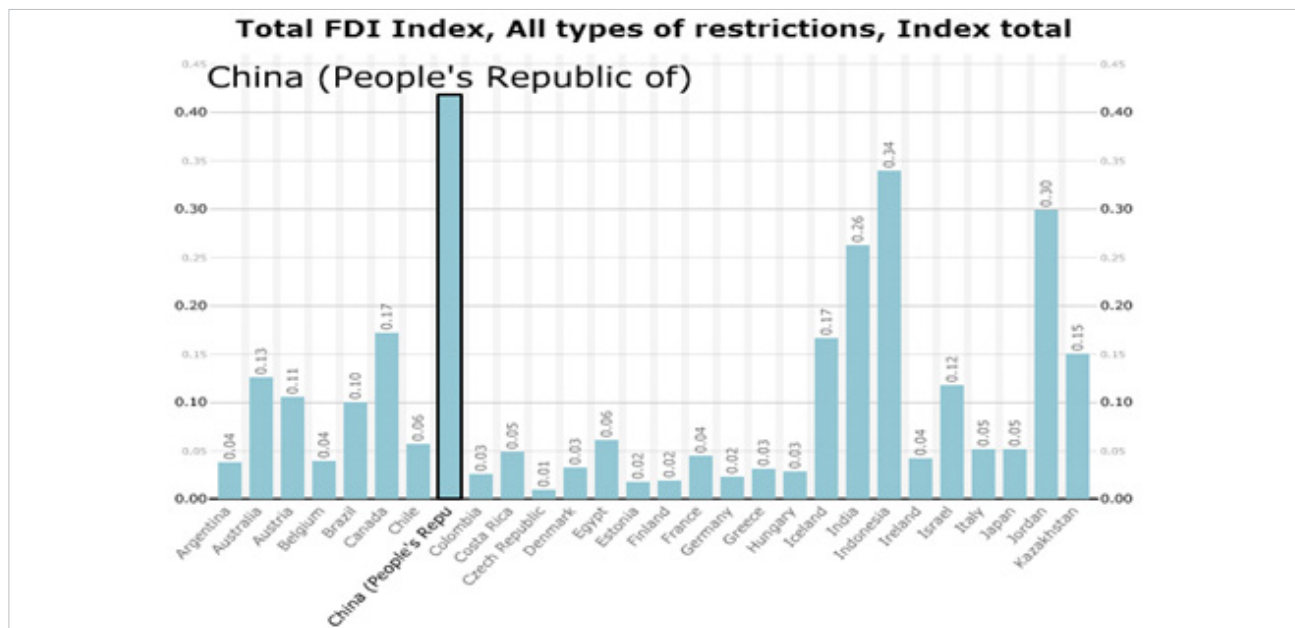
A common concern: the downsides of the current legal framework

China signed its first BIT with Sweden in 1982.⁶ Since then, 26 BITs have been signed between China and the various EU Member States (Belgium and Luxembourg have signed a joint one).⁷ However, the legal framework that currently regulates the EU-China investment relations has several shortcomings. In fact, those BITs were signed in different periods, causing a “regulatory discrepancy”. The European Commission, henceforth EC, differentiates between “Pre-1998” BITs and “Post-1998” BITs.⁸ While “[a]greements signed before 1998 lack important provisions guaranteeing substantive and procedural protection of foreign investment”, the “[a]greements signed after 1998 benefited from China’s ‘going out’ policy and include stronger investment protection provisions”, such as “principles of fair and equitable treatment, full protection and security, non-discrimination, as well as investor-to-state dispute settlement”.⁹ Ireland, as an exception, has no BIT with China.¹⁰ The only treaty currently enforced between them is a double taxation treaty signed in 2000.¹¹ Therefore, the first reason for which both parties need to conclude the EU-China BIT

is to promote “a simpler and more secure legal framework to investors of both sides”.¹² This was further confirmed as one of the main priorities in the frame of this negotiation by a Chinese official in Brussels.¹³ That being said, the analysis will hereafter focus on each parties’ motivations behind the negotiation.

EU motivations

In accordance with the principle that “[t]he Union should go where its investors would like to go”, in May 2011 the EC launched a public consultation to assess the European public opinion towards this negotiation.¹⁴ Around 60 percent of the respondents considered China as a strategic market for the EU, the majority of which came from the business world.¹⁵ The most attractive aspects were deemed to be “the proximity to the clients/market, the lower labour costs, the costs of resources and the productivity”.¹⁶ However, investing in China is still particularly challenging due to high restrictions on foreign investment. The OECD depicts the Chinese market as the most restricted in the world (see chart below).



Source: OECD, OECD FDI Regulatory Restrictiveness.

⁶ C. Xin, “The EU’s dilemma with China: free trade or bilateral investment?”, *The Parliament Magazine*, 18 March 2014, retrieved 11 April 2015, <https://www.theparliamentmagazine.eu/articles/feature/eus-dilemma-china-free-trade-or-bilateral-investment>. ⁷ “Investment Policy Hub: China”, UNCTAD, retrieved 22 September 2015, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42>. ⁸ “IMPACT ASSESSMENT REPORT ON THE EU-CHINA INVESTMENT RELATIONS”, EC, Brussels, 23 May 2013, p. 15, retrieved 11 April 2015, http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/swd_2013_0185_en.pdf. ⁹ *Ibid.* ¹⁰ W. Shan, *The Legal Framework of EU–China Investment Relations: A Critical Appraisal*, Oxford, Hart Publishing Salter’s Boatyard, 2005, p. 105. ¹¹ N. O’Brien, *Irish Investments in China*, Bremen, EHV academicpress, 2014, p. 112. ¹² “Countries and Regions: China”, *op. cit.* ¹³ Interview with a Chinese official, Brussels, 24 March 2015. ¹⁴ “Towards a comprehensive European international investment policy”, EC, *op. cit.*, p. 6. ¹⁵ “Summary of contributions to the European Commission’s public consultation on “The future investment relationship between the EU and China”, EC, p. 3, retrieved 2 September 2015, trade.ec.europa.eu/doclib/html/148394.htm. ¹⁶ *Ibid.*, p. 6.

In a study commissioned by the EC, Covington and Burling LLP identified four types of so-called 'Pre-Establishment' restraint, namely market entry and government approval, as well as equity requirements and technology transfer, which thwart free access for foreign capital in China.¹⁷ The study also recognised two types of 'Post-Establishment' restraint, namely limited access to financial support and government procurement, which apply once the investment in the country has been realised.¹⁸ The targeted enforcement against foreign companies operating in China, as well as the presence of the Chinese State-Owned Enterprises and their unfair competition practices, constitute further 'Post-Establishment' restraints.¹⁹ As the EC argues, the conclusion of the BIT is thus fundamental to "provide for progressive liberalisation of investment and the elimination of restrictions".

