Pros and Cons of the EU-China Comprehensive Agreement on Investment

Iulia Monica Oehler-Șincai[1]

Abstract: *The main objectives of the present paper are to elaborate on the EU-China Comprehensive Agreement on Investment (CAI), its provisions, advantages and potential risks, and to detach various standpoints of relevant actors, related to this agreement. The ad referendum CAI, complemented by additional documents by the European Commission, underscores that it goes well beyond the investment protection issues, usually addressed in bilateral investment treaties and it additionally includes rules for: a better market access for the EU companies, a fairer investment environment in China and sustainable development. Despite its support by the European Commission, there has been formulated a strong criticism of the deal from various directions, both European and non-European. Besides, the conclusion of the pact induced not only tensions at the extra-EU level, but also intra-EU. The largest two obstacles to the adoption of the treaty are the conflicting interests of the EU Member States and the opposition of the European Parliament. Therefore a common position is needed inside the EU. The research is complemented by an analysis of the broader circumstances of rising FDI protectionism worldwide, under the increased complexity of the system of international relations and recent trends, harmful to multilateralism.*

Keywords: *EU, China, investment regime, liberalization, market access, sustainable development, regulatory restrictiveness index, protectionism.*

JEL classification: *F21, F23, F29, F52, F53*

Introduction

After 35 rounds of negotiations over the course of more than seven years, the EU-China Comprehensive Agreement on Investment (CAI) was concluded "in principle" on the 30th of December 2020, under the German Presidency of the European Council.

There is still no definitive text (which means that negotiations will continue) and the process of adoption and ratification has not yet begun. The preliminary text was published on the 22nd of January 2021 therefore our argumentation in this paper is based on this draft (European Commission, 2021a), other key information offered by the European Commission (2021b; 2020a; 2020b; 2020c) and the relevant attitudes and positions formulated by international institutions and experts until now.

The difficulty and complexity of the addressed issues, China's specificities from

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the perspective of the role played by the state in the economy and its human rights record, various positions of different EU Member States, and also key EU partners, such as the US, vis-à-vis the agreement, explain the slow pace of negotiations and the controversy surrounding its adoption. The new agreement does not mean that the EU will give up its principles and objectives stated in its documents such as the ***"EU-China – A Strategic Outlook" of 12 March 2019***, or the ***EU Regulation 452/2019 of 19 March 2019 of the European Parliament and of the Council*** establishing a framework for the screening of FDI into the Union (applied from 11 October 2020), or the ***White Paper of 17 June 2020 on levelling the playing field as regards foreign subsidies***. Instead, in the context of rapid structural transformations of the system of international relations, the EU indicates that it prefers to cooperate and conclude this agreement with China than to get stuck in endless negotiations.

Under these circumstances, the main objectives of the present paper are to elaborate on CAI, its provisions, advantages and potential risks, and to detach various standpoints of relevant actors, related to this agreement. CAI should be interpreted in conjunction with Chinese and multilateral initiatives, being an appropriate tool to stimulate cooperation, in a time when mistrust, uncertainty and disruption dominate the international relations.

The *ad referendum* CAI

In its current form, CAI is only a draft agreement. Comparing its provisions with the European Commission's clarifications, it is evident that many details will have to be further negotiated and added to the agreement, including the investment protection and investment dispute settlement (within 2 years of the signature of CAI) (European Commission, 2020a; 2020b).

The key objectives of **investment liberalisation, ensuring reciprocity in market access (in order to rebalance the EU's economic relationship with China) and transparency of the negotiations and business practices** were set out by successive European Parliament resolutions (from 2013 to 2018) (European Parliament, 2020; Kuo, 2021). The resolution of 2013 was accompanied by a special request by the European Parliament to the Commission, namely to complement its general impact assessment by one regarding human rights (European Parliament, 2020). The complexity of the agreement is underscored also by the numerous successive steps of the negotiations, as synthesized in Box 1.

Box 1: CAI Preparations and key rounds of negotiations

Agreement reached to launch negotiations: at the 15th EU-China summit in February 2012.
Impact assessment publication: May 2013.
Adoption by the Council of the **negotiating mandate** for the Commission: October 2013.
Announcement of the launch of negotiations: November 2013, at the 16th EU-China summit.
First round: January 2014.
A **Sustainability Impact Assessment** was completed in December 2017, in order to assess the potential impact of the agreement in various fields (social and labour aspects, human rights and the environment, EU competitiveness, consumers and potentially significant impacts on third countries), including six key economic sectors (transport equipment, mining and energy extraction, chemicals, manufacture of food and beverages, finance and insurance, and communication and electronic equipment).

Exchange of market access offers for the first time: at the 20th EU-China summit in 2018.
19th round: feedback exchange on the market access offers.
At the 21st EU-China summit in 2019, **the EU and China committed to achieving in 2019 the progress required for the conclusion of the ambitious agreement in 2020**.
21st-25th rounds: disciplines on financial services, capital transfer, national treatment, state-to-state dispute settlement, investment-related sustainable development, competition-related issues, state-owned enterprises (SOEs).
25th round: second exchange of market access offers.
26th-29th rounds: discussions on revised offers.
30th and 31st rounds: level-playing field issued (SOEs, transparency of subsidies and forced technology transfers).
32nd round: sector-specific market access and the mechanism for addressing differences on sustainable development.
33rd round: competition related issues, capital movements and transfers, entry and temporary stay of business visitors for establishment purposes and intra-corporate transfers.
34th round: taxation matters and horizontal exceptions.
35th round (7-11 December 2020): reaching a deal by the end of 2020.
The European Commission announced the **conclusion of the negotiations and agreement in principle on December 30, 2020**.

