

Between a rock and a hard place: EU-China Investment Negotiations

EU TRADE WORKSHOP, OTTAWA

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Overview

Investment relationship between EU and China

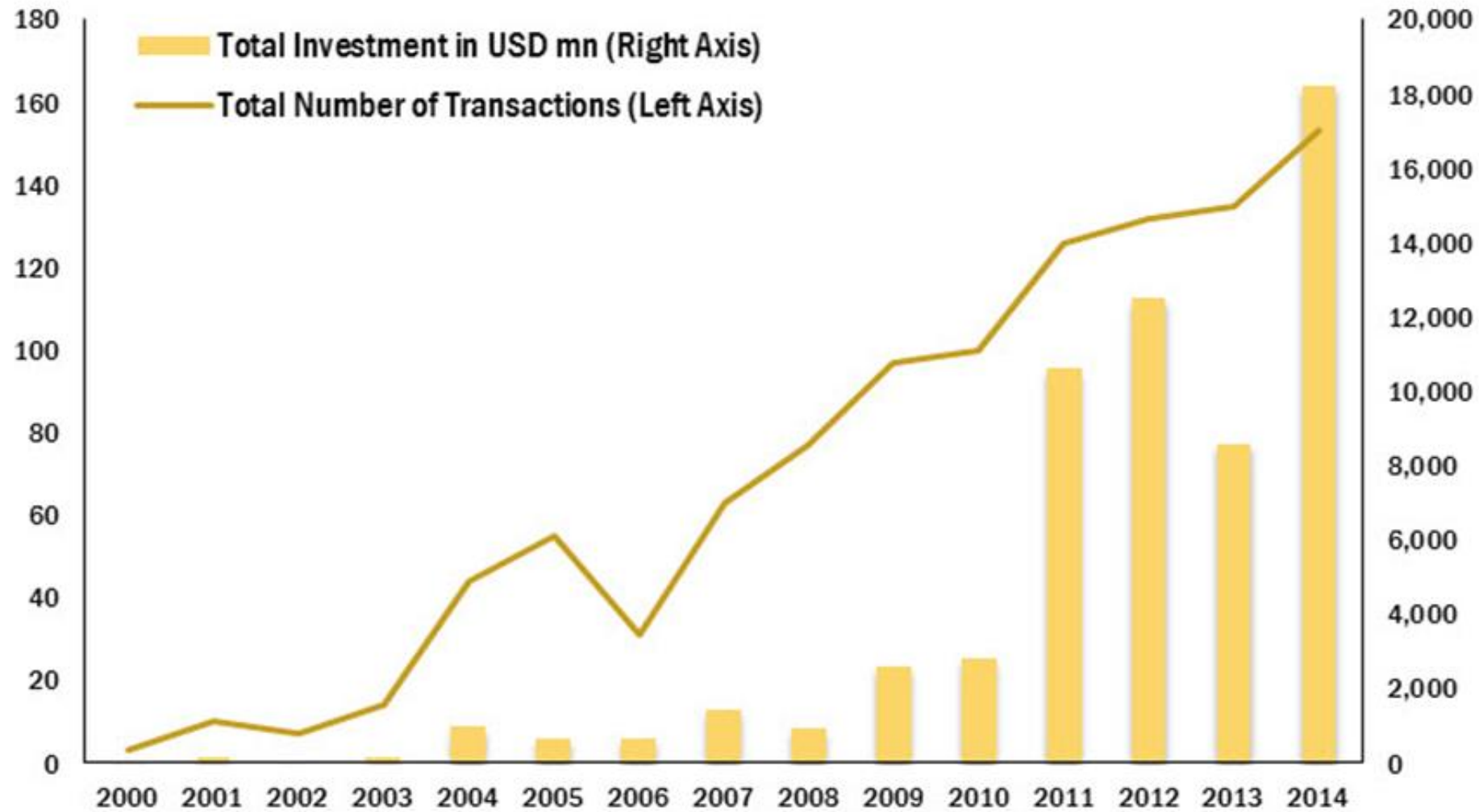
Existing legal basis of the relationship

Why negotiate an investment agreement?

What Prospects in light of recent EU and Chinese BITs?