Others are only partially opened, and investors may face numerous restrictions that include being prevented from setting up wholly owned foreign enterprises and having to fulfil local content requirements or overly burdensome procedures.²⁰

The Chinese Ministry of Commerce publishes an annual "foreign investments catalogue", which lists the areas of the Chinese market that are respectively "restricted", "prohibited" or "encouraged".²¹ However, even in those areas identified as "encouraged", foreign companies must obtain the mandatory government approval, which involves a long and costly procedure (please see Chart 1).²² As Zhang Xiaotong, director of the Wuhan University's Research Centre for Economic Diplomacy, argues, "[t]his review process therefore limits the amount and proportion of investments".²³

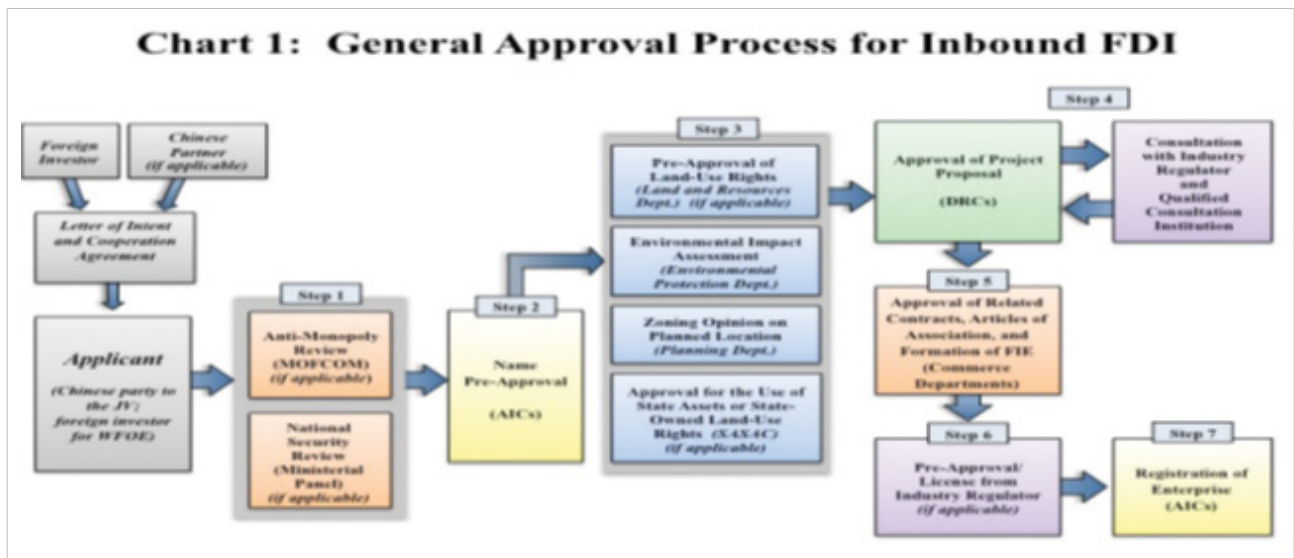
Pre-establishment restraints

Market entry and government approval

According to the EC:

Market access barriers persist at various levels [...] with several important sectors closed to foreign investors.

The issue of market access is of great significance for Europeans, and the Chinese government agreed to negotiate on this issue by adopting a "negative list" approach.²⁴ The inclusion of a negative list means that "a country can 'opt-out' certain sectors or sub-sectors from the application of



Source: China's Approval Process for Inbound Foreign Direct Investment: Impact on Market Access, National Treatment and Transparency, p. 10.

¹⁷ "Measures and Practices Restraining Foreign Investment in China", Covington & Burling LLP, 10 August 2014, p. 27, retrieved 3 May 2015, <http://trade.ec.europa.eu/doclib/html/152739.htm>. ¹⁸ Ibid. ¹⁹ "Countries and Regions: China", op. cit. ²⁰ "Impact Assessment Report on the EU-China Investment Relations", EC, Brussels, 23 May 2013, p. 12, retrieved 3 May 2015, http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/swd_2013_0185_en.pdf. ²¹ EC, "Impact Assessment", op. cit., p. 13. ²² "China's Approval Process for Inbound Foreign Direct Investment: Impact on Market Access, National Treatment and Transparency", US Chamber of Commerce, 2012, p. 9, retrieved 02 September 2015, <https://www.uschamber.com/china/E2%80%99s-approval-process-inbound-foreign-direct-investment-impact-market-access-national-treatment>. ²³ X. Zhang, "Trading carefully in the minefield of the EU-China investment treaty", Europe's world, 1 April 2015, retrieved 17 April 2015, <http://europesworld.org/2015/04/01/trading-carefully-minefield-eu-china-investment-treaty/#.VTEkFPkbJo8>. ²⁴ "EU-China Summit- building new connections", European Parliament, June 2015, p. 2., retrieved 23 September 2015, [http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/564356/EPRS_ATA\(2015\)564356_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/564356/EPRS_ATA(2015)564356_EN.pdf). ²⁵ "EU – China Bilateral Investment Treaty", King Wood and Mallesons, retrieved 7 September 2015, <http://www.kwm.com/en/knowledge/insights/eu-china-bilateral-investment-treaty-20150414>. ²⁶ Ibid. ²⁷ "Measures and Practices Restraining Foreign Investment in China", op. cit., p. 27. ²⁸ Ibid. ²⁹ K. Jarret & A. Wendholt, "Transferring Technology to Transform China—Is It Worth It?", China Business Review, 1 March 2010, retrieved 14 April 2015,

some of the clauses or principles found in the agreement”²⁵. Therefore, through the inclusion of the negative list, “all sectors would be open to foreign investment except for those specifically [mentioned] in the agreement”.²⁶ This will greatly help EU companies to gain free access to several sectors in the Chinese economy.