Sources: European Sources Online (2021), The European Parliament (2020), European Commission (2021a; 2021b) and European Commission (2018).

The CAI provisions go well ***beyond the investment protection issues***, representing a key focus of the bilateral investment treaties (BITs). Additionally, it includes rules for: (1) a better market access for the EU companies (such as the removal of joint venture requirements and foreign equity caps in many sectors, see Table 1); (2) a fairer investment environment in China (ensuring a better level playing field for the EU investors, through stipulations against the forced transfer of technologies, clear obligations for the state-owned enterprises, transparency rules for subsidies); (3) sustainable development (in the areas of environment, labour, corporate social responsibility) (European Commission, 2020a).

In this regard: (1) there are set up a state-to-state dispute resolution mechanism, other specific bodies and an "ad hoc mechanism for fast engagement at political level in case of serious and urgent issues", and specific ways for the participation of the civil society in the implementation process; (2) for European companies, it is secured the access to China's standard setting bodies; (3) the EU preserves its "sensitive areas such as public services, critical infrastructure and technologies", and the EU FDI screening mechanism and the 5G toolbox remain in force (European Commission, 2020a and 2020b).

Based on the key elements of CAI synthesized by the European Commission, the following table presents several examples of market access concessions offered by China.

Table 1: Exemplification of market access commitments by China

Field	Concessions
Manufacturing (representing more than half of the total EU investment in China) (transport and telecommunication equipment, chemicals, health equipment etc.)	Comprehensive commitments (such as the elimination of quantitative restrictions, foreign equity caps, joint venture requirements), with limited exclusions (especially in sectors with significant overcapacity), matching the EU's openness. China has not made such far-reaching market access commitments with any other partner.
Automotive sector	Removal and phase out of joint venture requirements, market access commitments for new energy vehicles.
Financial services	China had already started the process of gradually liberalising the financial services sector and will grant and commit to keep that opening to EU investors. Joint venture requirements and foreign equity caps have been removed for banking, trading in securities and insurance (including reinsurance), asset management.
Health (private hospitals)	China will offer new market opening by lifting joint venture requirements for private hospitals in key Chinese cities, including Beijing, Shanghai, Tianjin, Guangzhou and Shenzhen.
R&D (biological resources)	China has not previously committed openness to foreign investment in R&D in biological resources. China has agreed not to introduce new restrictions and to give to the EU any lifting of current restrictions in this area that may happen in the future.
Telecommunication/Cloud services	China has agreed to lift the investment ban for cloud services. They will now be open to EU investors subject to a 50% equity cap.
Computer services	China has agreed to bind market access for this sector and will include a "technology neutrality" clause, which would ensure that equity caps imposed for value-added telecom services will not be applied to other services such as financial, logistics, medical etc. if offered online.
International maritime transport	China will allow investment in the relevant land-based auxiliary activities, enabling EU companies to invest without restriction in cargo-handling, container depots and stations, maritime agencies, etc. This will allow EU companies to organise various types of multi-modal door-to-door transport.
Air transport-related services	The CAI does not address traffic rights (which are subject to separate aviation agreements), China will open up in the key areas of computer reservation systems, ground handling and selling and marketing services. China has also removed its minimum capital requirement for rental and leasing of aircraft without crew, going beyond GATS.

Business services	China will eliminate joint venture requirements in various business services: real estate services, rental and leasing services, repair and maintenance for transport, advertising, market research, management consulting and translation services, etc.
Environmental services	China will remove joint venture requirements in environmental services such as sewage, noise abatement, solid waste disposal, cleaning of exhaust gases, nature and landscape protection, sanitations and others environmental services.
Construction services	China will eliminate the project limitations currently reserved in their GATS commitments.
Employees of EU investors	Managers and specialists of EU companies will be allowed to work up to three years in Chinese subsidiaries, without restrictions such as labour market tests or quotas. Representatives of EU investors will be allowed to visit freely prior to making an investment.

Sources: European Commission (2020a; 2021a), Rhodium Group (2020).

CAI will replace the 25 bilateral investment treaties that EU members (all except Ireland)[2] signed with China before 2009, when the EU gained competence for investment issues based on the Lisbon Treaty. The main drawback of these BITs consist in their limited coverage area, as they are focused on investment protection and do not include issues such as investment liberalisation, market access, sustainability (related not only to environment and climate change, but also corporate social responsibility and other investment-related labour issues), rules on the SOEs and transparency rules on subsidies (García-Herrero, 2020).

The agreement will not come into force until it is signed by the EU Member States and ratified by the European Parliament. Taking into account that the next presidency trio (France – Czech Republic – Sweden, following Germany – Portugal – Slovenia[3]) is made of two countries extremely critical to China, namely the Czech Republic and Sweden, while the French diplomats have also an unfavourable opinion on China[4], if the Agreement is not ratified until the end of 2021, there is little chance of its endorsement afterwards. Germany and France seem to have the greatest interest in signing the agreement, due to their market access motivations, including in the health sector (Godement, 2021), in contrast with the increased pressure from other Member States to block the agreement (Hanke Vela, Leali, Moens, 2021).

Review of the main text provisions[5]

The CAI ***preamble*** underscores, among others, the EU normative power and the commitments towards a bilateral economic relationship "based on openness, reciprocity and mutual benefit, ensuring non-discrimination, a level playing field,

[2] Belgium and Luxembourg have a common BIT with China.