Challenges

Chinese FDI Transactions in the EU-28 Economies, 2000-2014



EU-China Investment Relationship

Remains heavily unbalanced

- Much more EU investment in China
- Chinese investment in EU (>1.5% of inward investment into EU)



EU Investment in China

- Investment in manufacturing capacity (global production chain)
- Investment as way of entering market



Chinese Investment in EU rising steeply since 2008

- Unresolved issue of threat or opportunity (Meunier 2014)
- Absence of overarching oversight like Committee on Foreign Investment in the United States favours growth in investment (Hanneman 2014, Eurochambres 2013)
- Investment to buy brands, gain technology/know-how, enter mature market



Motivations for Negotiations

- Improve access to Chinese market
- Guarantees for European investment
- New European Commission competences over investment
- Reinisch (2014, 119) → Lisbon Treaty leads to loss of power by MS and hence MS BITs become 'unconstitutional' under EU Law

EU



- Prelude to broader trade agreement?
- Regulatory simplification?

China



So, how compatible are
the Chinese and EU
approaches to BITs?

China's Bilateral Investment Treaties (BIT)

Phase 1:

- 1982-1989: The Launch of the BIT Programme and the First generation BITs

Phase 2:

- 1990-1997: International Centre Settlement of Investment Disputes – World Bank (ICSID) Accession and the Second Generation BITs

Phase 3:

- 1998- : Third Generation BITs start with Canada negotiations (signed Sept 2012), negotiations with USA (ongoing), negotiations with EU

Characteristics New Chinese BITs

NATIONAL TREATMENT

From 'best effort' to solid commitment:

- 'Without prejudice to its laws and regulations at the time the investment is made, each (...) Party shall accord to investors (...) **treatment no less favourable than that it accords, in like circumstances, to its own investors** with respect to the operation, management, maintenance, use, enjoyment or disposal of investments.'

Characteristics of New Chinese BITs: Caveats

Foreign investments screened over security and need enterprise approval

- (anti-monopolies, local approval, resource and environmental approval also apply to Chinese investors)

Shanghai Free Trade Zone (FTZ) is pilot for pre-establishment national treatment to foreign investors

- abolishes enterprise approval and relaxes project approval and industrial regulator approval
- Has given China confidence to extend national treatment in pre-establishment stage in China-USA BIT (negotiations) (Huang 2015, 318)

Characteristics of New Chinese BITs

INVESTOR-STATE DISPUTE SETTLEMENT

From ad hoc settlements, and then settlement at ICSID of disputes over amount of compensation (AOC) for expropriation only to ICSID arbitration for ALL investor-state disputes

Making use of International standards and international tribunals



TRANSFERS

Improves guarantees for investors to transfer funds in and out of the country:

‘Without prejudice to any applicable formalities pursuant to its laws and regulations, each Contracting Party shall guarantee to an investor of the other Contracting Party that **all payments related to an investment in its territory may be freely transferred into and out of its territory without delay.**’

European BITs

UNTIL LISBON TREATY

Investment a national competence

Each Member State negotiated own BIT

- UK, France, Germany do not always cover indirect expropriation (deprivations from a change in national regulations)
- EU Member States are mostly very open to investment and have **few pre-establishment** obstacles

Post-establishment complex → different corporate codes of conduct, tax regimes in each MS

Besides EU MS BITs

AT EUROPEAN LEVEL

European Programme for Critical Infrastructure

EU Merger Regulation

- Determined there should be no discrimination between private and public sector

MERGER REGULATION & CHINA

All cases reviewed have been allowed to go ahead

There needs to be thresholds and presence in 2 EU states

Chinese State-owned enterprises (SOEs) in same sector could be treated as one

Commission determines if SOE operates independently of Chinese government- state majority ownership is not sufficient for SOE to be considered a dependent of Chinese government (Zhang & Van den Bulcke 2014, 170)

Towards an EU Approach to Foreign Investment

2009 Lisbon Treaty grants European Commission powers over foreign investment (but not portfolio investment, so this will remain an area of 'mixed competence')

2010 European Commission Communication on International Investment Policy:

- Achieve highest levels of legal protection and certainty for EU investments
- Offer highest levels of investment protection (from amongst existing MS provisions)
- Guarantee appropriate regulatory space for EU and MS for measures to pursue legitimate public policy objectives such as social, environmental, security, public health and safety in a non-discriminatory manner
- Inclusion of Investor-State Dispute Settlement was included from start (Commission's consultation was on clarifying when and how, who would be the state- the MS or European Union?) & some preference for ICSID