Equity requirements and technology transfer

In many sectors, foreign investments are admitted only under the form of joint-ventures with a Chinese partner that, in some cases, must be entitled to the ownership.²⁷ The most important examples of restriction to foreign equity are evident in the automotive industry, in which “the proportion of foreign capital shall not exceed 50 percent” and in the telecommunications sector where “the foreign investors’ total capital contribution shall not exceed 49 percent”.²⁸ Another obstacle to free access to the Chinese market is the requirement for technology transfer. As some argue:

Leveraging foreign interest in its huge market, China’s leaders expected companies to provide access to high-tech products and systems as evidence of their commitment to China’s growth and development.²⁹

European firms are reluctant to share their ‘know-how’, which is the basis of their high competitiveness. Nevertheless, both the equity restrictions and the technology transfer are mandatory and they need to comply with it to operate in China, with a subsequent growth of the discontentment.³⁰

Post-establishment restraints

Financial support and access to government procurement

Even in these two cases European investors are demanding a strong intervention of the EC to defend their interests, which are too often put aside by the Chinese bureaucracy.³¹ When receiving financial support, for instance, foreign

firms claim to be discriminated against as “grants, loans, subsidies, and even the provision of land at lower than market prices” are offered almost exclusively to Chinese enterprises.³² As a result, foreign companies struggle to compete against highly subsidised local firms.

The Chinese Public Procurement Market, instead, has been estimated as having the same “size of the South Korean economy”, namely 1.072 billion dollars, and represents a golden opportunity for foreign entrepreneurs.³³ However, at the time of its accession to the WTO, China decided not to sign the Agreement on Government Procurement, which ensures “open, fair and transparent conditions of competition in the government procurement markets”.³⁴ According to a Chinese official, China is seriously willing to become part of this agreement in the near future.³⁵ Nevertheless, the current situation is far from an “equal treatment” as foreign firms complain that public tenders are fixed, especially at the local level, to favour Chinese firms.³⁶

Targeted enforcement against foreign companies

Foreign investors in China consider themselves to be targeted by unfair antitrust abuses and discriminatory administrative practices. As James Zimmerman, the former chairman of the American Chamber of Commerce in China, argued: “[f]oreign companies view recent investigations and prosecutions as politically motivated” in order to “hamper them and promote potential Chinese competitors in technology and other fields in violation of its free-trade commitments”.³⁷ In light of these unfair practices, “[i]n September 2014, FAW VW, Audi’s Chinese joint venture, and Chrysler’s local sales units had a combined fine of 46 \$ million imposed, with other firms expected to be fined too”.³⁸ As a result, foreign companies are becoming “increasingly cautious about future investments” due to “perceptions that foreign business faces a less welcome environment”, and are demanding a clearer framework to protect their investments.³⁹

The issue of the Chinese State-Owned Enterprises

There are currently over 155,000 Chinese State-Owned

<http://www.chinabusinessreview.com/transferring-technology-to-transform-china-is-it-worth-it/>. ³⁰ “The Impact of International Technology Transfer on American Research and Development”, United States House of Representatives, 5 December 2012, p. 2, retrieved 14 April 2015, <https://science.house.gov/sites/republicans.science.house.gov/files/documents/HHRG-112-SY21-WState-DShea-20121205.pdf>. ³¹ A. Gradziuk & D. Wnukowski, “Rocky Road to a Level Playing Field in EU-China Investment and Trade Relations”, The Polish Institute of International Affairs, Vol. 8, April 2014, p. 4, retrieved 10 September 2015, https://www.pism.pl/files/?id_plik=17005. ³² “Measures and Practices Restraining Foreign Investment in China”, op. cit, p. 32. ³³ K. Hille, “European companies attack Chinese procurement policy”, Financial Times, 20 April 2011, retrieved 16 April 2015, <http://www.ft.com/intl/cms/s/0/94e9b5c4-6af6-11e0-9744-00144feab49a.html#axzz3XSVpP7K0>. ³⁴ “Agreement on Government Procurement”, World Trade Organisation, retrieved 11 September 2015, https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm. ³⁵ Interview with a Chinese official, Brussels, 24 March 2015. ³⁶ K. Hille, op. cit. ³⁷ J. Macdonald, “China Turns Up the Heat on Foreign Businesses”, Inc, 7 August 2015, retrieved 14 April 2015, <http://www.inc.com/associated-press/chinese-regulators-probe-into-global-automakers.html>. ³⁸ “China: antitrust probes targeting foreign firms”, European Parliament, October 2014, retrieved 3 September 2015, <http://ethinktank.eu/2014/10/28/china-anti-trust-probes-targeting-foreign-firms/>. ³⁹ J. Macdonald, op. cit.

Enterprises, henceforth SOEs, that Europeans consider unfair competitors.⁴⁰ In China, European companies are not able to compete with these SOEs as Beijing subsidises them through “preferential access to credit, land and other resources”.⁴¹ In recent years, Chinese SOEs have also become a huge concern within the European market. After the outbreak of the economic crisis, in fact, Chinese SOEs started to invest heavily in Europe and this raised several issues. First, the previous European BITs with China were not conceived to deal with those entities and the current framework is insufficient to regulate their activities.⁴² Second, due to the lack of relevant restrictions within the European Market, those companies, subsidised by Beijing, have acquired European companies with a high level of expertise, generating turmoil among the public opinion.⁴³ As confirmed by European and Chinese officials, the regulation of SOEs will be on the table during the negotiations for the EU-China BIT.⁴⁴

Chinese motivations

As the American diplomat and philanthropist Walter Annenberg once said, “[t]he greatest power is not money power, but political power”.⁴⁵ The Chinese have learnt this lesson. Indeed, through the signing of the EU-China BIT they are not only aiming at facilitating European investment but, first and foremost, they intend to pursue relevant political objectives at national and international level. At the international one, the conclusion of the EU-China BIT will draw Beijing closer to the EU-China Free Trade Agreement (FTA) – Beijing’s real goal. It will also legitimise China’s role as a new international investor. At the national level, instead, the conclusion of the BIT and the rise of the European FDI in the country will allow Beijing to achieve two major objectives. First, to sustain the burden of its policies aimed at guaranteeing social stability; second, to encourage the project of reform introduced during the Third Communist Party Plenum.