[3] Portugal: January-June 2021, Slovenia: July-December 2021, France: January-June 2022, Czech Republic: July-December 2022, Sweden: January-June 2023.

[4] Please consult the European Think-tank Network on China Report on China's soft power in Europe, forthcoming, https://www.ifri.org/en/european-think-tank-network-china-etnc.

[5] As of January 2021, the agreement text is not complete and supplementary annexes will be published in the near future. Therefore the explanations offered by various documents of the European Commission are more relevant than the published text.

transparency, and a predictable and rule-based investment environment", "transparency in international investment to the benefit of all stakeholders" and the compliance with the "rights and obligations under the WTO Agreement and other multilateral, regional and bilateral agreements and arrangements".

Section I, consisting of two articles, is dedicated to (1) key objectives ("commitments under the WTO Agreement", "commitment to create a better climate to facilitate and develop trade and investment between the Parties", "liberalisation of investment", "the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment, including the fight against climate change, public morals, social security or consumer protection, privacy and data protection or the promotion and protection of cultural diversity") and (2) general definitions.

The European Commission underlines that CAI "will significantly improve the market access conditions for EU companies in China, in terms of predictability and new market openings; it will help to rebalance the current asymmetry in our respective market openness; it will help to level the playing field for our companies operating in China; it will promote sustainable development, including the respect of fundamental labour rights" (European Commission, 2020b).

Section II, "Liberalisation of investment", focuses on the: (1) scope of application; (2) market access; (3) performance requirements; (4) national treatment; (5) most favoured nation treatment; (6) senior management and board of directors and (7) non-conforming measures and exceptions. The text includes many exceptions and allows China to continue the process of reform and opening-up in the field of investment, taking into account its most viable choices.

Section III includes three sub-sections: (1) domestic regulation, three articles; (2) transparency, eight articles (the last one referring to the transparency of subsidies) and (3) financial services, seven articles. The annex regarding transparency of subsidies details the sectors falling under its incidence. It is worth noting that consultations are the modality of resolving the issues, the "best endeavours" are needed to find an acceptable solution and state-to-state dispute settlement is not applicable to the solutions considered "feasible and acceptable" by both Parties.

Section IV, "Investment and sustainable development", consists of four sub-sections and includes, inter alia, China's commitments in the direction of adopting the fundamental conventions of the International Labour Organisation (ILO) on forced labour (C29 and C105) (sub-section 3, article 4). Sub-section 4 focuses on the gradual mechanism to address differences (consultations, mutually agreed solution, panel of experts, reports and follow-up consultations, amicus curiae submissions) and emphasizes that the state-to-state dispute settlement does not apply to it.

Section V addresses the dispute settlement and is accompanied by two annexes, with exact judiciary details to be established at a later time, while ***Section VI*** focuses on the institutional and final provisions. The Parties establish three complementary bodies: (1) an ***Investment Committee*** (meeting once a year as part of the High-level Economic and Trade Dialogue HED, unless otherwise agreed by the Parties, with the main objective of implementing the CAI and further enhancing the investment relations between the Parties); (2) a ***Working Group on Investment*** (meeting once every six months, or as agreed by the Parties, in order to prepare the meetings of the Investment Committee and undertake the tasks decided by the Investment Committee) and (3) a

Working Group on Sustainable Development (meeting once a year, unless otherwise agreed by the Parties, and report to the Investment Committee ahead of its meetings, aiming at facilitating and monitoring the effective implementation of the Sustainable Development Section).

The agreement will be implemented via ***specific instruments and bodies*** (state-to-state dispute settlement mechanism, the Investment Committee, the Working Group on Investment, the Working Group on Sustainable Development). The higher transparency and enhanced dialogue between the EU and China will facilitate the EU FDI to China.

As regards the issue of ***forced technology transfers***, there is a three-directions approach: "direct prohibitions of forced technology transfers; prohibition of any state interference into the licensing of technology; enhanced protection of Intellectual Property sensitive business information and trade secrets in the administrative processes" (European Commission, 2020b). Another thorny issue, namely the ***behaviour of the SOEs*** (which contribute to around 30% of China's GDP – European Commission, 2020a), is approached as follows: SOEs should "act according to commercial considerations", i.e. "they should behave as any private business would", they are not allowed to discriminate against the EU companies; transparency obligations must be respected; the obligations will be enforced via the dispute settlement mechanism (European Commission, 2020b). At the same time, ***transparency of subsidies*** will be improved on the basis of a specific consultation mechanism, while the EU will keep its right to adopt autonomous measured to address any distortions manifested in the European internal market (European Commission, 2020b).

Concomitantly, the EU intends to attract China to support its initiatives in international organisations. For instance, in their further negotiations on CAI, EU and China will take also into account the work undertaken in the context of the United Nations Commission on International Trade Law (UNCITRAL) on a ***Multilateral Investment Court (MIC)*** (European Commission, 2021a, section VI, sub-section 2). Multilateral talks on MIC started in 2017 in order to find alternatives for the "outdated" investor-state dispute settlement (ISDS) system that had governed most international investment agreements (IIA) so far. Countries such as Canada, Singapore, Vietnam and Mexico are in favour of a MIC, while key trading actors, including the USA and Japan, express little support for the creation of a MIC (European Parliament, 2020a).

Therefore, the European Commission's motivations to support the agreement are various and should be interpreted as "a sign of Europe's flexibility" (Godement, 2021) in the larger framework of multilateralism. The EU is not "naïve", as it has often been criticized (Rachman, 2021), but cooperation with China is important both from the European and multilateral perspectives.