Towards and EU Approach to Foreign Investment: Within EU Contestation

- Introduced into Treaties by 'stealth' (Meunier 2017)
- Former Trade Commissioner De Gucht refers matter to ECJ in case of EU-Singapore FTA (2014)

Member States
discrepancy over
new EU-level power



- 2013 start of TTIP negotiations
 - Anti-TTIP demonstrations
 - Raised salience of ISDS
 - Contagion to CETA

Rising popular
contestation



Towards and EU Approach to Foreign Investment: Within EU Contestation

- Investment Court System, with retained Tribunal members and Appellate Body
- Language defending right to regulate in public interest

Revised EU
Approach to
ISDS in CETA



- Commission has competences over trade issues and investment
- But interpreted definition of investment (portfolio investment is not exclusive competence)
- Also matters related to investor-state dispute resolution remain shared competence

ECJ Opinion 2/15, May 2017



Recent Agreements

EU-CANADA (CETA) INVESTMENT CHAPTER

Most Favoured Nation Treatment

National Treatment

Specifies Market Access (but this does not trump zoning, conservation/protection natural resources, competition, separation ownership of infrastructure and goods/services delivered e.g. energy, telecommunications, transport)

No performance requirements

No expropriation (unless for public reasons, under law, in non-discriminatory way and against compensation)

Allows Transfers, Transparency

Transparency

CHINA-CANADA BIT 2012

Most Favoured Nation Treatment

National Treatment with respect to the expansion, management, conduct, operation and sale or other disposition of investments in its territory.

No expropriation (unless for public reasons, under law, in non-discriminatory way and against compensation)

Allows Transfers (exception in case of balance of payment difficulties)

Transparency (making laws, rules, etc available)

Recent Agreements – Investment Disputes

EU-CANADA (CETA) INVESTMENT CHAPTER

First attempt to reach amicable solution through consultation/ right to mediation

EU determines who is respondent of claim: EU or Member State & informs investor

Creates Investment Court System (ICS)

Claims made to Tribunal

- 15 Tribunal members on retainer

Appellate Body

CHINA-CANADA BIT 2012

- the investor-State tribunal established pursuant to this Part may not decide whether and to what extent Article 33(3) is a valid defence to the claim of the investor. It shall seek a report in writing from the Contracting Parties on this issue.
- Both states decide if claim falls under BIT and pass decision to investor-state tribunal (decision is binding)
- Claims made under ICSID Convention, Additional Facility Rules of ICSID or UNCITRAL Arbitration Rules
- Tribunals 3 members

Recent Agreements - Exceptions

EU-CANADA (CETA) INVESTMENT CHAPTER

National debt (and debt restructuring) not acceptable under ISDS (and any ongoing claims must be dropped)

CHINA-CANADA BIT 2012

Cultural Services

Measures, including environmental measures (that are not arbitrary) for:

- compliance with laws and regulations inconsistent with BIT
- to protect human, animal, plant life/health
- Conservation natural resources
- Ensure stability of financial market (depositor protection....)

Challenges

China's cautious approach

- Establishment
- Directing FDI
 - 2011 China issued procedures for foreign investment to include 'national economic security' including agricultural products, energy, infrastructure, transport, key technologies à haven't been used in protectionist way but could do so in future (Davies 2012)
 - 2012 revision of the Catalogue for Guiding Foreign Investment Industries (not per se a problem) but indicates China's approach to directing inward investment-incentives to attract investment in 'green' sectors, higher-end manufacturing and new-generation IT (Davies 2012, 5)

Challenges

Shared competence over Investment Disputes

Challenges in CETA ratification could resurface

Market access (to EU) and protection

Rising Chinese investment has prompted:

- EU states to review FDI screening mechanisms
- Demand for EU–level screening coordination (Feb 2017, Italian, German, French letter)
- 2017 Commission proposed EU Framework for FDI screening

Concluding remarks

In practical terms, positions still quite far apart

China has not addressed establishment in recent BITs- although Shanghai Free Zone indicates some intention

EU has not granted China market economy status at WTO

EU's aims are clearer (but challenging to achieve), it is less obvious what China might gain- especially as EU member states recalibrate investment screening, and as an EU Framework for FDI screening is prepared