A BIT to pave the way for an FTA: a first step to overcome European mistrust

Whilst the Europeans wanted a BIT, the Chinese were pushing for a Free Trade Agreement.⁴⁶ As Razeen Sally, director of the European Centre for International Economic Policy, argues, the Chinese elite sought to negotiate an FTA with the EU to put an end to European measures restricting “China’s labour-intensive goods exports”.⁴⁷ To this end, the FTA should have included:

“THE GREATEST POWER IS NOT MONEY POWER, BUT POLITICAL POWER”

“[S]tronger disciplines on EU anti-dumping and safeguard measures; removal of peak tariffs on garments, leather goods and other manufactured exports; reduction of EU agricultural subsidies and tariffs to open markets for its expanding agricultural exports; and less trade-restrictive EU SPS [Sanitary and Phytosanitary Measures, namely health safety regulations] and TBT [Technical Barriers to Trade, namely technical characteristics that a product must meet to be sold into a country’s market] measures.”⁴⁸

Nevertheless, the EC has been reluctant and the calls from the Chinese State Councillor Yang Jiechi, who asked the Europeans to “work jointly to create conditions for launching a feasibility study of a China-EU Free Trade Agreement (FTA)” have been largely ignored.⁴⁹ There are several explanatory factors for this. First, while some EU Member States, such as the UK and Finland, have shown interest in such an agreement, others, especially Italy and France, have been reticent. These countries see an FTA with China as a threat to their economies.⁵⁰ The opening of their markets to Chinese companies, which export at extremely low cost, might be seriously harmful for local enterprises already put

⁴⁰ B. Bland, “China plans shake-up of state-owned enterprises to boost growth”, *Financial Times*, 13 September 2015, retrieved 22 September 2015, <http://www.ft.com/intl/cms/s/0/aff90924-5a01-11e5-9846-de406ccb37f2.html#axzz3mSHKCbOH>. ⁴¹ L. Wei, “China Prepares Mergers for Big State-Owned Enterprises”, *The Wall Street Journal*, 11 March 2015, retrieved 16 April 2015, <http://www.wsj.com/articles/china-prepares-mergers-for-big-state-owned-enterprises-1426053543>. ⁴² F. Godement & A. Stanzel, “THE EUROPEAN INTEREST IN AN INVESTMENT TREATY WITH CHINA”, *European Council on Foreign Relations*, p. 7, retrieved 16 April 2015, http://www.ecfr.eu/publications/summary/the_european_interest_in_an_investment_treaty_with_china332. ⁴³ Ibid. ⁴⁴ Interview with a European official, Brussels, 27 March 2015. Interview with a Chinese official, Brussels, 24 March 2015. ⁴⁵ “Walter Annenberg Quotes”, *QuotesFame*, retrieved 23 September 2015, <http://www.quotesfame.com/quote/41038.html>. ⁴⁶ F. Godement & A. Stanzel, *op. cit.*, p. 7. ⁴⁷ R. Sally, “Looking East: the European Union’s new FTA negotiations in Asia”, *ECIPE*, 2007, Brussels, p. 20, retrieved 10 September 2015, <http://www.ecipe.org/publications/looking-east-the-european-union2019s-new-trade-negotiations-in-asia-1/>. ⁴⁸ Ibid. ⁴⁹ S. Tiezzi, “Beijing Pushes For China-EU Free Trade Deal”, *The Diplomat*, 28 January 2014, retrieved 12 April 2015, <http://thediplomat.com/2014/01/beijing-pushes-for-china-eu-free-trade-deal/>. ⁵⁰ S. Jean, “Faut-il négocier un accord de libre-échange entre l’UE et la Chine?”, *CEPII*, 10 April 2014, retrieved 12 April 2015, <http://www.cepii.fr/blog/bi/post.asp?Dcmmunique=296>. ⁵¹ C. Attanasio, “Cina - UE, l’accordo di libero scambio divide l’Europa” [EU-China, the Free Trade Agreement divides Europe], *Lettera*, 1 April 2014, retrieved 3 September 2015, http://www.lettera43.it/economia/industria/cina-ue-l-accordo-di-libero-scambio-divide-l-europa_43675126011.htm. ⁵² L. Davis, “Ten years of anti-dumping in the EU: economic and political targeting”, *ECIPE*, February 2009, retrieved 12 April 2015, <http://www.ecipe.org/publications/ten-years-of-anti-dumping-in-the-eu-economic-and-political-targeting/>. ⁵³ Y. Chen, “EU-China Solar Panels Trade Dispute: Settlement and challenges to the EU”, *European Institute for Asian Studies*,

through the wringer by the financial crisis.⁵¹ In addition, EU trade relations with China have historically been a sensitive issue. In fact, in the period 1998-2008 the EC carried out 73 investigations on alleged cases of subsidised imports from China, which confirmed itself as being Europeans' main concern.⁵² The situation deteriorated further in 2013 after the outbreak of the "Solar Panels" case. In 2011, Beijing had heavily subsidised the sale of solar panels and their components to the EU for more than 20 billion euros, sparking the biggest trade dispute to have ever arisen between the EU and China.⁵³ Since then, EU Member States have become more prudent when dealing with Beijing. Given the significant complexity of the EU-China trade relations, the idea of negotiating an FTA was put aside and the opening of the negotiation for a BIT was the only option on the table. However, China's dream of negotiating an FTA with the EU has not yet waned. The Chinese President Xi Jinping won a promise from the Europeans, that they will consider the discussion of an FTA if negotiations for the BIT produce a positive outcome.⁵⁴ Therefore, the Chinese want to conclude this BIT to demonstrate their reliability and to convince the Europeans finally that the time is ripe for an FTA.

"IT HAS TOO MUCH MONEY, AND DOESN'T KNOW WHAT TO DO WITH IT"

Legitimise the new role as international investor

During the last few years, Beijing has accumulated around 3.9 trillion dollars of exchange reserves.⁵⁵ Thus, it is currently facing a "sovereign asset crisis", namely "it has too much money, and doesn't know what to do with it".⁵⁶ This situation, encouraged by the lack of relevant restrictions to foreign investments in Europe, turned in China's favour during the years of the Eurozone crisis.⁵⁷ In light of the tough

financial situation in which many European companies found themselves, the Chinese decided to invest heavily in Europe "where many national companies were sold off quickly and cheaply at the height of the crisis".⁵⁸ Targets of the Chinese outbound investment flows in Europe are "brands, talent and technology to bring back to the Chinese market".⁵⁹ Therefore, China needs to negotiate the BIT with the EU in order to reaffirm its new role as an international investor and to guarantee the highest level of protection for its European investments.⁶⁰

The need to grow to guarantee social stability

China's economic growth, which used to be an average of 10 percent per year during the last 20 years, shrunk to 7 percent in the first quarter of 2015.⁶¹ This is particularly worrying for Beijing, which needs to guarantee a high level of growth to sustain the burden of its social and commercial policies. As the Chinese premier Li Keqiang argued, China needs at least 7.2 percent growth to meet its employment goals and "cap the urban unemployment rate" at around 4 percent in order to avoid turmoil that could destabilise the leadership of the Chinese government.⁶² Given that Beijing is currently undergoing "the slowest expansion in more than two decades", the signing of the EU-China BIT, by fostering inbound and outbound investments, will contribute to revitalise economic growth and allow Beijing to continue its 'peaceful rise' undisturbed.⁶³