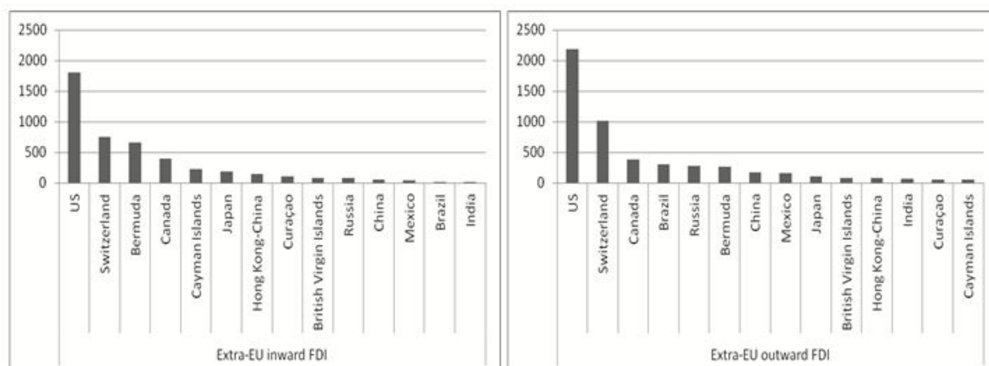
Brief EU-China[6] FDI Statistics

Despite their economic size and status of "strategic partner" for each other, FDI relations between the EU and China are not as strong as expected. In spite of the market access asymmetries (China being much more protectionist than the EU), the FDI stock received by the EU from China is even lower than vice-versa: EUR 59 billion versus EUR 175 billion as of 2018. As compared to the EU FDI stocks from/in its key partner, the US, as well as their real potential, the EU-China FDI stocks are insignificant. China

[6] China except Hong Kong-China.

was in 2018 only the 11th source and the 7th destination for EU FDI. Chart 1 reflects the EU inward and outward FDI in relation with various partners, including tax havens (Bermuda, British Virgin Islands, Cayman Islands, Curaçao).

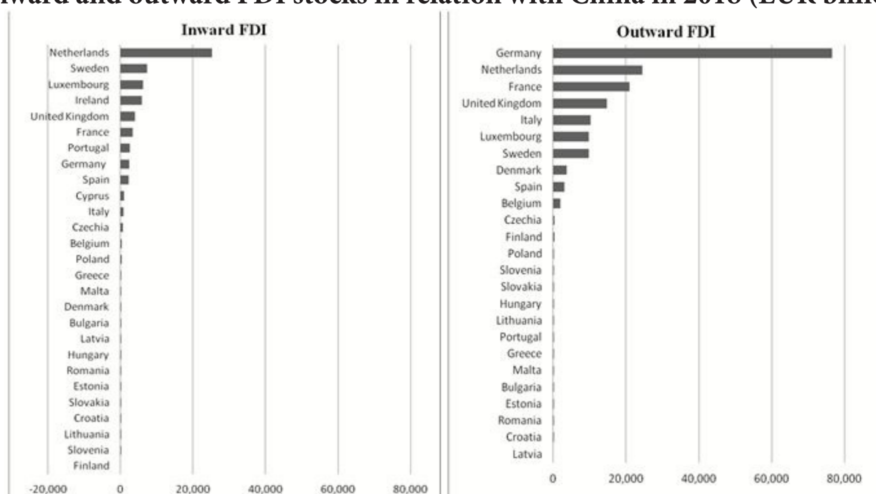
Chart 1: EU inward and outward FDI stocks in relation with relevant partners in 2018 (EUR billion)



Source: Eurostat (2020).

At the EU level, ***Germany*** is by far the main investor in China (over 40% of the EU FDI in China), but only the seventh recipient of Chinese FDI among the EU Member States (4%, similar to Portugal, as compared to Netherlands 43%, Sweden 12%, Luxembourg 11%, Ireland 10%, France 6%). Chart 2 highlights the EU plus the United Kingdom inward and outward FDI stocks in relationship with China. EU outward FDI are more concentrated than inward FDI.

Chart 2: EU Member States plus the United Kingdom inward and outward FDI stocks in relation with China in 2018 (EUR billion)



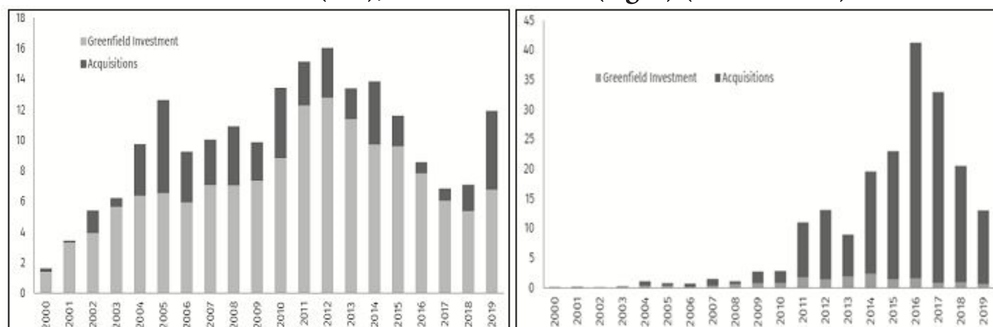
Notes: As regards EU inward FDI, data for Austria are confidential. Regarding EU outward FDI, data for Austria, Cyprus and Ireland are confidential.

Source: Eurostat (2020).

Kratz, Huotari, Hanemann and Arcesati (2020) underline that Chinese FDI in the EU (including the United Kingdom) sharply declined in the past few years after reaching a peak in 2016. Among the causes are the following: tighter administrative controls in China on outward investment and overseas asset financing; restrictions for "irrational" acquisitions of a few key investors and more defensive European policies within the EU. One can remark also a sharp decline of the share of SOEs in Chinese FDI in the EU, from more than 70% of total investment in 2010-2012, to below 50% percent in 2016, a revival in 2017 (72%), followed by a decreasing trend in the following years (41% in 2018 and 11% in 2019).

Chart 3 points to the distinct evolution of the EU-China FDI flows (including the United Kingdom). Even if Rhodium Group (2020) offers data in USD, instead of EUR, these are relevant from the perspective of investment type and also longer term trends (2000-2019). The Chinese FDI flows in the EU are dominated by mergers and acquisitions and are concentrated in the last decade, with the peak in 2016. By contrast, the EU FDI flows in China are predominantly greenfield and more evenly distributed during the last two decades, with the maximum value in 2012 and an evident revival in 2019.

Chart 3: Values of completed FDI transactions
EU in China (left), China in the EU (right) (USD billion)



Source: Rhodium Group (2020).

As regards predominant sectors, according to the EU documents, "roughly half of EU FDI is in the manufacturing sector (e.g. transport and telecommunication equipment, chemicals, health equipment etc.)". Services sectors such as telecommunication services, information and communication technology, health, biotech and financial services are still very restricted, which explains the much lower shares of EU FDI in China in these fields. According to CAI, China committed to open further sectors such as automotive (removal and phase out of joint venture requirements and market access for new energy vehicles) (European Commission, 2021a; Rhodium Group, 2020).

CAI in the broader context of rising FDI protectionism

Since 2018, one can remark three key motivations for restricting FDI worldwide: (1) limiting China's access to strategic assets; (2) strengthening national security and (3) achieving strategic economic autonomy, related to the evident inclination towards economic nationalism.

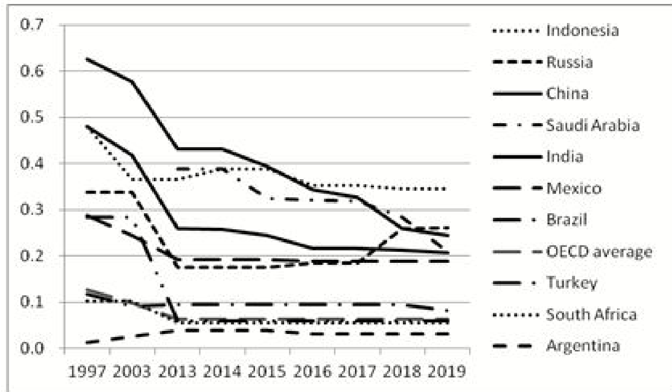
These represent for the most part a tough response to the sharp increase of Chinese investments (not only efficiency-seeking, market-seeking and resource-focused investments, but especially those oriented towards the acquisition of strategic assets) and also to major countries' excessive dependency on various imports from China (mobile phone components photovoltaic cells and modules, chemicals for batteries, raw materials, medical equipment, sanitary materials, active pharmaceutical ingredients and so on). The Covid-19 crisis has once again emphasized the inclination towards economic nationalism, accompanied by the goal of achieving strategic economic autonomy, not only in developed countries, but also in developing ones (of particular interest in this regard being case studies on China's goal of "making technological self-reliance a strategic support for national development" – Price et al., 2020 – and India's Self-reliant Mission).

Exemplifying protectionist manifestations against China, it is worth mentioning the initiatives under the Trump administration, which induced a tough confrontation between the US and China, and also a much stricter FDI regime in the US, invoking the argument of "national security". The EU, some of its Member States and other developed countries but also developing countries considering China a rival (India, for instance) introduced investment screening mechanisms, closely linked to national security issues. Practically, under the umbrella of "national security", a large part of Chinese investment can be blocked. Only in 2018, Western countries tightened their screening on Chinese investors so much, that 21 cases of Chinese acquisitions worth of USD 25 billion were cancelled or blocked by foreign regulators in 2018, indicating a 28% increase from 2017 (BBVA, 2019).

In general, developing and emerging countries have made substantial progress towards reducing FDI restrictions over the period 1997-2017, as reflected by the FDI regulatory restrictiveness index (OECD, 2020) (Chart 4)[7]. The FDI liberalisation by countries with a higher level of protection is possible at a faster pace, in contrast to the developed countries, with a lower level of restrictions, marking a slower pace of liberalization reforms, as there are fewer barriers to remove and, besides, restrictions that were easier to remove were among the first to be eliminated, but instead restrictions supported by some major actors persist (Mistura and Roulet, 2019). Most developing/emerging countries continue to liberalize their FDI regime in certain sectors that do not affect national security, as FDI represents their main source of capital. But starting from a higher level of restrictions, developing countries continue to be more protectionist than the developed ones (Oehler-Șincai, 2021).

[7] The **FDI regulatory restrictiveness index**, calculated by the experts of the Organization for Economic Co-operation and Development (OECD), measures FDI restrictions for 22 economic sectors in 69 countries (including OECD and G20 countries). Four categories of restrictions are taken into account: (1) foreign equity limitations; (2) screening or approval mechanisms that are discriminatory; (3) restrictions on the employment of foreigners as key personnel; (4) other operational restrictions, such as those on capital repatriation or land ownership. Restrictions are rated on a scale from 0 (open economies) to 1 (closed economies).