Boost internal reforms

On November 2013, the Third Communist Party Plenum issued a "Decision" that introduced reforms aimed at promoting a more effective market economy.⁶⁴ However, many experts are sceptical about the extent to which this reform plan will be implemented effectively. First, the final decision has been included in a non-binding communiqué, which does not set a clear roadmap.⁶⁵

June 2015, p. 2, retrieved 24 September 2015, http://www.eias.org/images/EU-Asia_Glance/2015/EU-Asia-at-a-glance-EU-China-Solar-Panels-Dispute-Yu-Chen.pdf. **54** R. Emmott & F. Guarascio, "China's Xi wins EU pledge to consider free-trade deal", Reuters, 31 March 2014, retrieved 12 April 2015, <http://www.reuters.com/article/2014/03/31/us-china-eu-idUSBREA2U15J20140331>. **55** H. Ling, "What should China buy with its \$3.9 trillion reserves?", MarketWatch, 17 June 2014, retrieved 17 April 2015, <http://www.marketwatch.com/story/what-should-china-buy-with-its-39-trillion-reserves-2014-06-17>. **56** Y. Wang & D. Freeman, "The International Financial Crisis and China's Foreign Exchange Reserve Management", Brussels Institute of Contemporary China Studies, 29 March 2013, retrieved 17 April 2015, <http://www.vub.ac.be/biccs/site/assets/files/apapers/Reserves.pdf>. **57** F. Godement & A. Stanzel, op. cit, p. 7. **58** "Chinese investments soar in crisis-hit Europe", Euroactive, 17 October 2014, retrieved 17 April 2015, <http://www.euractiv.com/sections/euro-finance/chinese-investments-soar-crisis-hit-europe-309282>. **59** E. Forchielli, "Chinese Investment in the EU: A Challenge to Europe's Economic Security", German Marshall Fund of the United States, January 2015, p. 2, retrieved 18 April 2015, <http://www.gmfus.org/publications/chinese-investment-eu-challenge-europe%E2%80%99s-economic-security>. **60** Ibid. **61** "China's growth slows to 7% in the first quarter", BBC, 15 April 2015, retrieved 17 April 2015, <http://www.bbc.com/news/business-32313557>. **62** G. Zhu & Y. Zhang, "China Needs 7.2% Growth to Ensure Employment", The Wall Street Journal, 5 November 2013, retrieved 17 April 2015, <http://www.wsj.com/articles/SB10001424052702303482504579179033609323974>. **63** "Why China's economy is slowing", The Economist, 11 March 2015, retrieved 02 September 2015, <http://www.economist.com/blogs/economist-explains/2015/03/economist-explains-8>. **64** N. Salidjanova & I. Koch-Weser, "Third Plenum Economic Reform and Proposal: a Scorecard", U.S.-China Economic and Security Review Commission, 19 November 2013, p. 3. **65** N. Salidjanova & I. Koch-Weser, op. cit.

Second, the communiqué reaffirms the role of the Communist Party and the fact that its hold over the economic system needs to “stay strong”.⁶⁶ Third, the Chinese elite will not allow its privileges to be wiped away easily. According to a Chinese official, the BIT with the EU will give the Chinese government the right impetus to accomplish the process of reform that started with the Third Plenum.⁶⁷ Zhang Xiaotong shares the same idea claiming that “the EU-China BIT would do much to help reform-minded Chinese leaders [...] [to] move towards a more open economy and a new approach to development”.⁶⁸

to pursue certain political objectives. On the one hand, the Chinese government needs to guarantee a high level of growth to cap urban employment at the minimum level and avoid potentially destabilising unrest. On the other hand, Beijing needs this agreement to emphasise its new role as an active investor, rather than as a passive recipient, as well as to give a boost to the project of reforms launched with the Third Plenum. But above all, the Chinese government wants China to stand out as a reliable and credible partner with whom Europeans can negotiate a Free Trade Agreement. ☺

Conclusion

This paper has demonstrated that the motivations that led both parties to the negotiation are different and reflect each party's concerns. Notwithstanding the huge divergences, both parties agree on the urgent need to substitute the old legal framework. The Europeans, who are seeking new markets in which their companies may invest and grow after the gloom of the financial crisis, want to conclude the BIT to remove various restrictions that hinder European investment in China. However, China, lacking relevant restrictions to foreign investment within the European market, considers this agreement as an opportunity



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⁶⁶ B. Davis, “Beijing Endorses Market Role in the Economy”, The Wall Street Journal, 12 November 2013, retrieved 17 April 2015, <http://www.wsj.com/articles/SB10001424052702304644104579193202337104802>. ⁶⁷ Interview with a Chinese Official, Brussels, 24 March 2015. ⁶⁸ Z. Xiaotong, op. cit.

THE ACTORNESS OF THE EUROPEAN PARLIAMENT IN EU-CHINA BILATERAL INVESTMENT TREATY NEGOTIATIONS

Shaohua YAN

This paper conducts an empirical analysis of the European Parliament's (EP) role in the EU-China Bilateral Investment Treaty (BIT) negotiations, through the framework of 'actorness' developed by Jupille and Caporaso.¹ Compared to other cases of trade agreements that have been studied, the EU-China BIT negotiation remains largely unexamined. Yet it presents a very interesting case to look at the role of the EP in shaping EU trade policy towards China.

First, it is the first stand-alone investment treaty that the EU has negotiated with a third country, and it is intended to replace the existing 26 Member States (MSs) BITs with one single comprehensive EU investment agreement.² Second, it is the first investment treaty to be subjected to the EP's consent after the Lisbon Treaty integrated Foreign Direct Investment (FDI) into the exclusive competence of the Common Commercial Policy (CCP).³ It is thus empirically interesting to see how international investment agreements are negotiated at the EU level. Third, the BIT is seen as "a precursor to a possible Free Trade Agreement

(FTA)",⁴ which, if negotiated successfully, would reshape EU-China trade relations and even the whole landscape of world trade.

An examination of the EP's actorness in the EU-China BIT negotiations therefore has implications for both the EP's broader role in EU trade policy and the development of EU-China trade relations in the future. The following part of the paper will analyse the EP's role in the EU-China BIT negotiations along the four dimensions of 'actorness': authority, autonomy, cohesion and recognition.

Authority of the EP in EU-China BIT Negotiations

From a legal perspective, the EP's authority in international investment agreements is clearly established in the provisions of the Lisbon Treaty (LT). First, Article 3 (1) TFEU establishes that the Union shall have exclusive competence in Common Commercial Policy.⁵ Second, Article 206 TFEU states that "the Union shall contribute, in the common interest, to the harmonious development

¹ According to Jupille and Caporaso, authority means the legal competence to act in a given subject matter. Autonomy implies institutional distinctiveness and independence from other actors. Cohesion refers to the extent to which an actor is able to formulate and articulate internally consistent policy preference. And recognition is understood as the acceptance from others in the process of interaction and socialization. See J. Jupille & J. Caporaso, "States, Agency, and Rules: The European Union in Global Environmental Politics", in Carolyn Rhodes (ed.), *The European Union in the World Community*, London, Lynne Rienner Publishers, 1998, pp.214-220. ² European Commission, "Commission proposes to open negotiations for an investment agreement with China", Press Release, Brussels, 23 May 2013, accessed 30 April 2015, http://europa.eu/rapid/press-release_IP-13-458_en.htm. ³ The Lisbon Treaty included FDI under the CCP, but did not define the scope of the competence; controversies still exist over the definition of FDI in the Lisbon Treaty. There are five main interpretations of the scope of the new FDI competence, see Wen Hua Shan & Sheng Zhang, "The Treaty of Lisbon: Half Way towards a Common Investment Policy", *European Journal of International Law*, Volume 21, Issue 4, 2010, pp.1049-1073. ⁴ S. Tiezzi, "Beijing pushes for China-EU free trade deal", *The Diplomat*, January 28, 2014, accessed 20 April 2015. ⁵ European Union, "Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union", March 2010, Article 3 (1) (e), TEU.

of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.”⁶ For the first time in history, Article 207 TFEU brings FDI under the exclusive competence of the EU by stating that “the common commercial policy shall be based on uniform principles, particularly with regards to [...] the conclusion of tariff and trade agreements relating to trade in goods and service, and the commercial aspects of intellectual property, foreign direct investment...”⁷ Third, the specific authority of the EP is stipulated in the following provisions: Article 207 (2), which states that “the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.”⁸; Article 218 (6), which says that the consent of the European Parliament is needed for

THE EP STILL SEES CHINA AS “AMONG THE TOP THREE MARKETS WORLDWIDE FOR INVESTMENT”.

“agreements covering fields to which either the ordinary legislative procedures applies, or the special legislative procedure where consent by the European Parliament is required.”⁹ And Article 218 (10), which states that “the European Parliament shall be immediately and fully informed at all stages of the procedure.”¹⁰

Therefore, according to the treaty provisions, the EP’s authority in the EU-China BIT negotiations lies in three fundamental rights: the right to be fully informed at all stages of the negotiation; the right to give its final consent after the treaty is negotiated; and the right to implement the treaty through domestic framework legislation under the Ordinary Legislative Procedure (OLP). With these ‘hard powers’, the EP is set to become an important actor in EU-China BIT negotiations.

The EP’s Autonomous Vision of EU-China BIT Negotiations

The EP’s views on EU-China trade BIT negotiations are established in its 2011 resolution on European international investment policy and 2013 resolution on the EU-China negotiations. In the first point of the 2011 resolution, the EP clearly states that a European investment policy should meet “the expectations of investors and beneficiary states but also the EU’s broader economic interests and external policy objective.”¹¹ This resolution set out the EP’s basic positions on the different aspects of EU international investment policy, including scope, investor protection, right to regulate, social and environmental standards, dispute settlement mechanisms, etc. However, the resolution on the EU-China BIT negotiations went much further than that in terms of agenda and the language used.

The EP’s intention to develop a balanced trade and investment relationship with China is clearly reflected in the first point of the resolution. Since a bilateral investment agreement would significantly upgrade the EU-China trade and economic relations, the EP “welcomes the strengthening of economic relations between the EU and China.”¹² But right after this, the EP calls on the EU and China to “pursue a well-balanced relationship of partnership.”¹³ The EP’s vision for an EU-China BIT could be framed in the following two dimensions.

Advocating Interests in the EU-China BIT

Despite the rising labour costs in China, the EP still sees China as “among the top three markets worldwide for investment.”¹⁴ It is thus in the interest of the EU to develop closer links and further integrate its economy with China. But in the eyes of the EP, the major challenges for European investment are the numerous tariff and non-tariff barriers in the Chinese market, such as IPR infringement, the unreliability of the judicial system, discrimination, technical barriers, the complexity of the tariff structure as well as the lack of transparency and uniformity in the application of the regulatory regimes, etc. Therefore, for this negotiation, the EP put much emphasis on trade liberalisation and market access in China to create a level playing field for European

⁶ European Union, “Consolidated Versions 2010”, op.cit., Article 206, TFEU. ⁷ European Union, “Consolidated Versions 2010”, op.cit., Article 207 (1), TFEU. ⁸ European Union, “Consolidated Versions 2010”, op.cit., Article 207 (2), TFEU. ⁹ European Union, “Consolidated Versions 2010”, op.cit., Article 218 (6), TFEU. ¹⁰ European Union, “Consolidated Versions 2010”, op.cit., Article 218 (10), TFEU. ¹¹ European Parliament, resolution of 6 April 2011 on the future European international investment policy, P7_TA (2011)0141, Brussels, 2011, point 1. ¹² European Parliament, resolution of 9 October 2013 on the EU-China negotiations for a bilateral investment agreement, P7_TA-PROV (2013)0411, Brussels, 2013, point 1. ¹³ Ibid. ¹⁴ Ibid.

investments, insisting that “a reassurance on the part of China that market access will be included in the negotiations should constitute a precondition for launching them.”¹⁵

Although this does not differ much from the Commission’s position, this liberal approach is compromised by certain protectionist tendencies in some sectors – as the EP pointed out that “the EU and China may have legitimate security concerns that justify total or partial exclusion of some sectors from foreign investment on a temporary or long-term basis.”¹⁶ For example, the EP have called for the exclusion of cultural and audiovisual services from the negotiation.

Fair competition is another concern for the EP in advocating European business interests in China. Unlike the previous resolution, which “welcomes investments of China’s sovereign wealth fund and state owned enterprises in the European Union”,¹⁷ the resolution on the BIT asks the Commission to ensure full transparency of China’s sovereign wealth funds and recommends that “the Commission negotiates strong and binding provisions on transparency and fair competition so that a level playing-field also applies to state-owned enterprises and sovereign wealth funds’ investment practices.”¹⁸

Promoting Norms in the EU-China BIT

While expressing the Parliament’s views on advocating European commercial interests, the EP’s resolution on the EU-China BIT devotes a large amount of space to emphasising the importance of norms and values in this negotiation. The points regarding norms in this resolution are more detailed and more strongly worded than the 2011 resolution on European international investment policy.