Chart 4: FDI regulatory restrictiveness index in 1997, 2003, 2013-2019 – OECD average as compared to ten developing/emerging countries, members of the G20



Source: OECD (2020)

In 2020, China adopted also protectionist measures in the field of FDI, even if it resorted to liberalization measures in some cities, provinces and sectors (UNCTAD, 2020a; 2020b). Among the restrictions, one can mention those related to national security and control of relations with "unreliable entities". Some initiatives combine liberalization with restrictive measures. For instance, China has made progress on investment liberalization through the ***Foreign Investment Law***, which entered into force on 1 January 2020, providing a much shorter "negative list" of protected sectors. However, Articles 6 and 35 include provisions related to national security and national interest, which may lead to unexpected restrictions on investor access to certain sectors (UNCTAD, 2020b). Meanwhile, through the ***corporate social credit system*** (SCS) only trusted companies have access to the Chinese market. The ***company behaviour*** becomes the key element taken into account by the Chinese authorities in the process of further liberalization. The Chinese screening process is a complex system, with corporate ratings, sanctions and reward mechanisms that have a direct impact on market access and the activities of companies active in China: (1) higher scores can mean lower tax rates, better access to credit, easier market access and more public procurement opportunities for companies; (2) lower scores, on the other hand, lead to limited access and even blacklisting; and (3) market access for unreliable and blacklisted entities will be limited and even banned (European Chamber-Sinolytics, 2019).

Doing business in China is not easy. But China is moving in the direction of offering trusted companies more access and more benefits. This means that the most favoured nation clause is not literally applied, but according to the new SCS. The state will not cease intervening in the economy, as is the case in the EU Member States (even if on a smaller scale). Business as usual (regionally and globally) is not any more possible because of the national security issues. The most stringent question at present is: Which partners in what alliances trust each other? The CAI indicates that the EU needs cooperation with China and both are willing to trust each other.

Pros and cons of CAI

The completion of the CAI, even if only "in principle", has been greeted with more hostility than praise, as indicated not only by hardliners (especially members of the European Parliament, such as Guy Verhofstadt, representing Belgium, or Reinhard Bütikofer, representing Germany), but also by moderates (like Joe Biden, calling for a US-EU coordinated approach to China) (Rodrik, 2021, Fallon, 2021).

CAI is considered by a large majority of European experts: "a mistake" for the EU, but a "great strategic success" for China (Carnegie Europe, 2021). Only a minority describe it as "step in the right direction" (Esteban and Otero-Iglesias, 2021). It is also worth noting the discrepancy between the European Commission, praising the agreement, in contrast to the European Parliament, criticizing it and threatening with the refuse to endorse it.

The CAI is seen by the European Commission as "the most ambitious agreement that China has ever concluded with a third country" (European Commission, 2020a). It goes well beyond the post-entry protection of investment and regulates also market access, investment-related sustainable development (including the protection of fundamental labour rights), and level playing field issues (Grieger, 2020; European Commission, 2020b).

All in all an, it means an improved level playing field for EU investors in China and a path towards rebalancing the current asymmetry in market openness, even if: the desired reciprocity in market access by the European side might be difficult to be reached in the near future, sensitive issues such as government procurement were not addressed in the negotiation process and prudential reasons, case-by-case and fact-based analyses allow many exceptions for both parties.

Recently, the EU's initiatives as regards to regulation in the field of FDI highlight protectionist trends. Its position towards China has become more critical since 2016 and culminated in 2019, with the adoption of the ***"EU-China – A Strategic Outlook" of 12 March 2019*** and the ***EU Regulation 452/2019 of 19 March 2019 of the European Parliament and of the Council*** establishing a framework for the screening of FDI into the Union (applied from 11 October 2020). At the end of 2020, it was needed a clearer message to China: the EU is open to cooperation and is ready to offer concessions, if China does the same. It is the high time for such an attitude, if multilateralism is to be safeguarded.

CAI should be interpreted as an appropriate tool to stimulate the EU cooperation with China in a hostile environment, when international relations are dominated by suspicion and unpredictability. CAI, replacing the existent 25 bilateral investment treaties, would ensure: (1) investment protection and increased negotiation power for the EU; (2) relevant sectoral market access commitments by China; (3) a fairer investment environment in China (due to stipulations against the forced transfer of technologies, clear obligations for the state-owned enterprises, transparency rules for subsidies); (4) clear rules regarding sustainable development (in the areas of environment, labour, corporate social responsibility); (5) European companies' secured access to China's standard setting bodies; (6) facilitation of investment through the state-to-state dispute resolution mechanism, as well as the new bodies (Investment Committee, the Working Group on Investment and the Working Group on Sustainable Development); (7) the EU's possibility to resort to defence mechanisms, such as the EU FDI screening mechanism and the 5G toolbox; (8) a higher probability of China's

supporting EU's initiatives in international organisations, for instance in the process of creating a Multilateral Investment Court under the auspices of the UNCITRAL.

Despite the optimistic reactions of the European Commission, there has been formulated a ***strong criticism of the agreement from various directions, both European and non-European*** (from the United States and other EU's partners). Besides, the conclusion of the agreement induced tensions at both extra-EU level (in the EU's relations with key strategic partners such as the United States) and intra-EU.