In saying that it wishes to develop a well-balanced relationship, the EP obviously means to bring into the agreement a normative dimension. This is consistent with its established position to see trade not only as an end in itself but also as a means to promote norms and values. This position seems to be quite straightforward and tough in the resolution on an EU-China BIT. Particular emphasis is

given to social and environmental norms, which appear again and again in different parts of the resolution.

In point 22, the EP stresses that “a precondition for the conclusion of the agreement should be the inclusion of a strong commitment by the parties to sustainable and inclusive development, in its economic, social and environmental dimensions and in relation to investment, in order to build a more balanced trade and investment relationship between the EU and China.”¹⁹ Following this statement, the EP continues to stress that “investment agreements concluded by the EU must not be in contradiction with the fundamental values that the EU wishes to promote through its external policies and must not undermine the capacity for public intervention, in particular when pursuing public policy objectives such as social and environmental criteria, human rights, and the fight against counterfeiting, security, workers’ and consumers’ rights, public health and safety, industrial policy and cultural diversity; [...] the inclusion of the respective specific and binding clauses in the agreement.”²⁰ This condition is reiterated in point 30 which stresses that “the agreement must promote investment which is sustainable and inclusive, and respects the environment.”²¹ Perhaps the EP is particularly concerned about the “poor implementation or non-implementation by China of certain fundamental social and labour rights and environmental standards”²², which the EP thinks are among the causes of the trade imbalance between the EU and China, as the EP insists “that the agreement should include a clause which prohibits the watering-down of social and environmental legislation.”²³

In addition to labour and environmental standards, the EP also calls for “an effective corporate social responsibility clause in line with the UN Guiding Principles on Business and Human Rights; affirms that investors should, respectively, apply the ILO Tripartite Declaration on Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises, as well as specific or sectoral international standards of responsible practice where these exist.”²⁴

¹⁵ Ibid, point 4. ¹⁶ Ibid, point 6. ¹⁷ European Parliament, resolution of 5 February 2009 on Trade and Economic Relations with China, P6_TA (2009)0053, Brussels, 2009, point 13. ¹⁸ European Parliament, resolution of 9 October 2013, op.cit., point 12. ¹⁹ Ibid, point 22. ²⁰ Ibid, point 23. ²¹ Ibid, point 30. ²² Ibid. ²³ Ibid, point 38. ²⁴ Ibid, point 33.

Cohesion of the EP in EU-China BIT Negotiations

Due to its significant weight in the EU's trade and investments relations, as well as its different norms and standards, China presents a litmus test for the cohesion of the EP to shape the EU's international investment policy. Since the negotiation is still ongoing and the final voting result is yet to be known, a quantitative analysis of this cohesion is impossible at this point in time. Nonetheless, by examining the debating and amendment records of the resolution, it is possible to undertake a qualitative analysis of some of the intra-group positions of the EP regarding the EU-China BIT negotiation.

The S&D group recognises that it is of great significance for both the EU and China to negotiate a bilateral investment treaty in order to tap the business potential, but it is also necessary to take into account the social and environmental impacts of investments, which in turn will have impacts on the safety of investments. As such, S&D member Bernd Lange (who also serves as Chair of the INTA committee) claimed in the debate that "it is a central demand for us Social Democrats to secure compliance with fundamental labour rights in investment agreements [...] we do not want competition on the basis of wage and social dumping, investment policy must be linked to the observance of fundamental workers' rights."²⁵

The EPP generally aims for an ambitious and balanced EU-China investment agreement, but there is a tendency to focus more on economic and investment interests. As EPP member Luliu Winkler said during the plenary debates of the resolution on the EU-China BIT negotiation, "the EPP is in favour of the inclusion of market access in the negotiations mandate, the elimination of as many tariff and non-tariff barriers to trade as possible, the reform of the Chinese Joint Venture Mechanism, better protection of property intellectual rights in China, enhanced transparency regarding governance rules for state-owned and private companies in China, a level playing field and fair competition between Chinese state-owned enterprises and European private companies, and effective support for European SMEs which invest in China."²⁶ This long list of

concerns of the EPP reveals an absolute focus on economic issues, which stands in contrast with the S&D Group's emphasis on the social and environmental dimension of the investment treaty.

The Greens and liberals (Verts/ALE group, now the Greens/EFA) also played a proactive role in putting the resolution together. The Greens believe that an investment treaty with China certainly offers opportunities, but they also see it as an opportunity to promote human rights and social norms in China. As Greens MEP Franziska Keller argued: "We find that an agreement between the EU and China has a chance when it comes to human rights and social standards. The bilateral investment agreements between China and the Member States have mostly no sustainability chapter. If we make it a binding rule, then we can really promote dialogue with China in these areas. We also want a clause that stipulates the existing international conventions of human rights and workers' rights [...] we are not against trade, but we also think we need to create a clear hierarchy of values."²⁷

Recognition of the EP in EU-China BIT Negotiations Recognition from the Commission

Perhaps because the EU-China BIT is the first stand-alone investment treaty that the Commission is negotiating and the EU has a huge stake in it, the Commission has been engaging closely with the EP throughout the negotiation. Trade Commissioner Karel De Gucht attended the plenary debates of the resolution on the EU-China BIT. In his opening remarks, he reemphasised the dual objective of investment protection and market access of the agreement, but interestingly, he also addressed a lot of issues that were not mentioned in the press statement of the Commission proposal. Probably aware of the EP's concern for norms and values, Commissioner De Gucht remarked that:

The EU will also endeavour to use these negotiations to promote the Union's general external action principles. For example, the Commission will aim to address sustainable development matters such as preventing the lowering of

²⁵ B. Lange, EU-China negotiation for a bilateral investment agreement (debate), Strasbourg, 8 October 2013, accessed 30 April 2015, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20131008+ITEM-016+DOC+XML+V0//EN&language=EN>. ²⁶ L. Winkler, EU-China negotiation for a bilateral investment agreement (debate), op.cit. ²⁷ F. Keller, EU-China negotiation for a bilateral investment agreement (debate), op.cit. ²⁸ Karel de Gucht, EU-China negotiation for a bilateral investment agreement (debate), op.cit. ²⁹ Ibid. ³⁰ Ibid. ³¹ European Commission, "Follow up to the European Parliament resolution on the EU-China negotiations for a bilateral investment agreement, adopted by the Commission on 29 January 2014", 6 March 2014, accessed 29 April 2015, [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/2674\(RSP\)#tab-0](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/2674(RSP)#tab-0). ³² European Parliament, Highlights from the European Parliament hearing of Cecilia Malmström, European Commissioner for Trade, Brussels, 29 September 2014, accessed 30 April 2015, <http://>

standards to attract investment, supporting social and environmental standards, and providing a reference in support of internationally recognised standards of corporate social responsibility and appropriate procedures to address disputes in this area.²⁸

At the end of the debate, Mr De Gucht welcomed the draft of an EP resolution that supports an agreement that “combines investment protection with liberalisation, that establishes a balance between the right to regulate and the right of the investors, that provides legal certainty and clarity to investors on both sides, and that takes into account important issues like environmental protection, labour standards and human rights.”²⁹ He further added that “the Commission will keep Parliament regularly up to date with regard to further development.”³⁰

AN AGREEMENT BETWEEN THE EU AND CHINA HAS A CHANCE WHEN IT COMES TO HUMAN RIGHTS AND SOCIAL STANDARDS.

Indeed, the EP’s resolution did not pass unnoticed by the Commission. On 6 March 2014, the Commission issued an official response to the EP’s adopted resolution. In the response, the Commission assured the EP that the Commission proposal and the negotiating directives adopted by the Council are overall in line with the resolution of the EP and cover most of the issues of concern to the EP, for instance, sustainable development, sovereign wealth funds, state owned enterprises, corporate social responsibility, right to regulate, transparency, exclusion of audio-visual services, etc.³¹ The Commission also carefully addressed the EP on issues of divergence between the two institutions.

Following De Gucht, the new trade Commissioner after the 2014 election, Mrs Cecilia Malmström continued the

Commission’s approach to engage the EP on the EU-China BIT negotiation. During a parliamentary hearing on 29 September 2014, she addressed a number of MEPs’ concerns about the negotiation. Regarding the EU-China investment agreement, she stated that an “investment agreement is the most important there [with China]. Before that is done I do not think we can embark on any other type of negotiations directly with China. Should we do so, this would of course merit a very careful assessment and discussion with the Parliament and I can assure you that you will be involved in that.”³² This is a clear indication that the Commission recognises the EP as an important actor in the EU-China BIT negotiation and has been engaging the EP seriously and closely.

Recognition from China

From China’s side, there is also growing recognition of EP’s role in EU trade policy in general and in the EU-China BIT negotiations in particular. On 31 March 2014, the Chinese President Xi Jinping made a visit to the European Parliament as part of his visit to the headquarters of the EU in Brussels and various Member States (the Netherlands, France, Germany and Belgium). This visit was a historic one considering the difficult relations between China and the EP regarding human rights. It has to be understood partly against the background of the second round of EU-China BIT talks, which took place on 24-25 March, on the eve of Xi’s visit to the EU institutions. According to some sources, President Xi Jinping’s visit to the EP and other EU institutions was “expected to give an impetus to the negotiations.”³³ During the meeting with the EP president Martin Schulz, Xi made it clear that “China attaches great importance to the role of the European Parliament, and is willing to strengthen China-EU parliamentary relations.”³⁴ Schulz also emphasised that “we are highly connected and interdependent [...] for our relations to flourish, political dialogue – not only our commercial ties – must be reinforced.”³⁵

www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/2674(RSP)#tab-0http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/536417/EXPO_BRI%282014%29536417_EN.pdf. ³³ Delegation of the European Union to China, “EU and China hold investment talks ahead of President Xi Jinping visit to Brussels”, 24 March 2014, accessed 30 April 2015, http://eeas.europa.eu/delegations/china/press_corner/all_news/news/2014/20140324_01_en.htm. ³⁴ People’s Daily (Renmin Ribao), “Xi Jinping Meets European Parliament President Schulz” (Xi Jinping Huijian Ouzhou Yihui Yizhang Schulz), 1 April 2014, access 30 April 2015, <http://politics.people.com.cn/n/2014/0401/c1024-24787559.html>. ³⁵ European Parliament, “Chinese president Xi Jinping visits European Parliament”, 31 March 2015, accessed 30 April 2015, <http://www.europarl.europa.eu/news/en/news-room/content/20140331STO41114/html/Chinese-President-Xi-Jinping-visits-European-Parliament>.

Conclusion

Unlike the previous trade agreements negotiated between the EU and China (1985 Trade and Economic Cooperation Agreement, Partnership and Cooperation Agreement) in which the EP has no formal role, the EP's authority is now established in the ongoing EU-China BIT negotiation, making it part of the 'triangle' together with the Commission and the Council. It has tried to enforce its vision of a more balanced approach between interests and norms in EU-China trade and investment relations. In particular, the EP seeks to include social, labour, and environmental standards in EU-China BIT negotiations, with a view to shaping the future EU international investment policy, which is still in the making.

In terms of cohesion, the EP cohesion seems to be quite high in the case of the EU-China BIT negotiations, with all major groups expressing support for the agreement. This might be due to China's importance for the EU's trade as well as the EP's aspiration to shape EU international investment policy through China's case. However, there is still a lack of consensus among the political groups in the EP about how to reconcile commercial interests with a normative agenda, which might represent an obstacle to the EP's actorness

In terms of recognition, by attending Parliamentary hearings and responding to EP resolutions, the Commission has demonstrated a willingness to engage the EP from an early stage of the negotiations and to take into account the EP's concerns. China has also showed a high level of recognition of the EP's role in the negotiations, which is il-

lustrated by China's direct efforts to engage the EP through high-level official visits and parliamentary diplomacy.

The actorness of the EP in the EU-China BIT negotiation has implications for both the EU and China. For the EU, the involvement of the EP has changed the institutional balance of EU trade policy making, this brings more legitimacy to the CCP but also leads to more complexity in the negotiation. It is thus important for the Commission to continue its practice of engaging the EP throughout the negotiation in order to avoid what Robert Putnam called "involuntary defection."³⁶ For the EP, since its authority is now established, cohesion is one of the central factors that affect its actorness in the CCP. If the EP is to shape the development of CCP and EU trade relations with others like China, it has to balance its internal division to find and enhance its own voice.

For Chinese negotiators, they need to adapt to the new reality of EU trade and investment policy making. This is the first time that China is negotiating an agreement with the EU that will be subjected to the consent of the EP. Chinese negotiators thus have to take into account the positions and preferences of the EP as well. In fact, China did show a degree of flexibility in accepting the EP's precondition of including market access in the negotiation. Yet this does not exclude the possibility of future politicisation of EU-China relations due to the involvement of the EP. It is thus imperative for China to turn its ear to the EP's voices, and engage closely with the EP. An EP office in Beijing, such as the one set up in Washington, would probably serve such a purpose. ☉



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³⁶ "Involuntary defection" refers to "the behavior of an agent who is unable to deliver on a promise because of failed ratification". See Robert Putnam, "Diplomacy and Domestic Politics: the Logic of two-level games", International Organization, Vol.42, No.3, 1988, p.438.