Critics point to the "CAI's geopolitical context and regrettable timing", asserting that it is "ill-advised" and offered China a "diplomatic victory" (Carafano, Gupta, Smith, 2021). It legitimizes the regime (party-state system of governance) in the eyes of domestic and international public opinion Fallon (2021). It is concluded not only at a time when China is facing a rising international disapproval (related to territorial disputes, lack of transparency as regards the Covid-19 pandemic, human rights issues, "wolf warrior diplomacy"), but especially shortly after the launch of the new transatlantic coordination mechanism, namely the EU-US Dialogue on China (October 2020) and just before the Biden administration took office (January 2021). The ***unilateral approach*** as regards relations with China is considered a mistake, while on the contrary, an increased coordination between the EU, the US and other trade partners (such as India) would lead to greater pressure on China to accelerate reforms and give up its anti-competitive practices (Carafano, Gupta, Smith, 2021).

Experts already point to possible retaliatory actions from the US, the largest investor in the EU (García-Herrero, 2021) and also to the EU's impossibility to ensure reciprocity in market access, taking into account the different treatment of the state-owned enterprises and private companies in China, in terms of asymmetric information, access to cheaper funding, subsidies and lower taxes (García-Herrero, 2020).

There are also other experts considering that CAI "robs the EU of a huge leverage in dealing with China" (Kuo, 2021), the EU has now a weaker position in relationship with China and there have been sacrificed better alternatives such as the EU-US-Japan alliance (frequent even under the Trump agenda), which are more efficient in obtaining more reciprocity from China, especially in the context of the new US direction, indicating a clear rejection of unilateralism and return to multilateralism.

At the EU level, officials from ***Italy, Poland, Belgium and Spain*** criticized the conclusion of the CAI agreement under pressure from Germany. They underscored that only the Commission President Ursula von der Leyen and the French President Emmanuel Macron were invited to take part in the December 2020 videoconference with Chinese President Xi Jinping, alongside the German Chancellor (who represented the EU presidency), excluding other EU leaders (Hanke Vela, Leali, Moens, 2021).

By many experts, the deal is most beneficial to some big German businesses, to the detriment of the others. Germany's key role in striking the bargain with China was facilitated by holding the EU rotating presidency in the second half of 2020, and, besides, the European Commission's President and Director-General for trade are both Germans (Kuo, 2021).

Also, ***the European Parliament*** remains sceptical. It is not excluded that European Parliament representatives refuse the CAI ratification, for reasons related to "human rights abuses". Keywords invoked in this regard are "Hong Kong", "Xinjiang" and "Tibet". This thorny issue of human rights has been already for a long time a leitmotif in developed countries' relations with China. Extremely vocal are Socialists,

Greens and Liberals and there is also a consensus among the European Parliament's five major political groups that the Commission should "at least require China to agree on a roadmap on implementing international labour rights conventions" (Mears and Leali, 2021).

Indeed, the apple of discord is the sensitive issue of human rights and the criticism of China as regards the stage of ratification of the 18 international human rights treaties. The US is one of the most vocal critics, even if it ratified only five of 18, and China eight, including the International Covenant of Economic, Social and Cultural Rights[8].

Out of the eight fundamental conventions under the International Labour Organisation, China ratified the two conventions on discrimination (C100 in 1990 and C111 in 2006) and the two on child labour (C138 in 1999 and C182 in 2002), but still has to adopt the other related to freedom of association (C87 and C98) and forced labour (C29 and C105)[9].

The pressure on the EU authorities to be more demanding in terms of ***human rights*** in relationship with China intensified and culminated with the *Joint appeal* of January 13, 2021, *on the inclusion of enforceable human rights clauses in the EU-China CAI*. Signed by 16 organisations, including the European Trade Union Confederation (ETUC)[10], this petition refers to the: (1) ratification by China of the core human rights conventions, including those of the International Covenant on Civil and Political Rights and International Labour Organisation) and (2) granting permission to international organisations and activists to monitor the human rights situation in China.

It is true that CAI does not insure either the adoption and implementation by China of international conventions on labour and human rights, or a perfect level playing field and reciprocity for EU companies (García-Herrero, 2021). It is difficult to ensure reciprocity in market access, taking into account the different treatment of the state-owned enterprises and private companies in China, in terms of asymmetric information, access to cheaper funding, subsidies and lower taxes (García-Herrero, 2020). Some experts draw also attention to the absence of deadlines within the agreement (for instance related to China's ratification of the outstanding fundamental ILO Conventions) and also to the "vague nature of some commitments" (Godement, 2021; Fallon, 2021).

However, CAI provides a more relaxed framework for debate and negotiations. It shows goodwill from both sides. And the three complementary bodies which will be created (the **Investment Committee**, the **Working Group on Investment** and the **Working Group on Sustainable Development**) ensure a better and more transparent communication process between the EU and China.

Huotari and Zenglein (2020) underline that CAI "is an advanced version of a bilateral investment treaty", it has wide political implications and is "a test for the future trajectory of the relationship". EU is seen as the "demanding party", while China as the party offering "selective concessions" in sectors such as financial services, telecommunications, new energy vehicles, air and water transportation services, private hospitals, and research and development. However, if the agreement is not accompanied by substantial improvements on effective commitments of respect for

[8] Please consult https://indicators.ohchr.org/.
[9] In comparison, the US adopted only two fundamental conventions (C105 in 1991 and C182 in 1999).
[10] Please consult https://www.etuc.org/en/publication/sign-joint-appeal-eu-china-investment-agreement.

human rights and labour standards, as stated under the ILO rules, the EU will lose credibility as a normative and principled power, the price paid for more market access being too high (Huotari and Zenglein, 2020).

Esteban and Otero-Iglesias (2021) synthesize that EU and its Member States identify China "as a partner, competitor and rival, but not as an enemy". They are "willing to further increase their ties with China, but "not at any price" therefore EU will continue using its normative power in order to safeguard its ***values and interests*** in relation with China.

The EU's support for CAI is motivated by ***various factors***, from the intention to increase its access to the Chinese market, but also "not to be left behind", in the context of the US Phase one deal with Beijing and the entry into the ratification stage of the Regional Comprehensive Economic Partnership, in 2020. At the same time, it generates ***side effects***, such as tensions with other strategic partners, by complicating "transatlantic conversations at a time when conditions for renewed cooperation have greatly improved" and challenging "European cohesion at a time when it is needed most urgently" (Carnegie Europe, 2021).

In conclusion, currently there is more criticism than support for the CAI. But investigating the pros and cons associated to CAI is not possible without taking into account the ***broader circumstances of rising FDI protectionism worldwide*** (as underscored in the previous section), under the increased complexity of the system of international relations and recent trends, harmful to multilateralism.

Conclusions

The EU-China Comprehensive Agreement on Investment (CAI) is at present only a draft agreement. Comparing its provisions with the European Commission's clarifications, it is evident that many details will have to be further negotiated and added to this treaty. ***Germany is the strongest supporter of CAI and it seeks the support of France***. In the context generated by Brexit, Germany and France are the most powerful engines of the European integration and cooperation, as reaffirmed in Franco-German treaty of Aachen on cooperation and integration of 2019.

The way from the actual stage of this agreement "in principle" to its entry into force is long, as its text has to be finalized, signed by the EU Member States and ratified by the European Parliament. There are many ***obstacles*** in this regard, starting with the pressure from various EU Member States and the European Parliament to block its adoption (for instance, until human rights issues are solved in China) and with the opposition of key extra-EU partners such as the US towards an agreement offering China a "diplomatic victory" at a time when China is facing a rising international disapproval (related to territorial disputes, lack of transparency as regards the COVID-19 pandemic, human rights issues, "wolf warrior diplomacy").

Key strategic partners of the EU, such as the US, Japan and India, reject the unilateral approach as regards relations with China, even if themselves resort to unilateralism in various occasions. In their opinion, an increased coordination between like-minded partners would lead to greater pressure on China to accelerate reforms and give up its anti-competitive practices.

We consider that ***the largest two obstacles to the adoption of the agreement are***: the conflicting interests of the EU Member States and the opposition of the European Parliament. Therefore a common position is needed inside the EU.

In our opinion, the agreement provisions do not preclude the EU of coordinating positions on China with other key players in international relations. It does not prevent the EU, the US and other like-minded partners to cooperating and adopting joint positions regarding China in multilateral institutions. At the same time, it is not equivalent with the EU giving up its values, principles and objectives.

The CAI provisions go well beyond the investment protection issues, additionally including rules for: (1) a better market access for the EU companies; (2) a fairer investment environment in China (ensuring a better level playing field for the EU investors, through stipulations against the forced transfer of technologies, clear obligations for the state-owned enterprises, transparency rules for subsidies); (3) sustainable development (in the areas of environment, labour, corporate social responsibility).

Through the agreement, three thorny issues are addressed. First, as regards the ***forced technology transfers***, there is a three-direction approach: "direct prohibitions of forced technology transfers; prohibition of any state interference into the licensing of technology; enhanced protection of Intellectual Property sensitive business information and trade secrets in the administrative processes". Second, ***SOEs*** should "act according to commercial considerations", i.e. "they should behave as any private business would", they are not allowed to discriminate against the EU companies; transparency obligations must be respected; the obligations will be enforced via the dispute settlement mechanism. Third, ***transparency of subsidies*** will be improved on the basis of a specific consultation mechanism, while the EU will keep its right to adopt autonomous measured to address any distortions manifested in the European internal market.

At the same time, the EU secures for European companies the access to China's standard setting bodies, while preserving its "sensitive areas such as public services, critical infrastructure and technologies", as well as the EU FDI screening mechanism and the 5G toolbox.

Simultaneously, the EU intends to attract China to support its initiatives in international organisations, such as those related to the international debate on ***Multilateral Investment Court*** (in the framework of the United Nations Commission on International Trade Law). In the context of rejection of MIC by key EU partners (such as the US and Japan), the EU needs support of other players (China) to find alternatives to the "outdated" investor-state dispute settlement system.

The agreement will be implemented via ***specific instruments and bodies*** (state-to-state dispute settlement mechanism, the Investment Committee, the Working Group on Investment, the Working Group on Sustainable Development). The higher transparency and enhanced dialogue between the EU and China will facilitate the EU FDI to China. It is a clear signal that both the EU and China need a tool to ensure more trust, predictability and opportunities in bilateral relations.

Even if there are not explicit deadlines for the implementation of individual commitments assumed by China and some previsions are vague, the message from China is unequivocal: it is ready to more investment liberalisation. If implemented by China as much as possible, CAI will mean a big step forward in terms of a better reciprocity in market access (in order to rebalance the EU's economic relationship with China), more transparency of business practices and investment-related sustainable development (including the protection of fundamental labour rights). However, China,

still a developing country, cannot give up its actual state capitalism (the most viable economic model for a developing country in order to be able to compete with old, experienced and well financed multinational enterprises from developed countries), nevertheless it will continue the process of reform and opening-up taking into account its most viable choices.

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